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The strike in Israel as a means of pressure and alternative means of pressure

Avraham Aviad Menashe

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**La grève en Israël comme moyen de
pression et moyens de pression alternatifs**

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Acknowledgments and a personal statement

It is likely that most readers of this PhD thesis will probably skip this part. I find it regretful, because it is the part of the thesis I found most enjoyable to write.

First and foremost, I am grateful to my supervisors - Prof. Sandra Schaal and Prof. Motti Schenhav, for devoting their experience and time to me, and for their helpful comments that made my work more precise and clearer.

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Chapter 1: Introduction

The earliest documentation of the strike in human history that tells the story of the strike occurred in 1158 BC, during the reign of Ramses III. The grave-builders rioted for non-payment of their wages and their hunger. Only after negotiations that went well and the strikers' food being guaranteed did they agree to return to work. Additional records of strikes also exist in ancient Jewish sources, and even during the days of the Temple.¹

Despite the fact that the strike has roots in history, in later times and even in modern times, countries that are usually seen as democracies, saw the strike as an illegal act and even imposed criminal sanctions on strikers. One such country is Britain, which in 1872, imposed a one-year prison sentence on workers who threatened to go on strike, in protest of another worker joining a trade union. Following the verdict, the British law was amended in 1875 and stated that no imprisonment would be imposed on strikers.² Only with the end of World War I, when the International Labour Organisation was established, did a new era begin for the international status of the right to strike. The right to strike was also recognized by the family of nations in international treaties,³ and the meaning of Israel joining those treaties later on required it to recognize the strike as a fundamental right at the state level.

The first strike that broke out in Israel, Palestine of those days, in the modern era, occurred in 1902 when the Ottomans ruled Israel. Zuckerman's printing workers demanded to shorten their working day and sign six-month work contracts with them. The strike was suppressed, finally, and strikers recorded only partial success, while at the same time, the printing workers' associations and employers' organisations were banned. Beginning in the mid-twenties of the last century, labour struggles and strikes in Israel started becoming frequent. Israel, which at this point was already under British Mandate rule, was faced with an economy that was largely based on private control, and at the same time an increasing number of urban waged labourers. This situation was the background for the crises between private employers and employees: an expression of the acute situation can be learned from the number of strikes that began breaking out in the Jewish settlement. In 1923 there were 23 strikes. In 1924 there were 46 strikes, and in 1925 there were 61 strikes. The number of strikers increased respectively from 579 strikers to 1,585 and 2,638 workers.⁴

The number of strikes and the number of striking workers continued to climb during the 1920s and 1930s, reflecting the intense conflict that had already erupted between the two political camps (the General Histadrut and the left against the revisionist movement through the National Workers' Union and the right), which was to continue until the present day, about the right to strike and its place in the Israeli reality. As early as the thirties, the revisionist movement sought to break the power of the Histadrut by breaking strikes. Ze'ev Jabotinsky, who headed the revisionist movement, came out against the institution of the strike and proposed to establish a mandatory arbitration institution as a replacement for the strike weapon. This was the background to the *London Agreements* signed between Jabotinsky and David Ben-Gurion in October-November 1934. These agreements attempted to regulate the issue of strikes and mandatory arbitration in the Jewish settlement and stipulated that there would be no strike breaking by the competing movement and that given a certain percentage of workers (belonging to one of the movements) in a certain workplace – compulsory arbitration would be offered to the employer

¹ For additional information regarding these strikes – see Chapter 2.1.

² Nir Ganinsky, *Constitutional Standing of the Right to Strike*, (2014), p. 21.

³ For additional information – see Chapters 2.3 and 2.4.

⁴ For additional information – see Chapter 3.3.

prior to the strike. This agreement was rejected on 24/03/1935 in a referendum held by the General Histadrut, because it rejected any arrangement with the revisionist movement which was seen in their eyes as a fascist movement.⁵

The strike continued to accompany the Jewish settlement and even the young state of Israel in its early days, and even during the War of Independence. In June 1948, the teachers in the young country demanded and received a salary increase. Two months later, a state workers' union threatened a lockout due to the plight of unemployed state workers in besieged Jerusalem. And in September, four months after establishment of the state, the first Kol Israel strike broke out, which stunned state leaders.

Over the years, the status of the strike in the State of Israel changed. According to the literature, three main periods can be distinguished in the status of the strike. The first period began with establishment of the state until the seventies. During this period, as I explain below, the status of the right to strike was, apparently, unlimited and even absolute. During these years, no law was enacted that limited it and no collective agreement was signed that set restrictions on it. The Histadrut, which was the largest workers' union in the country, was a close partner of the political establishment, which was controlled by the Mapai Party. It would not be an exaggeration to state that the two movements were educated on the knees of the same ideology, the key figures of which felt the same shared destiny and maintained close, clear and visible ties between them – such as David Ben Gurion,⁶ Pinhas Lavon,⁷ Golda Meir,⁸ Haim Ramon,⁹ Amir Peretz¹⁰ and Avi Nissenkorn.¹¹ In other words, a significant number of Israeli leaders who became part of the leadership of the Jewish community, and later – the State of Israel and even in recent years, began their public career as trade union leaders. The first period was also characterized by the breaking of strikes that did not match the spirit of the political and Histadrut establishments – such as the strikes of the train drivers, the seamen, and the cooperatives.¹² The second period began in the mid-seventies and lasted until the mid-nineties. In these years, protections for the right to strike were reduced either by the legislator or by the court.¹³ The third period, which began in the mid-nineties and continues to the present day, is characterized by a strengthening of the position of the right to strike without limit, following rulings of the Labour Court.¹⁴ Ganinsky claims that strengthening the position of the strike during this period led to a wave of strikes that took place in Israel in recent years “and it seems that today, every occupational sector is waiting for the right moment to strike and the weapon of the strike has once again become a central weapon in the struggle of the workers [...] and from the beginning of the second decade of the 21st century, when the strike became a central element in the life of every person in Israel, who are affected by it in one way or another.”¹⁵

⁵ For details on the London Agreements – see Chapter 11.2.

⁶ David Ben-Gurion headed the Histadrut (1921-1935), served as Prime Minister and Minister of Defense (1948-1954, 1955-1963).

⁷ Pinhas Lavon headed the Histadrut (1949-1950), and served as Minister of Defense (1954-1955).

⁸ Golda Meir headed the Histadrut Workers' Council (1928-1931), served as Minister of Labour (1949-1956), Minister of Foreign Affairs (1956-1966) and Prime Minister of Israel (1969-1974).

⁹ Haim Ramon headed the Histadrut (1994-1995), served as Minister of Health (1992-1994), Minister of the Interior (1995-1996), Minister of Justice (2006) and Deputy Prime Minister (2007-2009).

¹⁰ Amir Peretz headed the Histadrut (1995-2005), served as Deputy Prime Minister and Minister of Defense (2006-2007), Minister of Environmental Protection (2013-2014) and Minister of Economy and Industry (2020-2021).

¹¹ Avi Nissenkorn headed the Histadrut (2014-2019), and served as Minister of Justice (2020-2021).

¹² For more about these strikes – see Chapter 10.2.

¹³ For additional information – see Chapter 3.6.1.

¹⁴ Which I address throughout this paper.

¹⁵ Nir Ganinsky, *Constitutional Standing of the Right to Strike*, (2014), p. 23.

Support for these statements can also be found through quantitative and objective data that teach about the frequent use of strike weapons. These data are learned from the number of strike days in Israel, the number of striking workers and the number of working days lost to the Israeli economy. As mentioned, until the early seventies, the strike was an uncommon event in the young state of Israel. This trend began to reverse in the seventies. For example, if in 1974 the number of strikes in Israel was only 71, then this figure rose and climbed almost consistently over the years: in 1984 the number stood at 149 and in 1988 at 156 strike days. The number of striking workers in 1974 was an imaginary number of 24,141 only. In 1979 the number of strikers was 250 thousand men and women. In 1982, an all-time record was recorded when the number of striking workers exceeded 838 thousand people. The number of working days lost to the economy also reinforces the above. The number of working days lost to the economy in 1974 was slightly more than 51 thousand days. In 1979, the number of working days lost to the economy crossed the all-time record when it stood at over one million eight hundred thousand days. In 2007, an all-time record was set with a figure of 2,548,627 lost days.¹⁶ The fact that in the middle of the second decade of the 2000s, the percentage of strikes in the private sector began to equal that in the public sector, also has something to teach us about the prevalence and frequency of the strike in Israeli reality.

While use of strike weapons in Israel became frequent from the 1980s onwards, a comparison to Western countries shows that an opposite trend occurred. In the 1990s and early 2000s, Israel was the leading country in the world in the number of workers participating in strikes and in the number of strike days. A study conducted in 1993 and 2001 that compared Israel with eight other Western countries (the US, Canada, Great Britain, Australia, New Zealand, Japan, Spain, and Denmark) found that the average number of strike days per year and the average number of workers participating in a strike per year (both relative to the number of persons employed in the economy) in Israel were the highest.¹⁷ The findings of a similar study conducted in 2002 and 2003, which compared Israel to ten other Western countries (Denmark, Ireland, Italy, Japan, Holland, New Zealand, Norway, Spain, Sweden, Germany) were the same. In the years 2002-2006, the average strike days per year in OECD member countries was 31 strike days per thousand employed, in the European Union countries 41, and in Israel – 476.¹⁸ In another report, by the International Labour Organisation, which reviewed the years 2004-2016, Israel is ranked sixth in the world in the number of strike days per thousand workers. A report published by the OECD in June 2021, shows that between 2008 and 2018, every 1,000 workers in the Israeli economy lost an average of 80 working days a year due to labour disputes, compared to only 40 in Italy. About 30 days in Ireland and Finland, about 20 days in the United Kingdom and only a few days in the US, New Zealand, Hungary and Poland. Israel, according to the report, is ranked third from the bottom in *wasting* working days due to strikes.¹⁹ All of these illustrate how Israel has become one of the leading countries in the world to hold the title of *Strike Champion*.

The increasing use of the right to strike and the damages it causes did not escape the notice of the Israeli legislator either, and since the 2000s no fewer than eighteen bills have been submitted that sought to change the status of the right to strike in Israel. It can be said that in recent years, in every session of the

¹⁶ For more about these figures – see Chapter 3.4.2.

¹⁷ Naama Afik, *Review of Strikes in Israel and Other Countries*, (2003). Quoted in Assaf Shapira, *Strikes in a Comparative Perspective*, (2011). See also: <https://www.idi.org.il/parliaments/11092/11094> Also quoted in: Lilach Litor, *ibid*, p. 68.

¹⁸ Naama Afik, *Review of Strikes in Israel in an International Comparison*, (2005). Quoted in Assaf Shapira, *Strikes in a Comparative Perspective*, (2011). See also: <https://www.idi.org.il/parliaments/11092/11094>

¹⁹ OECD Report: *The Public Sector Pay System in Israel*, June 2021, at the link:

<https://www.oecd.org/gov/pem/the-public-sector-pay-system-in-israel-launch-version.htm> Accessed: 27/04/2022.

Knesset, at least one bill was submitted that sought to redefine the right to strike in Israel.²⁰ Coalition agreements that sought to establish governments in Israel also referred to the issue of limiting the strike, and made it a central agenda that is at the top of the Israeli government's agenda.

Evidence of the ambivalent and complex attitude of Israeli society regarding the desired nature of the strike can also be found in popular cultural. The poet and musician Naomi Shemer, who wrote many songs that have become staples of Israeli culture, wrote the humorous hit “Never a dull moment”²¹ in 1980, describing the Israeli reality in moments of despair and euphoria: “My kindergarten teacher went on strike, my teacher went on strike; they closed the bank and the police”, and: “They closed the Negev, opened El Al; left the trash, took away the electricity”. Ephraim Kishon, one of the most famous Israeli satirists and directors in the world, devoted his energy to describing Israel and the strike with the words: “This is a land that overcame the Arab boycott, but not the teachers' strike”.²² These works by Shemer and Kishon, two winners of the Israel Prize, which are played often even today,²³ prove their relevance and manage to give expression not only to the secret thoughts of the average Israeli citizen, but also to the complex concept of the strike in the Israeli climate which occupied and continues to occupy politicians, theorists, legislators, employers and trade union members, intellectuals, society and culture.

It would not be an exaggeration to state that in Israeli society in general and in working life in Israel in particular, there is an open assumption that the strike is the main and often the only tool of pressure available to workers in their struggle with employers. This view has gained followers in the field of labour relations – from trade union leaders, through labour court judges, researchers and scholars to politicians who believe in this view, and therefore try to restrict the right to strike. Support of this view is learned from the words of High Court Judge Yitzhak Zamir, who ruled in the Amit case that: “The main tool of the workers' union in its struggle to advance the interests of workers, is collective action [...] In the case of conflict between workers and their employer, the workers' union can use its collective power by means of sanctions against the employer, and especially through striking”.²⁴ Retired National Labour Court President Steve Adler was even more adamant in stating that “the strike is a *violent* measure, however, in the current state of affairs, the workers' union does not have an alternative tool to help it advance its goals with the employer”.²⁵ Researcher Michal Shaked, who was required to address the issue, also wrote that “a replacement for the strike has not yet been found in the labour relations system”.²⁶ But it seems that the sharpest and clearest statement on the subject was made by the then Chairman of the Histadrut,²⁷ Avi Nissenkorn, as part of the Histadrut's struggle to raise the minimum wage in the economy: “We went on strike because we realised that otherwise workers would not be counted. They are transparent and shame on the state”.²⁸ This statement was also supported by Chairman of the Histadrut: “I am afraid that, in this country, until you announce a strike – Nada, Zero, Zilch”.²⁹

²⁰ For more on the submitted bills – see Chapter 11.2.6.

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²² Ephraim Kishon, *The Knitted Kippah: And Some More Pro-Israeli Satires*, (Beit El Library, 1993), see his essay entitled: *This is the Land*. For more information about the Arab boycott – see Chapter 18.2.2.

²³ In the Israeli musical culture, you can find other songs dedicated to strikes such as that of Meir Ariel (*Strike* in 1980), the hip-hop group Snake Fish (*Strike* in 2004) and more.

²⁴ HCJ 7029/95 The New Histadrut v. The National Labour Court et al., Ruling 51 (2) 63, 91.

²⁵ Collective Dispute Appeal (National) 1013/04 Discount Bank Ltd. v. The New Histadrut – Derivatives Market Association, Clause 10 of the ruling of the President of the National Labour Court, Steve Adler.

²⁶ Michal Shaked, *Theory of the Prohibition of Political Strikes*, (Labour Law Almanac 7, 1999), p. 187.

²⁷ For more about the Histadrut – see Chapter 3.4, fn. 108.

²⁸ Zvi Lavie, *Nissenkorn: Without a Strike, Workers are not Counted* (Ynet, 24/11/2014). At the link:

It is clear, then, why the strike is the center of many academic studies in Israel and around the world. However, although there is broad general agreement, as mentioned, that the strike is a tool of pressure, it seems that the literature on the subject has focused on the field of legal or economic research or both, and there is no reference that goes beyond these research fields. Therefore, the ability to draw broad conclusions that are not limited to the field of legal or economic research is problematic and lacking (and I will offer a solution for this further ahead in this paper).

The first field of research dedicated to the study of the strike is the legal one – based on the assumption that the strike has consequences in the fields of criminal and contractual law, and especially in the field of torts and, of course, labour law. In 1969, the Labour Court was established in Israel, and it seems that this was also a call to labour law researchers to devote their energy and attention to this field, which had been neglected until then.

In general, it can be said that the legal literature in the 1970s was devoted to a **historical description** of labour laws in Hebrew law, and later during the British Mandate period up to the modern State of Israel. Such were the studies of Shilem Verhaptig,³⁰ Zalman Chen³¹ and Yitzhak Zamir.³² An exception was Michael and Bar-El's research, which I will describe later. The historical description in these years was barely devoted to a description of the strike, but rather to labour laws. Until the mid-seventies, as mentioned, the strike phenomenon in the State of Israel was not common and hence the paucity of research can be attributed to this reason.

The increasing frequency of strikes in the Israeli climate and the damages that came with them began to show their signs in studies conducted in the 1980s. These were studies that dealt with **the different types of strikes** (the partial strike,³³ the political strike,³⁴ the wildcat strike,³⁵ etc.). The types of strikes were not created in Israeli legislature – but rather in court and in the professional literature. In general, it can be said that the type of strike is a derivative of the cause the strike is aimed at and the demands raised within it. Recognition or non-recognition of a certain type of strike will make it legitimate or illegitimate.³⁶ From here, another wave emerged in research literature dedicated to the possibilities of **monitoring, reducing or limiting the right to strike** through arbitration or injunctions,³⁷ imposing supervision on workers' organisations³⁸ or restrictions that may apply to the strike.³⁹

<https://www.ynet.co.il/clauses/0,7340,L-4595168,00.html> Accessed: 17/04/2022.

²⁹ Attila Schumpelby: Chairman of the Nurses' Union: *Until you announce a strike you get zero*, (Ynet, 16/07/2020). At the link: <https://www.ynet.co.il/news/clause/HyuvBhTkw> Accessed: 17/04/2022.

³⁰ Shilem Verhaptig, *Labour Laws in Hebrew Law*, (Tel Aviv: Moreshet Publishing, 1969).

³¹ Zalman Chen, *Developments in Labour Legislation and Conditions During the Mandate, Worker Guide* (published by Am Oved in collaboration with the Ministry of Labour, 1971).

³² Yitzhak Zamir, *Labour Court and National Insurance Bill*, 5728 – 1967, Mishpatim A (5728).

³³ For example – Francis Raday, *Multiple Solutions to Partial Strikes – Didn't the Dish Burn from Too Many Cooks?* (Mishpatim, 10, 5760-2000).

³⁴ For example – Ruth Ben-Israel, *The Political Strike* (Comments regarding H CJ 525/84 Nabil Khatib et al. v. The National Labour Court et al., and Labour Court Hearing 44 / 3-29 – State of Israel – Nabil Khatib et al., *Studies in Law* 11, 5746-1986).

³⁵ For example – Ruth Ben-Israel, *The Status and Consequences of the Wildcat Strike* (The Advocate 37, 5747-1987).

³⁶ As I explain in Chapter 5.2.

³⁷ See, for example, Mordechai (Motti) Mironi's research on arbitration and injunctions (reviewed in detail in Chapter 11.2).

³⁸ For example – Francis Raday, *Workers' Unions – Privileges and Supervision*, (Studies in Law 9, 5743-5744 - 1984).

³⁹ Menachem Goldberg, *The Strike in Law, in the Collective Agreement and in Case Law*, (The Advocate, 5747-1987).

The nineties were marked by the continued line of research conducted up to that time. These were studies of political strikes.⁴⁰ Along with them, studies continued to be published about the use of injunctions⁴¹ and arbitration,⁴² as a way to prevent or reduce the right to strike.

The Ashdod Car Factories case⁴³ that occurred in the late 1980s-early 1990s and in which the existence of a duty of care imposed on strikers was recognized for the first time, gave the signal for the first publication of studies on dealing with the **damages of the strike**, but these examined the damages through a narrow economic prism,⁴⁴ or under the tort laws that sought to examine legal liability for damages caused by the strike,⁴⁵ such as in the tort of negligence or in the tort of breach of contract. Such were the studies of Ruth Ben Israel⁴⁶ and Nili Cohen⁴⁷ that received extensive mentions in literature and jurisprudence.

Studies in the 2000s that dealt with the Israeli strike were characterised by a multitude of trends – such as **types of strikes** – the sympathy strike,⁴⁸ the virtual strike,⁴⁹ etc.; trends in the **court rulings** that dealt with the functioning of the labour court during strikes,⁵⁰ and discussions about **the right to strike as a legal right or as a human right**.⁵¹ The 2000s were also marked by the establishment of new workers' organisations,⁵² struggles between trade unions, legal issues that had not been discussed before and predictions for labour law in the 21st century,⁵³ which found expression for the first time in the research literature of that period.

⁴⁰ For example – Francis Raday, *Political Strikes and a Fundamental Change in the Economic Structure of the Workplace*, (Law, 1994), Michal Shaked, *A Theory of Prohibition of the Political Strike* (Almanac of Labour Law 7, 1999).

⁴¹ Moti Netzer, *Government Intervention in Strikes and Labour Disputes through Emergency Regulations and Detention Orders*, (Human Resources Monthly, 111, March 1997).

⁴² Francis Raday, *The Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Labour Law Almanac 5, 5755-1995).

⁴³ For more on the Ashdod Car Factories – see Chapter 12.3.

⁴⁴ Adrian Zeiderman and Shoshana Neumann, *Economic Cost of Strikes in Israel – Input-Output Approach*, (Business Almanac: 1991), Roni Meir, Baruch Mevorach, *Strikes and Wages in Israel*, (Social Security 35, 1990).

⁴⁵ For example – Nili Cohen, *Strike Damages, Malicious Negligence, Economic Damage and the Cause of Breach of Contract*, (Law Review 14 (1), 1989).

⁴⁶ Ruth Ben Israel. *Liability for Damages Caused by a Strike*, (Law Review 14, 5749).

⁴⁷ Nili Cohen, *Strike Damages, Malicious Negligence, Economic Damage and the Cause of Breach of Contract*, (Law Review 14 (1), 1989).

⁴⁸ Chaim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, (Baranzon-Bnei Sabra Books, 2004).

⁴⁹ Ido Eshet, *On the Good Virtue of the Virtual Strike*, (Labour and Social Work 11, 2005); Amnon Caspi and Batya Ben Hador, *Virtual Strike*, (Labour Society and Law 11, 2005); Guy Davidov, *A strike as one stage in a sequence of events and a virtual strike (with wages) as a proportionate remedy*, (Labour, Society and Law 11, 5766-2006).

⁵⁰ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 5760-2000); Guy Mundlak and Yitzhak Harpaz, *Between the Systems: A Peer Review of the Role of the Labour Court in Strikes* (Studies in Law 26, 2002-5762).

⁵¹ Michal Horowitz, *Freedom to Strike – Proportionality and Mutual Respect in Labour Law*, (Labour, Society and Law 13, 2012); Nir Ganinsky, *The Constitutional Status of the Right to Strike*, (Nevo, 2014),

⁵² Itai Svirsky: *Not on the Law Alone; Not on the Histadrut Alone: Promoting Organisation of Workers as an Effective Tool for Self-Enforcement of Rights and Social Empowerment*, (Law Review B, 2009).

⁵³ Michael Atlan, *Working from Home in Labour Law* in: Menachem Goldberg Book, (Sadan, 2001); Nava Pinchuk-Alexander, *Directions for the Renewal of the Workers' Union in the Twenty-First Century*, (Labour, Society and Law 10, 5764-2004); Steve Adler and Efrat Koka, *The Right to Organise in the Mirror of Changes in Labour Relations in Israel* (Steve Adler Book, 2016); Ido Eshet, *The Model of Representation in Collective Labour Law – New Trends* (Mishpatim 46, July 2017); Yossi Rahamim, *The Modern Labour Market in the Age of Globalisation, and its Influence on Labour Law*, (Law 24, 5778-2018).

The second field of research dedicated to strikes is the field of economic research, in which a place of honor is given to the research of Avraham Michael and Raphael Bar-El,⁵⁴ who studied the strikes in Israel using a quantitative approach. These researchers, who wrote the most comprehensive and cited⁵⁵ work on the damages of strikes in Israel, tried to estimate the productivity losses resulting from unemployed labour and unemployed capital during the strike period. In their book, the researchers identified the issue of strike as a dependent variable explained by endogenous and exogenous independent variables (in recent variables, the researchers referred to the economic, political, and social contexts that formed the background for the strike. The researchers refrained from investigating them because they were less accurate and reliable and called for further research on the subject). The endogenous variables examined – what type of strike, whether the union approved the strike, what the number of participants in the strike was (assuming a large number of strikers increases the chances of success of a strike due to the heavy pressure the strike puts on the employer and vice versa), and how long the strike lasted (assuming that a long-lasting strike contributes to increasing its chances of success). In order to determine a measure of the success of the strikes, Rafael and Bar-El created a quantitative index to which they classified success using four values: workers' demands were accepted in full; workers' demands were accepted in part; workers' demands were not accepted; and the dispute was referred to arbitration or further negotiations. Complete worker success was defined as 100 points, partial success, arbitration and negotiation as 50 points and failure as 0 points.⁵⁶ However, Michael and Bar-El also admit that the calculation method they created “does not at all pretend to indicate the exact economic cost of the strikes”.⁵⁷

These conclusions were repeated in the Kohelet Forum's economic analysis from 2016: “In general, there is no exact way to measure the economic damage inherent in a strike. An agricultural field that depends on a regular water supply to maintain its crops can lose all its seasonal produce in one strike while a Hi-Tech company closing for a few days suffers damage due to the delay but has the ability to close the gap and return to normal activity. In the case of seaports, the consequences are more significant, as the strikes raise the price of domestic products and international trade. In terms of import, frequent strikes at ports undermine the reliability of delivery dates and add significant secondary damage. On the part of imports, uncertainty increases the risk for importers, and with it the price”.⁵⁸ This explains why very few quantitative studies have been conducted in recent decades that have attempted to estimate the impact of strikes on the Israeli economy.⁵⁹

Before I present the research questions that will accompany this thesis, I would like to point out that to the best of my knowledge, this is the first study that examines the effects of the strike not only in the field of economic or legal research, but also in other branches of research that go beyond the branch of

⁵⁴ Avraham Michael and Rafael Bar-El, *A Quantitative Approach to Strikes in Israel*, (Bar Ilan University in collaboration with the Institute for the Advancement of Labour Relations, 1977). For more on this study, see Chapter 14.2.

⁵⁵ See for example the research of Aviad Bar-Haim, who analysed strikes in Israel between the years 2004-2013, and also used the same variables established in the study by Michael and Bar-El, in determining the success of strikes. Bar-Haim's conclusions largely confirm the conclusions reached by Michael and Bar-El. See: Aviad Bar Haim, *Management of Human Resources, Unit 9: Labour and Employment Relations*, (Open University, 2018), p. 79.

⁵⁶ For more about Michael and Bar-El's research, see Chapter 14.2.

⁵⁷ Avraham Michael and Rafael Bar-El, *ibid*, pp. 289-290.

⁵⁸ Amir Feder, Michael Sarel, Zvia Zicherman, *ibid*, p. 25.

⁵⁹ An exception is the study of the Ministry of Finance, which estimated wage losses to the economy in 2003 at ILS 1 billion based on doubling the average wage in the economy per day in the number of lost working days (quoted in: Eliezer Schwartz, Jonathan Erlich, *ibid*, p. 1, fn. 4).

law and economics – such as history, sociology and the media. This is also the first contribution of this study, which is not limited only to a specific research field, but commences from the starting point that the strike is a complex, layered and multidimensional phenomenon, and it would not be right to ignore other fields of research that can shed light on it and bring new insights.

In order to answer the research questions, my work will address these areas of research, combine quality content analysis of various texts (studies and surveys, court rulings, press articles, bills, laws, and legislators' speeches in the Israeli parliament) and describe the current situation on the subject learned from Israel and compare it to the peoples of the world. The work will also include a reading and analysis of texts that deal with theoretical and practical aspects of the strike and alternative means of pressure. Particular emphasis will be placed on examining **case studies** that will examine actual strikes and, of course.

Since the research topic is largely innovative and has not yet been researched, the author had to turn to government bodies, workers' unions and employer organisations to obtain data, analyse and conduct interviews with union members and employers as those who have dealt with the strike, its damages and its effectiveness. The academic literature used includes books and clauses in journals in the research fields listed above. Lectures given at professional conferences as well as foreign and Israeli rulings. The views of judges, jurists, economists and sociologists on the subject of research will also be expressed.

Therefore, the purpose of this paper will be to answer **the following research questions, which also complement one another**:

1. Why is a strike seen as a tool of pressure?
2. Are there alternative pressure tool other than the strike and if so, what is their nature?

To answer the first research question, I first explain how the phenomenon of the strike manifests itself in the world and in Israel, I discuss its significance and its causes, and from there I emphasize the damage that the strike causes or may cause, and lists the factors that are damaged or may be damaged by it (and not only the players of the labour relations system, which traditionally include employers, workers' organisations and the sovereign), but also the individual worker, residents and consumers and business entities in commercial relations with the employer, and I explain how their damages are manifested. Then, I will discuss the likelihood of strike damages occurring and the exposure of various factors to being damaged by the strike, and additional levels of damage that may be caused by a strike, besides economic damages: political, social, image and trust relations. In order to evaluate the strike, in my work I propose a new index for evaluating the strike which I call: the **Practical Index**, which consists of three cumulative variables: effectiveness, efficiency and suitability for use in the 21st century. Using this index, I sought to assess a strike as practical if it succeeds in creating a new balance point between workers and the employer, while being adapted for use in the 21st century labour market, which has the power to put pressure on the employer that will cause him to respond to the demands of the workers as much as possible and with a minimum of damage. Another contribution that will emerge in this study will offer an alternative approach to the foundations of the strike, (as delineated by Ruth Ben Israel⁶⁰ and repeated again and again in research and rulings), and which distinguished between the level of its action, the essence of the action and its purpose.

⁶⁰ Ruth Ben Israel, *The Strike in the Mirror of Public Law: The Strike, The Political Strike and Human Rights* (Baranzon Book, Vol. III, Golel, 5767-2007) p. 113.

The importance of the second question lies in the assumption that the strike will change its face in the 21st century, either due to the bills seeking to limit it that frequently arise in the Israeli legislature, or due to the changing and dynamic nature of the labour market where a pattern of working remotely and from home is beginning to emerge, which undermines the strike and its effectiveness. Through the second question, this study will seek to examine what means of pressure will be available to workers to achieve their goals if their ability to exercise the right to strike is reduced. The importance of the second research question is also in examining the potential of allowing workers to achieve their goals without being required to exercise their right to strike (if at all), and as a result, also reduce the potential for strike damage to workers, employers, the sovereign and society.

I will do all this by dividing the work into four sections:

Section One includes six chapters in which I will discuss the basic terms used in the study: In Chapter Two, *The Strike in International Law*, I will discuss the various incarnations of the strike: from being prohibited by state laws, to being recognised by the UN through the International Labour Organisation and later in the constitutions or laws of various countries. In Chapter Three, *The Strike in Israel*, I will describe the sequence of events regarding the right to strike in Israel, from the days of the Jewish Settlement until the 21st century. In Chapter Four, *The Meanings of the Strike*, I will address the various meanings derived from using the strike: legal, intra-union, economic, and religious meanings. In Chapter Five, *Types of Strike*, I will distinguish between an economic strike, a political strike, a quasi-political strike, and a sympathy strike. I will then make further distinctions and show what strike options are possible in the State of Israel. In Chapter Six, which will deal with *The Causes of Strikes*, I will seek to understand what causes workers in the State of Israel to declare a strike and take part in one. In Chapter Seven, *Pressure and Its Meanings*, which is also the last chapter of the first section, we will learn about the frequent use made of the term *pressure* to characterise the action of the strike. At the end of this section, the term *pressure* will become much clearer, but it does not end there. I will examine why a strike is a means of pressure. The way to understand this question is through understanding the damage that the strike causes or may cause. I will detail this in the next section.

Section Two of my work includes six chapters and its purpose is to understand why a strike is a means / tool of pressure. My starting point for understanding this question lies in understanding the damages that the strike causes or may cause, assuming that these damages are a factor leading to stress. In Chapter Nine, *Strike Damages*, I will seek to understand what damage strikes may cause – other than economic damage. In Chapter Ten, *How the Employer Handles the Strike*, I will show how employers seek to see strikes come to an end by a variety of means. In Chapter Eleven, *How the Sovereign Handles the Strike*, we will learn about the ways in which the sovereign tries to deal with the strike phenomenon. In Chapter Twelve, *How Third Parties Handle the Strike*, we will learn that the way for third parties, who have nothing to do with the striking workers, to recover from the damage of the strike is difficult and complex. In Chapter Thirteen, *How the Workers' Union Handles the Strike*, I review measures that a workers' union employs to deal with the strike. These tools help the workers' union reduce the damage of the strike; may win the union public sympathy and support of the Labour Court; or allow it to continue to put pressure on the employer. In Chapter Fourteen, which closes this section, *Evaluating the Strike as a Pressure Tool*, I will seek to evaluate the strike as a means of pressure. The highlight of this chapter will be the development of the practical measure for assessing the strike as a means of pressure.

In the **Section Three** I will identify three alternative means of pressure for a strike: Chapter Sixteen will be devoted to an examination of *The Virtual Strike*. In this chapter I will discuss the nature of the virtual

strike, its various models, its advantages and disadvantages, and I will ask whether the virtual strike can indeed be an alternative and practical means of pressure for the traditional strike in the State of Israel. Chapter Seventeen will be devoted to the examination of *Shaming*. In this chapter I will explain what shaming is, what its goals and consequences are and I will diagnose shaming as an alternative means of pressure to the strike. Chapter Eighteen is devoted to the last means of pressure, *The Consumer Boycott*. I will discuss manifestations of the boycott, justifications for its use and its effects, and whether a consumer boycott can be an alternative means of pressure to the strike.

In **Section Four** I will summarise the work, present my conclusions and propose options for further research.

Section A

Chapter 2: The Strike in International Law

2.1 Introduction

Until the nineteenth century the Western world did not recognise the right to strike. It does not mean that strikes did not occur before this time. In fact, the earliest record of a strike in human history tells the story of a strike that broke out in 1158 BC. In the twenty-ninth year of the reign of Ramesses III (135 years after the burial of Tutankhamun), the tenth day of the month of Mechir, the five walls of the necropolis were destroyed by the tomb-building workers who rebelled against unpaid wages and starvation. Only after negotiations and securing food for the strikers was the peace restored.⁶¹

From this strike story we learn not only about workers striking from their work, calls for rebellion and active-violent actions of destructing the walls, which were presumably intended to put pressure on the government, but also about the recognition of the right to strike and the status of legitimacy given to it as a direct result of the government entering negotiations rather than suppressing it with force. Moreover, the striking workers were not a workers' association. They did not try to get results for other workers, they did not try to gain the support of other groups of workers and they were not at the risk of being dismissed or punished due to the strike.⁶²

There are additional records of strikes in ancient Jewish records⁶³, the Gemara tells the story of two families who held a kind of monopoly on two essential services in the work of the Temple: The Garmu family who were responsible for baking the showbread and the Avtinas family who were responsible for preparing the incense. Temple elders were dissatisfied with the power both families held due to their exclusive control of knowledge, and required them to teach their art to non-family members and allow their employment, but the two families refused and went on strike to get the elders to recant their unilateral demand. Two methods were tried to cope with the issues created by the prolonged strike: The first, the elders tried to reason with the two families to recant their decision, claiming their work was holy work. Second, workers were brought in from Alexandria to do the work instead of the striking families. The attempts failed, and the temple elders had no choice but to return the strikers to their work, at double pay.⁶⁴

This story teaches us about a strike of essential workers, attempts to handle the strike through the means of "gentle" persuasion (reasoning with them) and the application of pressure in bringing in foreign workers.⁶⁵

In the early modern period, the strike was considered a conspiracy to commit an offense, as will be explained below, since it was perceived as a breach of the employment contract. The shift in the field took place only with the rise of the socialist movements in the early twentieth century, with an increase

⁶¹ The main source of this strike is the 1800 Turin Papyrus, also known as The Strike Papyrus. See: Paul John Frandsen, *Editing Reality: The Turin Strike Papyrus*, in: Sarah Israelit Groll (ed.), *Studies in Egyptology Presented to Miriam Lichtheim*, vol. 1, Jerusalem 1990.

⁶² Deborah Sweeney, *The Earliest Recorded Strike in the World – The Tomb-Builders in the Valley of the Kings*, (Zmanim – Historical Quarterly, Tel Aviv University, Winter 2010), p. 14.

⁶³ Yoma Tractate 38, page a.

⁶⁴ For further information, see: Shilem Verhaptig, *Labour Laws in Hebrew Law*, (Tel Aviv: Moreshet Publishing, 1969), pp. 974-984.

⁶⁵ A similar idea can also be found in: Moti (Mordehai Mironi): *The Lesson from the First Strike in the World*, (The Marker, 12/06/2014). Link: <https://www.themarker.com/opinion/1.2346396>, retrieval date: 30/07/2021.

in the power of workers' organisations. These led to the institutionalisation of the strike as a legal and non-criminal right, to some extent against the will of governmental and legal elites.⁶⁶

The right to strike was recognised in different international settings during the twentieth century. The significance of recognised and accepted international institutions acknowledging the strike as a right is that it formally turned the strike into a recognised and legitimate democratic right in the law of nations, a vital tool for protecting workers against exploitation, a tool for expressing injustice and of course, a pressure mechanism exerted on employers to meet the demands of the workers. From here the road to recognition of the right to strike was also paved in Israeli domestic law.

The purpose of this chapter is to present the process of how the strike evolved and became recognised, and its limitations – first among the law of nations, and then in Israel, as well as to describe the various types of strike and the distinctions between them all, with the intent of sharpening the status of the strike.

2.2 Historical Development of the Right to Strike

History books tell us that until the early 19th century, strikes in the United Kingdom, the United States and some Western European countries were considered conspiracy to commit an offense, as it was seen as an organisation of several people to harm employers' businesses or property and breach their contracts with them.⁶⁷ Therefore, strikes were forbidden by law and a worker who dared to take part in one was perceived as *disrupting trade*. This is nothing new. Collective actions (and not necessarily strikes) were also perceived as conspiracies in the 16th and 17th centuries.

From the end of the 18th century, the constitutional prohibition on strikes was based on the *Laissez Faire* school of economics (from the French: *laissez faire, laissez passer* which translates as "Let be, and let pass"). Underlying the theory is the notion that the sovereign must barely, if at all, intervene in economic decisions of the individual and at the same time ensure the freedom of economic action. The *Laissez Faire* School of thought ratified the right to property, and as a result the right of employers to treat their property as they wish.⁶⁸ Hence, it is understandable why the right to strike was forbidden, as long as this school of thought dominated.

Following the French Revolution in 1793, trade organisations were declared illegal. The revolution ratified the freedom of the individual, first and foremost equality, and saw the citizen as one who is obligated to being loyal to the state and not to a particular group, least of all to an organisation of workers. Hereafter, professional organisations were perceived as threatening the new social order that the revolution sought to establish and strikes were perceived as breaches of contract with employers, and therefore allowed the latter to sue workers in the courts.⁶⁹

Around those years, various European countries were displeased with the social unrest in France, and began to restrict the right to strike out of growing fear of unrest, revolutions or similar uprisings in their territory. For example, the British Parliament enacted the Combination Acts 1799-1800 which stipulated that strikes are a criminal offense punishable by imprisonment or hard labour for workers who participated in or organised them. These laws failed to effectively prevent workers' organisations and

⁶⁶ Michal Shaked, *A Theory of Prohibition of the Political Strike* (1999), Yearbook of Labour Law 7, p. 185, quoted by: Ruth Ben-Israel ed. (*Strike and Industrial Action in the Face of Democracy*, Tel Aviv: The Open University, 2003, pp. 142-175).

⁶⁷ Storey, Moorfield, 1922. *The Right to Strike*, Yale Law Journal 32 (2), pp. 99-108.

United Nations, 1966. *International Covenant on Economic, Social and Cultural Rights*, Office of the United Nations High Commissioner for Human Rights.

⁶⁸ Lilach Litor, *The Strike in Law, History and Politics* (2019), p. 25.

⁶⁹ In 1864, legislation banning the strike was repealed in France under the Ollivier Law.

reality forced legislators to enact The Combination Acts 1824 that allowed workers to organise and assemble as long as it was not violent toward property or person. The right to vote, which was gradually gaining momentum during these years, brought with it a growth in workers' parties, and, as a result, recognition and protection of the right to strike.⁷⁰

The First World War (1914-1918) brought with it an intolerance of European countries towards the strike. It was now perceived as interfering with the war effort,⁷¹ and was prohibited by law as various restrictions began to be imposed, such as mandatory arbitration in the United Kingdom.

With the cessation of the battles of World War I, the International Labour Organisation was established, which marked a new period in the status of the right to strike. This is discussed in the chapter *Recognition by the International Labour Organisation*.

2.3 Status of the Strike in International Law – Recognition by the United Nations

The first step in paving the way for recognition in the right to strike as a human right occurred in 1948 when the United Nations General Assembly (hereinafter: **The UN**) adopted the *Universal Declaration of Human Rights*. This declaration included, for the first time, recognition of socio-economic rights.

Following the declaration, the UN Commission on Human Rights was asked to prepare a draft covenant in which human rights would be guaranteed and the steps taken to enforce them would be determined. Following discussions on formulating the covenants (one covenant on civil and political rights, and a second covenant on economic and social rights), and establishment of another committee to finalise the covenant, the UN Convention adopted the *International Covenant on Economic, Social and Cultural Rights of 1966*.⁷² Clause 8 of the Covenant determines that “The States Parties to the present Covenant undertake to guarantee [...] the right to strike, provided that they exercise it in accordance with the laws of each country”. This Covenant entered into force in 1976.

The importance of Covenant is in explicitly anchoring the right to strike in an official international document for the first time. It can be said that this was a tremendous progress in the status and recognition of this right. At the same time, Clause 8 also established a restriction on the right and subordination to the laws of the various states. That is, the right to strike is not unconditional or absolute, and in the event of a conflict between it and a state law, the latter will prevail. In subclause 2 to Clause 8 we learn that the Covenant does not guarantee the right to strike for security forces, police officers or public administration workers.

The question that arises is in what circumstances is it possible to restrict the right to strike or what are the criteria by which the right is restricted. On the one hand, Clause 8 of the Covenant determines that the right will be restricted “in accordance with the laws of each country”. On the other hand, the outlines for restricting the right to strike can be seen in Clause 4 of the Covenant: “The state may restrict these rights [i.e., those set forth in the Covenant. Me: A.M.] only under the same restrictions set forth in the law, and only to the extent that this may be reconciled with the nature of these rights, and solely for the purpose of promoting general welfare in a democratic society”. In other words, Clause 4 to the Covenant specifies three cumulative conditions for restricting the right to strike: restrictions must be made only through legislation, they must be consistent with the nature of the right and they must promote economic well-being in the democratic state. It appears that to date there is no answer to the question of the

⁷⁰ Lilach Litor, *ibid*, pp. 25-30.

⁷¹ *Ibid*, p. 31.

⁷² International Covenant on Economic, Social and Cultural Rights.

circumstances of restricting the right to strike. At the same time, from a comparison between Clause 4 and Clause 8 of the Covenant, it is clear that the intention of its drafters was that the right to strike would be subject to or limited to the laws of the various states.

The *European Social Charter* was published in 1961. Clause 6 Paragraph 4 of the Charter requires the parties to recognise the right of workers to strike subject to their obligations in collective agreements. This document precedes the 1966 UN Charter by five years and although it was largely declarative, from a historical perspective it can be assumed that its importance was summed up in two aspects: One is a regional-European agreement that ratified the right to strike, and the other is another catalyst in forming a consensus coalition around the 1966 UN Convention.

2.4 Status of the Strike in International Law – Recognition by the International Labour

Organisation

The International Labour Organisation was founded in 1919, near the end of World War I, during the Paris Peace Conference. The Constitution of the International Labour Organisation, which I will discuss below, was drafted between January and April 1919, and in April, the Constitution was adopted by the Paris Peace Conference, when it became the eighth part of the Treaty of Versailles.

Initially, the International Labour Organisation operated as an agency of the League of Nations. After the end of the activities of the League of Nations, the organisation acted as a UN agency and continues to do so to this day.

In 1948, the International Labour Organisation published the Freedom of Association and Protection of the Right to Organise Convention (No. 87),⁷³ and in 1949 the organisation published the Right to Organise and Collective Bargaining Convention (No. 98).⁷⁴ Neither of these conventions mentions the right to strike, and this was intentional. During discussions on Convention No. 87, the governments of Poland and Czechoslovakia submitted a request to guarantee the right to strike in the Convention. This request was repeated during the discussions on Convention 98, again by the Government of Czechoslovakia. On both occasions, the requests were rejected on formal grounds, which were probably based on a reluctance to register an achievement in favour of communist countries during the Cold War, and the fear that the right to strike would also have to be defined.⁷⁵

As stated, the right to strike was not mentioned in Convention 87 nor in Convention 98, but surprisingly it was recognised as a social human right by virtue of the decisions of the Committee on Freedom of Association operating under the Executive Committee of the International Labour Organisation.⁷⁶ This committee was authorised by the Executive Committee of the International Labour Organisation to investigate complaints against violations of freedom of association, and in doing so it recognised the right to strike as a derivative of freedom of association. How, then, did the committee recognise the right to strike even though it was not ratified in the above covenants? According to the committee, the freedom of association that underlies the two conventions can be exercised and realised through the freedom to conduct collective negotiations and through the freedom to strike. In other words, a group of workers seeking to protect their rights in the workplace through association must negotiate with an

⁷³ ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948. Appears in Charter Vol. 59, p. 249. (Hereinafter: Convention 87).

⁷⁴ ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Collective Bargaining Collectively, 1949. Appears in Charter Vol. 277, p. 453. (Hereinafter: Convention 98).

⁷⁵ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1396.

⁷⁶ Hereinafter: The Committee on Freedom of Association.

employer on the one hand, and need the right to strike on the other, in order to force the negotiation and ultimately, to exercise the right of association. These are, therefore, rights that complement each other.⁷⁷

A state that ratifies an International Labour Organisation convention is obliged to implement the provisions of that convention and is required to submit a report regarding implementation of the convention's provisions in the territory of their state to the organisation. Hence, a state that has not ratified Convention 87 or Convention 98 or both, is not obligated to recognise the right to strike arising from these conventions. Thus, the Freedom of Association Committee was forced to find another binding legal source that would guarantee the right to strike even in countries that did not ratify the above conventions. This came in the form of the International Labour Organisation Constitution. This is the place to remark that every country that joins the International Labour Organisation undertakes to respect the organisation's constitution. The Introduction to the Constitution guarantees the principle of freedom of association, and hence the Committee on Freedom of Association decreed the existence of the right to strike, much like the conclusion it reached by virtue of the decree of the right to strike by virtue of Convention 87 and Convention 98.⁷⁸

2.5 Review of the Status of the Strike in Various Western States

As we will see below, there are differences among many countries in the world regarding recognition of the right to strike. While there are countries that have chosen to explicitly recognise the right to strike in their constitutions, there are countries where the right to strike has been recognised indirectly and is a product of the interpretation of the constitution.

The criteria for selecting the states were – countries that did not explicitly include the right to strike in their constitutions, countries that did not include the right to strike in their constitutions but included reference to collective workers' rights and countries that explicitly recognised the right to strike in their constitutions.

2.5.1 The Right to Strike in the United States

There is no explicit mention in the United States Constitution of the right to strike. The same is true of the amendments made to the Constitution over the years. However, over the years, a number of legal cases have reached the High Court seeking an anchor for the right to strike in Amendments 14 (The Right to a Fair Trial), 13 (Prohibition of Slavery or Forced Labour) and 1 (which deals with freedom of religion, speech, press and organisation) to the Constitution.⁷⁹

In 1923, the High Court heard the case of *Charles Wolff Packing Company v. Court of Industrial Relations*. The focus of this case was a law enacted by the State of Kansas that prohibited manufacturing workers from striking, with the goal of ensuring *continuous production*. The law also called for imprisonment or a fine for a worker who took part in a strike. The High Court ruled that this provision equates civilians to soldiers in military service, and is therefore inappropriate and it was repealed for being contrary to Amendment 14 to the Constitution. In 1926 the High Court ruled in *Dorchy v. Kansas* that the right to strike is not absolute and in their words: "Neither the common law, nor the Fourteenth

⁷⁷ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1397.

⁷⁸ 149th Report, Case No. 678 (Spain), June 1976. Link to the report –

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2899454

Quoted in Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1401.

⁷⁹ Nir Ganinsky, *The Constitutional Status of the Right to Strike*, (2014), pp. 121-125.

Amendment, confers the absolute right to strike”. This did not prevent the court from allowing states to enact laws that require prior notice before an actual strike begins, similar to the arrangement in Israel.⁸⁰

Over the years, workers’ organisations have also tried to cite the 13th Amendment to the Constitution, which deals with the prohibition of slavery or forced labour, as one that allows workers to organise with other workers and hence the right to strike. But a High Court case⁸¹ refused to discuss the substance of the matter on this question, and since then the question has remained without a legal answer.

In the Lyng⁸² case, which dealt with the denial of food stamps to workers who are on strike, no answer was given as to whether the right to strike is enshrined in Amendment 1 to the Constitution (which deals, among other things, with the right to organise), since this was also not explicitly required by the judgment.

In conclusion, even today the status of the right to strike in American law is unclear in the absence of an explicit reference to the Constitution and in the absence of a ruling by the Federal High Court. All that exists on the subject, are incidental statements given by the court from time to time which referred to the constitutional right as a derivative of one of the options presented above. At the same time, the official position of the United States government is that the right to strike exists in the Constitution, but researchers express a more careful and cautious position.⁸³

2.5.2 The Right to Strike in Canada

The Canadian Constitution was enacted in 1982, and its first chapter is the Canadian Charter of Rights and Freedoms (abbreviated: The Canadian Charter). The charter guarantees the freedom of religion, conscience, the press, thought, faith, expression, demonstration and association. Like the United States Constitution, the Canadian Constitution lacks reference to the right to strike, and there are therefore appeals to the Canadian High Court to recognise it.

In the late 1980s, the Canadian High Court issued three judgments⁸⁴ on the right to strike, known as the Labour Trilogy. In the first case, a law was enacted in the province of Alberta that imposed restrictions on the public sector seeking to strike. In the second case, the Canadian government prohibited striking during a collective agreement.⁸⁵ In the third case, a law was enacted in Saskatchewan County against a strike that was expected at one of the county dairies. The High Court ruling in all three cases was restrictive, ruling that the right to association promised in the Canadian Charter does not include the right to strike.

Since the Labour Trilogy to the present day, this ruling has not been contradicted, although there have been judicial innovations in Canada regarding collective negotiations that have caused controversy among scholars over the status of the right to strike in Canada, but this has not yet been decided, as the High Court has not changed its explicit rule.⁸⁶

⁸⁰ Clause 5A of the Settlement of Labour Disputes Law, 5717-1957.

⁸¹ *AFL v. American Sash Co.*, 335 U.S. 538, 559 (1949).

⁸² *Auto Workers v. Lyng*, 485 U.S. 360 (1988).

⁸³ Nir Ganinsky, *ibid*, pp. 125-126.

⁸⁴ *Re: Public Service Worker Relations Law (Alta)*, [1987] 1 SCR 313; *Public Service Alliance of Canada v.* [1987] 1 SCR 424; *RWDSU v. Govt. of Saskatchewan* [1987] 87 CLLC para. 14.0233 (SCC), quoted in Nir Ganinsky, *ibid*, p. 127.

⁸⁵ This restriction is reminiscent of the duty to maintain industrial silence. For details – see Chapter 3: *The Strike in Israel*.

⁸⁶ Nir Ganinsky, *ibid*, pp. 126-129.

2.5.3 The Right to Strike in Germany

The German Constitution also does not explicitly recognise the right to strike. But it recognises the right of association and the right to improve working conditions, in accordance with clause 9(3) of its Constitution.

In 1954, the Federal Labour Court ruled that the right to improve working conditions also included the right to strike.⁸⁷ In 1971 the Constitutional Court of Labour ruled that a strike must meet the conditions of proportionality, in order to ensure its legality.

Since the Federal Court's ruling in 1954 until today, scholars around the world have noted that as a result, the right to strike in Germany is guaranteed by the Constitution.⁸⁸

2.5.4 The Right to Strike in France

The Fourth Clause of France's Constitution from 1946 explicitly recognised the right to strike, as did the Fifth Clause from 1958. This right has been extended by the *Conseil d'état* (the highest legal court in the administrative field which holds powers parallel to the authority of the High Court). Here, then, is a first example of a Western country recognising the right to strike and securing it in its Constitution clearly. And not only that. The right to strike in France is seen as the personal right of every worker, which gives them protection of their rights. This is the most striking innovation in the French Constitution compared to the world. At the same time, the practical meaning of the right, as interpreted by the legal system, requires the association of several workers in the workplace, whether they are the majority or individual workers who constitute a minority of the workers.⁸⁹

2.5.5 The Right to Strike in Switzerland

In 1999, a referendum was held in Switzerland to approve the new Constitution. The Constitution was approved by a majority of votes and it replaced the *old* Constitution of 1874. The new Constitution, unlike its predecessor, explicitly recognised the right to strike in Clause 28. It should be emphasised, however, that prior to the approval of the new Constitution, the Federal Court concluded that the right to strike is a derivative of the right of association recognised in the 1874 Constitution. Here, then, the right to strike has been recognised in Switzerland. While the right is recognised by the new Constitution, in the old Constitution it is indirectly recognised by the court.⁹⁰

2.5.6 The Right to Strike in Italy

Clause 40 of the Italian Constitution, published in 1947, recognises the right to strike, but says nothing regarding the restrictions applying to this right. The Constitutional Court was required to rule on this issue as well and ruled that striking workers could not be replaced by other workers, that a strike did not constitute a breach of contract by the striking worker and that the employer must not harm the striking workers.

Upon publication of the Constitution, there was a conflict between the recognition of the right to strike and the clauses of the Penal Code which prohibited economic strikes (Clause 502 of the Act), or those which provided for imprisonment for workers leaving the workplace or disrupting work (Clause 330 of

⁸⁷ David Westfall & Gregor Thusing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT'L & COMP. L. REV. 29

⁸⁸ *Ibid*, p. 133.

⁸⁹ *Ibid*, p. 140.

⁹⁰ *Ibid*, pp. 135-136.

the Act). During the 1960s, the Constitutional Court repealed these clauses of the law, which contradicted the recognition of the right to strike enshrined in the Constitution.⁹¹

2.5.7 The Right to Strike in Sweden

The Basic Laws of Sweden,⁹² from 1975, which operate similarly to most of the world's constitutions, recognise the right to strike.⁹³ As long as the strike is classified as an *economic strike*⁹⁴ it is extremely broad. In addition, Swedish law does not allow strikes to be prohibited except by special parliamentary resolutions, which are considered very exceptional.⁹⁵

2.5.8 The Right to Strike in Additional Countries

Other countries such as Greece⁹⁶, Poland⁹⁷, Hungary⁹⁸, Slovakia⁹⁹, Croatia¹⁰⁰, Macedonia¹⁰¹, Slovenia¹⁰², Serbia¹⁰³, Romania¹⁰⁴, Belarus¹⁰⁵, Latvia¹⁰⁶, Russia¹⁰⁷, Argentina¹⁰⁸ and Brazil¹⁰⁹ also have explicit and clear references to the right to strike.

2.6 Review of the Restrictions Applying to the Right to Strike Worldwide

As mentioned, conventions 87 and 98 of the International Labour Organisation do not recognise the right to strike, but the latter still recognises the right of workers to strike. From the point of view of the International Labour Organisation, the right to strike is a fundamental right which is inseparable from the right to the protection of workers' interests, so that strikes should not be prohibited. A general ban may be justified only in severe situations of national emergency such as uprisings or natural disasters, and for a limited time.¹¹⁰

Clause 8 of the International Covenant on Economic, Social and Cultural Rights of 1966 states that the right to strike may be subject to material or procedural restrictions.

Substantive restrictions on the right to strike in international law are permitted only in two groups of workers – workers employed in essential service and workers employed in public service. Restriction of the right to strike among those employed in essential services stems from its characteristics as a service whose termination may endanger the life, personal safety or health of the general public or parts of it. In

⁹¹ Nir Ganinsky, *ibid*, pp. 137-138.

⁹² In Swedish: Sveriges grundlagar.

⁹³ Under Chapter 2. *Fundamental Rights and Freedoms*, Clause 14.

⁹⁴ See Chapter 5: *Types of Strike* for the types of strike, including economic strike.

⁹⁵ *Ibid*, p. 141.

⁹⁶ Clause 23 to the Constitution of Greece.

⁹⁷ Clause 59 to the Constitution of Poland.

⁹⁸ Clause 70 to the Constitution of Hungary.

⁹⁹ Clause 37 to the Constitution of Slovakia.

¹⁰⁰ Clause 60 to the Constitution of Croatia.

¹⁰¹ Clause 38 to the Constitution of Macedonia.

¹⁰² Clause 77 to the Constitution of Slovenia

¹⁰³ Clause 61 to the Constitution of Serbia

¹⁰⁴ Clause 40 to the Constitution of Romania

¹⁰⁵ Clause 41 to the Constitution of Belarus

¹⁰⁶ Clause 108 to the Constitution of Latvia

¹⁰⁷ Clause 37 to the Constitution of Russia

¹⁰⁸ Clause 14 to the Constitution of Argentina

¹⁰⁹ Clause 9 to the Constitution of Brazil

¹¹⁰ Nati Perlman, *Restriction of the Right to Strike in Essential Services Comparative Review*, (Knesset, 2013), p. 6.

public service, the possibility of restricting the right to strike is based on the perception that a strike challenges the government and harms the democratic regime.¹¹¹

Procedural restrictions can apply to the process of deciding to strike such as obligating workers to carry out a secret vote. In special cases, the right to strike may be limited to the point of prohibition of strikes (explicit prohibition in legislation or an explicit result of all restrictions). Such a ban is possible in the case of certain groups of workers in public service and those providing essential services.¹¹²

The criteria for selecting the countries were – countries that require prior notice before starting a strike, countries that require completion of pre-strike proceedings, countries that require voting among workers approving strikes and countries that prohibit certain groups of workers from striking.

2.6.1 Restrictions on the Right to Strike in the United States

In 1926, the Railway Labour Law (RLA) was enacted which regulated labour relations in the railway industry, which a decade later was also applied to the aviation industry. And today it also applies to private railway and airline companies. In 1935, the National Labour Relations Law (NLRA) was enacted, applying to the rest of the private sector. Both the RLA and the NLRA give workers the right to strike and the protections for strikers (management and supervision workers are not recognised as workers and therefore if they decide to strike, they will not enjoy these protections). It should be emphasised that it is the right of employers to protect their interests and replace striking workers with permanent workers.¹¹³

The Federal Service Labour-Management Relations Law (FSLMRA) applies to federal public sector workers. These workers are prohibited from striking, and if they take part in a strike they may be dismissed, the courts may require them to return to work and civil and criminal sanctions may be imposed on them. A workers' organisation that violates the strike ban is also exposed to sanctions and may even lose its right to represent workers. And yet, strikes in the United States public sector exist and end successfully, even though they are illegal. This largely depends on the ability of employers to stand up to workers, the number of strikers and the ability to replace them, their solidarity and public sympathy for them.¹¹⁴

In most US states there are comprehensive strike bans for public servants. Even in states where state government workers are allowed to strike, this right is usually limited to workers in essential services or strikes that pose a risk to public health or safety, but the vast majority of workers in essential services, such as workers of electricity, water and gas companies, health and transport services, are employed in the private sector, and the provision of the NLRA or RLA which do allow workers to strike even in essential services apply to them. The RLA allows the parties to take self-help measures such as workers' strikes, after dispute resolution procedures have been exhausted. Workers are not allowed to strike before proceedings are completed. The NLRA gives the President the option of appointing a committee to look into the conflict, when he fears that a strike in an entire industry or in a significant part of it will endanger the public or its security. According to the committee's findings, the President may ask the court to order workers to return to work for 60 days. After an additional 15 days, a secret vote must be

¹¹¹ Yehudit Galili and Michal Koreh, *The Right to Strike: Essence, Boundaries and Future Changes*, (Knesset Research and Information Center, 2004), p. 7.

¹¹² Clause 8 of the International Covenant on Economic, Social and Cultural Rights of 1966. Cited by Yehudit Galili and Michal Koreh, *The Right to Strike: Essence, Boundaries and Future Changes*, (Knesset Research and Information Center, 2004), p. 6.

¹¹³ Nati Perlman, *ibid*, pp. 13-17.

¹¹⁴ *Ibid*.

held among the workers regarding the acceptance of the employer's final offer. If the conflict is still unresolved, workers may strike.¹¹⁵

2.6.2 Restrictions on the Right to Strike in Canada

Federal law and provincial legislation prevent police officers, health care workers and firefighters from striking. Sometimes, along with the right to strike there is an obligation to refer the dispute to arbitration. In most jurisdictions in Canada there is an obligation to continue to provide essential services, with essential services being defined as such that if discontinued it would cause harm to public health or safety, and there are provinces (counties) that define essential service as such that may also prevent damage to property. In British Columbia an essential service also includes education. In Ontario essential services include full-level transportation services, and labour disputes are resolved through mandatory arbitration.¹¹⁶

In the essential services there is an obligation to continue to provide a basic level of service. In some cases, the level of service is determined by the employer. This right of the employer may result in termination of the strike, if he determines that a high level of service must continue to be provided which may prevent the strike.¹¹⁷

In some provinces, voting is mandatory before a strike, including British Columbia, Alberta, New Brunswick, Quebec, Ontario and Saskatchewan. The law on the subject is different in each province. For example, in Quebec, not holding a vote does not infringe on the legality of the strike but exposes organisations to tortious and even punitive liability; in Saskatchewan, not holding a vote does not negate the legality of the strike but has the effect of negating the legitimacy of activities that are considered legal in other circumstances, such as a protest vigil; and in Ontario a vote which does not obtain a majority in favour of the strike will result in a cessation of the strike.¹¹⁸

The Canadian voting procedure does not seek to achieve an element of *cooling-off* like the British one,¹¹⁹ but rather democracy. Voting whether to strike also serves the employer, but also the workers, in that it reduces the possibility of decisions being made by minority groups holding positions of control in workers' organisations.¹²⁰

There are also certain cases where the Canadian government forces employers to sign a collective agreement. The coercion to sign does not stem from a desire to protect workers' rights but in the name of efficiency, in order to prevent strikes and ensure the continuous operation of the economy.¹²¹

2.6.3 Restrictions on the Right to Strike in Germany

The right for workers to strike in Germany must be balanced against the rights of employers and third parties affected by the strike, including the general public. Striking workers are required to perform emergency and maintenance work required to protect employer property. The work required are determined by the employer but the workers' organisation will determine which workers will perform the

¹¹⁵ Ibid.

¹¹⁶ Nati Perlman, *ibid*, pp. 17-19.

¹¹⁷ Ibid.

¹¹⁸ Sarah Zubner, Dan Lahav: *Review on the Subject: Prerequisites for Declaring a Strike* Comparative Review, (Knesset – Research and Information Center, 2003), pp. 4-6.

¹¹⁹ For the *cooling-off* element, which is reflected in the restrictions on the right to strike in the United Kingdom, see below.

¹²⁰ Ibid, p. 4.

¹²¹ Guy Davidov, *The Duty to Conduct Collective Negotiations* – Lecture at the Labour Law Association Conference, (March 2009).

work. During a private sector strike, public workers were also used to provide essential services to the population, but it was forbidden to use public workers as strike breakers. Public workers whose employment is regulated by law (and not through collective agreements) as well as judges and soldiers are not allowed to strike. German essential services are defined as ones that includes food, health, energy and water supply, transportation, mail, communications, broadcasting, firefighting, burial, waste management, protection and national security.¹²²

The guiding principle in determining the legality of a strike is the principle of proportionality. The Peace Obligation must be exhausted before going on strike, i.e., one must try to resolve the conflict peacefully before going on strike. The strike must also be fair. This rule is interpreted as a requirement that the strike does not intend to destroy the organisation in which it takes place. A strike will be declared as a last resort, meaning workers are obliged to exhaust direct negotiation, mediation or arbitration proceedings.¹²³

2.6.4 Restrictions on the Right to Strike in France

The right to strike can be restricted by legislation only (i.e., collective agreements cannot restrict the right to strike. Even if a collective agreement requires prior notice before the strike breaks out, then it will only bind the workers' organisations signed to it and not the workers themselves).

Clause L521-1 of the Labour Law (Code du Travail) sets out the rules for the legality of a strike: the strike must be professional (and not political), it is not bound by time and scope, the law allows for a voluntary reconciliation procedure (mediation, settlements, etc.). Workers are not obligated to wait for such a procedure to begin or end to start a strike. In the French public sector only representative workers' organisations may declare a strike and must notify the employer five days before the actual outbreak of the strike, in order to allow negotiations to take place. A strike without prior notice is illegal and disciplinary action can be taken against the strikers. In the public sector, there is an obligation to continue to provide a minimum level of service even during a strike, in order to ensure public safety. For example, it is possible to obligate work in public and private hospitals in an emergency format.¹²⁴ In 2007, a law was enacted requiring workers of land transportation services to give 48 hours prior notice before going on strike and provide a minimum level of service. Workers providing essential public services are forbidden to strike. These include: police officers, prison workers, judges,¹²⁵ soldiers, certain aviation workers, radio and television workers (who are required to report the news).¹²⁶

2.6.5 Restrictions on the Right to Strike in the United Kingdom

In the United Kingdom there is a ban on strikes by the armed forces and the police. But other than that, there is no legislation restricting the right to strike in essential services or requiring provision of minimal services. However, the government can make use of emergency legislation to provide essential services and also use the armed forces to carry out urgent work of national importance without the need for parliamentary approval.¹²⁷

¹²² Nati Perlman, *ibid*, pp. 11-12.

¹²³ Sarah Zubner, Dan Lahav, *ibid*, pp. 6-7.

¹²⁴ Sarah Zubner, Dan Lahav, *ibid*, pp. 7-8.

¹²⁵ Despite the restrictions on judges striking in France, in December 2021 there was a strike by this sector.

Cain Burdeau: *An unusual strike even for France: Judges walk out*, (Courthouse News Service, 15/12/2021),

<https://www.courthousenews.com/an-unusual-strike-even-for-france-judges-walk-out/>

¹²⁶ Nati Perlman, *ibid*, p. 12.

¹²⁷ *Ibid*, pp. 12-13.

British law (Trade Union Law 1984) requires a vote of the working public before going on strike. The right to vote is supposed to be granted only to workers whose participation in the strike establishes a breach of contract between them and their employer, and therefore not only workers are included in this definition, but also those who have a contractual relationship with the employer. Voting must be secret, in the workplace or by mail, and the required majority is a simple majority of the participants in the vote. The voting questionnaire must include a yes/no question regarding the worker's willingness to participate in the strike and must not include reasons or justifications for the strike. The vote is valid for four weeks, so if a longer period has elapsed, it is required to hold a repeat vote.

The British legislature believed that the vote would create a cooling-off period for the conflict and prevent strikes from taking place. But in practice, the voting process seems to have achieved opposite results for several reasons. First, participation in the vote and the preliminary negotiation procedures increase the rate of workers' identification and commitment to the strike. Second, approval of the strike by workers reduces the willingness of the workers' representatives to compromise with the employer. Third, the workers support for the strike, which is reflected in the vote, translates into legitimacy for the strike and strengthens the negotiating power of the workers' organisations.¹²⁸

During Margaret Thatcher's time in office as Prime Minister of the United Kingdom, restrictions on the right to strike prevailed. The 1980 Employment Law stipulated that a workers' protest shift is limited to a maximum of six people, and is only from the same workplace. The 1982 Employment Law allowed employers to dismiss striking workers, and reduced the immunity granted to workers' organisations and workers participating in strikes. The 1988 Employment Law protected workers who refused to strike and prevented workers' unions from seeing them as violators of discipline.

2.6.6 Restrictions on the Right to Strike in Switzerland

In Switzerland, too, the right to strike is not absolute.

The right to strike is subject to the existence of an affiliation between the strike and the system of labour relations and obligations of the parties to maintain industrial silence and to conduct mediation or arbitration proceedings. In addition, a strike is permitted only as a last resort in a labour dispute and there is an obligation to fair conduct and proportionality in the steps taken in the labour dispute.¹²⁹

The Constitution stipulates that the right can be denied to a "certain group of persons", meaning essential services.¹³⁰ The right to strike is not granted to civil servants / public servants and to senior management positions.¹³¹

2.6.7 Restrictions on the Right to Strike in Japan

The Constitution of Japan, like the constitutions of the United States and Canada, does not explicitly recognise the right to strike. However, Clause 28 of the Japanese Constitution recognises the right of workers to "organise and act as a collective". This clause has been interpreted among Japanese jurists as the right to strike.

¹²⁸ Sarah Zubner, Dan Lahav, *ibid*, pp. 1-3.

¹²⁹ *Ibid*, p. 8.

¹³⁰ Nir Ganinsky, *ibid*, pp. 135-136.

¹³¹ Sarah Zubner, Dan Lahav, *ibid*, p. 8.

In a ground breaking ruling regarding the Tokyo Central Post Office in 1965, the Japanese High Court ruled that legal restrictions imposed by the Japanese legislature on the right to strike would be interpreted narrowly, set in exceptional cases and apply – if at all – only to the essential and life-saving sector.

During the 1970s, the High Court of Japan was required to set the boundaries of the right to strike for public sector workers. The contention made, and adopted by the court, was that the right to a broad strike harms the interests of the general population. From here, Japan moved to a restrictive approach to the right to strike, not only among the essential and life-saving sector, but among the public sector in general. It is worth emphasising that the High Court has repeatedly stated in its later rulings that the restrictions are correct and good only for the public sector, and not for the private sector.¹³²

2.6.8 Restrictions on the Right to Strike in Australia

Labour relations in Australia are governed by the 2009 Fair Work Act.¹³³ This law is implemented by the FWC (Fair Work Commission). The FWC has the option to prevent strikes in essential services. It may suspend or terminate a prolonged strike for which they have a certainty that it will cause significant economic damage to the employer or workers and which will not end in a reasonable time. The FWC must do so when the strike could endanger the life, personal safety, health or well-being of the population or cause significant damage to the Australian economy.¹³⁴

Such a strike can also be stopped by a ministerial order. Furthermore, the FWC must suspend a strike at the request of a third party, when the strike is likely to cause significant harm and its prevention is not against the public interest.¹³⁵

2.6.9 Restrictions on the Right to Strike in New Zealand

The strike in New Zealand is subject to secret vote restrictions in which only workers who may take part in the strike must participate. The majority required to approve a strike is a simple majority.¹³⁶ Essential service workers in the private and public sectors are allowed to strike, but unlike other workers they must give prior notice in order to allow the government and employers to prepare for the strike. Notice must be given not less than 14 days and not more than 28 days prior to commencement of the strike. During a strike, an employer may not require non-striking workers to perform the work of the strikers, but may hire other workers to perform the work if there is a reasonable basis that the work is required to protect health or safety needs.¹³⁷

Essential services that are subject to the obligation of prior notice are – production, processing and supply of gasoline and oil products, production and supply of electricity, water supply, sewage disposal, firefighting, ports, aviation, ambulances and hospitals, manufacture and supply of medicines, prisons, production and supply of dairy and cheese products, meat supply (3 days' notice), police emergency services, shuttle services and trains (24 hours' notice).¹³⁸

¹³² Nir Ganinsky, *ibid*, pp. 130-133.

¹³³ Fair Work Law (Commonwealth) No. 28.

¹³⁴ Nati Perlman, *ibid*, p. 21

¹³⁵ *Ibid*.

¹³⁶ Clause 82A to the 2000 Employment Relations Act. See the [link](#).

¹³⁷ Nati Perlman, *ibid*, pp 19-20.

¹³⁸ *Ibid*, p. 20.

2.7 Summary

The review in this chapter teaches us about the various incarnations of the strike. From being banned under state laws, to being recognised by the UN through the International Labour Organisation and later in the constitutions of various countries or their laws.

We also learned that there are a number of differences between the countries of the world regarding recognition of the right to strike. While there are countries that have ratified it directly, others have recognised it through court rulings, indirectly as a derivative of other rights, such as the right of association. This is not a trivial matter. On the one hand, an explicit, direct and clear recognition of the strike (or another right) also confers a greater commitment and recognition to the strike and as a result also extends a broader protection to it. On the other hand, when a constitution ignores the strike (and again – other rights), it leaves it at the mercy of the court.

Be the difference what it may, it can be said that no country has remained indifferent to the strike phenomenon – and have chosen to address it in their constitution or in the rulings of their courts. From this, it can be concluded that the status of the right to strike and the restrictions that apply to it vary from one country to another.

There are countries that, in addition to recognising the right to strike, have made the point of mentioning the strike and the restrictions that apply to it in same breath: prior notice before a strike begins, voting, completing of proceedings, and so on. The common denominator to all the restrictions we have listed is the desire to allow the strike to cool down, attempts to prevent it altogether or to ensure a minimum of services during a strike, following recognition of the potential damage of a strike.¹³⁹

The similarities and differences between the various restrictions that apply to the right to strike among the countries surveyed are shown in the following table¹⁴⁰:

Country	Explicit recognition of the right to strike	Obligation to provide prior notice	Obligation to have a worker vote	Other restrictions	Restrictions on public / essential sectors
The United States	Not recognised by the Constitution, but recognised by virtue of laws	No	The NLRA allow for a secret vote among workers	The RLA requires extraction of procedures	Public sector workers are prohibited from striking Essential service may be restricted by state law
Canada	No	Yes (in some provinces)	No	Sometimes there is an obligation to refer the dispute to arbitration	The right is denied to police officers, health care workers and firefighters In most jurisdictions

¹³⁹ See Chapter 9: *Strike Damages*

¹⁴⁰ Hereinafter: Table 1.

					in Canada there is an obligation to continue to provide essential services
Germany	No	No	Not obligatory, but exists as voluntary	Striking workers are required to carry out emergency and maintenance works to protect the employer's property Strikes are subject to restrictions of proportionality, the duty of peace, fairness and as a last resort in the struggle	Public workers whose employment is regulated by law as well as judges and soldiers are not allowed to strike German essential services, food, health, energy and water supply, transport, post office, communications, broadcasting, firefighting, burial, waste management, protection and national security
France	Yes	It is obligatory to notify the employer five days before the strike	No	The strike must be professional (and not political), it is not constrained by limits of time or scope Only representative workers' organisations may declare a strike	In the public sector, there is an obligation to continue to provide a minimum level of service even during a strike The right is denied to police officers, prison workers, judges, soldiers, aviation workers, radio and television workers
The United Kingdom	No	No	It is obligatory to hold a secret vote before striking – contractors also have the right to vote	The law reduced immunity for strikers and allowed workers not to strike	Right denied to police officers and soldiers
Switzerland	Yes	No	No	Strikes are subject to restrictions on industrial quiet, a last resort in conflict, proportionality, mediation or arbitration. It is imperative to behave fairly	Not granted to civil servants / public servants and senior management positions

Japan	No	It is obligatory for essential services to provide notice of ten days	No	No	A narrow approach to the right to strike, regarding essential services and the public sector
Australia	Yes	Obligation for prior notice of three days	No	Strikes are controlled at the federal, state or territory level	It is possible to prevent strikes in essential services
New Zealand	Yes	Yes, but only for public sector workers – no less than 14 days and no more than 28 days in advance of the strike	Yes	Strikes are controlled and there are options for mediation and arbitration	Essential service workers in the private and public sectors are allowed to strike

Table 1: The various restrictions that apply on the right to strike among the countries.

The restrictions can be classified into three groups:

- A. Restrictions that apply to certain groups of workers – such as in Germany, France and the United States.
- B. Restrictions when there is no proportionality between the goals of the strike and the damage that may be caused – as in Germany and Switzerland.
- C. Ensuring a minimum of services even during a strike – as in France.

The preconditions for a strike may lead to a number of possible outcomes. The first result will be a reduction in the activation of the right to strike due to bureaucratic / procedural restrictions. A consequence of this is that workers will not have a legitimate platform for venting their tension with their employer, which can be dangerous because it can result in a violent and unbridled behaviour. The second result is that preconditions may lead to high levels of solidarity on the part of workers with the workers' union following a campaign justifying the use of strike weapons, increased use of strike weapons and low restraint by the workers' union – as occurred in the United Kingdom.¹⁴¹

Restricting the right to strike through arbitration is possible only in strikes that can be restricted and banned, i.e., in public services and essential services, the cessation of which endangers the life, personal safety or health of the general public or part of it. The arbitration must be independent and impartial in order to enjoy the ongoing trust of both parties.

The right to strike in public and essential services can be restricted and even banned if the strike may cause significant difficulty to the public, provided that the restrictions on the right to strike are accompanied by appropriate guarantees such as conciliation proceedings, which are available to the parties at all times. Even in non-essential services workers can be required to provide a minimum level of

¹⁴¹ International Encyclopaedia of Labour Law, *Great Britain* (suppl. 134 – April 1992), p. 269 para. 494

service when the extent or duration of a strike in them may result in a severe national crisis which will endanger living conditions or harm public services of basic importance.¹⁴²

In the next chapter I will discuss the evolvement of the strike in Israel, use of strike weapons, its recognition and the restrictions applicable to it in comparison to those specified in this chapter.

¹⁴² Nati Perlman, *ibid*, pp. 6-9.

Chapter 3: The Strike in Israel

3.1 Introduction

The purpose of this chapter is to discuss the historical development of the strike in Israel – from the Ottoman rule, through the rule of the British Mandate, and later in the sovereign state of Israel, all to advance us towards the discussion of the recognition of the strike and its limitations in Israel.

3.2 The Strike in Israel under Ottoman Rule

The first strike that broke out in Israel, Palestine in those days, occurred in 1902, under Ottomans rule. It was carried out by Zuckerman's printing workers. The Jewish printing workers in Jerusalem were the first to try to establish a workers' association. During the strike, the Printing Workers' Association demanded that the length of the working day be reduced from 12 hours that were customary at that time to 10 hours, and that half-yearly employment agreements be instituted. Employers refused to respond to the demands, and the workers' leaders declared a strike of all printing workers in Jerusalem. The strike was finally suppressed, and the strikers recorded only partial success¹⁴³ while at the same time banning the existence of printers' associations and employers' organizations.

Until 1909, there was no legal arrangement in Israel regarding strikes or the settlement of labour disputes. In that year, the Ottoman legislature passed the Ottoman Strike Law – 1909.¹⁴⁴ This law defined different types of essential workers, imposed restrictions on the right to strike, established the mediation and settlement tools to help parties resolve conflicts and imposed sanctions on violators of the law.

The law, as stated, defined two groups of workers. The first group included workers who perform work of a public nature and workers who were employed in factories that received government licenses and are of economic benefit. The second group included workers of institutions for the benefit of the public.

Restrictions on strikers were divided according to the group to which they belonged. At the outbreak of a labour dispute among workers of the first group, a conciliation committee was set up as follows: The workers were required to submit to the Ministry of Commerce and Public Works a memorandum detailing their claims and to elect three representatives. The employer was also required to elect three representatives to represent him. An official from the Ministry of Trade and Public Works was added to the six representatives. The purpose of the committee was to try and reach an agreement by way of mediation and settlement between the two parties. If the committee succeeded in its task – an agreement with binding legal force was signed. But if the committee failed in its task, the workers were then and only then allowed to strike. At the same time, the government is allowed to recruit other workers to carry out the work of the strikers, and the strikers are prohibited from interfering with them in the performance of their work. On the other hand, workers in the second group were prohibited by law from joining trade unions and were prohibited from participating in a strike.¹⁴⁵

Various sanctions were imposed to ensure compliance with the provisions of the law. It was determined that workers who went on strike before the mediation and settlement proceedings were exhausted were subject to imprisonment and fines. It was further stipulated that institutions that do not comply with the terms of the agreement will be subject to fines, which will be transferred to the workers' pension funds or divided among them and of course the agreement will be enforceable in court. With regard to workers of

¹⁴³ Yehoshua ben Aryeh, *A City in the Mirror of Time, on the Association of Printing Workers in Jerusalem* (Yad Yitzhak Ben Zvi, 1979). See also the following link: <https://kotar.cet.ac.il/KotarApp/Viewer.aspx?nBookID=21584635#5.5542.8.fitwidth>

¹⁴⁴ The Ottoman strike law was passed on July 27, 1909, and was in effect until March 1, 1957 when it was finally repealed.

¹⁴⁵ Moti Mironi, *Compulsory Arbitration – Eighty Years of Controversy*, (Labour Law Almanac, 1990), p. 120.

the second group, i.e., workers of public benefit institutions, it was determined that if they do not comply with the provisions of the law, they will be subject to fines, imprisonment and payment of compensation for damages caused by a strike.¹⁴⁶

The rationale of the law teaches us to distinguish between public sector workers and essential workers, even if they are not so named in the law. The law also teaches us that public services can be operated by private entities (which have received a government license for this) and therefore the continued provision of their service for the benefit of the entire public must also be protected through civil and criminal sanctions.

There is no record in the literature or in case law of operation of the Ottoman strike law, and it probably became a *dead letter* until it was finally repealed in 1957 with enactment of the Labour Disputes Settlement Law.¹⁴⁷ Even strikes that broke out during the Ottoman rule were not substantial strikes or strikes that recorded a change in labour relations.

3.3 The Strike in Israel under The British Mandate

Ruth Ben-Israel states that in the field of labour law, British legislature generally refrained from enacting laws other than exceptions that mainly concerned the work of women and minors or safety and hygiene at work.¹⁴⁸ Only at the end of the British Mandate in Israel did it propose legislative proposals in the field of organised labour relations: the Labour Councils Ordinance (whose purpose was to establish a mechanism for determining minimum wage and minimum working conditions in weak work industries), the Industrial Courts Ordinance¹⁴⁹ (whose purpose was to establish a mechanism for resolving labour disagreements and disputes) and the Trade Unions Ordinance (whose purpose was to regulate the status of workers' and employers' unions). These initiatives did not mature into legislation, or were enacted but became a *dead letter* in the rulebook and were not used.

The Jewish community had to fill the vacuum of the British government in the field of labour law by establishing internal arrangements and agreed mechanisms.

In order to understand this, one must go back to the beginning of the settlement period until the 1930s. During this period, labour disputes hardly revolved around wage problems, but against the background of the distress of unemployment and the demand to employ Jewish (and not Arab) workers in orchards and agricultural jobs.

Beginning with the fourth aliyah,¹⁵⁰ workers' struggles and strikes in the Land of Israel began to become frequent. In this aliyah, capitalists and merchants came to Eretz Yisrael, unlike the previous aliyahs to Eretz Yisrael, and it was characterised by *capitalists* and large capital, medium-sized property owners and a small bourgeoisie (petty merchants, craftsmen, etc.).

This wave of immigration had to deal with an acute economic crisis and high unemployment, which resulted from the inability of the Jewish community to absorb the large numbers of immigrants. In this wave of immigration, many industries developed that were under private control, and at the same time

¹⁴⁶ Ibid, pp. 121-122.

¹⁴⁷ Clause 44 of the Labour Disputes Settlement Law, 5717-1957 states: "The Industrial Courts Ordinance, 1947, and the Ottoman Strike Law of July 27, 1909 – are repealed".

¹⁴⁸ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 92.

¹⁴⁹ The Industrial Courts Ordinance was passed on June 14, 1947 and was in effect until March 1, 1957 when it was finally repealed.

¹⁵⁰ The fourth aliyah – a large wave of immigrants, mainly from Eastern European countries to Eretz Israel, between the years 1924-1931. The estimated number of immigrants was about 70,000, and most of them were absorbed in the city of Tel Aviv.

the number of municipal workers grew. This situation was the background for the crises between private employers and workers: an expression of the acute situation is learned from the number of strikes that began to break out in the Jewish community. In 1924 there were 46 strikes, and in 1925 there were 61 strikes. The number of strikers rose respectively from 1,585 to 2,638 workers. Most of the strikes took place in the manufacturing, craft and construction industries.¹⁵¹

The number of strikes and the number of striking workers continued to climb during the 1920s and 1930s. De Vries argues that the motives for the strikes also stemmed from an ideology that sought to promote a Zionist and national struggle and with a clear goal of strengthening the status of the **Histadrut**,¹⁵² which was sharpened in the face of the establishment of *Histadrut HaOvdim HaLeumit* (National Workers' Union), established by the Revisionist movement in 1934 as a competitor to the Histadrut for the representation of workers and advocated a free market, free competition and private capital rights.

Until the mid-1930s there was no real and effective activity of the national Zionist institutions in the field of labour relations, but tensions between workers and employers pushed the Jewish Agency management to establish the Jewish Agency Labour Committee¹⁵³ in 1934, in cooperation with all the factors in the settlement except the Revisionist movement.¹⁵⁴ The committee focused on the division of labour, established labour bureaus and engaged in mediation and arbitration in labour disputes.¹⁵⁵ In its decisions, the committee approved acceptable practices for working conditions and social procedures formulated in the collective agreements.¹⁵⁶

The Zionist General Council also made a decision in this year to maintain a “regime of labour agreements” in the settlement (referring to collective agreements). The decision was justified by the need to “fortify Hebrew labour in all branches of the Jewish economy in the village and city, to ensure fair working conditions for the Hebrew worker, taking into account the needs of the developing economy, and for the sake of sufficient fertility at work and for the sake of ensuring a fair distribution among Jewish workers in Israel and the prevention of conflicts and competition and quarrels between brothers”.¹⁵⁷

During the years of World War II, the British Mandate government became a significant employer as the employer of Jews and Arabs in public administration, railway services and the British army in Israel.

On January 1, 1942, the Mandate Legislature enacted the Protection Order (Labour Disputes) 1942.¹⁵⁸ The order applied to all workers in the economy and left to the discretion of the British High Commissioner and the Director of the Mandate Labour Department the decision whether a strike or lockout would be completely banned and the conflict transferred to departmental settlement mechanisms such as mediation and arbitration, or whether the strike will be postponed until the mediation and conciliation process is completed. Publication of the order did not prevent strikes in the economy. On the

¹⁵¹ Lilach Litor, *ibid*, p. 48, and see also: http://tnuathaavoda.info/history/home/1/b448_33.html on the website of the Israeli Labour Movement.

¹⁵² D. De Vries (2002). *Drawing the Repertoire of Collective Action: Labour Zionism and Strikes in 1920s Palestine*. Middle Eastern Studies 38 (3), 93-122. Quoted in Lilach Litor, *The Strike, Labour, History & Politics* (2019), p. 50.

¹⁵³ In some of the writings, the name also appears as the Jewish Agency's Labour Department.

¹⁵⁴ I will expand on the Revisionist movement in Chapter 11.2.2.

¹⁵⁵ Moti Mironi, *Compulsory Arbitration – Eighty Years of Controversy*, *ibid*, p. 131.

¹⁵⁶ Zalman Chen, *Developments in Labour Legislation and Conditions During the Mandate, Worker Guide* (published by Am Oved in collaboration with the Ministry of Labour, 1971), pp. 26-29.

¹⁵⁷ *Ibid*.

¹⁵⁸ Official Gazette No. 1159 – Supplement No. 2, January 1, 1942, p. 38.

contrary. The years in which the order was in force were characterised by quite a few strikes, which were explained against the background of rapid inflation, difficulty in obtaining consumer goods, expansion of economic activity and rise in living standards. This order was valid until June 15, 1946, but two months before it expired, the general strike of 1946 broke out. This wide-ranging strike began on April 9th and lasted until the 24th of the month and encompassed Jews and Arabs, despite tensions between them, who were workers of the Mandatory Public Administration. At its peak, 23,000 workers took part in the strike and it caused the cessation of postal, communications and transportation services in Israel.¹⁵⁹

3.4 The Strike in the State of Israel

The establishment of the State of Israel on May 14, 1948 brought with it a unique situation that has no equal in the history of the family of nations. The State of Israel was born into a reality in which a large and well-established workers' union already existed. And not just that. The **Histadrut**,¹⁶⁰ as the largest Jewish workers' union in the country, not only dealt with unionising workers, but also held a number of positions that are traditionally dedicated to state authorities – security, settlement and immigration, welfare services, labour and medicine.

Moreover, it was expected that in the first months of the state's existence, during the War of Independence, that labour disputes and strikes would be absent from labour relations in the economy, but this was not the case. As early as June 1948, about a month after establishment of the State of Israel, the first labour dispute broke out in the young state. The teachers demanded and received a salary supplement (*distress supplement*). On August 4, 1948, in the midst of the War of Independence, the Union of Civil Servants threatened to shut down all government ministries if the question of unemployed Mandate government workers in Jerusalem was not resolved. The first civil service strike broke out in Kol Yisrael in September 1948. The existence of the strike against the Jewish state stunned Prime Minister David Ben-Gurion, who refused to believe the truth of the news (Strike against the Jewish state). In 1950, a wave of strikes erupted in essential government services, including medical services, amid demands by academic and professional workers for a wage benefit beyond the general rating terms in which it was included.¹⁶¹

In the first decades of the state's existence, the Histadrut served as a "state within a state".¹⁶² Most of the Histadrut's power can be attributed to four main elements: It united most of the workers in the economy, served as a large employer, provided social services and forged close ties with Mapai, which was the ruling party.¹⁶³ In fact, the Histadrut was an integral part of Mapai and played an important role in shaping it. The connection between them was also anchored in the party's bylaws, in which every Mapai member was required to register as a Histadrut member. On the other hand, the Histadrut constitution stipulates that only Histadrut members will be entitled to receive health services within the framework of Clalit HMO. In this way, most Histadrut members became connected to the Clalit HMO.

¹⁵⁹ D. De Vries (2002). Quoted in Lilach Litor, *ibid*, p.54.

¹⁶⁰ Members of the Third Aliyah (a large wave of Jews immigrated to Israel between 1918 and 1924. The estimated number of immigrants in this period was about 35,000) wanted to create a single umbrella organisation for all the Hebrew workers, and thus the **General Histadrut of Hebrew Workers in the Land of Israel** was established (hereinafter: the **Histadrut**) in December 1920. The Histadrut incorporated workers' parties and operated in connection with the Zionist Movement.

¹⁶¹ Ya'akov Reuveni, *Public Administration in Israel – The Government Mechanism in Israel and Its Development in the Years 1948 - 5733*, (Masada, 1974), p. 157.

¹⁶² Lev Greenberg, *The Histadrut Above All*, (Nevo: 1993, Jerusalem).

¹⁶³ Lilach Litor, *ibid*, pp. 55-56.

Danny Vazana states that in the 1950s, the Histadrut established its hold on the economy and tightened cooperation with the establishment. Its control over most of the workers in the economy has blurred the fine line that separates it from the government and it seems that the worldview of the ruling party is in line with the ideology of the Histadrut.¹⁶⁴ The workers' committees also operated under the harsh authority of the Histadrut, and those of them who dared not accept their authority were perceived as enemies of the people and denounced as traitors. An expression of this can be seen in the *Seamen's Strike* in 1951. This 42-day strike paralyzed the country's maritime trade activities. In the end, the strike was suppressed through the use of violence, with the help of the police and the army, recruitment of strike workers for reserve duty in the army and their replacement by other workers.¹⁶⁵ The steps taken by the authorities in suppressing the seamen's strike only illustrate the blurring of the boundaries that existed between the Histadrut and the government, and the mobilization of each of them for the benefit of the other.¹⁶⁶

3.4.1 Establishment of the Labour Court – Judgment Instead of a Strike

The Labour Court system was established on September 1, 1969 under the Labour Court Law.¹⁶⁷

The first call for the establishment of a unique court to deal with labour matters was heard in late 1957 when the Histadrut held a seminar dedicated to labour law. During the seminar, "the difficulties faced were raised in government law and it was proposed to establish a labour court".¹⁶⁸ Later that year, a public committee was set up headed by High Court Judge Zvi Baranzon, who recommended the establishment of the Labour Court. "The recommendation was made with the understanding that the labour courts can improve labour relations in the economy and expedite processes regarding implementation of labour laws. In addition, they will be able to prevent or reduce the escalation of labour disputes, and reduce the number of strikes, especially the *wildcat strikes*, and their damage to the public".¹⁶⁹ The recommendation was not promoted due to opposition of then Minister of Justice, Dov Yosef (Mapai Party). Only after a decade and replacement of the Minister of Justice was the bill placed on the Knesset table. Even then, it was accompanied by the expectation that "the new judicial institution will lead to a reduction in the number of strikes and lockouts",¹⁷⁰ and during Knesset debates, Yigal Alon (Ahdut HaAvodah Party) coined the phrase "Justice Instead of a Strike". And indeed, these things reflected a decade of multiple public-sector strikes that were the result of a deep economic recession and acute unemployment.

Until the establishment of the Labour Court, the courts in Israel had little to do with labour disputes and strikes. The main reason for this was the Histadrut's lack of recourse to the courts and the tradition from the settlement period of independent dispute management,¹⁷¹ whether in arbitration mechanisms or in joint privatization committees of the Histadrut and workers' unions. Other reasons raised by Steve Adler,

¹⁶⁴ Danny Vazana, Meugadim [Unionised], (Schakim Publishing, 2017) p. 29.

¹⁶⁵ Lilach Litor, *ibid*, p.55. And Danny Vazana, *ibid*, pp. 30-31.

¹⁶⁶ I will discuss the Seamen's Strike in further detail in Chapter 9.

¹⁶⁷ Labour Court Law, 5729-1969, 68 5729 No. 553 dated 27/03/1969, p. 70.

¹⁶⁸ *Demand for the establishment of special courts for labour matters*. Davar newspaper dated 04/08/1957, page 6. See also the following link:

<https://www.nli.org.il/he/newspapers/dav/1957/08/04/01/clause/100/?e=-----he-20--1--img-txIN%7ctxTI-----1>

¹⁶⁹ Yaakov Friedberg and Yael Bar-Lev, *Judgment Instead of a Strike – Establishment of the Labour Courts*, (2020), p. 223

¹⁷⁰ Unknown author: *The status of district judges will be granted to judges of the Special Court*, (Davar, 02/11/1967), at the link:

<https://www.nli.org.il/he/newspapers/mar/1967/11/02/01/clause/103/?e=-----he-20--1--img-txIN%7ctxTI-----1>

¹⁷¹ Lilach Litor, *ibid*, p. 63.

president of the National Labour Court (retired), are that the Histadrut had made efforts to mediate between the workers' committees and employers, efforts that had borne fruit and led to a speedy end to strikes.¹⁷² Collective bargaining was seen as a preferred way of determining workers' working conditions. The strike was a means of pressure in negotiations, but emphasis was on reaching a collective agreement and not on striking.¹⁷³

But in those years the Mapai party's power began to wane and with it the Histadrut, which began to weaken in the face of the powerful local workers' committees. These led Mapai to try to strengthen the Histadrut as a body representing workers and to refer disputes to an external court, where new rules were set.¹⁷⁴

It is interesting to consider the reservations that were heard during discussions on the bill, because of fear that the new court will intervene in the right to strike through decisions and judicial orders. MK Tova Sanhedrai (NRP): "Perhaps the law will also succeed in preventing escalation of conflicts while finding a plausible solution".¹⁷⁵ MK Yehuda Sha'ari (Independent Liberal Party) also held a similar opinion: "I want to hope that with the leadership of the labour courts we will create a very important instrument for preventing unnecessary labour disputes... We have to create a maximum of tools that will enable conflicts to be resolved peacefully, without reaching a strike, and without banning a strike".¹⁷⁶

On the other hand, MK Uri Avnery (HaOlam HaZe [This World] – New Power Party) argued that "if the Knesset accepts this law, in the form before us, that is, in a way that allows for a ban on strikes by court restraining orders, we open *a new Pandora's box* in the field of labour relations".¹⁷⁷ And MK Reuven Arazi (Ma'arach, Labour – Mapam Party) added: "In a debate in the Knesset plenum in the first reading of this bill, we bound the law in principle but insisted that the labour courts could not in any way restrict the freedom of professional struggle, which is a right granted to workers in any advanced country. There is no ban on strikes in Israel. The professional struggle is a free struggle. I am therefore aware that the court will not be able to intervene in the strike at all, as the issue itself is not within its jurisdiction... It is known that there was no case in which the general courts would decide on a strike ban. Therefore, I would like to hope that the Labour Court... will also refrain from intervening in strikes". He then added: "Any breach in this principle of non-intervention of the labour courts in the freedom of professional struggle is a deviation from authority and intervention in the matter of strikes... In fact, this will not lead to improved labour relations and moreover, it may lead to disruption of labour relations".¹⁷⁸

MK Moshe Bar'am (Ma'arach, Labour – Mapam Party), chairman of the joint committee that prepared the bill for approval by the Knesset, responded to the reservations regarding the strike: "This law does not deal with material matters of labour but with the application of substantive law, as it exists, and determination of the procedure and authority for application. The authority to issue an order to prevent a strike or lockout depends on the question of what is the substantive law regarding the legality of the strike or lockout. In other words: a strike or lockout that is illegal, if the substantive law so provides. Only then does the authority even exist to issue an order prevent it. On the other hand, if the strike or

¹⁷² Steve Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 5760-2000), p. 481.

¹⁷³ Ibid.

¹⁷⁴ Yaakov Friedberg and Yael Bar-Lev, *ibid*, p. 224.

¹⁷⁵ Minutes of Session No. 390 of the Sixth Knesset (p. 2041), 18/03/1969.

¹⁷⁶ Ibid (p. 2044), 18/03/1969.

¹⁷⁷ ¹⁷⁷ Minutes of Session No. 390 of the Sixth Knesset (p. 2036), 18/03/1969.

¹⁷⁸ Ibid, p. 2044.

lockout is not a violation of substantive law, and in fact in most cases this is the legal situation today, then in any case the authority to issue injunctions does not exist".¹⁷⁹

In conclusion, we learn that the subject of the strike did not go unnoticed by legislators when they voted in favour of the Labour Court bill. While the left-wing party in the Knesset (HaOlam HaZe – New Power Party) feared for the status of the right to strike, the right-wing party (NRP, Independent Liberal Party) saw the new court as an opportunity to reduce the right to strike. The chairman of the committee that prepared the law for its approval tried to calm concerns by saying that no judicial orders would be issued for strikes that were legal. But all these did not take into account the fact that the entity that defines what a legal strike is the court. And the entity that can pour future content, even if it did not exist at the time the law was approved, to define the legality of the strike is also the court.

3.4.2 Use of the Strike Weapon in Israel

The first political upheaval took place in 1977, when the Likud Party led by Menachem Begin came to power. For the first time since the establishment of the state, the worldview of the Histadrut was not in line with the worldview of the government. The Histadrut was perceived as a nuisance to the neo-liberal government, and this limited the Histadrut's ability to manoeuvre and finance.¹⁸⁰ During these years, there was a decline in the rate of strikes in the Western world,¹⁸¹ but this trend did not reflect the reality that prevailed in Israel since those years. From data from the Central Bureau of Statistics¹⁸² (hereinafter: CBS) it is possible to learn about an increasing trend of the use of strike tools in those years. The CBS data, as collected over the years, use three indicators: the first, the number of strikes. This index does not teach us about the duration of the strike or the number of workers who took part in it. The second measure is the number of striking workers. And the third index, the number of working days lost to the economy, namely the number of days of strike.

It should be noted that the data collected and published by the CBS between 1949 and 1973 did not distinguish between the number of strikes and the number of lockouts and the number of striking workers and the number of disabled workers. This distinction was made from 1974 onwards. **Thus, it is not possible to learn about the exact number of strikes or the number of striking workers between the years 1949-1973 from CBS data and hence the discussion below will relate to the year 1974 onwards.**¹⁸³ In addition, it is worth emphasising that the data presented below are absolute and not proportional to the size of the economy. The CBS data do not take into account the fact that over the years the Israeli economy has undergone a number of changes: the Histadrut sector has disappeared, the private sector has grown and expanded and so has the number of workers. Therefore, some of the data presented originate from the expansion of the economy.¹⁸⁴

¹⁷⁹ Ibid, p. 2046.

¹⁸⁰ A. Ram, *The Globalization of Israel*, (Resling Publishing, 2005) Quoted in: Amnon Caspi and Ruth Kastiel, *Labour Relations in the Age of Globalisation* (Open University, 2010), p. 20.

¹⁸¹ Lilach Litor, *ibid*, p. 67.

¹⁸² Based on data from the Central Bureau of Statistics (hereinafter: CBS), Statistical Almanac of Israel, 1961 No. 12, Table 26 (p. 391). Published on 10/09/1961, and also: Statistical Almanac of Israel, 1974 No. 25, Table 12/32 (p. 350), published on 10/09/1974, and also: Statistical Almanac of Israel, 2020 No. 71, Table 9.49 Published on 10/09/2020. See also the following link: <https://www.cbs.gov.il/he/Pages/search/yearly.aspx>

¹⁸³ Hereinafter: Table 2.

¹⁸⁴ *Strike Here! On the culture of Israeli strikes*, (Parliament, 2011), p. 5. See also the following link: <https://www.idi.org.il/parliaments/11092/11096>

Year	No. of Strikes	No. of Striking Workers	No. of working days lost to the Economy
1949	53	5,189	57,436
1950	72	9,100	55,087
1951	76	9,715	114,290
1952	94	14,010	58,066
1953	84	8,804	35,404
1954	82	12,123	71,946
1955	87	9,861	53,978
1956	74	11,452	112,756
1957	59	3,692	165,549
1958	48	6,050	87,751
1959	51	5,873	31,328
1960	113	10,006	47,161
1961	125	26,184	122,897
1962	144	37,588	241,822
1963	126	86,475	128,001
1964	136	47,168	100,912
1965	288	90,210	207,561
1966	286	85,953	147,846
1967	142	25,058	58,286
1968	100	42,146	71,789
1969	114	44,496	102,162
1970	163	114,941	390,260
1971	169	88,265	178,612
1972	168	87,309	236,058
1973	96	122,347	375,023
1974	71	27,141	51,333
1975	117	114,091	164,509
1976	123	114,970	308,214
1977	126	194,297	416,526
1978	85	224,354	1,071,961
1979	117	250,420	539,162
1980	84	91,451	216,516
1981	90	315,346	782,305
1982	112	838,700	1,814,945
1983	93	188,305	977,698
1984	149	528,638	995,494
1985	131	473,956	540,232
1986	142	215,227	406,292
1987	174	814,501	995,546
1988	156	327,193	516,071
1989	120	209,841	234,073

1990	117	571,172	1,071,279
1991	77	38,776	97,923
1992	114	211,833	386,658
1993	73	462,208	1,636,866
1994	75	106,047	792,533
1995	71	75,792	257,796
1996	75	124,215	189,792
1997	69	434,335	2,416,254
1998	53	265,781	1,438,944
1999	66	292,583	1,640,891
2000	54	297,882	2,011,263
2001	62	462,560	2,039,974
2002	47	1,647,810	1,488,120
2003	60	1,285,904	2,725,159
2004	49	722,875	1,224,423
2005	57	103,666	244,236
2006	35	125,730	136,189
2007	30	386,075	2,548,627
2008	14	19,275	87,151
2009	15	50,866	208,691
2010	24	35,844	168,864
2011	25	290,820	556,748
2012	24	168,950	462,960
2013	25	21,730	52,274
2014	26	38,808	103,553
2015	38	29,891	167,353
2016	32	88,374	138,685
2017	48	815,198	672,842
2018	46	42,906	148,190
2019	45	45,086	110,422

Table 2: Presentation of the number of strikes, the number of striking workers, and the number of working days lost to the economy per year.

For example, if in 1974 the number of strikes in Israel was only 71, then this figure rose and climbed almost consistently over the years:¹⁸⁵ in 1975 it stood at 117, in 1976 and 1977 it stood at 123 and 126 respectively. In the second half of the 1980s, this figure continued to rise: in 1984 the number was 149, in 1985 131, in 1986 142, in 1987 174 and in 1988 156 days of strike.

From the *Number of Strikes* data, it is not possible to learn about the duration and scope of the strike. Therefore, one should also look at the two additional data collected: *Number of Striking Workers* and *Number of Working Days Lost to the Economy*. These two indices also support the fact that since the end of the 1970s, there has been frequent use of strike weapons in Israel.

¹⁸⁵ This data deserves careful consideration in light of the fact that in 1978 the number of strikes dropped to 85, but jumped again to 117 in 1979, dropped again in 1980 to 84 and rose to 90 in 1981. fell in 1983 to 93 and rose to 149 In 1984. dropped to 131 in 1985 and climbed to 142 in 1986.

The number of striking workers in 1974 stood at an imaginary number of only 24,141. Between 1975 and 1976, the number of striking workers was around 114,000 strikers, in 1977 it was 194,000 strikers, in 1978 the number of strikers was 224,000 and in 1979 250,000 strikers. In 1982, an all-time record was set when the number of workers on strike exceeded 838,000 people.

The number of working days lost to the economy also reinforces the above. The number of working days lost to the economy in 1974 was a little over 51,000 days. In 1975 about 164 thousand. In 1976 and 1977, the number of lost working days as a result of strikes was 308,000 and 416,000, respectively. In 1978, the number of working days lost to the economy crossed an all-time high of over one million. This record was broken again in 1982 when the number of lost working days was over one million eight hundred thousand days. 1997 ended with an inconceivable figure of 2,416,254 working days lost to the economy. And a decade later, in 2007, an all-time record was set with a figure of 2,548,627 lost days.

In the last three decades (1990 onwards) there has been a significant decrease in the average number of strikes, compared to previous decades:¹⁸⁶

Years	Average Strikes per Decade
1950-1959	72.7
1960-1969	157.4
1970-1979	123.5
1980-1989	125.1
1990-1999	79
2000-2009	42.3
2010-2019	33.3

Table 3: Average strikes per decade.

But as explained above, the number of strikes in the index is not enough to teach us about the scope and length of the strike. Therefore, the two additional indicators must also be taken into account: lost working days for the economy and the number of striking workers.

Average number of work days lost to the economy in each of the decades of the State of Israel:¹⁸⁷

Years	Average Strikes per Decade
1950-1959	78,616
1960-1969	122,844
1970-1979	373,166
1980-1989	747,917
1990-1999	992,894
2000-2009	1,271,383
2010-2019	258,189

Table 4: Average number of working days lost to the economy.

¹⁸⁶ Hereinafter: Table 3.

¹⁸⁷ Hereinafter: Table 4.

And indeed, use of the average index of the number of working days lost in a decade sheds light on the use of strike weapons in Israel over the years. The fourth decade (1980-1989), the fifth decade (1990-1999) and the sixth decade (2000-2009) of Israel boast peak years in the use of strike weapons. In the sixth decade, the average number of working days lost to the economy stands at 1,271,383 days. In the fifth decade the average stands at 992,894 while in the fourth decade it stands at 747,917 days.

Average Work Days Lost per Decade:¹⁸⁸

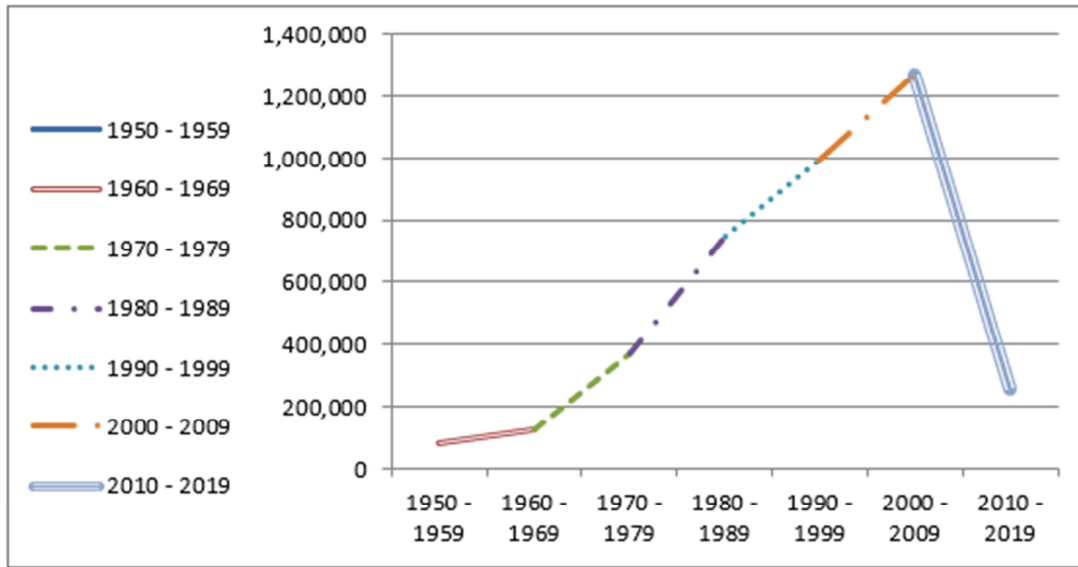


Figure 1: Diagram of the average number of working days lost per decade.

Having looked at the average number of strikes per decade, and the average number of work days lost per decade – I will examine the **average number of striking workers per decade:**¹⁸⁹

Years	Average Number of Striking Workers per Decade
1950-1959	9,068
1960-1969	49,528
1970-1979	133,814
1980-1989	400,316
1990-1999	258,274
2000-2009	510,264
2010-2019	157,761

Table 5: Average number of striking workers per decade.

¹⁸⁸ Hereinafter: Figure 1.

¹⁸⁹ Hereinafter: Table 5.

An examination of the results of the last index examined – average number of workers on strike in a decade, shows that in the sixth decade (2000-2009) more than half a million workers in Israel took part in strikes. In the fourth decade (1980-1989) this figure was a little over four hundred thousand workers and in the fifth decade (1990-1999) a little over a quarter of a million workers: 258,274 people.

Average Number of Striking Workers per Decade:¹⁹⁰

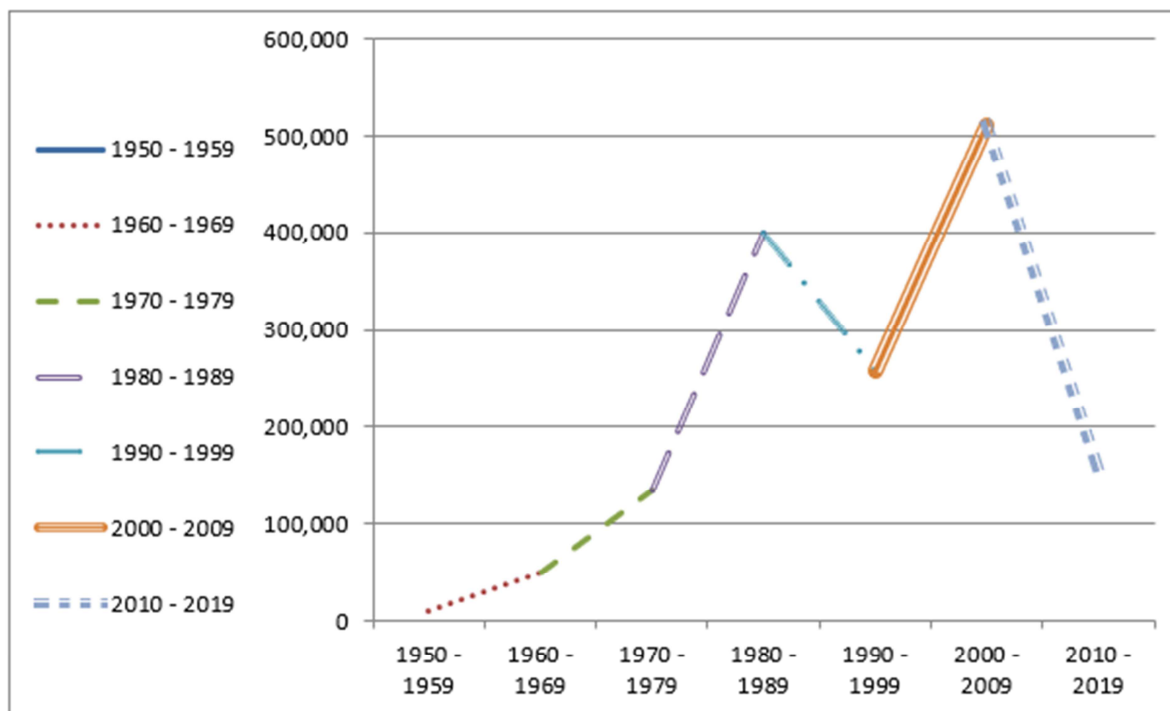


Figure 2: Diagram of the average number of Striking Workers per decade.

The obvious conclusion from the three indices presented above is that starting in the fourth decade (1980s), the use of strike weapons became more and more common in the Israeli reality. Expressions of this are found, as stated, in all three indices examined.

It is interesting to see what the situation is in Western countries in the corresponding periods. If in Israel the use of strike weapons became frequent from the 1980s onwards, then in comparison with Western countries there was an opposite trend. **In the 1990s and early 2000s, Israel became the leading country in the world in the number of workers participating in strikes and in the number of strike days.** A study conducted in 1993 and 2001 comparing Israel to eight other Western countries (United States, Canada, UK, Australia, New Zealand, Japan, Spain and Denmark) found that the average number of strike days per year and the average number of workers participating in a strike per year (both relative to the number employed in Israel) were the highest in Israel.¹⁹¹ A similar study was conducted in 2002 and 2003, which compared Israel to ten other Western countries (Denmark, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, and Germany). In the years 2002-2006, the average

¹⁹⁰ Hereinafter: Figure 2.

¹⁹¹ Naama Afik, *Review of Strikes in Israel and Other Countries*, (2003). Quoted in Assaf Shapira, *Strikes in a Comparative Perspective*, (2011). See also: <https://www.idi.org.il/parliaments/11092/11094> Also quoted in: Lilach Litor, *ibid*, p. 68.

strike day per year in OECD member countries was 31 strike days per 1,000 employed persons, in the EU countries 41, and in Israel 476.¹⁹²

An attempt to distinguish between strikes that took place in the public sector versus the private sector and to draw conclusions from them encountered a number of difficulties. First, the CBS data as collected in Israel's early years indicated absolute numbers (1949-1962), compared with data in percentages as given in subsequent years. Second, in Israel's early years, there was no separation between personal services provided by the public sector compared to personal services provided by the private sector. Third, the CBS has not always been careful to distinguish between a *strike* and a *labour dispute* that may not have developed into a strike at all. Fourth, the CBS did not make a distinction between strikes / labour disputes that broke out in the public sector compared to the Histadrut sector – and listed them together. Therefore, only partial data will be presented, only from 1997, as collected and published by the Chief Labour Relations Officer¹⁹³:

Year	Percentage of Strikes in the Private Sector	Percentage of Strikes in the Public Sector	Percentage of Strikes in the Union Sector
1997	33.3	63.77	2.9
1998	32.08	67.92	-
1999	28.36	65.67	5.97
2000	20.03	75.93	3.70
2001	27.42	72.58	-
2002	21.28	76.59	2.13
2003	11.67	83.33	5.00
2004	28.57	71.43	-
2005	26.32	73.68	-
2006	17.14	82.86	-
2007	16.67	83.33	-
2008	28.57	64.29	7.14
2009	40.00	60.00	-
2010	58.33	41.67	-
2011	25.93	74.07	-
2012	20.83	79.17	-
2013	32.00	68.00	-
2014	30.77	69.23	-
2015	50.00	50.00	-
2016	31.25	68.75	-
2017	50.00	50.00	-
2018	34.15	65.85	-

Table 6: Strikes in the economy per year, percentage of each sector.

¹⁹² Naama Afik, *Review of Strikes in Israel in an International Comparison*, (2005). Quoted in Assaf Shapira, *Strikes in a Comparative Perspective*, (2011). See also: <https://www.idi.org.il/parliaments/11092/11094>

¹⁹³ See the following link: <https://www.gov.il/he/Departments/DynamicCollectors/strikes-reports?skip=0&limit=10> It will be clarified that only from 1997 did the Chief Commissioner for Labour Relations begin to publish data, as stated. In a conversation that the author had on 22/04/2021 with the workers of the Commissioner's Office, it was clarified that the Commissioner does not have earlier data beyond those published on the Internet. Hereinafter: Table 6.

Distribution of the Number of Strikes in the Different Sectors of the Economy 1997-2018:¹⁹⁴

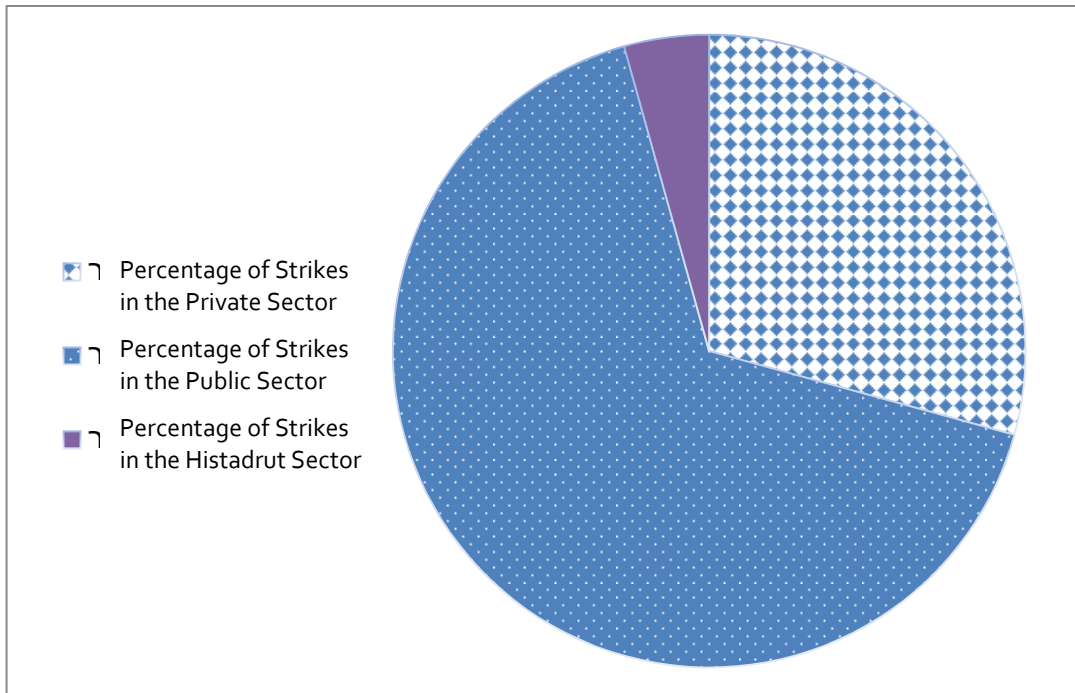


Figure 3: Diagram of the distribution of the percentage of strikes in the Different sectors of the economy between the years 1997 – 2018.

From the data presented in the diagram, it can be learned that the vast majority of strikes that have taken place over the years in the Israeli economy took place among the public sector. The data presented in this chapter raise three essential questions that are worth considering – the first question, how can the frequent use of strike weapons in Israel be explained compared to Western countries? The second question is, how can the frequent use of strike weapons in the public sector be explained? The third question, what is the share of the private-business sector among strikes in Israel?

We will discuss these questions in order.

The common use of strike weapons in the State of Israel can be explained by a number of possible variables. The chapter on *Strikes in International Law* details the restrictions that apply to the right to strike in various Western countries, including restrictions on strikes in essential services. These restrictions were not reflected in Israeli legislation. In the opinion of Mordechai Mironi, in the field of labour relations and the settlement of labour disputes, *time has stood still*, and the settlement of disagreements currently applied in Israel are very outdated or irrelevant in terms of usage patterns.¹⁹⁵ The non liquet in the law spurred Knesset members from the right side of the political map to submit bills to force compulsory arbitration in labour disputes.

Moreover, among Western countries there are mechanisms for preventing labour disputes or resolving them in a way that will prevent outbreak of the strike. For example, in Germany it is customary to

¹⁹⁴ Hereinafter: Figure 3.

¹⁹⁵ Mordechai Mironi, *Changes and Innovation in Negotiating and Resolving Conflicts in the World of Labour*, (Law and Business, 2005).

involve workers in decision-making in the factory.¹⁹⁶ Joint management is based on levels of inclusion: Inclusion on the supervisory board at the individual factory level – the number of directors is the same as that of the employer and another neutral representative and inclusion at the national level.¹⁹⁷ In Sweden, the obligation to involve workers in the management of factories exists at three levels: a level of transferring information to workers, a level of worker consultation and a level of joint decision-making. The law also requires employers to consult workers' committees in any case of a significant change in working arrangements or working conditions. In Sweden, Denmark, Norway and Finland, there is also an obligation to include workers in the boards of government companies.¹⁹⁸ In this way, the interests of workers are directly represented on the board.

What is the reason for the prevalence of the use of strike weapons in the public sector? There are a number of possible reasons for this –

- A. The public sector in Israel has about 395,700 workers.¹⁹⁹ This figure is particularly large compared to other Western countries mentioned in the review. The services provided by this sector are essential and monopolistic.
- B. The collective bargaining processes in this sector may take a long time and be disproportionate due to the difficulty in identifying the decision-making factor on the employer's side: the political echelon, the professional echelon or the finance officials and the payroll supervisor at the Treasury.²⁰⁰
- C. Workers in the public sector have been unionised under the Histadrut since the beginning of the establishment of the state. Hence, these workers had and still have a developed union consciousness and, no less importantly, experience in union struggles.
- D. In most cases, the Histadrut tends to approve almost any labour dispute and strike, and the powerful committees are given almost automatic backing.²⁰¹ This fact does not help reduce the use of strike weapons.
- E. Until the political upheaval in 1977, the Histadrut hardly activated the strike weapon in response to government measures, due to its strong position and influence on the government. We can learn more about this anomaly from the words of Yitzhak Ben-Aharon, a few days before he took

¹⁹⁶ Worker participation in Germany is based on the Gesetz über die Mitbestimmung der Arbeitnehmer (Law of Joint Management) of 1951, which was updated in 1971.

¹⁹⁷ Roby Nathanson and Itamar Gazala, *Israeli Guide for Co-Determination and Corporate Sustainability* (2016).

¹⁹⁸ Under Swedish law, every company with more than 25 workers has two directors, and a company with more than 1,000 workers has three directors. In Norway and Denmark, workers are entitled to appoint one third of the directors of companies with more than 50 workers, and in Finland, twenty percent are appointed from to the board of directors. Directors on behalf of the workers are not allowed to vote at board meetings dealing with the collective agreement, but other than this limitation their powers are the same as those of the directors on behalf of the owners. That is, they are entitled to vote on decisions of great indirect importance to workers, such as investment plans, decisions regarding profit sharing, appointment of managers at all levels, acquisitions of other companies and more. See: Ami Vaturi, *The Scandinavian Model*, at the following link: <http://hevrarnet/wp-content/uploads/2017/11/26-03.pdf>

¹⁹⁹ Based on the Bank of Israel report (*Employed Persons in the Economy by Industry*), updated to 04/06/2020, at the following link: <https://www.boi.org.il/he/DataAndStatistics/Pages/MainPage.aspx?Level=3&Sid=16&SubjectType=2>

²⁰⁰ Ozer Carmi, *Labour Relations in the Public Sector in Israel – Conflicts, Strikes, Solutions and Labour Relations* (Management, 2001), pp. 58-59. See also the remarks of MK Shlomo Yaakov Gross (Agudat Israel) during the debate in the Knesset plenum on Amendment No. 2 to the Labour Disputes Settlement Law. Minutes No. 223 of the Seventh Knesset (p. 57), 27/10/1971.

²⁰¹ Ozer Carmi, *ibid*, p. 59. See also: Steve Adler, *Freedom to Strike in the Mirror of Judgment* (Baranzon – Bnei Sabra Book, 2004), p. 488.

office as secretary general of the Histadrut at the end of October 1969, that “there were revelations that obscured the figure of the Histadrut in the eyes of the public. More than once they were forced to appear not as a representative of the workers but as a mediator between them and the employers, especially when the employer is the government. This phenomenon is unhealthy and should not be continued. The Histadrut is the representative of the workers organised under it and it is not possible to be both the workers’ representative and an arbitrator at the same time”.²⁰² Later in the 1970s, the Israeli government decided that the Chief Labour Officer would not mediate in conflicts in which the state was involved as an employer. Those who took over from the labour relations commissioner in the mediation efforts were senior Histadrut officials – the Histadrut secretary general or the chairman of the trade union division, all with the support of the employers.²⁰³ Since the mid-1980s, the Histadrut’s influence in the political arena has diminished and friction with the government has increased and has also manifested itself in multiple strikes.²⁰⁴ On January 24, 2021, Histadrut Chairman Arnon Bar-David announced the termination of his membership in the Labour Party: “[...] The fate of the Histadrut has been linked to the labour movement for years, but the days are long gone when the dominant tone in the organization is dictated by only one party, or only by one side of the political map”.²⁰⁵

- F. Strikes in the public sector may also break out as a *chain reaction*, both due to the association of the public sector in the same workers’ union, i.e., the Histadrut, and due to the identification that the various committees feel for each other.²⁰⁶

The last question to consider is what is the share of the private-business sector among strikes in Israel? First, the answer to this question cannot be detached from what has been said so far as all of these may also explain why the phenomenon of strikes among the private sector has been less common for many years. The private sector has been incorporated on a small scale and only in the last decade has it begun to experience strikes in places that were previously outside the framework of collective labour relations, on an unprecedented scale across age strata, workplace seniority, jobs and earning threshold. For the sake of illustration – if in 1985 30% of workers in OECD countries were unionised in workers’ unions, then in 2018 only 17% of them were unionised. The reasons for this, according to the International Labour Organisation, are decline in production, replacement of workers by technology and loss of many unionised jobs.²⁰⁷ In Israel, the change was even more radical. From 80% unionised workers in 1985, to about 22% in 2018. The main reason for this is the enactment of a state health insurance law that banned the Histadrut from providing medical services. In addition, the Histadrut waived positions that were not directly related to workers’ unions, and therefore its influence on Israeli politics plummeted.²⁰⁸

²⁰² Ha’ Aretz Newspaper, dated 24/10/1969.

²⁰³ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, ibid, p. 495.

²⁰⁴ At the same time, it is worth noting that Amira Galin and Baruch Mevorach found in a study that the Labour Party has no restraining effect on the frequency of strikes, but it does have a restraining effect on the intensity of strikes and especially on the total number of working days lost to the economy. This effect is significant and clear. See: Amira Galin and Baruch Mevorach, *On Politics and Labour Disputes*, (Quarterly for Economics, March 1981).

²⁰⁵ Unknown author, *The Histadrut is no longer on one side of the political map*, (Davar, 24/01/2021), https://www.davar1.co.il/277605/#utm_source=Daily+Newsletter&utm_medium=email&utm_campaign=25-01-2021

²⁰⁶ *Strike Here! On the culture of Israeli strikes*, (Parliament, 2011), p. 5. See also the following link: <https://www.idi.org.il/parliaments/11092/11096>

²⁰⁷ Yitzhak Harpaz, *Globalization and Its Impact on Society, the Economy and the Labour Market in Israel* (Discussion Paper presented at the conference of the Association for the Study of Labour Relations in Israel, 2005), p. 6.

²⁰⁸ Ibid, p. 7.

Nevertheless, in recent years, while the trend of weakening unions around the world continues, more than 150,000 new workers have unionised²⁰⁹ in Israel and the number continues to climb.

It would not be an exaggeration to state that after decades of stepping in place, the right to organise has gained a foothold in the judiciary. Stefan Adler and Efrat Koka state in this matter that there is a “clear connection between tightening the defences of the right of freedom of association in verse law and the significant increase in the rates of organisation in Israel”.²¹⁰ New workers’ organisations established in Israel, such as *Power for Workers*, must be added to these, which led to “competition and a free market in the field of workers’ unions, encouraged organising in new workplaces and awakened the labour relations system in Israel”.²¹¹ It can be stated that the right to organise now operates in a different, dynamic and vibrant space than we are used to, and as a result of all this we are also witnessing frequent use of strike weapons in the private sector, unlike in the past. For example, in 2015, the percentage of strikes in the private sector was equal to that in the public sector. This figure was repeated in 2017 as well.

3.5 Recognition of the Right to Strike in Israel

The strike has many faces and many hearings that have taken place in the Israeli Labour Court dealt with the question of whether a *strike* had indeed broken out in one workplace or another, a question whose positive answer would allow the court to grant legal remedies. It is clear that in order to know whether a strike has indeed broken out and of course, in order to assess the effectiveness of the strike and not to suggest alternative mechanisms for a strike, it is necessary, first, to operationalise the concept of strike in order to provide a definition that will be as acceptable as possible among researchers in accordance with the principles of *utilisation* and *singularity*.

Like other Western countries, there is no definition of the term *strike* in the Israeli law book. The Israeli legislature did not bother to inform us what, in their view, a strike is. In doing so, the Israeli legislature acted in the way it was outlined in legislatures in the Western world, such as in France, which recognises a strike in its constitution but does not define it.²¹² Moreover, in the State of Israel, the right to strike is not enshrined in law as one of the human or civil rights.

Although the term *strike* can be found in a long list of Israeli laws, nowhere in the Israeli law book,²¹³ as stated, is there a comprehensive definition of the right to strike, let alone an update. But this does not diminish the status of this right. In fact, the place of other basic human rights is also absent from a number of Israeli laws – the right to freedom of expression, the right to move freely or the right to demonstrate.

The absence of a definition of the strike in the Israeli law book can be attributed to a number of reasons:

²⁰⁹ Nitzan Zvi Cohen, *The Secret is in Trust and Security*, (Dvar HaOvdim [The Workers’ Say] in Israel, 09/07/2018), see also the link: <https://www.davar1.co.il/136448/>

²¹⁰ Stefan Adler and Efrat Koka, *The Right to Organise in the Mirror of Changes in Labour Relations in Israel*, *ibid*, p. 324.

²¹¹ *Ibid*, p. 325.

²¹² Labour Court hearing for 36/ 4-5 (National) Moshe Ginstler et al. v. State of Israel (Labour Court Ruling 8 3).

²¹³ Employment Service Law, 5719-1959, 68 32 (Clause 44); Annual Leave Law, 5711-1951, 68 234 (Clauses 4B (4), 5A (6)); Severance Pay Law, 5723-1963, 68 136 (Clause 2(6)); Discharged Soldiers Law (Reinstatement in Employment), 5709-1949, 68 13 (Clause 4B); Labour Disputes Settlement Law, 5717-1957, 68. 58 (Clauses 5A, 37B); Collective Agreements Law, 5717-1957, 68 63 (Clause 19); Civil Service (Pensions) Law [combined version], 5730-1970, 68 65 (Clause 3 (2)); National Insurance Regulations (Calculation of Regular Wages), 5717-1957, 108 596 (Regulation 1); National Insurance (Motherhood) Regulations, 5714-1954, 108 647 (Regulation 2B) – cited in Menachem Goldberg, *The Strike in Law, in the Collective Agreement and in Case Law*, (The Advocate, 5747-1987), fn. 1. In addition, also: Clause 2 of the Banking Ordinance 5701-1941 (Appeal No. 1134 dated 9.10.1941).

- A. The first reason may be the young age of the State of Israel compared to other countries, including the fact that Israel has not yet formulated a written constitution for itself, despite its statements in the declaration of the establishment of the State of Israel.²¹⁴
- B. The second reason may be the lack of interest of the trade unions that has also permeated the Histadrut in securing the right to strike in legislation, and the understandable fear that anchoring the right in law would set clear boundaries for a strike,²¹⁵ not to mention “a rigidity which would have prevented the expression of changing needs and situations in the field of labour relations and labour law”.²¹⁶
- C. The third reason is probably that the right to strike has always been recognised, respected and protected (one way or another) in the Israeli courtroom, which sterilised the need to anchor the right to strike in a clear and definite manner.
- D. The fourth reason was interpreted by the National Labour Court and is that the definition of a strike by way of legislation carries with it an intervention in autonomous collective labour relations.²¹⁷

The vacuum created in view of the silence of the Israeli legislature, which refrained from defining the right to strike and thus also granting it legal or constitutional recognition, was filled by the High Court and the Labour Court. As early as October 1962, during the Leo Beck case,²¹⁸ the High Court expressed its opinion that the issue of strikes should be regulated by legislation, saying: “It seems to me that this whole issue of labour relations and the right to strike and lockout requires a fundamental arrangement in the way of legislation”.²¹⁹ The Minister of Labour, Yigal Alon, referred to this High Court ruling, saying that “there is also no need to define exactly what a strike is [...] The concept of strike is well known and accepted even without a legal and explicit definition. It is one of the forms of professional struggle, and in the event that doubts arise – the court will decide according to customary practice. Imagine that we will begin to define some kind of pure professional strike; some kind of professional strike influenced by policy-making; some kind of political strike that has professional expression. It will always be possible to abuse a strike by sullyng it...”.²²⁰

In the spirit of these things, the High Court chose as comprehensive a definition as possible for the right to strike, stating that: “In order to choose as comprehensive a definition as possible I would say that a strike is a coordinated pressure action, taken by groups of workers as part of the workers’ professional struggle with an employer to achieve demands regarding their working conditions or regarding the demands of other workers presented to their employer. Absence from work is also included among the

²¹⁴ Appeal against the decision of the Registrar 5708-1948 1.

²¹⁵ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1384.

²¹⁶ Haim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, (Baranzon-Bnei Sabra Books, 2004), p. 765.

²¹⁷ Ibid.

²¹⁸ In this case, the High School Teachers’ Organisation presented the payment of the salary of one of the teachers who was fired from Leo Beck school as a condition for the non-existence of a strike. Initially, the district court issued an injunction prohibiting the strike, but later the injunction was revoked, and school management filed an appeal to the High Court, which was accepted and the strike was prohibited.

²¹⁹ CA 167/62 Leo Beck School Ltd. v. Association of High School Teachers Association, 16 Rulings and Discussions 2205, 2219.

²²⁰ Minutes of Session No. 208 of the Fifth Knesset (p. 868), 21/1/1963.

means of pressure”.²²¹ This definition, according to the High Court, has been repeatedly cited over the years by the labour courts, until it seems to have become the accepted definition for a strike in the courts.²²²

It would not be an exaggeration to claim that Israeli judges gave the strike validity more than once in their rulings. Hence, in order to evaluate development of the definition of the right to strike in Israel, it is necessary to discuss its development in the rulings of the Labour Court and the High Court sitting as the High Court of Justice.

3.5.1 The Status of the Right to Strike in Legislation

The right to strike has not been anchored, let alone explicitly recognised in the Israeli law book. In order to anchor the right to strike in a direct provision of law it was necessary to advance basic legislation in the matter of social rights, a move which has not yet matured politically. Despite this, the Israeli court has never been required to discuss recognition of this right. It seems that the words of Haim Cohen, a High Court judge, summed up the discussion of the strike very well by stating that it is a “tradition that is so sacred that one is no longer allowed to reflect on it”.²²³ The words of former president of the National Labour Court, Judge Steve Adler, also support this conclusion: “The freedom to strike is a constitutional right enshrined in Israeli legislation and case law since the early days of the state”.²²⁴

Even in the Basic Laws, which are supposed to be chapter-by-chapter²²⁵ of the future constitution of the State of Israel, there is no mention of the right to strike as well as other rights, and in the words of the Labour Court in this matter: “The freedom to strike and the right to strike are ‘in the good company’ of other basic rights such as freedom of speech, freedom of demonstration and freedom of occupation which, although not written, are not abstract rights, but have primacy in law”.²²⁶ In order to deal with this non liquet, case law uses the *doctrine of derivative rights*, which allows for recognition of rights that are not explicitly written, through rights enshrined in the Basic Law: Human Dignity and Liberty. According to this doctrine, there are particular named rights, which are explicitly guaranteed in the Basic Laws, and there are framework rights characterised by their flexibility, which allows for expanding constitutional protection, extending it to a list of rights not explicitly included and recognising them as having a superior normative status.²²⁷

Hence the question arose, whether there is room to recognise the right to strike, which is not enshrined in the Basic Law: Human Dignity and Liberty as a right derived from this Basic Law through the doctrine of derived rights.

²²¹ HCJ 525/84 Khatib v. Labour Court, Ruling 40 (1) 673, 701.

²²² See, for example, the words of Justice Ayala Procaccia in HCJ 1181/03 Bar Ilan University v. The National Labour Courts, Ruling 64 (3) 204.

²²³ CA 25/71 Feinstein et al. v. Organization of Upper Primary Schools, Ruling 25 (1) 129, 131.

²²⁴ Collective Dispute Appeal 23/07 IEC Ltd. v. The New Histadrut.

²²⁵ Knesset resolution of June 14, 1950 stated that: “The First Knesset imposes on the Constitution, Law and Justice Committee to prepare a draft constitution for the state. The constitution will be structured chapter by chapter, in such a way that each will constitute a basic law in its own right. The chapters will be brought before the Knesset, to the extent that the committee completes its work, and all the chapters together will be incorporated into the State Constitution”. (Knesset, Vol. 5, page 1743, Appendix 8 to the minutes of meetings No. 150-152).

²²⁶ Labour Court Hearing 48/ 4-23 Histadrut v. Airports Authority, Labour Court Ruling 19 449, 457 (1988).

²²⁷ Aharon Barak, *Constitutional Interpretation*, (Nevo, 1994) pp. 357 - 360.

In the Bezeq²²⁸ case, which was heard in 1995, High Court Judge Dov Levin referred to the status of the right to strike: “It appears that the *strike* which we counted as one of the fundamental freedoms that are not written and which was called as ‘essentially not belonging to the realm of *rights* but to the realm of *liberties* which are subject to binding restrictions [...] will from now on take cover under the wings of the value of *human dignity* enshrined in this Basic Law”.²²⁹ At the same time, despite the reference of Judge Levin who sought to recognise the right to strike as having a higher normative value, it was a single opinion and his colleagues in the judiciary did not address the issue, hence his opinion did not become a binding precedent.

In 2011, the status of the right to strike was discussed once again in the **Bar Ilan University case**.²³⁰ The workers’ union declared a strike following its desire to improve the conditions of workers who had since retired, but these were not among active workers and the employer, i.e., the university administration, believed that this was not possible under the Collective Agreements Law and the Labour Disputes Settlement Law. The High Court of Justice concluded that by virtue of the doctrine of derived rights, the purpose of the relevant labour legislation justifies, therefore, enactment of the Collective Agreements Law and the Labour Disputes Settlement Law not only on actual workers but also on pensioners who are members of the workers’ union. The importance of this judgment is not limited to use of the doctrine of derived rights, or to the final conclusion, but mainly to the High Court’s reference by Judge Procaccia to the right to strike that illuminates her internal concerns as to its status:

“There is an approach according to which the human right to dignity under Clause 2 of the Basic Law: Human Dignity and Liberty is interpreted, *inter alia*, also on the worker’s right to exist with dignity, from which the right to strike is derived, which is an essential means of ensuring the right to exist with dignity²³¹ [...] The right to strike can also be viewed as a derivative of the right to freedom of occupation protected under the Basic Law: Freedom of Occupation, and the right to property protected under the Basic Law: Human Dignity and Liberty. These two rights combined, embody on the one hand the freedom given to a person to choose his profession, and on the other hand, give the worker propriety protection, in the broadest sense, to receive adequate remuneration for his work, both in terms of pay and retirement.²³² The right to strike is also accompanied by a prominent element of freedom of expression. In our system, freedom of expression has acquired a supreme constitutional status in the theory of fundamental rights, which is a supreme principle in a democratic regime, [...] the right to strike entails the freedom given to workers to express their position and protest [...] the worker’s protest, reflected in the right to strike, therefore, also carries with it a prominent component of the freedom of expression”.²³³

The lack of clarity regarding the status of the right to strike and the source from which it derives was also the domain of High Court President Judge Aharon Barak and National Labour Court President Judge Steve Adler. Judge Barak delineated out of human dignity the worker’s right to strike and the ability to fulfil himself through the right to strike, but he was still careful in his rulings and questioned these

²²⁸ In this case, the Israeli government decided to open the international talks service to additional business competitors, and Bezeq employees - who feared that this decision would lead to the dismissal of many of them - went on strike. Although Bezeq management itself opposed the government's decision, it remained powerless in the face of the workers' demands: The management did not have the power to change it, while for the workers the strike was a tool to influence their working conditions.

²²⁹ HCJ 1074/93 Attorney General v. The National Labour Court in Jerusalem, Ruling 49 (2) 485, 497-498.

²³⁰ HCJ 1181/03 Bar Ilan University v. National Labour Court Israeli Ruling 64 (3) 204.

²³¹ *Ibid*, clause 50 of Judge Procaccia's ruling.

²³² *Ibid*, clause 52 of Judge Procaccia's ruling.

²³³ *Ibid*, clause 53 of Judge Procaccia's ruling.

conclusions. In contrast, Judge Adler held that the right to strike is drawn from a number of sources – including freedom of association, propriety rights and human dignity.²³⁴

To summarise this issue, it can be stated that although the right to strike was mentioned in incidental statements in quite a few laws,²³⁵ it did not receive an explicit anchor in Israeli law. Despite this and as we have seen, it has been recognised time and time again by senior judges of the High Court and the National Labour Court. Despite the judges' statements in favour of the right to strike, its lofty status and the way in which it is perceived in their eyes, the constitutional status of the right to strike remains to this day without an explicit decision. In this regard, it is worth reading the concluding remarks of Judge Procaccia in the Bar Ilan²³⁶ case: "The right to strike is a right that has a higher normative status. There are compelling reasons for its perception as a right derived from the statutory constitutional rights in the Basic Laws – the right to dignity, propriety rights and the right to freedom of occupation. **There is no need for a decisive determination for the purpose of our case here**, since it is sufficient to determine that this is a fundamental right of man, created by verse law" (emphasis not in the original),²³⁷ and it seems that this puts an end in the meantime regarding a decision on the status of the right to strike, and it is not clear from this what the boundaries of the protections it is entitled to are and how it should be balanced against other rights, if at all. At the same time, it should be borne in mind that precisely because the courts sometimes seek to balance the right to strike with other rights, they need to examine the dynamic definition of the strike, while adapting it to the changing reality.²³⁸

3.6 Restrictions on the Right to Strike in Israel

For many years, the strike in the State of Israel was an absolute right (and not a freedom), one to which no legal or other restrictions applied. Time and time again, the Israeli legislature has expressed its opinion on the right to strike in its defences: Clause 19 of the Collective Agreements Law of 1957 granted a worker who participated in a strike protection (participation in a strike henceforth was not perceived as a breach of personal duty), Clause 2 (6) of the Severance Pay Law of 1963 did not interrupt continuity of work for a worker who participated in a strike and also granted him entitlement to severance pay, Clause 44 of the Employment Service Law of 1959 prohibited the Employment Service from sending workers to a lockout factory or factory involved in a strike.

The High Court ruling in the early 1960s against the strike also pushed the Israeli legislature to try and close loopholes in the law that would prevent erosion of the scope of the strike. Thus, following the High Court ruling in late 1962 that "the immunity in Clause 32 (2) of the 1944 Civil Torts Ordinance regarding breach of contract in connection with a strike or lockout applies only to encouragement of an existing strike and not to the initiation of a strike or lockout", the Civil Torts Ordinance was amended and it was expressly stipulated that "a strike or lockout shall not be considered a breach of contract".²³⁹

During the discussion in the Knesset plenum on the proposal to amend the ordinance, Knesset members gave their opinion in favour of the strike and made arguments in favour of it derived the importance of the democratic regime and its being a legitimate means. MK Esther Vilenska (Maki Party) "[...] The strike is one of the most important, very important means of the workers against exploitation, in favour

²³⁴ Aharon Barak, *Constitutional Interpretation*, p. 431, Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 2000), 475, 493 quoted in Nir Ganinsky, *The Constitutional Status of the Right to Strike*, (2014), pp. 98-99.

²³⁵ HCJ 1181/03 Bar Ilan University v. National Labour Court Labour Court Ruling 64 (3) 204.

²³⁶ On this case - see explanation on the previous page.

²³⁷ Ibid, clause 55 of Judge Procaccia's ruling.

²³⁸ Haim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, ibid, p. 765.

²³⁹ CA 167/62 Leo Beck School Ltd. v. School Teachers Association et al., Ruling 16 2205.

of protecting their professional, economic and also political affairs”.²⁴⁰ MK Yaakov Riftin (Mapam Party): “[...] It is no coincidence that the question of the freedom to strike provokes controversy. The freedom to strike is a necessary instrument for the working public; but not only that, it is one of the fundamental hallmarks of the democratic nature of our regime [...]”²⁴¹

But it seems that above all, the words of MK Yehuda Shaarei (Independent Liberal Party) and Labour Minister Yigal Alon stood out. The first emphasised the right to strike in those days and not freedom, and the second gave public expression to his desire to defend the strike more tightly. MK Shaarei: “(Strike) One of the legitimate means that the trade union uses to achieve its demands in a professional struggle. There is room for immunity to strike as one of the means of struggle of a trade union, but the question is whether it is possible to grant such far-reaching immunity [...] Gone are the days when the strike was considered a conspiracy, the time when it was considered a criminal offense, **and now there is no talk of the freedom to strike, but even of the right to strike** [...]”²⁴² (emphasis not in the original). Labour Minister Alon: “For decades it was common to see the right of a trade union to initiate a strike without any legal restriction [...] **I tended to make comprehensive and far-reaching amendments to existing law. Representatives of the General Workers’ Union also asked me to examine the possibility of introducing an amendment that would ensure greater and more far-reaching immunity.** However, after a brief examination, I realised that any attempt to introduce more far-reaching and comprehensive amendments could take many months, if not more than that, and in the meantime the above ruling would have deprived the professional organisations of the right to a professional struggle, including strike or lockout, without risking payment of damages or receipt of a restraining order against them by the court. [...] Once the proposed amendment is received, as soon as possible, we will also be able to examine, in consultation with the relevant parties, as is customary with us, additional amendments to the law”²⁴³ (emphasis not in the original).

Over the years and in parallel with the increasing use of strike weapons, its power began to erode – and it became a right to liberty, limited by various restrictions. The National Labour Court well described the obligation to use the strike weapon under application of the restrictions in the following words: “This brings us to the words in the judgment under appeal (*la guerre c'est la guerre*), though, perhaps in a different context and in a different meaning. Labour relations are not at all *guerre* (war), but a unique struggle of its kind. But war also has rules that must be observed”²⁴⁴ (emphasis not in the original).

What are the restrictions that apply to the right to strike in Israel? What is their origin? And what did Israeli legislature seek to achieve under these restrictions? In this chapter we will seek to answer these questions.

The restrictions are commonly divided in the literature according to their origin – legislation, collective agreement, workers’ union regulations and court rulings that have established binding laws in the world of strikes.

²⁴⁰ Minutes of Session No. 208 of the Fifth Knesset (p. 866), January 21, 1963.

²⁴¹ Minutes of Session No. 208 of the Fifth Knesset (p. 867), January 21, 1963.

²⁴² Minutes of Session No. 208 of the Fifth Knesset (pp. 865-866), January 21, 1963.

²⁴³ Minutes of Session No. 208 of the Fifth Knesset (p. 865), January 21, 1963.

²⁴⁴ Labour Court Hearing 4-18/41 General Histadrut of Workers in Eretz Israel, Be’er Sheva Workers’ Council v. Dead Sea Works Ltd., clause 17 of the ruling.

3.6.1 Restrictions by Virtue of Legislation

A. Only a Representative Trade Union can Declare a Strike

Clause 3 of the Labour Dispute Resolution Law²⁴⁵ provides that the parties to a labour dispute may be “the employer and the workers’ union representing the majority of the workers to whom the dispute relates”. In this determination the legislature clearly frames the boundaries of the labour dispute, which can later develop into a strike.

The meaning of the above clause 3 is also denial of factors other than the representative workers’ union, and especially the workers’ committee, the possibility of managing the labour dispute as they wish and activating the strike weapon.

A workers’ union seeking to go on strike must be *representative* and in the language of the law: “representing the majority of workers affected by the conflict”. This is because in clause 3 there are in fact two restrictions on the right to strike: not only is the workers’ union the competent body to declare a strike, but it must also meet the requirement of representation.

The characteristics of representation are set out in clauses 3 and 4 of the Collective Agreements Law.²⁴⁶ A workers’ union that seeks to conduct collective bargaining, sign a collective agreement and, of course, declare a strike as required, as stated, must prove its representation. Representation of the workers’ union is determined by the type of collective agreement it seeks to sign – a special collective agreement or a general collective agreement.²⁴⁷ A special collective agreement applicable to a “particular enterprise or employer” requires the workers’ union to prove “that its members have the largest number of unionised workers to whom the agreement applies, or that it represents them for that agreement, provided that this number is not less than one-third of all workers”.²⁴⁸ In contrast, a general collective agreement applicable to “all or part of the country, to certain branches of labour or to all branches of labour” requires the workers’ union to prove “that its members have the largest number of unionised workers to whom the agreement applies”.²⁴⁹

B. Obligation to Give Prior Notice Before a Strike Breaks Out

With the escalation of wildcat strikes,²⁵⁰ the Labour Disputes Settlement Law was amended in 1969 and clause 5A was added to it requiring the workers’ union to give prior notice (hereinafter: Prior Notice) of any strike to both the Chief Labour Relations Officer and the employer fifteen days prior to a strike breaking out.

²⁴⁵ Labour Dispute Resolution Law, 5717-1957.

²⁴⁶ Collective Agreements Law, 5717-1957.

²⁴⁷ The wording of clause 2 of the Collective Agreements Law, 5717-1957 provides as follows: “Two types of collective agreements: (1) A special collective agreement – for a particular enterprise or employer – between an employer or a workers’ union representing the employer and the representative workers’ union of the workers to whom the agreement applies; (2) General collective agreement – for the entire territory of the state or part of it, for certain branches of labour or for all branches of labour when the agreement is between the representative workers’ union in the field of labour or the area in question and the workers’ union therein, all as the case may be”.

²⁴⁸ The language of clause 3 of the Collective Agreements Law, 5717-1957 states as follows: “A representative union of workers for the purpose of a special collective agreement is the workers’ union whose members have the largest number of unionised workers to whom the agreement applies, or who represent them for the purpose of that agreement, provided that this number is not less than one third of all workers to whom the agreement applies”.

²⁴⁹ The language of clause 4 of the Collective Agreements Law, 5717-1957 states: “A representative union of workers for the purpose of a general collective agreement is a union of workers whose members include the largest number of unionised workers to whom the agreement applies”.

²⁵⁰ On the nature of wildcat strikes – see Chapter 5: *Types of Strikes*.

Clause 5A of the law includes three obligations – cumulative restrictions, which apply to the entire economy: First, the workers’ union must announce the strike. That is – not a workers’ committee or any other organisation, and definitely not an individual worker. Second, notice should be sent to both the employer and the Chief Labour Relations Officer. And third, notice must be given at least fifteen days before start of the strike.

Prior notice has several purposes. To allow an external-state body, the Chief Labour Officer, to intervene in the conflict and try to eliminate it without the workers’ union needing the strike weapon (hence this clause of the law is called the *Strike Cooling Clause*);²⁵¹ allow the employer to prepare for the strike – in terms of ordering raw materials, receiving orders²⁵² or reducing damage that will be done to the public, and in the words of Aharon Barak, High Court Judge: “The Workers’ Council must give prior notice – orally or in writing – to the petitioner of the existence of the strike, thus enabling the petitioner to reduce their damages, finance their steps, and prevent unnecessary suffering from their customers. In a social atmosphere, where man to man is a wolf, there is no room for such prior notice. But this is not the relationship that the law imposes on parties to a contract”.²⁵³

On January 10, 1971, the Minister of Labour, Yosef Almogi, amended the Labour Disputes (Notices) Regulations, 5731-1971. These regulations include four forms; the first form is devoted to clause 5 of the Law (Notice of Labour Disputes) and the second form is devoted to clauses 5A and 5B of the Law (Notice of Strike or Lockout). The forms must indicate, among other things, the name of the factory and the employer, its address, the industry to which it belongs, the number of workers in the factory, the number of workers who will strike / to whom the dispute relates, the matters in the dispute, whether an attempt has been made to settle the dispute by direct negotiation and the results of the negotiations, and in case of a strike – what date is the strike scheduled for, what procedure were decided on (general meeting of workers, ballot, etc.), was the strike approved by the representative professional organization.

However, even when no notice of strike has been sent under clause 5A of the Labour Disputes Settlement Law, the court may justify the strike: “When, for example, the workers’ union does not give advance notice of the strike, then the strike is illegitimate. But the court may conclude that the circumstances are so extreme that despite not giving prior notice as required by law the strike should not be prevented”.²⁵⁴

C. Protected Strike

In 1972, the Labour Disputes Settlement Law was amended once again. The amendment this time revolved around a strike of workers in the Israeli public service (Chapter D of the Labour Disputes Settlement Law). The amendment does not prohibit a strike by public service workers, but stipulates that their striking not in accordance with the provisions of the law will be “unprotected”.²⁵⁵ That is, workers participating in public-sector strikes risk personal sanctions. The term “unprotected strike” reveals the intention of the legislature – which did not prohibit a strike in the public sector, but chose not to give strikers protection from any sanctions.

²⁵¹ Labour Court Hearing 53/ 4-13 Bromine Compounds Company Ltd. – The Histadrut, Be’er Sheva Workers’ Council, Labour Court Ruling 209, pp. 187-191, clause 15 of the ruling of Judge Y. Eliasof.

²⁵² Menachem Goldberg, *The Right to Strike in the State of Israel*, Studies in Law C (5733-5734), p. 611, and – Elisheva Barak, *The Principle of Good Faith in Labour Law*, Baranzon – Bnei Sabra Book, 5760-2000, p. 546.

²⁵³ HCJ 59/80 Public Transportation Services in Be’er Sheva Ltd. et al. v. The National Labour Court in Jerusalem et al., Ruling 35 (1) 828, 837.

²⁵⁴ Collective Dispute Appeal 1013/04 Discount Bank v. The New General Histadrut – Derivatives Market Association et al., Ruling of the then Vice President, Elisheva Barak- Ussoskin.

²⁵⁵ Clause 37A of the Labour Disputes Settlement Law. 5717-1957.

It is worth dwelling on the words of legislators during the discussions on amending the law. It seems that more than being interested in restricting the right to strike in the public service, the Knesset was interested in strengthening the Histadrut's position vis-à-vis the power of the powerful workers' committees, and the workers who did not surrender to it. MK Shoshana Arbeli Almozlino (Labour Party), Chairman of the Labour Committee: "The law was born in days of worsening public service labour relations, in days when groups of workers, sometimes without union approval and without prior notice as required by law, declared a strike, shut down essential services in the country, causing suffering to the population and great damage to the national economy. The trend of the law submitted to the Knesset for approval is to respect the employment agreement signed between the employers and the workers' union, after negotiations and out of free will, and to prevent strikes during the agreement [...] A second trend of the law is to strengthen the authority of the overall workers' union [...] The law comes to confer the authority only on the central administrative institution of the overall organisation to declare a strike in public services on matters unrelated to pay and social conditions during the term of the agreement. Only such a strike would be a protected strike".²⁵⁶ During the second and third readings for the approval of the law, the Minister of Labour, Yosef Almogi (Labour Party) said: "[...] This bill is submitted in full understanding with the Histadrut and in its support of all the clauses contained in the law".²⁵⁷ And also in an attempt to justify the amendment to the law, the minister asked: "[...] Who is allowed to declare a strike? Can any small group, which dominates an essential factor, voluntarily shut down a factory even against the interests of most of the workers in the same factory? [...] Are agreements signed just to be broken?".²⁵⁸

MK Zeev Herring (Ma'arach Party) added: "The Histadrut is interested in basing labour relations on the authority of all workers and not letting groups or individuals force their will on the entire workers' union".²⁵⁹

D. Emergency Regulations

Clause 9A of the Governance and Justice Ordinance, 5708-1948, gave Israeli government ministers (authorised by the government) the authority to set emergency regulations. Throughout history, ministers have exercised their authority and enacted these regulations.

For example, in the **Klopper-Naveh** case²⁶⁰, the High Court defended the minister's decision to oblige the workers of the Broadcasting Authority to broadcast the election broadcasts for the Knesset. The workers' union petitioned against the minister's use of emergency regulations, but the High Court rejected the petition, stating that the importance of election broadcasts outweighs the freedom to strike.

Emergency regulations do not cancel a strike, but require every worker declared in that regulation to "report to the place of work where he worked on the eve of the commencement of the regulations and perform his work completely and regularly, as he did before".²⁶¹

An example of the use of emergency regulations occurred in 2003. On April 30, 2003, a general strike began in the economy, in which about 700,000 men and women went on strike. The Government enacted, in accordance with its authority under clause 39 of the Basic Law: The Government, emergency

²⁵⁶ Minutes of Session No. 287 of the Seventh Knesset (p. 1974), 22/3/1972.

²⁵⁷ Minutes of Session No. 223 of the Seventh Knesset (p. 46), 27/10/1972.

²⁵⁸ Ibid, p. 47.

²⁵⁹ Ibid, p. 54.

²⁶⁰ HCJ 372/84 Klopper-Naveh v. Minister of Education and Culture, et al., Ruling 38 (3) 233.

²⁶¹ Menachem Goldberg, *The Right to Strike in the State of Israel*, Studies in Law C (5733-5734), p. 613.

regulations,²⁶² in which various authorised persons were authorised to issue a work order for certain workers in essential labour services. Petitioners to the High Court argued that it is the duty of the government, in the circumstances, to exercise its authority under clause 160 of the Penal Code,²⁶³ allowing the government to declare a special state of emergency while creating criminal offenses that violate the same declaration by way of work disruption or strike. The High Court rejected the petition, stating: “The question in our case is therefore this: whether the enactment of *regular* emergency regulations, as the government did, and at the same time refraining from using the provision of clause 160 of the Penal Code – there is in these acts and inactions such that goes beyond the bounds of reasonableness. Our answer to the question is in the negative. **In our opinion, in enacting emergency regulations as enacted by the government is in the area of legality and reasonableness assigned to it.** And by way of negation: The petitioners were unable to convince us that in enacting emergency regulations, and in failing to declare a state of emergency as a provision of clause 160 of the Penal Code, the government exceeded its authority or that it acted unreasonably in circumstances justifying us to intervene and instruct it what to do and what not to do” (emphasis not in the original).

E. Emergency Labour Service Law

Clause 19 of the Emergency Labour Service Law, 5727-1967, requires an internal or external worker “to perform any work assigned to him from time to time by a person specified in the order or on his behalf and to continue this work regularly as long as the order is valid”, and as long as the law is in force, the internal or external workers are not only not allowed to take part in the strike but also are not allowed to resign from their jobs.

3.6.2 Restrictions by Virtue of a Collective Agreement, Commitment to Maintain *Industrial Silence*

The first evidence of a restriction on the right to strike (and the employer’s lockout right) by virtue of an Israeli collective agreement is “the general collective agreement dated 10.01.1967 for the settlement of labour relations between the Israel Manufacturers Association and the Histadrut of Workers in Israel”, in which the Histadrut undertook not to use “means of a strike, slowdown strike or a partial strike or any other means of pressure” during the period of validity of the collective agreement.

When a workers’ union accepts restrictions that restrict it from going on strike in a collective agreement, it is a commitment to industrial silence. Commitment to industrial silence can come in two forms – it can be limited and it can be absolute. In its limited form, it is relative industrial silence (qualified no-strike clause), and in its absolute form it is an unconditional commitment to industrial silence (general no-strike clause).²⁶⁴

The characteristics of the qualified no-strike clause and the manner of its judicial examination are as follows: “Such an obligation is limited in two contexts: a) to disputes arising during the existence of a collective agreement; b) to matters regulated in the collective agreement in which it was included. These are not all the issues on which the negotiations revolved, but only the issues on which the parties reached

²⁶² Emergency Regulations (Essential Labour Services in Public Service), 5763-2003.

²⁶³ Clause 160 of the Penal Code, 5737-1977 provides as follows: “If the government has seen that there are serious disturbances in the labour relations that endanger the economy in the country or trade with foreign countries or harm them, it may declare a state of emergency for the purposes of this clause, and as long as the declaration has not been revoked, and the sentence of any participant in a strike or lockout involving the carriage or transport of passengers through a business or commerce in Israel or between it and foreign countries or for the provision of public service in Israel, and of the instigator, collaborator or supporter of such a strike or lockout or their continuation – shall be imprisonment for one year”.

²⁶⁴ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1511.

an agreement in the collective agreement. Hence, a strike on an issue that is not regulated in the collective agreement will not in these circumstances be considered a violation of the provision of industrial silence. The court asked to determine whether an undertaking in relation to industrial silence has been breached will carefully examine whether the attire given by the parties to the dispute does not empty it of content. Thus, for example, the court will ignore the wording of the cause of the strike if it is convinced that in this wording the workers are trying to circumvent their relative commitment to industrial silence. An obligation relative to industrial silence applies not only to issues explicitly regulated in the collective agreement, but also to issues regulated in it as a whole, such as the employer's privileges. That is, the relative commitment to industrial silence becomes an absolute commitment when it comes to matters of internal management".²⁶⁵

However, a general no-strike undertaking is defined in Ruth Ben-Israel's book as follows: "This type of commitment to industrial silence is as its name suggests. As stated, it is subject to only a periodic limitation, which coincides with the life of the employment agreement in which it is included. An absolute no-strike commitment prevents the parties to the employment relationship from striking or shutting down during the life of the agreement in any matter, whether or not it has been settled in the agreement".²⁶⁶

An example of the distinction between industrial and absolute silence, and the prohibition of strikes in respect of issues regulated in a collective agreement, is reflected in the Makhteshim case. Makhteshim and the Histadrut signed collective agreements that regulated, among other things, the issue of early retirement, change of ownership and the obligation to disclose and consult with the organisation regarding sale of the company. The Histadrut and the workers, for their part, undertook complete industrial silence in matters regulated by the agreement, which would not apply only during a national strike, subject to an agreed mechanism for resolving disagreements. When the workers' union learned that the company had been put up for sale without being informed and that there was a change in the budget for early retirement for workers, they decided to disrupt the operation of the factory. The regional court, after analysing the provisions of the relevant collective agreements, ruled that there was no justification for the Histadrut to take organisational measures. The Histadrut and the workers appealed to the National Court, which upheld the court's ruling that although the workers' commitment to industrial silence is relative and not absolute, they are not allowed to strike in protest of issues regulated in the existing collective agreement between them and the company.²⁶⁷

And what about a situation in which there is no obligation in the collective agreement on the part of the workers' union to maintain industrial silence? The Labour Court ruled that every collective agreement implicitly includes a relative commitment to industrial silence. So even if the workers' union does not explicitly undertake in a collective agreement to maintain industrial silence, it is still obligated to it.²⁶⁸

3.6.3 Restrictions by Virtue of Workers' Union Regulations

The court supported centralisation of the workers' unions in everything related to the declaration of a strike and defended it only if it was declared by the competent organisation.²⁶⁹ What is meant by this? The regulations of the workers' union in the State of Israel determine who is the body authorised to

²⁶⁵ Ibid, pp. 1511-1512.

²⁶⁶ Ibid, p. 1512.

²⁶⁷ Collective Dispute Appeal (National) 18/08 The New Histadrut et al. v. Makhteshim Chemical Factories Ltd.

²⁶⁸ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1513.

²⁶⁹ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 5760-2000), p. 480.

declare a strike and what is the procedure for approving a strike declaration procedure. Thus, a strike that has not been declared by the competent body or that has not been declared in accordance with the procedural procedure set forth in the regulations of the workers' union exceeds the boundaries outlined for the strike.

Hence, a strike declared by a workers' committee and not by the authorised Histadrut body is perceived as illegal, and in the words of retired High Court President Meir Shamgar: "It is inconceivable that every individual or even the chairman of the committee will decide from time to time, what expression they will give to the labour dispute and what sanctions they will decide to take. The organisational framework decides what expression will be given to the labour dispute, that is, whether the strike will be complete or partial, and if a partial strike is decided, how it will be expressed".²⁷⁰

It seems that the reason for the outbreak of strikes without the Histadrut's approval was the internal tension between Histadrut management and the workers' committees.²⁷¹ The court decided, as stated, to repeatedly side with the Histadrut in this matter, and in the Bezeq case ruled that: "Freedom to strike in Israel is part of the freedom of association, and a strike is legitimate only if declared by a workers' union. However, freedom is not anarchy. A workers' committee which illegally uses strike weapons, harms not only the employer and the entire state economy, but also the workers' union, whose job it is to steer the professional struggle, and to guard the exercise of the rights it has acquired".²⁷²

3.6.4 Restrictions by Virtue of Court Judgments

Aharon Barak explains that the right to strike is not an absolute right, but a relative one because it can be restricted. The restriction is constitutional if it is proportionate.²⁷³ The restrictions that apply to the right to strike that have been issued by the court and the High Court over the years will be detailed below, but even before that we will seek to address the issue of the *proportionate* restriction, according to Barak.

The proportionality test consists of three sub-tests. The first test of proportionality states that there must be a rational connection between the means and the end. Some interpret this requirement to mean that the means must be *appropriate*, that is, relevant. The second test of proportionality requires that the chosen means must also be *minimal*, in the sense that the goal cannot be achieved by means that are less detrimental to the rights of the individual. The third test of proportionality seeks to prevent a serious violation of the rights of the individual in favour of negligible purposes, and that the violation of rights be done only in favour of purposes that justify it. Guy Davidov explains that the main instrument that the courts began to use, even if not consistently, when debating whether to grant a restraining order against one strike or another is the principle of proportionality – and more precisely – whether the action of workers seeking to strike is proportionate.²⁷⁴ We give our opinion at length on this issue in the chapter dealing with injunctions.

Before approaching a review of the restrictions that apply to the right to strike by virtue of legislation, it will first be said that most of the restrictions that apply to the strike originate – prominently – in court rulings. One possible explanation for this is that the organised public of workers in the State of Israel

²⁷⁰ Disciplinary Appeal – Civil Service 1/86 Yehezkel Coca v. Chairman of the Broadcasting Authority, 40 (2) 406, clause 6 of the ruling.

²⁷¹ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, *ibid*, p. 482.

²⁷² Labour Court Hearing 53/ 4-4 Histadrut v. Bezeq, Israel Telecommunications Company Ltd., Labour Court Ruling 367, p. 373.

²⁷³ Aharon Barak, *Human Dignity – The Constitutional Value and the Constitutional Right*, (Nevo, 2014), p. 861.

²⁷⁴ Guy Davidov, *The Principle of Proportionality in Labour Law*, *Law Studies* 31 5 (2008), pp. 10-12, and p. 18).

cannot and will not allow the right to strike to be touched by legislation, even “if the amendments and changes may advance its affairs, and therefore the only intervention in the matter is through judicial legislation”²⁷⁵, that is, through rulings and precedents in the courts.

A. A Strike is a Collective Action

The Israeli court ruled that the strike stemmed from the right to organise. In doing so, it followed a lead paved in international law and in the Commonwealth of Independent States (which I discussed in the chapter *The Strike in International Law*). In other words, take away the right to organise and the right to strike that results from it. As long as the worker does not form a union and does not operate under the auspices of the right to organise, there is no right to strike, since it is part of the collective labour law and it is not part of the individual labour law. In the words of the High Court: “The right to strike does not give every single worker the right to breach his obligations, the recognition of the right to strike in modern society has meaning only when combined with the principle of organised labour”.²⁷⁶ In the case of *Yehezkel Coca*,²⁷⁷ which was heard in the High Court, this conclusion was repeated: “Labour law does not provide a seal of approval for any non-fulfilment of an obligation, provided that it is argued that it should be credited to the right or obligation of a future labour dispute between the worker and the employer. They also do not allow growth of a labour dispute out of nowhere, according to the decision of an individual, but determine how and who may decide on the onset and existence of such a conflict, and what steps will be taken in such a case by the workers”.²⁷⁸ And also: “The labour dispute is an act of the organised public of workers and not an individual decision or an individual response”.²⁷⁹

The National Labour Court was also required to address the issue: “In the individual relationship, no (prevention) order intervenes; the behaviour of each worker as an individual will not be seen as non-compliance. The non-compliance will be seen only in the worker’s activity as part of the collective – the strike”.²⁸⁰

The conclusions of the judges of the High Court and the National Labour Court are also consistent with the purpose of clause 5A of the Labour Disputes Settlement Law, which imposes an obligation to notify of every strike, as stated. This obligation is imposed on a “party to the conflict” defined by clause 3 of the Labour Disputes Settlement Law as “an organisation of workers representing the majority of workers...”. In other words, not only can a workers’ union declare a strike but an individual worker is not qualified or cannot do so.

B. The Strike as a Proposal for a New Temporary Employment Contract

The National Labour Court ruled that the strike, whether general or partial, suspends the worker’s personal employment contract, in which the striking workers offer work other than that stipulated in the original employment contract, and the employer must decide whether to accept their offer or shut down

²⁷⁵ Ruth Ben-Israel, *The Status and Consequences of the Wildcat Strike* (The Advocate 37, 5737-1977), p. 158.

²⁷⁶ HCJ 234/51 Koas et al. v. Minister of Labour et al., 6 Israeli Ruling 1192, 1197.

²⁷⁷ In this case, the Chairman of the Engineering Workers' Committee at the Broadcasting Authority ordered technicians not to broadcast a certain article, because in his opinion, a labour dispute was caused in that particular affair.

²⁷⁸ Disciplinary Appeal – Civil Service 1/86 *Yehezkel Coca v. Chairman of the Broadcasting Authority*, 40 (2) 406, clause 5 of the ruling.

²⁷⁹ Ibid, clause 10 of the ruling.

²⁸⁰ Labour Court Hearing 32/ 4-6 *Committee for Direct Maintenance Workers at El Al et al.*, Labour Court Ruling C 393, 412.

his factory.²⁸¹ Lockout of the factory by the employer is the ability to prevent the freedom of occupation of the workers in that the employer may refuse to accept part-time work from them and prevents them from receiving wages, even partial or proper.

C. Recognition of a Strike to Obtain New Rights and Non-Recognition of a Strike to Exercise Rights

As stated, the Histadrut and the Manufacturers' Association reached a binding agreement on the Histadrut's right to strike in preparation for a new collective agreement, in addition to the ban on strikes during the term of the collective agreement, i.e. – an obligation to maintain *industrial silence*.²⁸² The legal system has not remained indifferent to this commitment. The National Labour Court made a distinction between a strike to obtain new rights (Interest Dispute) prior to the signing of a collective agreement, a sign that there was a prior agreement between the parties and the agreement had expired, and a strike to exercise rights (Rights Dispute). While it allowed a strike to obtain new rights, it banned the strike for the exercise of rights and ruled that it should be discussed in the court: "For the exercise of permanent rights in a collective agreement, and in the absence of such a determination – the labour courts exist".²⁸³ And in the same case it was also stated that "the right to strike, like any other right of its kind, is limited by the rights of others, in this case the right of the employer to uphold and respect the collective agreement".²⁸⁴

In the Technion case,²⁸⁵ the National Labour Court ruled that there are "two ways to ensure industrial silence through a collective agreement, for the period of validity of the agreement. One way – ensuring complete peace, that is, a ban on strikes by any factor within the period of time stipulated for the validity of the agreement, and the other way – ensuring relative peace, that is, a ban on strikes on issues regulated in the collective agreement only".²⁸⁶ Menachem Goldberg explained that the National Court "adopted the rule customary in European countries" and that "during the period of validity of the collective agreement, and in matters regulated in a collective agreement (unless *relative peace* is agreed on in the same agreement) there is no room for collective dispute".²⁸⁷

The meaning of this ruling is to anchor *industrial silence* in the binding law. By signing a collective agreement, the workers' union undertakes not to use the strike weapon during the term of the collective agreement.

D. The Strike Should be a Last Resort in the Struggle

The Labour Court has repeatedly ruled that a strike should be a last resort in a professional struggle, after using means of dispute resolution such as negotiation, arbitration, conciliation, mediation and the like have been exhausted.²⁸⁸

²⁸¹ Labour Court Hearing, *ibid*, Kozolovich Baruch et al. v. Ordan Ltd., Labour Court Ruling 12 200.

²⁸² See restrictions under collective agreement above.

²⁸³ Labour Court Hearing 34/ 4-4 The Hebrew University, Jerusalem et al. v. The Organization of Lecturers at the Hebrew University, Labour Court Ruling 123-124.

²⁸⁴ *Ibid*, p. 134.

²⁸⁵ In this case, the National Labour Court was asked to order cancellation of a strike announcement.

²⁸⁶ Labour Court Hearing 36/ 1-4 Technion Institute of Technology Israel – Economic Histadrut, Labour Court Ruling 6 313, 324.

²⁸⁷ Menachem Goldberg, *The Strike in Law, the Collective Agreement and in Case Law*, The Advocate General 5747-1987, p. 57.

²⁸⁸ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, Baranzon – Bnei Sabra Book, 2004 Page 478.

In the Dead Sea case,²⁸⁹ the National Labour Court clarified the obligation to exhaust dialogue procedures while also rejecting biblical-religious “advice”: “In the book of Proverbs, although the wisest of all men says that “with tricks you will make war” (Proverbs, 24, 6), but this is only advice and not a mitzvah, and good advice is sometimes good to reject. On the other hand, you will find a mitzvah which states what it is permissible and forbidden in war, and in this case, “When you approach a city to fight for it call out in peace” (Deuteronomy, 20, 10) and “Do not make war with a man in the world until you call it peace” (Rambam, Judges, Laws of Kings, 6, 1)”.²⁹⁰ In the general strike case that the Histadrut sought to start regarding employment of workers with personal and contractual contracts, the court ruled that “as part of the balance between the freedom to strike and its actual implementation and limitation, the court will examine the parties’ dialogue actions and utilisation, which they are committed to taking before organisational measures and a strike in general”.²⁹¹ As stated, the workers’ representatives have an obligation to exhaust dialogue procedures before exercising the right to strike and when the workers’ union convinces the court that it has reached a *dead end*, the dialogue procedures are exhausted and the requirement that a strike be the last resort in the struggle is met.²⁹²

Premature use of strike weapons may indicate a lack of good faith (see below).

E. The Duty to Act Proportionately During the Strike

By virtue of the principle of proportionality, there must be proportionality, that is, proportion, between the strike that is taken and the goal that the strikers are trying to achieve. Proportionality is measured geographically, quantitatively or materially.²⁹³

In the matter of proportionality, Judge Elisheva Barak Ussoskin ruled in the Discount Bank²⁹⁴ case: “The scale for balancing the right to strike is the test of proportionality. It is very important to run this test mainly due to the great weight that must be given to the right to strike and on the other hand the perception that this right is always harmful. Its purpose is to harm, whether only to the employer or also to third parties. The steps for examining proportionality are [...]: 1. The scale must be compatible to achieving the goal. 2. It must be essential in the sense that no other means less detrimental to human liberties is sufficient. 3. The means cannot be disproportionate to its purpose (this is proportionality in the narrow sense)”.²⁹⁵

F. The Strike Must be Reasonable

A workers’ union exercising the right to strike is subject to the principles of administrative law. This means that a decision to declare a strike must be factual, without extraneous considerations. The decision must consider the public good, fairness and reasonableness. And the exercise of this authority shall be subject to judicial review by the court.²⁹⁶

²⁸⁹ For more on this case – see chapter 13.3.2.

²⁹⁰ Labour Court Hearing 4-18 / 41 General Histadrut of the Workers in Eretz Israel, Be’er Sheva Workers’ Council v. Dead Sea Works Ltd., clause 17 of the ruling.

²⁹¹ General Collective Dispute 8375-11-11 Coordination Bureau of Economic Organisations v. The New General Workers’ Union, Clause 19 of the ruling of the then President of the National Court, Nili Arad.

²⁹² Request for Leave to Appeal 7867-07-16 State of Israel – New General Workers’ Union (granted on 11/07/2016).

²⁹³ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1465.

²⁹⁴ For more on this case – see chapter 16.3.

²⁹⁵ Collective Dispute 1013/04 Discount Bank v. The New Histadrut – Derivatives Market Association et al.

²⁹⁶ Chaim Baranzon and Assaf Baranzon, *Sympathy Strike – Its Status and Proportionality*, *ibid*, p. 776.

Many rulings issued by the court involve the test of *proportionality* along with the test of *reasonableness*. For example, in the Pelephone²⁹⁷ case, The court ruled that this was a disproportionate and unreasonable strike, and that it was the duty of the workers' union to conduct itself reasonably, proportionately and responsibly towards the public. In the absence of service, network users may find themselves disconnected even when it comes to matters of life and death. The court issued a restraining order ordering the workers' representatives to stop disrupting repair of the network's malfunctions and to return to on call and ready for callout for repairs as a matter of routine.²⁹⁸

G. The Duty to Act in Good Faith Even During a Strike

High Court Judge Zvi Baranzon insisted on acting in good faith even during the strike: "Even in a labour relationship, do not act dishonestly and without good faith, saying one thing and meaning another. Saying: 'I resign', and thinking: 'I do not resign and I wish to use this means to subdue the employer'. The law requires good faith in relationships with others and in the use of a right deriving from a contract (clause 39 of the Contracts Act (General Part)). The right to a professional struggle, including the existence of a strike, derives from a labour contract. Therefore, use of this right must be done in an acceptable way and in good faith, and not in the form of speech that conceals the true intention of the speaker".²⁹⁹

As stated, according to clause 5A of the Labour Disputes Settlement Law, the workers' union must notify the employer in advance of a strike. Elisheva Barak believes that the form of the notice and the date of its delivery should be reasonable and in good faith. Each notice must be examined on its own merits and the notice must be given in good faith in a manner that balances the right to strike with the rights of the employer and the public.³⁰⁰

The good faith of the workers' union when operating the strike weapon is also examined in the light of the motives that led it to operate the strike weapon: "The workers' union is required to act for the benefit of the entire public of factory workers and for business reasons. To the extent that the workers' union takes organisational measures for improper motives or in bad faith, its steps may be restricted or prevented. Thus, a strike designed to achieve discriminatory working conditions, such as those that violate fundamental rights or public policy, is invalid and can be restricted or prevented. Similarly, to the extent that a workers' union declares a strike for personal motives of the union's representatives or members, it will be appropriate to impose a restriction on the strike taken for motives unrelated to the employment relationship".³⁰¹

H. Refusal to Recognise and Failure to Legitimise the Political Strike

The court has classified the strike as *economic strike*, *political strike*, *quasi-political strike* and *sympathy strike*. Each classification brought with it a recognition of the legitimacy of the strike, or a non-

²⁹⁷ In this case the employer sought to prevent the workers' union from taking organisational measures that could lead to network malfunctions on the grounds that this strike constituted an extremely irresponsible and dangerous step.

²⁹⁸ Collective Dispute 50253-02-17 Pelephone Communications Ltd. - New General Workers' Union and Pelephone Communications Workers Ltd.

²⁹⁹ HCJ 566/76 Elco, Israeli Electromechanical Factory Ltd. v. The National Labour Court and 20 et seq., Ruling 31 (2) 197, p. 209.

³⁰⁰ Elisheva Barak, *The Principle of Good Faith in Labour Law*, Baranzon – Bnei Sabra Book, 2004, p. 546.

³⁰¹ Collective Dispute Appeal (National) 64/09 Power for Workers – Democratic Workers' Union v. Jerusalem Cinematheque – Israeli Film Archive, Clause 6 of the ruling of the then President of the National Labour Court, Steve Adler.

recognition of its legitimacy. In the chapter *Types of Strikes* I will discuss the classifications of strikes created by the court and their recognition in detail.

I. A Strike as Grounds for Creating Liability in a Tort Claim

In view of legislative amendments, the strike (which was defective in its implementation) was exposed to a tort claim for two wrongs. First, non-compliance with the provisions of clause 5A of the Labour Disputes Settlement Law exposed the strike to a claim by virtue of the tort of breach of statutory duty, in accordance with clause 63 of the Torts Ordinance. Second, non-compliance with a protected strike, as stated in clause 37A of the Labour Disputes Settlement Law, exposed the strike to a claim by virtue of the tort of causing a breach of contract. In the Ashdod Car Factories case,³⁰² the High Court ruled that a tortious cause arose for a third party harmed by a protected strike of a workers' union, and imposed liability for damages on the strikers under the tort of negligence under clause 35 of the Torts Ordinance. In the Ashdod Car Factories case, an innovative rule was established in that the imposition of responsibility on strikers was based on policy considerations of balancing interests. The chapter *Strike Damages* expands on this issue.

J. Prohibition of Violence During the Strike

In the Makhteshim Chemical Plant case,³⁰³ the judges disagreed on how to treat violence by strikers. While Judge Elisheva Barak allowed striking workers to use "verbal threats but without the use of force", Judge Goldberg, on the other hand, ruled: "It seems to me that verbal threats are completely forbidden. The struggle of the workers also has limits, and we must not allow them to deviate from the limit set by criminal law, which – needless to say – prohibits use of making threats". The two judges agreed that physical violence is strictly forbidden, and that public order should be maintained even during a strike.

K. Balance Between the Right to Strike and Other Rights

High Court Judge Alfred Witkon ruled that: "The court must consider not only what was the legitimate interest of the workers, but also the question, whether in the circumstances the strike was a kosher means of preserving that interest given the interest of the plant".³⁰⁴ This gave the signal for balancing the right to strike, not to mention – limiting it, against other rights or interests. Over the years, judges of the National Labour Court have also been required to balance the issue of the right to strike with other rights. Thus, Judge Elisheva Barak believed that the purpose of the strike was to cause harm in order to bring about a solution to labour disputes. Therefore, by its very definition the strike causes harm. "This harm must be balanced against harm to the injured public and the employer harmed by the strike. The balance must take into account the weight of other fundamental rights, other fundamental principles practiced in a democratic state. The freedom to strike is balanced against execution of agreements in good faith, public peace, a person's right to his body and dignity, a person's right to mobility and departing the country. The balance must also take into account the extent of the harm to innocent third parties. A worker union that acts in good faith will take into account the proper balance between all these factors,

³⁰² CA 593/81 Ashdod Car Factories Ltd. et al. v. The late Tzizik et al., Ruling 41 (3) 169.

³⁰³ Labour Court Hearing 57/ 27 - 41 The Histadrut et.al. – Makhteshim Chemical Plant Ltd., Labour Court Ruling 449. During the labour dispute, a group of workers stood in front of the factory gates, and tried to convince contractor workers not to enter the factory.

³⁰⁴ Tax Laws 207/57 Paul Arnsberg v. Official Property Receiver, Elimelech Ochin and 38 others, 12 Rulings and Discussions, p. 125.

including the degree of harm that may be caused to the employer”.³⁰⁵ President of the National Labour Court, Steve Adler, also explained that the right to strike is subject to “consideration of other legal rights and principles, such as protecting the sovereign (Knesset and government) from strikes that are mainly regarding economic policy or elections; strengthening discipline in the workplace; rights enshrined in the continuous provision of essential services; freedom of expression and the like”.³⁰⁶

L. Restrictions that Apply to Certain Job Holders

Israeli law does not include exceptional job holders in the definition of *worker* – such as elected officials (such as mayor, local council members, Knesset members), law enforcement officers (such as judges and ambassadors) and security forces (such as soldiers and police). Since all of these are not defined as *workers*, they have also been deprived of the right to strike. The fear of recognising these job holders as workers stemmed from the fact that recognition would also give workers the right to organise in workers’ unions, from which the right to strike is also derived, and “giving these rights to workers sitting in governmental power centers could jeopardise democracy and the integrity of the governmental process”.³⁰⁷

Lawyers were also added to the group of exceptional workers who are not allowed to strike by High Court President Yoel Sussman: “Soldiers, policemen and judges are not allowed to take this measure of struggle... I am sorry to say that lawyers who take sanctions, violate these provisions of the Bar Law, degrade their status as lawyers and lower themselves to the level of justice workers, organised in a professional organisation. In short, just as a lawyer is not allowed to strike, by not representing his client before the court as he promised, so also the state attorneys, who are lawyers employed by the state, owe the same duty to their employer”.³⁰⁸

M. Additional Restrictions that Arose in Court Rulings

Within the walls of the Labour Court, exceptional cases are often discussed that are not similar to precedents or previous rulings issued by the Labour Court. No rules should be drawn from them, but it is worth considering them in order to infer the mindset of the court from them.

For example, when the Histadrut considered taking organisational measures that threatened to disrupt the judicial system, the National Court ruled that even if all the restrictions on the strike were met, the workers’ union must give the employer 48 hours prior notice of further details of the organisational steps it intends to take, detailing their nature, scope and duration, in addition to an order for the Histadrut to operate exception committees (to discuss exceptional cases and deviate the strike from them).³⁰⁹ Another example was in the case of the Middle East Pipeline Company. In this case, a rare restriction on the right to strike was imposed, after the company’s management provided guarantees for the fulfilment of its obligations in collective negotiations. The company stated in court that it complied with the workers’ demand regarding the wage increase, and that it would provide collateral for fulfilment of the agreement. Therefore, the court ruled that the case is one of the rare cases in which it is justified to restrict the right to strike, since the securities offered, of the type of bank guarantee or deposit of funds with an agreed trustee, were given a different guise than the one agreed upon by the parties, which are ways that fulfil

³⁰⁵ Elisheva Barak, *The Principle of Good Faith in Labour Law*, Baranzon – Bnei Sabra Book, 2004, p. 545.

³⁰⁶ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, Baranzon – Bnei Sabra Book, 2004, p. 486.

³⁰⁷ Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), p. 405.

³⁰⁸ Various Applications 127/79 Avuzar v. State of Israel, Ruling 33 (3) 50, 51.

³⁰⁹ Request for Leave to Appeal 7867-07-16 State of Israel – The New General Workers’ Union.

the purpose of the agreement.³¹⁰ In the case of the **Dead Sea Works**, the National Labour Court ruled that the Histadrut must accompany the strike by a competent presence on the ground, so that matters do not fall under the obligation of the steps it has announced and for which it is responsible in collective labour relations.³¹¹ In the **Yedioth Ahronoth** case,³¹² the court ruled that if the workers believe that the employer is not acting as required by the agreements signed with them, their way is open to clarify the dispute by way of a judgment that precedes the strike. For the Labour Court, this is the proper way to resolve labour disputes.³¹³

3.7 Summary

The purpose of this chapter was to describe the sequence of events regarding the right to strike in Israel.

Recognition of the right to strike developed even during the period of the Jewish settlement before the establishment of the State of Israel. And as we learned in the previous chapter,³¹⁴ the right to strike was also recognised by the Commonwealth of Independent States, and the significance of Israel's joining those conventions obliged it to recognise the strike as a fundamental right at the state level.

The freedom to strike is an organic and fundamental part of the social democratic tradition on which the State of Israel was built in its infancy.³¹⁵ At the same time, until the early 1970s, the strike was an uncommon event in the young state of Israel. The Histadrut, which was the largest workers' union in the country, was a close partner of the political establishment, which was controlled by the Mapai Party. It would not be an exaggeration to state that the two movements were educated on the knees of the same ideology, the key figures of which felt the same shared destiny and maintained close, clear and visible ties between them. Therefore, the existence of a strike in the first decades of Israel's existence, especially among the public sector that was affiliated with the Histadrut, was perceived as an exceptional and specific event. The use of strike weapons during this period was also a relatively unusual and uncommon event.

For many years, the Histadrut refrained from appealing to the courts in matters of collective disputes in general and strikes in particular. The decision-makers – both in the administration and in the Histadrut – succeeded time and time again in reaching an understanding. Therefore, it is not surprising that following the publication of the ruling regarding the Leo Beck School³¹⁶ in late 1962, the Knesset amended the Civil Torts Ordinance to ensure the protection of the right to strike.

But in the late 1960s and early 1970s, the use of strike weapons began to become more common. Simultaneously with the decline of the Histadrut and its diminishing influence, friction increased with the decision-makers in the government and these were reflected in the increasing use of strike weapons.

During these years, the Labour Court was established with the slogan *Justice Instead of a Strike* justifying its establishment, and the Labour Dispute Settlement Law was amended so that it must

³¹⁰ Collective Dispute 23054-01-15 Middle East Pipeline Company Industries 2001 Ltd. – The New General Workers' Union, Association of Metal Electricity and Electronics Workers, et. al.

³¹¹ Labour Court Hearing 41/ 4-18 The Histadrut of Workers in Eretz Israel, Be'er Sheva Workers' Council v. Dead Sea Works Ltd. Clause 8 of the Ruling.

³¹² For more on the Yedioth Ahronoth case – see Chapter 10.11.3.

³¹³ Collective Dispute 401133/00 New General Workers' Union – Association of Printing, Media and Artists – Yedioth Ahronoth Ltd.

³¹⁴ Chapter 2: *The Strike in International Law*.

³¹⁵ Michal Shaked, *Theory of the Prohibition of Political Strikes*, (Labour Law Almanac, 1999), page 187, and see also fn. 1 in the article.

³¹⁶ See above: 3.6 *Restrictions on the Right to Strike in Israel*.

henceforth give the workers' union fifteen days' prior notice before the actual strike, otherwise it will be liable for damages it causes. These were the first, but not the last, restrictions that led to an encroachment of the limits of the right to strike. In 1972, the Labour Dispute Settlement Law was amended once more, when this time the legislature made public-sector strikes *protected* or *unprotected*.

In the 1980s, the use of strike weapons continued to break records in all the indices surveyed – the number of strikes that broke out, the number of striking workers and the number of working days lost to the economy. These years periodically brought with them new precedents and laws – from the High Court and the National Labour Court – which limited, demarcated and defined the strike time and time again by stating that a strike is a collective action, like a proposal for a new temporary employment contract, in non-recognition of a strike to exercise rights, as it must be proportionate and a last resort in the struggle, by the duty to treat it in good faith, refusal to recognise the political strike, imposition of tortious liability for its consequences, prohibition of violence during its existence, the balance between it and other rights and by denying specific job holders. There is no doubt that only a handful of the restrictions that apply to the right to strike have been set by the legislature and most of them by the courts.

The restrictions that apply to strikes can be divided according to the functions they seek to achieve: restrictions that regulate the strike, restrictions that prevent it and restrictions that seek to settle it. The list of tools that regulate the strike includes the obligation to give prior notice 15 days before the strike breaks out, restrictions on unprotected strikes in the public sector and more. Mordechai Mironi explains that what these restrictions have in common is that they do not prevent the use of the strike as a means of pressure and do not contribute to bringing the parties closer to an agreement, but they clearly have an effect on the balance of power, and consequently on the willingness of the parties to continue in a state of disagreement and even act to escalate the struggle.³¹⁷ The list of restrictions that prevent the strike completely include emergency regulations, the Emergency Labour Service Act and restraining orders.³¹⁸ These restrictions do not purport to bring the parties to an agreement or to settle disputes in their place.³¹⁹ The necessity to use a strike as a last resort in a struggle can be mentioned in the list of restrictions seeking to reconcile.

If in the years of the Jewish settlement and in the first decades of the State of Israel, the strike was an absolute right in stark contrast to any other state and received unreserved support from all the governing authorities, even though it was not written, then, in the 21st century the use of the term strike cannot be in the context of a *right* but in the context of *freedom* or *liberty*, and it seems that the words of the Knesset members in 1972 illustrate this point: MK Uri Avnery: "During the discussion on the establishment of the labour courts, some members of the Knesset and I expressed the fear that the courts would become, in contrast, an instrument for breaking strikes [...] In the meantime, experience has accumulated, and the courts have indeed become such an instrument [...]"³²⁰ MK Avraham Levenbrown also shared this view: "Indeed one of the functions for which the labour courts were established is to prevent the adoption of organisational pressure measures to ensure industrial peace. In simple language, this means preventing

³¹⁷ Mordechai Mironi, *Arbitration as a Substitute for a Strike - A Framework for Thinking and Clarifying Basic Concepts*, (The Hebrew University, 1986), p. 18.

³¹⁸ On restraining orders, see Chapter 11.

³¹⁹ Mordechai Mironi, *Arbitration as a Substitute for a Strike - A Framework for Thinking and Clarifying Basic Concepts*, *ibid.*, p. 19.

³²⁰ Minutes of Session No. 368 of the Seventh Knesset (p. 844), 19/12/1972.

strikes or other forms of workers' struggles to achieve their demands. And reality has shown that more and more people are using the labour courts to curb and stop the struggles of the working public".³²¹

³²¹ Minutes of Session No. 368 of the Seventh Knesset (p. 844), 19/12/1972.

Chapter 4: The Meanings of the Strike

The use of strike weapons by workers carries with it various meanings. These meanings go beyond the legal framework and are also reflected in the intra-union, economic and even religious spheres. These meanings should be considered, as they may later teach about the effectiveness of the strike compared to other pressure mechanisms.

I shall discuss these meanings in order.

4.1 Legal Meanings

A. Suspension / Termination of a Work Contract

Two theories that are apply during a strike are prevalent in the legal literature: the Theory of Suspension of a Work Contract and The Termination Theory.

Historically, the Termination Theory preceded the Suspension Theory. The meaning of the Termination Theory is the termination of an employer-worker relationship. As a result, it was legitimate to dismiss striking workers which made it possible to employ new workers instead of those who were dismissed.

According to the Termination Theory, almost every pattern of strike and every sanction is a breach of the duty to work, and so is a breach of the employment contract if the worker has not priorly resigned. Proponents of this theory claim that the cessation of work during a strike are to be seen as resignation or self-dismissal. According to this Theory, employers are exempt from their duty to pay wages during a strike, as is the case in Denmark and Britain, where the British employer has the discretion to dismiss a worker participating in a strike and is not obligated to treat all workers equally.³²²

The meaning of the Suspension Theory is that the work contract is not terminated (or severed, as it is in the Termination Theory) during a strike, but suspended until the strike is over. In other words, during a strike, the employer-worker relationship is suspended and therefore, so are the obligation to provide labour and labour productivity on the part of the worker, and on the part of the employer, the obligation to pay wages. At the end of the strike, the employer-worker relationship is re-established as are the variety of rights and obligations arising from it.

The Suspension Theory can still be found today in France, Sweden, Poland, Germany, Japan, and to a certain to partial extent, in the United States and New Zealand as well.³²³

In Israel, the accepted theory is the Suspension Theory, which has been anchored in both legislation and case law. The Theory is expressed in legislation in the Discharged Soldiers (Reinstatement in Employment) Law, 5709-1949; the Annual Leave Law, 5711-1951; the Severance Pay Law, 5723-1963; the Civil Service Law (Retirement) [Consolidated Version], 5730-1970 – and we will return to all of these.

In a ruling, the High Court ruled that “the strike, although in essence is a cessation of work or avoidance of work [...], does not lead to severance of the labour relationship which must be re-established at the end of the strike by a decision to return the strikers to work”.³²⁴

³²² Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), pp. 1504-1506.

³²³ *Ibid*, pp. 1500-1501

As stated, according to the Suspension Theory, participation in a strike is not a resignation, but in exceptional circumstances the ability to resign or dismiss during a strike is possible if there are grounds that justify dismissal or resignation under normal circumstances, similar to the practice in Spain.³²⁵ Dismissal of a worker in France, however, is only possible due to offenses of gross misconduct.³²⁶

B. Non-Interruption of Work Continuity

What is the status of a worker who wishes to go on annual leave, which is supposed to accrue to his credit while he works, but during this period he participated in a strike and did not actually work? The answer to this and the status of all rights accrued during an employer-worker relationship is that, as a result of the Suspension Theory, the strike does not interrupt the continuity of rights and their accumulation.

For example, the Annual Leave Law stipulates that: “For the purposes of subclause (a), working days are considered consecutive, even there is a break in work due to [...] a strike or lockout”.³²⁷ The Severance Pay Law stipulates that: “For the purposes of clause 1, continuity of work shall stand even if there is a break in work due to [...] a strike or lockout”.³²⁸ The Civil Service Law (Retirement) stipulates that “Continuity in service is not considered to be discontinued due to the worker’s absence from work on the occasion of one of the following: [...] strike”.³²⁹ And the Discharged Soldiers (Reinstatement in Employment) Law stipulates that “continuity in work is not seen as discontinued by a worker being absent from work due to [...] a strike [...]”.³³⁰

C. Non-Violation of Personal Obligation

Participation in a strike does not constitute a breach of the worker’s personal obligation to perform work in accordance with the employment contract applicable to him. This rule of law is learned from the Collective Agreements Law: “Provisions in a collective agreement regarding working conditions, termination of employment, and personal obligations imposed under those provisions on a worker and employer and rights conferred on them (hereinafter – Personal Provisions), shall be regarded as an employment contract between any employer and any worker to whom the agreement applies, and will be valid even after expiration of the collective agreement, as long as they have not been legally amended or revoked; Participation in a strike will not be considered a breach of personal obligation”³³¹ (emphasis does not appear in original). Hence, it is not possible to prosecute a striking worker for breach of the obligations he assumed in his employment contract.

³²⁴ HCJ of Israel 566/76 *Elco Israeli Electromechanical Industry Ltd. v. The National Labour Court et al.*, Ruling 31(2) 197, pp. 206-207.

³²⁵ M.A. Olea, *Spain* in: Int’ Enc. Lab. L., vol XL (1988), s.636, quoted in Ruth Ben Israel, *Labour Law – Vol. IV*, The Open University, 2002), pp. 1503, fn. 120.

³²⁶ J.S Rojot, *France* in: *Strikes and Lockouts in Industrialised Market Economies* (R. Blanpain (ed.) and R. Ben-Israel (guest ed.)) 29 Bull. Com. Lab. Rel. (1994) 55 at p.60.

³²⁷ Clause 4 (b) (4) to the Annual Leave Law, 5711-1951.

³²⁸ Clause 2 (6) to the Severance Pay Law, 5723-1963.

³²⁹ Clause 3 (2) to the Civil Service Law (Retirement) [Consolidated Version], 5730-1970.

³³⁰ Clause 4 (b) to the Discharged Soldiers (Reinstatement in Employment) Law, 5709-1949.

³³¹ Clause 19 to the Collective Agreements Law, 5717-1957.

D. Prohibition of Dismissal and Prohibition of Worsening Working Conditions

As of 2021, the prohibition to dismiss a worker has been explicitly anchored in law, as well as the prohibition to worsen a worker's working conditions or refrain from accepting a person for work due to "his membership or activity in a workers' union; his activity for the purpose of establishing a workers' organisation [...]".³³²

Although the language of the law refers to companies or activities of workers' unions, it can be argued that a strike is an activity carried out within a workers' union or for its establishment, and hence that participants in a strike enjoy the protection afforded to them by law.

Even before the law was enacted, the court set a precedent in *Horn v. Leibowitz* when it ruled that dismissal of striking workers is illegal and even ordered, in a rare move, to return them to work for the reason "[...] that dismissal of workers due to their desire to organise and strike is a violation of their constitutional right".³³³

E. Prohibition to Replace Striking Workers with Other Workers

In Israel there are two laws that prohibit the employment of workers during a strike: the Employment Service Law, 5719-1959; and the Employment of Workers by Manpower Contractors Law, 5756-1996.

Clause 44 to the Employment Service Law provides: "The Employment Service Bureau shall not send workers to a place of work where there is a strike or lockout and shall not send striking workers to work, all the time of the strike or lockout. An employer who has employed workers striking or under lockout, and workers who worked in a factory that has a strike or lockout, will not be prosecuted for that."

And Clause 16 of the Employment of Workers by Manpower Contractors Law provides that "a manpower contractor shall not employ workers in the place of workers participating in a strike and shall not employ workers in place of workers who are under lockout due to a strike, as long as the strike or lockout exist."³³⁴

In the chapter *The Employer During a Strike*³³⁵ I will give my opinion at length on both these clauses of the law and on examples that will accompany relevant case law.

F. Reduction of the Ability to Sue Striking Workers for Damages

In the chapter *Strike Damages*³³⁶ I will discuss the damages of strikes as well as the protections extended to workers who take part in them in further detail, but it can already be said in a nutshell that except for a few isolated and exceptional judgments, Israeli workers are protected from liability for damages deriving from strike damages by virtue of an exemption provided for in Clause 62 of the Torts Ordinance, which deals with the grounds for agreement breaches. In the case of a public sector strike, protection is reduced under this Clause and a worker or employer

³³² Clause 33 (10) to the Collective Agreements Law, 5717-1957.

³³³ Collective Dispute Appeal 1008/00 *Horn v. Leibowitz Ltd.* – The New General Workers' Union, Judgment of the Labour Courts 35 (2000) 145, Clause 10 to President Steve Adler's Ruling.

³³⁴ Clause 16 to the Employment of Workers by Manpower Contractors Law, 5756-1996.

³³⁵ Chapter 10.

³³⁶ Chapter 9.

who was a party to the strike may file a tort claim for breach of agreement, but a third party affected by the strike may not do so.

4.2 Interorganisational Meanings

The strike weapon is considered the main tool for protecting workers' rights in the context of collective labour relations. The factor that declares the strike and thus gives it one vital dimension in its legality is, (as I pointed out in the chapter *Strike Restrictions*)³³⁷ the trade union. The union mediates the causes of the conflict to the workers, negotiates between them and the employer, outlines the nature and scope of the strike and ultimately – also decides when to end it. The strike can and will affect the union at any of these stages.

However, it can be assumed with considerable confidence that a trade union will go on strike only when its power is not in doubt and only when it believes it can convince the workers of the need for a strike, since as long as the workers strike, they do not receive wages.

The strike is, therefore, not only a weapon in the workers' struggle against the employer's decisions, but also –

- A. A tool by which the union unites the workers under a common theme (and sometimes even a common *enemy*). In creating a common *goal* for all workers and dealing, usually, with job security and their economic future, the union may also wake up the *sleepy* and uninvolved workers, be portrayed as their leader in time of need and teach them about the importance of union for them.
- B. A calming tool. Sometimes, some workers organise as opposition to the union and the committee that represents them with the employer. In order to unite the workers, the union has to polarise positions and turn to the strike weapon – so that it is used more as a calming tool than as a means of combating the employer.³³⁸
- C. A tool for demonstrating the power of the union against competing political factors (such as another trade union seeking to unite the workers of the factory under it);

By activating the strike weapon, and especially with a sympathy strike, the full power of the union is revealed: it garners sympathy for its goals and support for its actions, not only from the business around which the labour dispute revolves, but also from other businesses that are separated from it (geographically / by industry). It may transmit economic power by securing the payment of strikers' salaries through a *strike fund* – and the larger the union, the stronger its strike fund.

- D. A regulated, legal and legitimate tool for expressing and venting the anger and frustration of workers.
- A workers' strike is not limited to shutting down production lines at the factory. It may usually be accompanied by one or more of the following – a peaceful or violent demonstration in the employer's yard, playing defiant songs and rhythmic chants in condemnation of management, union leaders delivering speeches, placards bearing short messages, presenting representations (statues / inflatable dolls, etc.). Sometimes the strikers will use violence such as burning tires (which have become a common sight in Israeli strikes for years), restrain themselves at the factory gates and even vandalism.

³³⁷ Chapter 3.6: *Restrictions that Apply to the Right to Strike in Israel*.

³³⁸ Amnon Caspi and Ruth Kastiel, *Labour Relations Learning Guide* (The Open University, 2005), p. 262.

These actions, with the exception of the violent ones, are enshrined in three basic freedoms: freedom of expression, freedom of demonstration and human dignity, as the High Court states: “The right to demonstrate and protest is indeed derived from the right to freedom of expression, and is one of the highest expressions of the idea of human dignity and freedom.”³³⁹

E. A tool for demonstrating the power of the union towards the employer.

The strike is not only a tool for achieving goals in labour relations, but also a tool that the trade union uses to deter employer from taking unilateral measures or actions that are unacceptable to the union. The voice of reason says that knowing the devastating implications of a strike on his business or his reputation, the employer will reconsider his actions.

F. A negotiating tactic: “To show management who has the power”.³⁴⁰

Caspi and Kastiel explain that tactics are the bulk of negotiation, which can be *soft* and involve exchanging information, consulting and creating an informal relationship, or *hard* tactics that include threat, intimidation, ultimatum and severance of contact.³⁴¹ A strike belongs to the group of hard tactics, which is supposed to influence the employer to change his positions.

G. A tool for demonstrating the union’s vitality for workers.

The strike, and especially the economic strike, it will be recalled, is a weapon for achieving goals in labour relations whose traditional and well-known purpose in international law is to ensure the economic and employment security of the worker. The strike is also an action whose declaration and operation are reserved only for the workers’ union (and not for the individual worker). In the use of strike weapons, the union is seen as a factor that fights for the interests of the workers and protects them.

H. A tool for resolving labour disputes and a move that returns the parties to the labour relations system to the negotiating table. Every strike opens in a labour dispute, and every labour dispute ends at the negotiating table where the parties to the labour relationship try to reach an agreement and put the conflict behind them. Thus, in the case of the **Coordination Bureau of Economic Organisations**, President of the National Labour Court, Nili Arad, wrote: “When the course of negotiations has run aground, granting the relief of permitting a strike will be there to contribute to the advancement of the negotiations which have not been fully exhausted”.³⁴²

I. A tool that allows the continuation of work and cooperation between the parties and the labour relations system.

Maximum cooperation between the parties and the working relationship are not possible in days of conflict. But at the end of the conflict, the workers return to work and fulfil their role as usual. In doing so, they cooperate with the employer for the success and profitability of the factory.

According to Sharon Rabin-Margalit,³⁴³ one of the reasons for the strike is the recognition by human beings of the importance of reciprocity (positive and negative), in order to maintain relationships

³³⁹ *Administrative Appeal 3829/04 Israel Toito and the MiKol HaLev Association v. Jerusalem Municipality*, Judgment 59 (4) 769 (dated: 06.12.2004), clause 11 of the judgment of Judge Ayala Procaccia.

³⁴⁰ Amnon Caspi and Ruth Kastiel, *Labour Relations Learning Guide* (The Open University, 2005), p. 262

³⁴¹ *Ibid*, p. 186.

³⁴² *General Collective Conflict 8375-11-11 Coordination Bureau of Economic Organisations et al. v. The New General Workers’ Union*.

³⁴³ Sharon Rabin-Margalit, *Behavioural Explanations of Labour Law and Labour Relations*, (Law and Business 3, 2005).

based on cooperation. The purpose of the strike is to eventually bring the parties (strikers and employers) back to the negotiating table, soften their positions on the focus of the conflict, and re-establish a reciprocal and positive relationship.

4.3 Economic Implications

The strike stops or reduces labour productivity. In this way, the employer's income from the sale of its products is harmed. But it is not just labour unproductivity that damages the employer's balance. The outbreak a strike may also have an economic impact on the company's shares traded on the stock exchange, the employer's financial strength, its ability to meet its obligations and more.

The strike in the global age has economic implications that were not known several decades ago. Thus, factory X in one nation state depends on the supply of materials from factory Y in another nation state. A strike at factory Y that is not related to the workers of factory X may harm the latter factory, due to the same dependency. In the chapter *Strike Damages*, I will give my opinion on these economic implications.

4.4 Religious Implications

The State of Israel is defined as a Jewish and Democratic State.³⁴⁴ Clause 1 of the Basic Law provides that “if the court considers a legal question that requires a decision, and has not found an answer to it regarding legislation, case law or by way of analogy, it will decide it in light of the principles of freedom, justice, fairness and peace of Jewish law and Israeli heritage”.³⁴⁵

Judaism is not just a matter of defining the State of Israel in its system of laws. From a religious aspect, Jewish society in Israel is divided into three main reference groups: secular, traditional, and religious. Judaism, whether as a religion or as a value, has a grip – on at least some of these groups in the State of Israel. Therefore, there is room to examine the status of the strike in halakhic sources too, in light of which some of the reference groups in the State of Israel behave.

Opinions are divided on whether workers are allowed to strike in an organised manner. Some argue that workers are allowed to strike, as is the custom of the state. Rabbi Avraham Yitzchak HaCohen Kook³⁴⁶ held that a strike is permissible only when its purpose is to bring the employer before an objective body that will determine what a fair wage is for the worker. Or when the same objective factor determined the wages of the workers and their conditions, but the employer refuses to comply with the ruling, the workers are allowed to strike and are forced to comply with the ruling.³⁴⁷ Therefore, Rabbi Kook called for the establishment of a court that would try to find a solution before using the strike weapon.

With the exception of Rabbi Kook, who is often quoted, it seems that there are currently two halakhic references regarding the right to strike. One is that a worker is allowed to stop his job (i.e., strike) in the middle of the contract period, but according to *Dvar HaAved*,³⁴⁸ it is forbidden.³⁴⁹ That is, a worker is

³⁴⁴ Clause 1A of Basic Law: Human dignity and liberty determine that its purpose is “[...] to enshrine the values of the State of Israel as a Jewish and democratic state in the Basic Law”. Clause 2 of the Basic Law: Freedom of occupation also uses the same language. Basic Law: The Knesset stipulates in Clause 7A that participation in elections is to be denied to candidates who reject “the existence of the State of Israel as a Jewish and democratic state”.

³⁴⁵ Basic Law, 5740-1980.

³⁴⁶ The first Ashkenazi chief rabbi in the Land of Israel. Was a judge, traditional Kabbalist and thinker. Considered one of the fathers of religious Zionism.

³⁴⁷ Rabbi Yaakov Ariel's commentary provided at the link: <https://www.toraland.org.il/22746>

³⁴⁸ The definition in *Dvar HaAved* is when a loss is caused to an employer in an existing thing and not only a profit is withheld from him (Gaon Rabbi Shlomo Israeli, Year of the Year 5727, p. 87), at the link:

allowed to strike only if he does not cause a loss to the employer. However, if the employer does not provide the worker to what he is entitled to by law, the worker may strike under the law that “a man makes his own law”.³⁵⁰ The second reference to the right to strike is similar to Rabbi Kook’s opinion in that it transfers the dispute to a neutral party, except that while Rabbi Kook favoured the establishment of a court, this opinion favours arbitration, as stated in the Sanhedrin Tractate: *Zabla* – “One arbitrator for him”. That is, each party chooses one arbitrator on its behalf, and the two agreed arbitrators arbitrate another agreed arbitrator and the parties undertake to accept any decision of the arbitrators.³⁵¹

Rabbi Uziel proposed to sue the employers, assuming that there the employers would be obligated to pay what was required, if indeed the lawsuits were just. According to Rabbi Uziel, even if the strike causes loss to others it is legal and legitimate. In the opinion of Rabbi Zvi Spitz, since it is customary in Israel and around the world for workers to strike when there is a labour dispute, it must be assumed that the employer received the workers knowing that they may strike in the future, and therefore they may strike – even if it harms the employer. In any event, the picture that emerges from most opinions is that a trade union is not authorised to declare a strike that results in economic harm to the employer and other circles, unless the strike has validity and approval from an objective body – a court or an agreed arbitrator.³⁵²

<https://www.yeshiva.org.il/midrash/14790>. See also the words of Rabbi Gideon Binyamin Shalita, who relies on the answer of The Gaon Rabbi Shlomo Zalman Auerbach – Tehumim 5, page 289. at the link: <https://www.yeshiva.org.il/midrash/6391>

³⁴⁹ Shulchan Aruch, Hoshen Mishpat, C-E, at the link: <https://www.yeshiva.org.il/midrash/14790>

³⁵⁰ Gaon Shapira, Shvilin booklet 33-35, p. 64 and p. 71 at the link: <https://www.yeshiva.org.il/midrash/14790>

³⁵¹ The words of Rabbi Yaakov Idles Shalita at the link: <https://www.yeshiva.org.il/midrash/6391>

³⁵² (Rabbi) Yehuda Zoldan, *The Tzedakah of Judea and Israel – Land, State and Law, Tzedakah and Society, Education*, (Torah VeHa’arezt Institute, 2009), pp. 352-356.

Chapter 5: Types of Strike

5.1 Introduction

In this chapter I will seek to make a distinction between types of strikes. The distinction between types of strikes is necessary to advance in this study, because the type of strike can carry with it recognition (and consequently legitimacy) of the strike and provide the strikers with protection under the law and case law, and vice versa: failure to recognise the type of strike will deprive the strike of its legitimacy and the striking workers will risk various sanctions and in particular – the possibility that the court will order an end to the strike.

Over the years, the nature of demands raised in a labour dispute has changed and so has the identity of the person from whom the demands are made, following two developments: the state's over-involvement in economic life and the labour relations judging process. These developments are reflected in the fact that demands raised by workers do not concern issues that can be settled in negotiations with the employer but relate to a policy of privatisation or breaking a monopoly and opening it up to competition, and in that the entity against whom the workers are striking and in whose hands is the decision whether to accede to the demands raised during the strike is a different entity from the employer who continues to be harmed without having the power to accede to the demands of the workers.³⁵³

Thus, the classification of strikes became more diverse. In the legal literature and case law, there is a distinction only between an economic strike, a political strike, a quasi-political strike and a sympathy strike. Common to these types of strikes is the recognition and legitimacy granted to only some of them and the identity of the person against whom the strikes are directed. Apart from this distinction, it seems that no previous attempt has been made to build an orderly distinction base between the existing types of strikes. Therefore, this chapter will present, first, the existing distinction between strikes. Later on, this chapter will also propose a distinction between strikes in terms of scope (wide scope or partial scope); a distinction between the timing of the strike (before signing a collective agreement and after signing a collective agreement); and a distinction between a lawful strike, and an unlawful strike / wildcat strike. In the summary of the chapter, we will learn that the distinction between the types of strikes is not dichotomous as revealed at first glance and we will ask ourselves whether the boundaries of the classification of strikes meet – and if so, in which situations.

I will open the discussion on the different types of strikes according to the classification proposed above.

5.2 Classification of Strikes in terms of their Legitimacy and the Identity of the Person to whom they are Addressed

As explained above, the ruling and subsequently – the legal literature, created a distinction between the different types of strikes according to the identity of the person against whom the strike is directed, and as a consequence – recognition of the strike and the legitimacy granted to it.

A. The General Strike

The traditional approach reflected in the legislation³⁵⁴ has seen a strike carry with it economic demands related to working conditions, labour relations and procedures for hiring and dismissing workers and

³⁵³ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), pp. 1444-1445.

³⁵⁴ Clause 2 of the Labour Disputes Settlement Law, 5717-1957 defines a labour dispute: “For the purposes of this Law, a labour dispute is a dispute in one of the matters listed below that arises between an employer and its workers or some of them, or between an employer and a workers’ organisation or between an employers’ organisation and a workers’ organisation,

rights and obligations arising from labour relations. This strike was perceived as an Economic Strike and was recognised as legitimate. Ruth Ben-Israel explains that the economic strike has three characteristics³⁵⁵:

- A. The strike is aimed at an employer who seeks to infringe on workers' rights or refuses to improve their working conditions.
- B. The demands raised in the context of the strike can only apply to the rights of workers.
- C. It is only permissible to strike on issues that can be agreed in a collective agreement.³⁵⁶

In other words, for a strike to be recognised as an economic and legitimate strike, it must meet the above three cumulative characteristics. Any strike that does not meet all three characteristics is not an economic strike. An economic strike will entitle the striking workers to all protections (except for the exception in clause 37A of the Labour Disputes Settlement Law which deals with an unprotected strike).³⁵⁷

An economic strike can also be directed against the sovereign – when the sovereign acts as an employer in the public sector or when the sovereign uses its governmental power to change existing arrangements in the employment relationship between workers and employers or to prevent such arrangements.³⁵⁸

Is it possible to limit an economic strike? This question arose in the Cinematheque case.³⁵⁹ First, the National Labour Court noted that “the economic strike was recognised in Israeli law years ago when a strike was allowed and few restrictions were imposed on it”.³⁶⁰ The court also mentioned its policy of acting with self-restraint and restricting or prohibiting the strike only in extreme cases of serious harm to the general public.³⁶¹ Subsequently, the court ruled that the theory of balances and proportionality should be applied to it.³⁶² The court, in considering whether there is room to impose restrictions on the freedom to strike, is also required to examine the cause of the strike, the parties' conduct in negotiations and their good faith, the stage of negotiations and the impact of the issuance or non-issuance of orders on its going ahead, the severity of the cumulative damage caused by the strike and the number of injured persons, whether unreasonable and irreversible damage was caused to the employer, third parties and the public and the duration of the strike.

excluding the individual dispute; And these are the topics: (1) the conclusion, renewal, amendment or cancellation of a collective agreement; (2) determining working conditions; (3) employment of a person or non-employment or termination of employment; (4) Determination of rights and obligations arising from employment relations”.

³⁵⁵ Ruth Ben Israel, *The Strike in the Mirror of Public Law: The Strike, The Political Strike and Human Rights* (Baranzon Book, Vol. III, Golel, 5767-2007) p. 114.

³⁵⁶ Clause 1 of the Collective Agreements Law, 5717-1957 defines a collective agreement: “A collective agreement is an agreement between an employer or employers' union and a workers' union made and submitted for registration under this Law, regarding employment or termination of employment, working conditions, labour relations, rights and obligations of the organisations to the agreement, or in some of these matters”.

³⁵⁷ Guy Mundlak, *A Quasi-Political Strike, A Quasi-Political Instruction: Reflections on Legal Distinctions and Their Instruction*, (Studies in Law 25 (2), November 2001), pp. 247-346.

³⁵⁸ Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), pp. 1461-1462.

³⁵⁹ Business (National) 64/09 Power to the Workers – Democratic Workers' Organisation v. Jerusalem Cinematheque – Israeli Film Archive.

³⁶⁰ *Ibid*, clause 5 to the judgment of the then President of the National Court, Steve Adler.

³⁶¹ *Ibid*, clause 6 to the judgment of the then President of the National Court, Steve Adler.

³⁶² *Ibid*.

B. The Political Strike

The political strike is directed against the sovereign not in his status as an employer, but as the one in charge of setting an overall economic policy that is not acceptable to the working public. The workers believe that the government's policy and/or plan will restrict their steps and impair their ability to deal with the determination of their rights as workers, and therefore seek to strike.³⁶³

In the Khatib case,³⁶⁴ the High Court called for a political strike. In this case, teachers who were also residents of the Golan Heights decided to leave their jobs, because they wanted to protest the enactment of the Golan Heights Law,³⁶⁵ under which the Golan Heights was annexed to the State of Israel. The then President of the High Court, Meir Shamgar, stated in his ruling on the problematic nature of the political strike: "The political strike – which comes to impose an act or omission on the authorities that they would not have been prepared for without the strike – raises many constitutional and social problems: in a democratic regime, it opens the door to the strikers' will to control the elected democratic institutions and to direct proceedings according to the coercive power of non-governmental bodies and even of minority groups with de facto coercive ability".³⁶⁶

The court disqualified the legitimacy of such a strike, because in this conduct the workers seek to intervene in legitimate legislative proceedings and force the democratically elected legislature from having their say. Hence, in the opinion of the court the political strike undermines the foundations of democracy. This conclusion was repeated and sharpened in the Bezeq case as well: "This is a strike that is considered illegitimate, in that it seeks to undermine the sovereign's authority to establish economic policy with a broad view of the good of the general public and to subdue it to the demands of the workers; it is a strike that seeks to intervene in legitimate legislative procedures of the legislature within its authority not by persuasive methods accepted in our democratic system, but by forceful intervention that seeks to impose on the legislature what is inappropriate in its eyes. This strike is illegitimate, and there is justification for preventing it".³⁶⁷

Non-recognition of the political strike in the State of Israel is in line with the spirit of the International Labour Organisation, which ruled through the Committee on Freedom of Association that a pure political strike is not included in freedom of association.³⁶⁸

Is there room to recognise the political strike? On the one hand, there is a claim that there is, and it finds a number of reasons for this. The importance of criticising the government and preventing government tyranny; in view of the existing connections between capital and government, it is important to make the voices of workers who are not represented in a similar way to capital in the corridors of government; the difficulty of influencing decision makers similar to the various elites.³⁶⁹ The fact that the strike is a derivative of human dignity and liberty and serves as a tool for freedom of expression also supports this conclusion. On the other hand, Frances Raday denies the option of recognising the political strike.³⁷⁰ In

³⁶³ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1462.

³⁶⁴ HCJ 525/84 Nabil Khatib v. The National Labour Court, Ruling M (1) 673.

³⁶⁵ Golan Heights Law, 5741-1981.

³⁶⁶ Clause 14 of the judgment of the then President of the High Court, Meir Shamgar.

³⁶⁷ HCJ 1074/93 Attorney General, Bezeq – The Israeli Media Company Ltd. v. The National Labour Court in Jerusalem et al., clause 49 (2) 485, pp. 490-505, clause 32 to the ruling of Judge Dov Levin.

³⁶⁸ Compilation of Decisions of the Committee on Freedom of Association. 2018 para. 760-761 340th Report Case no. 2413 para. 901: 344th Report Case no. 2509 para 1245. Quoted in Lilach Litor, *ibid*, p. 161, fn. 45.

³⁶⁹ Lilach Litor, *ibid*, p. 163.

³⁷⁰ Francis Raday, *Political Strikes and a Fundamental Change in the Economic Structure of the Workplace*, (Law, 1994), p. 159.

her opinion, the freedom to strike is a freedom that accompanies the freedom of collective negotiations and is possible only in cases where the employer must and can reach a collective agreement with the workers. From this Raday concluded that political strikes could not be recognised.

We can learn about the tension of the political strike and the difficulty of deciding whether a particular strike is directed against the sovereign not in his status as an employer but as one in charge of setting an overall economic policy from the May 2003 exchange of words between High Court Judge Mishaal Cheshin and the Histadrut prosecutor. Judge Cheshin asked: “Is not your strike a political strike?” and received the response: “This is an economic strike against an employer seeking to infringe on worker rights”. Cheshin went on to ask: “You are actually striking against the government’s recommendations to anchor the economic plan in the law. This is very problematic. You say to the Knesset: You must not discuss this matter. You are threatening the Knesset. You are putting a gun to its head. Am I not correct?”. The Histadrut’s attorney responded: “It is the government that is threatening the workers with a gun. **The employer changes its hat and becomes a sovereign and legislator**”. Cheshin asked, “And if the law is passed?” and the prosecutor replied: “Workers have the right to strike”. Cheshin responded: “You are saying that the Histadrut is above the Knesset”³⁷¹ (emphasis does not appear in original).

In any event, it can be assumed that classifying a strike as economic or political is not only dependent on circumstances of time and place, but also involves the exercise of discretion that may differ from one judge to another.

C. The Quasi-Political / Combined Strike

The quasi-political strike was recognised, for the first time, in the Bezeq³⁷² case discussed in the High Court. At the heart of this affair was the government’s decision to open international calls³⁷³ to competition, and Bezeq workers – who feared that this decision would lead to the dismissal of many of them – went on strike. Although Bezeq’s management itself objected to the government’s decision, it remained helpless in the face of workers’ demands, because it did not have the power to change it, while for workers the strike was a tool that sought to impact on their working conditions.

The High Court ruled that the Bezeq workers’ strike is a combination of a political strike and an economic strike, because the strikers sought to oppose both the change in their work terms (thus meeting the characteristics of the economic strike) and the political policy of the sovereign (thus meeting the characteristics of the political strike). In other words, a quasi-political strike is in the middle between the economic strike and the political strike, but even though it is directed towards the sovereign, its goal is to achieve goals in the field of labour relations.

Ultimately, the High Court decided to recognise the quasi-political strike as long as it is directed against the employer and confirmed its existence only for a short time³⁷⁴ (this is in contrast to the economic strike whose existence is not limited in time). Such a strike would be recognised as legitimate if,

³⁷¹ Shlomi Levya, *Law, Strikes and Everything In Between*, Business and Economics, 2004 158: pp. 21-22.

³⁷² HCJ 1074/93 Attorney General, Bezeq – The Israeli Media Company Ltd. v. The National Labour Court in Jerusalem et al., Ruling 49 (2) 485, pp. 490-505.

³⁷³ Hereinafter: *The Government’s Decision or The Decision*.

³⁷⁴ In his clause A Quasi-Political Strike, a Quasi-Political Resolution: Reflections on Legal Distinctions and their Instruction, (Studies in Law 25 (2), November 2001), pp. 247-346, Guy Mundlak explains that *short time* ranges from an hour to a working day – see fn. 12 on page 351. Over the years, there has been a change in the court’s approach and this has been approved for longer periods of time – as stated in Nir Ganinsky’s book, *The Constitutional Status of the Right to Strike*, (2014), p. 203, fn. 306.

according to its main objective test, it was clarified that the workers were on strike for an issue unrelated to their working conditions in the narrow sense, but it affects them directly.³⁷⁵

The issue of the quasi-political strike came up for discussion in two interesting judgments, and in both, the National Court was required to consider the concept of the **Combination Strike**.

The first ruling dealt with the teachers' union strike in upper secondary schools.³⁷⁶ The teachers' union made claims that were partly economic and partly political, against implementation of a reform committee report that sought to bring about reform in the education system. In this ruling, similar to the ruling in the Bezeq case, the court used the main objective test in order to classify the strike. The court also coined the Combination Strike – a strike that revolved around both economic and political demands. If a strike has salient economic characteristics – it will be considered permissible but limited, and in the words of the ruling: “Thus, the teachers' strike that is the subject of our discussion holds, on the one hand, aspects of a quasi-political strike and a strike in matters that are in the employer's prerogative. This, insofar as it revolved around reducing the number of students in the classrooms and adding teaching hours. On the other hand, the strike has key economic aspects. Regarding these aspects, this is a permissible strike. The conclusion is that this is a *combination* strike. This matter is considered in an examination of the proportionality of the strike and making the necessary balances, that is, it is more limited according to its nature”.³⁷⁷

The second ruling³⁷⁸ dealt with a strike that the Histadrut asked to hold on the issue of working conditions of contractor workers in the economy. On the one hand, the court considered the strike to be of a legitimate economic nature since structural changes in society usually have considerable and general impact on the rights of many workers. On the other hand, the cause of the strike has a quasi-political aspect because its purpose is to constitute a means of pressure on the sovereign in order to change its moves since the Histadrut demanded a structural change in employment in the workplace, which is in fact a *reversal of privatisation*. The National Labour Court allowed the Histadrut to hold a general strike in the economy after ruling that the cause of the strike would be classified according to the main objective test. It will examine the dominant purpose of the strike, whether it is economic and legal or political and wrongful. In the circumstances of this case, the court determined according to the main objective test that this combination strike was leaning towards the dominant economic aspect of the dispute and that is the change of working conditions. It is therefore a legitimate cause for striking.

Can a labour dispute begin as quasi-political and later become economic, and as such give workers the right to use the strike weapon? The answer to this question is yes, as we will learn from the Ashdod Port affair. As early as 2013, Ashdod Port workers declared a labour dispute following the Israeli government's intention to reform its seaports. The Labour Court ruled that this was a quasi-political strike and for about seven and a half years prevented port workers from striking, by means of a restraining order. At the end of this period, after several applications for removal of the restraining order and lengthy dialogue proceedings, the Histadrut appealed to the National Labour Court and asked that it be allowed to strike again. The court ruled that the nature of the conflict had changed to a purely economic one: “[...] the center of gravity of the conflict has changed with time in accordance with the

³⁷⁵ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1462.

³⁷⁶ Collective Dispute (national) 20/07 State of Israel v. Teachers' Organisation in Upper Elementary Schools in Seminars and Colleges.

³⁷⁷ Ibid, clause 12 of the ruling of the then President of the National Court, Steve Adler.

³⁷⁸ General Collective Dispute 8375-11-11 Coordination Bureau of Economic Organisations v. The New Histadrut (dated: 2.2.12)

progress of the dialogue and the issues at stake. Initially, the strike was mainly aimed at the quasi-political aspects of the conflict [...] this state of affairs has changed. The conflict in its most recent incarnation is deeply rooted in the purely economic aspect”³⁷⁹ and as such allows port workers to strike. In other words, the nature of the strike, as learned from the ruling, has changed and so has its legitimacy.

In conclusion, the political and quasi-political strike raises considerable difficulties, as Nir Ganinsky explains. Their status is not as stable and entrenched as that of the economic strike and therefore, their status is also unclear and ambiguous.³⁸⁰ Ganinsky also explains that there are a number of reasons that support recognition of political / quasi-political strikes and among them – in most cases it is difficult to make a distinction between the economic distinction and the political / quasi-political distinction. This conclusion is also shared by Michal Shaked, who argues that there is no realistic distinction between *economic* and *political*, and that such a distinction is irrelevant and not applicable in real life and therefore leads to absurd results.³⁸¹

Through the political / quasi-political strike the goal that underlies the right to strike is fulfilled as part of the right to dignity; The right to strike is in fact a political right and therefore there is justification for striking on political issues. Against such arguments, the court’s rulings have repeatedly raised the unwillingness to recognise political / quasi-political strikes for fear of a “slippery slope” – a particular government decision will not be well received by workers, who went on strike to change it.³⁸²

D. Sympathy Strike

To understand what a sympathy strike³⁸³ is, the following example is used: In Factory X, there is a labour dispute between the workers and their employer. Workers from Factory Y come to their help and use their strike weapon with their employer – even though he is not related to the labour dispute and cannot comply with the demands of Factory X workers. In other words, workers go on strike to advance goals that do not pertain to their working conditions, but to the working conditions of other workers.

The scope of support and expression of solidarity is not limited to belonging to the same workers’ union whose members are involved in the initial strike, nor even the same geographical area. For example, the relationship between sympathiser strikers to the workers who are sympathised may be: factory sympathy – among groups of workers in the same factory; inter-factory sympathy – among workers in several factories; local sympathy – among groups of workers or the workers from a number of factories in the same area; industry sympathy – among workers from different factories of different employers in the same industry; national sympathy – among workers in different sectors in the same country, even when it comes to different workers’ unions; international sympathy – among workers and workers’ unions in different places around the world.³⁸⁴

In this strike, as in the political strike, the employer is helpless because he cannot accede to the demands of the workers, he is not connected to the labour dispute and probably, neither do his customers. Hence,

³⁷⁹ General Collective Dispute, 40815-07-13 Tel Aviv and Central Chamber of Commerce, Association of Chambers of Commerce v. The New Histadrut et al. (given on 27/12/2020), clauses 13-14 to the ruling of the Vice President, Justice Ilan Itach.

³⁸⁰ Nir Ganinsky, *The Constitutional Status of the Right to Strike*, (2014), p. 202, p. 206.

³⁸¹ Michal Shaked, *Theory of the Prohibition of the Political Strike*, (Labour Law Almanac, 1999), p. 195.

³⁸² Ibid, pp. 209-212.

³⁸³ The sympathy strike is also referred to in case law and literature as the empathy strike, solidarity strike, secondary strike, and support strike.

³⁸⁴ Haim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, (Baranzon-Bnei Sabra Book, 2004), pp. 766 – 767.

it is clear why in different countries sympathy strikes are forbidden, or restrictions have been imposed on them due to the difficulties they raise, as stated.³⁸⁵ For example, in Germany,³⁸⁶ as a rule, a sympathy strike is illegal and only in exceptional cases will exceptions be recognised for which it will be possible to strike. In the United States³⁸⁷ the attitude towards sympathy strikes is negative and the American legislature has ruled that sympathy strikes are prohibited in the sense that they are treated as an unfair act of the workers' union. In the United Kingdom³⁸⁸ a law was passed in 1980 under which only workers directly involved in the labour dispute are allowed to take sanctions against a given legal entity. This definition includes workers of the legal branch, *direct* suppliers and customers as well as business partners to whom the work was transferred following the dispute. This is a technical definition that opens the door to many manoeuvres and British employers have used this legislation to thwart labour disputes through a fictitious division of the factory into several legal entities. For example, the press mogul Rupert Murdoch, who created separate legal entities for departments in the newspapers under his control and set up idle entities designed to create a distinction between suppliers and customers and the newspapers (buffer companies). These measures were taken to prevent the existence of *direct* suppliers and customers whose workers are entitled to hold a sympathy strike. The British government also used this technique in some sectors of the economy, such as education (each school is defined as a separate unit) and medicine (some hospitals are separate units). In Sweden,³⁸⁹ on the other hand, it has been ruled that a sympathy strike is legitimate as long as its sole purpose is to help other workers, as long as the sympathy strikers garner no benefits. In Norway,³⁹⁰ the strike being joined (by the sympathy strike) is required to be legitimate in itself.

Despite the prevailing attitude in the world which seeks to prohibit or limit the sympathy strike, it is customary in Israel to see a sympathy strike as legitimate, according to the High Court ruling in the Shavit³⁹¹ case, which was also repeated in the Elco³⁹² case: “We do not have a general statutory definition of a strike, and in this matter the concise definition given in the above-mentioned Shavit case can be used as follows: “A striker is a person who, without severing his employment relationship with his employer, stops working together with other workers in order to obtain his demands from his employer or to help other workers obtain their demands from their employer”. A work stoppage of the latter kind, when workers come to the aid of other workers, is what people call a sympathy strike. At the same time, it should be emphasised that apart from the Shavit affair and the Elco affair, in which the sympathy strike was mentioned twice as an aside, since then the sympathy strike has not been mentioned further in Israeli case law, compared to the economic strike that was recognised as a constitutional right. The reason for this may be the fact that the sympathy strike is rare in Israel.³⁹³

Why, then, is the sympathy strike recognised as legitimate despite the difficulties it raises? The answer to this question lies in historical economic and social reasons and its main point is the desire to better balance the power of employers with the power of workers, which is sometimes perceived as inferior to

³⁸⁵ Lilach Litor, *ibid*, p. 171.

³⁸⁶ Haim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, *ibid*, pp. 783-784

³⁸⁷ *Ibid*, pp. 784-785.

³⁸⁸ Sarah Zubner, Dan Lahav, *ibid*, pp. 3-4

³⁸⁹ *Ibid*, p. 782, and Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), p. 1463.

³⁹⁰ Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), p. 1474.

³⁹¹ CA 573/68, *Shavit v. Hanan et al.*, Ruling 26 (1) 516, 520. In this case, it was claimed that the Histadrut caused the strike at Shavit Cinema illegally.

³⁹² H CJ 566/76 *Elco Electro-Mechanical Factory Ltd. v. National Labour Court*, Ruling 31 (2) 197, 207. For more on the Elco case – see Chapter 13.8.1.

³⁹³ Haim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, *ibid*, p. 770.

that of employers. Participation in a sympathy strike, as a legitimate strike, is the expression of collective power.³⁹⁴

E. Interim Summary

So far, four types of strikes have been reviewed: economic, political, quasi-political (or combination) and sympathy. As I have shown, each of these strikes differs in its terms – and as a result – in the recognition it receives. The conclusions are illustrated in the table below³⁹⁵:

	Entity Against which the workers are striking	Demands raised in the strike	Recognition of the legitimacy of the strike in Israel	Additional restrictions³⁹⁶ on the strike in Israel
Economic Strike	Direct employer	Refers to working conditions / labour relations	Recognised	None
Political Strike	Against the sovereign (that is not the employer)	Not due to working conditions / labour relations	Not recognised	None (because it is not recognised)
Quasi-Political Strike / Combination Strike	Not against an employer	Refers to work conditions but also to the sovereign's policies	Recognised according to the main objective test: as long as it is mainly economic, it is legal	Short time only
Sympathy Strike	Not against a direct employer	Refers to the work conditions of other workers	Recognised	Demands must be legitimate

Table 7: Conclusions by strikes type.

From Table 7 we learn that while the economic strike and the sympathy strike are recognised in Israel, the political strike is not recognised and the quasi-political strike is recognised only according to the main objective test. The economic strike is directed at the direct employer, as opposed to the sympathy strike that is not directed at him. The political strike is directed against the sovereign and the quasi-political strike is not necessarily towards the employer.

Similarly, the demands raised in the context of the strike are different. While the demands raised in the context of an economic strike relate to working conditions or labour relations, this is not the case in the context of a political strike. In a quasi-political strike, the demands do apply to working conditions but also to sovereign policy. And in a sympathy strike, the demands relate to working conditions – but of other workers. The restrictions that apply to a strike derive from its recognition: the economic strike has no additional restrictions (beyond those discussed in the chapter on restrictions on the right to strike in Israel), the demands of the sympathy strike must be legitimate and the duration of the quasi-political strike must be short.

³⁹⁴ Ibid.

³⁹⁵ Hereinafter: Table 7.

³⁹⁶ Additional restrictions beyond those discussed in Chapter 3.

5.3 Classification of Strikes by Scope: Full Strike and Partial Strike / Sanctions

The scope of disabling activities designed to generate outputs can also be a method in itself for differentiating and classifying strikes.

A Full Strike describes the cessation of all activities designed to generate outputs or services. This is in contrast to a Partial Strike, also called a sanction, which describes a deliberate disruption to the proper course of work that is not a full strike. Such a disruption can take various forms – for example: a Focus Strike – in which different groups of workers strike each time³⁹⁷; a strike in which workers do not perform some routine tasks expected of them – such as a strike in which the telephones are not answered, or in which strikers do not work overtime, or do not see the public. Such a strike can also be a strike in which workers reduce their activities, for example, a strike in which workers work in an *emergency format* or in a *Saturday format*. A partial strike can also be a *slowdown strike* (grève perlée); a *strict strike* (working while over-adhering to the rules which harms the work process),³⁹⁸ or an *Italian strike*. This strike was born to describe the legal situation that prevailed in Italy during the reign of Benito Mussolini – who forbade workers to strike.³⁹⁹ In response, workers showed up for work, but deliberately slowed the pace of their work until productivity dropped. This strike, as mentioned, is called an *Italian strike*, *work to rule strike*, or *slowdown strike* because it describes a slowdown in the pace of work.

The phenomenon of partial strikes began to develop after the *Strike Cooling Down* Law was passed in 1957. The background to this was the fact that the Histadrut tended not to approve strikes at all and strikes in services in particular, which exposed strikers to legal sanctions and especially to non-payment of wages or strike fees if they went on a full and visible strike. The partial strike turned out to be a weapon intended to put pressure on the employer by disrupting normal work procedures, but without excessive risk. Therefore, most partial strikes are unapproved strikes.⁴⁰⁰

How does the Labour Court treat a full strike versus a partial strike? The answer to this question was given in the Ordan case⁴⁰¹: “In a full and regulated strike, the result is clear – one does not have to perform work and does not perform it, and the other does not have to pay wages. In partial strikes and sanctions, which deal with the actual performance of work, the result is different, although it is not a fundamental difference. The difference is in the side effects. Even in a strike expressed as *sanctions*, the individual contract as it exists between the parties is suspended. This contract requires the worker to perform certain jobs, fulfil a certain role or be prepared for it, and the employer to pay an agreed wage. This contract is suspended with the activation of sanctions. The direct result is that the employer is free to say to each and every worker participating in the sanctions: “The contract with you has been suspended and inactive for now. We do not have a contract for part-time work, we do not have a contract for a different job, in scope, nature and conditions, from the contract we had before today, and I refuse to receive from you a service other than the one required by the contract”. This is not a lockout, but, rather,

³⁹⁷ See, for example: General Collective Agreement (National) 4081507-13 Tel Aviv and Central Chamber of Commerce – Association of Chambers of Commerce – The New Histadrut, clauses 72-73 of the ruling.

³⁹⁸ See, for example: Labour Court Hearing (National) 35/ 4-5 Ginstler – State of Israel, Ruling 8 3, clauses 44-47 of the ruling.

³⁹⁹ According to Benito Mussolini, labour is not a commodity or an exchange value but a *national duty*. The class war is a distortion that must be uprooted from life, the state is the supreme and objective expression of the national interest and strikes and lockouts are a *national crime*. Therefore, as early as 1926, strikes were banned as well as the existence of non-fascist trade unions. Workers and employers were required to be incorporated into corporations according to economy industries. The corporations determined wages, production quotas and product prices. Labour disputes were resolved in arbitration within the corporations.

⁴⁰⁰ Yair Tzaban, *The Strike – Analysis* (Position: Monthly for Peace and Socialist Change, 1978), p. 9.

⁴⁰¹ For more on the Ordan case – see Chapter 10.6.1.

a refusal to make a new contract, instead of the contract for full-time work – a contract for part-time work, whatever the expression of the part-time may be. In this situation, the result is no different from that of a full and regular strike – this is one of the options the employer has. The other option, and also in the hands of the employer and not in the hands of the worker, is that the employer agrees to receive a service different from that required by the contract from the striker; so, in retrospect, a new contract was established temporarily, according to which the work is what the worker actually performs [...]”.⁴⁰² This case shows that from the point of view of the court during a full strike, the original employment contract signed between the employer and the workers is suspended. In contrast, in a partial strike the original employment contract is suspended and, in its place, the striking workers are perceived as offering the employer a temporary and new employment contract for the strike period, according to which they are willing to perform only some of the tasks defined in their original employment contract. The employer, in such a situation, has the right to receive a partial job (and also a strike) or the right to refuse it.

5.4 Classification of Strikes by the Timing of their Announcement – Before or After Signing a Collective Agreement

Labour law distinguishes between an economic dispute or a “dispute over the determination of rights” and a legal dispute or a “dispute over the exercise of rights”. An economic dispute is usually defined as a dispute that concerns the establishment of new rules, new conditions, a new norm that will form part of the new collective agreement that has not yet been signed. While a legal dispute concerns the application or interpretation of an existing norm, of existing and binding conditions in signed collective agreements.⁴⁰³

A. A strike declared before a collective agreement has been signed

From the restrictions that apply to a strike after the signing of a collective agreement (see below), we learn about the protections that the court seeks to extend to the strike before the signing of the collective agreement, and if during a collective agreement *industrial silence* applies to the parties, then a collective agreement has not yet been signed, and in particular a first collective agreement – this restriction does not exist.

In the IEC⁴⁰⁴ case, the president of the National Labour Court ruled as follows: “Economic Strike – this is a strike regarding a professional struggle and protection of working conditions, and is a strike that is mainly allowed. The economic strike has been recognised as legitimate since the early days of the state. Typically, this type of strike breaks out as part of negotiations to sign a new collective agreement, a demand to improve working conditions, prevent harm to them, and so on. Israeli law has imposed few restrictions on the economic strike, while adopting the rule that harming the employer is not sufficient reason to prohibit a strike. “When it comes to deciding the legality of an economic strike, the court must examine its proportionality, while drawing up the necessary balances between the freedom to strike and other fundamental rights that are at stake”.⁴⁰⁵ In the Cinematheque⁴⁰⁶ case, the National Court ruled,

⁴⁰² National Labour Court Hearing *ibid/ 2-35 Kozolovich Baruch et al. v. Ordan Ltd.*, Labour Ruling 12 200, at pp. 210-21, clause 10 of the Ruling.

⁴⁰³ Amnon Caspi and Ruth Kastiel, *Labour Relations* (The Open University, 2005), p. 221.

⁴⁰⁴ In this case, the question that came up for discussion was whether the refusal of IEC employees to operate a computer system is a proportionate and legitimate organisational measure as part of their fight against the planned structural change in the electricity sector in Israel.

⁴⁰⁵ Collective Dispute Appeal 23/07 IEC Israel – The New Histadrut, (dated: 10.1.2007).

inter alia, that no restrictions would be imposed on a workers' strike in a workplace where a *pioneering* workers' union has been established, in which a collective agreement was not signed, and in the words of the court president, Adler: "We believe that in cases where organisational measures are taken by a representative organisation in the circumstances of initial organisation in a factory, in order to reach the signing of a first collective agreement, and subject to the other considerations I have stated, no restrictions on the right to strike will be imposed except in exceptional cases".⁴⁰⁷

B. A strike declared after a collective agreement has been signed

We have already seen that the Labour Court ruled that any collective agreement implicitly includes a commitment relative to industrial silence.⁴⁰⁸ So even if the workers' union does not explicitly commit in a collective agreement to maintain industrial silence, it is still obligated.⁴⁰⁹ In other words – from the time a collective agreement is signed, the workers' union is obliged to maintain industrial silence and in general it can be said that its ability to declare a strike is limited. Why limited? Because even in a situation where the workers' union has signed a collective agreement, a distinction is made between "absolute industrial silence" and "relative industrial silence".

In the Makhteshim case,⁴¹⁰ the National Court analysed the collective agreement between the parties and concluded that the industrial silence at which the parties were aiming was broad, and concluded the established organisational silence was in fact a strike. In this case, when the workers' union learned that the company had been put up for sale without being informed and that there was a change in the budget for early retirement of workers, they decided to disrupt the factory's operations. The regional court, after analysing the provisions of the relevant collective agreements, ruled that there was no justification for the Histadrut to take organisational measures. The Histadrut and the workers appealed to the National Court, which upheld the lower court's ruling and stated that although the workers' commitment to industrial silence is relative and not absolute, they are not allowed to strike in protest of issues regulated in the existing collective agreement between them and the company.

In the case of the teachers' union,⁴¹¹ the National Labour Court also ruled that declaration of the strike was illegal because the New Horizons reform set the wage and working conditions of all teaching staff in the civil service, including middle school teachers. Thus, the teachers' union cannot represent the middle school teachers and declare their strike since the terms of their salaries are already regulated in said agreement.

At the same time, the determination regarding commitment to industrial silence on the part of the workers' union must be qualified, since the High Court recognised another type of strike – **The Strike in a Legal Dispute**.⁴¹² Such a strike occurs when an employer who signs a collective agreement with the workers' union violates his obligations. The High Court ruled in this case that workers have the right to

⁴⁰⁶ In this case, the management of Jerusalem Cinematheque requested to prohibit its employees from taking organisational measures or disrupting work. The Regional Court accepted the request, but the National Court overturned this decision in an appeal.

⁴⁰⁷ Collective Dispute Appeal 64/09 Power for Workers – Democratic Workers' Organisation v. Jerusalem Cinematheque – Israeli Film Archive (dated: 2/7/2009), clause 8 of the ruling of the President of the National Court, Steve Adler.

⁴⁰⁸ See Chapter 3, that discusses the restrictions on the right to strike in Israel.

⁴⁰⁹ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1513

⁴¹⁰ Collective Dispute Appeal 18/08 (National Labour) The New General Workers' Union, Makhteshim Workers' Council v. Makhteshim Chemical Factories Ltd. (dated: 18/11/2009).

⁴¹¹ Collective Dispute 55491-08-10, Collective Dispute 55490-08-10, State of Israel, Ministry of Education v. Teachers' Union in Upper Primary Schools (given on 1/9/2010).

⁴¹² HCJ 539/85 Histadrut et al. v. The National Labour Court et al., Ruling 40 (4) 834, at p. 838.

use the strike weapon, because if the employer does not honor his obligations, the workers' union cannot be expected to fulfil their obligation to maintain industrial silence.

5.5 Classification of Strikes in terms of their Legality: Lawful Strike, Unlawful Strike / Wildcat

Strike

The legal literature and case law define a Lawful Strike as a strike declared by and in the manner specified in the law, in the regulations of the workers' union and in the collective agreement (if any). While a strike that was not declared by someone who is qualified to declare it in the legislation and regulations of the workers' union, or there were defects in the process of declaring it such as failure to give prior notice or failure to wait 15 days until the actual strike (according to Clause 5A of the law⁴¹³). Such a strike is an unlawful strike or a wildcat strike (also, unauthorised strike, unofficial strike).

As I pointed out in Chapter 3, according to Clause 37A of the Labour Disputes Settlement Law, there is a distinction in the public service between a protected strike, which is a lawful strike, and an unprotected strike, which is an unlawful strike. The unprotected strike, which is the wildcat strike, is still a strike, only the workers who take part in it do not enjoy any protections. The Labour Court also saw the wildcat strike as a strike for all intents and purposes. That is, failure to comply with the established procedure for declaring a strike does not impair its recognition under the Labour Court. However, given that all the procedural conditions for its existence have not been met, the Labour Court has the authority to issue a restraining order against it and in the words of the court: "The nature of a strike that must be notified in accordance with Clause 5A above (reference to Clause 5A of the Labour/ Disputes Settlement Law - me: A.A.M) is "not abstract, but is related to a given labour dispute trying to be settled [...] however, a strike does not cease to be a strike, simply because no notice was given under Clause 5A of the law, but this strike is unlawful and therefore, "given the totality of the circumstances, the court has the power to issue a restraining order".⁴¹⁴

What is the status of the wildcat strike? Ruth Ben Israel explains that there are three approaches to a possible answer to this question.⁴¹⁵ According to the first approach, the act of the wildcat strike can be seen as a strike for all intents and purposes despite the defect that clung to it at the time of its declaration, preventing it from being a lawful strike. Recognition of the wildcat strike gives it all the protections and immunities available to strike declarers, strikers and the strike. According to the second approach, the wildcat strike can be seen as an act of strike but its status will be inferior to that of the lawfully declared strike and this means that the strike declarers, strikers and the strike will enjoy more limited protections compared to the lawfully declared strike. Whereas according to the third approach, the wildcat strike will not be regarded as a strike at all, hence the striking workers will not enjoy any protection or immunity. According to Ben Israel, a wildcat strike in the private sector was perceived by the court as a strike for all intents and purposes, i.e., the court used the first approach. While a wildcat strike in the public sector was perceived by the court using the second approach, in which protections for strikers are limited.⁴¹⁶

⁴¹³ A restriction by virtue of Clause 5A of the Labour Disputes Settlement Law, 5717-1957, as specified in Chapter 3.

⁴¹⁴ Labour Court Hearing 53/4-13 Bromine Compounds Ltd. – Histadrut, Be'er Sheva Workers' Council, Labour Courts Ruling 26 179, at pp. 187 - 191, clause 18 of the ruling.

⁴¹⁵ Ruth Ben-Israel, *The Status and Consequences of the Wildcat Strike* (The Advocate), pp. 150-151.

⁴¹⁶ *Ibid*, p. 151.

5.6 Classification of Strikes in terms of the Sector in which they Occur

In the chapter *The Strike in Israel*, I discussed the distribution of strikes between various sectors that exist in the State of Israel – the private sector, the public sector and the (no longer existing) Histadrut sector.

I showed that the vast majority of strikes that have taken place over the years in the Israeli economy have taken place in the public sector, and I have looked at the possible reasons for this as well as the share of the private-business sector among strikes in Israel.

5.7 Classification of Strikes as a Protected Strike or Unprotected Strike

Clause 37A of the Labour Disputes Settlement Law provides that a public service strike may be a Protected Strike or Unprotected Strike. We need to understand what a protected strike is and what an unprotected strike is and what their consequences are.

What then is an unprotected strike? An unprotected strike is any of the following:

- A. A strike of public service workers whose cause is working conditions or wages, and which occurs with the existence of a collective agreement is an unprotected strike.
- B. A strike of public service workers when a collective agreement did not apply to them, which was not declared by a competent workers' union and not approved by it, is also an unprotected strike.
- C. A strike in the public service for which prior notice of 15 days in accordance with Clause 5A of the Labour Disputes Settlement Law, was not given to the Chief Labour Relations Officer and the employer.

What are the consequences of an unprotected strike?⁴¹⁷

- A. An unprotected strike in the public service does not suspend the personal employment contract between the worker and the employer. Hence, a worker taking part in an unprotected strike violates his personal employment contract.
- B. According to Clause 37C of the Labour Disputes Settlement Law, when we are dealing with an unprotected partial strike of workers in public service, litigation must take place in the Labour Court. In the first stage, the employer must apply to the Labour Court and obtain a declaratory judgment according to which his workers are on a partially unprotected strike. The issuance of such a judgment entitles the striking workers to a partially unprotected strike at half their contractual wage. In the second stage, the employer or worker can apply to the Labour Court in a personal claim and claim wage differentials, if either of them believes payment of half the contractual wage does not reflect the rate of work actually performed. In other words, an unprotected partial strike in public service entitles striking workers to half their wages, while private sector workers who strike a partial strike will in no case be entitled to half their wages when they strike (but to “worthy wages”⁴¹⁸).
- C. Workers taking part in an unprotected strike do not enjoy the immunity provided for in Clause 62 of the Torts Ordinance, which deals with exemption from claims dealing with a breach of contract. I will deal with this issue in detail in the chapter *Strike Damages*.

⁴¹⁷ Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), pp. 1535-1537, 1551-1552.

⁴¹⁸ As stated in the Ordan case: National Labour Court Hearing, *ibid*/ 35-2 Kozolovich Baruch et al. v. Ordan Ltd., Labour Ruling 12 200, at pp. 210-21, clause 10 of the Ruling.

D. The ban on strikes on the basis of wages during the existence of a collective agreement invites the declaration of “disguised strikes due to wage matters on completely different grounds”, in the words of MK Moshe Nissim when the section of the law was approved in the Knesset.⁴¹⁹

5.8 Summary

In this chapter we learned about different types of strikes using different methods for differentiating and classifying strikes. As stated, the case law and the literature have distinguished between an economic strike, a political strike, a quasi-political strike and a sympathy strike. In this chapter, I discussed the differences between these strikes and saw that the emphasis between them is reduced to the factor to which the strike is directed and the demands that arise within it.

In addition, I also discussed the distinction between strikes in terms of scope, to the distinction between the timing of the strike (before signing a collective agreement and after signing a collective agreement); and between the legality of the strike – lawful or an unlawful / wildcat strike.

It is important to note that some researchers also include a *virtual strike* as another type of strike. But, since there is no consensus in the literature on this subject (some classify it as a stand-alone type, and some include it among the other types of strikes), since the virtual strike has been activated only three times in the history of the State of Israel and because the literature in this field is poor – this chapter did not include the virtual strike in the strike classifications, and a discussion will take place later in the work.⁴²⁰

According to Aharon Barak, the constitutional right to strike – as a derivative of human dignity – is not limited to this or that type of strike. Any strike action that falls within the authority of the workers’ union falls within the scope of a strike in the constitutional sense. The distinction between types of strikes is a balance between the right to strike and the freedom of occupation, the right of movement, etc.⁴²¹

The justification that Aharon Barak finds for the strikes’ classifications is not acceptable to Michal Shaked. She holds that there is room to abolish the classifications of strikes, since the classification was born in the legal system (and not in the legislature) in order to reduce the right to strike. Shaked claims that the classification of the strikes allows the court to determine that some of the strikes are unlawful and thus it reduces the use of strike weapons. According to Shaked, the court does so out of a neo-liberal view that seeks to reduce the recognition of social rights and labour rights.⁴²² Hence, there is no doubt that Shaked would be vehemently against the approach of Menachem Goldberg, who favoured the possibility that the court is the one to define what a strike is: “It may well be that this issue has been left to the discretion of the courts on the grounds that the needs and situations in the field of labour relations and labour law are dynamic and changing, and a definition in the law, which by its nature is rigid, does not change over time, and may be an obstacle while the courts will have to enforce the law”.⁴²³

Compared to Barak and Shaked, Ruth Ben Israel presents a middle position. According to her, it is not only desirable to re-examine the legal status of the right to strike in Israel, but also to examine a change in the boundaries of the strike institution,⁴²⁴ and even “expand the strike umbrella established in labour

⁴¹⁹ Minutes of Session No. 287 of the Seventh Knesset (p. 1990), 22/03/1972.

⁴²⁰ See Chapter 16.

⁴²¹ Aharon Barak, *Human Dignity – The Constitutional Value and the Constitutional Right*, (Nevo, 2014), p. 860.

⁴²² Michal Shaked, *ibid*, pp. 219-220

⁴²³ Menachem Goldberg, *The Strike in Law, in the Collective Agreement and in Case Law*, The Advocate General 5747-1987, p. 52.

⁴²⁴ Ruth Ben-Israel, *The Status and Consequences of the Wildcat Strike* (The Advocate 37, 5747-1987), p. 158.

law, and include behaviours that have a particular political aspect”.⁴²⁵ Ben-Israel justifies her conclusion by saying that the government has become an active factor in the labour relations system and in negotiations on labour agreements. In addition, the government is the largest employer in the economy; The public sector has grown and expanded and the fact that the labour relations system in the economy has changed from a bilateral system (between a workers’ union and an employer) to a tripartite system in which the government also negotiates.⁴²⁶

On the face of it, the onlooker will see that there is no connection between the types of strikes and that this is a dichotomy that can be described using the following diagram⁴²⁷ that illustrates how the classification boundaries of strikes do not meet:

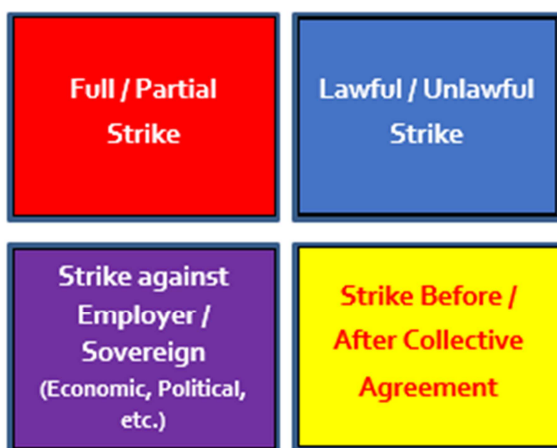


Figure 4 :Limitations of strike classifications.

Do the limits of the classification of strikes not actually meet? It can be assumed that an economic strike may be full (or partial), lawful (or unlawful) and also possible before a collective agreement (or after signing it), as shown in the following diagram:⁴²⁸

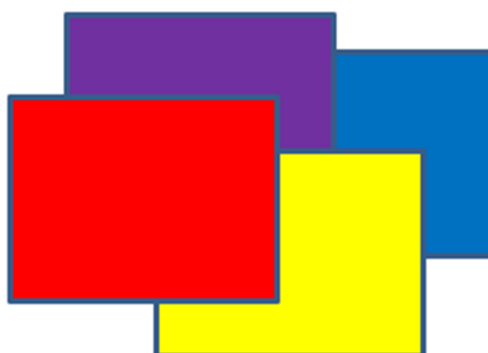


Figure 5 :Overlapping strike classifications.

⁴²⁵ Ruth Ben-Israel, *The Political Strike* (Comments regarding H CJ 525/84 Nabil Khatib et al. v. The National Labour Court et al., and Labour Court Hearing 44 / 3-29 – State of Israel – Nabil Khatib et al., *Studies in Law* 11, 5746-1986, p. 622.

⁴²⁶ Ibid, pp. 618-619

⁴²⁷ Hereinafter: Figure 4

⁴²⁸ Hereinafter: Figure 5

At this stage of the discussion there is room to dwell around this question. It seems that examining the limits of the classification of strikes using the following table⁴²⁹ may lead to a number of interesting and important conclusions.

		Economic Strike	Political Strike	Quasi-Political Strike	Sympathy Strike
Scope of the Strike	Full	1 V	2 X	3 V	4 V
	Partial	5 V	6 X	7 V	8 V
Legality of the Strike	Legal	9 V	10 X	11 V	12 V
	Wildcat	13 V	14 X	15 V	16 V
Timing of the Strike	Before signing a collective agreement	17 V	18 X	19 V	20 V
	After signing a collective agreement	21 X	22 X	23 V	24 V

Table 8: Strikes classifications: examination of limits.

Of the 24 possible strike options (described in cells 1 - 24 in the table above), we learn that in the State of Israel there can be, at most, only 17 strike options. And no more.

It shall be noted that sympathy strikes and quasi-political strikes relate by their very definition to issues not regulated in a collective agreement (cells 23 and 24 in the table), hence they do not violate the obligation to maintain industrial silence,⁴³⁰ and are therefore considered as possible strikes.

Considering the review of the types of strikes and their characteristics and the restrictions on the right to strike as discussed, it can be concluded that the most common types of strikes and those that will benefit from the protection of the courts will be a full economic strike (Cell 1); a partial economic strike (cell 2); a lawful economic strike (9); and an economic strike before a collective agreement (Cell 17). And of these possibilities, the strikes that will most likely benefit from the full protection of the courts will be an economic strike – full or partial, lawful and before a collective agreement.

The reduction in strike options (as mentioned – from 24 options to only 17) can be attributed to two reasons. The first reason is that a political strike, in all its forms, cannot take place in Israel, for the reasons I have stated above. The second reason is that a strike after signing a collective agreement is also prohibited. Hence the obvious conclusion that not all the boundaries of the classification of strikes meet in Israel. For example, a wildcat-political strike after signing of a collective agreement, is not possible in Israel and the court will not support it.

⁴²⁹ Hereinafter: Table 8

⁴³⁰ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1515.

Chapter 6: The Causes of Strikes

6.1 Introduction

Historically, many scholars believe that strikes in the period before World War II were primarily intended to gain recognition of rights, such as the right to organise, the right to negotiate, and the legitimacy of the strike. Once the unions achieved these rights, the causes of strikes became mostly economic.⁴³¹ After World War II, the concept of the welfare state was formed. Growth of the welfare state was also the golden age of organised labour, and so was the use of strike weapons. Since 1950, the rate of strikes has been rising. For example, during these years there were extensive national and general strikes in Britain that revolved around wage struggles. In France, too, there was an increase in the rate of strikes after World War II, with the peak being recorded in 1968 when strikes encompassed about two-thirds of the French labour force.⁴³²

In the chapter *The Strike in Israel*⁴³³ we concluded that starting from the fourth decade (1980s) of the existence of the State of Israel, the use of strike weapons has become more and more common in the Israeli reality. If in Israel the use of strike weapons became frequent from the 1980s onwards, then in comparison with Western countries there has been an opposite trend. In the 1990s and early 2000s, Israel became the leading country in the world in the number of workers participating in strikes and in the number of strike days.

In the later 2000s, there was an increase in workers' unions in Israel, and as a result, announcements of labour disputes and strikes that began taking place in various sectors. In the Al Batuf⁴³⁴ case, the National Court declared that we are witnessing a "renaissance in the organisation of workers and its expansion".⁴³⁵ Among the many who joined the organised sector, it is worth mentioning a specific association – followed by one strike that broke out on December 10, 2012. I am referring to the strike of workers of Pelephone, a company belonging to the private sector. The consequences of this strike caused a real earthquake in the collective labour relations in the State of Israel in general, and in the use of strike weapons in particular. For the first time in the history of the cellular industry, a strike broke out. This strike lasted 26 days and included vociferous demonstrations in front of the company's facilities around the country, sympathy processions of thousands of workers from all the major committees in the economy and closure of service centers and the logistics warehouse. The Pelephone strike that ended successfully was a harbinger, as mentioned, in the cellular phone industry. Following organisation of Pelephone workers and their successful strike, a wide range of unionisations began in the cellular industry, including: workers of Cellcom (in 2013); workers of Partner (in 2014); and workers of Hot Mobile (in 2014) who even declared a labour dispute (April 2014). The echo of the Pelephone strike crossed industries – and new workers' unions were established in the credit card companies, communications and high-tech industries – some of which also had to declare labour disputes and strikes.

The aim of this chapter then, is to understand what causes workers in the State of Israel to declare a strike and take part in one? Among other things, we will consider the following questions: Why do strikes break out and what is the background to the strikes? And what theories exist in the research literature that explain the existence of strikes?

⁴³¹ Amnon Caspi and Ruth Kastiel, *Labour Relations Learning Guide* (The Open University, 2005), p. 261.

⁴³² Lilach Litor, *The Strike in Law, History and Politics* (2019), pp. 35-36

⁴³³ Chapter 3

⁴³⁴ In this case, two labour organisations competed for representation among the workers of the Al Batuf Regional Council.

⁴³⁵ Conflict Between Organisations 31575-02-13 The National Workers' Union v. The New Histadrut (dated: 9/9/2013).

6.2 The Causes of Strikes According to the Law

Clause 2 of the Labour Dispute Resolution Law⁴³⁶ sets out the matters in respect of which a labour dispute and a strike may be declared: (1) conclusion, renewal, amendment or cancellation of a collective agreement; (2) determination of working conditions; (3) employment of a person or non-employment or termination of employment; (4) determination of rights and obligations arising from labour relations.

Of course, the language of Clause 2 of the Law is very broad and covers almost every issue related to labour relations. Hence, drawing conclusions from the language of the law alone is not sufficient and requires us to look for answers in other sources as well.

6.3 The Causes of Strikes According to the Chief Labour Relations Commissioner

The Chief Labour Relations Commissioner (hereinafter: the **Commissioner**) publishes an annual Labour Relations Report on Strike Data.⁴³⁷ The Commissioner's reports summarise the strikes according to a number of criteria: causes of the strike, industries in which strikes broke out, sectors in which strikes broke out (public sector / private sector) and actual duration of the strikes.

In the chapter dealing with the restrictions that apply to the right to strike in Israel, I emphasised that workers' unions are not obligated to send notice of a labour dispute to the supervisor.⁴³⁸ On the other hand, they are obligated to send notice to the person in charge of a strike.⁴³⁹ Both the labour dispute notice form and the strike notice form use the same wording that the workers' union is supposed to fill in with reference to the details of the causes that led to the conflict or strike: "Matters in the dispute (full details):".⁴⁴⁰ From this wording, we learn that the workers' union sending the notice (of a labour dispute, or respectively, of a strike) is required to state the "matters of the dispute" and not the causes published in the commissioner's reports. The reasons stated in the Commissioner's reports are, therefore, the Commissioner's own interpretation of the "matters of the dispute" as specified by the workers' union itself in the form. The interpretation is the result of a review of press clauses covering the strikes and conversations conducted by workers of the unit for labour relations with the workers' unions, in order to understand why this or that strike broke out. Only in exceptional cases are workers of the Labour Relations Unit assisted by forms received by the Unit informing of a labour dispute or strike.⁴⁴¹

From a review of the Commissioner's reports one can discern several causes of strike as recurring over the years: demands for wages and other benefits; dismissal of workers; withholding wages; organisational changes; labour agreement; labour relations and discipline; worsening of working conditions; physical conditions; manpower; worker representation; factory recovery; outsourcing; other reasons. The Commissioner's reports do not specify the causes of the strike, and these often remain

⁴³⁶ Labour Dispute Resolution Law, 5717-1957

⁴³⁷ As of 2000, the Commissioner's reports are published online on the Commissioner's website: <https://www.gov.il/he/Departments/DynamicCollectors/strikes-reports?skip=0&limit=10>

⁴³⁸ The permission to send a notice regarding a labour dispute originates in Clause 5 of the Labour Disputes Settlement Law, 5717-1957, and Form 1 for notifying of a labour dispute was created, Labour Disputes Settlement Law, 5717-1957 (Clause 5), published in Regulations File 5731-1971 No. 2658 dated 28/1/1971, p. 496

⁴³⁹ The obligation to send notice of a strike or lockout originates in Clause 5A of the Labour Disputes Settlement Law, 5717-1957. Pursuant to this Clause, the Labour Dispute Resolution Regulations (Notices) 5717-1971 were enacted, and Form 2 for notifying of a strike or lockout was created, Labour Disputes Settlement Law, 5717-1957 (Clauses 5A and 5B), published in Regulations File 5731-1971 No. 2658 dated 28/1/1971, p. 496

⁴⁴⁰ Clause 6 – both for Form 1, Notification of a Labour Dispute, Labour Disputes Settlement Law, 5717-1957 (Clause 5), and for Form 2, Notification of a Strike or Lockout, Labour Disputes Settlement Law, 5717-1957 (Clauses 5A and 5B).

⁴⁴¹ Based on a telephone conversation the author had with Mr. Avner Amrani, Senior Director of International Relations at the Labour Relations Unit, on 17/01/2021.

obscure. For example, when the Commissioner's reports use the term *violence*, it could be thought that this was a strike that broke out against the background of violence on the part of the employer, but the intention is that we are dealing with violence used by consumers / customers towards workers.⁴⁴²

Before approaching a discussion about the causes of strikes, it is worth remembering that in many cases, the *real* reasons for the outbreak of a strike are not always those that the parties declare. To understand what causes a strike to break out, one has to go back to conflicts that unfold over long periods of time, with the accelerator to the outbreak of the strike being a marginal act of one of the board members, a misunderstood statement or any other event. That is, the causes of conflicts are profound and can stem from different situations and planes of conflicts that are not addressed over time.⁴⁴³ So the connection between the formal reasons for the strike declared by the workers' representatives and the informal and deeper reasons for the strike is often loose.⁴⁴⁴ The Labour Court is also aware of this fact, as Steve Adler writes, that in most collective bargaining proceedings the legal problem that emerges before the court is not the real problem between the parties, and therefore the emphasis in the courts on returning the parties to the negotiation table also brings them back to the discussion of the real problems that require their attention.⁴⁴⁵

At the same time and despite all the many biases and problems in the Commissioner's reports, it is interesting to draw attention to the distribution of strike causes over the years, as shown in the following table:⁴⁴⁶

⁴⁴² For example, in June 2022, it was reported that hospitals will be shut down for two days following an attack on a female doctor in Be'er Ya'akov, (Meital Yas'ur Beit Or: *Following an attack on a female doctor with an iron rod: hospitals and clinics will be shut down for two days*, Israel Hayom, 06/14/2022, <https://www.israelhayom.co.il/health/article/11643640>; Later that month, a bus drivers' strike took place following violence against them, (Roi Rubinstein: *Disruptions and traffic jams: Bus drivers on strike during rush hour in a number of cities*, Ynet, 06/26/2022, <https://www.ynet.co.il/news/article/rjkcwkv5c>; And a month later, a strike by bank employees broke out also due to violence, Globes service: *Following violence in the branches: Bank Hapoalim employees will strike tomorrow morning*, Globes, 07/26/2022, <https://www.globes.co.il/news/article.aspx?did=1001419352>.

⁴⁴³ Amnon Caspi and Ruth Kastiel, *ibid*, p. 263

⁴⁴⁴ *Ibid*, p. 264

⁴⁴⁵ Steve Adler, *Freedom to Strike as Reflected in Case Law*, (Branson Book – Bnei Sabra, 5760-2000), p. 483.

⁴⁴⁶ Hereinafter: Table 9. Data on the distribution of strikes are based on reports of the Chief Commissioner on Labour Relations as stated on the website: <https://www.gov.il/he/Departments/DynamicCollectors/strikes-reports?skip=0&limit=10>

2000	21.78%	16.67%	14.81%	7.41%	18.52%	1.85%	3.70%	-	9.26%	-	-	-	-	-	-	-	-	100.00%
2001	25.81%	17.74%	14.52%	6.45%	12.90%	3.23%	9.68%	1.61%	4.84%	-	3.23%	-	-	-	-	-	-	100.01%
2002	10.64%	19.15%	12.77%	19.15%	19.15%	-	10.64%	-	6.38%	-	2.13%	-	-	-	-	-	-	100.01%
2003	-	20%	18.33%	46.67%	5%	1.67%	5%	-	3.33%	-	-	-	-	-	-	-	-	100.00%
2004	18.37%	12.24%	28.57%	20.41%	8.16%	-	6.12%	-	6.12%	-	-	-	-	-	-	-	-	99.99%
2005	14.04%	5.26%	35.09%	36.84%	3.51%	-	1.75%	-	3.51%	-	-	-	-	-	-	-	-	100.00%
2006	25.71%	5.71%	34.29%	14.29%	5.71%	2.86%	5.71%	2.86%	2.86%	-	-	-	-	-	-	-	-	100.00%
2007	6.67%	6.67%	10%	16.67%	36.67%	-	6.67%	6.67%	6.67%	3.33%	-	-	-	-	-	-	-	100.02%
2008	21.43%	21.43%	14.29%	-	42.86%	-	-	-	-	-	-	-	-	-	-	-	-	100.01%
2009	20%	33.33%	-	6.67%	6.67%	13.33%	6.67%	6.67%	-	6.67%	-	-	-	-	-	-	-	100.00%
2010	41.67%	16.67%	8.33%	8.33%	16.67%	-	4.17%	-	4.17%	-	-	-	-	-	-	-	-	100.01%
2011	37.04%	14.81%	3.70%	3.70%	29.63%	-	-	-	3.70%	7.41%	-	-	-	-	-	-	-	99.99%
2012	54.17%	8.33%	4.17%	-	4.17%	-	-	-	8.33%	4.17%	-	12.05%	-	4.17%	-	-	-	100.01%
2013	24%	4%	4%	12%	4%	4%	28%	-	-	20%	-	-	-	-	-	-	-	100.00%
2014	19.23%	30.77%	3.85%	11.54%	19.23%	-	7.69%	-	3.85%	3.85%	-	-	-	-	-	-	-	100.01%
2015	23.68%	26.32%	5.26%	10.53%	10.53%	-	-	-	5.26%	10.53%	-	7.89%	-	-	-	-	-	100.00%
2016	28.13%	28.13%	-	3.13%	21.88%	-	3.13%	-	3.13%	-	-	12.50%	-	-	-	-	-	100.03%
2017	39.58%	22.92%	2.08%	2.08%	18.75%	-	-	2.08%	-	2.08%	-	4.17%	-	4.17%	-	-	-	99.99%
2018	26.83%	-	12.20%	7.21%	24.39%	-	-	-	2.44%	2.44%	-	7.32%	-	-	-	-	-	100.01%
2019 ⁴⁷	6.98%	25.58%	4.65%	6.98%	6.98%	-	4.65%	-	6.98%	6.98%	-	6.98%	-	2.33%	-	17.17%	18.6%	100.02%

Table g: Causes for strikes according to reports from the Chief Labor Relations Commissioner.

⁴⁴⁷ It is worth noting that in some years (2001, 2002, 2004, 2007, 2008, 2010, 2011, 2012, 2014, 2016, 2017, 2018, 2019) the total causes do not always amount to 100%, a figure that originally appears in the Commissioner's reports.

⁴⁴⁸ In 2019, another cause of strike was added that did not appear earlier in the Commissioner's reports, namely: structural changes. The total number of strikes that broke out in 2019 due to this cause stands at 2.33%.

The most common causes of strikes between the years 2000-2019 in order, are: demands for wages and other benefits; dismissal of workers; work agreements; organisational changes; withholding wages; worsening of work conditions; manpower; worker representation; outsourcing; labour relations and discipline; violence; physical conditions; factory recovery, and finally – demands for tenure. The frequency of causes of strikes can be illustrated using the following diagram:⁴⁴⁹

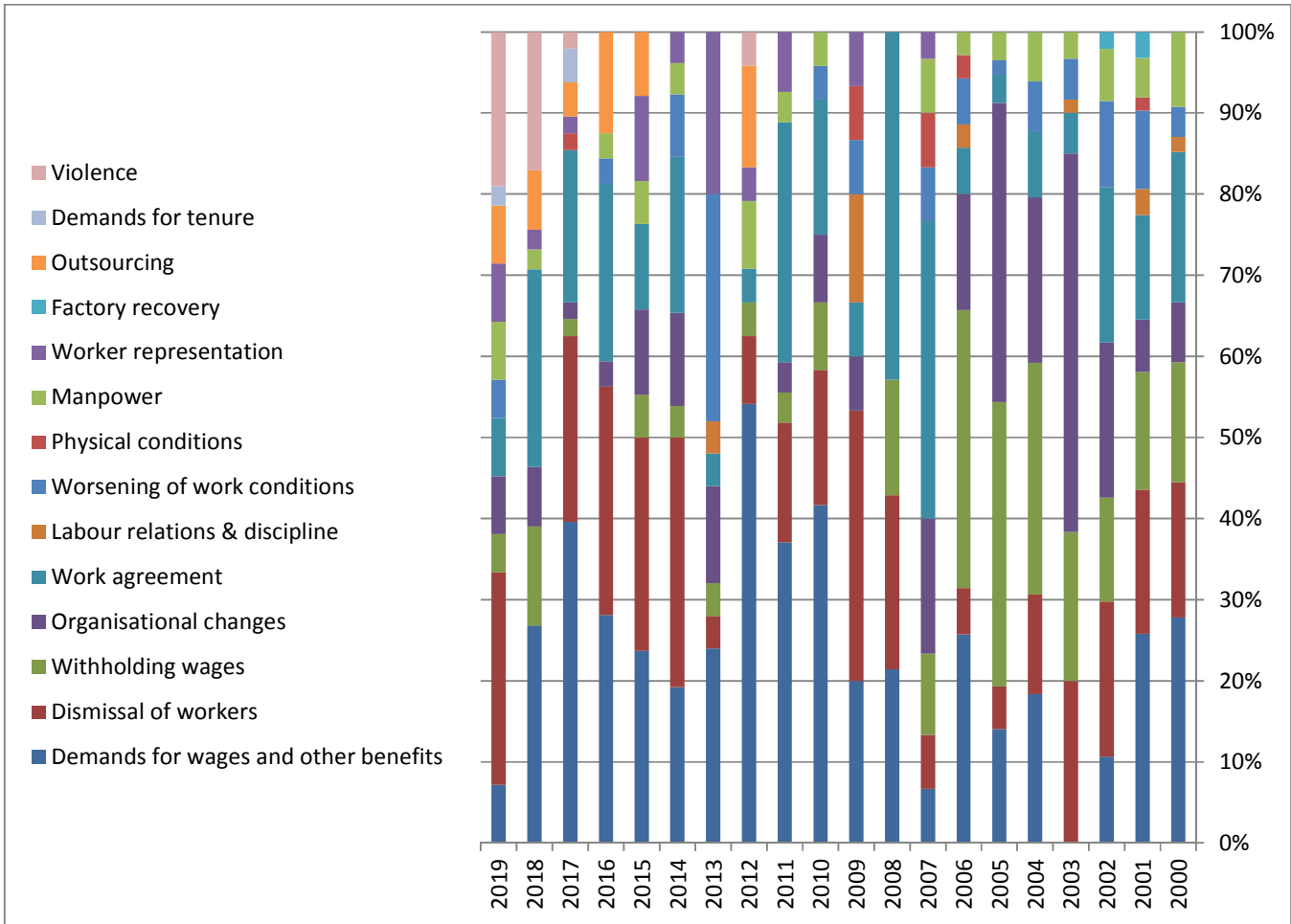


Figure 6: Diagram of the frequency of causes of strikes.

⁴⁴⁹ Hereinafter: Figure 6.

The frequency of strike causes can also be shown in the following table:⁴⁵⁰

Type of Cause	Frequency 2000-2019
Demands for wages and other benefits	471.76 %
Dismissal of workers	335.73 %
Work agreement	315.38 %
Organisational changes	240.17 %
Withholding wages	230.91 %
Worsening of work conditions	98.93 %
Manpower	80.83 %
Worker representation	67.46 %
Outsourcing	51.36 %
Labour relations & discipline	26.94 %
Violence	23.32 %
Physical conditions	19.89 %
Factory recovery	5.36 %
Demands for tenure	4.17 %

Table 10 :The frequency of strike causes.

From that stated in Table 9 and the reasons for the strike (which are listed in Graph 1 and Table 10), we learn that economic and worker job security reasons (demands for wages and other benefits; dismissal of workers; work agreements; organisational changes; withholding wages) play a significant role in labour relations and the most common causes for the outbreak of strikes in Israel as of 2000 onwards. Among the pseudo-economic reasons – worsening of working conditions; manpower; worker representation; outsourcing, as can be learned from the database listed above. Finally, the least common causes for strikes in Israel over the specified years are *basket reasons* – labour relations and discipline; violence; physical conditions; factory recovery.

Here too, the aforesaid must be somewhat doubted since the Commissioner’s reports classify each strike on only one ground. That is, if a strike broke out because of a demand for wages and other benefits and also because of dismissal of workers, it would be classified as only one of these causes and not both. It is clear that there is a bias in this method of working.

In the opinion of Caspi and Kastiel, the reasons for strikes can be classified into several categories – economic claims; politics; psychology (alienation due to boring or monotonous work); socio-psychological reasons (“rebellion” against the employer); reasons related to struggles within the union.⁴⁵¹

6.4 Theories Explaining Strikes

There are nine theories in the literature that explain the existence of strikes: the Marxist approach to strikes; the anarchist-syndicalist approach to strikes; the economic approach to strikes; the economic-political approach to strikes; the institutionalist approach to strikes; the administrative approach of human relations in industry; the industrialism approach to strikes; the behaviouralist approach and the eclectic approach.

⁴⁵⁰ Hereinafter: Table 10.

⁴⁵¹ Amnon Caspi and Ruth Kastiel, *ibid*, p. 264.

A. Marxist Approach to Strikes

This approach grew out of the general point of view of the trade union. In Marxist ideology, the trade union was intended to play only a secondary role in the class war that would abolish the capitalist socio-economic arrangement. Because the trade union compromises with the socio-economic system it creates a relaxation of class consciousness instead of deepening it. The strike may be a *school of labourers* (according to Engels), in which they are educated towards a comprehensive and all-encompassing class struggle in the capitalist system. But in retrospect both trade unions of workers and the various employers against whom they operate the strike weapon ignore the expressions of struggle between the classes embodied in the strike.⁴⁵²

B. Anarchist-Syndicalist Approach to Strikes

The anarchist-syndicalist ideology sees the violent action of trade unions as a major means in the class revolution that will abolish the existing capitalist socio-economic arrangement and bring about the society of the future. The anarchist-syndicalists aspired to establish a decentralised state consisting of independent working units (syndicates) connected by a federalist connection. The main way to eradicate the capitalist state, is a direct action of the workers against the employers and against the state. The main form of expression of this direct action is the general strike, which has been given a purifying and cleansing meaning. This ideology had an impact on the trade union movement in France and Italy, especially in the period between the two world wars.⁴⁵³

C. Economic Approach to Strikes

The economic approach to strikes holds the premise that workers and employers are rational people. Accordingly, individuals in the labour market act as rational players to enhance their expected benefit and reduce risks. Similarly, the workers' union and the leaders of the organisation will economise their steps in labour disputes in a way that will maximise their benefit. A declaration of a strike, then, will be considered in cases where the cost of the benefit of the strike is likely to yield the best result. Neoclassical economic approaches emphasise that economic factors such as asymmetric situations of information between workers and employers or uncertainty affect labour disputes. These factors have implications on cost-benefit calculations performed by workers' and workers' unions and on their decision-making, in accordance with the rational choice approach. If the information is complete there is no point in starting a strike, as the strike imposes many costs on both parties.⁴⁵⁴

Thus, there are economic approaches to strike that are based on asymmetry in information and gaps in worker information. Certain economic approaches examine the impact of the economic situation in a country or industry and information on this subject to which workers are exposed, on the tendency to go on strike. The economic data made public and known to workers, affect their rationality and decision-making regarding strike action.⁴⁵⁵

Other researchers highlight other aspects of the economic approach and especially the effect of inflation. In times of rising inflation, workers are more likely to strike. The reason being the many price increases in the economy and erosion of workers' wages that lead them to use the strike as a means of raising

⁴⁵² Ibid, p. 256.

⁴⁵³ Amnon Caspi and Ruth Kastiel, *ibid*, p. 256.

⁴⁵⁴ Lilach Litor, *ibid*, pp. 76-77.

⁴⁵⁵ *Ibid*, p. 77.

wages.⁴⁵⁶ Other economic approaches hold that situations of high profitability in the industry and clear information about rising wage rates in the industry in general, affect the tendency of the workers' union to go on strike. If the data indicate that there has been a real wage increase in the industry, the workers' union will tend not to go on strike at the end of the agreement, as in this situation there is a pretty high chance that workers will be able to receive wage increases anyway in negotiations.⁴⁵⁷ Approaches based on asymmetry of information focus, at times, on the effect of wage increases resulting from collective wage agreements on workers' willingness to strike. Local direct wage increases resulting from wage agreements in a factory or in certain sectors reduce the tendency of workers in the particular factory or sector to go on strike, as the workers' union enjoys some certainty during this period that there will be wage increases anyway.⁴⁵⁸ The economic approach of Ashenfelter and Johnson holds that workers' leaders are influenced by considerations of political power. Therefore, when they understand that the firm is not willing to accept demands for wage increases and improved conditions, they prefer to go on strike in order to maintain their power.⁴⁵⁹

Another economic approach that focuses on situations of uncertainty and lack of information is the approach of game theory. This approach holds that strikes are affected by situations of uncertainty. In such situations the players as rational beings will choose the best option, in their opinion, in these conditions of uncertainty. The approach holds that strikes break out in situations of uncertainty between workers and the employer. In conditions of uncertainty, the strike option is chosen as the best option against the background of lack of information, and even if there was access to information, this option would not have been selected.⁴⁶⁰

D. Economic Political Approach to Strikes

This approach sees the strike as not only a tool for a limited local struggle but also a tool for a class political struggle. If the regime is a democratic social where there is a close connection between the workers' parties and the government, the workers are able to influence and bring about changes in social and economic policy through the existing political model. Thus, they may lead to the pursuit of full employment and policies that benefit workers without the need for strikes. In a social democratic or corporatist regime the workers' union enjoys great power in the political arena and therefore does not need the means of strikes. The growing influence of the parties operating in the institutionalised political channels, largely obviates the channel of protest and struggle in a number of ways. First, the uniformity of interests between the leaders of the workers' parties and the leaders of the trade unions and the common desire to ensure continuity of the labour government. Since the strike poses a threat to this government, investigators assume that their government could be harmed. Second, union leaders see conflict resolution through political negotiations, within the party framework, as a more effective way to protect workers' rights.⁴⁶¹

Gall argues that in recent years, many strikes have been political strikes directed against the government and against the political system. Despite an overall decline in the number of strikes, there has been an increase in the phenomenon of general mass and large-scale political strikes. According to Gall, major

⁴⁵⁶ Ibid, p. 78.

⁴⁵⁷ Ibid, p. 79.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid, p. 80.

⁴⁶⁰ Ibid, pp. 80-81.

⁴⁶¹ Ross, A. M., Paul T. Hartman, *Changing Patterns of Industrial Conflict*, John Wiley, 1960. Pp. 42 – 61.

political strikes have broken out in France, Greece, Italy, Spain and Portugal. He explains the existence of these strikes in a relative rift between left-wing parties in the political system and workers' unions.⁴⁶² These findings do not coincide with Hibbs's 1970s study of a number of Western countries, which found that left-wing parties were no more successful than right-wing or center-right parties in preventing a rise in strikes. The degree of coordination between the workers and workers' parties is far from perfect, and even if there is a high degree of harmony between them, strikes originating from the militancy of the workers themselves still occur.⁴⁶³

E. Institutional Approach to Strikes

The institutional approach to strikes holds that the factors that affect the players operating in a particular arena and the outcomes are the institutions, norms and rules that apply in that arena. In the context of labour relations, rules and norms that apply in the field of labour relations in a particular country affect the players operating in the labour market and the results evident in the extent and nature of labour disputes.⁴⁶⁴

Institutionalist approaches to strikes hold that the rules that create a particular structure of collective labour relations in the state, and the power and strength of workers' unions affect the rate of strikes. According to these institutionalist approaches, the structure of labour relations and the power of workers' unions are of great value because they affect the ability to organise large groups of workers' unions in protest of various issues. The structure of labour relations and the rate of organisation into workers' unions affect the extent of strikes. The option of workers' unions launching a strike is affected not only by economic conditions such as the situation in the market, but mainly by the rate of organisation of the collective system. Institutional approaches hold that the parameter of the structure of the collective bargaining system in the country, which affects the scope of strikes, is known to be important. High concentration of negotiations leads to a decrease in the volume of strikes, in countries that also have a high rate of organising. The rate of organising and changes in the rate of organising are also explanatory variables for the increase or decrease in the volume of strikes. A decrease in the rate of organised workers leads to a decrease in the volume of strikes.⁴⁶⁵

F. Administrative Approach of Human Relations in Industry

This approach is associated with the name of the social psychologist Mayo. In his opinion, industrial conflict in general and a strike in particular are manifestations of a morbid phenomenon in the factory. The way to eliminate this issue is to restore the spontaneous cooperation that prevailed between the workers and their managers in the pre-industrial and pre-urban society. Planning and operation of the spontaneous collaboration was entrusted to Mayo by the elite of industry executives, from whom he demanded in his writings to increase the satisfaction and fulfilment of the workers and the identification of working groups with the goals of the organisation. Thus, Mayo opposed any interest group in the

⁴⁶² Gall, G. (2012). *Quiescence Continued? Recent Strike Activity in Nine Western Economies*. *Economic and Industrial Democracy* 34 (4), 667 – 691, quoted in Lilach Litor, *ibid*, p. 84, fn. 38-39.

⁴⁶³ Hibbs, Douglas A. Jr, *Industrial Conflict in Advanced Industrial Societies*, *American Political Science Review*, col.70,4, 1976, pp. 1033 – 1058. And see also: Hibbs, Douglas A. Jr, *On the Political Economy of Long-run Trends in Strike Activity*, *British Journal of Political Science*, 1978,8, pp. 153 – 175.

⁴⁶⁴ Lilach Litor, *ibid*, p. 85.

⁴⁶⁵ *Ibid*, pp. 86-87.

factory that prevented formation of spontaneous cooperation, including the interest group of trade unions.⁴⁶⁶

G. Industrialism Approach to Strikes

The industrialism approach emphasises that the profile of the factory, the industry and the production technology affect strikes. The size of the organisational unit in which the strike flares up and the nature of production affect labour disputes and strikes. The smaller the company and the lower the volume of production, which is a production process that requires knowledge, trade secrets and expertise and the use of sophisticated technologies, the less the tendency to strike. In a large factory that performs mass production, no personal relationship is created between the workers and management. The work is routine and wears workers down. In a small organisation and in an intimate environment, better working relationships are forged that are characterised by closeness and informal relationships. Therefore, most disputes are resolved through dialogue and there is no need to strike.⁴⁶⁷

Market structure and the location of the factory in that market affect strikes. The larger the factory's share of the market, the lower the tendency to strike. Therefore, in competitive markets and in cases where the factory struggles for its place, the tendency to strike increases. Such a factory, as opposed to a monopolistic factory, finds it difficult to offer its workers high wages or improved working conditions. The trend of declining industrialisation, the shift from manufacturing to services also leads to a decrease in the volume of strikes because the services industries are less inclined to use the strike weapon. In addition, a decrease in the employment industries in which the rivalry between workers and the employer tends to be high also leads to a decrease in the volume of strikes. A model of a small and less organisational bureaucratic enterprise in which the worker can express himself, allows him flexibility and discretion, the work is more diverse and less monotonous and it also leads to a decrease in the tendency to strike.⁴⁶⁸

H. Behaviouralist Approach to Strikes

The behaviouralist approach analyses the underlying reasons for the pattern of mass political participation such as strikes. The approach seeks to trace the reasons for the political participation of individuals in society. It may be that emotions, thoughts, anxieties, satisfaction, or dissatisfaction influence behaviour. The approach sees actions such as a strike as clearly political behaviour and not an economic or semi-economic action. The strike is seen as political behaviour in the sense that it expresses an attitude towards the political system similar to a demonstration or participation in elections. The behaviouralist approach holds that actions taken in a particular arena are influenced by behavioural characteristics and characteristics of the individuals involved, their perceptions and emotions – both the individuals involved in a particular political and social activity and the leaders of those individuals.⁴⁶⁹

The behaviouralist approach sees strike as a means of expressing worker dissatisfaction. According to this approach, a strike breaks out against the background of dissatisfaction among workers and it serves as a means of collective protest for the workers. The behavioural approach called the Theoretical Realist Approach points to reasons for worker dissatisfaction: inequality in the distribution of income between employers and workers and workers' job insecurity, asymmetry in power and control over decision-

⁴⁶⁶ Amnon Caspi and Ruth Kastiel, *ibid*, p. 257.

⁴⁶⁷ Lilach Litor, *ibid*, p. 90.

⁴⁶⁸ *Ibid*, pp. 91-92.

⁴⁶⁹ *Ibid*, p. 96.

making during work between workers and employers, and the treatment of worker work as a commodity or goods without emphasising the human aspect.⁴⁷⁰

One of the behavioural approaches is the common voice of the workers, the Collective Voice Approach which offers various explanations that can lead to strikes. These explanations lie in the human factor involved in the strikes. Thus, the more militant the workers' leaders are in negotiations, and they are by nature militant or they are under a system of pressure that causes them to be forced to adopt a militant approach, the greater the tendency to strike. Among the factors that create a militant tendency among workers' leaders are internal politics within the workers' union and internal pressures that are exerted on the leaders of the workers' union and personal hostility. The nature of employers and the way the factory is managed by them also has an impact on the existence of strikes. Thus – emphasising aspects of factory stability, giving greater autonomy to workers and discretion in carrying out the work, will lead to a reduction in the number of strikes, and vice versa.⁴⁷¹

6.5 Summary

In this chapter I sought to understand what makes workers in the State of Israel declare a strike and take part in it. I reviewed grounds for strikes as stipulated and permitted in Israeli law, grounds for strikes as evidenced by the Chief Commissioner's reports on labour relations and theories that exist in the research literature that explain the existence of strikes.

Caspi and Kastiel argue that achieving high wages, improved working conditions and job security through collective bargaining have always been the main goals of workers' unions. In the period after World War II until the early 1980s, workers' unions demanded and received improved working conditions through collective bargaining, and if necessary, they forced it on employers through a strike in its various forms.⁴⁷² The grounds for strikes breaking out, as presented in this chapter, support this conclusion.

As mentioned, this chapter also reviewed various approaches that seek to explain the strike phenomenon. It seems that today, it is common to explain the strike through another approach – the ninth approach, referred to as the Eclectic Approach, that is, based on a combination of several factors operating simultaneously, in parallel or separately. Factors include – **Economic tensions**: due to a disparity between the workers' desire for achievements in the areas of wages and working conditions, and the willingness or ability of employers to provide them, whether due to competition or due to other factors. **Social tensions**: between different groups in the population (not necessarily between workers and employers). The disparities that cause social tensions are disparities in wealth, economic / social status, status or political opinions (civil service strikes cannot be explained on the basis of economic tensions between employers and workers, as well as in the public sector as a whole). **Psychological tensions**: between those in authority (managers, employers) and those who must carry out the instructions (workers). Tensions can develop due to many reasons, such as differences in the personality characteristics of both parties, or poor training of managers for management positions, non-participation of workers in solving problems directly related to their position and more. **Organisational tensions**: existing in organisational systems and stemming from the dominant managerial school in the organisation (scientific management, human relations, human resources). Different management schools have different

⁴⁷⁰ Ibid, p. 94.

⁴⁷¹ Ibid, pp. 95-96.

⁴⁷² Amnon Caspi and Ruth Kastiel, *Labour Relations in the Age of Globalisation*, (Open University, 2010), p. 43.

answers to the question “how should the organisation be run and what are the main points of its activities?”.⁴⁷³

This chapter also reviewed causes of strikes, as evidenced by the annual reports of the Chief Labour Relations Officer. From the reports we learned about the prevalence of the causes for the outbreak of strikes in Israel and from them we concluded that economic reasons and employment security of workers are the decisive factor in the outbreak of strikes in Israel from 2000 onwards: demand for wages and other benefits; dismissal of workers; work agreements; organisational changes; withholding wages. Followed by – pseudo-economic reasons – such as worsening of working conditions; personnel; worker representation; outsourcing. And finally, the less common reasons for strikes in Israel in the specified range of years are “basket reasons” – which include labour relations and discipline; violence; physical conditions; factory recovery.

The economic reasons and some of the pseudo-economic reasons can lead to the strikes declared for these reasons being considered economic strikes, which carry with them economic demands that can deal with working conditions, labour relations, procedures for hiring and dismissing workers and rights and obligations arising from labour relations. As we will learn (in the chapter on types of strikes)⁴⁷⁴, economic strikes are legal and legitimate strikes in the State of Israel, and therefore it is not surprising that the causes of formal and declared strikes, even ostensibly, are the economic strikes.

⁴⁷³ Ibid, pp. 257-258.

⁴⁷⁴ Chapter 5.

Chapter 7: The Strike as a Means of Pressure

7.1 Introduction

The term *Pressure* is frequently used to characterise strike action. This term is prevalent in court rulings, in the publications of researchers in the field and even in the jargon of leaders of labour unions and worker strikes. The purpose of this chapter is to move us towards the questions at the heart of this study – why is a strike considered a pressure tool? And what alternative means of pressure exist for a strike?

Therefore, this chapter will be dedicated to an examination of the strike as a means of pressure.

7.2 The Strike as a Means of Pressure in the Eyes of the Judiciary

Strikes have been and still are perceived by the judiciary as an action, a means or a tool of pressure taken by the workers in the context of their professional struggle. In fact, perception of the strike in this way has been repeated as an underlying theme in the rulings of the High Court and the Labour Court over the years.

One of the first rulings in which the term *Pressure* was used to describe the action of the strike was in the Khatib case.

In this case, teachers belonging to the Druze community and residents of the Golan Heights, declared a protest strike following application of Israeli law in the Golan Heights, by virtue of the Golan Heights Law,⁴⁷⁵ and therefore, they were absent from work. About four months after the strike broke out, the Ministry of Education warned strikers that it does not accept their strike and that they must return to their jobs, otherwise they will be seen as having resigned. When the Ministry of Education tried to hire other teachers instead of the striking teachers, the latter submitted a petition to the Labour Court which eventually reached the High Court. In its ruling, the High Court explained that the term *strike* is not explicitly defined in Israeli law, and may take on a different meaning depending on the context in which it appears. Hence, the High Court tried to define what a strike is in its eyes and ruled as follows: “A strike is a **coordinated pressure action**, taken by a group of workers in the context of the workers’ professional struggle with an employer to achieve demands regarding their working conditions, or regarding demands of other workers presented to their employer”.⁴⁷⁶ In the end, the High Court of Justice ruled that the teachers’ failure to show up to work was not the result of a labour dispute with the employer, but rather a political decision, born by political parties, and hence the High Court of Justice refused to consider the workers’ action a strike.

The High Court’s definition of the strike in the Khatib case was repeated many times in rulings and literature,⁴⁷⁷ and therefore, I shall expand on it.

A review of the High Court's definition shows that in order for a strike to be recognised as such and to be entitled to legal protections, it must meet four cumulative conditions:

⁴⁷⁵ Golan Heights Law, 5742-1981.

⁴⁷⁶ H CJ 525/84 Nabil Khatib et al. v. The National Labour Court et al., Ruling 40 (1) 673, 701.

⁴⁷⁷ See, for example, the words of Justice Ayala Procaccia in H CJ 1181/03 Bar Ilan University v. The National Labour Court, Ruling 64(3) 204. Chaim Baranzon and Assaf Baranzon, *The Sympathy Strike – Its Status and Proportionality*, (Baranzon-Bnei Sabra Book, 2004), p. 766.

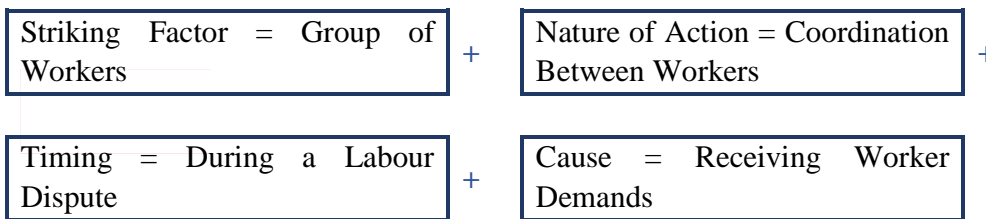


Figure 7 :High Court definition for a strike

A strike that meets these conditions is also an act of pressure.

In other rulings,⁴⁷⁸ Israeli judges have also given their opinion on the pressure that accompanies a strike.

In the Ordan⁴⁷⁹ case, it was ruled: “As for a strike, in its broadest sense, as stated, all the coordinated collective actions of the following workers constitute a **means of pressure** on the employer”.⁴⁸⁰

In the Life Guard case, in which the question arose as to whether beach lifeguards in Tel Aviv were violating collective agreements by going on strike, this definition was repeated again: “This court has already ruled that as for a strike, all coordinated collective actions of the following workers will constitute a **means of pressure** on the employer to bring him to comply with their demands”.⁴⁸¹

In the Hebrew University case, the university petitioned the court with a request to prohibit veterinarians employed by them from going on strike. The veterinarians’ strike was planned for the end of the academic school year, in order to increase its damage. The court ruled that: “A full or partial strike (including sanctions) constitutes a legitimate **means of pressure** on the part of the workers whose purpose is to force the employer to advance their demands”.⁴⁸²

In the Chambers of Commerce case, which dealt with a petition submitted by the Association of Manufacturers, the Banks Association, the Ports Authority, Israel Railways and the Airports Authority against the *mega strike* that was about to break out in the economy, it was ruled: “The strike is specific in the sense that it puts **pressure** on those in the country with whom the organisation conducts collective bargaining”.⁴⁸³

In the Clalit Health Services case, in which Clalit health fund attributed a wildcat strike to the cleaning and maintenance workers at Emek Hospital in Afula, it was ruled that: “The purpose of the freedom to strike is to provide workers with a **means of pressure** in the framework of collective bargaining. Without the possibility to strike or in the absence of another mechanism established by the legislator or with the agreement of the employer and the workers' organisation (such as arbitration), the workers' power to conduct negotiations is compromised, which is a right that stems from the right of association, which is a constitutional right”.⁴⁸⁴

The wording adopted by the court in this case modifies two elements defined in the Khatib case above:

⁴⁷⁸ The below emphases do not appear in the original.

⁴⁷⁹ For more on the Ordan case – see Chapter 10.6.1.

⁴⁸⁰ Discussion 340 / 35-2 Kozolovich Baruch et al. v. Ordan Ltd., Labour Court Ruling 12 200.

⁴⁸¹ Discussion 46 / 4-7 All the Life Guards in the Tel Aviv-Yafo Municipality v. The Municipality Worker Organisation, Labour Court Ruling 17 174.

⁴⁸² 72 38 / 99-41 (Tel Aviv) The Hebrew University of Jerusalem v. The Association of Veterinary Physicians.

⁴⁸³ Collective Conflict (national) 13-03 New General Workers’ Union – Tel Aviv Chamber of Commerce and the Association of Chambers of Commerce.

⁴⁸⁴ Collective Conflict (Nazareth) 1019-04 New General Workers’ Union – Clalit Health Services.

A. The purpose of the strike in the Khatib case was for the workers' demands to be accepted. Conversely, in the case of Clalit Health Services, the goal had already become to provide employees with means of pressure. The author of this paper believes that although it appears from reading the ruling that the means becomes the end, it can be assumed that this was not the intention of the court.

B. The timing of the strike, as determined in the Khatib case, is during a labour dispute. On the other hand, in this case, the court focused the timing to the collective negotiations.

In the Cinematheque case, the Cinematheque Association sought to prevent a strike by its employees. The court accepted the request after getting the impression that the announcement of a labour dispute and the strike were made improperly and in bad faith: "It is well-established case law that taking strike action without allowing dialogue with willingness and the intent of good faith constitutes use as an illegitimate **means of pressure** and strike equipment must be used in the struggle as a last resort and not as a first resort".⁴⁸⁵

In two different cases, presented below, the court referred to the public as a party damaged by the strike, able to exert pressure on the employer:

In the Bnei Brak Municipality case, which discussed a strike that broke out due to non-payment of wages to employees and non-payment of pensions to the municipality's retirees, it was ruled that: "It is known that the greatest **means of pressure** during a strike is the piles of garbage that accumulate on the street. These create the greatest impression both on the city's residents and especially on the decision makers inside and outside the municipality".⁴⁸⁶

In the International Bank case, the Bank Employees' Division of the new General Histadrut and the National Committee of the International Bank's employees petitioned for a temporary injunction, prohibiting the International Bank from hiring external employees in place of the striking bank employees. The Court ruled that: "A strike, in essence, is intended to **put pressure** on the employer in order for him to accept the workers' demands. The purpose of the strike is not to cause harm to the employer, but by its nature, it causes harm", and later in the ruling: "The intention of shutting down these services is to exert pressure on the public and advance negotiations between the parties".⁴⁸⁷

And hence the conclusion, that the court accepts the use made of the public as a lever of pressure on the employer during a strike.

In the case of the collective resignation of interns,⁴⁸⁸ it was decided that: "The resignation letters do not indicate an authentic resignation but rather a collective action aimed at **exerting illegitimate pressure** on the legally authorised bodies to conduct the negotiations, which are the representative organisation of doctors and employers".⁴⁸⁹

In the Electra case, which dealt with the Histadrut's request for a declaratory order instructing Electra to recognise it as a representative workers' organisation of the *Mahsanei Hashmal* network, it was ruled that:

⁴⁸⁵ Collective Conflict (Jerusalem) 4-09 Power for Workers Democratic Workers' Union – Jerusalem Cinematheque – Israeli Film Archive.

⁴⁸⁶ Collective Conflict 278/05 Bnei Brak Municipality – Derivatives Market Association.

⁴⁸⁷ Collective Conflict (Tel Aviv Regional) 269/06 New General Workers' Union – Derivatives Market Association – Bank Workers Division – International Bank Ltd. (dated: 20/11/2006).

⁴⁸⁸ For more on the Interns' case – see Chapter 13.8.1.

⁴⁸⁹ General Collective Conflict (National) 722-09-11 State of Israel Ministry of Health and Finance – Israel Medical Association.

“This court consolidated and promoted the status of the right to organise in a series of rulings, which developed the protection of this right in all its aspects at the pre-collective stage, including at the initial stage of organising, including dismissal cancellation, stipulating the obligation to hold collective bargaining, and recognising the right of workers to take organisational measures as a **means of pressure** on the employer to improve working conditions or sign a collective agreement”.⁴⁹⁰

In the Discount Bank case, the Histadrut demanded a collective agreement be signed to guarantee the rights of employees in the process of privatising the bank, while the bank sought to prohibit the sanctions taken by its employees, which were expressed in non-production of the bank's financial reports. The court asked itself: “What are the differences between **exerting pressure** on the employer by ceasing to provide services to the public and **exerting pressure** by not preparing a report to the Securities Authority? In both cases, these are organisational measures aimed at **exerting pressure** on the state to ensure workers' rights after the change of ownership in the controlling shares”.⁴⁹¹

In the HOT case,⁴⁹² it was ruled that: “Although in the case of a strike the rate of absence is extensive, it must be remembered that a strike, by definition, is a **means of pressure** that causes harm to the employer and even to the workers taking action. Notwithstanding the foregoing, this is a tool that has been recognised as legitimate in the context of a collective labour dispute”.⁴⁹³

In the HaNoar HaOved VeHaLomed Youth Movement case, in which the youth movement sought to unite the working youth through the Histadrut at the McDonald's chain, it was ruled that: “A strike is a coordinated **pressure action** taken by a group of workers in order to promote a common group interest, and it is expressed in a refusal to perform the work. It is a matter of **exerting pressure** on the employer to meet the demands of the workers raised in the context of the collective dispute”.⁴⁹⁴

7.3 The Strike as a Means of Pressure in Literature and Language of Labour Organisation Leaders

In the literature, too, various scholars have given their opinion that a strike is a means of pressure. Ruth Ben-Israel explained that: “Today, in many strikes, the **exertion of pressure** in the strike is directed at the public instead of directly at the employer. The public becomes the strikers' hostage who expect them to put pressure on the government, which in turn will put pressure on the employer to accede to the strikers' demands. **Pressure** is exerted on the public, who are unrelated to the conflict and cannot refuse or accept the demands of the workers. However, the government, for which public opinion is a relevant factor, is being pushed to intervene in such labour disputes for which the public has been called in, so as not to lose the support of the potential voter”.⁴⁹⁵ And elsewhere: “The strike is an exertion of economic **pressure** on the employer. It is up to the employer to decide whether to comply with the demands of the workers and he is also the one harmed by the exertion of economic pressure by strikers”.⁴⁹⁶ And Francis Raday wrote that “during a strike, although damage is caused to third parties such as the employer's service providers,

⁴⁹⁰ Collective Dispute Appeal (National) 41357-11-12 New General Workers' Union – Electra Consumer Products (1951).

⁴⁹¹ Collective Dispute Appeal 1013-04 Discount Bank Ltd. – New General Workers' Union - Derivatives Market Association.

⁴⁹² For more about the HOT case – see Chapter 18.4.

⁴⁹³ Collective Conflict (Tel Aviv) 15391-12-11 New General Workers' Union – Hot Telecom Limited Partnership.

⁴⁹⁴ Clause (Tel Aviv) 31826-10-14 The New General Workers' Union, HaNoar HaOved VeHaLomed Youth Movement Aloniel Ltd.

⁴⁹⁵ Ruth Ben-Israel, *The Political Strike* (Comments regarding H CJ 525/84 Nabil Khatib et al. v. The National Labour Court et al. and Hearing of the Labour Court 44 / 3-29 State of Israel – Nabil Khatib, et al., *Studies in Law* 11, 57461986, p. 619.

⁴⁹⁶ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1434.

customers or suppliers, without this damage, the strike would not have been able to **exert economic pressure** on the employer”.⁴⁹⁷ (Emphases not in the original).

The *pressure* is not just an expression that appears in rulings of the judiciary or in professional literature. In fact, its use and understanding of its importance have also permeated the prevailing practice in workers’ unions. Thus, for example, it was written about the organisation of workers of Discount Mortgage Bank that formed in mid-2010 that “in an attempt to put **pressure** on management, they announced [...] a loud demonstration against management. [...] at four in the morning, the management of Discount Bank announced that it would recognise the organisation on the condition that we cancel the demonstration. It was the best demonstration there never was. [...] we were able to get management to recognise the organisation only by **applying pressure**”.⁴⁹⁸ Another example is reflected in the strike at Pelephone in January 2013: “[...] There is no dispute that the decisive influence on decision-makers is attributed to escalation of the struggle in recent days and the power of workers to bring about a complete lockout of important company business centers, including the logistics center, the beating heart of the company. “There was under **immense pressure**” [...] “Elovich began to realise that things were flaring up against him, and then he said, let’s put a stop to it. Gil also felt the **pressure** from the demonstrations we held outside his home twice a day, at 7:00 in the morning and at 19:00 in the evening, and brining in the Sabbath every Friday, it’s a **pressure** that works. There was an escalation in recent days, we held a large procession with thousands of workers in front of the government complex in Tel Aviv, we broke into Azrieli and made a noise there that undoubtedly shook Elovich’s chair. [...] that’s **pressure**, the logistics center is closed, and the Jerusalem center is closed, the **pressure** of the last few days worked”.⁴⁹⁹ (Emphases not in the original).

7.4 Conclusion

From a review of the above rulings, as in the words of the scholars and leaders of the workers’ unions, we learn that the strike is an action, a tool or a means of exerting pressure. In the eyes of the judiciary, pressure can be legitimate or illegitimate, but in any case, it must be coordinated between the workers, that is, it is a collective action that cannot be taken by the individual. The target for pressure was, traditionally, the employer but over the years other factors have also become the target for pressure: the public, consumers, suppliers etc. In previous chapters I argued that the act of pressure can take various forms – a total refusal to perform work or a partial refusal (in the form of a partial strike, also called sanctions): a slowdown strike, an overtime strike, etc.⁵⁰⁰

At the end of this section, the term *pressure* has become much clearer, but it is not enough. Now, one has to understand why a strike is an action / means / tool of pressure. The way to understand this question is, first and foremost, in understanding the damages that a strike causes or may cause. I will discuss this in the next section.

⁴⁹⁷ Francis Raday, *The Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Labour Law Almanac 5, 5755-1995), p. 145.

⁴⁹⁸ Danny Vazana, *Association for the Renewal of Organised Work in Israel*, (Schakim, 2017), p. 151.

⁴⁹⁹ *Ibid*, pp. 247-248.

⁵⁰⁰ See Chapter 5.

Chapter 8: Summary of Section A

In summation of Section A, the first section of this paper, which includes seven chapters, a number of important conclusions were reached.

Chapter two, *The Strike in International Law*, taught about the various incarnations of the strike. From being banned under state laws, to being recognised by the UN through the International Labour Organisation and later in the constitutions of various countries or their laws. I also discussed the differences between the countries of the world in recognising the right to strike. The conclusion of the chapter was that no country remained indifferent to the strike phenomenon – and the status of the right to strike and the restrictions that apply to it vary from one country to another.

Chapter three, *The Strike in Israel*, defined the chain of events regarding the right to strike in Israel. In the late 1960s and early 1970s, the use of strike weapons began to become more common. In the 1980s the use of strike weapons continued to break records in all the indices surveyed. These years brought with them new laws – from the High Court and the National Labour Court – which limited, demarcated and defined the strike time and time again. I have shown that only a minority of the restrictions that apply to the right to strike have been set by the legislature and most of them by the courts. If in the years of the Jewish settlement and in the first decades of the State of Israel, the strike was an absolute right in stark contrast to any other state and received unreserved support from all government authorities, then in the 21st century the use of strike cannot be in the context of *right* but in the context of *freedom* or *liberty*.⁵⁰¹

In the fourth chapter, *The Meaning of the Strike*, I discussed the various meanings derived from the use of a strike: legal, intra-union, economic, and religious meanings.

In the fifth chapter, *Types of Strike*, I distinguished between an economic strike, a political strike, a quasi-political strike, and a sympathy strike. Next, I also proposed a distinction between strikes in terms of scope (wide scope or partial scope); a distinction between the timing of the strike (before signing a collective agreement and after signing a collective agreement); and between a lawful strike, and an unlawful strike / wildcat strike. In the summary of the chapter, we learn that the distinction between the types of strikes is not dichotomous as revealed at first glance. I have shown that out of 24 options for a strike, in the State of Israel there can be, at most, only 17 options for a strike. I have also shown which are the most common types of strikes and which will benefit from the protection of the court.

In the sixth chapter, which dealt with *The Causes of Strikes*, I wanted to understand what causes workers in the State of Israel to declare a strike and take part in one. I reviewed grounds for strikes as stipulated and permitted in Israeli law, grounds for strikes as evidenced by the Chief Supervisor's reports on labour relations and theories that exist in the research literature that explain the existence of strikes.

In the seventh chapter, *The Strike as a Means of Pressure*, which is also the last chapter of this section, we learned about the frequent use made of the term *pressure* to characterise the action of the strike. This term is prevalent in court rulings, in publications of researchers in the field and as I have shown, also in the jargon of leaders of trade unions and workers' strikes.

⁵⁰¹ Granting the status of a *right* to a strike will give it legal recognition and allow it to enjoy an improved legal status that will not detract from its power. Given that in Israel the right to strike has not been enshrined in law and given the restrictions imposed on it, the status of the strike is a status of liberty only.

At the end of this section, the term *pressure* has become much clearer, but it is not enough. One must now understand why a strike is a means / tool of pressure. The way to understand this question is in understanding the damage that the strike causes or may cause. This will be detailed in the next section.

Section B

Chapter 9: Strike Damages

9.1 Introduction

Vice president of the National Labour Court (in her title at the time), Judge Elisheva Barak-Ussoskin, wrote that “a strike should hurt,”⁵⁰² in an article bearing the same name. By stopping production and causing economic damage to their employer, workers put pressure on him to accept their demands. In other words, causing harm to an employer is the schedule of a strike.⁵⁰³ This seems to exhaust the understanding that this is the essence of the strike. There can be no strike that is free of pain, that is, damage. The National Labour Court was also aware of this and recognised the significance of the damage of the strike by stating that: “Every strike causes damage to the employer and sometimes also to the public or parts of it. However, in the current labour relationship in the economy, a strike is a legitimate tool. The strike is a *violent* measure, but in the current situation the workers’ union does not have an alternative tool to help it advance its goals with the employer”.⁵⁰⁴ A similar position was expressed by the National Labour Court in another case when it ruled: “The immediate result of a strike is, as a rule, causing difficulties for the employer and sometimes also for the public. Despite the balance of strike damages, the strike is a legitimate and permissible tool and has even been recognised in Israeli law as a freedom”.⁵⁰⁵

In this chapter I will seek to understand what damage strikes may cause – in addition to the economic damage, I will examine the factors damaged by strikes and ask: How can the damage of strikes be estimated? In order to understand why a strike is a means of pressure and how it can be assessed.

9.2 What Damages do Strike Pressures Cause?

Ruth Ben-Israel explains that as a result of an increase in the number of essential services and the lockout of these services, heavy pressure is created on the public. This pressure has been exacerbated by technological developments⁵⁰⁶, which do not differentiate between the private or public sector, and which make it possible to paralyse those essential services by a strike of a very small group of workers. Reducing the number of striking workers has led to a reduction in the price of the strike for the working public and has made its use extremely accessible. Moreover, the growing dependence between the various manufacturing industries, resulting from a concentration of industries in patterns of specialisation, has caused the lockout of a non-essential service to also result in an essential service being shut down in a very short time⁵⁰⁷. Hence, it is easy to understand why the consequences of strike damage are spread over many diverse areas, and yet in the research literature much and sometimes exclusive attention is paid to the economic damages that strikes cause.⁵⁰⁸ However, a strike does not cause only economic damages,

⁵⁰² Elisheva Barak-Ussoskin, *A Strike Should Hurt*, Orech HaDin [Lawyer] January 2011), p.16.

⁵⁰³ Ronen Perry, *Strikers’ Liability for Third Party Damages*, (Labour Society and Law, 16), p. 311.

⁵⁰⁴ Collective Dispute Appeal (National) 1013/04 Discount Bank Ltd. V. The New Histadrut – Derivatives Market Association, Clause 10 of the judgment of the President of the National Labour Court, Steve Adler.

⁵⁰⁵ Collective Dispute Appeal 1008/00 Horn and Leibowitz Ltd. – The Histadrut, Labour Court Ruling 25 145.

⁵⁰⁶ See chapter 3 of Yuval Noah Harari’s book, *21 Thoughts about the 21st Century*, (Kinneret Zmora Bitan, 2018) in which the author shares his thoughts on how developing technology will affect workers.

⁵⁰⁷ Ruth Ben Israel. *Liability for Damages Caused by a Strike*, (Law Review 14, 1989), p.150.

⁵⁰⁸ The literature deals mainly with the economic damage caused as a result of strikes and divides it into two: direct costs and indirect costs. **Direct Costs** are the direct product losses caused to the industry on strike and **Indirect Costs** are the effects on the industries that provide inputs to the industry on strike and the effects on its purchasers’ outputs. Quoted in: Eliezer Schwartz, Yonatan Erlich, *The Strikes in Israel in the years 1995-2004: Numerical Data and Cost Estimates*, (Knesset Research and Information Center, 21/11/2005), p. 2.

reality teaches us that a strike can cause damage in other areas as well, as will be clarified below. It should be emphasised that there is not much literature in this field.

What are those damages that may be caused as a result of the strike? Before turning to the various strike damages, it seems to me that it is worthwhile to dwell on the definition of what *damage* is. In the Torts Ordinance (which is the main legislation in the State of Israel dealing with damages) damage is defined as follows: “Loss of life, loss of property, comfort, bodily well-being or reputation, or subtraction from them, and any deriving loss or subtraction”.⁵⁰⁹ The definition of damage opens with tangible and clear damages that cannot be challenged or questioned in their occurrence: “loss of life” and “loss of property”. These are assets that are often quantifiable, and their deficiency is obvious. But the definition of the law is broad and gives expression also to intangible interests that are not as easy to quantify such as “convenience” or “reputation”. In this respect, the High Court has extended the definition of damage to damages that do not always have a physical manifestation such as pain and suffering involved in bodily harm caused to the injured party. Given the breadth of this definition, it has been ruled that suffering, fear, harm to happiness – even if they are not accompanied by any physical harm, may constitute compensable harm.⁵¹⁰ Therefore, by virtue of the definition of damage given by the legislator and since the interpretation of damage has been expanded by the High Court, I believe that there is room to address the question of economic damage caused by a strike, but this cannot lead us to ignore other aspects of damage. The possible damages, therefore, which a strike may cause are – economic, political, social, image and trust. These damages arise from the literature, case law, media coverage and interviews conducted by the author of this study. I will discuss them in their order.

9.2.2 Economic damages

Researchers list a long list of possible **economic damages**, including – loss of productivity and loss of output,⁵¹¹ damage to income and profits, slowing down production in the economy, rising product prices, difficulty competing with other economies in the world, rising unemployment while creating fewer jobs, unused equipment cost, fines due to delay in product delivery and overtime pay (a strike delaying production requires the employer to pay his workers overtime pay until a contract is completed, or alternatively, to pay a penalty for late delivery of goods – and thus bear additional significant cost), cancellation of future work plans to close the gap created in the factory, instability in the economy, escape of potential entrepreneurs and foreign capital, erosion in the credibility of Israeli entrepreneurs abroad, loss of workers (during the strike there are workers who leave the factory and do not return to it. In such cases it is necessary to locate, recruit and train new workers in place of those who have left. Sometimes, due to an economic loss caused as a result of the strike, the employer was forced to lay off workers who had already been recruited and trained for their job)⁵¹², and the loss of export contracts and customers – for example during May 2003 the Histadrut put most of the public sector on strike. As a result, Israeli companies reported cancellations of orders from customers abroad that amounted to hundreds of thousands of dollars. These orders were transferred to other suppliers. Another example is the strike at Haifa Chemicals in late 2011. As a result of the strike, which lasted many months, the company’s

⁵⁰⁹ Clause 2 of the Torts Ordinance (new version), 5728 – 1968.

⁵¹⁰ CA 243/83 Municipality of Jerusalem v. Eli Gordon, 39(1) 113, pp. 139-141.

⁵¹¹ A study by Clegg and Adams found that in most of the strikes examined, workers caught up with production lag to one degree or another in the days after the strike. Researchers illustrate this with the example of the miners’ strike that took place in 1912 in Britain, and which cost the mining industry 11% of annual work time but only 4% of the expected value of annual output. See: *The Employer’s Challenge: A Study of the National Shipbuilding and Engineering Dispute of 1957*, Hardcover – 1 Jan. 1957, by H. A. Clegg & Rex Adams (Author), Basil Blackwell: 1957, p. 341.

⁵¹² Woodruff Imberman, *Strikes Cost More Than You Think*, Harvard Business Review (May-June 1979).

management reported that its loyal customers also secured supplies from its competitors⁵¹³. That is, during a strike, customers discover alternative sources of supply, and it can be assumed that some even get lower prices. This means not only loss of the current export contract, but also that customers will not return to work with their Israeli counterparts. In an attempt to avoid losing export contracts, Israeli companies are forced to minimise their damages by holding a larger inventory of raw materials, or by storing finished products abroad, which makes their products more expensive and less competitive.⁵¹⁴ This also significantly reduces the Israeli companies' competitiveness in world markets, and causes enormous damage to the economy, whose total exports may reach an average of one third of the GDP.⁵¹⁵

The cost of hearings in the Labour Court, payment of attorneys' fees, a decrease in the value of shares of a company traded on the stock exchange⁵¹⁶, or a strike on the stock exchange that affects trading in shares and bonds⁵¹⁷, and even damage to the company's dividend distribution can all be added to this list.

9.2.3 Political Damages

Until 2014, the vast majority of strikes in the Israeli economy occurred in the public sector.⁵¹⁸ The strikes in this sector cause enormous damage to the lives of residents, especially in light of the increase that took place since the 1980s in the volume of essential public services and their being monopolistic services, which made the public a direct victim of almost every strike.⁵¹⁹ These damages, combined with the fact that the government is the employer of the public sector workers, is the one that negotiates with them and is also the one responsible for meeting or refusing workers' demands, explain why strikes may cause political damage to the government and its ministers and the abandonment of its supporters-voters. This conclusion is also supported by Bar-Mor, who believes that the strike entails abusive elements both towards the employer and towards third parties and is perceived in the corridors of power as a violation of governance and the democratic regime. This is especially true when the strikers are fighting against reforms in the state economy or trying to disable services that are perceived by the public as essential.⁵²⁰

Beyond all this, the *political strike* also causes political damage to the sovereign. As we will learn,⁵²¹ the political strike is directed against the sovereign not in his status as an employer, but as one in charge of setting an overall economic policy that is not acceptable to the working public. The workers believe that the government's policy and / or plan will narrow their steps and impair their ability to deal with the determination of their rights as workers, and therefore initiate a strike against it. Although a political strike is considered an illegal strike in the State of Israel and hence the Labour Court will prohibit its

⁵¹³ Miki Peled: *Exclusive to Calcalist: Strike Damages: Haifa Chemicals recorded a decrease of up to 40% in sales abroad*, (Calcalist, 07/07/2011), at the link: <https://www.calcalist.co.il/local/clauses/0.7340.L-3523567.00.html> Accessed: 21/03/2022.

⁵¹⁴ Evelyn Gordon, *Doomsday Economy*, (Tchelet on the Net, Winter 5764), p. 3 The author quotes the stated in *Focus on Industry, Internet Weekly for Manufacturers* dated 11/06/2003 in fn. 25 to her clause.

⁵¹⁵ According to the Central Bureau of Statistics. See: www.cbs.gov.il

⁵¹⁶ The author is unaware of a study that examined the relationship between a strike and a decline in stock value, but it can be assumed with high probability that there may be some connection between the two.

⁵¹⁷ It should be noted that the last strikes that broke out on the stock exchange took place in the years 01/07/2008, 21/05/2019 and 07/06/2020. The damage from strikes on the stock exchange, which constitutes a national infrastructure for the capital market, is estimated at tens of millions of shekels, including global image damage. See: *Stock Market Strike Damages: Tens of millions of shekels have evaporated, foreign customers are shocked* / Shelly Appleberg (The Marker, 21/5/2019) and at the following link: <https://www.themarket.com/markets/1.7270975> Accessed: 12/05/2021.

⁵¹⁸ See Chapter 3: *The Strike in Israel*

⁵¹⁹ Ruth Be Israel, *Labour Laws – Vol. I* (Open University: 2002), p. 107.

⁵²⁰ Hadara Bar Mor, *The Strike and its Genetic Classification – following HCJ IEC*, (Labour Society and Law 16, 2020), p. 266.

⁵²¹ In chapter 5: Types of Strike.

existence, this does not mean that over the years strikes that have been defined, in retrospect, by the court as political strikes, did not break out. These strikes, both short and long, undermine the government's efforts to formulate policy and implement it and cause the public to perceive the government in its laxity, as one that is unable to impose its authority on its workers who serve as its executive arm.

Both the workers' union and employers may experience political damage as a result of the strike. The workers' union is an organisation that is up for election.⁵²² Its leaders are seeking the workers' trust in the elections. Therefore, unsuccessful strikes that failed to achieve their full goals or strikes in which the workers' union failed to recruit the workers to stand behind them – may cost the union's leaders the voices of its supporters. Strikes may also lead to intrigue and tension in the executive branch. Blame for the deterioration that led to the strike situation could cloud the relationship between the company's owners and its executives, or between the board of directors and the company's chairman or CEO.

9.2.4 Social Damages

The more the public uses public services and the more it is dependent on the provision of essential services, the more the routine of its life is disrupted during a strike, its quality of life is impaired and it inevitably becomes a victim of the strike. The strike could be detrimental to its well-being, health and livelihood. For example – in the event of a strike in the health services, medical examinations and surgeries may be cancelled or postponed. In the event of a strike by local authority workers where waste is not removed from the streets – sanitary damages may be caused. In the event of a teachers' strike, the public will have to find an alternative solution for their children or be unemployed (in order to be with their children).

These damages did not escape the eyes of the legislators either⁵²³, and an example of an attempt to rectify the situation was the Prevention of Strike Damages Bill, 5760-2000, which sought to stipulate that “any permit or passport whose validity is not extended due to a strike shall be automatically extended, and any payment date not received due to a strike will also be postponed” with the goal of “providing the citizen protection against the damages (of the strike) in these areas, and thus prevent much suffering from the citizens, caused to them due to the strikes.”⁵²⁴ This bill did not pass the stages of legislation.

A strike may even lead to violation of fundamental constitutional rights such as the right to move freely, the right to vote in elections or the right to property: if there is a strike in public transport services, which are generally enjoyed by the weaker sections of the population, the right to move freely is violated. In the event of a strike in the Ministry of the Interior, it is not possible to issue passports and thus the right to leave the country⁵²⁵, for leisure, work, or mission on behalf of the state, is violated. This is also the case when there is a general strike at the airport⁵²⁶ - which is the gateway to and from the country. A strike at

⁵²² Every workers' union must conduct democratic procedures in the organisation and elect representatives of the organisation by all its members, and non-compliance with this condition may result in disqualification from being recognised as a workers' union. This condition was repeated in the rulings of the Labour Court and the High Court, and see, for example: HCJ 7029/95 *The New General Workers Union v. The National Labour Court, Amit – The Maccabi Workers' Union et al.*, Ruling. 51 (2) 63.

⁵²³ This will be detailed in Chapter 11: *How the Sovereign Handles the Strike*.

⁵²⁴ Bill P/2096 of MK Nahum Langental (NRP), was brought to the Knesset on 31/07/2000 and did not pass the stages of legislation.

⁵²⁵ The right to leave the State of Israel is set forth in Clause 6A of the Basic Law: Human Dignity and Liberty: “Every person is free to leave Israel”, and since it is set forth in the Basic Law, it is defined as a constitutional right.

⁵²⁶ In May 2004, for example, Ben Gurion Airport closed twice. In this context it should be noted that the International Labour Organisation ruled that airports should not be disabled. See: Freedom of Association: Digest of Decisions and Principles of the

the Ministry of the Interior also precludes the possibility of issuing identity cards, and thus does not allow citizens to exercise their duty and right to vote in elections.⁵²⁷ Strikes can also prevent the employer from accessing its property, thereby violating the right to property.⁵²⁸ A strike can even endanger the lives of residents: a strike in the medical services, in the lifeguard system at the beaches or in the fire brigade system may cost lives and injuries, and these are not mere examples.⁵²⁹

No wonder, then, that surveys⁵³⁰ conducted among the Israeli public over the years show consistent opposition to the use of strike weapons and support for imposing various restrictions on it. A survey conducted by the Labour Relations Unit at the Ministry of Industry, Trade and Employment in late 2003 shows that 41% of workers support a ban on strikes in the public sector, 47% of workers tend to extend the cooling-off period to allow longer negotiations before a strike breaks out, and two-thirds of workers support holding a secret ballot among workers before a strike is announced.⁵³¹ Another private survey, conducted in late 2019, found that “82% of the public support the restriction of the right to strike in essential services in Israel, 49% believe that strikes are not a legitimate tool, 35% think that strikes are unjustified at any stage and 66% believe that the right to strike should be restricted in health services, the electricity company, fire services, teachers in schools, seaports, trains and public transportation, the Airports Authority and border crossings”.⁵³²

9.2.5 Image Damages

As stated, strikes cause image damage to the employer, the factory, the workers’ union and the state economy. What is the meaning of this? An employer image, for example, is how the employer is perceived in various aspects such as his attitude towards his workers, the opportunities he provides for promotion and remuneration to workers. A factory image is the way a factory is perceived in terms of the excellence of the organisation, the workers and managers, its managerial climate, its organisational culture and values, trust in the product, the way, and future success of the company. A positive factory image enables organisations to position themselves as more attractive workplaces, and to attract excellent

Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition, International Labour Organisation (Geneva, 2006) Paragraph 586.

https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf Accessed 18/05/2021.

⁵²⁷ See: The strike of the workers of the Ministry of the Interior and the decision of the Regional Labour Court in Jerusalem dated 25/05/1992, as stated in fn. 23 in – Frances Raday, *The Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Yearbook of Labour Law 5, 5755), p. 151.

⁵²⁸ The right to propriety is set forth in Clause 3 of the Basic Law: Human Dignity and Liberty: “A person’s property shall not be infringed upon”. An example of a violation of the right to property occurred in ruling – Tel Aviv 17226/95 Beitar Tour Ltd. v. Jerusalem Workers’ Council. In this case, bus drivers blocked the buses in the Histadrut parking lot and locked them without allowing the employer to take them out for two days.

⁵²⁹. An example of a strike that resulted in severe bodily injuries was discussed in Ruling Civil Case 862/02 Anon. v. Municipality of Rishon LeZion. This ruling will be discussed in the context of Chapter 12: How Third Parties Handle Strike Damages.

⁵³⁰ The author wishes to emphasise that he was unable to establish the sampling error in the quoted surveys. At the same time, they provide a picture of the public’s positions on the issue, although they should be taken with reservation.

⁵³¹ Shlomo Yitzhaki, Chief Labour Relations Commissioner: *Workers’ Public Attitudes on Labour Relations* (State of Israel – Ministry of Industry, Trade and Employment, Labour Relations Unit, November 2003), see also the link:

https://employment.molsa.gov.il/About/Units/WorkingRelations/Documents/seker03_schirim.pdf

The survey was conducted by a computer company in the second half of October 2003 through telephone interviews. The survey included 800 worker interviewees and is a representative sample of the worker population in Israel.

⁵³² Gilad Zwick: *Survey: The majority of the public supports restriction of the right to strike* (Israel Today, 15/09/2019), see also the link: <https://www.israelhayom.co.il/clause/692035> Accessed: 12/05/2021. The survey was commissioned by the Tacharut [Competition] movement that promotes freedom of employment and was conducted by Direct Polls surveying institute among 527 respondents.

workers, who match the organisational values. In a competitive market where the human resource is a significant factor in a company's success, organisations are interested in positioning themselves as such that are perceived as successful, innovative, and leaders in their field of activity, and as a workplace that recognises the value of excellent workers and provides them with an empowering and appreciative work environment. Employers and companies invest a lot of capital in constantly improving their image. Thus, for example, a company whose good name has been harmed by various moves is likely to invest in improving its reputation, by doing a positive deed and publicising it in a way that will restore public confidence in it.

It is clear, then, that a factory where labour disputes and strikes often break out is a factory whose image is perceived by the public⁵³³ and potential employers as an unstable, unrewarding, or unappreciative workplace, a factory where labour and communication relations are problematic and complex. A country with an image of labour disputes and many strikes is a country from which foreign investors may turn away and foreign capital is deducted from the state coffers. A workers' union whose name is linked to many strikes or as one that does not hesitate to go on strike, may be perceived as militant and a quarrel monger. Therefore, it is not surprising to hear the words of the president of the National Labour Court, Judge Varda Wirth Livneh, saying: "There is no self-respecting strike today without media consultants. And this is also reflected in the use of the media towards public opinion".⁵³⁴ From here the road is short to campaigns run by workers' unions to improve their image before or after strikes, and for example the campaign conducted by the Histadrut in April 2013 with the aim of "contributing to its public legitimacy to shut down the economy and help put pressure on Knesset members in Knesset budget discussions".⁵³⁵

9.2.6 Damage to the Relationship of Trust

There is a consensus that mutual trust in every system is an essential infrastructure for success and prosperity. When the balance on which trust is based is disturbed, a long-term relationship can go down the drain at once, and tremendous efforts are needed to repair and restore to the system the trust, good atmosphere and balance needed for its functioning. Good trust relationships in the workplace also have many benefits: they help workers accept change and strive for success, help motivate work teams, may increase workers' morale and loyalty to the company, foster a positive company culture and increase productivity and quality of work and more.

Surprisingly, there is almost no reference in the literature to the damage that may be caused to the relationship of trust between the parties and the labour relationship during and following a strike. After all, a strike can cloud the atmosphere, make it difficult to function on a daily basis and lead to a chain of unwanted behaviours. Thus, when the atmosphere is unpleasant and the joy of doing decreases, it permeates the entire chain of management and workers. In such situations, the chance of absenteeism from work increases, the chance of human error and work accidents (due to lack of concentration, etc.) increases. Simultaneously with the decline in trust, it may be assumed that the workers' loyalty to their workplace will decrease and with it their motivation to work. When a worker goes on strike his output stops or decreases and is not of the highest quality. It can be assumed that a relationship of trust damaged

⁵³³ This conclusion is based on consumer decisions made by the ethical consumer, as Yaniv Manu aptly described, *Consumer Boycott: The Ethical Weapon of Consumers* (Law 15 (2), 5771).

⁵³⁴ Words by Judge Varda Wirth Livneh, President of the National Labour Court, at the Bar Association Conference, May 2012.

⁵³⁵ Miki Peled: *The Histadrut is planning a campaign to improve its image* (Calcalist, 30/04/2013), see the following link: <https://www.calcalist.co.il/local/clauses/0.7340.L-3601238.00.html> Accessed: 12/05/2021.

as a result of a strike may also lead to workers leaving the factory in favour of the competitors, so that the damage to the organisation will not be limited only to the strike period but may be ongoing.

9.3 Who is Damaged by the Strike?

In the past, it was customary to see only the employer and workers who took part in the strike as being harmed by the strike. The employer was at the same time both the factor that had the power to accede to the demands of the workers and also the factor that was financially harmed by the decision not to concede to the demands of strikers⁵³⁶, because labour productivity was reduced or stopped altogether. While the workers did not earn their wages due to the strike in which they participated.

Following technological, modern, economic and global changes that have developed over the years, the economy has become more developed and as a result, economic interdependence between various factors⁵³⁷ has intensified and the circle of those affected by the strike has expanded to include other parties. Thus, for example, during a strike in the public sector there is no economic pressure on the employer, and in these circumstances, workers are forced to take an alternative and indirect step, such as exerting pressure on the public, in order for it to put public pressure on the employer to grant their claims. The public has in fact become hostage in the hands of the strikers.⁵³⁸

In this subchapter I will discuss the chain of those damaged by the strike.

9.3.1 Employers

The strike is intended, first and foremost, to constitute a means of pressure that will harm the employer and cause him to accede to strikers' demands. In a strike, workers stop or reduce their work. Consequently, labour productivity decreases, the employer's profit is harmed (both as direct profit and as indirect and future profit, such as dividends). He has difficulty complying with supply contracts he has signed, and he pays fines for late delivery and his credibility as a business entity is compromised. Sometimes, as a result of a strike, he is forced to raise prices or lay off workers, refrain from implementing work plans and his competitiveness is impaired. During a strike the employer has to explain his positions in court and his motives in the media, and to that end he has to fund defence in the legal arena, public relations spokespersons making sure his name is not harmed, and that the public will not blame him for the damages caused to it by the strike.

These are economic and image damages. However, this does not exhaust the employer's damages. As a result of the strike, he may experience a crisis of trust in his relationship with the workers' union and with the workers themselves. He may feel resentment, anger and suspicion towards the organisation that did not hesitate to go on strike and hit his pocket, and he may feel betrayed by his workers, who took part in the strike against him. These hard feelings may cloud the employer's relationships and permeate through the rest of the company's workers.

The exchange of allegations in the situation that led to the strike and the damage it caused, may erupt among the company's executive branch, the board of directors. These accusations will make it difficult for the employer to run the company in the absence of backup, lack of support or lack of confidence in his abilities.

⁵³⁶ Ruth Ben Israel. *Liability for Damages Caused by a Strike*, (Law Review 14, 1989), p.150.

⁵³⁷ Francis Raday, *The Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Labour Law Almanac 5, 5755), p. 146.

⁵³⁸ Ruth Ben Israel *Liability for Damages Caused by a Strike*, *ibid*, p. 150.

9.3.2 Workers

During a strike, workers do not earn their salary due to their striking from work⁵³⁹.

The employer may *mark* the striking workers and identify them in one breath with the workers' union, which may explain the workers' fear to participate in a strike or their participation in a strike break. Sandra Schaal provides a good example of this idea by describing in her book how as early as 1927, letters were sent to the families of female silk mill workers in Japan, accusing them of an unreasonable strike, and the indication for this was that their daughters refused to work. The letters were also accompanied by a threat of dismissal of female workers who went on strike. These threats achieved their goal: they scared the female workers whose families depended on their income, and managed to break the strikes.⁵⁴⁰

It can be assumed that during a strike and after a strike, the level of the workers' trust towards the employer will be low. Workers who took part in a strike, and even more so, took an active part in it, can see the employer as an oppressor or exploiter. Hence, their sense of motivation in the workplace and sense of belonging to the workplace may be damaged.

In many cases, strikes revolve around the economic demands of workers from their employer.⁵⁴¹ But even meeting these economic demands on the part of the employer may fall on the shoulders of the workers in the form of dismissal of workers, voluntary early retirement of workers, non-allocation of work standards or failure to recruit new workers.

9.3.3 Residents and Consumers

Members of this group are forced to absorb the damage several times: in the short term, strikes prevent the provision of services to consumers, impair the quality of life and are often a nuisance to the general public who cannot take basic actions following the strike. In the long term, they may be rolled back to the public (in the form of rising prices, raising taxes, or cutting back on plans that would benefit the public).

Following the strikes, the state treasury's revenues decline, so public investment declines. There is also a theory that although strikes harm the economy as a whole, they particularly affect low-income families and those who are not among the established strata.⁵⁴²

9.3.4 Business Entities in trade relations with the Employer including Local and Foreign Corporations

Business entities in trade relations with the employer may find themselves victims of strikes. For example, truck drivers are forcibly disabled whenever port or customs workers declare a strike, and the resulting work time they lose is never returned after the strike.

It is not only local corporations that may find themselves harmed as a result of a strike that breaks out within the State of Israel, but also corporations in other countries that are in business ties and dependent on the supply of Israeli products.

⁵³⁹ There are two exceptions to this: The first exception is that public sector workers are entitled to a part of their wages, as detailed in Chapter 10: *How the Employer Handles the Strike*. The second exception is that unions operate strike funds for the benefit of striking workers, as detailed in Chapter 13: *How Workers' Unions Handle the Strike*.

⁵⁴⁰ Schaal, Sandra. *Discovering Women's Voices. The Lives of Modern Japanese Silk Mill Workers in Their Own Words*, Leiden, Brill, 2022, pp.339-340.

⁵⁴¹ As we will learn in Chapter 6: *The Causes of Strikes*

⁵⁴² Amos Moav and Hadas Gabay, *How to Solve the Strike Problem?* (Tchelet, 2006), p. 75.

9.3.5 The Government

In public sector strikes, the government is perceived in its laxity and weakness. On the one hand, it is controlled by the striking workers who portray it as an oppressive / exploitative employer. On the other hand, it is criticised by the opposition and sometimes also by the media for its inability to establish industrial quiet, manage the economy, ensure labour productivity and create a life routine free of labour disputes for the country's citizens. In this context, it is worth noting the research of Hermesh, who argued that frequent strikes could undermine public confidence in the functioning of the government, the political system or in the validity of the company's core values.⁵⁴³ Such a projection is already destructive in collective-national terms. Reuveni, who researched the issue, also claimed that the level of strikes is an accepted measure for comparing the effectiveness of government functioning.⁵⁴⁴

As a result of strikes (both in the public sector and in the private sector) state revenues dwindle. Public-sector strikes usually end in wage increases for striking workers (by diverting budgets or raising taxes in favour of ending labour disputes over implementing future work plans). What this means for the government is its inability to implement or execute future work plans.

9.3.6 Workers' Unions

During a strike, the workers' pockets are harmed, and they may be *marked* as union followers. Therefore, the workers' union is often required to direct valuable resources during a labour dispute in order to preserve the morale of striking workers – so they persist in their strike, rather than increasing pressure on the employer.

During a strike, the workers' union may also find itself dealing with an *organisational internal revolt*. Such a revolt may be manifested in the abandonment of workers who are members of the union, who do not identify with the goals of the strike or fear its consequences, or in the growth of an opposition that challenges the organisation's leaders, criticises their conduct, suggests alternative ways of dealing with the crisis and call for their replacement by other leaders.⁵⁴⁵

If the workers' pockets are damaged, because their salary is not paid during a strike, the membership fee⁵⁴⁶ that the workers are obligated to regularly pay the workers' union is not paid during the strike and the union's coffers are depleted. For a workers' union that does not have the financial strength, this may be a significant financial difficulty. But even an economically established workers' union must deal with considerable financial expenses: payment to lawyers, who will protect it in the legal

⁵⁴³ Ran Hermesh, *Damages of Labour Disputes in Israel*, (Quarterly for Economics 99, December 1978), p. 333. Hermesh explains that the social system in modern society is built on foundations of interdependence through the political, economic and value and integrative subsystems which are intertwined, and therefore the malfunction of one gives rise to malfunctions in the other.

⁵⁴⁴ Yaakov Reuveni, *Political Changes and Their Impact on Labour Relations*, (Quarterly for Economics 100, May 1979).

⁵⁴⁵ An excellent example of this appears in Sandra Schaal's book, which describes how internal disputes in trade unions in Japan weakened them. See: Schaal, Sandra. *Discovering Women's Voices. The Lives of Modern Japanese Silk Mill Workers in Their Own Words*, Leiden, Brill, 2022, page 348.

⁵⁴⁶ Clause 25(A) (3) of the Wage Protection Law, 5718-1958 stipulates that "only these amounts shall be deducted from wages [...] Membership fees in a workers' union of which the worker is a member, which must be deducted from wages according to a collective agreement or work contract or that the worker has agreed in writing that they will be deducted, and the normal payments to the workers' committee in the plant". And Clause 25(A) (3b) also provides for the possibility of deducting "professional-organisational handling fees for the benefit of the representative organisation within the meaning of the Collective Agreements Law, 5717-1957, which must be deducted under a collective agreement or employment contract from a worker, who is not a member of any workers' union or the worker agreed in writing to such deduction".

arena, payment to spokespersons and media consultants, who will protect it in the media arena and payment to workers from a strike fund that will ensure their economic survival. These are expenses that will not always return to the workers' union coffers.

During a strike, communication between the employer and the workers' union is reduced or completely stopped, and it may take the form of an exchange of words within the walls of the Court or in the various media channels. The relationship of trust between them during this period is at rock-bottom, and it can be assumed that even in the period close to the end of the strike, the relationship between them is not brilliant, something that is projected to the other workers and managers.

Moreover, strikes do not increase the Israeli public support in the workers' unions. In the State of Israel, solidarity with workers' unions is eroding. The public does not tend to identify with workers' unions or with their goals. This result is attributed to the prolonged rule of the Mapai party, which almost fully identified with the Histadrut, and the enormous power that the latter held, to the wave of strikes in the public and essential services that erupted in the late 1980s that made the public tire of the workers' unions and the strikes associated with their name. For example, during the strikes that broke out in 1991 and 1994, IEC workers did not hesitate to cut off power to various parts of the country. Workers of Mekorot, which is responsible for supplying water in the country, stopped the flow of water to several local authorities, one at a time, during a strike in 1999. And Ben Gurion Airport workers have shut down its operations many times over the years. These strikes gave rise to the idiomatic expression: *Lowering the Switch*,⁵⁴⁷ which means that the workers' union will not even hesitate to lower the switch and prevent the supply of electricity or water to the country's residents, an essential service that in many countries is considered out of bounds. This may explain the alienation of the Israeli public towards the Histadrut, as someone that disrupts the routine of life indiscriminately, and in the words of Ruth Ben-Israel: "The public, very frequently affected by any occasional strike in the economy, is sick and tired of strikes and was willing to welcome any restriction to be imposed on the organisation of workers and any steps taken in the professional struggle".⁵⁴⁸ Caspi and Ben Hador also support the conclusion that the Israeli public has lost patience with strikes in the public sector.⁵⁴⁹

The question arises – where is the limit of potential victims of a strike? Can anyone claiming damages claim compensation for a strike (legal or illegal) that has broken out? For example – if as a result of a strike the stock exchange may open a few hours late and this could cause billions of shekels in damages for companies interested in making transactions? Or, for example, can patients who have waited long months for medical treatments that have been cancelled be reimbursed in filing a compensation claim?

The answer to this seems to be in the negative, as the High Court ruled: "One of the most famous is that the nature of strikes and lockouts is to cause very different and varied breaches of contracts; If the strike

⁵⁴⁷ See for example the following clauses: Kobi Nachshoni, *Electric Company Demonstration: Lowering the Switch* (Ynet, 28/12/2014), at the link: <https://www.ynet.co.il/clauses/0.7340.L-4608426.00.html> ; Dvir Schwartz, *Taking the Workers Committees' hands off the switch* (Mida, 10/08/2016), at the link:

<https://mida.org.il/2016/08/10/%D7%9C%D7%94%D7%95%D7%A8%D7%99%D7%93-%D7%9C%D7%95%D7%95%D7%A2%D7%93%D7%99-%D7%94%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D-%D7%90%D7%AA-%D7%94%D7%99%D7%93-%D7%9E%D7%94%D7%A9%D7%90%D7%9C%D7%98%D7%A8> ;

Zvi Bar'el, *Lowering the Cultural Switch*, (Haaretz, 24/10/2018), at the link: aaretz.co.il/opinions/.premium-1.6589345; Accessed: 24/06/2021.

⁵⁴⁸Ruth Ben Israel, *Labour Law – Vol. I*, (Open University: 2002), p. 107.

⁵⁴⁹ Amnon Caspi and Batya Ben Hador, *Virtual Strike*, (Labour Society and Law 11, 2005), pp. 13-14.

initiators or strikers or lockout instigators had to bear the damage resulting from all these violations, this would have eliminated the institution of the strike and made it impossible”.⁵⁵⁰ This claim received a negative answer in the literature, too, in the words of Nili Cohen: “After all, it would be completely unreasonable to impose on the damaging factor’s shoulder all the economic damages that his injury caused indirectly”.⁵⁵¹

In other words, the Court will be required to define the boundary of caution and determine where the boundary passes in the chain of indirect casualties, by “using the brakes of causation and distance the damage”.⁵⁵² On the other hand, to the extent that absence of disproportion between the damage and the harm claimed by the strikers and the damage caused to the economy and third parties is proven, the strikers may be liable for the damage caused to others as a result of the strike.⁵⁵³

9.4 Interim Summary

This is the place to cross reference the factors damaged by the strike and the strike damages:⁵⁵⁴

	Economic Damages	Political Damages	Social Damages	Image Damages	Trust Damages
Employers	1 V	2 V	3	4 V	5 V
Workers	6 V	7	8	9	10 V
Residents and Consumers	11 V	12	13 V	14	15
Business Entities in trade relations with the Employer	16 V	17	18	19	20
The Government	21 V	22 V	23	24 V	25
Workers’ Union	26 V	27 V	28	29 V	30 V

Table 11: Causes for strikes according to reports from the Chief Labor Relations Commissioner.

The above table can indicate two conclusions: The first, on the likelihood of damage occurring as a result of a strike, and the second, on the exposure of various factors damaged by the strike.

The likelihood of damage occurring as a result of a strike:

- A.** Of the 30 options (cells 1-30 in the table) there are only sixteen possible damages in five areas of damage: economic, political, social, image and trust. That is, **the table indicates the possibility of slightly more than half of the possible damages a strike may cause.**
- B.** The economic damages are the most likely damages to occur (cells 1, 6, 11, 16, 21, 26) and hence it is understandable why much attention has been paid in the literature to the assessment of these damages (see below).

⁵⁵⁰ CA 25/71 Zvi Feinstein and 3 others. v. Teachers’ Organisation of upper-secondary schools, ruling 25(1) 129.

⁵⁵¹ Nili Cohen, *Strike Damages, Malicious Negligence, Economic Damage and the Cause of Breach of Contract*, (Law Review 14 (1), 1989), p. 185.

⁵⁵² This expression was used by High Court Judge Levin in CA 593/81 Ashdod Car Factories Ltd. v. The late Adam Tzizik (hereinafter: Ashdod Car Factories Case). In Chapter 12: *How Third Parties Handle the Strike*, I will expand on this case.

⁵⁵³ In Chapter 12: *How the Third Party Handles the Strike*, I will discuss how third parties handle strikes, and I will also give my opinion on the possibility of filing a claim for compensation for strike damages.

⁵⁵⁴ Hereinafter: Table 11.

C. The political damages, the image damages and the damages to the relationship of trust are the second in their likelihood (cells 2, 22, 27), (cells 4, 24, 29) (and cells 5, 10, 30) respectively.

D. And finally, social damage (cell 13) only affects residents and consumers.

The likelihood of damage occurring can also be illustrated using the following diagram:⁵⁵⁵

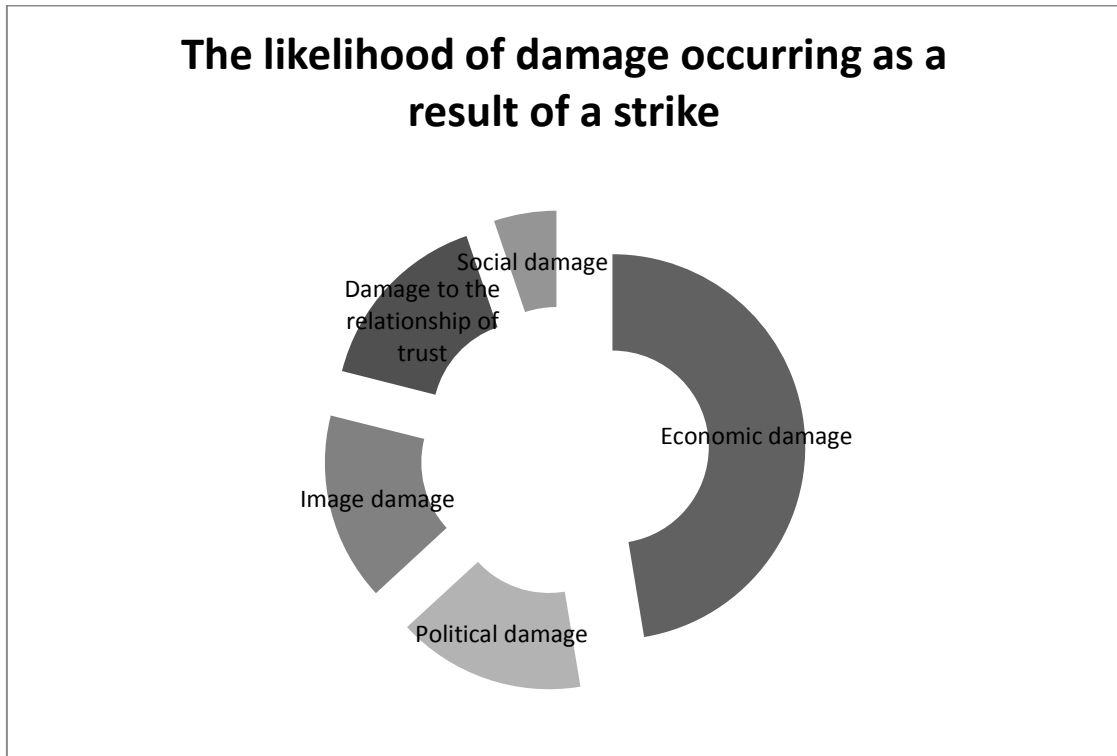


Figure 8: The likelihood of damage occurring as a result of a strike.

Exposure of various factors to damage caused by a strike:

A. The workers' union and the employer are the factors that are expected to be exposed to the greatest number of levels of damage from the strike.

The employer is expected to be exposed to four levels of damage: economic, political, image and trust (cells 1, 2, 4, 5). This conclusion can be self-evident because the strike is directed at the employer.

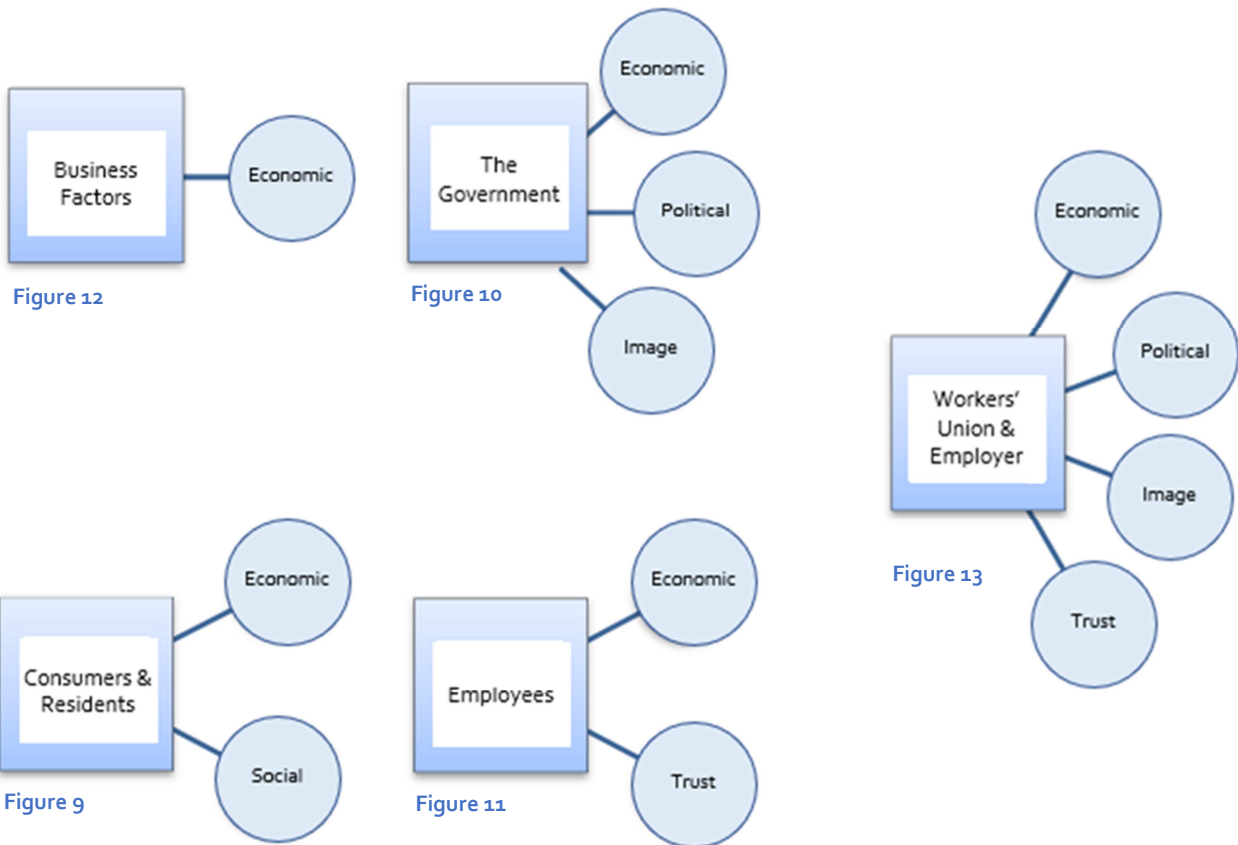
The workers' union is also expected to be exposed to the same four levels of damage (cells 26, 27, 29, 30). This conclusion is surprising, because the purpose of the strike – as we will learn – is first and foremost to put pressure on the employer to comply with the demands of workers. **Hence, operating the strike weapon by the workers' union could be a double-edged sword against it!**

B. The second factor that is expected to be exposed to the greatest number of levels of damage from the strike is the government, which is expected to deal with three levels of damage: economic, political and image damage (cells 21, 22, 24).

⁵⁵⁵Hereinafter: Figure 7

- C. The third factors that are expected to be exposed to the large number of levels of damage from the strike are workers, residents and consumers. Each is expected to deal with only two levels of damage (which is less than half of the levels of damage to which the workers’ union and employer are exposed): workers are expected to deal with economic damage and trust relationships (cells 6, 10), and residents and consumers are expected to deal with economic and social damage (cells 11, 13). The difference between each and every one of these factors is, as mentioned, the type of damage expected to it.
- D. Finally, business entities that are in trade relations with the employer are likely to be exposed to damage on only one level, the economic level (cell 16), and are therefore only the fourth factor likely to be damaged by the strike.

Exposure of the various factors to strike damage can also be illustrated using the following graphs:⁵⁵⁶



In the series of graphs above, it is easy to see both the amount of different levels of damage to which the various factors are expected to be exposed, and to make a quick comparison between the amount of levels of damage of each of the factors.

⁵⁵⁶ Hereinafter: Figure 8 – Figure 12.

9.5 How can Strike Damage be Estimated?

According to previous studies and calculations of direct damages⁵⁵⁷ carried out in these studies, it seems that in a multi-year perspective, the Israeli economy loses about 0.2% of its gross domestic product due to strikes, which is about ILS 2 billion a year.⁵⁵⁸ However, it is likely that the direct damages do not reflect the whole picture. The Association of Chambers of Commerce estimated in the past that the full cost of a day of strike for the economy is about ILS 500 million, and an examination by Dun & Bradstreet revealed that the price is close to about ILS 1.4 billion.⁵⁵⁹ These contradictory data illustrate the difficulty in measuring the economic damage that strikes cause.

In addition, not all strikes cause the same amount of damage. The damage depends on the benefit of the services provided in that same industry, the alternative services that can be provided when needed and their price. The cost of the strike will be greater the more central the service is to the economic activity of private businesses and citizens. Therefore, it appears that strikes in public services create the most severe economic harm, especially when it comes to monopolistic services. The empirical data support the hypothesis that strikes in essential services cause more significant damage to the local economy, while private companies are sometimes irreversibly affected by stopping the movement of goods, receiving mail and regular supply of electricity and water (thus for example, official EU estimates suggest that the French postal service strike in December 1995 alone caused a loss of about 0.2% of annual GDP, and about two-thirds of the total damage was caused directly to the private sector. Similarly, the general strike of Spanish public workers, for one day, on June 20, 2002, caused direct damage of about €250 million to firms and the local public. In Austria, the public workers' strike in May 2003 cost the economy €one billion, about 0.46% of GDP that year).⁵⁶⁰

Hence, it is easy to understand why there are different approaches to defining the economic cost of strikes.⁵⁶¹ The first approach sees the economic cost of strikes as the wage losses incurred by workers during their strike period. A variation of this approach is the cost calculation when wage losses are weighed against the benefits obtained for the strike. In this case finding the cost can indicate failure (positive cost) or success (negative cost) of the strike in terms of financial achievements. The problems raised by this variation are, inter alia, according to which interest rates should the wage increase be capitalised? What is the part of the wage increase that would have been received even without the strike and which should not be taken into account in the capitalisation calculations? How to treat achievements that are not measurable in financial terms?

A second approach examines the cost of strikes from the point of view of employers. The cost calculation according to this approach includes: wage increases obtained by workers due to the strike, losses incurred by the employer as a result of non-compliance with supply contracts, loss of markets, losses due to non-

⁵⁵⁷ Refers to direct cost calculations, as detailed in fn. 7 above.

⁵⁵⁸ In terms of 2014. The author of the study would like to point out that he is not aware of any economic research conducted on the subject since.

⁵⁵⁹ Eliezer Schwartz, Jonathan Erlich, *ibid.* Also: Einav Ben Yehuda: *Dun & Bradstreet Israel: The Cost of a General Strike in the Economy – ILS 1.4 Billion* (The Marker, 20/10/2003), <https://www.themarker.com/career/1.175212> Haim Bior: *The Traders: The cost of a day of strike for the economy – ILS 500 million* (Haaretz, 25/02/2007) <https://www.haaretz.co.il/misc/1.1389627>. Accessed: 11/05/2021. See also fn. 37, 38, and 39 in: Amir Feder, Michael Sarel, Zvia Zicherman: *Workers' Unions in Israel Economic Analysis and Legislation Recommendations* (Kohelet Policy Forum 25, March 2016).

⁵⁶⁰ Amir Feder, Michael Sarel, Zvia Zicherman, *ibid.*, p. 26.

⁵⁶¹ Avraham Michael and Rafael Bar-El, *A Quantitative Approach to Strikes in Israel*, (Bar Ilan University in collaboration with the Institute for the Advancement of Labour Relations, 1977), p. 287.

utilisation of invested capital, damage to machinery and equipment as well as finished products in the process as a result of lack of care during the strike and more.

The third approach measures the cost of strikes from an economic point of view: what are the losses caused to the Israeli economy as a whole as a result of the strikes. This approach guided Chamberlain and Schilling,⁵⁶² who held that the damage caused by strikes to all factors directly and indirectly related to them should be examined, when this damage is manifested not only in economic terms but also in social costs: the inconvenience caused to consumers to varying degrees of the commodity vitality, the cultural need for the commodity, etc. The approach of these researchers therefore refers to the damage as a whole, caused by the strikes in various respects, and not to the mere economic cost of the strikes. This approach raises two major issues. First, no strike is similar to another in terms of all its consequences, so each strike must be monitored separately, and its effects examined in different areas. The second problem that this approach raises is that while the economic cost can be quantified in terms of money, other effects of the strike (social costs) are not reflected in these terms and sometimes not in any other terms.

It also appears that the literature does not take into account damage to business reputation as a result of a strike (although there are formulas for calculating business reputation), nor damage to the reputation of a workers' union that may also be damaged as a result of a strike.

The accepted international estimation method has focused on estimating the direct production damages caused to the striking industry. This method measures the product losses caused as a result of the strike, by doubling the number of working days lost as a result of product strikes per worker per working day. For the purpose of comparing years and countries, the percentage of GDP of the economy lost as a result of strikes is also calculated. This method is expressed by the following formula: $N * P = C$ where: P is a product per worker per working day, and N is the number of working days lost due to strikes. An examination of the economic cost in terms of GDP is effective in two respects: First, it allows for a comparison over years and between countries. Second, it takes into account the product differences between industries, since the data on net domestic product are presented by industry. In this way, by summing up the costs of all industries it is possible to arrive at a more accurate estimate of the direct cost caused to the economy due to strikes.⁵⁶³ Hence, this formula has been refined so that the calculation of the loss to the economy is expressed in the following formula: $C = \sum (Pz * Nz)$ where: C is the loss of the product to the economy, Pz is the product per worker per day and in industry, Z⁵⁶⁴ and Nz is the number of working days lost due to strikes in industry Z. It is clear that the emphasis on the number of working days lost following a strike, highlights only one aspect of strikes and does not include reference to other characteristics such as the duration of the strike, the number of strikers, the reasons for the strike, the nature of the declaration, the manner of termination and the outcome. This estimation method ignores the more comprehensive results of the strike, which affect both the industries that provide inputs to the striking industry and those who purchase inputs from it. The more comprehensive and stronger the ties of an industry with other industries, the greater the cost of the strike that breaks out in it. On the other hand,

⁵⁶² Neil W. Chamberlain and Jane Metzger Schilling: *The Impact of Strikes: Their Social and Economic Costs*, (New York Harper, 1954).

⁵⁶³ Eliezer Schwartz, Jonathan Erlich, *ibid*, p. 2.

⁵⁶⁴ The product per worker per day is calculated in two stages: A. Division of product in the industry by 240 (number of working days per year) B. Division of the ration received in the number of employed persons in the industry.

the complexity of industry-wide internal trade ties is thwarted by attempts to measure these indirect strike damages.⁵⁶⁵

Hammed and Lomas were the first to estimate output and product losses (following strikes that occurred between 1966 and 1967, in selected industries in the Canadian economy)⁵⁶⁶. Zeiderman and Neumann also expanded Hammed and Lomas' approach to industry analysis. The method they used was composed of the following steps: after calculating the direct damage (i.e., output lost in the strike industry only), the final artificial demand from which output of this magnitude is derived is calculated, and consequently (using a coefficient matrix) the damages in the strike related industries were estimated. The summary of industry damages is the total damage: direct (in the striking industry) and indirect (in related industries) combined. The limitation of this method stems from the fact that the coefficient matrix only takes into account the relationships with input suppliers to the industry and therefore it gives a bottom obstruction to the cost estimate.⁵⁶⁷

Researchers Michael and Bar-El, who wrote the most comprehensive and quoted work on the damage of strikes in Israel, tried to estimate the productivity losses resulting from idle work and idle capital during the strike period. They estimated the losses according to the domestic product for each actual working day, in each of the general industries in which the strikes took place. They calculated the costs according to the following steps: (1) The figure of the net domestic product, at the prices of the production factors, in each of the industries. (2) Data on domestic product became data at constant prices, by weighting in the consumer price index. (3) The number of working days per employed person is calculated at 312. (4) In each industry and in each year, the distribution of domestic product from section (2) on working days from section (3) gave the product per working day in each industry and each year (at constant prices). (5) The economic cost of strikes in each industry each year will be found by multiplying the result of (4) by the number of unused working days as a result of strikes. However, Michael and Bar-El also admit that the calculation method they created “does not at all pretend to indicate the exact economic cost of the strikes”, and further: “This method does not overcome a very wide range of obstacles, making an accurate estimate of economic cost a completely impossible task technically”.⁵⁶⁸ These conclusions were repeated in the Kohelet Forum's economic analysis from 2016: “In general, there is no exact way to measure the economic damage inherent in a strike. An agricultural field that depends on a regular water supply to maintain its crops can lose all its seasonal produce in one strike while a Hi-Tech company closing for a few days suffers damage due to the delay but has the ability to close the gap and return to normal activity. In the case of seaports, the consequences are more significant, as the strikes raise the price of domestic products and international trade. In terms of import, frequent strikes at ports undermine the reliability of delivery dates and add significant secondary damage. On the part of imports, uncertainty increases the risk for importers, and with it the price”.⁵⁶⁹ This explains why very few quantitative studies have been

⁵⁶⁵ Adrian Zeiderman and Shoshana Neumann, *Economic Cost of Strikes in Israel – Input-Output Approach*, (Business Almanac: 1991), pp. 53-54.

⁵⁶⁶ Hammed, S.M.A. & Lomas, T. (1975), *Measurement of Production Losses Due to strikes in Canada: An Input-Output Analysis*, *British Journal of Industrial Relations*, (March)

⁵⁶⁷ Adrian Zeiderman and Shoshana Neumann, *ibid*, p. 57.

⁵⁶⁸ Avraham Michael and Rafael Bar-El, *ibid*, pp. 289 - 290.

⁵⁶⁹ Amir Feder, Michael Sarel, Zvia Zicherman, *ibid*, p. 25.

conducted in recent decades that have attempted to estimate the impact of strikes on the Israeli economy.⁵⁷⁰

9.6 Summary

In this chapter we learned that strikes cause damage. Through the damage, the workers' unions want to put pressure on the employer to comply with their demands. Sometimes the strikes cause damage to third parties, so that these will put pressure on the employer to comply with the workers' demands. Thus, as a result of the strike pressure, business entities that are in trade relations with the employer, local and foreign companies/corporations, service consumers, residents and the government may also find themselves harmed.

Not always and not in every strike do all these factors find themselves on the damaged side. But this long list of possible victims shows that the strike has the potential to have a *domino effect*. For example, a strike that breaks out in a factory in one nation state may affect a factory that has economic ties with it and is located in another nation state. That is, the damage does not only amount to the here and now (place and time known in the present) but the damage may occur over a continuous present (the number of damaged factors that continue to rise in the present) and the damage may also occur in the future (unknown place and time). Thus, responding to the pressure of a particular strike in the present may paradoxically lead to an increase in strikes in the future. These are the *shock waves* that constitute significant stressors when declaring a strike.

In this chapter we also learned that a strike can cause economic, political, social, image and trust damage. I reviewed the various methods that seek to estimate strike damage, I showed that there is no consensus on how to calculate strike damage and that there are also damages that cannot be estimated. This indicates thousands of times the complexity of the strike as a means of pressure. In the literature much attention has been paid to the economic damage caused by the strike, but at the same time little attention has been paid or there is disregard for the rest of the damage caused by the strike. This may in the future be a background for further research.⁵⁷¹ One of the conclusions recorded in this chapter is that the factors exposed to the greatest number of levels of damage from the strike are, the employer and the workers' union, each of which is exposed to four levels of damage: economic, political, image and damage in the trust relationship with it. Hence, activation of the strike weapon by the workers' union could be a double-edged sword against it. This is a particularly surprising conclusion, because the natural tendency is to think that the employer is the main or almost exclusive victim of strikes.⁵⁷² In Rabin-Margalio's opinion, the laws of strikes are an example of the dynamics of a pattern of negative reciprocity: striking workers are willing to suffer personal damage, such as non-payment of wages during the strike, etc., in order to inflict economic damage on an employer perceived by them as someone who does not treat them fairly in the collective bargaining negotiations. Rabin-Margalio adds that the strike is intended to eventually bring the parties back to the negotiating table, while re-establishing a relationship based on positive reciprocity. Without the ability to withdraw from the positive reciprocity towards the negative reciprocity (strike) it

⁵⁷⁰ An exception is the study of the Ministry of Finance, which estimated wage losses to the economy in 2003 at ILS 1 billion based on doubling the average wage in the economy per day in the number of lost working days (quoted in: Eliezer Schwartz, Jonathan Erlich, *ibid*, p. 1, fn. 4).

⁵⁷¹ The author seeks to emphasise in particular the absence of a study examining the relationship between a strike and a decline in stock value, as he pointed out in this chapter.

⁵⁷² It is worth noting that in 1989 Ruth Ben-Israel wrote that "the paradox of this change in the nature of the strike is that the workers in general are both the strikers and the immediate victims of the strikes". (See: Ruth Ben Israel, *Liability for Damages Caused by Strike*, *ibid*, p. 150). However, this statement remained incidental, and was not expanded on.

will not be possible to sustain the collective bargaining mechanism over time. For her, the right to strike is the power to *punish* an employer, who deviates from the framework of positive reciprocity, in order to bring him back into a relationship where each party benefits the other even though it is not obligated to do so.⁵⁷³ Another explanation for the use of strike weapons despite the fact that it causes damage to the union and the workers themselves, lies in the thought that the damage the current strike will cause will be used by the union in future talks with the employer, while the bargaining power of the union will increase with each strike that has caused harm to the employer.⁵⁷⁴

At the end of this chapter, it can be stated that despite the questions that remain open regarding the calculation of strike damages, there has been progress in understanding the question – Why is a strike a means of pressure, and what damages can it cause? At this stage of the study, it is known that there are different forms of strikes, partial strikes may cause heavier damages than full strikes,⁵⁷⁵ and that strikes cause heavy damages, some of which have no way of being estimated and to a wide circle of damage. No doubt every country would have a hard time withstanding the ongoing damage of strikes. But in Israel, which still carries a world of wars, an unstable security situation, population sectors that do not utilise their full earning potential – the results are particularly severe.⁵⁷⁶ The mere knowledge of a certain employer in the State of Israel that he is exposed to strike damage on four levels of damage is a stressful fact. Now, I can go over and examine in the following chapters the question How do the employer, third parties, the sovereign and the workers' union handle strikes?"⁵⁷⁷.

⁵⁷³ Sharon Rabin-Margaliot, *Behavioural Explanations of Labour Law and Labour Relations*, (Law and Business C, 5755), pp. 142-143, 148-149.

⁵⁷⁴ *Ibid.*, fn. 101 on page 150.

⁵⁷⁵ See, for example, the words of the Court in hearing of the Labour Court (national) 38/4-13 / The National Association of Israeli Journalists - Haaretz newspaper, Ruling of the Labour Court 9 415, Clause 6 of the ruling: "Sometimes strikes that are not full and continuous strikes may burden a plant more than a complete and continuous strike".

⁵⁷⁶ Evelyn Gordon, *ibid.*, p. 1.

⁵⁷⁷ It is possible to think of ways of dealing with other damaged factors (for example – service consumers, etc.), but to the author of this study it seems that this will not add significant mass to understanding the strike, its damages or its ability to be a stress factor.

Chapter 10: How the Employer Handles the Strike

10.1 Introduction

In the **Tadiran**⁵⁷⁸ case, President of the National Labour Court, Steve Adler, wrote: “The nature of a strike is that it causes economic damage to the employer, as well as to third parties associated with it in business relations and sometimes even to the general public. It is an unfortunate necessity that is required to fulfil the right of association. However, the freedom to strike, like any other freedom, is not absolute and must be balanced against other freedoms and rights, including **the employer’s right to protect his property and conduct his business as he wishes. As a result, our legal system does not prohibit an employer whose factory workers have gone on strike to reduce his damages from the strike**”⁵⁷⁹ (emphasis not in the original). Reducing the employer’s strike damage, as stated, is not prohibited by the National Labour Court. Rather: In some cases,⁵⁸⁰ the reduction of strike damages amounts to a duty imposed on the employer.

This is the place to recall, briefly, the damages caused to the employer as a result of the strike: loss of productivity and loss of output, damage to revenues and profits, rising product prices, fines for late delivery of products and overtime pay, cancellation of future work plans, erosion of credibility, loss of workers, loss of export contracts and customers, legal costs, image and communication costs and more.

Reducing the damage of a strike by filing a lawsuit against the workers’ union or against its workers participating in a legal strike is not possible,⁵⁸¹ as we will learn. The Israeli law book makes it difficult for the employer to recover from the damage of the strike by filing claims against the workers’ union and its workers. Thus, clause 19 of the Collective Agreements Law provides that: “Provisions in a collective agreement regarding working conditions, termination of employment, and personal obligations imposed under those provisions on a worker and employer and rights conferred on them (hereinafter – personal provisions), shall be regarded as an employment contract between any employer and any worker to whom the agreement applies, and valid even after expiration of the collective agreement, as long as they have not been lawfully amended or revoked; participating in a strike will not be considered a breach of personal duty”. That is, a worker who chooses to participate in a strike will not be considered to be in breach of an employment contract with his employer. Clause 62B of the Torts Ordinance (which states that: “A strike and a lockout shall not be considered a breach of contract”) also demonstrates the Israeli legislature’s policy of making it difficult for an employer seeking to sue its workers for strike damages. However, in 1972 the Dispute Resolution Law was amended and clause 37B (a) of the Law established that an unprotected strike would not be considered a strike as stated in section 62B of the Torts Ordinance, thereby giving the public sector employer the option to file a breach of contract claim. Clause 37B (b) also provided that an unprotected strike would not be considered a strike “for the purposes of clause 19 of the Collective Bargaining Act” and thus the legislature saw the workers taking part in an unprotected strike as violating their employment contracts.

⁵⁷⁸ For more on this case – see Chapter 10.2.2.

⁵⁷⁹ Labour Dispute (National) 742/05 The New General Workers’ Union, the Electricity, Metal and Electronics Association et al. v. Tadiran Systems Ltd. et al. (Dated 13.12.2005), clause 5 of the ruling of President Adler.

⁵⁸⁰ See, for example, Competition Law 801/08 Bezeq Israel Telecommunications Company Ltd. v. Competition Law Commissioner (16.12.2009). In this case, it was determined that the employer, Bezeq, had to take a series of steps in order to bring the sanctions to an end.

⁵⁸¹ Francis Raday, *Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Labour Law Almanac 5, 5755-1995), p. 146.

The cases in which the employer can legally file a lawsuit against the workers' union or its striking workers, therefore, are not numerous, to say the least. Considerations of a desire to put an end to the labour dispute, not to ignite the flames and focus on the prosperity of the factory and its recovery, also replace the desire to recover from the damage of the strike. For example, in the **Israel Railways** case, railway management filed a lawsuit against the then chairman of the workers' committee, Gila Edrei, and against her deputy, after railway activity was disabled in violation of the law, allegedly violating a court order and causing heavy damage to the railway company. The cause of action was based on the tort of negligence. However, after signing the final reform arrangements in the company, the railway withdrew the lawsuit, without justifying the withdrawal publicly.⁵⁸²

The focus of this chapter will therefore be on examining the following question: What means does the employer have of dealing with the strike and its damages? An answer to this question will help us assess the strike as a means of pressure.

To this end, I will examine the employer's ways of dealing with the strike in this chapter: breaking a strike; prohibition of replacement of workers or employment of external workers during strikes; prohibition of dismissal of striking workers during a strike; turning to the employers' mutual fund; use of injunctions; lockout; refusal to accept part-time work; deduction of wages and payment of proper wages; circumvention of the collective labour law; taking deterrent action against union and strike leaders; harassment of members of the workers' representative association at a disciplinary level; filing lawsuits against workers and their representatives; demand to maintain industrial quiet; use of non-striking workers; stockpiling; increasing production in the employer's other factories; engagement in alternative business relationships; continued supply of produce in the age of globalisation; worker vacation and unpaid worker vacation.

10.2 Breaking Strikes

One of the means for employers to deal with the strike and its damages is to break a strike by replacing the striking workers with new-external workers temporarily (during the strike), permanently or dismissing them. Although the replacement of striking workers with other workers and dismissal of striking workers are prohibited in the State of Israel by law and case law, this has not prevented employers, both in the public and private sectors, from trying to do so, from the earliest days of the State of Israel.

In this chapter, we will look at the prominent examples of attempts to break strikes in the history of the State of Israel, give our opinion on legislation on the subject, court rulings as well as the inconsistency in rulings, and the opinions of scholars in the literature.

In the Israeli collective memory, a number of famous attempts were made to break strikes that were even carried out using military force, police or accompanied by private security companies.

10.2.1 Historical Examples of Strike Breaking in Israel

A. Train Driver Strike

In 1951, the train drivers demanded that the Ministry of Transportation update their wages, who agreed in principle. However, the negotiations did not go well and following the prolonged discussions, the train drivers of Haifa held a meeting on Saturday, October 13, 1951, and decided to shut down the train. The train drivers in Lod also joined this strike, and thus train traffic in the country ceased. The cessation of train traffic severely hampered the possibility of removing goods from the port of Haifa, which was the

⁵⁸² Civil File (Petah Tikva) 53696-09-11 Israel Railways Ltd. v. Gila Edrei.

main port in the country at that time. The press reported that the government began to deal with the damage of the strike by removing the goods from the port of Haifa in trucks belonging to municipalities, the cooperative economy of the Histadrut and even the army. The army carried out two operations to clear cargo from the port with the help of the 691st Transport Battalion. The first operation began on October 16, 1951, lasted more than 18 hours, and the army operated 100 trucks during it; the second operation, which began on October 18, 1951, lasted more than 23 hours, and the army operated 102 trucks. In the two operations together, about 740 tons of sugar and flour were taken out of the port.⁵⁸³

At a cabinet meeting on October 17, Prime Minister and Defense Minister David Ben-Gurion stated: “If they do not stop their strike – they will not be returned to work, we will train new workers [...] I instructed the army to take goods out of the port as much as they could, and tonight they did this work, and I instructed them to continue this work the following night as well”. According to him, the strike is very severe, and if the strikers decide to continue their strike, on the one hand they will be drafted into the army, and on the other hand the army will operate the trains. The government decision supported Ben-Gurion in his role as defence minister, to put the train under military command if the workers do not reactivate it.⁵⁸⁴

The strike ended on November 6, 1951, when the parties reached an agreement, under which most of their demands for improvement in their wages and working conditions were met.

B. Seamen’s Strike

On June 10, 1951, a technical malfunction occurred to the ship *Negba* while sailing in the western Mediterranean, and it was required to sail to the port of Marseille in France for inspection. There it turned out that the repair of the ship would take two weeks. The seamen demanded that the ship’s owners cover their living expenses during these two weeks, but they refused and in response the seamen declared a general strike. Having no choice, the company agreed to the seamen’s demands, but with the return of the ship to the port of Haifa, several sailors received immediate notice of dismissal, along with an IDF conscription order.⁵⁸⁵ The sailors of *Negba* barricaded themselves on board and again declared a strike (known as the *Little Strike*), and the seamen were joined by all the Israeli passenger and merchant ships in Israel and around the world. The strike ended in July 1951, when it was decided to hold a consensual discussion between the Histadrut and the shipping companies and a new seamen’s representative called the *Temporary Representation* headed by the captain Nimrod Eshel.

On November 12, 1951, the *Great Seamen’s Strike* broke out. This lasted 43 days and included about 840 seamen. The cause of the strike was the Histadrut’s disagreement with the three main demands of the seamen: first, establishment of a national, independent seamen’s association, which would not be subject to supervision of the Haifa Workers’ Council; second, management of the Maritime Labour Bureau exclusively by the administration of the Seamen’s Association; third, allowing seamen to elect their own representatives in democratic elections. The seamen’s strike developed into an unusual event in terms of the force used against the strikers. The Haifa Workers’ Council, the Histadrut and the government brutally suppressed the strike through the use of force. The government issued conscription orders to the

⁵⁸³ Boaz Garfinkel, *Operation of the Army to Break the Train and Seamen’s Strikes in 1951*, (Studies – Multidisciplinary Journal for the Study of Israel - Vol. 34, 5780-2020), pp. 159-160.

⁵⁸⁴ Boaz Garfinkel, *ibid*, p. 161.

⁵⁸⁵ It will be explained that during the War of Independence the seamen (like other groups of workers in essential services) were exempted from military service. With the dismissal of the seamen, they were issued conscription orders on the grounds that since they are on strike, they are not essential workers and there is no reason to exempt them from military service.

strike leaders, and following a collective resignation of the masses of seamen during the Great Strike, they were drafted into the army. The seamen who were barricaded on the ships were forcibly evacuated by police, and the evacuation culminated on December 14, 1951, on Black Friday, when police and Hapoel Companies (young thugs operating on behalf of Mapai) removed the striking seamen from the ships *Rimon* and *Tel Aviv* with the use of violence, and in the area of the port of Haifa a mass brawl developed between the sides and even civilians who came to support the strikers. It was only on December 24, 1951 that the parties reached agreements concerning questions of representation, following which the Seamen's General Assembly declared the end of the strike.

The recurring question in the study of the seamen's strike is why such rigid and unusual measures were taken to break the strike. Common interpretations tend to explain the strike by factors beyond the realm of workers' struggles.⁵⁸⁶ The atmosphere of the Cold War and the struggle between the blocs,⁵⁸⁷ proximity to the date of aliyah of Libyan Jews and the fear that the Israeli merchant navy strike would endanger their safety, and centralisation mechanism of Mapai and the Histadrut who feared losing control of workers.

C. Cooperatives' Strike

At the beginning of August 1956, Egged, Dan and HaMekasher transport cooperatives decided to launch a two-hour warning strike, in which all public transport services (except trains) in the country would strike. The strike was preceded by a rise in fuel prices, the cooperatives' demand to raise transportation prices and their demands that their social rights not be reduced (extra effort payments, food and drink expenses, clothing expenses and overtime), and the transportation minister's decision to set up a public committee chaired by the Tel Aviv District Court to examine their demands. The committee's recommendations were published later in August, but were rejected by the cooperatives, who decided to lay off workers and go on strike, despite resolute opposition of the Histadrut, which even tried to prevent it. The strike lasted a total of nine days and at its peak encompassed 2,000 buses on urban and intercity transportation across the country.

One of the steps taken by the Minister of Transportation, Moshe Carmel, (Ahdut HaAvodah – Poalei Zion Party) during the strike, was speeches he gave live on the radio almost daily, including reports on the labour dispute, commendation of drivers who mobilised transportation and encouragement of the citizens of the country. In his first speech before the strike, the minister addressed a radio broadcast to the members of the cooperatives and asked them to reconsider their steps. At the same time, the minister also appealed to the residents of the country "to assist the government in its just cause towards the cooperatives and announced that all arrangements have been completed to ensure essential transport on strike days" and advised the public to "walk, because walking is good for one's health".⁵⁸⁸ In his speech

⁵⁸⁶ Boaz Garfinkel, *ibid*, p. 151.

⁵⁸⁷ Yosef Almogi, secretary of the Haifa Workers' Council, during the strike emphasised the "connection between the resistance to the strike and the inter-bloc struggle and the Korean War that took place at the time and saw the struggle between Mapai and the left (Mapam and Maki) as a local reflection of Western struggle against communism". Quoted in: Boaz Garfinkel, *ibid*, p. 152. This position presented by Almogi also raises the exchange between David Ben-Gurion who announced in the Knesset that "there was no strike. An attempt was made by the state's enemies to sabotage the commercial navy" and Moshe Sneh (Mapam) who replied to Ben-Gurion: "You are the number one enemy of the state". See Minutes of Session No. 25 of the Second Knesset (11/28/1951, at p. 497), at the link: https://fs.knesset.gov.il/2/Plenum/2_ptm_250623.pdf. A similar position is presented in Danny Vazana's book, which explains that the seamen maintained ties with communist regimes as part of their overseas voyages. (Danny Vazana, *Unionised*, (Schakim, 2017), p. 20.

⁵⁸⁸ Unknown author, *Last address of the Minister of Transportation*, (Haaretz, 22/08/1956), at the link:

after the first day of the strike, the Minister expressed his warm appreciation to the drivers for their beautiful response to assisting the traveling public all over the country.⁵⁸⁹

To deal with the strike, the Department of Transportation added train carriages, and additional train journeys to alleviate passenger congestion. But the most dramatic step taken to break the strike was to recruit private drivers to operate alternative public transport services. Prior to the strike, the Ministry of Transportation organised and operated transportation services in trucks, taxis, private cars and vans. Benches, ladders and tarpaulins were installed in the latter. Drivers who chose to operate lines, received instruction on the routes. Furthermore, insurance was instituted for all passengers in all means of transport. During the strike, the government decided not to negotiate with the strikers until their regular work resumed, considered nationalising the cooperatives, posted (through local authorities) on all bulletin boards the fare allowed to be charged from the traveling public and took care to prevent and handle price expropriation by recruited drivers.⁵⁹⁰ As the days wore on and the start of the school year approached, there was concern that the public transport strike would also harm schoolchildren. Therefore, the government decided to install emergency regulations “concerning supervision of transport and transportation services”, which authorised the Minister of Transport to seize the buses of the cooperatives and operate them themselves.⁵⁹¹ Apparently, this decision was the last straw for the strikers who decided to accept the government’s decision to raise fares at the rate it set, and return to their regular work. The government promised that in the event of a deficit at the end of the year, it will help cover it.

Despite the implications of government measures that constituted breaking the strike for all intents and purposes, and despite the issues recorded due to congestion, as well as passengers who had to travel in oppressive conditions and the scorching sun fainting, not only did most of the Israeli public understand them but they supported them. The Minister of Transportation’s office received hundreds of telegrams and letters from private individuals and public institutions expressing support for his positions and encouraging him to continue his actions. The press also praised the Minister of Transport: “Suddenly, Moshe Carmel’s star is dazzling. The youngest minister in the government (45) has become the hero of the day. His war on transportation cooperatives gave him more general sympathy than ever given to a minister in Israel and raised him to be the talk of the day for all residents of the country”⁵⁹². It seems that public support for the tough conduct of the government in general and the Minister of Transport in particular in breaking the cooperatives strike, caused the government to adopt an intolerance to public transport strikes, as only a decade later, Dan management again threatened to go on strike. As before, the Minister of Transportation, Carmel, promised to provide alternative public transportation. This time, his

<https://www.nli.org.il/he/newspapers/harets/1956/08/22/01/article/2/?e=01-08-1956-31-08-1956--he-20--1--img-txIN%7ctxTI-%d7%9e%d7%a9%d7%94+%d7%9b%d7%a8%d7%9e%d7%9c-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1> All below links accessed on 13/10/2021.

⁵⁸⁹ Unknown author, *Warm Appreciation for Drivers*, (LaMerhav, 23/08/1956), at the link:

<https://www.nli.org.il/he/newspapers/lmrv/1956/08/23/01/article/2/?srpos=15&e=01-08-1956-31-08-1956--he-20--1--img-txIN%7ctxTI-%d7%9e%d7%a9%d7%94+%d7%9b%d7%a8%d7%9e%d7%9c-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1>

⁵⁹⁰ Unknown author: *The government approved the position of the Minister of Transportation*, (She’arim, 27/08/1956), at the link:

<https://www.nli.org.il/he/newspapers/shar/1956/08/27/01/article/40/?e=01-08-1956-31-08-1956--he-20--1--img-txIN%7ctxTI-%d7%9e%d7%a9%d7%94+%d7%9b%d7%a8%d7%9e%d7%9c-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1>

⁵⁹¹ Unknown author, *Minister of Transportation authorised to enforce emergency laws*, (Herut, 30/08/1956), at the link:

<https://www.nli.org.il/he/newspapers/hbkr/1956/08/08/01/article/5/?srpos=20&e=01-08-1956-31-08-1956--he-20--1--img-txIN%7ctxTI-%d7%9e%d7%a9%d7%94+%d7%9b%d7%a8%d7%9e%d7%9c-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1>

⁵⁹² Unknown author, *Shining Star*, (HaOlam HaZe, 29/08/1956), at the link: <https://thisworld.online/1956/985#p6>

promise was also accompanied by a threat to expropriate Dan's franchise to operate public transportation services in the Gush Dan area.⁵⁹³

The question which I think should be asked in this case is what caused the government to be intolerant of the strikers' demands? Although the research literature is silent in this case as well, it seems that an answer to this question can first be found in the words of David Ben-Gurion, the Prime Minister, who wrote in his diary after the warning strike started by the cooperatives: "Moshe Carmel came to me. Should the transport people be put on trial for the temporary strike yesterday? I advised not to do so, but to warn them that they would be prosecuted in the future. Tomorrow, the public committee will finish its work, and Carmel speculates that it will support the government's opinion, and transportation will not be satisfied with this addition and a strike will probably break out next week. **I asked to make all the preparations and the army will also mobilise all available vehicles**"⁵⁹⁴ (emphasis not in the original). Admittedly, in the end no punitive measures were taken against the strikers out of a desire not to exacerbate the conflict and end it peacefully, and for this reason probably no military vehicles were recruited. But it seems that it was Ben-Gurion from the beginning who set the firm tone in this strike, as in the train strike and the seamen's strike.

D. Air Traffic Controller's Strike

On August 30, 1976, Davar newspaper reported that 1,200 civil aviation workers were "preparing to go on a general strike today at midnight that would paralyse all international flights to and from Israel and domestic flights".⁵⁹⁵ The background to the sanctions was the workers' demand to compare the terms of their employment with those of El Al – then the national airline that was owned by the state, and those of IAI workers. Unlike the rest of the civil aviation workers, who were adequately represented by a strong workers' committee, the air traffic controllers felt that their social rights were being violated, and decided to begin a slowdown strike, in which they worked *by the book*.

In January 1977, the controllers threatened to intensify the sanctions, so the pilots' association wrote a letter to Prime Minister Yitzhak Rabin and Transport Minister Gad Yaakobi, warning of the danger posed by their actions. The pilots' union has asked for permission to stop using the control tower in some cases, in coordination with the Air Force. In May, Minister of Transportation Yaakobi, ordered that the powers in the control tower be confiscated from the controllers, and military flight inspectors operated it for two weeks, together with air traffic controllers whose work had been stopped in the past. Some controllers protested, and some of them were even arrested by the police, as they distributed leaflets among the passengers, warning that "danger of death lurks for everyone taking off or landing at Ben Gurion Airport, due to poor supervision by the military controller".⁵⁹⁶

After a long and stubborn struggle that lasted several months, the air traffic controllers, mediated by the Histadrut, reached an agreement with the Ministry of Transportation on the cessation of delays in their

⁵⁹³ Unknown author, *Carmel: If Dan strike, we will ensure alternative transportation* (LaMerhav, 28/01/1966), at the link: <https://www.nli.org.il/he/newspapers/?a=is&oid=lmrv19660128-01.2.24&type=nliologicalsectionpdf&e=-----196-he-20--181--img-txIN%7ctxTI-%d7%9e%d7%a9%d7%94+%d7%9b%d7%a8%d7%9e%d7%9c-ARTICLE-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1>

⁵⁹⁴ Dated 09/08/1956, at the link: <https://bengurionarchive.bgu.ac.il/node/14724>

⁵⁹⁵ At the link: <https://www.nli.org.il/he/newspapers/dav/1976/08/30/01/?&e=-----he-20--1--img-txIN%7ctxTI-----1>
Accessed: 15/07/2021.

⁵⁹⁶ Yossi Elias: *The Government v. Port Committees: A History of Threats and Wars* (Walla, 24/05/2013). At the link: <https://news.walla.co.il/item/2644948> Accessed: 15/07/2021.

work, and the Air Traffic Controller Committee was incorporated under the General Workers' Committee.

E. Soltam Strike and The Night of the Dogs

In the late 1990s, Soltam, which was owned by the Histadrut Workers' Union, experienced a crisis in orders due to debts caused by the severance of diplomatic ties between Israel and Iran, and its management announced its intention to lay off hundreds of workers. The dismissal agreement between the factory's management and the Histadrut was rejected by the workers, who began to barricade in the factory for more than five weeks, which led the factory's management applying to the Magistrate's Court in Haifa to request – and obtain an order directing evacuation of workers from the factory, claiming that these prevent its continued operation.

The factory's management, now equipped with a court order, decided to hire a private security company to evacuate workers from the factory's compound. On September 6, 1990, at 3:30 a.m., the evacuation operation began. 150 security guards broke through the back gate of the factory, escorted by 40 threatening Rottweilers and began "commanding the dogs to attack people, beating them and pushing them out of the factory".⁵⁹⁷ Residents of Yokne'am, where the Soltam factory is located, left their homes in the middle of the night and were horrified to see their family members being forcibly dragged out of the factory. The evocative cries of the evacuees were obscured by the terrifying barks of the dogs.

Evacuation of workers from the factory, dubbed *The Night of the Dogs*, shocked the country. The secretary general of the Histadrut, Israel Keisar, set up an inquiry commission to examine the recruitment of a private evacuation company and the use of assault dogs against workers. The committee pointed out shortcomings in the decision-making process in the case and their implementation and invalidated the use made of dogs. Following the affair, Soltam's CEO, Uri Simchoni, was forced to submit his resignation to Koor's management.⁵⁹⁸ Koor's CEO later filed a private criminal complaint against the owner of the security company, Benny Tal. The consequences of *The Night of the Dogs* are an expression of the unique conflict in which the Histadrut was in a dual role: on the one hand, it employs workers and on the other hand, a trade union that is supposed to back the rights of the workers.

10.2.2 Prohibition of Replacing Workers or Hiring External Workers During a Strike

An employer can minimise the damage of the strike if he replaces his workers, if only for the period of the strike, with other workers who will meanwhile operate his business. Of course, employment of permanent replacements completely sterilises the right to strike. However, employment of temporary replacements also infringes on the right to strike – although it does not completely sterilise it – as it reduces the impact of the strikers' pressure and allows the employer to hold out longer when his workers strike.⁵⁹⁹

⁵⁹⁷ Amir Gilat: *At 3:30 at night, the security guards entered Soltam and attacked us with dogs* (Ma'ariv, 07/09/1990). At the link:

<https://www.nli.org.il/he/newspapers/mar/1990/09/07/01/article/55/?e=-----he-20--1--img-txIN%7ctxTI-----1>

Accessed: 16/07/2021.

⁵⁹⁸ Avshalom Ginosar and Tal Shachaf: *CEO Uri Simchoni took personal responsibility for the Soltam events and resigned* (Ma'ariv, 24/09/1990). At the link:

<https://www.nli.org.il/he/newspapers/mar/1990/09/24/01/?e=-----he-20--1--img-txIN%7ctxTI-----1>

Accessed:

16/07/2021.

⁵⁹⁹ Nir Ganinsky, *ibid*, p. 36.

A. Prohibition of Replacing Workers or Hiring External Workers During a Strike – in Israeli Law

Israeli law contains two expressions of a policy according to which the employment of external workers in place of striking workers is undesirable:

- A. Clause 44 of the Employment Service Law,⁶⁰⁰ entitled *Non-Intervention in Strikes and Lockouts*, provides as follows: “The Employment Service Bureau will not send workers to a workplace that has a strike or lockout and will not send strike workers to work, all the time of the strike or lockout. An employer who has employed striking or locked out workers, and workers who worked in a factory that has a strike or lockout, will not be prosecuted for this”. This principle was applied in clause 64A of this law also to a private labour bureau.

The legislature maintained a consistent position in its policy even years later, when it enacted the second piece of legislation:

- B. Clause 16 of the Employment of Workers by Manpower Contractors Law,⁶⁰¹ called the Prohibition of Employment during a Strike or Lockout, provides as follows: “A manpower contractor shall not employ workers in place of workers participating in a strike and shall not employ workers in place of workers who are locked out due to a strike, as long as the strike or lockout occurs”. Clause 20 of the Law provides that an offense under clause 16 constitutes a criminal offense.

Israeli law also expresses a policy that dismissals due to participation in a strike are undesirable. Clause 19 of the Collective Agreements Law stipulates that “[...] participation in a strike shall not be deemed to be a breach of personal duty”. The labour courts interpreted this clause as conferring protection on workers from dismissal due to their participation in a strike, because the employment contract is suspended at the time of the strike.⁶⁰²

In 1972, the Knesset amended section 37B (c) of the Labour Disputes Settlement Law and allowed labour bureaus to send workers to a workplace where there was an unprotected strike⁶⁰³: “An unprotected strike does not constitute a strike for the purposes of the second paragraph of clause 44 of the Employment Service Law, 5719-1959, regarding sending workers to a workplace where a strike is taking place; however, a person looking for a job that a labour bureau has offered a job in a workplace where there is an unprotected strike and as a result he refuses to accept said work, his rights under the regulations established by virtue of clause 41 of said law will not be violated”. MK Shoshana Arbeli Almozlino (Ma’arach), Chairman of the Labour Committee, explained to the Knesset plenum the proposed change: “This clause comes to repeal the prohibition that applies to the Labour Bureau, according to clause 44 of the Employment Service Law, 5719-1959, regarding sending workers to a workplace where there is a strike or lockout. When the law is passed, the Labour Bureau will be allowed to send workers to a workplace where there is an unprotected strike or lockout”.⁶⁰⁴ From this we learn about the legislature’s attitude towards unprotected strikes versus protected strikes, and about its desire to make it difficult for an unprotected strike to exist, in sending job seekers to the workplace.

⁶⁰⁰ Employment Service Law, 5719-1959.

⁶⁰¹ Employment of Workers by Manpower Contractors Law, 5756-1996.

⁶⁰² For example, see Ruling – Collective Dispute Appeal 1008/00 Horn and Leibowitz Ltd. v. The New General Workers’ Union, Labour Court Ruling 145, clause 6 of President Adler’s ruling.

⁶⁰³ On unprotected strikes, see Chapter 5: *Types of Strikes*.

⁶⁰⁴ Minutes of the 287th sessions of the Seventh Knesset (dated 22/03/1972, at p. 1975), at the link:

https://fs.knesset.gov.il/7/Plenum/7_ptm_252909.pdf

B. Prohibition of Replacing Workers or Hiring External Workers During a Strike – in Israeli Case Law

Over the years, case law has been changed in the Labour Court, which prohibits the employer from operating his business through workers who were not part of the workforce at the time of the strike, and that the employer is prohibited from hiring replacement workers instead of striking workers, whether temporary or permanent.

Ruth Ben-Israel believes that hiring temporary replacements violates the right to strike, even though it does not completely sterilise it. In her opinion, hiring temporary workers during a strike has the potential to reduce the impact of economic pressure on the employer and allow him to hold out a long time. Thus, it even increases the cost of the strike for workers. According to her, hiring permanent replacements completely sterilises the right to strike since the worker loses his job due to his participation in the strike. For democratic reasons that require respect for the right to strike, it is doubtful in the eyes of Ben-Israel whether there is any justification for the employer even training temporary replacements.⁶⁰⁵

This opinion was also expressed in the **Tadiran case**. In this case, two companies from the Tadiran Group (Tadiran Systems and Tadiran Spectralink) used the warehouse of Tadiran Keshet to store raw materials. At a certain point, a strike broke out at Tadiran Keshet and as a result of the strike, work was stopped in warehouses that served, as stated, the two other companies and their activities were disrupted. These sought to make their workers available to Tadiran Keshet so that they could work in the warehouses instead of the striking workers. President of the National Labour Court, Steve Adler, stated that “hiring replacement workers for strikers, both temporary and permanent, can allow the employer to continue to operate his factory properly even during the strike period and thus reduce his damage”⁶⁰⁶ and further stated: “Operating a factory that is disabled by other workers can certainly impair the possibility of formulating a new collective agreement and in fact the collective relations in the factory, as well as the freedom of association. Therefore, as a rule, the employer should not be allowed to operate his factory through external workers, since this is a weapon that does not meet the test of proportionality”.⁶⁰⁷ In the same breath it was also stipulated that an employer may during a strike “operate the factory through his non-striking workers, although he may not compel them against their will to perform work of striking workers”.

In the **International Bank case**, during the strike, the bank’s management recruited workers of a subsidiary, which was wholly owned by the bank, to serve as replacement workers. The Histadrut and the National Committee of International Bank Workers petitioned the court for a temporary injunction prohibiting International Bank from employing workers external to the bank, including workers of the bank’s subsidiaries, in place of the striking bank workers. The court ruled that “the action taken by the employer – placing workers from Mataf in place of the striking bank workers, does not stand the test of proportionality in the face of the organisational measures taken by the workers. Furthermore, the Tadiran rule should be applied to the matter discussed here, whereby workers who are not bank workers should not be placed instead of the striking workers”.⁶⁰⁸

⁶⁰⁵ Ruth Ben Israel, *Strike and Lockout in the Mirror of Democracy*, (The Open University, 2003), p. 144.

⁶⁰⁶ Labour Appeal (National) 742/05 The New General Workers’ Union, the Histadrut of Electricity, Metal and Electronics et al. v. Tadiran Systems Ltd. et al. (dated 13.12.2005), clause 6 of the ruling of President Adler.

⁶⁰⁷ Ibid, clause 8 of the ruling.

⁶⁰⁸ Collective Dispute (Tel Aviv Areas) 269/06 The New Histadrut – Derivatives Markets Association – Bank Workers Division – International Bank Ltd. (dated: 20/11/2006), clause 32 of the ruling.

In the **MetroDan case**, a private company that won a concession to operate public transportation in Be'er Sheva, two interesting issues came up for discussion. The first issue was the refusal of workers to allow entry and exit of vehicles, and closing the gates of the parking lot where they parked, all as part of the strike they had started. In response, the company's management petitioned the Regional Labour Court for an order directing workers to refrain from interfering with entry, exit and free movement of people, vehicles and equipment to and from the applicant's compound. The court ruled that "the balance point for the purpose of the decision on temporary relief is therefore to recognise the employer's property right", but in the same breath it stated that it prohibits the company's management "from operating the services it provides through workers who were not their workers" before the strike.⁶⁰⁹ The second issue dealt with temporary-relief work which eight striking workers began during the strike. The company's management claimed that while it was suffering from real economic damage – since it was prevented from operating the service it provided, no parallel economic pressure was exerted on the striking workers. This is because during the strike period, these workers benefit from their income from alternative work and money received through the workers' union's strike fund. The court allowed the striking workers to work in alternative temporary work while ruling that "while the individual employment contract between the striking worker and the employer is suspended, the striking worker may work in alternative work during the strike. All this on the condition that it is not a permanent job that involves a statement by the striking worker to sever the working relationship between him and the employer".⁶¹⁰

The **MetroDan case** did not end here. Later in this case, the right to strike is discussed in the face of the state's status, and the right of the state to intervene as a governmental authority, in an organisational struggle between a workers' union and the employer. The background to the ruling was the strike of transport company workers for more than five months. During the strike, the then Minister of Transportation, Meir Shitrit, approved operation of bus lines in the city through other companies, and also through the reinforcement of taxi services, stating in the order that the price for each trip will be only ILS 4.

The regional court ruled that "in the case before us, instead of the closed monopoly, a new monopoly has risen where the workers operate the service. Since this is a privatised service, the state has the right to replace the service provider, in part or in full and regardless of the workers' right to strike".⁶¹¹ Further in the ruling, the court ruled that the effectiveness of the strike was impaired only in relation to the public (whose harm was reduced following entry of the additional operator) and not in terms of the effectiveness of the strike, towards the employer – MetroDan, which did not gain or lose less as a result of the introduction of another operator, and therefore, the Minister of Transportation's decision to add another operator to public transportation does not harm the strike but only works for the benefit of the residents of Be'er Sheva.⁶¹²

This decision of the Regional Labour Court was appealed to the National Court, which ruled that in the circumstances of the case, the Ministry of Transport deviated from its role as regulator and put itself in the *wrestling arena* between MetroDan and the other transport companies. When the state decided to

⁶⁰⁹ Various civil applications 2816/04 MetroDan Be'er Sheva v. New General Workers' Union of the Negev Region et al. (dated 30.11.2004), clause 11 of the court's decision.

⁶¹⁰ Various civil applications 2816/04 MetroDan Be'er Sheva v. New General Workers' Union of the Negev Region et al. (dated 22.03.2005), clauses 6-7 of the court's decision.

⁶¹¹ Collective Dispute 1001/05 New General Workers' Union in the Negev Region v. State of Israel – Ministry of Transportation et al. (dated: 07/02/2005), clause 74 of the ruling.

⁶¹² Ibid, clauses 77-80 of the ruling.

grant a concession to provide transportation services in Be'er Sheva to a private company, then the labour dispute that breaks out with the concessionaire is a dispute in the private sector, and the state must respect the parties' autonomy and allow the parties to use the tools at their disposal. The National Court ruled that the state should "immediately stop issuing permits for operating public transportation in Be'er Sheva through temporary concessionaires", and based its decision on considerations of proportionality, stating: "In our opinion, the measure chosen by the Minister is disproportionate and gives too much weight to prevent the inconvenience caused to the public. The minister did not give enough weight to the fact that MetroDan managed, despite the strike, to operate 13 of the 21 bus lines through 40 company drivers that chose not to join the strike... The result of the minister's decision is a fatal blow to the efforts of MetroDan workers to organise, since in this way all public pressure was taken from their strike...".⁶¹³

Against the decision of the National Court, the parties petitioned the High Court, but it rejected the petitions in light of an announcement regarding the end of the labour dispute and the return of MetroDan workers to regular work.⁶¹⁴

In the **Davidson Institute case**, the court expressed its opinion that "the employer is prohibited from hiring replacement workers in place of the striking workers, whether the replacement workers are temporary or permanent workers. The mechanism of a strike is built on balance, so that on the one hand economic damage is caused to workers – loss of wages, and on the other hand economic damage is caused to the employer – losses as a result of the lockout of his business. Allowing the employer to hire replacement workers in place of the striking workers violates this balance, and creates a situation where only the workers pay the price of the strike. These things are true and material in the case where the cause of strike is the realisation of the fundamental right to freedom of association, when workers have no protection against dismissal under a collective agreement, so hiring a replacement worker for the striking worker creates pressure on the striking worker to resign from the workers' union due to the fear that at the end of the strike the new worker will be preferred over him and he will lose his job. Moreover, when it comes to a strike whose cause is organisation of the workers, accepting replacement workers may even increase the number of workers in the bargaining unit and make it difficult for the workers' union to achieve the status of a representative workers' union".⁶¹⁵

In the **Lifeguard's case**,⁶¹⁶ the District Court pointed to a series of omissions in the operation of the municipality, led by its failure to recruit replacement lifeguards in place of those who were striking. Michal Horowitz states that "the ruling in the lifeguard's case has far-reaching consequences, since the obvious conclusion is that failure to break a strike is a reason to impose tortious liability [...] Every employer should fight a strike by his workers with all his might and avoid any move that recognises the existence of a social interest in protecting this right. It is advisable that he tries to obtain replacement workers for the striking workers in order to avoid a claim for damages due to damage caused by the strike".⁶¹⁷ In Horowitz's opinion, this action is also impossible since it is contrary to the law of the National Labour Court (mentioned in the Tadiran case, above). However, the hearing in the lifeguard's

⁶¹³ Collective Dispute Appeal (National) 57/05 New General Workers' Union v. State of Israel and MetroDan Be'er Sheva Ltd. (dated: 03/03/2005), clause 19 of the ruling.

⁶¹⁴ HCJ 2406/05 Be'er Sheva Municipality v. The National Labour Court (dated: 27/07/2005).

⁶¹⁵ Collective Dispute (Tel Aviv) 504/09 Power to the Workers Organisation – Democratic Workers' Union v. Davidson Institute for Science Education, near the Weizmann Institute of Science (published in databases, dated 2.3.2009), clause 144 of the ruling of Judge Leah Glicksman.

⁶¹⁶ Which will also be discussed in Chapter 12: *How Third Parties Handle the Strike*.

⁶¹⁷ Michal Horowitz, *Freedom to Strike – Proportionality and Mutual Respect in Labour Law*, (Labour, Society and Law 13, 2012), p. 130.

case was held in a District Court, which does not consider itself subject to the rules established in the Labour Court.⁶¹⁸

In the **Ness case**, the president of the Jerusalem Regional Labour Court, Eyal Avrahami, ruled in a lawsuit against Hadassah Hospital that a service client must not break a strike of contractor workers employed by him. This was determined after Hadassah asked to replace contractor workers in the computer department who were employed by Ness Technologies who were striking, with workers of other contractor companies: “Ness’s workers have workers’ rights both at the individual level and at the collective level. Because if we do not say so, we will cancel the right to strike in particular and the collective rights as well as the individual rights... The idea inherent in the ban on bringing new workers to replace the striking workers, through a services contractor or a manpower contractor applies here as well”.⁶¹⁹

In the **Court System case**, the Histadrut claimed that the courts’ management had illegally violated the workers’ right to strike, both by replacing them with contractor workers who were recording the ongoing hearings, and through the use of national service volunteers working in the courts, who according to the Histadrut were required to perform work performed, on an ongoing basis, by the workers. “The National service girls – for me it is equivalent to the army. The courts’ administration is placing the army in the courts”,⁶²⁰ said the chairman of the court staff committee. In his ruling, Judge Shmuel Tenenbaum partially granted the request after being convinced that it would cause disproportionate harm to those in need of court services, and ruled that court workers would return to work to a limited extent, but the approved quota of workers could be moved between different districts in accordance with workloads.⁶²¹

In the **Rami Levy case**, the Histadrut claimed that during the workers’ strike, the company began hiring new workers to replace the striking workers and perform their work. The striking workers noticed the entry of dozens of outside workers into the factory yard belonging to outside contractors. Company trucks began exiting the site gate driven by drivers from outside contractors. The strikers also learned that the contractor’s workers were performing the collecting work within the company’s premises, and cashiers employed at a nearby branch entered the company’s site, in order to replace the striking cashiers. The Regional Labour Court ruled that continued employment of replacement workers drained the effective force of the strike.⁶²²

10.2.3 Prohibition of Dismissing Workers During a Strike

In Chapter 4,⁶²³ I discussed the existing prohibition in the law to dismiss a worker, worsen a worker’s working conditions or refrain from accepting a person for work due to “his membership or activity in a workers’ union; his activity for the purpose of establishing a workers’ organization [...]”.⁶²⁴ Although the

⁶¹⁸ Ibid, fn. 40 in the article.

⁶¹⁹ Collective Dispute (Jerusalem) 33270-11-18 New General Workers’ Union – Jerusalem Area v. Ness AT Ltd. (dated: 02/12/2018), clause 7 and clause 14 of the ruling.

⁶²⁰ Nitzan Zvi Cohen: *The government is trying to break a strike, and is using national service girls*, (Davar, 21/07/2016). At the link: <https://www.davar1.co.il/25524/> Accessed: 18/07/2021.

⁶²¹ Collective Dispute (Tel Aviv) 38207-01-16 State of Israel v. New General Workers’ Union (dated: 21/07/2016). It will be noted that this was not the first time that allegations of a strike breaking by the courts were made. Even during the stenographers’ strike in 2009, the stenographers threatened to appeal to the Labour Court over their replacement with interns, legal assistants and recordings of the hearings. See: Miki Peled: *The Histadrut: The Courts Break a Strike*, (Calcalist, 24/11/2009), at the link: <https://www.calcalist.co.il/local/articles/0,7340,L-3368731,00.html> Accessed: 03/08/2021.

⁶²² Collective Dispute (Be’er Sheva) 14979-12-15 New General Workers’ Union v. Bicurei HaShikma Ltd., clauses 57-89 of the ruling.

⁶²³ Chapter 4: *The Meanings of the Strike*.

⁶²⁴ Clause 33J of the Collective Agreements Law, 5717-1957.

language of the law deals with companies or the activities of a workers' union, it can be argued that a strike is an activity carried out within a workers' union or for its establishment, it is a right derived from the right to organise, and hence strike participants enjoy the protection extended to them by this law as well.

One of the first cases in the private sector, in which workers were dismissed during a strike, and which also came up for legal discussion, is the **Horn and Leibowitz case**. In this case, the company was a private company engaged in transporting passengers and leasing vehicles. The Histadrut contacted the company and demanded that it negotiate with them in preparation for drafting a collective agreement that would regulate its working conditions, but the employer refused. As a result, a conflict erupted between the parties and a strike was declared. In response to the strike, the employer fired thirty-three drivers, all workers who took part in the strike.

The National Labour Court ruled that “violation of the freedom to strike deprives the workers' union of the main tool that enables it to exert pressure on the employer and eliminates its existence in the eyes of the workers [...] Protection against harm by the employer to members of the workers' union or its representatives is an integral part of the freedom of association of the workers. Therefore, it is clear that the dismissal of workers due to their desire to organise and participate in the strike constitutes a violation of their constitutional right”.⁶²⁵

The court debated whether there was room to revoke the workers' dismissal and return them to work. The company claimed that “even if there is room to recognise the right of association and the prohibition to dismiss a worker on the basis of his participation in the strike, this does not nullify the dismissal of the workers in this case. This, in light of the fact that the dismissed workers behaved violently during the strike [...]”.⁶²⁶ The court ruled that the claim should not be accepted, that the workers should not be returned to work due to the violence they used during the strike. First, it appears that as a rule the workers in the compound used reasonable force during the strike. Second, although one of the foundations of labour relations is that there is no room for violence in the workplace or with regard to labour relations, a strike is an action which by its very nature entails a foundation of force, if only for the purpose of preventing the employer from operating his business. To the same extent, an employer's effort to operate its business during a strike, with the aim of breaking it, also includes an element of the use of force.⁶²⁷

In this case, the National Labour Court decided to cancel the dismissal of the dismissed workers, stating that in these circumstances the freedom of association of the workers prevails over the freedom of management of the employer, even when it is a private workplace.⁶²⁸

10.2.4 Interim Summary

From this chapter, we learn that the law in the State of Israel does not make it possible to replace the work of striking workers with permanent or temporary workers who are external to the workforce on the eve of the strike. But the prohibition in the law, as we have learned, did not prevent the Israeli government (which is responsible for the government sector), the Histadrut (which owned the Histadrut sector) or the owners of companies and private businesses from trying to break their workers' strikes. Thus, a bill was introduced that sought to prohibit breaking a strike, punishment of a worker who took part in a strike, or

⁶²⁵ Collective Agreement Appeal 1008/00 Horn and Leibowitz Ltd. v. The New General Workers' Union, Ruling 145. Clause 7 and Clause 10 of President Adler's ruling.

⁶²⁶ Ibid, Clause 11 of President Adler's ruling.

⁶²⁷ Ibid, Clauses 11-12 of President Adler's ruling.

⁶²⁸ Nir Ganinsky, *ibid*, pp. 35-36.

employment of soldiers in place of striking workers, and at the same time sought to give a workers' union or worker whose right to strike was harmed the option to claim compensation from his employer.⁶²⁹ The bill did not pass the stages of legislation in the Knesset.

I reviewed attempts to break strikes through recruitment of strikers for reserve service in the army (the train drivers' and seamen's strikes), use of the army to operate striking workplaces (the lifeguards' strike), hiring of a security company to evacuate strikers (night of the dogs), hiring replacement workers (in the cooperatives case, the Tadiran case, the International Bank case, the Power to the Workers v. Davidson Institute case, the Rami Levy case), hiring replacement workers by a service client (in the Ness case), use of national service girls (in the court system case), or intervention in a public tender through other companies (in the MetroDan case). In almost all of these cases, the various courts prevented the strike from being broken and upheld the spirit of the law, with the exception of the train drivers and seamen cases – which occurred in the early years of the state, and the lifeguards' case. The latter case, as stated, was discussed in the District Court, which is not the place for resolving labour disputes, and the District Court's ruling was even sharply criticised in the literature, as we will learn.

In the course of seventy years of Israel's independence, has the norm been formed among employers that a strike should not be broken? The answer seems to be no. Reinforcement of this can be found in the government's plans to build a new port for unloading goods. In parallel with preparation of a tender for construction of the port, the Israeli government revealed how it intends to fight a potential strike of port workers: "Rapid legislation banning strikes on essential services such as seaports; use of foreign ports, for example in Greece or Cyprus, for the purpose of unloading cargo and transporting it to a port in Hadera, using small ships; Use of Aqaba Port to unload cargo, which will be transported to Eilat Port by means of a chartered ship; recruitment of retired port workers, operation of Israeli shipyards using additional cranes and preparation of tugboats."⁶³⁰

10.3 Employers' Mutual Fund

The Association of Industrial Owners in Haifa initiated a referendum among its members to establish an Insurance Fund against Occupational Disorders as early as 1947.⁶³¹ This proposal did not purport to provide collateral against strikes to all employers in Israel at the time, but twenty years later, in 1967, the Manufacturers' Association established the Employers' Insurance Fund (which later changed its name to the Employers' Mutual Fund)⁶³² with the aim of "helping its members implement employment agreements, and reduce strike threats as a means of pressure to negotiate working conditions".

In accordance with its bylaws, the fund pays its members damages in cases of strikes and factory lockouts, as well as in cases of strikes or sanctions at external infrastructure providers (electricity, water, fuel and gas for industry, customs and air and sea ports or in a factory producing main raw materials without an immediate replacement), which cause the member's production to shut down completely".⁶³³

⁶²⁹ Labour Dispute Resolution Bill (Amendment – Prohibition of Strike), 5756-1996, (80/294/14). Tabled in the Knesset on 22/07/1996.

⁶³⁰ Shahar Hazelkorn: *Breaking a strike: this is how the state will fight the ports' committees*, (Ynet, 05/22/2013), at the link: <https://www.ynet.co.il/articles/0,7340,L-4382895,00.html> Accessed: 03/08/2021.

⁶³¹ Unknown author, *Organization of Industrial Owners Against Strikes*, (Haaretz, 22/01/1947), at the link: <https://www.nli.org.il/he/newspapers/haretz/1947/01/22/01/?&srpos=202&e=-----194-he-20-haretz-201--img-txIN%7ctxTI---1947-----1> Accessed: 16/08/2021.

⁶³² Hereinafter: The Fund.

⁶³³ From: The Israel Manufacturers Association, link:

The goals and actions of the fund do not come for the purpose of making profits and/or distributing them. The infrastructure for the fund's operations is through accumulation of "[financial] reserves in an amount that will be required from time to time, in order to maintain the financial capacity to support members by paying damages caused by labour disputes".⁶³⁴ Some see the fund as a kind of *insurance company* for industrialists, to which claims are filed in cases of prolonged strikes and the formation of financial damages that harm companies. An example of this is the Covid-19 crisis, following which the fund created a loan for its members aimed at helping industrialists overcome the crisis. Another example occurred during the economic crisis in 2008, when the fund issued a tender and negotiated with banks, to help small and medium-sized enterprises obtain credit with preferential terms.⁶³⁵

The basis for joining the fund is voluntary, but every member of the fund must be a member of the Manufacturers Association. The fund's management consists of industry executives. From the moment of admission to the Manufacturers' Association, a member is considered to have accepted all the provisions of the regulations and the decisions made and those that will be made according to it.⁶³⁶ The companies pay membership fees to the fund on a regular basis. Membership fees vary according to the number of workers the companies employ, their size and the scope of their activities. Members of the fund are entitled to compensation for defined damage caused to their factory as a result of a cessation or slowdown of normal production resulting from a strike, lockout, partial strike, slowdown strike and the like. Compensation is based, among other things, also on the amount the employer would have paid as wages to the workers had it not been for the workers striking.

The fund's regulations stipulate the conditions for compensating employers who have been harmed by labour disputes, including a two-year qualifying period, at the end of which members will be entitled to compensation, and the maximum compensation rate that a fund member will be entitled to receive for a strike or lockout (this rate shall not exceed the monetary value of 33 working days for the number of employed persons striking).⁶³⁷

It is worth dwelling on three provisions of particular interest in the fund's regulations that set conditions for an employer seeking compensation from the fund:

- A. Every member who wishes to shut down his factory must notify the fund's management and the association's work committee in writing, provide all the motives for the lockout and obtain prior approval.⁶³⁸
- B. A member of the fund shall not employ striking or locked out workers and shall not provide them with any support, whether they are workers of his factory or the factory of any other member, as long as he has not received prior written consent from the fund management.⁶³⁹

<https://www.industry.org.il/%D7%94%D7%A7%D7%A8%D7%9F-%D7%94%D7%94%D7%93%D7%93%D7%99%D7%AA> Accessed: 13/07/2021.

⁶³⁴ Clause 7 of the Employers' Mutual Fund Regulations, as quoted by: Amnon Caspi and Ruth Kastiel, *Labour Relations*, (Open University: 2005), p. 268.

⁶³⁵ Unknown author, *A unique loan for manufacturers to members of a mutual fund*, (Bank Hapoalim, date unknown), at the link: <https://www.bankhapoalim.co.il/he/loans/business-loan/keren-hadadit-loan>, Accessed: 16/08/2021.

⁶³⁶ From: The Israel Manufacturers Association, link: https://www.industry.org.il/index.php?dir=site&page=union_articles&op=item&cs=5783&langpage=heb Accessed: 13/07/2021.

⁶³⁷ Clauses 40A, 40E, 43A, 43C of the Articles of Association of the Mutual Fund of Employers, as quoted by: Amnon Caspi and Ruth Kastiel, *Labour Relations*, (Open University: 2005), p. 268.

⁶³⁸ *Ibid*, clause 48A.

⁶³⁹ *Ibid*, clause 46.

C. A member will not be allowed to pay any payment to strikers and/or locked out workers for the strike and/or lockout, by paying regular wages and/or by paying disguised wages such as grants, loans, increased vacation quota, converting paid leave and/or any other form of payment. A member who acts in violation of this directive will be denied eligibility for compensation from the fund.⁶⁴⁰

The Manufacturers Association's website does not specify who manages the fund,⁶⁴¹ and its reports are not made public. Requests from media outlets over the years for requests to disclose the fund's data have also not been successful.⁶⁴² Since the fund is a voluntary association,⁶⁴³ it is not subject to external oversight, and is not subject to a duty of freedom of information – so if it refuses to transfer data, it cannot be required to do so by law.

Employers see the fund as a stabilising and balancing factor in the employment relationship. In its years of existence, the fund has provided backing for their positions in negotiations conducted at both the national and factory levels, and has prevented labour disputes or reduced the damages of disputes. For example, in 1974 the fund paid ILS 200,000 to the owners of the Rogozin factories in Ashdod following a lockout.⁶⁴⁴ In 1998, for the first time in all the years of the fund's existence, partial economic data were published, which showed that in 1997 the fund paid ILS 19 million for five strikes that took place that year.⁶⁴⁵ In 2005, there were nine labour disputes among fund members, six of which did not develop into strikes or did not justify filing claims. Three disputes developed into strikes, for which the fund paid damages in the amount of ILS 2.04 million. This included a payment of about ILS 578,000 to a company in the metal industry; ILS 1.044 million to a company in the construction and consumer products industry; and ILS 419,000 to a company in the chemistry and pharmaceuticals industry.⁶⁴⁶ Between 2012 and 2017, the fund provided ILS 50 million in assistance to ICL Group following a prolonged strike by their workers, and to another company that faced a similar crisis and received ILS 10 million in compensation from the fund.⁶⁴⁷

⁶⁴⁰ Ibid, clauses 49A, 49B.

⁶⁴¹ Although in the past it has been reported that “the fund is supervised by representatives of plants that are members of the association, and the fund has three permanent committees: Finance, Torts, and Audit”. Moti Netzer, *Strike Funds and Opposition*, (Management, August 1998), p. 28.

⁶⁴² And see for example – Tali Heruti Sover: *The secret money: what do the manufacturers do with hundreds of millions of shekels?* (The Marker, 01/07/2018). See link: <https://www.themarker.com/career/premium-1.6222452> Accessed: 13/07/2021.

⁶⁴³ A voluntary association is a corporation composed of a group of individuals or other corporations that have joined together, by definition, for public purposes, use public funds and receive benefits from the State of Israel. A voluntary association is governed by the provisions of the Voluntary Associations Law of 1909. In a proposal to amend the Voluntary Associations Law (Reporting and Transparency), 5781-2021, which was intended to increase the transparency of voluntary associations, it was proposed in clause 9 to continue to allow unions such as workers' unions and employers' unions to determine the amounts related to the strike fund (for workers or employers) remain confidential. See link:

<https://moj.my.salesforce.com/sfc/p/#1t000000uX5h/a/3Y000001V5Zx/UHcVgfQVUcymHpNRI24uSgDnD7ESWP045whuU.tJ.6a4> Accessed: 18/07/2021.

⁶⁴⁴ Unknown author, *Employers' Fund paid ILS 200,000 to Rogozin owners*, (Davar, 08/08/1974), at the link: <https://www.nli.org.il/he/newspapers/dav/1974/08/08/01/article/80/?srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%94%d7%9e%d7%a2%d7%a1%d7%99%d7%a7%d7%99%d7%9d+%d7%a9%d7%99%d7%9c%d7%9e%d7%94+200%2c000+%d7%9c%22%d7%99+%d7%9c%d7%91%d7%a2%d7%9c%d7%99+%d7%a8%d7%95%d7%92%d7%95%d7%96%d7%99%d7%9f-----1> Accessed: 16/08/2021.

⁶⁴⁵ Moti Netzer, *Strike Funds and Opposition*, (Management, August 1998), p. 28.

⁶⁴⁶ Unknown author: *Manufacturers' mutual fund convenes today* (Channel 7, 30/01/2007). See link: <https://www.inn.co.il/news/158980> Accessed: 13/07/2021.

⁶⁴⁷ Yuval Azulai: *ILS 800 million in the Manufacturers' Strike Fund – Will Teva be Compensated?* (Globes, 28/12/2017), see the link: <https://www.globes.co.il/news/article.aspx?did=1001217240> Accessed: 13/07/2021.

In conclusion, when it comes to the employers' mutual fund, hidden prevails over the visible. Since it is not conducted in a transparent manner, the conclusions derived from its actions should be taken with a grain of salt. As stated, it is not possible to review the fund's reports and it is not possible to oblige it to submit such reports and/or data in accordance with the law. The author's attempts to address a number of individual questions to fund officials also met with strong opposition.⁶⁴⁸

However, it can be determined from the little that exists in media archives and from its bylaws that the fund is not without its drawbacks: It requires its members to confirm their intention to shut down the factory in advance, it does not approve the full amount of damage caused by strike or lockout, it prohibits employment of striking or locked out workers, and it also prohibits payment (in any form) to workers who have been striking or locked out.⁶⁴⁹

This means that employers who wish to be reimbursed from the fund, subject in advance their ability to strike to the fund's approval; employers cannot reduce their damages during a strike or lockout by employing workers and they also cannot sue for payment to workers after a strike or lockout.

10.4 Injunctions

When a strike does not meet the various restrictions that apply to it, the Labour Court can issue an injunction against it, which will prevent its continued existence. What is the source of the authority to issue an injunction against a strike? What are the court's considerations in considering whether to grant an injunction? And what are the consequences of issuing an injunction? All of these will be answered in the chapter below.

10.4.1 Source of the Authority to Issue Injunctions Against Strikes

The authority to issue an injunction against a strike appears in a number of sections of the law. The first section is clause 75 of the Courts Law,⁶⁵⁰ which provides that "any court hearing a civil matter is empowered to give a declaratory judgment, an order to do or not do something, an order of execution and any other remedy, as it sees fit in the circumstances of the case before it".

The second section is clause 29 of the Labour Courts Law,⁶⁵¹ which provides that the Labour Court is empowered to grant any relief which the District Court is empowered to grant.

10.4.2 Considerations for Issuing Injunctions by the Labour Court

As early as 1972, the Labour Court ruled that "due to the interest in honoring collective agreements, for the benefit of organisations, for the benefit of workers and employers to whom they apply, and for the benefit of the economy and society – When injunctions are issued, it is of special importance that they be obeyed, and the court will not be fulfilling its role if it fails to do so. The degree of restraint that is required in the issuance of injunctions – is the degree of firmness that is required to enforce them, once given".⁶⁵² In other words, when the court discusses giving an injunction, it will take into account respecting the collective agreement, the good of the parties who signed the collective agreement and the

⁶⁴⁸ The author of the study contacted a number of fund officials both by telephone and email (the mutual fund manager for employers, the mutual fund's legal counsel) on 15/07/2021 and 02/08/2021, but did not receive an answer to his questions.

⁶⁴⁹ In this regard, it is interesting to compare the present objectives of the fund with the objectives of the Insurance Fund against Disruptions at Work from 1947: this fund also prohibited the employment of striking workers by other enterprises, and *in some cases*, required employers to seek prior approval before a strike.

⁶⁵⁰ Courts Law, 5744-1984.

⁶⁵¹ Labour Courts Law, 5729-1969.

⁶⁵² Labour Court Hearing 36/ 4-6 Committee for Direct Maintenance Workers at El Al - El Al Ltd. Ruling C 393, 414.

‘good of the economy and society’, as stated. But still in the same breath, the court warns itself to act with a “degree of restraint”. Indeed, the court’s policy on issuing injunctions against strikes has for many years been a clear policy of restraint: applications for injunctions against strikes have been responded to *sparingly*.⁶⁵³

There are several reasons for this policy of the Labour Court:

- A. The right to strike is a fundamental right, and therefore the court seeks to limit it only in exceptional cases.⁶⁵⁴
- B. The parties to an employment relationship maintain a long-term relationship between them, and this relationship will continue to exist even after the strike and therefore, issuance of an injunction against one party for the benefit of the other party does not serve this relationship.⁶⁵⁵
- C. The court does not want to bring about “government by injunctions instead of the rule of law, the rule of the collective agreement established in the framework of collective labour law”.⁶⁵⁶
- D. The Labour Court seeks to allow the parties to determine the conditions for the employment relationship between them, and to prevent power struggles between the workers’ unions and the courts.⁶⁵⁷ That is, the court will want to see the parties maintain their relationship in light of the obligations they have undertaken under the collective agreement.

And what, then, are the considerations for issuing an injunction against a strike? In some cases, the National Labour Court linked the issuance of injunctions against strikes in freezing the activities of employers that caused the strike to break out.⁶⁵⁸ Other considerations were – a strike that broke out not in accordance with its restrictions. For example, the National Court ruled that: “It is not disputed that in the case of a strike it is permissible to issue orders both against the workers’ union and against the members of the committee, and this is especially true, when the strike broke out, as in this case, without consent of the workers’ union. Each order stands on its own and must be complied with”.⁶⁵⁹

Over the years the consideration in issuing an injunction against one strike or another depended on the type of strike that broke out. An *economic strike* was accepted by the court as legitimate, and therefore the court generally refrained from issuing an injunction against it, unless it was proved that the harm that might be caused to the public would be severe. But even the term *severe damage* is interpreted narrowly. Compared to the economic strike, the *quasi-political strike* was accepted as illegitimate and the Labour Court was right to issue injunctions against it,⁶⁶⁰ but even in this strike the Labour Court is in no hurry to issue an injunction against it and examines what the *severe damage* will be to the public.⁶⁶¹ In the words of (retired) President of the National Labour Court, Steve Adler: “It appears that even in cases of *quasi-*

⁶⁵³ Labour Court Hearing 30/ 2-5 Engineers’ Histadrut – Civil Service Commission, Ruling B 58, 71.

⁶⁵⁴ Menachem Goldberg, *The Strike in Law, the Collective Agreement and Case Law* (The Advocate, 1987), p. 57.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ Menachem Goldberg, *The Strike in Law, the Collective Agreement and Case Law* (The Advocate, 1987), p. 60.

⁶⁵⁷ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 5760-2000), p. 481.

⁶⁵⁸ Steve Adler, *Freedom to Strike in the Mirror of Judgment*, (Baranzon Books – Bnei Sabra, 5760-2000), p. 487.

⁶⁵⁹ Labour Court Hearing 49/ 44-48 Masad Maman v. State of Israel, Ruling 21 150, pp. 160-161.

⁶⁶⁰ Nir Ganinsky, *The Constitutional Status of the Right to Strike*, (2014), p. 101.

⁶⁶¹ *Ibid.*, p. 102.

political strikes, injunctions are issued sparingly, and only to the extent that the strikes cause serious harm to a public service, the economy and the general public”.⁶⁶²

As stated, the Labour Court emphasised that when considering the issuance of an injunction, it will examine the severity of the damage that will be caused to the public against the right to strike. The court’s considerations will be guided by the balance between the right to strike and the damage that may be caused to the public. The test that will be used is the *near certainty* test in which it will test “whether there is a near certainty that the strike, when it breaks out, will disrupt in a way that exceeds the essential service provided by public service workers”.⁶⁶³

Nir Ganinsky explains that the use of balance tests is not done according to an orderly sub-design designed to determine a particular legal test and apply it to the circumstances of each and every case. Instead, rulings went the way of point-by-point decisions on a case-by-case basis.⁶⁶⁴

In recent years, the Labour Court has used proportionality tests to examine whether a strike in a particular case was proportionate, and whether to issue an injunction against it. But at the same time, even when using the test of proportionality, the court does not clarify what the norm is, “thus it is not clear whether the right to strike is the supreme norm and its violation should be proportionate, or whether the right the strike violates in some cases is the supreme right, and proportionality is examined in relation to the harm the strike causes with this right”.⁶⁶⁵

A study conducted by Mondalek and Harpaz⁶⁶⁶ examining the involvement of the Labour Court in the relationship between the social system and the legal system between 1990 and 1997 shows that the judicial discretion of court judges in applications for injunctions against strikes was clearly guided by legal considerations only. This finding supports the existence of a separation between the labour relations system and the legal system. Comparing the strikes in which the court was requested to be involved and the strikes that ended without involvement, it turns out that the results of the legal proceedings were expected and known to the parties.

At the same time, the multiplicity of factors that characterised the strikes in which the court was requested to be involved compared to the strikes in which it was not involved, shows that the labour relationship maintains extrajudicial norms. After 1997, there was a significant decrease (of about 50%) in the number of applications to the Labour Court for an injunction, despite the increase in labour disputes in the economy and in their intensity. Mondalek attributes the reason for this to the Labour Court’s approach from 1997 to further emphasise its role as an industrial mediator and to relatively reduce legal decisions regarding applications for injunctions against workers.⁶⁶⁷ Avraham Weinroth, on the other hand, believes that the Labour Court has adopted a restrictive policy against issuing injunctions for strikes when their legal procedure is in place, and he explains this by the decline in the power of the Histadrut (following the enactment of a state health insurance law that caused a sharp decline in the number of unionised

⁶⁶² Collective Dispute Appeal 64/09 Power to the Workers – Democratic Workers Union v. Jerusalem Cinematheque – Israeli Film Archive, Clause 6 of the ruling of President Steve Adler.

⁶⁶³ Labour Court Hearing 53/ 4-4 Histadrut Clalit v. Bezeq Israel Telecommunications Company Ltd., Ruling 381, cited in: Nir Ganinsky, *ibid.*, p. 110.

⁶⁶⁴ Nir Ganinsky, *ibid.*, p. 111.

⁶⁶⁵ *Ibid.*, pp. 114-115.

⁶⁶⁶ Guy Mundlak and Yitzhak Harpaz, *Between the Systems: A Peer Review of the Role of the Labour Court in Strikes* (Studies in Law 26, 2002-5762), pp. 145-195.

⁶⁶⁷ Guy Mundlak (Team Head of Position Paper No. 54): *Labour Relations in an Age of Change*, (Israel Democracy Institute, November 2004), p. 44.

workers),⁶⁶⁸ and the Labour Court's desire to balance the balance of power between employers and workers, following the same decline in workers' unions. In opposition to Weinroth, Raday and Noam write that the court refrained from issuing injunctions against strikes even if they were tainted with illegality, during the twilight periods between a collective agreement that ended and a new collective agreement or in case of employer breach of arrangements between the parties without negotiations with the union. In doing so, the court returned the power of the right to strike as a bargaining tool in collective bargaining – and Raday and Noam call this trend “the policy of restoring freedom to the strike”.⁶⁶⁹ To summarise, it is interesting to recall the **Yedioth Ahronoth** case: “The newspaper's representation vehemently argued before us that the fact that labour courts have been stingy in recent years in issuing strike prevention orders leads to a situation where employers must seek another remedy to minimise their damage during a collective dispute”.⁶⁷⁰

10.4.3 Consequences of Issuing Injunctions

The consequences of an injunction can be one of two: compliance with the injunction – that is, cessation of the strike, or non-compliance with the injunction and its violation. Violation of legal orders provides an opportunity to apply to the court that issued them and charge the violator both with their execution and with *contempt of court*.

However, Amendment No. 2 to the Labour Disputes Settlement Law⁶⁷¹ provides as follows: “No imprisonment shall be imposed under clause 142 or 143 of the Criminal Law Ordinance 1936 or under clause 6 of the Contempt of Court Ordinance, or under clause 70 of the Execution Law, 5727-1967, for violating a judgment, decision, order or legislative provision concerning participation in a strike”.⁶⁷² Hence, the provisions of the law are clear – imprisonment for violating injunctions against a strike is impossible. The only option open to the court against the violators of the order is monetary.

In the **Maman** case, the court gave its opinion on charging financial expenses due to a violation of orders issued against a strike: “As for charging expenses in a proceeding involving contempt of court – the courts routinely impose them, as a matter of routine, on the loser in the case [...], and there is no reason why we should not act in this way. It should not be forgotten that the members of the committee are the ones who forced the state to take proceedings to bring them to honor orders issued lawfully, thus causing it to incur expenses. These, at least in part, as ruled, must be borne by the violators [...] we cannot conclude this judgment without addressing the serious phenomenon of non-compliance with orders lawfully issued by the labour courts, a phenomenon that causes the rule of law to be challenged. Unfortunately, there are more and more cases in which strikes break out before the usual procedures for resolving disagreements have been exhausted, and without the representative workers' union announcing them. And if in the not-too-distant past most of the strikes affected the employer to whom the wage demands and working conditions were directed, then with the culture of strikes in the public service, the main victim is the general public, who need this or that service in every area of life”.⁶⁷³

⁶⁶⁸ Abraham Weinroth, *Doctors' Strike – Legal and Ethical Aspects*, (Asia – Medical Journal, August 2011), pp. 139 - 140.

⁶⁶⁹ Francis Raday and Gil-Ad Noam, *Workers' Unions and Collective Bargaining in Israel – A Look at the 21st Century*, (Mishpatim 24(1), 2004), p. 70.

⁶⁷⁰ Collective Dispute 401133/00 New General Workers' Union – The Printing, Media and Artists' Union – Yedioth Ahronoth Ltd.

⁶⁷¹ Addendum 37D, clause 9.

⁶⁷² The amendment was approved by the Knesset on Saturday, March 22, 1972.

⁶⁷³ Labour Court Hearing 49/ 44-48 Masad Maman v. State of Israel, Ruling 21 150, pages 160-161.

It will be noted that in extreme cases the court may impose an *on-the-spot fine* in light of the violator's conduct. In the **Moore v. Danziger – Dan Flower Farm case**, it was ruled that the cases in which an on-the-spot fine will be imposed in an application under the contempt of court order are “cases in which violation of the order in the past was so severe and blatant that past experience justifies immediate action against the violator, in order to motivate him effectively not to continue violating the order”.⁶⁷⁴

In the **Israel Railways case**, the court gave its opinion in determining the amount of the fine to be imposed for contempt of court due to non-compliance with the decisions. The rule is that contempt of court proceedings is intended to **impose future compliance with court instructions**, and according to the rule that the fine should be significant for the purpose of achieving the goal – to compel compliance with court orders and for the actual observance of the rule of law.⁶⁷⁵

Despite the aggressive nature of the laws reviewed above, from we might have thought that the court would not facilitate with violators of anti-strike orders, Steve Adler, president of the National Labour Court (retired) explains that injunctions are problematic, and the problem stems from the fact that the contempt procedure has been proven ineffective. Workers and a workers' union can violate the injunctions and the court lacks the tools to ensure its enforcement, and the court does not have all the remedies necessary to deal with a breach of the rules of conduct by a group of workers.⁶⁷⁶ This approach may explain why since 1997 (with the entry of Steve Adler into his position as president of the National Labour Court) there has been a change in the court's approach and there seems to be an increase in his position as a mediator at the expense of his formal judicial role.⁶⁷⁷

In conclusion, injunctions do not prevent a strike, but are a tool that seeks to enforce the restrictions set forth in the group of restrictions that regulate the strike by legal means.⁶⁷⁸ Issuance of injunctions against the strike will, in most cases, occur when the workers' union did not give fifteen days' notice before the strike broke out, or for example when the workers' union declared a strike in violation of industrial silence and so on.

10.5 Lockout

A lockout is defined as termination of employment on behalf of the employer. In a lockout, the employer instructs workers not to report for work, and he asks not to pay them wages. The National Labour Court defined the lockout as “prevention of work by an employer or group of employers, as a planned step, from a group of workers while depriving them of wages, in order to thereby achieve defined goals in the field of working conditions and labour relations”.⁶⁷⁹

The idea behind recognition of the right to strike states that since workers use strike weapons to pressure the employer through damages caused by the strike, it would only be natural for the employer to try to reduce the workers' benefit from the strike. In these circumstances, the employer's right to reduce the damage of the strike is balanced against the right of the workers to cause economic damage during the strike.⁶⁸⁰

⁶⁷⁴ Criminal Appeal 5177/03 Moore v. Danziger – Dan Flower Farm, ruling 58 4 184.

⁶⁷⁵ Collective Dispute (Tel Aviv) 20420-05-11 Israel Railways Company Ltd. v. The new Histadrut, trade union division.

⁶⁷⁶ Steve Adler, Freedom to Strike in the Mirror of the Judgment, Branson Book - Benny Sabra, 5760-2000, p. 494.

⁶⁷⁷ Guy Mundlak and Yitzhak Harpaz, *ibid*, pp. 188-189.

⁶⁷⁸ For the list of restrictions, see Chapter 3, Subsection 3.7.

⁶⁷⁹ Labour Court Hearing 33/ 3-39 Shmuel Shina et al. - Gershon Faglin & Sons Ltd., Ruling 4 458, 465, 466.

⁶⁸⁰ Ruth Ben Israel, *Labour Law* - Vol. IV, (Open University: 2002), p. 1470.

10.5.1 Lockout in International Law

In international law there is no explicit universal recognition of the right to lockout, but such recognition has been crystallising for several decades through Convention 87 of the International Labour Organisation,⁶⁸¹ in the European Charter⁶⁸² and in domestic laws. The International Labour Organisation interpreted Convention 87 as giving the employer the option to use the lockout weapon. The Committee for Freedom of Association also ruled that the right to lockout is derived from Covenant 87, which states that “employers’ organisations will have the right to organise their managers and actions”.⁶⁸³ In Sweden the right to lockout has been given constitutional recognition, as it has in New Zealand,⁶⁸⁴ but not in the French or Japanese constitution,⁶⁸⁵ nor in southern European countries such as Greece or Portugal. German law stipulates that in the event of a strike by a small number of workers that creates great economic pressure on the employer, it will be possible to use the lockout, but even then, the lockout will have to prove that it was used as a shield (rather than an offensive weapon by the employer) and meet the conditions of proportionality.⁶⁸⁶

10.5.2 Lockout in Israeli Law

What, then, is the attitude of Israeli law to the employer’s right to lockout?

Clause 5A of the Labour Disputes Settlement Law,⁶⁸⁷ which deals with the obligation to notify of a strike and lockout, states: “Notwithstanding the provisions of clause 5, a party to a dispute must give notice as aforesaid in that clause to the other party and to the chief commissioner of any strike or of any lockout, as the case may be, at least fifteen days before they commence”. On the face of it, the legislature appears to have recognised the lockout in clause 5A by requiring an employer who chooses to suspend his business to give fifteen days’ notice to both the workers’ union and the chief labour relations officer. However, the National Labour Court, which is required to address the law’s opinion of the lockout, stated that “[...] you will not find in Israeli law a provision that gives the employer or employers’ union the right to locked out workers, just as you will not find in Israeli law a parallel provision regarding the strike. It is true that you will find in the laws enacted by the Knesset, from the beginning of its work in the field of labour law, a reference to *strikes* and *lockouts* in the same place. A perusal of these laws shows that the parallel comes to compare the right of an employer or employers’ union to lockout with the right to strike; the comparison of *strike* and *lockout* also came to protect the worker from the result of the lockout, and not to protect the employer who shuts down his workers [...]”.⁶⁸⁸

The main laws regarding the lockout and the developments that took place for them can be found in three constitutive judgments: in the Elco case, the Dead Sea Works case and the Ordan case.⁶⁸⁹ The approaches set out in these rulings largely apply the pluralistic approach to the lockout, which is also prevalent in most OECD countries. This is an approach that allows a lockout if certain conditions are met, designed to

⁶⁸¹ ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, 1948. Appears in Charter, Vol. 59, p. 249., as also quoted in Chapter 2: *The Strike in International Law*.

⁶⁸² By virtue of clause 6 paragraph 4 of the Social Charter.

⁶⁸³ 278th Report Case no. 1517 (India) Pars. 309 – 346 and 284th Report 443 – 458. Quoted in: Lilach Litor, *ibid*, p. 211.

⁶⁸⁴ Clause 62 of the Employment Contract Act 1991.

⁶⁸⁵ Ruth Ben Israel, *Labour Law* - Vol. IV, (Open University: 2002), p. 1469.

⁶⁸⁶ Lilach Litor, *ibid*, p. 213.

⁶⁸⁷ Clause 5A of the Labour Disputes Settlement Law, 5717-1957. See also Chapter 3 which discusses this issue.

⁶⁸⁸ Labour Court Hearing 37/4-13 Ramat Ga workers' Council v. Elco Electro-Mechanical Factory, FDA 9 (1) 113.

⁶⁸⁹ Regarding the Ordan case, see Chapter 5: *Types of Strikes*.

allow the employer a certain bargaining power and it aims to create equality at the organisational level between him and the workers.⁶⁹⁰

10.5.3 Examples of Lockouts Discussed in Labour Courts in Israel

In the Elco case,⁶⁹¹ the National Labour Court was asked to declare that the lockout of the factory in August 1976 was illegal, and oblige Elco to pay all workers full wages for all the days of the lockout. In its ruling, the National Court set cumulative conditions that may legitimise the use of the lockout weapon by the employer.⁶⁹² The first condition is the protective condition, which states that a lockout can only take place in a situation where the workers have already declared a labour dispute and have already started a strike. The second condition is the condition of necessity, which is interpreted as the need of the employer to make use of the lockout weapon to reduce his damages. For example, if only some of the workers have reported for work and it is not possible to provide them with work due to the strike of their co-workers. The third condition for a lockout is the requirement of proportionality and it being the last step in the struggle. The employer must demonstrate proportionality between his lockout and the workers' strike. The employer must show that the lockout meets the minimum requirement for violating workers' rights and that the lockout was taken as a last step in the struggle and not as a first step.

Another significance of the ruling in the Elco case is that employers now face a difficult dilemma: They cannot respond immediately to the strike with a lockout, but must wait for the strike to break out (as stated, the protective conditions) and from the moment the strike breaks out they must wait another fifteen days before the lockout takes effect. This period of time is long enough to inflict economic, image damage, etc. before employers can protect themselves from the strike through a lockout.

In the **Dead Sea Works case**,⁶⁹³ workers went on a partial strike – they closed the factory gates and did not allow the removal of goods (potash) from the factory area. Five days later, in response, factory management announced lockout of the workers' work without giving fifteen days' prior notice, as required by clause 5A of the Labour Disputes Settlement Law. In this case, the National Court reiterated the ruling regarding the Elco case, adding that only a lockout that is a protective lockout exempts the employer from paying wages to a worker who is willing to perform his normal work and a distinction must be made between the right to wages of workers who are not directly involved in the labour dispute and the workers directly involved in the dispute. The National Court further ruled that the burden of proving that the lockout is a protective lockout is on the employer, who in the first instance must prove that the nature of the factory and its mode of operation do not allow the workers who were not directly involved in the conflict to continue working.

In the **TevaTech**, the regional labour court also reiterated the cumulative conditions for the existence of a lockout. The court noted that the absence of workers operating essential forklifts prevented the possibility of providing work for all workers, and that the employer tried to operate the facilities for several days but without success: "It is not only the right of factory management to prevent damages – certainly damages

⁶⁹⁰ Lilach Litor, *ibid.*, pp. 212-213. Apart from the pluralistic approach, Litor also mentions the neo-liberal approach to lockout, which recognises lockout as an offensive and spontaneous tool, and the corporatist approach to lockout, which imposes a comprehensive ban on lockout.

⁶⁹¹ Labour Court Hearing 37/4-13 Ramat Ga workers' Council v. Elco Electro-Mechanical Factory, Ruling 9 (1) 113.

⁶⁹² See clause 11 of the ruling.

⁶⁹³ Labour Court Hearing 41 / 4-18 Israel Workers' Histadrut, Be'er Sheva Workers' Council et al. – Dead Sea Works Ltd., Labour Court Ruling 14 225, pp. 241 - 254.

of millions of dollars – but in certain circumstances it is also a duty”.⁶⁹⁴ The court also referred to the duty of good faith that applied to the employer, and which it complied with in this case: “The employer must act in good faith towards his workers, and in examining the courses of action he faces, he must refrain from infringing on the rights of his workers, but he also has the right to protect his property right, which is now recognised as a constitutional right. Sometimes the course of action the employer chooses is consistent with both his own well-being and the well-being of the workers, and sometimes the two will clash. In cases of the second type, the duty of good faith imposed on the employer requires as little harm as possible to the workers. This is what happened in our case. Instead of choosing to refuse to accept part-time work from the workers of **all** the facilities, the factory management chose to lockout only the workers of the large facilities and thus protect both their interests – reducing harm to production as much as possible – and the interests of as many workers as possible, the workers of the other facilities – by agreeing to accept their part-time work and pay them wages for this work”.⁶⁹⁵

In conclusion, the Labour Court ruled that there is no provision in Israeli enactment law that gives an employer or an employers’ union the right to lay off workers. Hence, it established in his rulings a series of cumulative conditions for the existence of a lawful strike:

- A. Protective;
- B. Necessity;
- C. Proportionality;
- D. Last measure in the struggle;
- E. The duty to make a distinction between the right to wages of workers who are not directly involved in the labour dispute and the workers directly involved in the conflict;
- F. The duty to make use of a lockout only in good faith;
- G. The employer’s duty to prevent damage.

To these cumulative conditions must be added the existing limitation in clause 5A of the Labour Disputes Settlement Law, which requires the employer to notify the existence of the lockout fifteen days in advance, prior to its start, to both the workers’ union and the chief labour relations officer. This condition, which accompanies the protective condition, actually requires employers to wait for the strike to actually break out and then wait another fifteen days until the start of the lockout. However, as soon as the workers declare their willingness to return to work unconditionally, they cause the protective lockout to become mere lockout. That is, a lockout that is no longer for the employer’s protection against a strike that was forced on him.⁶⁹⁶

If all these are not enough, the court ruled that the burden of proving that the lockout is a protective lockout is, as stated, that of the employer. Failure to comply with these conditions renders the lockout illegal, and in these circumstances the court may order its termination, including payment of wages to workers who were deprived of work during the lockout, plus interest and wage withholding compensation.

⁶⁹⁴ Collective Dispute (Be’er Sheva) 1016/08 New General Workers’ Union – Negev Region v. Asia Chemical Industries Ltd. (TevaTech), clause 88 of the ruling.

⁶⁹⁵ Clause 71 of the ruling.

⁶⁹⁶ Collective Dispute 401133/00 New General Workers’ Union – The Printing, Media and Artists’ Union – Yedioth Ahronoth Ltd.

These conclusions teach us that the lockout, as a tool of pressure by the employer, is not easy to implement both because it imposes on the employer who chooses to impose many and complex restrictions that he must meet, and because the burden of proof that he has met them will be his.

10.6 Refusal to Accept a Partial Strike, Wage Deductions and Payment of *Appropriate Wages*

In Chapter 4,⁶⁹⁷ we learned that the employment contract is suspended during a strike. We also learned that the meaning of this suspension is that on the one hand, the worker does not have to report for work, and on the other hand, the employer does not pay wages during a strike. This principle, which states that a striking worker is not entitled to the payment of wages, is also reflected in the **Hajaj** case, which states: “A strike, any strike, whether *lawful* or *unlawful*, does not entitle the worker to a wage. The individual employment contract is suspended”.⁶⁹⁸

Nir Ganinsky explains that the basis for denying a worker a salary is for two reasons. First, wages are paid for actual work or, at the very least, due to the worker’s willingness to make himself available to the employer. This does not take place, of course, during a strike. The second reason is that this is a legitimate response of the employer against the workers. In fact, it is an attempt to create a kind of *balance of terror* between the employer and the workers, so that during the strike the worker is also at some risk and has an interest in ending the strike as quickly as possible in order to get paid again.⁶⁹⁹ According to Ido Eshet, this reasoning is an economic-incentive reasoning, and he explains it by saying that the loss of wages is the economic price that workers must pay for the use of strike weapons.⁷⁰⁰ Francis Raday also expressed a similar opinion in writing: “Wage loss is the economic price that workers must pay for the use of strike weapons [...] Thus, even when the strike is considered legitimate [...] the denial of the strikers’ wages is a legitimate response to the very use of this tool by them”.⁷⁰¹ The statements of various courts, both of the Labour Court and of the High Court, indicate a similar thinking. In the words of the Labour Court: “Loss of wages is the economic price that workers must pay for the use of strike weapons [...]”.⁷⁰² The High Court, which was required to do so, also ruled that: “Upon the commencement of a full strike, an employer is entitled to refrain from paying wages to the striking workers, without risking a claim against him to pay the wages and compensation for his withholding. It was an important instrument in the professional struggle, since the striking workers had to take their considerations into account, before launching a full strike, because the strike would require a sacrifice from them as well”.⁷⁰³

The theory that a strike means the denial of wages from strikers is expressed in other cases too, but this is all good and well in the matter of full strikes.⁷⁰⁴ Hence, the following questions arise that need to be considered: What is the law when a partial strike occurs? (After all, in a partial strike, the workers

⁶⁹⁷ See Chapter 4: *The Meanings of the Strike*.

⁶⁹⁸ Labour Court Ruling 31/ 3-199 Hajaj v. Factory A. Shanaf & Co. Ltd., Ruling 17 370, 375.

⁶⁹⁹ Nir Ganinsky, *ibid*, pp. 37-38.

⁷⁰⁰ Ido Eshet, *On the Good Virtue of the Virtual Strike*, (Labour and Social Work 11, 2005, p. 38.

⁷⁰¹ Francis Raday, Multiple Solutions to Partial Strikes – Didn’t the Dish Burn from Too Many Cooks? (Mishpatim, 10, 5760-2000), p. 279.

⁷⁰² Various Civil Applications 1226/01 New General Workers’ Union – The Histadrut of Officials – The Center for Local Government, Ruling 36, 418, 422.

⁷⁰³ HCJ 289/79 Israel Ports Authority v. The National Labour Court in Jerusalem.

⁷⁰⁴ See, for example: Collective Dispute Appeal 400005/98 Administrative and Household Employees in Hospitals, ruling 31 103; Labour Court Hearing 98 / 4-4 Histadrut of Clerks Administration and Services v. Local Government Center and Tel Aviv and Haifa Municipalities, Ruling 32 201.

perform some of the tasks of their routine work); How is the deduction of wages conducted in the State of Israel? And is there a difference in this issue between the private sector and the business sector?

10.6.1 Clause 37C to the Labour Dispute Settlement Law

1973 was marked as a *watershed* in everything related to partial deduction of wages. Until then, employers had refrained from reducing workers' wages, inter alia, due to a lack of clarity that prevailed regarding their power to avoid partial payment of wages.⁷⁰⁵ Indeed, one of the ways in which workers' unions deal with wage deductions was to initiate a partial strike, knowing that in a full strike, wages would be denied to the striking workers, but in a partial strike they would be entitled to a certain wage⁷⁰⁶ in return for their part-time work.

In order to resolve the non liquet in the law, the legislature initiated the enactment of clause 37C of the Labour Dispute Settlement Law:⁷⁰⁷

“(A) A regional court within the meaning of the Labour Court Law, 5729-1969, is authorised to determine, at the request of an employer in a public service, that his employees in a particular workplace or some of them have or are holding an unprotected strike that is not a complete cessation of work; If the court so determines, the workers employed in the same place of work or some of them, as determined by the court, will be entitled only to a partial wage for the work they actually do during said strike, at the rate determined by the court according to the circumstances [...].

(C) A worker who is entitled to only a partial wage as stated in subclause (A), is entitled to an amount equal to half of his regular wage as the partial wage to which he is entitled as long as the court has not determined the rate of his partial wage as aforesaid; For the purposes of this subclause, *regular wage* – the sum of the components of wages that are taken into account in the matter of severance pay, according to clause 13 of the Severance Pay Law, 5723-1963, except for supplements paid due to output or due to work effort”.

The Minister of Labour, Moshe Bar'am (Mapai), sought to explain the rationale behind the enactment of this clause during the Knesset debate, saying: “In all cases where sanctions were taken, a full salary was paid, since there was no legal instrument that would allow deduction from the salaries of alleged ‘working’ workers. This situation encouraged pressure groups to disrupt work ethic and work arrangements, cause harm to the public, violate the authority of the Histadrut and paralyse essential services, and all this – without risking even harming their regular wage. This situation – you will surely agree – is unacceptable, and the proposed amendment before you, comes to correct it”.⁷⁰⁸ The words of the Minister of Labour should be read together with the words of MK Shoshana Arbeli-Almozlino (Mapai), chairwoman of the Labour Committee, who brought the bill to a second and third reading: “It is important to emphasise in this law the element of deterrence in the case of a partially unprotected strike. It is important for the worker to know that once he declares an unprotected partial strike and sanction, he has something to lose. Naturally, determining the rate of the partial wage, which is due to workers who go

⁷⁰⁵ See explanatory memorandum to the Labour Disputes Settlement Bill (Amendment 3), 1976 (Bill 1252, 5736, p. 343), also available at the link: https://fs.knesset.gov.il/8/law/8_Is1_290039.PDF

⁷⁰⁶ This is called an *Appropriate Wage*. See below in this chapter.

⁷⁰⁷ Labour Dispute Settlement Law, 5717-1957 (Amendment 3), 5736-1976.

⁷⁰⁸ Minutes of Session No. 320 of the Eighth Knesset (19/07/1976, at p. 3576), at the link:

https://fs.knesset.gov.il/8/Plenum/8_ptm_253562.pdf

on an unprotected partial strike, continues for the purpose of clarifying various facts, and therefore there is room to determine a partial wage at a rate of 50% until the court decides”.⁷⁰⁹

Did the enactment of clause 37C above resolve the question of wage deduction? It seems not. The legislature addressed the issue of wages only in the context of the public sector and only in the context of an unprotected partial strike. With regard to the private sector – the legislature says nothing. This is what the National Labour Court was required to do in the **Ordan** case, stating: “In a full and regular strike, the result is clear – one does not have to perform work and does not perform it, and the other does not have to pay wages. With a *partial strike*, with *sanctions* that deal with the actual execution of work, the result is different, although not a fundamental difference. The difference is in the side effect. Even in a strike that finds expression in such *sanctions*, the individual contract is suspended as it exists between the parties. This contract requires the worker to perform certain jobs, fulfil a certain role or be prepared for it, and the employer – to pay an agreed wage. This contract is suspended with the activation of sanctions. The direct result is that the employer is free to say to each and every worker participating in the sanctions – “The contract with you has been suspended and in the meantime is not active. We do not have a contract for part-time work, we do not have a contract for work of a different scope, quality or conditions, from those of yesterday, and I refuse to receive from you a service other than that required by the contract”. This is not a *lockout*, but, rather, a refusal to make a new contract, instead of the contract for full-time work – a contract for part-time work, however part-time is expressed. In this situation, the result is no different from that of a full and regular strike – this is one of the choices the employer has. The other choice, and also in the hands of the employer and not in the hands of the worker, is that the worker agrees to receive from the striker a service different from that required by the contract; so, in retrospect, a new contract is temporarily established, according to which the work is what the worker actually performs [...]”.⁷¹⁰

From the Ordan affair we learn that the partial strike offered by workers to an employer should be interpreted as a proposal for a temporary employment contract, in which they are willing to perform only part of their work. An employer who receives such an offer has two ways of responding. First, reject the workers’ offer for partial execution of the work. Such a refusal forces workers to go on full strike. The employer’s refusal to accept part-time work is not considered a lockout. That is, the status of the workers will be that of striking and not locked out workers. Second, he can agree to accept the workers’ offer for partial execution of the work. Under these circumstances he will have to pay the workers an appropriate wage.⁷¹¹ This offer, which, as stated, is like a temporary employment contract, can be terminated by the employer at any time.⁷¹²

⁷⁰⁹ Minutes of Session 345 of the Eighth Knesset (16/11/1976, at p. 307), at the link: https://fs.knesset.gov.il/8/Plenum/8_ptm_253566.pdf

⁷¹⁰ National Labour Court Hearing *ibid/ 2-35 Kozolovich Baruch et al. v. Ordan Ltd.*, Labour Ruling 12 200, at pp. 210-21, clause 10 of the Ruling.

⁷¹¹ Ruth Ben-Israel, *Labour Law* – Vol. IV, (The Open University: 2002), p. 1434. Also: Ruth Ben-Israel, *Strike and Lockout in the Mirror of Democracy*, (The Open University, 2003), p. 137.

⁷¹² Menachem Goldberg, *The Measures Facing Employers in the Face of Workers’ Sanctions (Labour Court Hearing 340/2-35 Kozolovich Baruch et al. v. Ordan Ltd.)*, (The Advocate 35, 5744-1984), p. 86.

10.6.2 Policy of the Government of Israel and Treasury's Wages Commissioner

The Israeli government was required to address the issue of wage deductions in the early 1980s, stating: "The government will not pay wages for strike days. The government will pay partial wages (*appropriate wages*) for days of partial strikes (sanctions)."⁷¹³

The circular of the Wages and Employment Agreements Commissioner at the Ministry of Finance stipulates the principle that an employee in public bodies or government ministries who participates in a partial strike will receive only a partial wage that reflects his missing function when taking a partial strike. The mechanism for determining the partial salary as determined by the Commissioner is as follows: the Administrative and Human Resources VP must collect work / strike declarations, which will be provided to him by workers, and accordingly prepare lists of workers absent from work due to the strike.⁷¹⁴ The test for examining the wage to which a worker is entitled during sanctions is the value of the work actually performed, in relation to the full normal work of the worker. Therefore, at the beginning of the sanctions, the VP must check and prepare a list of the units in which sanctions were taken, referring to a set of data that reflect the value of the work, including the nature of the work that the workers refrain from performing, and the extent of the work which is not performed by them out of their total regular work.⁷¹⁵ The determination of appropriate wages will be made in coordination with the Wages Division.⁷¹⁶ This conduct of the public employer is subject to judicial review by application by the workers' union or the workers as individuals to the Labour Court.⁷¹⁷

In the mid-1980s, the Budget Basics Law⁷¹⁸ was enacted, and clause 29A of this law states as follows: "A budgeted body or a supported body shall not agree on changes in wages, retirement or pension conditions, or on other work-related financial benefits, and shall not institute such changes or benefits except in accordance with what has been agreed upon or customary for all state employees or with the approval of the Minister of Finance [...]". This clause prohibits budgeted bodies and supported bodies within the meaning of the law from agreeing to the payment of wages in excess of what is customary in respect of all civil servants except with the approval of the Minister of Finance (authority delegated to the wage commissioner).⁷¹⁹ The ruling of the National Labour Court confirmed and ruled that the authority of the Commissioner under clause 29 also extends to the approval of payment of wages for the period of a strike.⁷²⁰

10.6.3 The Court's Attitude to Payment of Appropriate Wages

The labour courts usually distinguish between the payment of an appropriate wage in a protected partial strike and the payment of an appropriate wage in an unprotected partial strike.

Payment of appropriate wages in an unprotected partial strike:

⁷¹³ See Government Resolution No. 647 of 22/04/1980 and Resolution No. 646 of 26/05/1981, as set forth in the circular of the Commissioner of Wages and Labour Agreements dated 18/6/2019: Guidelines regarding non-payment of wages for full strike and payment of appropriate wages for a partial strike (sanctions) – Procedure Update, at the link:

https://www.gov.il/BlobFolder/policy/instructions_employers_strike/he/Procedures_instructions_employers_strike_file3.pdf

Accessed: 28/07/2021.

⁷¹⁴ Ibid, clauses 7-9.

⁷¹⁵ Ibid, clause 14.

⁷¹⁶ Ibid, clause 15.

⁷¹⁷ This is as stated, according to the antecedent to clause 37C (a) of the Labour Disputes Settlement Law, 5717-1957.

⁷¹⁸ Budget Basics Law, 5745-1985.

⁷¹⁹ https://www.gov.il/he/departments/policies/instructions_employers_strike Accessed: 28/07/2021.

⁷²⁰ See for example: Collective Dispute (Tel Aviv) 2750-07-21 Clalit Health Services – Executive Management – The New Histadrut.

The easiest way of determining an appropriate wage is in a two-stage arrangement as provided for in the Labour Dispute Settlement Law. In the first stage, the employer may file a party application against a workers' union. If the request is granted, it means that the workers who took the unprotected partial strike are only entitled to part of their contractual wage. In the second stage, each of the parties – the worker or the employer – who wishes to obtain a fixed wage can apply to the Labour Court in a personal claim in order to determine the appropriate and final wage rate. In the event that the court determines, at the request of an employer, that the default wage paid to the worker was higher than the appropriate wage rate, the excess amount paid to the worker shall be regarded as an advance that the employer may deduct from the worker's wage, provided the deduction does not exceed 25% of the worker's wage.⁷²¹

An alternative way of determining the appropriate wage has one step, when it comes to simple cases only. In this way, a comprehensive collective procedure will be established which will determine whether an unprotected strike is taking place, and if the answer is in the affirmative, it will determine the appropriate wage due to the workers. The parties to this proceeding may be only the employer and the workers' union. Workers, as individuals, are not a party to this proceeding. The burden of proof in the alternative proceeding rests solely on the employer.⁷²²

In the **Ashdod Port** case, the National Labour Court ruled⁷²³ that in a partially unprotected strike, for the purpose of determining the appropriate wage, the employer has only one alternative and that is to apply in accordance with the provisions of clause 37C of the Labour Disputes Settlement Law. That is, payment of an appropriate wage will be made only after an early application to the court and a decision regarding the nature of the strike, the scope of the sanctions and the amount of the appropriate wage. In a petition to the High Court, submitted by the Wages Commissioner on the ruling of the National Labour Court, it was argued that the employer should also be left with an alternative of proper payment unilaterally. The reasons for this were: A key means of dealing with strike action is non-payment of wages at the time of the strike, as well as payment of appropriate (partial) wages at the time of a partial strike, as a balance to the right of the workers to exercise the right to strike; A mechanism has been established that complicates the existing procedure that determines the payment of an appropriate wage in a manner that may empty it of its contents and create a great delay in the payment of the appropriate wage to the employees. "In view of the ruling of the National Court", the wages commissioner concluded his petition, "it seems that there is no effective tool left in the toolbox of the employer in public service when he has to deal with workers and their representative union during sanctions".⁷²⁴ The High Court did reject the petition on the grounds that it does not serve as an appellate court for the decisions of the National Labour Court and its intervention in the judgments of the court is limited to exceptional cases, but also ruled that the aforesaid court's ruling in relation to the one alternative should not be seen as a law but just a passing remark.⁷²⁵

Following this High Court ruling, the Haifa Regional Labour Court ruled in June 2020⁷²⁶ that the arrangement in clause 37C is not a conclusive arrangement (i.e., the employer has the ability to apply to

⁷²¹ See clause 46 of the Collective Dispute Appeal (National) 55074-08-16 New General Workers' Union v. Ashdod Port Company Ltd.

⁷²² Doron Yefet: *Law and Order in the Payment of Appropriate Wages in Partial Strikes*, (Labor, Society and Law 16, 2020), pp. 295-296.

⁷²³ Collective Dispute Appeal (National) 55074-08-16 New General Workers' Union v. Ashdod Port Company Ltd.

⁷²⁴ Tali Heruti Sover: *You both cause harm and get paid: the Treasury demands that wages be reduced to those who take sanctions*, (The Marker, 02/01/2018), at the link: <https://www.themarker.com/career/1.5579668> Accessed: 28/07/2021.

⁷²⁵ HJC 10226/17 State of Israel - Wages and Employment Agreements Commissioner at the Ministry of Finance v. The New General Workers' Union.

⁷²⁶ Collective Dispute (Haifa) 66991-05-19 New General Workers' Union – The State Workers' Association – State of Israel.

the court in advance and can act on his own and deduct the striking workers' wages), and that the words of the National Labour Court in the Ashdod Port case, that is, the right of the employer to deduct from the wages of his workers in respect of sanctions, even without prior application to the court, should not be accepted. An appeal was filed against this decision to the National Court which dismissed the appeal and held that "in the event of an unprotected partial strike, a public employer is not obliged, by virtue of clause 37C, to apply to the court before payment of appropriate wages. This clause in combination with the law enforcement clause gives the public employer the choice to apply to the court. When this is the interpretation of the clause, the *strange result* does not arise in which the situation of public employer workers who strike a partially unprotected strike is better than that of public employer workers who strike a partially protected strike or that of non-public employer workers who strike. Of course, the aforesaid does not prevent a public employer who so wishes from acting in accordance with the provisions of clause 37C. Sometimes referring to this route will provide a quicker and safer remedy for the employer, especially when it is not clear whether a partial strike is in effect at all".⁷²⁷

Payment of appropriate wages in a protected partial strike:

As stated, clause 37C of the Law applies only to *unprotected strikes* in the public service. Insofar as it is a *protected* strike, to which said section of the law does not apply, there is apparently no legal impediment to the employer unilaterally deducting from the wages of the workers, who have taken a partial strike, without first applying to the court, as was also determined in the case of the **teachers' union**, by the president of the National Labour Court, Adler, that the employer has two alternatives for dealing with protected partial strikes: (1) Apply to the Labour Court during or near the partial strike, requesting a declaratory judgment on the existence of sanctions and in relation to the appropriate wage rate. (2) Act unilaterally and pay only a relative part of the workers' wages due to the sanctions.⁷²⁸

All this only ostensibly, since in the recent ruling mentioned above regarding Ashdod Port, things were said in a completely different spirit. There, the court ruled that *on the face of it*, it is not possible for workers' rights during a protected partial strike to be less than workers' rights during an unprotected legal strike, and therefore even during a protected partial strike – it is the employer's obligation to first go to court and implement the two-step procedure in clause 37C. That is, according to this ruling, even during a protected partial strike, the employer must not unilaterally deduct from the workers' wages, except as part of a collective procedure that he must first take. The Honourable Judge, Doron Yefet, wrote that "it is not entirely clear from the ruling whether the court's intention was for this statement to be a non-binding recommendation or a binding determination".⁷²⁹

In the private sector, too, petitions have been heard in the Labour Court over the years that have revolved around the issue of appropriate wages and have also imposed additional obligations on employers in this matter. It is interesting to dwell on two of them – the Migdal case and the NCR Global Ltd. Case.

⁷²⁷ Collective Dispute Appeal (National) 4849-07-20 New General Workers' Union - The Histadrut of Civil Servants et al. v. State of Israel – Enforcement and Collection Authority.

⁷²⁸ Collective Dispute (National) 1012/04 Teachers' organization in upper elementary schools, seminars and colleges – State of Israel – Ministry of Finance. Confirmation of this was also established in the ruling: Collective Dispute (Haifa) 11303-10-13 Israel Electric Company Ltd. v. The New General Workers' Union, clause 71 of the ruling.

⁷²⁹ Doron Yefet: *Law and Order in the Payment of Appropriate Wages in Partial Strikes*, ibid, p. 289.

In the **Migdal** case,⁷³⁰ the company paid 70% of their salaries in January 2014 to 933 of its employees, who took part in sanctions as part of a dispute regarding their unionising under the Histadrut. In response, the Histadrut filed a motion with the Labour Court to reimburse the workers the amounts deducted from their wages due to their participation in the strike, after it claimed the company had taken a unilateral, punitive, collective and arbitrary step aimed at harming workers against their desire to organise. According to the ruling of the National Court, during a partial strike, the employer may pay only part of the wages of the workers participating in the sanctions, based on their real contribution to the work, but he must prove the amount of the appropriate wage. The District Court ruled that the committee members had many committee hours during their work throughout the month of the strike, and therefore the appropriate wage for their work is less than 70%. However, it was determined that the wages of company workers should not be deducted beyond the *by-the-clock* deduction and therefore, the company will reimburse the rest of its employees the temporary deduction of 30% of their January wage, and the final calculation of the deduction for committee members and workers will be made in the main procedure.

In the **NCR Global Ltd.** case, the company's workers went on strike for one day. In response, the company deducted a working day from their wages and an additional wage component without providing an explanation of how it was calculated. The Histadrut approached the company in an attempt to negotiate a component deduction, but it was not answered, so it petitioned the court. In its ruling, the court ruled that the company acted in bad faith and violated the obligation to negotiate, since it did not provide an explanation of how they calculated the deduction of the salary component, which it refused to negotiate. It was further ruled that in collective labour relations, each party is obliged to consult with the other party on matters within its authority that concern all employees or that have special significance in the workplace, and therefore, the court ordered the company in an order to justify the deduction and enter into negotiations with the workers' representatives to arrange a deduction of the amounts from the workers' wages.⁷³¹

10.6.4 Interim Summary

As reviewed, it is the employer's right to refuse to accept part-time work. This right has been backed up by the rulings of the Labour Court and the legal literature, and is undisputed. And yet, with regard to the issue of the payment of the appropriate wage (and the mirror image of this issue – wage deduction) for partial work during sanctions, we will learn that this issue has undergone various incarnations. The solution proposed in the form of clause 37C for the deduction of wages of public sector workers, was a partial and problematic solution, because it addressed a partial strike only among public sector workers and only in relation to an unprotected strike. Hence, it was clear why the judges of the Labour Court would need to address the non liquet in the law.

I reviewed the developments in the various courts regarding the correct legal approach regarding the payment of appropriate wages:

- A. From the late 1970s, the appropriate wage was determined and paid without going to the Labour Court.⁷³²

⁷³⁰ Collective Dispute (Tel Aviv) 19873-02-14 New General Workers' Union v. Migdal Insurance Company Ltd.

⁷³¹ Collective Dispute (Tel Aviv) 14387-01-17 The New General Histadrut-Cellular, Internet and Hi-Tech Association – NCR Global Ltd.

⁷³² Labour Court Hearing 36/ 5-4 (National) Moshe Ginstler et al. – State of Israel, ruling 8 3.

- B. In recent decades, the opinion has prevailed that an employer who receives part-time work and pays a decent wage to the employees, is required before payment to apply to the Labour Court in order to declare that sanctions have been met and that the wage is indeed appropriate. This is the case whether it is a public employer or a private employer, whether it is a protected partial strike or an unprotected partial strike.⁷³³
- C. In the **Ashdod Port** case, the High Court ruled that payment of an appropriate wage in an unprotected partial strike must be made in accordance with the outline of clause 37C and is within the scope of an *incidental statement*.

This issue has not yet been resolved in the National Labour Court. At the same time, the Israeli government is trying, even these days, to *settle* the payment of appropriate wages to workers who went on a partial strike, as part of the draft Arrangements in the State Economy Law, published in July 2021.⁷³⁴ The wording of the proposal is the same as the work procedure previously published by the Commissioner of Wages at the Ministry of Finance.⁷³⁵

The issue of wage deduction during a strike raises the question of the *balance of power* required between an employer and his workers during a strike. The current situation – in which the employer's freedom of action to deduct wages during the strike imposed on him – is not clear enough yet, as stated, and there is a considerable chance that he will be required by his own initiative to use exhaustive proceedings in the Labour Court. In practice, use of the partial strike has become more and more frequent, and the public employer,⁷³⁶ as well as the private employer are often willing to accept part-time work from their workers who take a partial strike, out of a desire to continue providing service, meet their obligations and generally reduce strike damage.

The desire (and sometimes also the need and obligation) to continue operating the factory despite the partial strike, while giving the employer the opportunity to determine an appropriate wage imposes on him the obligation to perform thorough staff work, work to be examined by the court, as far as it is brought before it. In this regard, the words of the Commissioner for Wages at the Ministry of Finance, Eran Yaakov, should also be considered: “How can I know what caused me damage and what has not? How can I decide to reduce 5% of wages or 50% on a day of sanctions? By what criteria exactly?”.⁷³⁷ These words reflect the frustration among employers, who on the one hand decided to take the part-time work and on the other hand, find it difficult to determine what the appropriate wage is, because they know that one day, they may have to account for it and explain to the court.

⁷³³ Doron Yefet, *ibid*, pp. 288-289.

⁷³⁴ Tali Heruti Sover: *Appropriate Wages for Partial Strikes: The Ministry of Finance is making order in labour relations* (The Marker, 12/07/2021), at the link: <https://www.themarker-com.elib.openu.ac.il/career/premium-1.9993728> Accessed: 29/07/2021.

⁷³⁵ Reference to the circular of the Commissioner for Wages and Labour Agreements dated 18/6/2019: *Guidelines regarding non-payment of wages for a full strike and payment of an appropriate wage for a partial strike (sanctions) – procedures refreshment*, as stated above.

⁷³⁶ Reports of the Chief Labour Officer show that between 1999 and 2017, Israel experienced a record number of partial strikes. (See fn. 15 in Doron Yefet's article, *ibid*.)

⁷³⁷ Tali Heruti Sover: *You both hurt and get paid: the Treasury demands that wages be reduced for those who take sanctions*, (The Marker, 02/01/2018), at the link: <https://www.themarker.com/career/1.5579668> Accessed: 28/07/2021.

Hence, it is no wonder why most public sector strikes end when the government agrees to relinquish its right to operate the wage deduction arrangement.⁷³⁸ When there is no deduction, the workers generally show indifference to the shortcomings of the strike, since they have, in fact, nothing to lose.⁷³⁹

When employers insist on deducting workers' wages, they are forced to negotiate with workers' unions regarding wage payment arrangements for the workers who have been on strike. This negotiation is obligatory by virtue of the rulings of the court, and as such it must be conducted in good faith. However, in an atmosphere of labour dispute, suspicion and resentment, it is a goal that is not always easy to achieve. An example of such negotiations and its absurd result is given by Ofer Yochananoff, who explains how employers sometimes allow striking workers to convert all or part of their strike days into paid vacation days. For example, in 2017, an eleven-day strike was held at Clal insurance company. At the end of the strike, the workers' union and company management reached an agreement that ended the strike, and it was stipulated that management would not deduct the entire eleven days of the strike from the wages of the striking workers, but only two days of strike. Management allowed workers to convert some of the strike days into paid vacation days. Regarding the fate of the additional strike days, it was determined that it will depend on the company's business results: If the results are good and the company has a financial profit in 2017 of ILS 300 million – the remaining strike days will also be converted and paid as a grant. The meaning of this agreement is that the workers were *punished* by a two-day wage deduction, that is, one-fifth of the time they were actually on strike.⁷⁴⁰ Guy Mundlak also explains that for many years employers reached agreements with the workers' unions, and the wages for the days of strike were not deducted, and so in unprotected strikes the workers were not required to pay compensation and even received their wages at the end of the strike.⁷⁴¹

10.7 Bypassing the Collective Labour Law

Unionised workers in the workplace benefit from the application of a collective agreement and a larger protection network over them. Workers who are not members of a workers' union, which has signed the collective agreement, will also benefit from the application of the special collective agreement to them (by virtue of clause 15 of the Collective Agreements Law; the same is true of the applicability of worker in a general collective agreement, which will apply to all employees of the types included in the agreement and which applies to their employers, by virtue of clause 16 of the Collective Agreements Act). The greater the number of workers who benefit from application of the collective agreement, the greater the bargaining power of the workers' union. In order to reduce the power of the workers' union or abolish it altogether, it can be assumed that an employer will strive to see its workers not unionised at all, reduce the number of its unionised workers or reduce the number of beneficiaries of the collective agreement. Processes such as mergers, bargaining, contracting with service contractors and splitting the workplace into independent units can be used by employers as tactics aimed at moving from a collective bargaining regime to a system of personal contracts, thus undermining the status of the workers' union and its ability to operate the strike weapon. In all these processes, the power of the organised workers splits into small, isolated and weakened bargaining units. Hiring workers through service contractors, for

⁷³⁸ A similar position is presented by – Tali Heruti Sover: *Wages worthy of partial strikes: The Ministry of Finance makes order in labour relations* (The Marker, 12/07/2021), at the link:

<https://www-themarker-com.elib.openu.ac.il/career/premium-1.9993728> Accessed: 29/07/2021, *It has often been stipulated as a condition for ending the strike that the workers will receive the full wage, even though they have gone on strike.*

⁷³⁹ Amos Moav and Hadas Gabay, *How to Solve the Strike Problem?* (Tchelet, 2006), p. 81.

⁷⁴⁰ Ofer Yochananoff, *Self-Goal for Employers – Payment of Wages for Strike Days*, (Net Plus: July 2017), p. 16.

⁷⁴¹ Guy Mundlak (Team Head of Position Paper No. 54): *Labour Relations in an Age of Change*, (Israel Democracy Institute, November 2004), p. 39.

example, prevents the association of workers in the client's workplace, because these are not considered his employees. They cannot set up a representative workers' union together in the workplace where they are placed, because their direct employer is the contractor. There is, for the most part, also a disconnect between these workers that neutralises their attempt to organise.⁷⁴²

In the **Rami Levy** case, Rami Levy Shikma Marketing Ltd., which is controlled by businessman Rami Levy, acquired Bicurei HaShikma Ltd. In view of his intention to make the working conditions of the acquired company's workers the same as the parent company's workers, the workers of Bicurei HaShikma unionised and went on strike. Rami Levy decided to act by merging the two companies, absorbing the workers he wanted and dismissing the rest, thus preventing unionisation of the workers in the company he acquired and making the strike redundant.⁷⁴³

Employers can also set up workers' unions on their behalf, in order to be a substitute for an authentic workers' union. In this way, employers rule out the option of using strike damage, because they control the workers' unions, its agenda, its actions and, of course, its demands on them.

In the **Amit** case, the organization filed a lawsuit with the National Labour Court, in which it sought to be recognised as a workers' union for all intents and purposes. The court accepted the claim,⁷⁴⁴ and therefore the Histadrut filed a petition with the High Court. The latter stated that in the circumstances of the case, an examination of the characteristics of Amit reveals that the organisation does not constitute a workers' union in at least four respects: First, the High Court was not under the impression that Amit set improvement of working conditions by way of activity in the field of collective labour relations as a central goal for itself. Second, it emerged from the evidence that it is not known who the members of the organisation are, and in any case, it has not been proven that most of the members of the organisation are employee-workers. Third, the organisation is not democratic, because no elections have been held for the organisation's institutions. Fourth, the organisation is not independent, but it and its managers depend on the Maccabi Health Fund and the Maccabi Foundation, which established the organisation and operate it.⁷⁴⁵

In the **Notev**⁷⁴⁶ case, Notev Association lawsuit filed a lawsuit in which it sought to declare that it is the representative workers' union at Haifa Chemicals factory in the south. The Histadrut, in which some of the factory workers had previously organised, claimed that the plaintiff was not a workers' union, since it was a coercive product of factory management and therefore could not be the representative union of factory workers. The court mentioned that the principle of establishing a *factory union* or *organisation on behalf of*, is considered an improper way for an employer seeking to influence its workers, and violates the workers' right to organise, to the extent that such an organisation is not considered a workers' union. In determining whether an organisation has been proven to be a *factory union* or *organisation on behalf of*, the court must take into account all the circumstances of the case, including the question of the existence of a *factory association / organization* on behalf of factory management in order to thwart organisation actions of an existing workers' union. In its ruling, the court described the atmosphere of opposition to the existence of a workers' union in the factory; the pressure exerted by factory

⁷⁴² Yossi Rahamim, *The Modern Labour Market in the Age of Globalisation, and Its Influence on Labour Law*, (The Law of 24, 5769-2009), pp. 437, 456.

⁷⁴³ Ibid, fn. 31 on p. 433.

⁷⁴⁴ Labour Court Hearing 55/ 4-30 Amit – Histadrut Maccabi – Center for Local Government, ruling 29 61.

⁷⁴⁵ HCJ 7029/95 New General Workers' Union v. The National Labour Court, Ruling 51 (2) 63.

⁷⁴⁶ Election Appeal 1/03 Notev Workers Management and Operations Association - The New General Workers' Union, Ruling 40, 277.

management on workers who did not go on strike demanding that they write letters of opposition to Histadrut activities; the threats that management made to workers and their families during the strike; and the use it made of the services of a security company, which treated strikers with violence. Establishment of the association was done under the auspices of the factory and with its support. After the strike, management transferred Histadrut activists to other roles, inferior to the roles they held on the eve of the strike, and the senior role were filled by members of Notev Association. For these reasons, the court dismissed the claim.

In the case of the **ultra-Orthodox kindergarten teachers**,⁷⁴⁷ two organisations claimed to be a workers' union of kindergarten teachers employed by Agudat Israel Kindergarten Network: One, the Union of Haredi Kindergarten Teachers, which was a new organisation under establishment, the other, Agudat Israel Teachers' Union (hereinafter: Agudat Israel), which claimed to have been the representative workers' union of independent education teachers for over fifty years. In its ruling, the National Court reiterated the hallmarks of a workers' union and its characteristics (as outlined in the Notev case). Among other things, the court ruled that Agudat Israel's Histadrut does not fulfil the values of gender equality – kindergarten teachers are not allowed to be elected to its institutions or to attend meetings of the institutions and their management; It is an undemocratic organization – the incumbents are appointed and not elected. Even if it seems that the by-laws of the Histadrut include a set of provisions required for the existence of a strictly democratic organization, these provisions have not been implemented in practice; It is an organisation on behalf of the network's management, with senior officials in the Agudat Israel Histadrut also serving in senior positions in the kindergarten network; it is not an authentic workers' union. The court also noted that it did not find evidence that the Agudat Israel Histadrut had signed a collective agreement with the Kindergarten Network since its inception, it did not take any organisational measures and did not declare a labour dispute as a means to achieve its goals. It also noted that the lack of independence of the Agudat Israel Histadrut was also reflected in the words of MK Avraham Ravitz (Yahadut HaTora) during a discussion in the Knesset Education Committee: “There is a kindergarten committee but it is really ineffective and it cannot be effective by definition because they will obey the rulings [referring to the rulings of Halacha – AAM] put before them and not necessarily protect their interests. It will not happen once even that the Kindergarten Committee declares a strike and it cannot do so”.⁷⁴⁸

In the **Mizrahi Bank** case, negotiations were conducted without success. Eventually, the bank's management wrote a direct letter to each of the workers who was a candidate for dismissal, and offered him a retirement plan that was not acceptable to the workers' union and was unilaterally determined by the bank's management. In the letter, management threatened each worker that if he or she did not sign the retirement agreement offered, they would not be entitled to receive its terms in the future. The goal of management was to thwart the possibility of the workers' union taking organisational measures that would lead to an improvement in the conditions offered to the dismissed workers. The National Labour Court ruled that the actions of the bank's management constitute improper conduct in preferring a worker who is not a member of the workers' union over a worker who is a member of a union: “Improper use of power and improper preference that undermines the authority of the union as a body representing the bank's employees should not be tolerated. This preference runs counter to the purpose of the Collective Agreements Law. Representation of the Bank's employees by the union is enshrined in the constitutional

⁷⁴⁷ Election Appeal (National) 9/07 Union of ultra-Orthodox kindergarten teachers v. Agudat Israel Teachers' Union.

⁷⁴⁸ Minutes of the hearing in the Knesset Education Committee dated 10.7.2007, as quoted in clause 23 of the ruling in the case of ultra-Orthodox kindergarten teachers.

right of workers to form an association, in legislation (Collective Agreements Law), in the collective agreement (the Constitution) and in case law. There have been collective labour relations between the parties for many years. A professional struggle is often a tier of negotiation between the parties, but this struggle needs to be set boundaries. There is no place for preferring a worker who does not belong to the representative organisation over an employee who is a member of the organisation, since, as stated, such a preference violates the freedom of association of bank employees and violates the principles set forth in Israel's Labour Convention".⁷⁴⁹

Another example of circumvention of the collective labour law emerges from a petition submitted to the High Court in the **Gurevich Tanya** case. The petition sought to invalidate the Public Broadcasting Law, 5774-2014, which regulates the dissolution of the Broadcasting Authority and the establishment of a new public broadcasting corporation. The reason for the petition was, inter alia, due to the legality of this law, and in particular clauses 96 and 106 (a) of the law, which allow sweeping dismissals of all workers of the Broadcasting Authority, while absorbing only a small group into the new public broadcasting corporation. According to the petitioners, these clauses violated the right to organise on two levels; Both on the negative level of the right – which anchors the workers' right to organise and prohibits the employer's intervention in the workers' union, and on its positive level – which gives organised workers a basket of tools for the effective exercise of this right. As for the negative level, the petitioners argued that dissolution of the authority and dismissal of all workers, while establishing a new body with other workers, is an act of prohibited intervention by an employer in a workers' union, and the state as an employer benefiting from a regulatory force, has used this power for a prohibited violation of an existing workers' union. With regard to the positive level, the petitioners argued that the choice of the state to change labour relations in legislation deprived workers of the ability to exercise the right to organise by way of a labour dispute, strike or sanctions, thereby harming the same basket of tools aimed at giving effectiveness to the organising force, that is, the same positive level of the constitutional right to organise. At the end of the day, the High Court rejected the petition while examining the limitation clause in the Basic Law. The High Court ruled that as to the first condition in the limitation clause, there were no defects in the process of enacting the Public Broadcasting Law, nor is it a specific or retroactive law. As for the second condition, the Public Broadcasting Law does not contradict the basic principles of the democratic system or the Zionist and legacy aspects on which the State of Israel was established. As for the third condition, the purpose of the Public Broadcasting Law is to improve public broadcasting in Israel – a worthy purpose by all accounts. As for the fourth condition, not only is there a rational connection between the purpose of improving public broadcasting in Israel and all the arrangements enshrined in law, but there is a rational connection between the purpose of improving public broadcasting in Israel and the determination that the Broadcasting Authority should be closed and a new public broadcasting corporation established. In addition, it seemed to the High Court that the choice to advance the purpose of improving public broadcasting in Israel by closing the Broadcasting Authority and establishing a new public broadcasting corporation is reasonable, and is within the scope of the manoeuvre given to the legislature. Finally, the High Court ruled that there were enough arrangements that referred to the Public Broadcasting Law and made it proportionate. First, negotiations were held with the representative workers' union, and this led to agreements enshrined in the agreements. Second, the signed agreements enshrine the Minister of Communications' obligation to act with the CEO of the new Public Broadcasting Corporation, in order to conduct collective bargaining to sign a collective agreement in the new corporation. Third, the law requires the Public Broadcasting Corporation to absorb the

⁷⁴⁹ Collective Dispute Appeal (National) 70/05 Organisation of United Mizrahi Bank Employees v. United Mizrahi Bank Ltd.

employees of the Broadcasting Authority so that at least 25% of its workforce will be composed of them. These arrangements, the High Court ruled, do not, of course, nullify the particular violation of the right to organise, but they have the potential to make it proportionate.⁷⁵⁰

10.8 Deterrence Moves Against Union and Strike Leaders

In recent decades, one can see a radical change in the parties to collective labour disputes regarding how they conduct themselves during the labour dispute. Employers are not content with absorbing the pressure of the strike, but are looking for the leaders of workers' representatives. This is reflected in the harassment of members of the workers' representatives on a disciplinary level, in filing lawsuits against them and more.⁷⁵¹

As we will learn, dismissal of workers due to their membership or activity in a workers' union, or for the purpose of establishing a workers' union⁷⁵² were prohibited by law and case law, and as stated, extensive discussions have been held on this subject.⁷⁵³ But many times, layoffs are made on the pretext of dysfunction and disciplinary violations, as the National Labour Court has well described: "One of the main tools that employers use to thwart the organisation of workers in its early stages is the dismissal of an active or key activists in the organising process. This discourages other workers from joining the workers' union, supporting the organisation or active involvement in it. A worker who is aware that his friend has been fired due to his involvement in the workers' union will be afraid to take part in that organisation lest his fate be the same as his friend's. **In most cases, the true purpose or the true motives underlying the dismissal are disguised and the employer will raise allegations of downsizing, organisational change, malfunction, misconduct offenses and so on.** This means that dismissing a worker on the basis of his involvement in the workers' union constitutes a double violation of the right to organise: a personal violation of that worker's right to form a union, and a collective violation of the right of all factory workers to freely decide whether to join a union"⁷⁵⁴ (emphasis not in original). Alon Lee-Green, who led the workers' union of the Coffee Bean chain in 2007, also speaks of being dismissed: "I was called to a conversation and a very aggressive conversation developed [...] they said 'We know what you're doing, we are asking you to stop', I was told that they think setting up a private sector workers' committee is illegal. I told them it was legal and that I was not going to stop. The conversation lasted a long time and at the end the manager told me 'Well, maybe it's legal and I cannot fire you on the grounds that you are setting up a workers' committee, but I can fire you because your employee badge is a bit crooked'. The next day I was fired".⁷⁵⁵

Segal and Litor note that such negative behaviour has developed in recent years among large employers trying to collapse the power of the workers' union to take organisational measures. Employers turn directly to workers and threaten to impose sanctions in the event that workers comply with the strike or organisational measures initiated by the workers' union. Employers' aggressive behaviour toward workers is designed to prevent them from organising or engaging in organisational activities such as strikes. The rulings of the Labour Court, against this background, are intended to eradicate the

⁷⁵⁰ HJC 6133/14 Gurevich Tania and others v. Knesset of Israel.

⁷⁵¹ Mordechai (Moti) Mironi, *Privatization of Labour Relations and Labour Law*, in: Steve Adler's Book, (Nevo, 2016), p. 349. The author points out that there are also other measures that can be taken by employers in order to deter employees and their representatives – such as cancelling their positions, dismissing them, retiring them or violating their privacy.

⁷⁵² Clause 33J of the Collective Agreements Law, 5717-1957.

⁷⁵³ See above: Prohibition of dismissal of workers during a strike.

⁷⁵⁴ Collective Dispute Appeal 24/10 Hot Telecom Ltd. v. The National Workers' Union.

⁷⁵⁵ Danny Vazana, Meugadim [Unionised], (Schakim Publishing, 2017) p. 118.

phenomenon of harassment of workers seeking to exercise their right to organise, and on the other hand to strengthen this right. Most often, employers are willing to accept payment of compensation, even increased compensation, for violating the right of workers to organise in the factory, provided that the workers' union or labour relationship is terminated. Were it not for the ruling of the Labour Court which ruled on the remedy of enforcing an employment contract,⁷⁵⁶ employers would have been given an incentive to continue harassing workers in order to prevent them from exercising the right to strike or to unionise.⁷⁵⁷

10.9 Harassment of Members of the Workers' Representatives on a Disciplinary Level

In the **Shavit**⁷⁵⁸ case, the High Court ruled that the employer's rights towards its employees are subject to the struggle of the workers' union and to the strike declared by them. In light of this ruling and in light of the doctrine of suspension of the employment contract,⁷⁵⁹ it can be said that the worker's obligation to comply with the employer's instructions is subject, *inter alia*, to the existence of a labour dispute or the existence of a strike. Hence, the way employers take disciplinary action against union leaders or strike participants is wrong and illegal.

Discussion about a worker's actions during a labour dispute cannot take place in isolation from that labour dispute. A distinction must be made between a breach of a worker's obligation to comply with the employer's instructions during a labour dispute and when the reason for a breach of duty lies in the existence of a labour dispute, and such a breach of duty by a worker when there is no labour dispute. Ignoring the circumstances of the breach of duty and not addressing the existence of a labour dispute, has the effect of emptying the right to strike, which will allow the employer to isolate the worker as a party to the dispute, which can empty the right to wage a professional struggle, and prevent a strike in his factory by giving instructions to various workers of his choice.⁷⁶⁰

In the **Hot** case, the question of the legality of dismissing of Yoni Mendel, who claimed that he was fired from Hot only because he was the *driving force* in the attempt to organise Hot employees, came up for discussion. Hot, on the other hand, claimed that he was fired due to failures in his job and that his dismissal was for material reasons and had nothing to do with his active involvement in attempts to organise Hot's employees. The District Court ruled, based on the evidence before it, on the basis of reversing the burden of proof set forth in the ruling and the increased burden of proof placed on the employer, that Hot did not lift the burden of proof, that Mr. Mendel was fired for material reasons and regardless of his activities to organise Hot employees. Hot appealed to the National Court, who dismissed the appeal, holding that the allegations of failures in Mr. Mendel's performance arose in reality only after he had begun his activities for organising company workers, even though he had worked for the company for a long time. In the opinion of the court, this is sufficient to constitute first evidence and shift the burden of persuasion to the company to show that Mr Mendel's dismissal was not in connection with his

⁷⁵⁶ The meaning of the remedy of *enforcing an employment contract* is a court order issued by the Labour Court, which orders continuation of the employee-employer relationship, as if the employee was not fired by the employer. The granting of this remedy is a change in an older trend of the court that refused to grant this remedy, on the grounds that it does not comply with the spirit of clause 3 (2) of the Contracts (Remedies for Breach of Contract) Law, 5730-1970, which prohibits enforcement or accepting personal work.

⁷⁵⁷ Zeev Segal Lilach Litor, *Activism and Judicial Passivism*, (Nevo, 5768), pp. 63-64.

⁷⁵⁸ CA 533/68 Yitzhak and Masada Shavit v. Gideon Hanan et al., Ruling 23 (1) 516.

⁷⁵⁹ As discussed in Chapter 4: *The Meanings of the Strike*.

⁷⁶⁰ Eli Mi-Tal, Non-Compliance with an Employer's Instruction During a Labour Dispute – Is It Really a Disciplinary Breach? (The Advocate, 36, 5744-5748), pp. 478, 481.

activities for organising company workers. Both the National as well as the District Court ruled that the company “did not meet this burden”.⁷⁶¹

In the **Kiryat Malachi Community Center** case, the Histadrut petitioned against the dismissal of the chairman of the community center workers’ committee and another committee member. The National Labour Court came to the general conclusion that dismissal of the two was not against the background of redundancies, as the employer claimed, but on the basis of their membership in the workers’ committee and their activities within it: “Dismissals due to membership or activity in a workers’ union or due to organisational measures, are invalid and null and void, even made in the context of redundancies”.⁷⁶²

10.10 Filing Lawsuits Against Workers and Their Representatives

Filing personal claims and using legal proceedings against workers for the purpose of deterring them or for the purpose of directing their resources to the management of their legal protection and not for the benefit of worker representation, have become more common in the struggle of employers against workers’ unions. These lawsuits are also often referred to as *silence lawsuits*.

An example that illustrates the misuse of legal proceedings also came up in the **Automation Company** case. It filed a defamation lawsuit, amounting to ILS 2,500,000, against the chairman of the workers’ committee for publishing a letter in which he reported a discussion to the defendant’s workers in the State Audit Committee in the Knesset held two days earlier regarding the plaintiff’s condition. The District Court ruled that “the plaintiff sued the defendant for nothing, for he is innocent [...] This frivolous claim was not intended but to harm the defendant and his function as chairman of the workers’ committee. The plaintiff sought to intimidate him. I saw him in court wringing his fingers anxiously, troubled and apprehensive, and not in vain. [...] The lawsuit was nothing more than a tool in the hands of the plaintiff in a fight against the workers’ committee. That shall not be done”.⁷⁶³

10.11 Additional Measures

Beyond the measures discussed at length in this chapter, there are other measures that can and will be used by employers, as detailed below.

10.11.1 Measures Intended to Prevent Strikes

Requirement for the commitment of a workers’ union to industrial silence

Industrial silence was discussed in Chapter 3,⁷⁶⁴ and it is also relevant in the context of the alternative measures available to the employer. I shall reiterate that when a workers’ union accepts restrictions restricting it from going on strike in a collective agreement, it is a commitment to industrial silence. An absolute commitment not to strike prevents the parties to the labour relationship from striking or shutting down during the life of the agreement in any matter, whether or not it has been settled in the agreement”.⁷⁶⁵ An undertaking to maintain industrial silence can be explicit in a specific clause in the collective agreement or an implied undertaking, and it can be absolute or relative.

⁷⁶¹ Collective Dispute Appeal 24/10 Hot Telecom Ltd. v. The National Workers’ Association.

⁷⁶² Collective Dispute Appeal 1013/02 New General Workers’ Union – Kiryat Malachi Community Center, Ruling 39 295, p. 303.

⁷⁶³ Civil Suit (Jerusalem) 8069/06 Automation Company in the Local Government Administration Ltd. v. Aryeh Gur, clauses 34-35 of the ruling.

⁷⁶⁴ Chapter 3: *The Strike in Israel*.

⁷⁶⁵ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1512.

It is clear that this measure will be reflected in the anchoring of industrial silence in the collective agreement between the employer and the workers' union both before or after the strike – in order to ensure its existence, and it is clear that this measure is recognised as a legal measure in Israel. Allegedly, the breach of the obligation to maintain industrial silence is a ground for imposing sanctions on the workers' union, but clause 24 of the Collective Agreements Law almost completely reduces the possibility of obliging the striking workers' union to pay compensation for breach of the collective agreement: "Notwithstanding any law, a workers' union or employers' union shall not be liable for compensation for breach of its obligations under a collective agreement, except to the extent that it has expressly undertaken them in a general collective agreement". According to clause 24, it is not legally possible to award compensation for breach of a special collective agreement, and compensation for breach of a general collective agreement may be awarded only if the parties have expressly stated so in the agreement.

10.11.2 Measures Intended for Operating the Factory Despite the Strike

A. Use of Workers Who are Not Striking

Employers can operate their factory through their non-striking workers. This practice was approved by the Labour Court in the International Bank case⁷⁶⁶ and the Tadiran case, while the court notes that an employer cannot oblige non-strike workers to perform the work of striking workers.⁷⁶⁷

B. Storing Inventory

An employer can defend against a workers' strike by accumulating a sufficient stock of goods and raw materials, thus avoiding the risk of non-compliance with delivery dates that it has committed to its customers.⁷⁶⁸

While the first measure, the use of non-striking workers, can only exist during the strike, the existence of the second means, stockpiling, must be implemented before the strike.

10.11.3 Measures Intended to Ensure Continued Supply of Factory Produce

A. Increasing Production Processes in Other Employer Factories

An employer can meet its obligations to its customers by increasing the production process in its factories located in other areas, whether in the same country or outside it, and which are not locked out due to the local labour dispute.⁷⁶⁹

An example of this occurred when Amos Shoken, owner of Haaretz newspaper, founded the Tel Aviv local newspaper Ha'ir in October 1980. A year earlier, in 1979, Shoken founded the Jerusalem local newspaper Kol Ha'ir. Establishment of the free local newspapers was done under a new and independent company called Local Press Ltd., thus circumventing Shoken's duty to employ the workers through collective agreements, like all the country's journalist. Establishment

⁷⁶⁶ Collective Dispute (Tel Aviv Areas) 269/06 The New General Histadrut - Derivatives Market Association et al., - Bank Employees Division – International Bank Ltd. (dated: 20/11/2006).

⁷⁶⁷ Labour Appeal (National) 742/05 The New General Workers' Union, The Histadrut of Electricity, Metal and Electronics v. Tadiran Systems Ltd., Clause 5 of the ruling.

⁷⁶⁸ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1475. A similar opinion was also expressed in Labour Appeal (National) 742/05 The New General Workers' Union, the Histadrut of Electricity, Metal and Electronics v. Tadiran Systems Ltd., clause 5 of the ruling.

⁷⁶⁹ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1475.

of the local newspaper was accompanied by modern technology (offset printing and not in the method of arranging letters by hand) and in personal contracts with workers and not a collective agreement, met with a strike by his workers and stormy demonstrations that threatened to continue printing the newspaper and distributing it. “I asked the editors to lower the papers with the texts [from the windows, AAM] with a rope to the backyard without them being seen, and to fly to Jerusalem to print the newspaper from the system of Kol Ha’Ir” relates Shoken. “So, the striking print workers sat all weekend in the editorial office in Tel Aviv, and we published the local newspaper in Jerusalem”.⁷⁷⁰

B. Contracting in Alternative Business Ties

In the Yedioth Ahronoth case, the workers’ claim arose that the other operators of the country’s most popular newspapers (Ma’ariv, Globes) assisted the management of Yedioth Ahronoth in the professional struggle against the workers, either by providing minor media coverage of the labour dispute, or by providing equipment and manpower to replace workers.⁷⁷¹

While the first measure (increasing the production process in the employer’s other establishments) would only take place during the strike and depends on the establishment of additional establishments by the employer, the second measure (entering into alternative business relationships) can only exist if the employer manages to form alternative business relationships on the eve of the strike or during it.⁷⁷²

In the Tadiran case, the Labour Court qualified the possibility for an employer to enter into alternative business relationships or transfer its activities to other sites of its business, where there is no strike.⁷⁷³ At the same time, to the best of the author’s knowledge, with the exception of the Tadiran case, there is no in-depth and extensive discussion in case law regarding the use of these measures. Therefore, it seems to the author that there is room to examine these tools in essence, because they have some practices in them that may lead to a strike breaking.

C. Continued Supply of the Factory Produce in the Age of Globalisation

Beginning in the mid-1970s, the world economy underwent a dramatic change through the phenomenon known as *globalisation*. This concept describes the growing integration of physical, financial and services markets around the world. This has led to a growing interdependence of countries (and of corporations and individuals) manifested in trade and manufacturing through an increasing volume of cross-border transactions, a wider spread of technology and investment.

⁷⁷⁰ Danny Vazana, *Meugadim* [Unionised], (Schakim: 2017), p. 284.

⁷⁷¹ Collective Dispute 401133/00 New General Workers’ Union – The Printing, Media and Artists’ Union – Yedioth Ahronoth Ltd.

⁷⁷² In this regard, it is interesting to note the goals of the Insurance Fund against Occupational Disruptions, initiated by the Association of Industrial Owners in Haifa in 1947. This fund stipulated that every member of the Industrial Owners Association will be obliged to help a plant where an unjust strike has broken out. Help was supposed to be given by filling orders that the disabled plant could not fill. See: Unknown Author, *The Organization of Industrial Owners Against Strikes*, (Haaretz, 22/01/1947), at the link: <https://www.nli.org.il/he/newspapers/haretz/1947/01/22/01/?&srpos=202&e=-----194-he-20-haretz-201--img-txIN%7ctxTI---1947-----1> Accessed: 16/08/2021.

⁷⁷³ Labour Dispute (National) 742/05 The New General Workers’ Union, Histadrut of Electricity, Metal and Electronics v. Tadiran Systems Ltd., clause 5 of the ruling.

Under the auspices of globalisation and its support, employers have been given the opportunity to reduce labour costs, rebuild their organisations and shape labour relations.⁷⁷⁴ Hence globalisation has created a situation where the activation of strike weapons no longer balances the bargaining power between labour and capital, for several reasons.

First, globalisation has enabled the establishment of multinational corporations,⁷⁷⁵ through which employers succeed in reducing the power of workers, rejecting the demands of striking workers and not being harmed by the strike, by threatening to relocate factories to other countries where there are no strong trade unions, and where wages, working conditions and job security are very low, if any.

Second, by reducing the damage of the strike (resulting from cessation of the production process) by increasing production in the employer's factories outside the country.⁷⁷⁶

Third, many firms have begun to move into indirect employment. These forms of employment have reduced the ability to organise among workers, and led to a reduction in the proportion of members in the local workers' union, and naturally, these undermined the union's power to negotiate organised labour and operate the strike weapon.⁷⁷⁷

Fourth, globalisation has also created changes in the financing markets and the demand for foreign investment. Market opening and increasing global competition have forced countries to compete with each other for investment from foreign financing entities. In order to encourage investment, simplify regulation and reduce bureaucratic barriers, lenient tax methods, low tariffs and the privatisation of state assets have been used, which led to un-unionised employment. Workers employed in this manner cannot or have difficulty operating the strike weapon.⁷⁷⁸

Work has become grounded on a global basis, in which there is a great mobility of factories and migration in the opposite direction of foreign and weakened job seekers. In a labour market based on a global division of labour, workers' unions have lost their efficiency, and their power to influence workers' working conditions has been significantly impaired.⁷⁷⁹ Cheap labour in developing countries, along with the threat of closing factories and relocating them, allowed employers a new leeway in the age of globalisation, exposing the strike, as a traditional means of struggle for workers, in all its weakness.⁷⁸⁰

This was the case during the port strike, which lasted 23 days in 2004. Following approval of the law to introduce structural changes in Israeli ports,⁷⁸¹ the port workers declared a strike. During the strike, the then Minister of Finance, Benjamin Netanyahu, tried to circumvent the damage of the strike, by unloading 30,000 containers destined for Israel in the ports of Cyprus, Greece and

⁷⁷⁴ T.D. Sebbens, *Globalization and International Trade Unions: The Working Men Have no Country*, New Zealand Journal of Industrial Relations, No. 25 (3) (Wellington. October 2000), pp.234 – 255

⁷⁷⁵ A multinational corporation is also known as: Multi-National Corporations – MNC, Multi National Enterprise – MNE, a transnational enterprise (TNE), a transnational corporation (TNC), an international corporation, or a stateless corporation.

⁷⁷⁶ Ruth Ben-Israel, *The Strike in the Mirror of Public Law: The Strike, the Political Strike and Human Rights*, in: Baranzon Book – Vol. III, (Nevo, 5767), p. 118.

⁷⁷⁷ Lilach Litor, *ibid*, pp. 44-45.

⁷⁷⁸ *Ibid*.

⁷⁷⁹ Yossi Rahamim, *ibid*, p. 449.

⁷⁸⁰ Nava Pinchuk-Alexander, *Directions for the Renewal of the Workers' Union in the Twenty-First Century*, (Labour, Society and Law 10, 5764-2004), p. 60.

⁷⁸¹ Reference to the Shipping and Ports Authority Law, 5764-2004.

Egypt. In the case of **Ashdod Car Factories** case,⁷⁸² containers that arrived at the port of Haifa during the strike, were forced to sail to Italy and unload their goods there, in order to reduce their damage, and this is also the idea behind the unloading of goods in Cyprus and Greece. But the unloading of goods in Egypt, sought not only to reduce losses but also to try and transport the goods to Israel by land.

This also explains the attempt to sell the Dead Sea Plant to foreign investors.⁷⁸³

10.11.4 Measures Intended to Apply Pressure on Workers / Workers' Union

A. Sending Workers on Leave

In the Ginstler case, workers of the Income Tax Department began to take a partial strike. In response, management of the Income Tax Commission ordered that the workers be sent on leave on the same day. The workers petitioned the National Labour Court, stating that “the whole purpose of our vacation is an attempt by the employer to *break* the strike in an indirect way by sending some of the workers on leave”. In its ruling, the National Labour Court explained that “predetermining the date of annual leave is essential, both for the worker and for the employer. The instruction is not purely technical; it is very substantial [...] this and more. The workers were sent on leave not for a fixed period of time, but for the time it would take them to change their ways and lift the sanctions”. In these circumstances, the court ruled that in sending the workers on annual leave, the provision of annual leave was not in accordance with the Annual Leave Law.⁷⁸⁴

B. Sending Workers on Unpaid Leave

An employer whose workers are striking can defend himself against the damage of the strike by using unpaid leave as a substitute for a strike, sometimes also called a *cold lockout*. According to Ruth Ben-Israel, this is a tool designed, for the most part, to give workers temporary leave due to being absent from work. Using this tool, the employer can, ostensibly, overcome the cumulative and procedural conditions for the existence of the lockout.⁷⁸⁵

However, in the case of **Me'uhedet Health Insurance Fund**,⁷⁸⁶ the employer was prohibited from sending employees not involved in the strike on forced leave. The workers, through the Histadrut, petitioned the District Labour Court, against Me'uhedet Health Insurance Fund, for an order prohibiting the HMO from sending the managers and dental assistants in the dental clinics on forced leave, following a strike by dentists and dental hygienists who began the strike. The court ruled that although the employer has the authority to determine the dates of vacation, the provision regarding annual leave set forth in the collective agreement between the parties is a normative provision that treats the worker as an individual and does not allow coordinated collective action to send workers on forced leave as a response to a strike. Hence this is not based on the signed collective agreement, and is therefore contrary to the provisions of the Annual Leave Law. Accordingly, the District Court granted the Workers' request.

⁷⁸² As will be discussed in Chapter 12: *How Third Parties Handle the Strike*.

⁷⁸³ Yuval Azulai: *ICL employees: Potash will transfer activities to Jordan, where employees are cheap*, (Globes, 13/03/2013), at the link: <https://www.globes.co.il/news/article.aspx?did=1000829633> Accessed: 03/08/2021.

⁷⁸⁴ Labour Court Hearing 36/ 4-5 (National) Moshe Ginstler et al. - State of Israel, Labour Court Ruling 8 3, clause 55 of the ruling.

⁷⁸⁵ Ruth Ben Israel, *Labour Law* – Vol. IV, (The Open University, 2002), p. 1475.

⁷⁸⁶ Collective Dispute (Tel Aviv) 26490-01-16 New General Workers' Union in Israel v. Me'uhedet Health Fund.

10.12 Summary

This chapter reviewed employers' means of dealing with the strike, as revealed in the judgments, the literature and the media.

I have shown that the law in the State of Israel does not allow striking workers to be replaced by permanent or temporary workers who are external to the workers' situation on the eve of the strike. A strike, from the employer's point of view, cannot be resolved by breaking it. The law and the court will not allow it. An employer seeking to replace his workers during a strike and thus possibly pressure his striking workers is likely to face legal discrimination in the same court while his striking workers can work during the strike at another temporary job, and the pressure is back on him. Employers who rely on compensation from the employers' mutual fund should know that the fund is not without its drawbacks: It requires its members to confirm their intention to shut down the factory in advance, it does not approve the full extent of the damage caused by strike or lockout, it prohibits employment of striking or lockout workers, and it also prohibits payment (in any form) to workers who were on strike or locked out. Employers cannot rely on the court to issue injunctions against a strike in their factory. We have learned that injunctions do not prevent a strike, but are a tool that seeks to enforce by legal means the restrictions set forth in the group of restrictions that regulate the strike. We have also learned that since the late 1990s, there has been a significant decrease (of about 50%) in the number of applications to the Labour Court for the issuance of injunctions, and I discussed the court's reduced policy against issuing injunctions for strikes when their legal procedure is in place. In all matters relating to the lockout, the Labour Court has established a series of cumulative conditions for the existence of a lawful lockout. The court also ruled that the burden of proof that the lockout is protective is, as stated, that of the employer. Failure to comply with these conditions renders the strike illegal, and in these circumstances the court may order its termination, including payment of wages to workers who were deprived of work during the strike, plus interest and wage withholding compensation. An employer seeking to deduct wages is required to know that there is a reasonable chance that he will be required on his own initiative to utilise exhaustive proceedings in the Labour Court. The desire to operate the factory despite the strike, while at the same time giving the employer the opportunity to determine the appropriate wage, imposes on him the obligation to perform thorough staff work, that will be examined by the court in due course. When employers insist on deducting workers' wages, they are forced to negotiate with workers' unions regarding wage payment arrangements for the workers who have been on strike. This negotiation is obligatory by virtue of the rulings of the court, and as such it must be conducted in good faith. We also learned that in many cases strikes may end when the government agrees to waive its right to operate the wage deduction arrangement. Negative behaviour of employers, in all its various forms, which seeks to prevent the organisation of workers and strike, is subject to sanctions in the form of increased compensation and even a remedy of enforcement of an employment contract by the Labour Court.

This This is the time to ask – what are the common conclusions for all the ways of coping mentioned in this chapter?

The first conclusion and the most obvious one is that employers seek to see strikes come to an end – whether by trying to exert economic pressure on workers by preventing work or harming their wages; or by breaking the strike; or by the use of legal tools.

The attempt to exert economic pressure on workers by preventing work or harming their wages: included in this category are the following measures: refusal to accept part-time work; lockout; sending employees

on forced leave (paid and unpaid); wage deduction and payment of appropriate wages. Strike breaking:⁷⁸⁷ included in this category are the following measures: replacement of striking workers with temporary or permanent new workers; layoffs of striking workers; employing external workers; use of workers who are not striking; increased production in the employer's other factories; contracting in alternative business ties; continued supply of produce in the age of globalisation; stockpiling. Use of legal tools: included in this category are the following measures: appealing to the courts in an attempt to obtain an injunction against the strike; demand for anchoring industrial silence in collective agreements.

The second conclusion is that the various measures reviewed in this chapter can be divided into the timing of their activation. The measures can be taken before, during or after the strike:⁷⁸⁸

Measures to be used before the strike	Measures to be used during the strike	Measures to be used after the strike
Stockpiling;	Refusal to accept part-time work;	Demand for anchoring industrial silence in collective agreements;
Demand for anchoring industrial silence in collective agreements;	Lockout;	Applying to the employers' mutual fund;
	Sending workers on forced leave;	
	Deducting pay and paying an appropriate wage;	
	Replacement of striking workers with temporary or permanent new workers;	
	Layoffs of striking workers;	
	Employing external workers;	
	Use of workers who are not striking;	
	Increased production in the employer's other factories;	
	Contracting in alternative business ties;	
	Continued supply of produce in the age of globalisation;	
	Appealing to the courts in an attempt to obtain an injunction against the strike;	

Table 12: Timing of the operation of measures by the employer before / during / after the strike.

The third conclusion is regarding the legality of the measures: they can be legal, illegal or ones whose legality is in doubt because the Israeli legislature or the Labour Court has not yet given their opinion on them:⁷⁸⁹

⁷⁸⁷ The meaning here of the use of the words *strike breaking* is for the continued operation of the plant despite the strike, and does not come to express an opinion as to the legality of the measure or its illegality.

⁷⁸⁸ Hereinafter: Table 12.

⁷⁸⁹ Hereinafter: Table 13.

Legal Measures	Illegal Measures	Measures whose legality is in question
Stockpiling;	Sending workers on forced leave;	Increased production in the employer's other factories;
Demand for anchoring industrial silence in collective agreements;	Replacement of striking workers with temporary or permanent new workers;	Contracting in alternative business ties;
Refusal to accept part-time work;	Layoffs of striking workers;	Continued supply of produce in the age of globalisation;
Lockout (only a protective lockout);	Employing external workers;	
Deducting pay and paying an appropriate wage;		
Use of workers who are not striking;		
Appealing to the courts in an attempt to obtain an injunction against the strike;		
Applying to the employers' mutual fund;		

Table 13: The legality of measures used by the employer.

A perusal of the timing table for operating the measures teaches us that the employer's toolbox is almost empty before the strike. The vast majority of the measures reviewed in this chapter can only be used during a strike. However, quite a few of these tools are also illegal tools, as we will learn from the tool legality table. At the end of the day, an employer dealing with a strike may find itself dealing with a minority of useful and legal tools during a strike, and this is also the conclusion of this chapter. It is understandable, then, why the strike is for employers a factor that is not simple and easy to deal with, and even stressful.

The fourth conclusion is that often the measures taken by employers are only a response to the actions of the workers' union. In this respect, the employer hardly initiates – but only responds. Exceptions are stockpiling and the demand to anchor industrial silence in collective agreements before or after the strike.

Even when an employer responds to the actions of striking workers, his reactions are not always direct towards them. Thus, when an employer chooses to shut down the factory in the event of a partial strike, the employer seeks to put pressure on the non-involved workers, so that they will put pressure on the striking workers.

The fifth conclusion is that not all measures are possible for employers, because not all of them are applicable. For example, *stockpiling* requires employers to rent or purchase storage space. It is clear that this has an economic price and it is clear that not all employers deal in storable produce.

The sixth conclusion is that some measures are accompanied by an additional price that employers have to deal with, such as image or reputation damaged during the strike, and an employer who chooses to use those measures will have to pay the price.

The seventh conclusion is that whatever measure the employer chooses to take, he must still ensure it is taken in good faith, in the words of the National Labour Court in the **Dead Sea Works** case: "Labour relations are not a war, but a unique struggle, but even in war there are rules that must be observed. From the essence of labour relations it arises, that there is no room for tricks when conducting a struggle. These relationships require good faith at all stages, including the struggle, since the contractual relationship

continues even in those cases where they are suspended. Acts that go beyond the legitimate struggle and the duty of good faith – will not be protected”.⁷⁹⁰

The eighth conclusion is that it is true that additional measures not reviewed in this chapter can be thought of as additional ways for employers to handle the strike,⁷⁹¹ that are not prohibited by law. However, in the case of the International Bank, the court also set reservations to this in ruling: “According to the bank, a law that does not exist is permitting, that is – as long as there is no additional prohibition in the legislation on protection against a strike, it should be seen as a permit to do everything that is not prohibited by law. **In our opinion, this is not the case. Legislation, by its nature, cannot cover all areas of life and all individual cases. The rulings of the High Court and the rulings of the Labour Court added prohibitions and restrictions beyond the words of the legislation,** resulting from “changes that occurred in the basic perceptions of Israeli society...” (remarks of President Barak in the matter of HCJ Additional Hearing 4191/97 Ephraim Recanet v. The National Court). In our case, too, **in addition to the prohibitions set forth in the law, additional restrictions have been imposed on the employer over the years [...]**⁷⁹² (emphases not in original). In other words, an employer who thinks of a *creative* solution may face financial and legal consequences, as **Bromine Compounds** found out when they refused to accept part-time work, announcing a lockout. When the chairman of the workers’ committee informed management of the end of the sanctions, management refused to end the lockout and return the workers to work, except subject to a written commitment from the workers’ council that it would refrain from instructing workers to carry out any sanctions in the future and at most, would instruct only to carry out sanctions in the times between work and not while performing work. The Regional Labour Court ruled in this case that no restrictions could be placed on a future strike as a condition for ending the current strike.⁷⁹³

The ninth conclusion is that *sitting on the fence, dragging one’s feet*, coming to terms with the strike or severing contact during a strike are not always possible. Employers who choose to say nothing because they *do not negotiate under fire* may find themselves facing economic damage or the consequences of the law. In the **Bezeq** case ruling, the court ruled that the employer must negotiate in order to exhaust all possibilities and to reduce the damage that the strike will cause to competitors and consumers: “[...] From the documents and testimonies presented to me, it is clear that Bezeq’s management knew in practice, or at least should have known, about the various sanctions taken by its workers against Bezeq’s competing operators. Despite this, Bezeq’s management did not take the necessary steps to find out the scope of the sanctions and their exact location and did not act decisively to bring them to an end [...]”.⁷⁹⁴

⁷⁹⁰ Labour Court Hearing 41/ 4-18 The Histadrut of the Workers in the Land of Israel, Be’er Sheva Workers’ Council, etc. – Dead Sea Works Ltd., ruling 14 225, p. 247.

⁷⁹¹ For example – *drawing out* the collective negotiations with the workers’ union or hiring communications consultants.

⁷⁹² Collective Dispute (Tel Aviv Areas) 269/06 The New General Histadrut – Derivatives Market Association – Bank Employees Division – International Bank Ltd. (dated: 11/20/2006), clause 24 of the ruling.

⁷⁹³ Collective Dispute (Be’er Sheva) 54634-01-15 The New General Workers’ Union, Negev v. Bromine Compounds Company Ltd.

⁷⁹⁴ CA (Antitrust) 801/08 Bezeq Israel Telecommunications Company Ltd. v. Antitrust Commissioner, clause 31 of the ruling.

Chapter 11: How the Sovereign Handles the Strike

This chapter will be devoted to examining the ways in which sovereign representatives, i.e., Knesset members and government ministers, handle strikes.

In Chapter 3,⁷⁹⁵ I discussed the significance of the sovereign in labour relations in the State of Israel, the fact that it is the largest employer in the state, and its responsibility to provide essential public services to citizens of the state. These services, for the most part, are monopolistic services, meaning a monopoly created by the government and made possible by the fact that the government is the only entity that provides them,⁷⁹⁶ and therefore, their complete or partial disruption disrupts the lives of the citizens. Of course, the sovereign, who seeks the trust of citizens in elections, seeks to prevent or at least reduce the harm to his electorate and therefore over the years has chosen to deal with strikes, usually through one of two: restraining orders and a desire to promote the use of arbitration in public sector strikes, as detailed below.

11.1 Restraining Orders

The questions that require clarification in this chapter are: What are restraining orders? What are the implications of restraining orders on strikes? How does the legal system treat restraining orders? What is the actual use made of restraining orders?

A. What are Restraining Orders?

Restraining orders (also known as *emergency orders* or *work orders*) are orders issued by the executive during an emergency, in which workers are required to report for work, otherwise they will be subject to imprisonment, fines and immediate dismissal without compensation.

In other countries, too, the executive branch is given authority to prevent a workers' strike in an emergency. For example, in the United States the Taft Hartley Act⁷⁹⁷ makes it possible to deal with an emergency situation that has arisen as a result of strikes and which may endanger the country's economy. By law, the president can apply to a federal court for an order directing workers to return to work due to damages caused by the strike. The order can prevent a strike for 80 days.⁷⁹⁸ In the case of emergency regulations, the power of the executive is not limited to prescribing "outside-of-the-law" arrangements (*praeter legem*) but allows it to enact regulations that can change, expropriate or set conditions that change primary legislation. That is, these regulations may be contrary to law (*contra legem*).⁷⁹⁹

In order to issue restraining orders, a collective labour dispute is required that attempts to terminate it have failed. The Minister responsible for the sector in which the strike broke out then seeks the government's approval to install emergency regulations and authorisation to publish these regulations. Upon receipt of government approval, the Minister authorises the CEO of his office (or the CEO of the Government Authority or any other director or person authorised to do so by regulations) to issue restraining orders. The orders state the names of the workers and call them to return to work fully,

⁷⁹⁵ See Chapter 3.4.2 *Use of the Strike Weapon in Israel*.

⁷⁹⁶ In Israel, for example, there are also a number of prohibitions in the law on competition in the fields of electricity services (IEC is the only company that can provide energy services in the State of Israel under the Electricity Law, 5714-1954), ports (establishment of a private port is prohibited), education programmes (Ministry of Education is the only body that can approve education programmes for schools, and private schools are a rarity).

⁷⁹⁷ Labour Management Relations Act-29 U.S.C 1994. Quoted in: Lilach Litor, *ibid*, p. 195.

⁷⁹⁸ Lilach Litor, *ibid*, p. 195.

⁷⁹⁹ Amnon Caspi and Ruth Kastiel, *Labour Relations* (The Open University, 2005), p. 59.

without slowdowns and disruptions and to follow any instruction given to them in connection with the performance of the work in full, continuously and regularly. The orders do not come to confine workers to their place of work, but deny them the possibility of resigning, forcing them to end the strike and resume their regular work.⁸⁰⁰ The order of actions for issuing detention orders can be illustrated in the following diagram:⁸⁰¹

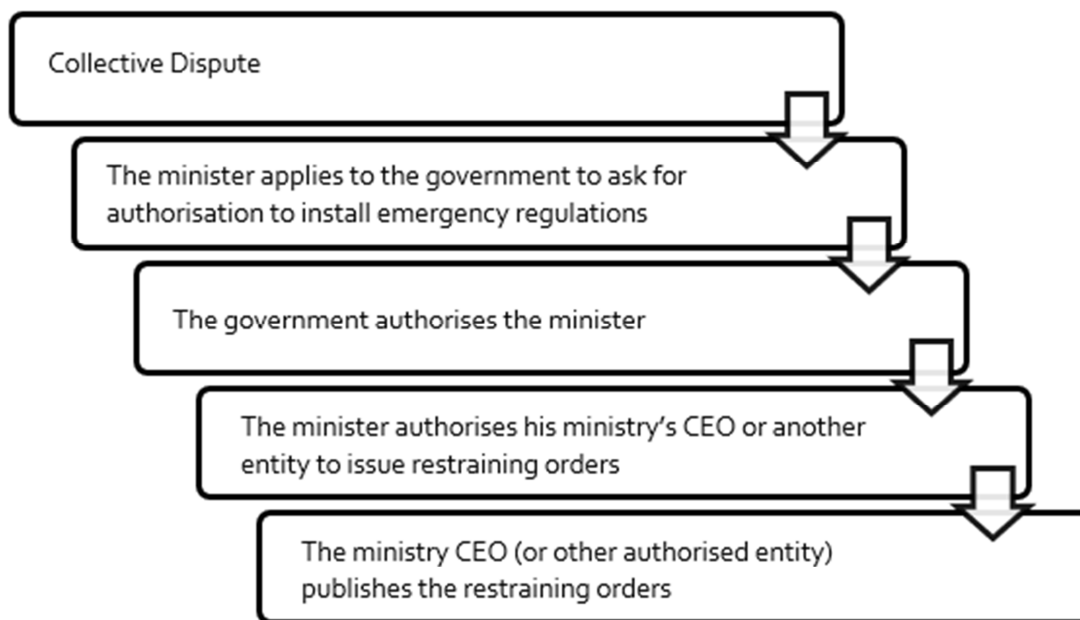


Figure 14: Diagram of the order of actions for issuing detention orders.

By law, in order for restraining orders to be issued, the Knesset must declare a state of emergency, and in accordance with this declaration, restraining orders will be issued by virtue of emergency regulations. As early as May 19, 1948, five days after the establishment of the state, the State Council declared a state of emergency. Since then, the State of Israel has been in a state of emergency and with it the authority to install emergency regulations.⁸⁰²

Clause 160 of the Penal Code,⁸⁰³ called *Labour Disruptions* allows for declaration of a state of emergency alongside a criminal sanction: “If the government has seen that there are serious disturbances in labour relations that endanger the economy in the country or trade with foreign countries or harm them, it may declare a state of emergency for the purposes of this clause, and as long as the declaration has not been revoked, a participant in a strike or lockout in work relating to the transportation of cargo or the transportation of passengers through business or commerce in Israel or between it and foreign countries or to the provision of public service in Israel, shall be deemed as an instigator, collaborator or as encouraging the continuation of said strike or lockout, and be sentenced to one year incarceration”. However, Israeli governments have never exercised their authority under Clause 160 above. The president

⁸⁰⁰ Mordechai Mironi, *Restraining Orders: Government Intervention in Labour Disputes through Emergency Regulations and Work Orders* (Tel Aviv: Institute for Labour and Social Studies, 1983). p. 3.

⁸⁰¹ Hereinafter: Figure 13.

⁸⁰² The declaration was published in the official newspaper on 21/05/1948 5708, p. 6. Every year, the Knesset renews the declaration of a state of emergency. In 2011, a petition was submitted to the High Court of Justice for cancellation of the state of emergency as declared by the Knesset, but this petition was rejected – see: HCJ 3091/99 Association for Civil Rights v. The Knesset.

⁸⁰³ Penal Code, 5737-1977.

of the Association of Chambers of Commerce, Uriel Lin, who was required to address the issue, explained that in his opinion, “there is reluctance in all state and law authorities to exercise the law with the committees”.⁸⁰⁴

Restraining orders are different from injunctions in a number of respects: the difference in the identity of the body issuing the order, considerations guiding issuance of the order and the identity of the party acting to enforce the orders and the sanction for violating them. As we will learn,⁸⁰⁵ injunctions are issued by the judiciary, while restraining orders are issued by the executive branch; the considerations that guide the judiciary in issuing an injunction, in a nutshell, are related to faults that were attached to the strike⁸⁰⁶ – this is in contrast to the considerations in issuing restraining orders that relate to the type of service harmed and essential it is; and in order to enforce injunctions it is necessary to go to court in a contempt of court proceeding, as opposed to restraining orders which are perceived as an actual violation of law.

Historically, the authority to enact emergency regulations and their legal status have been established in Clause 9 of the Governance and Justice Ordinance.⁸⁰⁷ According to Clause 9A of the Ordinance, the authority to install emergency regulations was not given to the government, but to ministers authorised by it, thinking that in an emergency the government could not convene and it was necessary to give powers to a minister or ministers authorised in advance. With the enactment of the Basic Law: Government, Clause 9A of the Law and Administration Ordinance was repealed, and the authority to enact emergency regulations was established in Clause 39 of the Basic Law: Government. **This Clause prescribes stricter arrangements than those provided for in Clause 9A of the Law and Administration Ordinance.** According to Clause 39 of the Basic Law: Government, the authority to install emergency regulations is given to the government and only in special circumstances can they be conferred on the Prime Minister or authorised by a Minister to install them. Basic Law: The government also expresses a reduction in the power of the government and an explicit ability to attack its decision to install regulations in the courts. The differences between Clause 9 of the Law and Administration Ordinance and Clause 39 of the Basic Law: Government, can be summarised in the following table:⁸⁰⁸

	Clause 9 to the Law and Administration Ordinance 5708-1948	Clause 39 of the Basic Laws
Authority to establish emergency regulations	“The government may authorise the prime minister or another minister to install emergency regulations.”	“The government may install emergency regulations. If the Prime Minister sees that the Government cannot be convened and that there is an urgent and vital need to install emergency regulations, he may install them or authorise a Minister to install

⁸⁰⁴ Avi Bareli: *Workers’ Committees Strike, the Public Pays and no one Sues*, published in The Marker on 20/12/2013, see the following link: <https://www.themarker.com/dynamo/1.2188398>

⁸⁰⁵ See: *Discussion on Restraining Orders* in Chapter 10.

⁸⁰⁶ These faults can be, for example, failure to notify the chief labour relations officer of the intention to go on strike, failure to wait 15 days before the strike begins, etc.

⁸⁰⁷ Law and Administration Ordinance 5708-1948.

⁸⁰⁸ Hereinafter: Table 14.

		them.”
Purpose of emergency regulations	“For the benefit of state protection, military security and the existence of essential supplies and services.”	“To protect the state, public safety and the existence of essential supplies and services.”
Power of the regulations	“Amend any law, temporarily suspend or impose conditions on it, and impose or increase taxes or other mandatory payments”	“Amend any law, temporarily suspend it or impose conditions on it, and impose or increase taxes or other mandatory payments, all unless there is no other provision in the law.”
Reducing the power of regulations	(There is no reference in the Ordinance)	“Emergency regulations do not have the power to prevent turning to the courts, imposing retroactive punishment or allowing a violation of human dignity. Emergency regulations will not be enacted and no arrangements, measures and powers will be enforced by them, except to the extent that the state of emergency so requires.”
Validity of regulations	<p>“An emergency regulation shall expire three months after the date of its enactment, unless its validity has been extended or previously cancelled by the Provisional State Council or revoked by the Regulatory Authority.</p> <p>When the Provisional State Council deems it appropriate, it shall declare that the state of emergency has ceased to exist, and once the declaration has been published in the Official Newspaper, the emergency regulations shall expire on the date or dates to be determined in the declaration.”</p>	<p>“The validity of emergency regulations shall expire three months after the date of their enactment, unless their validity has been extended by law, or repealed by the Knesset by law or by a decision of a majority of Knesset members.</p> <p>If the state of emergency ceases to exist, emergency regulations shall continue to exist for a period of validity but not more than 60 days from the end of the state of emergency; Emergency regulations that have been extended by law will continue to be in force.”</p>

Table 14: Comparisons between Clause 9 of the Law and Administration Ordinance and Clause 39 of the Basic Law: Government.

B. What are the Implications of Restraining Orders on Strikes?

Workers' representatives harshly criticise the use of restraining orders as a tool in intervening in labour disputes. They raise a number of allegations against the use of restraining orders:⁸⁰⁹

1. There is a use that the state makes of its power as a sovereign through restraining orders – potential for gaining an advantage in the field of labour relations, as a way of achieving goals that the state fails to achieve as an employer.⁸¹⁰
2. Restraining orders deny workers the right to strike which is a fundamental right in a democratic state. This violation of the right to strike is justified by the administration on the grounds that the general good allows violation of the freedom to strike for workers in essential services.
3. According to the workers' representatives, use of this measure for purposes that do not comply with the intention of the legislature and the principle of the rule of law, is inappropriate. Moti Netzer, who was also required to address the issue, stated that “an examination of the distribution of emergency regulations according to the years of their enactment shows that all regulations were enacted at times when the state was not at war and for purposes that have nothing to do with an emergency”.⁸¹¹
4. Restraining orders are structurally flawed in that against a strike, which is a collective action, orders are issued and penalties are imposed on an individual level that expose the individual worker to pressure and undermine the action of the workers' union.
5. Restraining orders are violent, oppressive and ineffective intervention tools. The restraining orders reject and exacerbate the real disputed issues, harden the positions of the parties and make employers sit idly by, knowing that they can rely on the restraining orders.
6. The purpose of the restraining orders, from the outset, was to renew the regular supply of essential services. But in practice, restraining orders serve a number of foreign purposes, such as creating an image in public opinion that the government is taking action (for example, taking care of renewing the supply of essential services).
7. Enforcing the orders and punishing non-compliant workers is problematic: In the few cases in which it was decided to take action against the violators, it was difficult to establish evidence and cooperation from workers who refused to testify against their co-workers. As a result, complaints against violators of the orders were cancelled.⁸¹²
8. The State of Israel is a signatory to the International Covenant that prohibits forced labour,⁸¹³ hence the use of restraining orders may be perceived as contrary to the obligation imposed by Israel in this Convention and in violation of international law.
9. In the State of Israel, there is an Emergency Employment Service Law⁸¹⁴, which deals with the possibility of recruiting vital manpower in an emergency, “in a special situation in the home front” or a “civil emergency” and authorises the Minister of Labour to recruit workers for industry, commerce, transportation, agriculture, education and public services, including “subsistence

⁸⁰⁹ Claims 2-6 are based on the clause by: Mordechai Mironi, *Restraining Orders: Government Intervention in Labour Disputes through Emergency Regulations and Work Orders*, *ibid*, p. 3.

⁸¹⁰ Mordechai Mironi, *Use of Legislation to Violate Contractual Rights and Achieve Structural Changes – Aspects of Labour Law and Labour Relations*, (Labour Society and Law, 2004), p. 274.

⁸¹¹ Moti Netzer, *Government Intervention in Strikes and Labour Disputes through Emergency Regulations and Detention Orders*, (Human Resources Monthly, 111, March 1997), p. 7.

⁸¹² *Ibid*, p. 9.

⁸¹³ *Convention Concerning Forced or Compulsory Labour* 1930, drawn up in Geneva on June 18, 1930, ratified by the State of Israel on June 7, 1955.

⁸¹⁴ Emergency Employment Service Law, 5727-1967.

services – supply of water, food or electricity, as well as the provision of inpatient and health services, sanitation, communications or mail” if there was a call for reservists under the Security Service Act. Enactment of the Emergency Employment Service Law shows that the legislature has already considered the provision of essential services in an emergency, and that it has not occurred to them that use of emergency regulations would be used to prevent or stop strikes.

10. Returning to regular work also depends on respect for the rule of law (that is, respect for restraining orders) but also on the good will of the workers. In the past, there have been incidents in which workers have judged themselves and disobeyed the provisions of the restraining orders. Even when workers return to work and do not do so wholeheartedly and willingly, this can impair productivity and quality of work, similar to a *by-the-book* strike or an *Italian* strike⁸¹⁵ in which workers slow down the pace of work.

Against these claims are the advantages inherent in restraining orders:

1. Renewal of the regular supply of essential services: This is the main contention of the deniers of the right to strike and the proponents of reducing it. In this respect, restraining orders provide an effective solution in renewing essential services to the public.
2. Speed: unlike injunctions that are conditional on a hearing in the Labour Court, finding a date in the court diary and a hearing procedure, restraining orders do not suffer from these bureaucratic failures, because they are signed by the CEO of a government office and can be activated within 24 hours of receiving government approval, which can be obtained in an expedited procedure through a telephone poll between the ministers.
3. Flexibility and selectivity: restraining orders do not expropriate the freedom to strike from entire groups of workers in all situations, but make it possible to select between the workers employed in vital positions and order them to return to work while the rest of the workers continue with the strike. In doing so, the restraining orders also result in minimal violation of the right to strike.⁸¹⁶
4. Effectiveness: although there are no current studies, the studies that did examine the orders found that in 70% of cases, the restrained workers obeyed the orders, returned to work and this was conducted in an orderly manner. However, about a third of the orders were not complied with and the effectiveness was found to be only partial.⁸¹⁷

C. How does the Judiciary relate to Emergency Regulations and Restraining Orders issued under these Regulations?

On poraz⁸¹⁸ case the High Court ruled that an authority may not use the means of emergency regulations in matters not directly related to emergency needs and exercise its authority in cases where it is possible to apply to the Knesset in advance and initiate regular legislation: “Where there is a possibility of regular and expeditious legislation by the Knesset, the legislative authority of the executive must withdraw from

⁸¹⁵ For more on an Italian strike see: Chapter 5.3.

⁸¹⁶ Mordechai Mironi, *Restraining Orders: Government Intervention in Labour Disputes through Emergency Regulations and Calls to Work*, *ibid*, p. 53.

⁸¹⁷ Moti Netzer, *ibid*, p.9.

⁸¹⁸ In this case the legality of emergency regulations (Emergency Regulations (Plans for the Construction of Housing Units), 5750-1990) was discussed. These regulations established an abbreviated mechanism for approving city building plans while circumventing the procedures under the Planning and Building Laws.

it, since in principle the authority of emergency legislation should be needed only when it is not possible to wait for the Knesset's legislative processes take place".⁸¹⁹

In the case of the lifeguards' strike, the question arose as to whether the state should have issued restraining orders and prevented the lifeguards' strike. The court ruled that restraining orders are a draconian tool that must be used sparingly, and by virtue of the duty of proportionality, restraining orders will be issued only as a last resort.⁸²⁰

D. What is the actual Scope of use of Restraining Orders?

Mordechai Mironi explains that since 1960 the government has begun to make frequent use of its authority to install emergency regulations. Over the years the use of restraining orders has increased and they have earned a place of honor in the list of mechanisms for intervening in labour disputes. As of 1977, restraining orders have been used extensively. The model of calculated and controlled use has been replaced by a model characterised by intoxication of power or recklessness, overuse, abuse, inconsistency and arbitrariness that contribute to a decrease in the efficiency of the mechanism and a serious impairment of its acceptability.⁸²¹

Moti Netzer also believes that the governments in Israel have shown a great deal of haste in installing emergency regulations, and even when these were enacted, restraining orders were not always issued (because another way was found to end strikes and return strikers to regular work even without enforcing the orders).⁸²²

11.2 Arbitration as a Tool for Preventing Strikes in the Public Sector

The wish to promote use of arbitration as a way to prevent strikes in the public sector, as arises from time to time, is not new and discussions on the issue began as early as the years of the Jewish Settlement, before establishment of the State of Israel. Since then, there have been a number of developments on the subject and this subchapter will be devoted to examining them.

11.2.1 What is Arbitration and what is Arbitration in Labour Disputes?

Arbitration is a decision in disputes by way of adjudication, and most arrangements are determined by the disputed parties – from appointment of the arbitrator, determination of the substantive law, the rules of procedure and law of evidence to determination of the date for ruling. Arbitration exists alongside the state's judicial system. However, while in the judicial system there are many defined and detailed requirements regarding the judge and rules of procedure, arbitration is free from all these and in certain situations the arbitrator is free to decide at his discretion and not according to state law.⁸²³ The institution of arbitration known to us today as an accepted procedure for resolving disagreements in many fields originated in a practice introduced in the late Middle Ages to resolve labour disputes.⁸²⁴

⁸¹⁹ Clause 8 of the judgment of Justice Dov Levin in HCJ 2994/90 MK Avraham Poraz v. Government of Israel, Minister of Construction and Housing, Minister of the Interior.

⁸²⁰ Clause 61 of the judgment of Justice Bilhah Gilor in Tel Aviv 862/02 Anon v. Municipality of Rishon LeZion.

⁸²¹ Mordechai Mironi, *Restraining Orders: Government Intervention in Labour Disputes through Emergency Regulations and Work Orders*, *ibid*, pp. 52-53.

⁸²² Moti Netzer, *ibid*, p. 9.

⁸²³ Smadar Ottolenghi, *Arbitration, Law and Procedure*, (Shoken Publishing, 1995), p. 1.

⁸²⁴ G. Bierbrauer, T. Falke & K. Koch, *Conflict and its Settlement — An Interdisciplinary Study Concerning the Legal Basis, Function and Performance of the Institution of the Schiedmann*, in: Access to Justice (Sijthoff, M. Cappelletti & J. Weisner

In arbitration in the field of labour relations, a neutral external body, elected or appointed, undertakes to decide for the parties on disputed issues. The arbitrator's decision is final and binds both parties to the dispute.⁸²⁵ The great advantage of arbitration is that it leads to an immediate, final and binding result,⁸²⁶ which serves as a substitute for a strike.

11.2.2 Review of Historical Arbitration Milestones in the Jewish Settlement and in the State of Israel

As early as the days of the Jewish Settlement, the proposal to introduce mandatory arbitration in labour disputes created a controversy between the labour movement and the revisionist movement. The latter was perceived, by the leaders of the labour movement as an anti-socialist movement that advocated a liberal economy that encouraged and fostered private initiative. It was headed by Ze'ev Jabotinsky, who called the strike a *national sin* and *national betrayal*, since it harmed the growth of the Hebrew economy and, as a result, fulfilment of the goal of establishing a Jewish state. According to him, the balance between the interests of the workers and employers must be achieved, not through a professional struggle, which harms the growth of the Hebrew economy, but through mandatory arbitration. This method is intended to be a kind of supra-class mechanism, which regulates conflicts in labour relations and postpones conflicts between workers and employers for the period after the achievement of the goal of establishing the state. In contrast to the revisionist movement, the labour movement was a socialist Zionist movement, led by David Ben-Gurion, which denied revisionism from the core. This movement emphasised the sanctity of the right to strike and saw the idea of arbitration as part of a fascist worldview.⁸²⁷

Over time, labour disputes between the two sides escalated, leading to civil strife between Jewish workers in Israel. The Histadrut's Labour Bureau secured a monopoly on the Hebrew labour market, and revisionist workers began to find themselves deprived in matters of labour. The constant tension led to a series of assassinations, and often unilateral attacks, on the revisionists, such as the demolition of a house by revisionist workers in the streets by the Histadrut, and an ambush by *boxing groups* in the Frumin factory that beat revisionist workers.⁸²⁸

All of this led to the London Agreements signed between Ze'ev Jabotinsky and David Ben-Gurion in October-November 1934. One of those agreements tried to regulate the issue of strikes and mandatory arbitration in the Jewish Settlement. Among other things, it stipulates that there will be no strike breaking by the competing movement; and that given a certain percentage of workers (belonging to one of the movements) in a particular workplace – mandatory arbitration will be offered to the employer prior to the

eds., 1981) 40, 56. Quoted in: Mordechai Mironi, *Arbitration as a Substitute for a Strike – A Framework for Thinking and Clarifying Basic Concepts*, (The Hebrew University, 1986), p. 14.

⁸²⁵ Mordechai Mironi, *Arbitration as a Substitute for a Strike – A Framework for Thinking and Clarifying Basic Concepts*, *ibid*, p. 16.

⁸²⁶ Mordechai Mironi, *ibid*, p. 16.

⁸²⁷ Keren Finkelstein, *Solution to Public Sector Strikes – Effective Use of the Institute for Agreed Arbitration* (Institute for Advanced Strategic and Political Studies, Jerusalem 2003), page 3.

⁸²⁸ *Ibid*, p. 3.

In October 1932, a strike broke out in the Frumin factory in Jerusalem. The owner of the factory employed a Beitar worker (= youth alliance of the Revisionist movement named after Joseph Trumpeldor before the establishment of the state) not through the labour bureau of the Jerusalem Workers' Council. In response, a strike was launched without warning by the Histadrut. The Jerusalem Workers' Council demanded that Frumin fire the worker, but he refused, while the workers refused to arbitrate. The employers hired Beitar workers to work instead of the striking workers. The Histadrut deployed members of the Hapoel companies to prevent workers from entering the work areas. Eventually, the Histadrut had to come to terms with the employment of Beitar members.

strike.⁸²⁹ This agreement was rejected on 24/03/1935 in a referendum held by the Histadrut, because it rejected any arrangement with the revisionist movement that was perceived by them as a fascist movement.⁸³⁰

Between 1942 and 1946, the British Mandate authorities tried to use a certain type of mandatory arbitration in order to prevent interruptions and disruptions in production so as not to harm the war effort. Mandate Law⁸³¹ stipulated that workers seeking to go on strike must give prior notice of the strike to the Mandate Ministry of Labour. The ministry would decide whether to conduct mediation. If the ministry decided to mediate and the mediation did not succeed, the ministry could have referred the dispute to the arbitration committee.⁸³² It is worth noting that Mandate authorities enacted the Arbitration Ordinance in Israel in 1926,⁸³³ which was an almost exact copy of the English Arbitration Law of 1889,⁸³⁴ but this ordinance dealt with general arbitration and not with arbitration in labour disputes or strikes.

After establishment of the State of Israel, the idea of mandatory arbitration arose again in 1964. On June 18 of this year, an agreement was signed between the Minister of Finance as the representative of the Government of Israel and the Secretary General of the Histadrut. The agreement was to apply to the civil service, national institutions, and local authorities. An eight-member arbitration committee was appointed: government representatives, employers, the Histadrut and neutral public figures. The agreement stipulated that the members of the committee would rule by a simple majority, according to their conscience and knowledge and out of consideration for the economic and security issues of the state. However, this temporary committee dealt with only one labour dispute, of the postal workers,⁸³⁵ which lasted for several years. As stated, the committee was not established by law but as an agreement between the government and the Histadrut, and the parties to the conflict were supposed to contact the committee after negotiations between them reached a dead end.⁸³⁶

Four years later, in 1968, the Arbitration Law was enacted.⁸³⁷ This law, which lays down provisions regarding the way in which arbitration is conducted, applies to all sectors of the economy, and is not specific only to arbitration in labour disputes. The declared aim of the law was to correct the deficiencies discovered in the Arbitration Ordinance of 1926.⁸³⁸ The labour relations system makes use of this law when the parties agree on the existence of arbitration (such as the Institute for Agreed Arbitration), as will be detailed below.

In 1969, the Labour Court was established. During deliberations on the enactment of the Labour Court Law, a proposal was made that the court use an *advisory arbitration* procedure in labour disputes: “At the request of the government, or the workers’ union representing the largest number of civil servants, the national court will be empowered to establish facts in connection with a labour dispute in the civil service

⁸²⁹ Mordechai Mironi, *Mandatory arbitration Eighty Years of Controversy*, (Labour Law Yearbook I, 1991), pp. 128 - 131.

⁸³⁰ Out of 60,000 members of the Histadrut, 29,024 members took part in a poll. Of these, 16,474 voted against the agreement, and 11,522 people voted in favour of the agreement.

⁸³¹ Reference to the Defense Order (Labour Disputes), 1942. The order was enacted on 01/01/1942 and was valid until 15/06/1946.

⁸³² Mordechai Mironi, *Mandatory arbitration Eighty Years of Controversy*, *ibid*, p. 132.

⁸³³ Arbitration Ordinance 1926, Laws of the Land of Israel, Vol. I, Chapter 6, Page 35.

⁸³⁴ Smadar Ottolenghi, *ibid*, p. 3.

⁸³⁵ Keren Finkelstein, *ibid*, pp. 5-6.

⁸³⁶ Lev Greenberg, *The Histadrut Above All*, (Nevo, 1993), p. 129.

⁸³⁷ Arbitration Law, 5728-1968.

⁸³⁸ Smadar Ottolenghi, *ibid*, p. 4.

[...]”.⁸³⁹ In advisory arbitration (which has garnered considerable success in the United States,⁸⁴⁰ for example) a neutral body hears the arguments of the parties and compiles its own recommendations for a just and equitable agreement that will resolve the dispute. In the end, this offer fell through. Yitzhak Zamir explains that this proposal could have been seen as a first step towards the introduction of real mandatory arbitration, but precisely because of this the proposal “very strongly released a charge of ideology that rejects mandatory arbitration or anything similar to it, outright. Rumour has it that not only the Labour Minister’s party, but also the Histadrut, which gave its blessing to the bill, denies this provision”.⁸⁴¹

Three years later, Chapter C was added to the Labour Court Law, simply called Arbitration – which we will discuss in the next subsection.

11.2.3 Enactment of Chapter C of the Labour Disputes Settlement Law

In 1972, the Labour Disputes Settlement Law was amended, and as part of the amendment, Chapter C of the Law dealing with Arbitration was added to the law, among other things. Clauses 15-37 in Chapter C determine matters for arbitration, rules of procedure in arbitration, duty of confidentiality in arbitration and finality of the hearing, as explained below.

Arbitration matters were defined as “any labour dispute that the parties have agreed in writing to submit to arbitration”.⁸⁴² In other words, in order to transfer a labour dispute to arbitration, it is necessary, as stated, that the parties have agreed in advance and in writing to submit it to arbitration. In order for the parties to give their prior consent, they must recognise the existence of the Arbitration Institute in the first stage, and its advantages in the second stage, over the existence of an actual strike or the submission of the matter to the court for a ruling. Matters not subject to agreement between the parties may not be referred to arbitration. Such matters may be “rights conferred on a worker by law, as well as rights under collective agreements”.⁸⁴³ Either party to a labour dispute may notify the dispute to the Chief Labour Relations Officer who will act to appoint an arbitration committee for that dispute.⁸⁴⁴ Alternatively, the chief commissioner may, at the request of one of the parties to a labour dispute, appoint himself or a regional commissioner as the sole arbitrator in the dispute.⁸⁴⁵ The arbitral court “shall discuss and adjudicate in accordance with any legislation, collective agreement or professional practice” and in the absence of any answers to the questions before it, it shall adjudicate “in accordance with the degree of justice and fairness”.⁸⁴⁶ The arbitral court “shall determine the order of its deliberations”,⁸⁴⁷ it may “waive the use of witnesses or experts”,⁸⁴⁸ and it “shall not be bound by the law of evidence, but shall act in a manner which it deems most expedient for the inquiry in question”.⁸⁴⁹ The law establishes the duty of

⁸³⁹ Clause 25 of the Labour and Social Security Court Bill, 5728-1967 (Book of Laws 553, p. 70, dated 27/03/1969), see the following link: https://fs.knesset.gov.il/6/law/6_ls1_290558.PDF

⁸⁴⁰ Mordechai Mironi, *Arbitration as a Substitute for a Strike – Framework of Thinking and Clarifying Basic Concepts*, ibid, p. 20.

⁸⁴¹ Yitzhak Zamir, *Labour Court and National Insurance Bill, 5728 – 1967*, Mishpatim A (5728), pages 253-254.

⁸⁴² Clause 15(A) to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴³ Various Civil Applications 1011/02 Moshe Dirham v. Shalom Shirky, Regional Labour, Vol. 13 127.

⁸⁴⁴ Clauses 16-17 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴⁵ Clause 18 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴⁶ Clause 22 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴⁷ Clause 25 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴⁸ Clause 22 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁴⁹ Clause 24 to the Labour Dispute Settlement Law, 5717-1957.

confidentiality applicable to members of the arbitral court.⁸⁵⁰ And finally, the finality of the hearing: “The arbitral decision is final, and there is no appeal against it”.⁸⁵¹

The court regards an *ordinary arbitration ruling* as arbitration in accordance with the Arbitration Law,⁸⁵² and therefore from the time its judgment is approved, it is “as a judgment of a court and it is considered an act of a court”. On the other hand, the status of an arbitral ruling under Clause 31 of the Labour Disputes Settlement Law is as a contract between the parties to arbitration (referring to cases where the parties to arbitration are not fit to be parties to a collective agreement) or as a collective agreement between them, and an arbitration ruling regarding a valid collective agreement is as that same collective agreement.⁸⁵³

Further on in the law, Clause 37E provides: “A collective agreement applicable to public service shall be deemed to include the provisions in the Addendum in respect of any dispute that is not in the agreement otherwise provided for in its resolution”. The Addendum mentioned in this Clause deals with the referral of a labour dispute, which has erupted in the public sector, to the decision of a parity committee. And if it fails to resolve the dispute within 30 days, the dispute shall be referred to arbitration, which shall be concluded within 30 days from the date of request for arbitration.

In the case of the Coordinating Council of Academic Staff Organisations⁸⁵⁴, the question arose as to whether all labour disputes are subject to the obligation of arbitration under Clause 37E, or only a certain type? (In other words – the parties did not disagree regarding the very existence of an obligation of arbitration in labour disputes arising under Clause 37E and the Addendum to the Law), the doubt in question derives from the fact that Clause 37E, which imposes the mandatory arbitration “on any dispute” – does not include a definition of the term *dispute*. In the absence of such a definition, the concept can be interpreted broadly or narrowly, with each side adopting an interpretation that suits its needs.

Ruth Ben-Israel explains that “the question of what kind of disputes the provision of Clause 37E applies to is problematic and the meaning of this provision must be understood in light of its legislation and purpose... if the legislature found it appropriate to add to the legislation another means that would provide the conflicting parties with an alternative way of resolving the economic conflict instead of using the strike. When it comes to legal disputes, there is an alternative way, since it is possible to apply to the Labour Court to exercise an existing right. However, this is not the case when it comes to an economic conflict. In these circumstances, the Labour Court lacks substantive jurisdiction. Hence, the provision of Clause 37E of the Law and the Addendum are intended to channel the economic dispute from the strike channel to the judicial channel, i.e., to arbitration”.⁸⁵⁵ Ben-Israel also states that Clause 37E of the law imposes an obligation of arbitration regarding legitimate and complex economic disputes on the one hand, and excludes the purely economic conflict from its application on the other.⁸⁵⁶ To summarise the words of Ben-Israel, there are three types of economic disputes: the pure economic dispute, which takes place without a collective agreement applying to the parties; the legitimate economic dispute, which exists when a collective agreement applies to the parties, but the existence of the economic dispute does

⁸⁵⁰ Clause 34(A) to the Labour Dispute Settlement Law, 5717-1957.

⁸⁵¹ Clause 33 to the Labour Dispute Settlement Law, 5717-1957.

⁸⁵² Arbitration Law, 5728-1968.

⁸⁵³ Discussion (national) 31/4-5 Shmuel Izeson v. Pardes Mazia Ltd. and Pardes Eliyahu Ltd., Ruling C 253, Clause 16 of the ruling.

⁸⁵⁴ National Labour Court Hearing *ibid/* 4-19 Coordinating Council of Academic Staff Organisations et. al. – Committee of University Heads, et. al., Ruling 11 164.

⁸⁵⁵ Ruth Ben Israel, *The Strike* (Sadon: 1987), p. 207.

⁸⁵⁶ *Ibid*, p. 207.

not in fact constitute a breach of the agreement; and the complex economic conflict, which exists when there is a collective agreement, and the very existence of the conflict is a breach of the agreement. Prof. Ben-Israel was of the opinion that Clause 37E imposed an arbitration obligation regarding legitimate and complex economic disputes, but excluded the purely economic conflict from its application.

The National Labour Court accepted Ben-Israel's position, stating that Clause 37E of the law came into being in order to prevent strikes during the period of a collective agreement and to determine the arbitration tool as a tool for resolving disputes. In this respect, the court interpreted the purpose of Clause 37E as required to "provide the parties to collective negotiations with an additional tool for resolving disputes between them, without a strike or lockout",⁸⁵⁷ and that "a party to a labour dispute in the public service has the power to force the existence of economic arbitration during the period of the existence of a collective agreement, provided that no other way of resolving said dispute is specified in the agreement".⁸⁵⁸ Hence, **establishment of the Institute for Agreed Arbitration** (which I will discuss below) **froze the relevance of the provision of Clause 37E of the Law regarding civil servants for the period of the institution's existence,**⁸⁵⁹ that is, to this day.

In conclusion, it seems that as early as 1972 the legislature sought to settle labour disputes in the public sector through mandatory arbitration. Chapter C, which was added to the Labour Disputes Settlement Law and Clause 37E of the Law, proposed arbitration in labour disputes and ensured that it would be accompanied by a flexible, efficient and final hearing procedure. Less than a decade after its enactment, however, criticism began to surface against the fact that mandatory arbitration was hardly used: "It is puzzling that the government, which sees labour relations as an all-encompassing arbitration, does not exploit the institution of arbitration as a public service employer".⁸⁶⁰ This fact did not change in the following decades, nor as a result of a change of government.

11.2.4 The Institute for Agreed Arbitration in Public Service

A. Background

Following intensification of strikes in the economy during the 1970s, in 1975 the Minister of Finance, Yehoshua Rabinowitz, decided to appoint Haim Barkai, a professor of economics at the Hebrew University, to head a committee to examine public service pay. The Barkai Committee report recommended, among other things, establishment of an institution that will serve as an agreed arbitration between the public employer and the workers' unions and which will consist of public figures with authority and expertise at the first level.⁸⁶¹

At the same time as the Barkai Committee report and following an increase in strikes, the public demand increased to enact a mandatory arbitration law for essential services in order to prevent strikes in these services. And indeed, in the spirit of this demand, five private bills⁸⁶² were tabled in the Knesset, and it seemed that the government also intended to promote a mandatory arbitration bill. The Histadrut, which opposed these moves, declared a general strike in 1977.

⁸⁵⁷ Labour Court Case 57/4-26 The New Histadrut – State of Israel, Judge Steve Adler, p. 539.

⁸⁵⁸ Ibid, pp. 536-537.

⁸⁵⁹ Ruth Ben-Israel, *Mandatory Arbitration in Public Service*, (Studies in Law, Vol. VIII, 1981), p. 181.

⁸⁶⁰ Ibid, p. 173.

⁸⁶¹ Keren Finkelstein, *Solution to Public Sector Strikes – Effective Use of the Institute for Agreed Arbitration* (Institute for Advanced Strategic and Political Studies, Jerusalem 2003), p. 6.

⁸⁶² Mordechai Mironi, *Arbitration in Labour Disputes*, The Institute for Agreed Arbitration – Hopes and Lessons (Jerusalem: Faculty of Law, The Hebrew University of Jerusalem, Institute for Legislative Studies and Comparative Law named after the Harry Sacher), p. 26.

The proliferation of strikes in the economy, which was expressed in “the feeling that the State of Israel is in one of the most difficult periods in labour relations in public services”,⁸⁶³ and the feeling that “the powerful groups that have the state by the throat are growing”⁸⁶⁴; The Barkai Committee’s report, the fear of the bills seeking mandatory arbitration,⁸⁶⁵ the strike that followed, the impending Ninth Knesset election date⁸⁶⁶ and the government’s desire to prove to the voter that it has the capacity to deal with the strikes, finally led the Histadrut to reach an agreement with the Israeli government regarding establishment of a public arbitration institution, the “Agreed Arbitration Institute for Public Service”.⁸⁶⁷ The Arbitration Institute was established on February 2, 1977, by virtue of a collective agreement⁸⁶⁸ signed between the Government of Israel, headed by Yitzhak Rabin, and the Histadrut, headed by Yeruham Meshel.⁸⁶⁹

The Arbitration Institute replaced the *mandatory arbitration* provided for in Clause 37E of the Labour Disputes Settlement Law.⁸⁷⁰

B. The Infrastructure for the Activities of the Arbitration Institute

1. The Arbitration Institute is authorised to discuss economic disputes (i.e., claims for the creation of new rights in the field of wages and working conditions), mixed disputes – legal and economic, and with the consent of both parties, it also discusses legal disputes. The Institute does not deal with disputes of individuals (a dispute between a worker and his employer), but only with collective disputes.⁸⁷¹
2. Whenever the Histadrut and the Ministry of Finance sign a new wage agreement, either party to the agreement may demand that the dispute between them be transferred to the Arbitration Institute. In such a case, the Histadrut is required to end the strike immediately.⁸⁷²
3. A workers’ committee may not file a claim with the Arbitration Institute on its own initiative, but only through the Histadrut and its institutions.
4. The agreement stipulates that the proceedings at the Arbitration Institute shall take place before a panel of three arbitrators. The Institute is subject in its actions to the Arbitration Law,⁸⁷³ which leaves complete freedom of action for the arbitrators to rule according to their best judgment, according to the material before them, without being bound by the substantive law, the law of

⁸⁶³ Remarks by Uriel Avramovich, Chairman of the Trade Union Department of the Histadrut, during the ceremony for the establishment of the Arbitration Institution. Quoted in Yosef Priel’s article: *The Institute for Agreed Arbitration has been Officially Established* (Davar newspaper, 01/03/1977).

⁸⁶⁴ Remarks by the Minister of Labour, Moshe Bar’am, during the ceremony for the establishment of the Arbitration Institute. Quoted in Yosef Priel’s article: *The Institute for Agreed Arbitration has been Officially Established* (Davar newspaper, 01/03/1977).

⁸⁶⁵ On January 17, 1977, the secretary general of the Histadrut, Yeruham Meshel, stated: “It should be known that if there is no agreed arbitration, more acute ways will be found... I went for the idea of the Institute for Agreed Arbitration in order to prevent mandatory arbitration”. Quoted in: Keren Finkelstein, *ibid*, p. 12.

⁸⁶⁶ Elections to the Ninth Knesset were held on May 17, 1977.

⁸⁶⁷ Hereinafter: *The Arbitration Institute* or *The Institute*.

⁸⁶⁸ Hereinafter: *The Agreement*.

⁸⁶⁹ Collective agreement No. 19770107, registered in the Register of Collective Agreements on April 15, 1977. See the wording of the agreement at the following link: <https://workagreements.economy.gov.il/Agreements/19770107.pdf> Accessed 16/02/2021.

⁸⁷⁰ Labour Court Case 57/4-26 The New Histadrut – State of Israel, Judge Steve Adler on p. 540.

⁸⁷¹ Clause 4A to the collective agreement.

⁸⁷² Clause 13 to the collective agreement.

⁸⁷³ Arbitration Law, 5728-1968.

evidence or the law customary in the courts. This allows the Institute to be less formal and allows the parties to appear without a lawyer and without legal proceedings.

5. The ruling of the Arbitration Institute has the legal status of a collective agreement,⁸⁷⁴ and as such it allows for the filing of an individual or collective claim in the event of a breach of the collective agreement.⁸⁷⁵

Since 1978, the scope was expanded and allowed any employer in the public service to use the Institute's services on an ad hoc basis, without joining. And indeed, other public employers joined the agreement, such as national institutions, universities, the Israel Ports Authority, Clalit Health Fund, the Israel Airports Authority, ORT Israel and Mekorot Water Company Ltd.

C. Status of the Arbitration Institute and Examination of its Effectiveness

Upon its establishment, the Arbitration Institute enjoyed a certain prestige with the election of Zvi Branson, who was a High Court Judge, to head it. Indeed, the Institute also handled dozens of cases a year. But over the years, the Arbitration Institute's shine has waned and the number of referrals transferred to its treatment has decreased accordingly.⁸⁷⁶

There is a consensus in the literature that the government, the Histadrut, the Labour Court and the Agreed Arbitration Institute itself have contributed their share to the failure of the Institute. The long list of failures of the Institute's founders, and its non-cultivation as a mechanism for resolving labour disputes have brought it to its dismal state. All of these caused many to simply forget about its existence. Workers and employers keep away, and many disputes that should have been resolved under it are resolved by other means such as private arbitration, strikes and sanctions.⁸⁷⁷

The reasons for this are –

1. Workers' unions preferred the strike weapons in their possession over turning to the Institute, and did not want the power of the Institute to be a substitute for their organisational deterrent power.⁸⁷⁸ They thought they could get more if they went on strike. Therefore, stronger workers' unions in the civil service, such as the attorneys, whose strike has power and influence, vehemently refused to contact the Institute. A comparison of strikes that workers went on compared to the Institute's arbitration rulings, between 1977 and 2001, shows that the workers' achievements from strikes were significantly higher than their achievements in the Arbitration Institute. From this comparison it can be understood why the workers prefer the strike weapon over turning to the Institute.⁸⁷⁹
2. Even large public employers refused to join the Institute's agreement. For example, the center of local government, local authorities and the three major cities, Tel Aviv-Jaffa, Jerusalem and Haifa, refused to join the Institute.⁸⁸⁰

⁸⁷⁴ Clause 9 to the collective agreement.

⁸⁷⁵ See Clauses 20-22 of the Collective Agreements Law, 5717-1957.

⁸⁷⁶ In the first year of the Institute's existence, 24 lawsuits were filed for clarification. But over the years, this level of activity has diminished, to the point of one lawsuit a year being filed (for example, in 2000 and 2001). Today, for unclear reasons, the Institute does not publish its rulings as it used to do in the past.

⁸⁷⁷ Keren Finkelstein, *ibid*, p. 25.

⁸⁷⁸ *Ibid*, p. 13.

⁸⁷⁹ *Ibid*, p. 24.

⁸⁸⁰ *Ibid*, p. 19.

3. Workers' unions claim that their applying to the Agreed Arbitration Institute is a *waste of time*. They prefer the professional struggle over the long and tedious process customary in the Arbitration Institute.⁸⁸¹ This argument is a bit problematic because in the case of the labour dispute with the psychologists, the litigation lasted about three years, but in the end the psychologists received a salary increase of no less than 35%.⁸⁸² A review of the average time for a decision of the Arbitration Institute shows that it stands at 205 days. In completed cases, maximum times reached 1,902 days, over 5 years.⁸⁸³
4. The Histadrut itself contributed "to undermining the status of the Institute and disrupting its proper operation"⁸⁸⁴ by representing workers in appeals to the labour courts for the purpose of delaying or terminating proceedings at the Institute.
5. The government, like the Histadrut, established the Agreed Arbitration Institute just to appear to be doing the right thing. They did not want to entrust their powers to another body that will become active and central in shaping labour relations and working conditions in the public sector. Therefore, they limited its power and used it sparingly, thus leaving it a relatively marginal role in these areas.⁸⁸⁵ Indeed, the policy pursued for years by the government was to avoid bringing disputes to the Agreed Arbitration Institute.⁸⁸⁶
6. Clause 29(A) of the Budgetary Principles Law⁸⁸⁷, enacted in 1985, stipulates that the arbitrator may not determine the granting of wage supplements without approval of the person in charge of wages at the Ministry of Finance.⁸⁸⁸ This restriction also reduces the scope of the Institute's operation.
7. Fear of employers in the public sector that an application to the Institute will be perceived by workers as a provocation. This was the case, for example, in 1995 when the National Insurance Institute referred the conflict that had erupted with its workers to the Agreed Arbitration Institute, where the workers went on strike as a show of force. This was despite the commitment of the Histadrut and the workers not to take sanctions as long as proceedings are pending before the Institute.⁸⁸⁹
8. When it was decided in 1977 to establish another mechanism that would be competent to hear legal disputes – the Agreed Arbitration Institute – it was a competing factor to the Labour Court, so the then President of the National Labour Court intervened in drafting the agreement. One of the consequences of this intervention was a change in Clause 4 of the agreement and addition of the restriction on the Institute's authority to discuss a legal dispute only with the special consent of both parties to the dispute.⁸⁹⁰ Over the years, there has been no serious attempt by the labour court system to nurture and support the Agreed Arbitration Institute.⁸⁹¹

⁸⁸¹ Ibid, p. 13.

⁸⁸² *The Ministry of Finance is considering expanding the powers of the Arbitration Institute* / Miki Peled. Published in Calcalist on 25/04/2013 <https://www.calcalist.co.il/local/clauses/0.7340,L-3600861.00.html> Accessed: 15/02/2021.

⁸⁸³ Keren Finkelstein, *ibid*, p. 16.

⁸⁸⁴ Mordechai Mironi, *Arbitration in Labour Disputes, The Agreed Arbitration Institute Hopes and Lessons*, *ibid*, P. 271.

⁸⁸⁵ Keren Finkelstein, *ibid*, p. 16.

⁸⁸⁶ *Ibid*, p. 17.

⁸⁸⁷ Budgetary Principles Law, 5745-1985.

⁸⁸⁸ Keren Finkelstein, *ibid*, p. 17.

⁸⁸⁹ *Ibid*, p. 18.

⁸⁹⁰ *Ibid*, p. 20.

⁸⁹¹ Mordechai Mironi, *Arbitration in Labour Disputes, The Agreed Arbitration Institute Hopes and Lessons*, *ibid*, P. 255.

9. The Agreed Arbitration Institute is low in resources and it cannot be said that the best people have filled the few positions that exist in it.⁸⁹² For years the Arbitration Institute has been in an “unsuitable apartment in the heart of a residential building” and the arbitrators have enjoyed “low salaries by any standard”.⁸⁹³
10. It can be assumed that the fundamental loss of privacy of proceedings due to the publication of decisions sometimes led to distancing from the Institute, in those cases where the parties feared public exposure.⁸⁹⁴ At the same time, this assumption does not explain appeals to courts over the Arbitration Institute, because courts in the State of Israel also operate according to the principle of public hearing.⁸⁹⁵

In conclusion, there is no doubt that the Agreed Arbitration Institute has not succeeded in becoming a central and exclusive forum for resolving disagreements in public service.⁸⁹⁶ This opinion is also shared by Menachem Goldberg, who believed that “it is doubtful whether the founders of the Institute intended an exclusive forum, but it is clear that the intention was for a central forum, thus their hopes were dashed. What’s more, its founders have not done anything real over the years to give the Institute the status they themselves intended for it upon its establishment”.⁸⁹⁷

11.2.5 Arbitration in the context of Labour Disputes in Civil Service

Until January 2008, the Attorney General’s directive was that “as a rule, the state does not settle its disputes in arbitration but through the courts”.⁸⁹⁸ There were various considerations behind this guideline, the main ones being: the importance of transparency and publicity when managing disputes concerning state assets and public funds, the fear of wide-ranging consequences and the fear of the tendency to treat the state as a “deep pocket”. Apparently, the Attorney General was of the opinion that these concerns would be intensified in arbitration proceedings, in view of the lack of subordination to the substantive law and the absence of a possibility of appeal.

However, on January 14, 2008, at the end of a comprehensive discussion on this issue, the Attorney General instructed on a change of policy regarding resolution of disputes to which the State is a party in arbitration proceedings. It was determined that the restrictive approach to the possibility of resolving disputes to which the state is a party in arbitration proceedings should be abandoned, and that henceforth the premise will be that “the State considers arbitration, along with other dispute resolution mechanisms, a legitimate and appropriate tool, in appropriate cases, also for the resolution of State disputes.”

This change in policy was due to the fact that it asked the state to exclude itself from using arbitration proceedings to resolve disputes to which it is a party. Among these, it can be noted that since the state encourages other litigants to act to resolve disputes outside the walls of the court, it should act in the same way. Furthermore, some of the benefits of arbitration, and in particular the avoidance of binding precedents, some control over the identity of the arbitrator and the creativity allowed in the proceeding,

⁸⁹² Caspi, Amnon Strike – Everyone Loses: Peretz, Netanyahu, the Workers, the Employers and also the Public *Net Plus: Journal of Labour and Human Resource Management*, 2004, Vol.165, pp.112-113.

⁸⁹³ Mordechai Mironi, *Arbitration in Labour Disputes, The Agreed Arbitration Institute Hopes and Lessons*, ibid, P. 269.

⁸⁹⁴ Ibid, pp. 274-275.

⁸⁹⁵ Clause 3 of the Basic Law: The Judiciary, provides that “a court shall hear in public, unless otherwise provided by law or if the court has ordered otherwise by law”.

⁸⁹⁶ Mordechai Mironi, *Arbitration in Labour Disputes, The Agreed Arbitration Institute Hopes and Lessons*, ibid, P. 263.

⁸⁹⁷ Menachem Goldberg, Book Review: Mordechai Mironi: *Arbitration in Labour Disputes, The Agreed Arbitration Institute – Hopes and Lessons*, (Mishpatim 19, 5749 - 5750), p. 225.

⁸⁹⁸ Attorney General’s Directive No. 6.1204 dated: September 12, 2003. See the following link:

<https://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Six/61/Pages/612.aspx> Accessed: 24 February 2021.

may, in certain circumstances, better address needs derived from the special characteristics of the state as a litigant. This is in addition to the aforementioned general benefits of arbitration proceedings.⁸⁹⁹

Arbitration in labour disputes in the civil service can be one of four types:

1. Arbitration under Clauses 15-37 (Chapter 3) of the Labour Disputes Settlement Law, 5717-1957;
2. Arbitration by virtue of Clause 37E and the addendum to the Labour Disputes Settlement Law, 5717-1957;
3. Arbitration according to the agreement establishing the Agreed Arbitration Institute (to which the Arbitration Law, 5728-1968 applies);
4. Arbitration under another agreement under the Arbitration Law, 5728-1968.

Handling labour disputes in the civil service, which are collective disputes, is coordinated by the Wages and Labour Agreements Division at the Ministry of Finance, with coordination and involvement of the ministry concerned, and if necessary – the Department of Labour Disputes. Referring the matter to arbitration requires an examination of all the factors that can and will be involved in a labour dispute – the relevant ministry, the Commissioner for Wages and Labour Agreements, the Civil Service Commissioner and the Department of Labour Disputes in the State Attorney's Office.

11.2.6 Legislative Proposals for Mandatory Arbitration

Another way for the sovereign to deal with strikes is to propose bills in the Knesset that require mandatory arbitration in public services and/or essential services. In passing these bills, the sovereign seeks to prevent the strike in public and/or essential services and thus prevent or at least reduce the damage experienced by the public. Another working assumption is that will these bills the sovereign seeks to signal to public sector workers that the pressure they seek to exert on it in specific labour disputes is unacceptable and that workers should consider their next steps.

After the first political upheaval in 1977, a bill was proposed to obligate mandatory arbitration in essential services.⁹⁰⁰ This bill, like many other bills that have been proposed in the Knesset in recent years, was not promoted or passed the stages of legislation, as detailed below.

During the fifteenth Knesset, there were bills seeking mandatory arbitration by MK Haim Drukman,⁹⁰¹ by MK Avigdor Lieberman and a group of MKs,⁹⁰² by MK Yehudit Naot,⁹⁰³ by MK Eliezer Cohen and a group of MKs,⁹⁰⁴ and by MK Avigdor Lieberman and a group of MKs.⁹⁰⁵

During the sixteenth Knesset, there were bills by MK Aryeh Eldad and a group of MKs,⁹⁰⁶ by MK Michael Nodelman and a group of MKs,⁹⁰⁷ by MK Reshef Chen and a group of MKs,⁹⁰⁸ and by MK Yuri Stern and a group of MKs.⁹⁰⁹

⁸⁹⁹ Attorney General's Directive No. 6.1205 dated: October 12, 2009. See the following link:

<https://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Six/61/Pages/612.aspx> Accessed: 24 February 2021.

⁹⁰⁰ Memorandum of the Mandatory Arbitration in Essential Services Bill, 5739-1978 – Mentioned in Ruth Ben-Israel, *Mandatory Arbitration in Public Service*, (Judicial Studies, Vol. VIII, 5741-5742), p. 173, fn. 6.

⁹⁰¹ State Arbitration Bill in Essential Services, 5760-2000 (P/15/1403). Tabled in the Knesset on 21/02/2000.

⁹⁰² Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5760-1999 (P/15/713). Tabled in the Knesset on 26/01/2000.

⁹⁰³ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5760-2000 (P/15/1514). Tabled in the Knesset on 23/10/2002.

⁹⁰⁴ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5762-2001 (P/15/3193). Tabled in the Knesset on 24/12/2001.

⁹⁰⁵ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5763-2002 (P/15/4195). Tabled in the Knesset on 04/11/2002.

During the seventeenth Knesset, there was a bill by MK Zevulun Orlev.⁹¹⁰

During the eighteenth Knesset, there was a bill by MK Zevulun Orlev.⁹¹¹

During the nineteenth Knesset, there was a bill by MK Ayelet Shaked and a group of MKs.⁹¹² During this Knesset, Prime Minister Benjamin Netanyahu sought to promote the application of arbitration prior to the lockout of essential services. The Minister of Finance, Yair Lapid, who was coordinated with Ofer Aini, chairman of the Histadrut, succeeded in removing the proposal from the agenda.⁹¹³ In 2015, during the coalition negotiations to form a government, Netanyahu again sought to establish an agreement between the coalition parties on the promotion of a Mandatory Arbitration Law that would restrict the right to strike in services defined as essential. The person who vetoed the initiative was Finance Minister Moshe Kahlon.⁹¹⁴ This did not prevent Netanyahu from trying to persuade Kahlon to support the introduction of a mandatory arbitration clause in the Electricity Law, restricting the right of essential services workers to strike,⁹¹⁵ and MK Sharan Miriam Hashkel to place a bill of a similar vein during the twentieth Knesset,⁹¹⁶ and again during the twenty-first Knesset.⁹¹⁷ This time, too, Netanyahu pushed for a mandatory arbitration law within the framework of coalition agreements.⁹¹⁸

The bill was also proposed in the twenty-second Knesset table by MK Ayelet Shaked and a group of MKs and again by MK Sharan Miriam Hashkel.⁹¹⁹

During the twenty-third Knesset, there was a bill by MK Eli Avidar and a group of MKs,⁹²⁰ and by MK Ayelet Shaked and a group of MKs.⁹²¹

⁹⁰⁶ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5763-2003 (P/15/792). Tabled in the Knesset on 31/12/2003.

⁹⁰⁷ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5763-2002 (P/15/250). Tabled in the Knesset on 26/03/2003.

⁹⁰⁸ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5763-2003 (P/15/481). Tabled in the Knesset on 12/05/2003.

⁹⁰⁹ Dispute Resolution of Labour Disputes Bill (Amendment – Mandatory Arbitration in Public Service), 5763-2003 (P/15/792). Tabled in the Knesset on 31/12/2003.

⁹¹⁰ State Arbitration Bill in Essential Services, 5766-2006 (P/17/1218). Tabled in the Knesset on 17/07/2006.

⁹¹¹ State Arbitration Bill in Essential Services, 5771-2011 (P/18/3012). Tabled in the Knesset on 28/02/2011.

⁹¹² Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5773-2013 (P/19/1482). Tabled in the Knesset on 01/07/2013.

⁹¹³ Adrian Pilot, Shai Niv: *The Netanyahu-Lapid crisis is exacerbating and this time on the mandatory arbitration during strikes*, published in Globes, on 06/06/2013, see the following link:

<https://www.globes.co.il/news/clause.aspx?did=1000850345> Accessed: 03/03/2021.

⁹¹⁴ Avi Bar-Eli: *Kahlon objected, Netanyahu folded – and the Arbitration Law was shelved again*, published in The Marker on 03/05/2015, see the following link: <https://www.themarker.com/dynamo/1.2627116> Accessed: 03/03/2021.

⁹¹⁵ Shai Nir: *Kahlon to Netanyahu: even if you are in power for 20 years, you will not make significant reform*, published in Davar on 08/07/2018, see the following link: <https://www.davar1.co.il/136220/> Accessed: 03.03.2021.

⁹¹⁶ Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5776-2015 (P/20/2188). Tabled in the Knesset on 02/11/2015.

⁹¹⁷ Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5779-2019 (P/21/242). Tabled in the Knesset on 27/05/2019.

⁹¹⁸ *Netanyahu and Katz concluded: The Prohibition of Strike Law will be included in coalition agreements*, published in Ma'ariv Online on 14/04/2019, see the following link: <https://www.maariv.co.il/news/politics/Clause-694364> Accessed: 03/03/2021.

⁹¹⁹ Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5780-2019 (P/22/164). Tabled in the Knesset on 04/11/2019.

⁹²⁰ Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5780-2020 (P/23/1362). Tabled in the Knesset on 29/06/2020.

⁹²¹ Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5780-2019 (P/23/1283). Tabled in the Knesset on 22/06/2020.

During the twenty-fourth Knesset, there was a bill by MK Sharan Miriam Hashakel.⁹²²

Common to these bills is that most of them tried to define what an essential service is (health services, IEC, Mekorot, water plants and water corporations, seaports, airports and the Airports Authority and public transport). These bills explained that agreed arbitration bodies had failed so far, as there was a lack of the obligation to bring the government to arbitration. Under most proposals, a strike in these essential services would be banned by law and the labour dispute resolutions in them would be decided by an arbitration committee. Composition of the committee shall include: a retired High Court judge or President of the National Labour Court as decided by the President of the High Court, and he shall chair the committee, the Civil Service or Employers Commissioner, and a representative of the labour union represented in the labour dispute. Some proposals also sought to extend the cooling-off period currently in place in the law or to encourage use of mechanisms such as mediation, and other proposals sought to hold a democratic vote among workers in order to approve a strike.

In conclusion, the debate during the period of the Jewish settlement before establishment of the state revolved around the introduction of a model of labour relations without strikes throughout the Hebrew economy (and not only in essential services) and introduction of mandatory arbitration as the sole way of resolving disagreements. In contrast, in a debate that has been going on in recent years, it is proposed to ban the use of strike weapons on workers in essential public services, and that labour disputes in this sector be resolved through arbitration. So far, none of the bills have passed the legislative stages, both due to the difficulty of mobilising the parliamentary majority needed to do so, and due to opposition from the Histadrut and the pressure it exerted to remove the bills from the Knesset agenda.⁹²³ Caspi and Ben-Dor also explain that despite its principled support for mandatory arbitration, the Likud party did not enact any law on this issue when it came to power in 1977, both because of opposition from the Histadrut, which was perceived as powerful in the Israeli economy, but also because of the government's opposition as an employer to subordination of its power to mandatory arbitration.⁹²⁴

11.3 Summary

In this chapter we learned about the ways in which the sovereign – members of the Knesset or government ministers – try to deal with the phenomenon of strikes: through restraining orders or through petitions and bills seeking to promote the use of mandatory arbitration.

With regard to restraining orders, it seems that over the years the use of restraining orders has increased, and since 1977 they have been used indiscriminately. It further appears that the court has held, as aforesaid, that restraining orders are a draconian instrument to be treated sparingly, and that they will be issued only as a last resort. I emphasised the benefits of restraining orders: their ability to renew the regular provision of essential services, their speed, flexibility and efficiency, and I mentioned the arguments against the use of these orders.

⁹²² Labour Dispute Resolution Bill (Amendment – Mandatory Arbitration in Essential Services), 5781-2021 (P/24/703). Tabled in the Knesset on 10/05/2021.

⁹²³ See, for example, the words of Arnon Bar-David, Chairman of the Histadrut: “We have called for peace and cooperation, but whoever leads an incitement and agitation campaign against the workers will be met with force”, quoted in Shahar Ilan, *Mandatory Arbitration Law is on the Way: Netanyahu Does Not Need a Team to Prevent the Right to Strike*, (Calcalist, 16/04/2019), at the link: <https://www.calcalist.co.il/local/clauses/0,7340,L-3760494,00.html> Accessed: 02/03/2021.

⁹²⁴ Amnon Caspi, Batya Ben Hador, *Virtual Strike*, Social Work and Law 11 2005: Mandatory Arbitration – History, see fn. 23.

With regard to mandatory arbitration, I reviewed the historical chain of events regarding mandatory arbitration, beginning with the period of the Jewish Settlement in Israel, establishment of the Arbitration Committee in 1964, the attempt to introduce Advisory Arbitration into the Labour Court Law, amending the Labour Court Law and anchoring Chapter C which deals with arbitration, and later – establishment of the Agreed Arbitration Institute that froze, in effect, the relevance of arbitration in Labour Court Law regarding civil servants – to this day, the Attorney General’s directive to refrain from using the tools of mandatory arbitration and the change in this policy, and ending with new bills for the Knesset that sought to oblige the use of mandatory arbitration.

More than forty years ago, Ruth Ben-Israel wrote about Clause 37E of the Labour Disputes Settlement Law as follows: “(This is) an institution which, despite the fact that it has been in the law book for almost eight years, has not been used... It is puzzling that the government, which sees the issue of labour relations as a matter of mandatory arbitration, does not exploit the Mandatory Arbitration Institute in its capacity as an employer in the public service”.⁹²⁵ These words are also true today. In this respect, the governments of Israel, for generations, have not bothered to make use of the arbitration tool, whether in mandatory arbitration or in the Agreed Arbitration Institute. This did not prevent them from repeatedly calling for amendment of the legislation and for anchoring of mandatory arbitration.

The question is, therefore, why arbitration was not used and why are further bills being submitted on the subject? I find two main answers to this question:

1. For years, the Histadrut has done everything in its power to confound, dissolve and remove the ideas of mandatory arbitration from the public agenda. In the end, all their actions stemmed from their desire to continue to seize the strike weapon, fearing that arbitration would serve as a substitute for its deterrent power, and that it would not achieve its objectives through objective professional arbitrators, not subject to the public pressure the sovereign is.
2. The sovereign, in contrast to the Histadrut, is reluctant to entrust powers to another body that will become active and central in shaping labour relations and working conditions in the public sector (therefore limiting the power of the Agreed Arbitration Institute, for example). At the same time, there is another working assumption, which is that behind bills to make arbitration mandatory, the sovereign seeks to signal to public sector workers that the pressure they seek to exert in specific labour disputes is unacceptable and that workers should consider their next steps, because otherwise, mandatory arbitration will be anchored in the law.

⁹²⁵ Ruth Ben-Israel, *Mandatory Arbitration in Public Service*, (Studies in Law, Vol. VIII, 1981), p. 173.

Chapter 12: How Third Parties Handle the Strike

12.1 Introduction

I have made the point that strikes cause damage from which third parties also suffer. During a strike, third parties cannot purchase a product or service, or they are required to pay a very high price for their replacements. Often, third party damages are a deliberate rather than an accidental consequence of the strike and causing them creates the main (but indirect) incentive for the employer to compromise, and to comply with the demands of the workers' union.⁹²⁶ This is especially true when strikers are fighting against reforms in the state economy or trying to disable services that are perceived by the public as essential.⁹²⁷

Frances Raday explains that damage to service recipients, customers and suppliers of the lockout employer are results without which there is no value to a strike as an economic weapon,⁹²⁸ and that "there is no doubt that granting a right of action to a third party against strikers participating in a legitimate strike, due to the damage caused to it as a result of acts integral to the strike, would have undermined the freedom to strike".⁹²⁹ As I have shown in Chapter 3, this has also been the mindset of the State of Israel for many years: recognising the strike, its importance and at the same time protecting its participants from its damage.

If this is the conclusion of the matter, the question arises – what, after all, are the legal tools available to a third party in dealing with the damage of the strike in Israel?

The relevant legal tools for dealing with damages in general and with strike damages in particular are two: tort law and class action lawsuits. Tort law regulates the issue of compensation for damages caused to a person or property, and they are structured in the form of various tortious wrongs. Apart from tort law, there is also the option of obtaining relief by virtue of class actions. Contrary to tort law, on the basis of which the individual can sue for damages, the class action lawsuit is based on cases where there are many victims, but each has suffered minor damage and therefore it is not advisable for each of the victims to file a lawsuit (due to the costs and hassle entailed). Class action lawsuits allow the lead plaintiff, who is part of the victim group, to sue on behalf of the entire group.

I will dedicate this chapter to understanding the various tortious wrongs (breach of contract tort, negligence tort, breach of statutory duty tort and nuisance tort) and illustrate the ability to sue for damages caused by strike, using examples previously discussed in labour courts, district courts and the High Court. I will then discuss the Bill of Property Law, the possibility of recovering from the damage of the strike through class actions, and I will summarise the conclusions that emerge from this chapter.

12.2 Tort Caused by Breach of Contract

The breach of contract tort deals with circumstances in which a person causes by his conduct a breach of contract between the other party and another third party. For example: A workers' strike may result in a breach of contract for the supply of goods between the factory and a customer waiting for those goods. Because of the strike, the employer finds itself in a situation where it is unable to meet its contractual

⁹²⁶ Ronen Perry, *Strikers' Liability for Third Party Damages*, (Labour Society and Law, 16), p. 311.

⁹²⁷ Hadara Bar Mor, *The Strike and its Genetic Classification* – following HCJ IEC, (Labour Society and Law 16, 2020), p. 266.

⁹²⁸ Francis Raday, *The Freedom to Strike, Third Party Claims and Mandatory Arbitration*, (Labour Law Almanac 5, 5755-1995), p. 146.

⁹²⁹ F. Raday, *Tort Liability for Strike Action & Third-Party Rights*, 14 I.L.R. (1979), 31.

obligations to third parties. Allegedly, if a claim due to a tort caused a breach of contract was possible, the factory owner could sue the workers' union or the workers who participated in the strike for damages caused to him due to breach of contract with the customer, who did not receive the goods.⁹³⁰

Over the years there has been a growing understanding that allowing workers' unions to sue for this tort empties the strike weapon of its power, so in 1906 a law was enacted in the United Kingdom that denies a claim for breach of contract if the act causing the breach was done as part of a labour dispute.⁹³¹ In addition to this immunity, strikers were also granted immunity from prosecution against the most common causes of strike, arising from acts that are integral to the act of strike. Thus, for example, immunity was granted for a criminal connection, a civil connection, and, as stated, against claims for breach of contract.

In 1962, the Israeli Torts Ordinance⁹³² was amended following the case of the Leo Buck School Ltd.⁹³³ and the following was determined in Clause 62B of the Ordinance: **“A. Whoever knowingly and without sufficient justification causes a person to breach a legally binding contract between him and a third person, is doing an injustice to that third person, however the third person will not be able to be compensated for this tort unless he has suffered pecuniary damage. B. For the purposes of this clause, the relationship created by marriage shall not be deemed a contract, and a strike and lockout shall not be deemed a breach of contract”**.

Israeli law, therefore, prevents filing tort claims against a workers' unions or workers who take part in a strike on the ground of wrongdoing causing a breach of contract in the private sector. This exemption also applies to a protected strike in the public sector.⁹³⁴ In contrast, the legislature ruled that this exemption does not apply to an unprotected strike in public services and thus reduced the protection of workers in the public sector. However, **the ability to sue for a tort caused by a breach of contract is not available to a third party**. This capability is available to workers or employers or their replacements only. The legislature even found it appropriate to give workers' unions additional protection when they did not declare the unprotected strike or did not approve it.⁹³⁵

An employer in the public sector in whose factory an unprotected strike has occurred may file a tort claim for a breach of contract tort as follows:⁹³⁶

- A. He can sue the workers' union that declared an unprotected strike that caused him to violate the employment contract between him and any of the striking workers.
- B. He can sue the workers' union for declaring an unprotected strike that resulted in a breach of business contracts between him and his customers.
- C. He can sue any of the workers who took part in the unprotected strike.

In the Feinstein case, which was heard in the High Court in 1971, Judge Haim Cohen stated that the High Court held that deployment of protection in Clause 62B of the Torts Ordinance does not apply only to the cause of breach of employment but that “Clause 62B should be read as if it stated that a breach of any

⁹³⁰ Lilach Litor, *The Strike in Law, History and Politics* (2019), p. 218.

⁹³¹ Trade Disputes Act, 1906, Edw. Quoted in: Ronen Perry, *Strikers' Liability for Third Party Damages*, (Labour Society and Law, 16), p. 313.

⁹³² Torts Ordinance (New Version), 5728-1968.

⁹³³ Which I discussed in Chapter 3: *The Strike in Israel*.

⁹³⁴ Clause 37B (A) of the Labour Disputes Settlement Law, 5717-1957. For more information regarding protected and unprotected strikes, see Chapter 5: *Types of Strikes*.

⁹³⁵ Ilan Itach, *Third Party Claims for Strike Damages*, (Net Plus, July 2001), p. 81.

⁹³⁶ Ruth Ben Israel, *Labour Law – Vol. IV*, (The Open University, 2002), p. 1552.

contract which comes as a result of a strike or a lockout, does not constitute a cause of breach within the meaning of this clause”. And to emphasise his words he added: “One of the most famous is **the nature of strikes and lockouts being a cause of breaches of very different and varied contracts**; and if the initiators of strikes or the strikers or the lockout initiators had to bear the damage resulting from all these breaches, this would in effect eliminate the institution of the strike and make it impossible. It is safe to say that there is nothing farther from the Israeli legislature than the desire to eliminate the institution of the strike”⁹³⁷ (emphasis does not appear in original). That is, in the eyes of the High Court the legislature granted the protection to strikers against breach of any type of contract, even where the strike was intentionally to cause damage.

However, a few years later, in 1977, the applicability of the permanent protection in Clause 62B was discussed again. The workers’ committee at EAPC appealed to the National Labour Court against the decision to charge it for damages caused to the employer as a result of the strike it initiated. The court ruled that the workers’ strike was an unprotected strike, and therefore the committee that caused the breach of the employment contract between the workers and the company is not immune from a claim for breach of contract. Underlying the decision is the idea that participation in a protected strike does not violate the personal employment contract, but participation in an unprotected strike does violate this contract, and therefore does not enjoy protection for a third party.⁹³⁸

Despite the different results the courts reached in these two cases, it seems to the author of this study that the difference between them is not notable. In both cases, the court defended the workers’ union and imposed on it the protection against tort for breach of contract. The novelty in the EAPC case was a distinction made by the court between a protected strike that would continue to enjoy the exemption provided for in Clause 62B, and an unprotected strike that would not.

In the Eran Zeiman case, which did not receive much attention, the breach of contract tort again came up for discussion. Mr. Zeiman demanded compensation from Israel Rail in the amount of ILS 1,750 for four cases of strike, eight cases of disruption and two cases of delay, while on his way to or from work. Judge Ayala Gazit, of the Tel Aviv Magistrate’s Court, dismissed the lawsuit regarding the strike days taken by train workers, but after the plaintiff proved that the sanctions taken by the train workers on other days were in violation of a court order ordering them to return to work, the judge accepted his claim, and ruled Israel Rail to compensate him with an equivalent travel card: “The defendant contends that some of the strikes were taken by railway workers who constitute a separate legal entity. I did not find cause to enter into the argument of lack of rivalry, since a strike is a constitutional right enshrined in Israeli law. Clause 62B of the Torts Ordinance grants special protection to strikers, stipulating that for the purposes of this Clause, “strikes and lockouts shall not be considered a breach of contract”. Therefore, I hold that the plaintiff is not entitled to compensation from the defendant, since in the context of the contractual relationship between the defendant and its passengers the strike will not be considered a breach of contract on the part of the defendant. The plaintiff alleges that on 14.2.12 the defendant violated a court order ordering them to return to work but the railway workers did not return to work. The plaintiff attached to his statement of claim a transcript of a conversation dated February 14, 2012 between him and Israel Rail Call Center, according to which it appears that despite the order, the train was not operating.

⁹³⁷ CA 25/71 Zvi Feinstein et al. v. Association of Teachers of Upper Elementary Schools, Ruling 25(1) 129.

⁹³⁸ Discussion 37/3-4 (National) EAPC Workers’ Committee et al. V. EAPC Ltd., Labour Ruling 8. 421.

Therefore, on 14.2.12 the lockout of the train was not lawful, and therefore the plaintiff is entitled to compensation [...]”⁹³⁹

In this case, the court made a distinction between the right to strike and taking illegal sanctions, and therefore decided not to grant the strike actually taken protection under Clause 62B of the Torts Ordinance. However, the entity who had to bear the cost of the compensation was the government company and not the workers who took sanctions or the heads of the committee who allegedly ordered them to act in this way, who got away scot-free.

12.3 Tort of Negligence

The tort of negligence is set forth in Clause 35 of the Torts Ordinance: **“If a person performs an act that a reasonable and prudent person would not have in the same circumstances, or did not perform an act that a reasonable and prudent person would have in the same circumstances, or did not use skill in a certain profession, or take a degree of caution, that a reasonable and prudent person competent to operate in the same occupation would have used or taken in the same circumstances – this is negligence; and if he was negligent as aforesaid in relation to another person, in respect of whom he has in the same circumstances an obligation not to act as he did, then it is negligence, and the person causing his negligence to harm another is committing a tort.”**

In order to claim damages for the tort of negligence, a number of cumulative conditions must be proven:⁹⁴⁰ an act of negligence, a result of damage, a causal link between the act and the damage caused by it, a duty of care imposed on the wrongdoer which was violated by him and a test of expectations – which requires that a reasonable person watched or could have anticipated the occurrence of the damage.

However, there are at least five obstacles to this. First, many damages caused to third parties by a strike are purely economic damages, and common law has for many years shied away from imposing liability for such damages on the grounds of legal policy. Second, the conduct for which liability is sought is, for the most part, an omission (failure to perform work) and not an act of risk-taking, and traditionally common law treats *negligent omissions* very carefully. Third, the damages for which the claims are filed are not a direct result of the defendants’ conduct (the direct victim is, usually the employer), and indirect damages cause difficulties at the conceptual-causal level and at the level of legal policy even when they are not purely economic. Fourth, in the matter of policy, it is not appropriate to undermine the delicate balance created in labour law by a claim for damages, even on the grounds of negligence. Fifth, when it comes to claims for negligent harm and not for intentional (or at least conscious) harm to a specific person, the expected burden of imposing liability can be very heavy, significantly impairing bargaining power of workers and workers’ unions and their ability to use strike weapons and even bring about the collapse of workers’ unions.⁹⁴¹

In the **Ashdod Car Factories**⁹⁴² case heard in the High Court in 1987, the existence of a duty of care imposed on strikers was recognised for the first time. The background to the strike was the determination of ratings and wage conditions that were not acceptable to the Union of Naval Officers in the Israeli Merchant Navy. At the outbreak of the strike, the director of Haifa Port ordered the owners of two ships (owned by Zim and El-Yam) that were docked at the single wharf for unloading containers, to move the

⁹³⁹ Civil Case (Tel Aviv) 13353-03-12 Eran Zeiman v. Israel Railways Ltd.

⁹⁴⁰ According to Clause 35 of the Torts Ordinance (new version), 5728-1968.

⁹⁴¹ Ronen Perry, *ibid.* p. 315.

⁹⁴² CA 593/81 Ashdod Car Factories Ltd. v. The late Adam Tzizik, Ruling 41(3) 169.

ships to another wharf. The companies passed the order to the captains of the ships, who refused to comply with the order due to the strike. As a result, the only container wharf was not evacuated and the plaintiffs' ship could not unload the containers it was carrying for them, neither at Haifa Port nor at any other port in the country. Due to the high accommodation fee, the ship could not wait in the country for a long time and had to sail to Naples in Italy, unload its cargo there, and the cargo was brought to Israel only three weeks later.

Ashdod Car Factories suffered pecuniary damage and they filed a lawsuit in the District Court, and when their claim was not accepted, they filed an appeal to the High Court, basing their claim on the tort of negligence. The High Court accepted the claim and imposed tort liability on the strikers under Clause 35 of the Torts Ordinance: "Not only could the strikers expect damage to a third party due to the disruption of the ships, but they foresaw the damage and intended for that third party to be harmed, nothing would have been taken from the freedom of the strike if the strikers had moved the ships elsewhere, but they chose to take a position of control over public resources, not by plan, in the belief that everything is allowed. They did not even take measures to warn the potential victims a reasonable time in advance of the problem that will face them when they arrive at Haifa Port. Like the striking doctor, who during the operation left the patient on the operating table to join the strikers. In doing so, the strikers significantly disturbed the balance between the freedom to strike and the rights of others. All in all: non-evacuation of the container wharf was a breach of duty towards the appellants as a tort of negligence".⁹⁴³

According to Michal Horowitz, the High Court applied the tort of negligence to actions that are integral to exercising the freedom to strike, thus establishing an innovative and revolutionary rule both in terms of tort law and in terms of recognising the right to strike and its centrality as a tool for balancing workers' bargaining power. The test set by the High Court regarding application of the tort of negligence focuses on the question of anticipating causing damage to third parties.⁹⁴⁴

The High Court accepted, as aforesaid, the claim by virtue of the tort of negligence, but it did so with great consideration, as it itself testified in the ruling: "**This ruling is the first to be heard in this Court establishing the possibility of claiming strike damages on the ground of negligence; the issue is sensitive and complicated**, and unnecessary generalisations should be avoided. Our approach is that the issue at hand should be allowed to develop gradually. We have already pointed out the importance of a strike in the public consciousness in Israel as a socio-economic means of balance, and care must be taken not to set the boundary line of duty too far. It is true that the strikers are not entitled to immunity from a tort claim, but on the other hand a situation must not arise in which the charge of compensation will fall on strikers to the point of deterring them from declaring a legitimate strike" (emphasis does not appear in original).⁹⁴⁵

In conclusion, in the Ashdod Car Factories case, the High Court ruled that the strikers took advantage of the position of control they had over public resources. They foresaw the damage that was likely to be caused to importers, and intended that the same third party would be harmed, although they could take various steps that would reduce the harm to third parties, without reducing the strike. In this act, there was, in the opinion of the High Court, a proportion between the degree of benefit of the strikers and the degree of harm of the act of strike. Hence, the High Court established the possibility of claiming strike

⁹⁴³ Clause 29 to the Ruling.

⁹⁴⁴ Michal Horowitz, *Freedom to Strike – Proportionality and Mutual Respect in Labour Law*, (Labour, Society and Law 13, 2012), p. 132.

⁹⁴⁵ Clause 28 to the Ruling.

damages from the strikers on the basis of the tort of negligence, thereby circumventing the protection afforded to strikers under Clause 62B of the Torts Ordinance. The charge based on the tort of negligence was based on the fact that the strikers deliberately violated the freedom of movement of the shipowners, and not the contract between them and the port owners.

Over the years, additional lawsuits have been filed based on the tort of negligence for strike damages, by virtue of the precedent created in the Ashdod Car Factories case. It is interesting to expand on two of them.

The first of the lawsuits that I would like to mention is the **Beitar Tor Ltd.** Case. In this case, bus drivers blocked the buses in the Histadrut's parking lot and locked them without allowing the employer to take them out for two days. In doing so, drivers prevented the employer from exercising his fundamental and proprietary right over the buses.

The Magistrate's Court ruled that if the drivers had left the buses at the departure station, or even in the employer's car park, locked them and handed over the keys, it would then have believed that even though they caused the damage, they were still within the *reasonable and prudent* range of those using the strike weapon against the employer. As the drivers did not do so, they "violated the conceptual and concrete duty of care towards (the employer) and prevented (him) from exercising his fundamental-proprietary right for the buses", and therefore, the court ordered the drivers to pay compensation to the employer.⁹⁴⁶

The second lawsuit I would like to focus on is the **lifeguards' case**.⁹⁴⁷ In this case, which took place in June 1999, Hagai Emanuel, an eighth-grade student, arrived at the beach in Rishon LeZion on the last day of the school year. At that time there was a partial strike by the lifeguards at the beach, and the rescue services ended at 14:00 (instead of 18:30). Emanuel got into the water, got caught in a whirlpool and drowned. As a result, he suffered severe bodily injuries, and he filed a lawsuit against the Histadrut, the lifeguards' representative union, and against Rishon LeZion Municipality as the lifeguards' employer.

The District Court based its ruling on an allegation of disproportion and unreasonableness in the conduct of the strike. It ruled that the municipality was negligent by not placing warning signs on the water line, did not operate a public address warning system, did not effectively announce the existence of the strike and did not contact the Histadrut Exceptions Committee to suspend the strike.⁹⁴⁸ The court ruled that the Histadrut was also at fault, as the one that initiated and managed the strike and therefore, had a conceptual duty of care towards third parties for damages caused to them during the strike. According to the court, the Histadrut could and should have expected that pupils such as Emanuel would come to the beach during the strike, and that they might suffer bodily harm due to drowning. This technical view also entails normative views, for which the concrete duty of care of the Histadrut arose.⁹⁴⁹

12.4 Tort of Breach of Statutory Duty

This tort is set out in Clause 63 of the Torts Ordinance: "**A. A person in breach of a statutory duty is a person who does not fulfil an obligation imposed on him under any legislation – except this Ordinance – and the legislation, in its proper meaning, is intended for the benefit or protection of another person, and the breach caused that person damage of the kind or nature of the damage to**

⁹⁴⁶ Civil Case 17226/95 Beitar Tor Ltd. v. Jerusalem Workers' Council.

⁹⁴⁷ Civil Case 862/02 Anon. v. Rishon LeZion Municipality.

⁹⁴⁸ Clauses 28-40 of the ruling. It will be noted that the court ruled that the municipality should have provided alternative rescue services in place of the strikers.

⁹⁴⁹ Clause 47 to the Ruling.

which the legislation is intended; however, the other person is not entitled due to the breach to the explicit remedy in this ordinance, if the legislation, according to its correct interpretation, intended to remove this remedy. B. For the purposes of this clause, legislation is considered to have been done for the benefit or protection of a person, if according to its correct interpretation it is intended for the benefit or protection of that person or for the benefit or protection of persons in general or of persons of the type or definition to which he belongs.”

Five cumulative elements establish the breach of statutory duty tort:

- A. Existence of an obligation imposed on the entity causing harm by virtue of legislation.
- B. The legislation is intended for the benefit or protection of the injured party.
- C. The entity causing harm has violated its duty.
- D. The violation caused the injured party damage.
- E. The damage caused is the type of damage that the legislation intended.

This tort creates a cause of action for the person injured as a result of a breach of duty enshrined in law. For the purpose of the example, Clause 5A of the Labour Disputes Settlement Law stipulates that there is an obligation to declare a strike fifteen days before its outbreak. Declaration of the strike is, therefore, a duty and a workers' union that does not fulfil this duty in fact, violates Clause 5A of the above law and thus also violates a statutory duty.

A more concrete example came up in the **Ashdod Car Factories** case. As stated, in this case, the captains of the ships were ordered to evacuate their ships from the wharf. The instruction was given to them by virtue of Clause 36A (1) of the Ports Ordinance:⁹⁵⁰ “(A) A person who is in charge of a vessel or is a member of a vessel crew shall at all times obey the instructions of the harbour master or any other qualified official regarding – (1) the manner and time in which he will drive the vessel to the wharf, or approach it, moor next to it or move away from it”. The District Court held that since the strike had suspended the personal employment contracts, the naval officers were not obliged to move the ships, and therefore there was no breach of statutory duty here and these provisions should not be regarded as conferring the right to sue for damages for their breach. When the case reached the High Court, the latter decided not to rule on this tort in light of its conclusions that negligence arose, but found it appropriate to note that the doctrine of suspension⁹⁵¹ does not apply in a relationship involving a third party.

Nili Cohen explains the difference between the tort of negligence and the tort of breach of statutory duty: “The greatness of the tort of negligence is also in its power to create within it, since a necessary basis for the occurrence of negligence is the existence of guilt while the tort of breach of statutory duty can be based on a breach of an absolute prohibition, which does not include any basis of guilt”.⁹⁵² Referring to the Ashdod Car Factories case, Cohen reveals that it is difficult for her to see how the fact that the damage was caused by a strike can be taken into account in the tort of breach of statutory duty, and “The court therefore did well to base the responsibility of the strikers in the sensitive area, which involves the tension between the right to strike and competing rights, on the flexible basis of the tort of negligence”.⁹⁵³

⁹⁵⁰ Ports Ordinance [new version], 5731-1971.

⁹⁵¹ On the Doctrine of Suspension see Chapter 4: *The Meanings of the Strike*.

⁹⁵² Nili Cohen, *Strike Damages, Malicious Negligence, Economic Damage and the Cause of Breach of Contract*, (Law Review 14 (1), 1989), p. 175.

⁹⁵³ *Ibid*, pp. 175-176.

12.5 Tort of Public Nuisance

The tort of public nuisance is set out in Clause 42 of the Torts Ordinance: **“Public nuisance is an unlawful act or omission of legal duty, where the act or omission endangers the life, safety, health, property or convenience of the public, or is an obstacle to the public using general rights”**.

The basis of the tort of public nuisance concerns an *unlawful* act or omission, or in violation of a *legal duty*. In the context of a strike, the significance of this must be examined with regard to actions that are integral to a strike, in the context of a *lawful* strike and in an *unlawful* strike.⁹⁵⁴ Although these tests seem to be simple and easy to perform, to date they have not been decided in case law and have been left for study. Evidence of this can be found in the words of the High Court as expressed in the **Ashdod Car Factories case**: **“However, it is not my intention to continue to examine whether in this case the element of *unlawful* was fulfilled or not or whether the other elements of Clause 42 of the Torts Ordinance (new version) were fulfilled or not; [...] The reason for this is that I have reached the general conclusion that the respondents committed an act of tort of negligence and it has already been ruled that the existence of the foundations of one tort does not exclude the possibility of another tort whose foundations partially overlap the foundations of the first tort [...] therefore, what is the difference between a tort of nuisance or another tort, if the respondents or any of them can also be charged with negligence?”**⁹⁵⁵ (emphases do not appear in original).

12.6 Monetary Law Bill

In 1968, the Ministry of Justice began to lead hearings aimed at unifying the twenty-four main laws in civil law under one umbrella, with the aim of creating a uniform ideology for them, harmony between the various laws, uniform wording and interconnected solutions. In 2004, the work that had been formulated up to that time was presented as a law memorandum, and in 2011 the memorandum became a bill and passed its first reading in the Knesset, known as: The Monetary Law Bill, 5771-2011, or in short: the *Civil Code*.⁹⁵⁶

Clause 377 of the Monetary Law Bill protects workers from negligent liability for damages resulting from integral actions to lawful strike, excluding bodily injuries: **“A person shall not be liable for damages due to an act committed in the course of a lawful strike or lockout, provided the act was done in the natural and direct course of a strike or lockout; The provisions of this clause shall not apply to an act which has caused bodily harm”**.⁹⁵⁷

The explanatory notes accompanying the Bill explain the rationale for Clause 377: “Clause 62B of the Torts Ordinance provides protection, in cases of strike and lockout, from being held liable for the tort of breach of contract. The Labour Disputes Settlement Law, 5717-1957, denies this protection in cases of unprotected strike, according to the principles set out in it. It is proposed to change the existing form of protection in order to achieve proper balance between the freedom to strike and the conflicting interests of strike victims”.⁹⁵⁸

⁹⁵⁴ Ilan Itach, *ibid*, p. 83.

⁹⁵⁵ CA 593/81 Ashdod Car Factories Ltd. v. The late Adam Tzizik, Ruling 41(3) 169, Clause 8 of the ruling of Justice Levin.

⁹⁵⁶ Hereinafter: *Monetary Law Bill* or *The Bill*.

⁹⁵⁷ Clause 377 of the Monetary Law Bill Memorandum, 5766-2006. See also the following link:

<file:///C:/Users/Aviad/Downloads/%D7%AA%D7%96%D7%9B%D7%99%D7%A8%20%D7%97%D7%95%D7%A7%20%D7%93%D7%99%D7%A0%D7%99%20%D7%9E%D7%9E%D7%95%D7%A0%D7%95%D7%AA.%20%D7%94%D7%A%D7%A9%D7%A1-%D7%95-2006.pdf> Accessed: 30/05/2021.

⁹⁵⁸ Page 156 of the Monetary Law Bill, 5771-2011, (published in *Reshumot* on 15/06/2011). See also the following link:

https://www.knesset.gov.il/committees/heb/material/data/H06-07-2011_11-33-01_595.pdf Accessed: 04/06/2021.

The wording of the bill and the explanatory memorandum indicate that an exemption from liability for strike damages will be granted which will extend to all tortious offenses, and not only with respect to the tort of causing a breach of contract. The implications of the change, if accepted, is that it will not be possible to circumvent the protections that are entitled to the strike as was done in the cases discussed in this chapter (Ashdod Car Factories case or in the lifeguards' case, for example), and the protections that will be applied to strikers will apply to both claims filed by the employer and claims filed by third parties. In order for strikers to enjoy the exemption provided for in the bill, two cumulative conditions must be met:

- A. The strike must be lawful.
- B. There must be a substantial link between the operation and the strike. This condition is intended to ensure that under the *shelter* of a strike or lockout no improper acts will be committed that do not have a sufficient substantive affiliation between them and the strike or lockout. This condition is expressed in terms of “the natural and direct course of a strike or lockout”.

The clause ends with exclusion of the exemption from bodily harm, hence the mirror image learned from it – that the exemption from liability for strike damages applies only to economic damages, such as property damage.

12.7 Call Actions due to Strikes

The purpose of the Class Actions Law⁹⁵⁹ is to improve the protection of rights and promote in particular the exercise of the right of access to court; enforce the law and deter its violation; provide adequate relief to victims of the violation of the law; and manage claims efficiently, fairly and exhaustively.⁹⁶⁰ It is common to say that the two main interests that the class action is supposed to promote are public interest and individual interest. Public interest is promoted by the class action in two ways: The class action lawsuit serves the interest of law enforcement because it deters potential wrongdoers from violating the law for fear of filing a class action lawsuit against them, and because the power of the lawsuit filed can cause the defendant to change his ways. The interest of the individual is promoted by the class action in that it enables the provision of effective relief where the small damage caused to each consumer does not justify filing an individual claim. It also allows the right of access to the small citizen court in cases where the victims would have difficulty filing a lawsuit due to the complexity of the matter or even refrain from filing, thus enabling them to receive appropriate relief for their harm.⁹⁶¹ The defendants, by the way, have to prove their damage only at the apparent level.⁹⁶²

The problem is that providing relief to members of the aggrieved group is admittedly one of the most basic principles in a class action lawsuit, but for some reason this goal is often pushed to the side due in favour of other goals, as Flint and Vinitzky explain. Thus, in the Tnuva case, the court ruled that the main purposes of the class action are deterrence and denial of profits obtained illegally and that the interest of compensating the individual receded from these purposes.⁹⁶³

⁹⁵⁹ Class Action Law, 5766-2006 (hereinafter: *The Law*).

⁹⁶⁰ According to Clause 1 of the Law.

⁹⁶¹ Aviel Flint and Hagai Vinitzky, *Class Actions*, (Nevo, 2017), p. 65.

⁹⁶² According to Clause 4B (1) of the law: “In an application for approval submitted by a person as stated in subclause A (1) – it is sufficient for the applicant to see that he has allegedly been harmed”.

⁹⁶³ Civil case 1372/95 Heirs of Rabi v. Tnuva Cooperative Center for Marketing Agricultural Products Ltd., quoted by Aviel Flint and Hagai Vinecki, *Class Actions*, (Nevo, 2017), p. 77.

A class action lawsuit is filed in court like any other ordinary lawsuit, however, in order for a class action lawsuit to be filed it is accompanied by a *request for approval of the class action lawsuit*,⁹⁶⁴ and it must obtain the court's approval for the class action lawsuit.⁹⁶⁵ In order for the court to decide whether it is appropriate to have a class action, the plaintiff and the action must meet a number of conditions, including: Existence of a *personal cause of action* for the specific plaintiff,⁹⁶⁶ the court must be under the impression that the plaintiff brings before it a *joint* cause of action, which constitutes a common basis for a claim by a large group of plaintiffs, other than the specific plaintiff.⁹⁶⁷ As a condition for filing the lawsuit, the court will also examine that the lawsuit was filed in good faith,⁹⁶⁸ that the lawsuit is the effective and fair way to resolve the dispute in the circumstances of the case,⁹⁶⁹ and that there is a reasonable basis to expect all class members to be suitably represented and managed.⁹⁷⁰

The law determines the parties against whom a class action may be filed, and among these are an employer as defined in the Consumer Protection Law in connection with the matter between him and a customer; an insurer, insurance agent or management company; a banking corporation; financial services provider.⁹⁷¹

Attempts have been made over the years to recover from strike damages caused to third parties through filing class action lawsuits. Because a workers' union (which is the entity qualified to declare a strike) does not appear in the law as a group against which a class action can be filed,⁹⁷² lawsuits have been filed against employers, in their capacity as *employers, banking corporations*, etc., as responsible for strike damages.

One of the most famous cases was the **Sagit Penn** case.⁹⁷³ In this case, Mrs. Penn purchased a travel ticket on Israel Rail. On the morning of the day of the purchase, train traffic was stopped throughout the country, for about an hour, as a result of information meetings held by the train workers' committee – with the intention of bringing about this result. Some of the passengers who held travel tickets did not board the train at all and travelled by alternative means of transportation, and some arrived at their destination late. Against this background, Penn submitted a request to the Tel Aviv District Court for approval of a class action lawsuit against Israel Rail, claiming that the cessation of train traffic is tantamount to violating an agreement between Israel Rail and its passengers. In addition, it was alleged that the respondent was negligent, as it did not inform passengers before start of the lockout that it may occur, so that they could plan their steps accordingly.

⁹⁶⁴ According to Clause 5A (1) of the Law.

⁹⁶⁵ According to Clause 3B of the Law.

⁹⁶⁶ Clause 4A (1) to the Law.

⁹⁶⁷ Clause 8A (1) to the Law.

⁹⁶⁸ Clause 8A (4) to the Law.

⁹⁶⁹ Clause 8A (2) to the Law.

⁹⁷⁰ Clause 8A (3) to the Law.

⁹⁷¹ See second addendum (Clause 3A) to the Class Action Law, 5766-2006.

⁹⁷² The argument that the Class Actions Law does not allow a workers' union or workers' committee to be sued argues that these have a special status and that "there is an inherent tension between the workers' union and the workers, simply because the union does not perfectly embody the will of the workers". See: Avi Bar-Eli, *Workers' Committees Strike, the Public Pays and no one Sues*, (The Marker, 12/12/2013), at the link:

<https://www-themarker-com.elib.openu.ac.il/dynamo/1.2188398> Accessed: 06/06/2021.

⁹⁷³ Civil case 1694/07 Sagit Penn (Ben Margi) v. Israel Railways.

The court, according to Judge Ruth Ronen, rejected the request for approval of a class action lawsuit,⁹⁷⁴ but in the same breath also noted that “it is clear that a strike causes damage – hence its power. Its purpose is to cause harm – and if it does not, it is ineffective. The question asked in this context is in fact who should bear the damage – whether the employer should absorb it, i.e., Israel Rail, or the general public, who use the employer’s services. **I believe that as a rule, the one who has to bear the damage of the strike is the employer. The strike was intended to harm him.** Had the employer been certain that he could not be sued for damages caused to third parties as a result of the strike, he would have had virtually no reason (except perhaps for indirect public pressure exerted on him) to address the demands of the striking workers. **The fact that the employer is aware that the strike will cause him harm, is what creates the incentive that workers want to create – to enter talk with them**”⁹⁷⁵ (emphases not in the original). In the Sagit Penn case, the District Court ruled that focusing on the employer as a factor required to bear the damage of the strike creates an equilibrium point that brings a balance between the right to strike and its damages, and creates an incentive for dialogue between workers and the employer. After the District Court dismissed the class action, its decision was appealed to the High Court ordering the District Court to reconsider the lawsuit, but in the meantime the parties reached an agreement on a settlement, in which all train passengers will be compensated, through the purchase of vending machines for the purchase of tickets and presentation of signage showing a specific designated timetable for the station at station platforms.⁹⁷⁶

In the **Dafna Algazi** case,⁹⁷⁷ a request was submitted to approve a class action, also against Israel Rail due to a dispute between the workers’ committee and management. The applicants claimed that on the morning of 12.05.2011, while they were preparing to travel by train, they were surprised to find that train traffic in Israel had stopped. The order to suspend train activity was given by the respondent’s workers’ committee, which was in conflict with its management, around 10 pm the previous evening. Since no one could reach their destination by train for several hours, the applicants had to find alternative means of transportation, which made travel more expensive. The court denied the request and ruled that the workers’ committee should have warned management at least one day before the strike broke out, but no such notice was given. If that was not sufficient, once the strike began and the court’s restraining order had been issued against the strike, the expectation was that the committee would respect it, act in accordance with it and immediately order the resumption of train traffic. However, the committee did not act as ordered, and the workers continued to strike in violation of the order. The court ruled that the damage could have been avoided had it not been for the contempt for the order issued by the court. Therefore, it had not been proven that the employer abused his position in a way that could harm the public. On the contrary, from the facts presented it is inferred that the employer acted swiftly and effectively to remove the threat of strike.

In the case of the **Traders’ Association v. Ashdod Port**,⁹⁷⁸ a request was submitted to approve a class action lawsuit concerning damages caused to various parties due to strikes and sanctions taken by Ashdod and Haifa port workers. According to the petitioners, the employer did not fulfil its duty to prevent or at

⁹⁷⁴ Rejection of the application was due to the lack of chances for a claim, and in that even if the train passengers are entitled to compensation for breach of the agreement, the compensation is limited in the *Compensation Procedure* established by Regulation 8 of the Railways Regulations (Fares) 5765-2004, which grants a free train ticket for a delay of more than half an hour and two tickets for a delay exceeding one hour.

⁹⁷⁵ Clauses 39-40 of Judge Ruth Ronen’s ruling.

⁹⁷⁶ The district court approved the settlement in its decision of 22/03/2015.

⁹⁷⁷ Civil Claim 49580-05-11 Dafna Algazi v. Israel Railways Ltd.

⁹⁷⁸ Class Action 1425308-18 General and Independent Merchants Association of Israel v. Ashdod Port Company Ltd.

least reduce the damages and sanctions caused to third parties, and therefore it is liable for the damages alleged by virtue of a series of legal causes, negligence and breach of statutory duty, various contractual causes and antitrust grounds. At the tort level, the plaintiffs argued for the tort of negligence. It was argued that the employer had a duty of care towards third-party applicants, in addition to their supervision and control over what is done in its field, and in view of the powers granted to it within the law. It was argued that the employer should have anticipated the strikes and their consequences for the third parties, and by failing to take the necessary measures to prevent the strikes and their damages – he was negligent. The court rejected the request, noting that “the weight of the common questions within the set of questions that arise does not justify, in my opinion, approval of the management of the claim as a class action as an effective and fair hearing tool for resolving the dispute. There is great variability between the various petitioners, and in their relations with the respondents, both on the factual level and on the legal level. In addition, the lawsuit relates to many organisational measures, which differ from each other in their time, nature, scope and the respondents’ response to them”.⁹⁷⁹

In the **Hot** case, a request was submitted to the court for approval of a class action, after the company’s workers created work disruptions in June-August 2013, as part of their professional struggle with company management. One of the applicants claimed that after telephone and internet interruptions began, he tried to contact the company and report the fault, “he claimed he waited in vain for long minutes for his call to be answered and after despairing of the long wait, left his phone number with the call center and waited for a return call – but when they did not call back... the plaintiffs in the class action add that the most outrageous fact in Hot’s conduct is that a consumer who called the service centers and chose the option to talk to a sales representative was answered within seconds while a consumer who chose the option to receive service or report a fault had to wait for a long time... and often was not called back at all”.⁹⁸⁰

The court granted the request for approval of the class action, stating that “the main cause of action is the conduct of Hot in violation of its license and in violation of the Telephone Service Regulations. Violation of the regulations constitutes a breach of statutory duty. In my opinion, this is also a violation of the license granted to Hot, ostensibly a violation of a statutory obligation...”.⁹⁸¹ However, before an evidentiary hearing took place, the parties submitted a request for approval of a settlement (in which it was agreed that the company’s customers would be given the opportunity to watch two films for free). The court upheld the settlement agreement stating that it was proper, fair and reasonable given the case of the group members.⁹⁸²

In the **International Bank** case, bank workers went on strike in July 2010. As a result of the strike, a class action⁹⁸³ lawsuit was filed by Messrs. Finkelstein and Flick, who claimed that they “could not perform basic operations on their accounts, including elementary operations of depositing funds in the account, withdrawing funds from the account, receiving basic service from the customer service representatives at the bank, including answering trivial questions, as well as withdrawing money from the ATMs, since when the cash runs out in the machine – there is no one to fill it”. In addition, “they cannot even express their protest and leave the bank, since leaving the bank involves performing operations with

⁹⁷⁹ Clause 9 of the Ruling.

⁹⁸⁰ Jasmine Guetta and Hila Weisberg: *Following the Technicians’ Strike: ILS 14.7 million Class Action Against Hot* (The Marker, 05/08/2013), see link: <https://www.themarker.com/law/1.2090004> Accessed: 04/06/2021.

⁹⁸¹ Class Action 552-07-14 Or Karbaki v. Hot – Communication Systems Ltd., Clause 48 of the Court's Decision.

⁹⁸² Class Action 3637-08-13 Shmuel Shemer v. Hot Telecom Limited Partnership.

⁹⁸³ Class Action 5685-07-10 Alex Flick v. The First International Bank of Israel.

bank officials and signing documents”.⁹⁸⁴ The chairman of the bank described the damage: “I want to express my sorrow and apologise to the customers. I’m very sorry for the inconvenience... customers were harmed. I urge workers to think about the day after, when they will have to look customers in the eye. How will they stand up to customers and prevent them from moving to another bank?”.⁹⁸⁵ The class action lawsuit was not heard in court and was dropped.⁹⁸⁶

12.8 Summary of Handling Strike Damages with Legal Tools

In this chapter, we learned that the way for third parties, who have nothing to do with the striking workers, to recover from strike damage is difficult and complex. It seems that the expansion of harm to third parties, as a result of strikes, necessitated adjustment of the legal situation and creation of tools that will also take into account the interests of a third party. But the Israeli legislature left the arena untouched, and this matter has led third parties to try and act through the courts, using torts to reduce their damages by reducing the right to strike, by obtaining compensation for their damages.⁹⁸⁷

I have shown how the court applies the stated protection against a breach of contract to workers’ unions, and I examined the distinction made by the court between a protected strike that will continue to enjoy the exemption provided for in Clause 62B of the Torts Ordinance and an unprotected strike that does not. I pointed out the obstacles facing those seeking to be reimbursed for their damages using the tort of negligence, the tort of breach of statutory duty and the tort of public nuisance.

I explained why the ruling given in the matter of Ashdod Car Factories is the guiding and central ruling on the relationship between the right to strike and other conflicting rights, which are protected by tort law. In this judgment, the High Court ruled that the freedom to strike has limitations, and that strikers have a duty of care towards third parties who may be harmed by the strike. The court ruled that there is a duty of care within the scope of the tort of negligence on the part of the strikers towards another person, who is not their employer, for damage caused to him during the strike.

Since the High Court’s innovative rulings in the Ashdod Car Factories case, lawsuits and motions have been filed in the courts that revolve around the interests of third parties. The various courts have tried, as we shall see, to respect the right to strike and to distinguish between damage caused to the employer as a result of the strike and damage caused to the public – and especially the more weakened public. A clear example of this conclusion is reflected in the case of the **National Insurance Institute v. the New Histadrut – the State Workers’ Union**. The National Insurance Institute petitioned the Regional Labour Court to lift the sanctions imposed by the Institute’s workers. The court rejected the request, except for the matter of receiving public, in light of the unjustified harm to weak populations and ordered workers to receive public again: “In considering the question of whether the sanctions taken by the respondents are proportionate or not, we must distinguish between harm to the employer – the applicant, and harm to third parties, in this case – the public applying to the institution. While an injury to the employer is considered proportionate, and does not lead to the imposition of restrictions on the organisational measures taken by

⁹⁸⁴ Chen Ma’anit: *Customers have Lost Patience: Class Action against the International Bank for the Strike*, (Globes, 11/07/2010), see link: <https://www.globes.co.il/news/clause.aspx?did=1000573303> Accessed: 06/06/2021.

⁹⁸⁵ Iran Pe’er: *A worker who earns ILS 300,000 a year has no reason to strike* (Globes, 08/07/2010), see link: <https://www.globes.co.il/news/clause.aspx?did=1000572506> Accessed: 06/06/2021.

⁹⁸⁶ The author of the study wishes to note that all his efforts to find out why the claim was dropped (including contacting the class action attorneys) were in vain, and that he assumes it was dropped due to the plaintiffs’ understanding that the chances of the court approving the claim were slim.

⁹⁸⁷ Ruth Ben Israel, *The Role and Status of the Labour Court in the Israeli Legal System*, The Advocate, The Jubilee Book (December 1993), 431, p. 437.

the workers [...] the injury to third parties, in this case – the public applying to the institution, should be seen in a different light. The National Insurance Institute serves all residents of the State of Israel, but a significant portion of those applying for pensions and other benefits from the applicant are among the weaker populations, and they need help, and they are knocking on the doors of branches across the country, sometimes for assistance in financing basic livelihoods [...] therefore, we believe that this measure, taken by the respondents is disproportionate, and it harms the applicants above what is required. It can be assumed with a degree of *near certainty* that the damage that will be caused to the general public, and especially to the weaker populations that need the services of the National Insurance Institute, is great, and therefore we believe that sanctions should be limited only in this regard [...].⁹⁸⁸

This conclusion is also supported by Ilan Itach, who explains that the legal pendulum swings between the protection of the right to strike and the protection of the interests of a third party. Development of the economy and the transition to a modern and developed economy, in which there is inter-economic dependence between the actors in the economy, have led to many strikes causing severe damage to the general public, not necessarily in public or essential services.⁹⁸⁹ It appears that Itach's conclusion, even though it was written over two decades ago, still finds expression in the courts today.

I then reviewed the possibility of recovering from the damage of the strike by filing a class action. The conclusion is that the way to approve a class action lawsuit is through a request for approval, a request that the court is in no rush to approve. Another conclusion that has been learned is that it is not possible to file a class action lawsuit against a workers' union or a workers' committee, and therefore the employer becomes the address against which the lawsuit is filed. In the Sagit Penn case, one of the most cited cases in the ruling, the court justified the filing of the lawsuit against the employer. The court ruled that the person who should bear the damage of a third-party strike is the employer. In order for the employer to not be held accountable, he must prove to the court that he did everything in his power to prevent harm to third parties, that he was flawless in his activities and more precisely – he must have effective channels of dialogue with the workers' union and exhaust negotiations with them.

⁹⁸⁸ Collective Dispute (Jerusalem) 11/09 The National Insurance Institute v. The New Histadrut – The State Workers' Union.

⁹⁸⁹ Ilan Itach, *ibid*, p. 84.

Chapter 13: How Workers' Unions Handle the Strike

13.1 Introduction

In the chapter *Damages of the Strike*, we learned that the strike causes damage, inter alia, to the worker as an individual and to the workers' union. During a strike the worker does not earn his wages. The employer may *mark* the striking worker and identify him with the workers' union. A workers' union whose name has been linked to many strikes or one that does not hesitate to go on strike, may be perceived by the workers, the employer and the public as a militant organisation and as a source of strife and quarrel. Strikes that failed to achieve their full goals or strikes that the workers' union failed to mobilise the workers to get behind – may cost the union's leaders their supportive voices. I also saw that strikes do not increase the support of the Israeli public for the workers' union. In the State of Israel, solidarity with workers' unions is waning, and the public does not tend to identify with workers' unions or their goals.⁹⁹⁰ A workers' union that declares a strike harms residents and consumers because the provision of services they need is stopped, and so is their quality of life.

How does the workers' union handle the strike and its damage? This is the question that will be the focus of this chapter.

An examination of how the workers' union deals with the strike will be done using the following tools, which the workers' unions have used or are still using: a hidden struggle; picketing; transferring pressure from the organisational-collective level to the individual-personal level; setting up a strike fund; strike enforcement (against strike breakers); operating exception committees; collective resignation.

13.2 Hidden Struggle

Behind the words *hidden struggle*, *covert strike*, or *disguised strike* hides the use of strike weapons by striking workers, but without announcing the strike or without acknowledging its use.

Use of the hidden struggle raises a number of questions – why do workers use the hidden struggle and what are its benefits? How do the employer, the public and the court regard a hidden struggle? And how does all of this affect the way the workers' union deals with the strike? We will answer these questions in this subsection.

13.2.1 Why do workers use the hidden struggle and what are the benefits for them?

Use of the hidden struggle can manifest itself, for example, in a slowdown strike, or a strike by the book.⁹⁹¹ These are partial strikes. The phenomenon of partial strikes began to develop, as we learned, after clause 5A of the Labour Disputes Settlement Law was passed, which required that before the strike began, the workers' union announce it, send an appropriate notice to the employer and chief labour relations officer and wait 15 days. As a result, the Histadrut tended not to approve strikes at all and strikes in public services in particular, which exposed strikers to legal sanctions and especially to non-payment of wages or strike fees if they went on a visible and full strike.

In Chapter 2 we will learn about the restrictions that apply to workers seeking to use strike weapons. The conclusion of the chapter was that the strike is limited by a variety of restrictions – a minority of which are set out in law and most of them in the laws of the courts which have limited, demarcated and defined the strike time and time again. We explained that restrictions do not prevent use of the strike as a

⁹⁹⁰ Ruth Ben Israel, *Labour Law* – Vol. I, (Open University: 2002), p. 107.

⁹⁹¹ On by-the-book strikes, see Chapter 5: *Types of Strike*.

means of pressure and do not contribute to bringing the parties closer to an agreement, but it is clear that they have an effect on the balance of power and consequently on the willingness of the parties to continue in a state of dispute and even act to escalate the struggle.⁹⁹² I addressed the fact that the strike was causing damage to both the workers' union declaring it and the workers implementing it in practice. During a strike the workers do not earn their wages due to their strike.⁹⁹³ The employer may *mark* the striking workers, and identify them with the workers' union, which may explain the workers' fear of participating in a strike. Therefore, the workers' union is often required to direct valuable resources during the labour dispute in order to preserve the morale of the striking workers – so they persist in their strike, instead of increasing pressure on the employer. Strikes also do not increase the support of the Israeli public for the workers' unions. In the State of Israel, solidarity with workers' unions is eroding. The public does not tend to identify with workers' unions or with their goals.

Hence, it is no wonder why the hidden struggle has become common in the struggle of the workers: it allows them to fight, without endangering their livelihood, it allows them to fight the employer without having to meet the many restrictions that apply to the strike – because, even if they meet all of them – there is no guarantee there will not be an injunction against the strike. It turns out therefore, that the hidden struggle is a weapon intended to put pressure on the employer by disrupting proper work order, but without excessive risk.

As stated, a *hidden struggle* is, in effect, the use of strike weapons without declaring a strike. Hence it is interesting to examine the prevalence of unapproved strikes over the years. To this end, the reports of the Chief Labour Relations Officer were reviewed, and the number of strikes approved (and therefore, also announced) was examined each year, compared with the number of strikes that were not approved (and therefore, not announced).⁹⁹⁴ Before discussing the findings, I will note that reference to approving strikes in the Commissioner's reports appear from 1997 (which is also the year in which the Commissioner began publishing his reports) and ended in 2013.⁹⁹⁵

Year	Number of Approved Strikes	Number of Unapproved Strikes	Percent of Approved Strikes	Percent of Unapproved Strikes
1997	64	5	92.75	7.25 %
1998	46	7	86.79	13.21 %
1999	53	14	79.10	20.90 %
2000	47	7	87.04	12.96 %
2001	52	10	83.87	16.13 %
2002	37	10	78.72	21.28 %
2003	55	5	91.67	8.33 %
2004	40	9	81.63	18.37 %
2005	30	27	52.63	47.37 %
2006	20	15	57.14	42.86 %

⁹⁹² Mordechai Mironi, *Arbitration as a Substitute for a Strike - A Framework for Thinking and Clarifying Basic Concepts*, (The Hebrew University, 1986), p. 18.

⁹⁹³ There are two exceptions to this: The first exception is that public sector workers are entitled to a share of their wages, as detailed in Chapter 10: *How the Employer Handles the Strike*. The second exception is when workers' unions operate strike funds.

⁹⁹⁴ Hereinafter: Table 15.

⁹⁹⁵ In Chapter 3 I discussed the problematic nature of the Commissioner's data collection method, which is also inconsistent.

2007	22	8	73.33	26.67 %
2008	6	8	42.86	57.14 %
2009	4	11	26.67	73.33 %
2010	14	10	58.33	41.67 %
2011	16	11	59.26	40.74 %
2012	20	4	83.33	16.67 %
2013	14	11	56.00	44 %

Table 15: The prevalence of pproved and unapproved strikes over the years according to the Chief Labour Relations Commissioner reports.

Using a linear regression makes it possible to predict the value of the dependent variable / explained variable (axis Y – rate of unapproved strikes) using an independent variable / explanatory variable (axis X – years):⁹⁹⁶

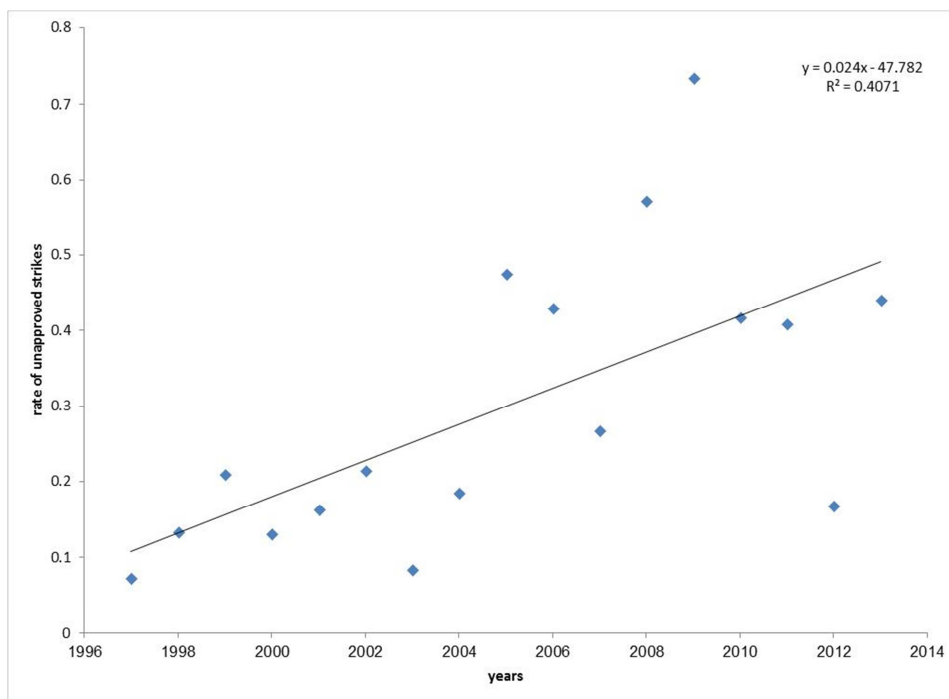


Figure 15: Diagram of the rate of unapproved strikes - using linear regression.

The significant value is the p-value which stands at 0.0059,⁹⁹⁷ hence the model statistically clearly predicts the variable value *rate of unapproved strikes*. That is, the number of unapproved strikes has increased over the years.

13.2.2 How do the Employer and the Court Treat a Hidden Struggle?

In 1971, two years after the enactment of clause 5A of the Labour Disputes Settlement Law, the headline of the newspaper Davar announced that officials from the Ministry of Education and Culture “deny a slowdown strike at the Ministry of Education”.⁹⁹⁸ Since then, similar headlines have been published in the

⁹⁹⁶ Hereinafter: Figure 14.

⁹⁹⁷ It is acceptable to see a p-value of less than 0.05 as a clear model.

⁹⁹⁸ Unknown author, *Denial of a Slowdown Strike at the Ministry of Education*, (Davar, 26/08/1971), at the link: <https://www.nli.org.il/he/newspapers/dav/1971/08/26/01/article/59/?srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%9e%d7%9b%d7%97%d7%99%d7%a9%d7%99%d7%9d+%d7%a9%d7%91%d7%99%d7%aa%d7%aa+%d7%94%d7%90%d7%98%d7%94+%d7%91%d7%9e%d7%a9%d7%a8%d7%93+%d7%94%d7%97%d7%99%d7%a0%d7%95%d7%9a-----1> Accessed: 30/07/2021.

media and also – similar denials by workers’ unions:⁹⁹⁹ “Medical miracle in Ashdod Port: All workers recovered and returned to work. Port workers who took to their beds yesterday due to a general illness, miraculously recovered in the last few hours [...] Chairman of the Ashdod Port Workers’ Committee said that it was not clear to him what the commotion was about because a number of workers had fallen ill and they have certificates from qualified doctors”¹⁰⁰⁰. “Mechanical Machining Service workers deny: We do not strike – we work according to normal hours”¹⁰⁰¹ “An Italian strike in the port of Haifa? A slowdown was felt in the pace of work”. The article also said that “the problem with an undeclared strike is that it is very difficult to prove that it is occurring and it is also difficult to prove that the slowdown in output was not caused by other reasons”.¹⁰⁰² “Sudden Illness: El Al pilots have returned to disrupting flights”¹⁰⁰³ “Once again, fear of disruptions on Israel Railways: A number of drivers have reported they are ill”, the Railway Workers’ Committee claims that the reports of alleged illness of train drivers are incorrect and even false”.¹⁰⁰⁴ “Train disruptions – technical malfunction or an Italian strike?”¹⁰⁰⁵ “A technical malfunction caused delays of about an hour and a half on flights that were about to depart from the airport. Passengers reported queues of two to three hours. Maybe this is an Italian strike? I find it hard to believe that this is a problem with computers. Everyone knows this is a strike”.¹⁰⁰⁶

In all the cases reviewed below, the position of the workers’ union (usually the Histadrut) is that it did not approve or declare a labour dispute, did not allow or approve any sanctions. The position of the workers’ representative, the workers’ committee, is that it did not declare sanctions and did not approve them – on the contrary – they instructed workers to carry out their work as usual, in accordance with the law.

Employers, for the most part, rely on case law, according to which any collective and coordinated action of workers to disrupt work is a strike,¹⁰⁰⁷ and that the manner in which workers try to conceal the strike and disguise it under the guise of unavailability, illness, and other reasons is an attempt to be clever and stems from their desire to ensure that their wages are not harmed.

How, then, does the Labour Court determine whether this is a hidden strike or objective reasons that prevent the working public from carrying out their work? At times, the line between sanctions and an objective reason, as we shall see, may be very thin.

The **Ports Authority** case was one of the first cases in which the question arose as to whether workers had engaged in a hidden struggle. The National Court has established a number of important laws in this

⁹⁹⁹ Access date of all the following articles is: 30/07/2021.

¹⁰⁰⁰ Sharon Kedmi, *Medical miracle at Ashdod Port: all workers recovered and returned to work*, (The Marker, 09/03/2006), at the link: <https://www.themarker.com/career/1.357015>

¹⁰⁰¹ Yehuda Konfortes, *Mechanical Machining Service workers deny: We do not strike – we work according to normal hours*, (People and Computers – High Tech News Portal, 14/10/2020), at the link: <https://www.pc.co.il/news/323777/>

¹⁰⁰² Daniel Shmil, *An Italian strike in the port of Haifa? A slowdown was felt in the pace of work*, (The Marker, 30/09/2013), at the link: <https://www.themarker.com/dynamo/1.2129262>

¹⁰⁰³ Yoram Gabison, *Sudden Illness: El Al pilots have returned to disrupting flights*, (The Marker, 09/06/2020), at the link: <https://www.themarker.com/markets/1.8908138>

¹⁰⁰⁴ Moshe Cohen: *Once again, fear of disruptions on Israel Railways: A number of drivers have reported they are ill*, (Ma’ariv, 03/03/2019), at the link: <https://www.maariv.co.il/news/israel/Article-687594>

¹⁰⁰⁵ Shlomo Piotrkowski, *Train Disruptions - Technical Fault or Italian Strike?* (Channel 7, 15/05/2011), at the link: <https://www.inn.co.il/news/219689>

¹⁰⁰⁶ Itai Blumenthal and Noam (Devol) Dvir, *A malfunction in the conveyor belts led to disruptions at Ben Gurion Airport*, (Ynet, 22/06/2014), at the link: <https://www.ynet.co.il/articles/0,7340,L-4532902,00.html>

¹⁰⁰⁷ The National Court ruled that “any coordinated and organised disruption to the normal course of work” is considered a strike, and the *Italian strike* is also included in this context, in which workers as one man decide to slow down the pace of work (General Collective Dispute. 40815-07-13 Tel Aviv Chamber of Commerce v. The New General Workers’ Union), Or they decide to *work to rule*, see HCJ 789/78 Shmulevitz v. Minister of the Interior, ruling 33 (3) 480 (29.4.79).

matter. First, they held that a strike threat, which had not been proved to have been realised and probably remained merely a threat, is not evidence of the existence of a strike. Second, proof of a strike is done according to the law of evidence, but whatever the weight of circumstantial evidence – it is not the end of things, and does not prevail over direct evidence. It does not prevent a court from being persuaded, on the basis of all the evidence, that there were indeed circumstances from which a particular factual conclusion could have been drawn. Third, and to the substance of the matter, the court referred to the workers' sick notes. They ruled that the contents of each sick note were unequivocal, the certificates were given by different doctors from different clinics, and the Ports Authority did not do what an employer is expected to do when provided with a sick note that he suspects is invalid and he is unwilling to act on it. Therefore, the National Labour Court was unwilling to rule that the workers had taken a strike.¹⁰⁰⁸

In the case of **Yehud Monson Municipality**, workers showed up for work and found the municipality building closed. The municipality claimed that the building was closed by the workers' committee, and that it was a strike for which the workers were not entitled to wages. The Histadrut denied that it was a strike. The Labour Court ruled that the workers' committee had not taken strike action and that the workers' inability to work on that day was unrelated to them. The court ruled that the municipality was not closed by the workers' committee and was not done within the powers conferred on the committee. There was no question of an organised work stoppage or an organised disruption of the normal course of work. And it was not a collective action. Some municipal employee who also happens to be a committee member, decided, not in the opinion of the committee members, to close the building and prevent the workers from doing their job. Committee members rushed and warned about it that morning and even tried to open the building and allow workers to enter.¹⁰⁰⁹

In the **Interns'** case, the interns submitted about a thousand mass resignation letters and left the hospitals. In the National Labour Court, **the discussion revolved around the question of whether the letters should be regarded as personal and valid legally binding or a coordinated collective action and a means of organisational pressure against the validity of a lawfully signed collective agreement.** The court examined the evidence and ruled that the mass resignation of the interns was a coordinated collective action that served as a means of pressure on the employer aimed at changing the collective agreement signed with the workers' union (Israel Medical Association). In the end, the court ruled that this action had not been approved by the representative workers' union (which under the Labour Disputes Settlement Act is the body authorised to declare a strike), and the action taken contradicts an undertaking to maintain industrial silence. Hence the court's conclusion that this was a *strike in disguise*, and therefore ordered its cancellation and the continuation of an employer-employee relationship with the interns.¹⁰¹⁰

In the **Bromine Compounds** case, the Labour Court expressed its opinion on the burden of proof that the employer owes during a hidden struggle. When the workers' representative announces that workers are returning to regular work, then the workers are at the employer's disposal and any step that blocks the possibility of working is ostensibly a strike. In such a case, the employer has to lift the burden of proving that the workers have not stopped the sanctions and they are still working partially.¹⁰¹¹

¹⁰⁰⁸ Labour Court Hearing (National) 41/ 5-4 Israel Ports Authority Ltd. v. Haifa Workers' Council, ruling 133.

¹⁰⁰⁹ Collective Dispute (Tel Aviv) 58/08 New General Workers' Union – Derivatives Market Association v. Yehud Monson Municipality.

¹⁰¹⁰ General Collective Dispute (National) 2376-10-11 State of Israel – Ministry of Health and Ministry of Finance v. Israel Medical Association.

¹⁰¹¹ Collective Dispute (Be'er Sheva) 54634-01-15 The New General Workers' Union, Negev Region v. Bromine Compounds Company Ltd.

In two cases involving a hidden struggle fought by El Al pilots, the Labour Court reached a different conclusion.

In the first El Al Pilots case, the company's crew placement department contacted 19 captains by phone and text messages who could fly its planes, but encountered a series of refusals due to various excuses (illness, fatigue, drinking alcohol, etc.), with some captains not responding to the messages at all. El-Al's management claimed that the pilots had engaged in a hidden struggle, and the court accepted this claim. The court ruled that El Al's management proved that a few hours after sending the pilots a letter from the chairman of the workers' representative, the rate of pilots agreeing to fly drastically decreased, forcing them to postpone and cancel a significant number of flights. The court found evidence of coordinated organisational activity. In recent years, pilots have created a method for disrupting the requested flights whenever they want to put pressure on management. In all these cases sanctions broke out illegally and, in all cases, when the parties reached an agreement, the pilots returned to regular work. It was also proved that the chairman of the workers' representatives not only sent the letter following which the disruptions broke out, but that he also kept in touch with his pilots, releasing or not releasing them for flights, all depending on the outcome of the ongoing negotiations with management.¹⁰¹² Therefore, the court issued an order instructing the pilots to cease their organised activities.

In the second **El Al Pilots** case, the question again arose as to whether the pilots were engaged in a hidden struggle. This time, the Labour Court ruled that it has not been proven that EL AL pilots are carrying out organised and coordinated activities to disrupt work in the company. The court reached this conclusion after being impressed that company management have not proven that the workers' committee had instructed, directly or indirectly, not to perform work and/or that a collective and organised instruction had been given by the committee to disrupt work routines. On the other hand, it had been proven that for a long time, the company's pilots had been flying to a significant extent, exceeding their full contract while making a great effort to man all flights. The court noted that they simply give credence to the workers' version, that contrary to the company's claim, the pilots' unavailability to fly does not stem from sanctions, ostensibly, but for material and objective reasons (illness, contractual rest, being on trainings, etc.), and from the evidence presented to the court, it emerged that the decision of a pilot whether to accede to the company's requests to report for flight is a personal decision of each pilot and certainly not a collective decision.¹⁰¹³

In the **Haifa Port** case, management claimed that some workers had taken an Italian strike. On the other hand, the workers clarified that they did not take any organisational measures and/or sanctions, but carried out the work as usual. To prove their claims, management attached a table of daily outputs, from which it emerged that on 22.12.2015, there were 196 operations in Shift A, there were 103.6 operations in Shift B, and 82.1 operations in Shift C. The court did not rule on the dispute, because the parties reached agreements according to which management undertook not to take any action in respect of the alleged events.¹⁰¹⁴

In the **Ashdod Port** case, the question once again arose as to whether a *slowdown strike* or a *strict strike* had broken out illegally. In this dispute, the court preferred management's version rather than the workers' union version, which did not provide any plausible explanation for the drastic increase in shift

¹⁰¹² Collective Dispute (Tel Aviv) 2436-01-15 El Al Ltd. v. New General Workers' Union – Transportation Workers Union.

¹⁰¹³ Collective Dispute (Tel Aviv) 46627-12-15 El Al Airways v. New General Workers' Union – Transportation Workers Union.

¹⁰¹⁴ Collective Dispute (Haifa) 64227-12-15 New General Workers' Union v. Haifa Port Company Ltd.

opening times in 5/20, nor did it provide any explanation for the more moderate increase in shift opening times in 6/20. The court ruled that it has not been proven that the time set by management for the purpose of carrying out the safety instructions is unreasonable and that the increase in the opening time of the shift is due to the foremen's adherence to the safety instructions management itself requires workers to follow.¹⁰¹⁵

13.2.3 Interim Summary

From a review of the cases in this chapter, we learned that the questions 'Did workers start a covert struggle?' And 'Is this really a strike?' are questions that are not simple for the employer to prove, and are not simple for the Labour Court to decide.

When the court comes to decide whether it is a hidden struggle, it seeks to be impressed by the actions that preceded the sanctions, past experience in the company's labour relationship, the relationship between the workers representation and the workers themselves, the degree of workers' responsiveness to tasks required of them and of course the evidence presented to them. For the most part, it requires the employer, who also files the claim with the Labour Court, to have the burden of proof that the workers are indeed taking sanctions.

In the **Ordan** case,¹⁰¹⁶ the court noted that the most direct way for an employer who encounters a partial strike, when he is unsure of its existence, is to apply to the court for a declaratory judgment regarding the existence of a partial strike: "It is always possible to apply to the Labour Court for a declaratory judgment regarding the existence of a *partial strike* in the examination of the need for preventive medicine". And yet, in Menachem Goldberg's view, this proposal does not seem practical, because the rules of procedure in the Labour Court will result in the declaratory judgment being given long after the application is submitted, and in most cases the employer will not be able to handle a relatively long period of partial strike.¹⁰¹⁷

13.3 Picketing

During a strike, workers can resort to picketing. Picketing is defined as a situation in which employees are located near the workplace where there is a labour dispute, or in the workplace itself. The purpose of the workers is to persuade non-striking workers and workers hired to be substitute strikers not to work, or to persuade suppliers not to provide goods or services to the employer. Picketing can be quiet and then fall within the scope of freedom of expression, or include physical activities such as carrying posters and conducting tours, for example.¹⁰¹⁸

13.3.1 The Attitude of the Israeli Legislator Towards Picketing

The Israeli law book contains a number of sections of law that have led, it seems immediately, to various rulings and interesting developments in everything related to picketing. In our case, it is appropriate to dwell on the Penal Code and the Torts Ordinance.

¹⁰¹⁵ Collective Dispute (Be'er Sheva) 63102-05-20 Ashdod Port Company Ltd. – New General Workers' Union – Trade Union Division.

¹⁰¹⁶ National Labour Court Hearing *ibid*/35-2 Kozolovich Baruch et al. v. Ordan Ltd., ruling 12 200, at pp. 210-21, clause 11 of the ruling.

¹⁰¹⁷ Menachem Goldberg, *Measures Facing Employers in the Face of Employee Sanctions* (National Labour Court Hearing *ibid*/2-35 Kozolovich Baruch et al. v. Ordan Ltd.), (The Advocate 35, 5744-1984), p. 87.

¹⁰¹⁸ USA-Goldman, p.227. Quoted in: Ruth Ben Israel, *Labour Law* – Vol. IV, (Open University: 2002), p. 1573.

Clause 164A of the Penal Code allows picketing to be held during labour disputes: “Notwithstanding the provisions of clause 163,¹⁰¹⁹ a person, on his own behalf or on behalf of a corporation, or on behalf of an individual or a group of persons, may stand in, or nearby, a location where work or labour is being carried out, in order to assist a labour dispute, if the sole aim is to achieve, or peacefully deliver information, or peacefully persuade to work or refrain from work”.

Clause 164A above gives legal legitimacy to picketing in the event of a labour dispute. According to the language of the law, picketing allows a person to *stand*, and the place where he is allowed to stand is in or near the workplace. For picketing to be legal, its purpose must be one of the following four: obtaining information, providing information, persuading to work or refrain from working. Each of these goals must be obtained *peacefully*.

The Torts Ordinance contains two clauses that prohibit trespassing, one in real estate and the other in movables.

Clause 29 of the Torts Ordinance provides: “Trespassing on real estate is unlawful entry into real estate, or damage or interference by a person to the real estate unlawfully; but no plaintiff may be compensated for trespassing on real estate unless he has thereby suffered pecuniary damage”.

And clause 31 of the Torts Ordinance provides: “Trespassing in movable property is the unlawful taking of goods from another person's possession, or a violent interference with them while in another person's possession; but no plaintiff can be compensated for trespassing on movables unless he has thereby suffered pecuniary damage”.

13.3.2 Development of the Labour Court's Attitude Towards Picketing

Over the years, a number of labour disputes have come before the Labour Court, in which workers have picketed. As we shall see below, a number of developments have taken place on this subject.

The **Amgat Plastic** case was one of the first in which the question of the legality of picketing was discussed, without referring to it by name. In this case, a wildcat strike broke out at the Amgat Plastic factory because, according to the workers, the employer violated the labour agreement signed with the workers' union. The employer, who appealed to the district court, noted that during the strike, workers prevented entry and exit of vehicles to the factory, and forcibly prevented the removal and entry of goods, products, raw materials, molds and other items – which the company required for production or intended to market as its products. The workers, for their part, argued that these were legitimate acts within the scope of the strike they were conducting, and therefore the court could not intervene in their actions. The District Court issued a restraining order against the workers' actions on the grounds that the strikers' actions did not constitute a strike, because “a strike is a refusal to provide services and not an injury to the employer's property”, noting that the cause of action of the company against its workers is a tort of trespassing on movables, and it is even possible that the tort may be an unlawful delay of movables, because the workers prevent the employer from accepting the movables brought to the company.¹⁰²⁰

¹⁰¹⁹ Clause 163 of the Penal Code, entitled *Unlawful Interference with the Exercise of a Right*, provides: “Whoever unlawfully commits one of the acts listed below, in order to compel another to do what he is not obliged to do by law or to refrain from doing what he is entitled to do, is punishable by imprisonment for one year: (1) uses violence or threats against him or his wife or children, or harms his property; (2) following him continuously from place to place; (3) conceals a device, clothing or any other property belonging to another or in his use, or denies it or interferes with its use; (4) stands guard near his home or near his place of residence, work or business or place of opportunity, or near access to them, or prevents access to them; (5) follows him wildly on the street or on the road”.

¹⁰²⁰ Laws of Taxes (Tel Aviv) 2832/78 Amgat Plastic Ltd. v. Zeev Ya'ari et al., tax ruling 5768 (1) 434.

In the **Dead Sea Works** case, a strike broke out in the factory, which manifested itself, among other things, in closure of the factory gates and the workers preventing removal of produce from the factory so that “the company could not do as they do with them and at their discretion”. The National Labour Court was unable to determine whether workers did indeed take over the factory gate, forcibly preventing the opening and closing of gates, but it took the opportunity to determine that “a worker is on the factory premises as an *invited* individual – and he remains in this position as long as his presence there “reconciles with his work”, in the broad sense of the term [...]. Once an employee is on the premises for the purpose contrary to his personal employment contract – he ceases to be *invited* or even *authorised*, for all that arises for damages, and in certain circumstances – can and will be seen as a *trespasser* even in criminal law.¹⁰²¹

In the **Haifa Chemicals** case, company management decided to cancel the collective agreements it signed with the Histadrut and on dismissal of 124 employees. In response, the Histadrut declared a strike. Company management claimed that the strikers were not satisfied with the strike, but also blocked the factory gates and did not allow entry of the plaintiff’s vehicles and workers on behalf of the company to perform essential work at the factory and its facilities. It was further alleged that the workers prevented ammonia from being taken out, which is necessary for the operation of a factory in which the company has a part, in the south of the country, from a special facility in the Haifa Bay area, thus paralysing the factory in the south, which had nothing to do with the conflict. The company claimed that with these actions, the strikers had taken the factory over, in effect, and they were using it as their own, thereby infringing on the right of possession of the factory and the property right of the company. Faced with these facts, the court reminded itself that this was a protest and demonstration of company employees and therefore, “they must be allowed physical contact with the workplace, in order to effectively express their protest, and we are aware that there is some harm to the plaintiff’s property, symbolic harm and not real harm”.

In its ruling, the Regional Labour Court sought to balance the company’s property right with the “physical connection of the strikers to the workplace” by stating that on the one hand, that Haifa Chemicals Ltd. factory gate area be evacuated from containers and all accessories preventing free entry and exit. Entry and exit of management personnel, maintenance workers, safety personnel, etc. to the factory will be free and no one will be able to delay them, neither entering nor leaving the factory, except for routine inspections, the same applies to entry and exit of the above vehicles. Removal of ammonia from the terminal in Haifa Bay will be free. On the other hand, a representative of the workers will be able to exercise the right to demonstrate and protest inside the factory, 20 meters from its main gate (inside). The number of representative members shall not exceed 18 persons, and they shall be allowed to sit in the place permitted as aforesaid, provided that this place shall not be on the main road leading from the gate into the factory. Above representative members will be allowed to sit in a tent, sleep in it, and even carry signs.¹⁰²²

The company appealed to the National Labour Court on the ruling of the District Labour Court, which accepted the appeal in part and ruled “[...] that no *protest tents* should be set up or any other

¹⁰²¹ Labour Court Hearing 41/4-18 Histadrut of Workers in Eretz Israel, Be’er Sheva Workers’ Council v. Dead Sea Works Ltd., section 8 of the ruling.

¹⁰²² Labour Court Case (Haifa) 57/ 4-10 Haifa Chemicals Ltd. – David Raviv et al.

demonstration in the factory premises or stay there; such demonstrations and protests are permitted, within the framework of the law, outside the premises only”.¹⁰²³

In the **Makhteshim** case, a labour dispute arose regarding the company’s increasing employment of contractor workers. The labour dispute finally escalated to a situation where a group of workers stood picketing outside the factory gates, turning to the contractor workers in an attempt to persuade them not to enter the factory as sympathy with their professional struggle. Some of the contractor workers responded to the request and some entered the factory. Picketing was held with a lawful license from the police to hold a demonstration. Management petitioned the court to order the strikers to refrain from any act and action with which there is a disturbance in the use of its land or movables and including an act of closing gates. They also petitioned to refrain from any action that would prevent the company’s invitees from entering its sites. The National Labour Court asked itself: “What is the proper balance when the freedom of expression, including the freedom of demonstration and strike, the freedom to participate in picketing, conflicts with property rights and freedom of contract?”.

Judge Elisheva Barak Ussoskin explained picketing, as well as demonstrations and strikes, are fundamental rights enshrined in the right to freedom of assembly. They are considered as part of the freedom of expression, as they are a way of communication and expression of opinions. The importance of workers’ right to demonstrate and protest by picketing is that it allows them to express their protest against their employer. The judge also stated that picketing at public sites is essential for expressing an opinion that will reach the general public as much as possible, and that workers’ picketing should be given more weight than other protests, since the purpose of labour law is to bring about equality in the bargaining power between workers and their employers, hence the judge came to the conclusion of her ruling: “In examining the measures taken by the appellant: silent picketing of workers in the early morning hours in front of their employer’s factory and prevention with persuasion, perhaps even with a verbal threat but without the use of force, towards the contractor’s workers not to enter the employer’s factory, it seems to us that the freedom of expression of the organisation and the workers prevails, and the appellant’s organisation and the workers will have the justification of freedom of expression” (emphases not in original). The other judges sitting in the case agreed with the conclusion of the judge’s ruling, but objected to Judge Barak Ussoskin’s permission to resort to verbal violence. President of the National Court, Menachem Goldberg, stated: “It seems to me that a verbal threat is completely forbidden. Workers’ struggles also have limits, and we must not allow them to exceed the limit set by criminal law, which – needless to say – prohibits threats”.¹⁰²⁴

In the Makhteshim case, therefore, permission was granted for the existence of picketing. In this case, however, the use of violence during picketing and the limits of this violence also came up for discussion.

In the **Horn and Leibowitz** case, the sole opinion of Judge Barak Ussoskin in the Makhteshim case had already been adopted, according to which a strike is intended to be painful, and is allowed to include threats and verbal violence, as long as there is no deviation from the test of proportionality: “In the circumstances of the case, the claim that workers should not be returned to work due to violence they used during the strike should not be accepted. First, [...] it appears that, as a rule, the workers in the compound used reasonable force during the strike. Second, although one of the foundations of labour relations is that there is no room for violence in the workplace or with regard to labour relations, a strike is an action which by its very nature entails a foundation of force, if only for the purpose of preventing

¹⁰²³ Labour Court Hearing 57/4-43 Haifa Chemicals Ltd. – David Raviv et al.

¹⁰²⁴ Labour Court Hearing 57/27-41 Histadrut Clalit et al. – Makhteshim Chemical Plants Ltd., [published in Nevo] ruling 449.

the employer from operating his business. To the same extent, an employer's effort to operate his business during a strike, with the aim of breaking it, even that includes an element of the use of force".¹⁰²⁵

13.3.3 Interim Summary

As I have shown, the pendulum of ruling ranges over the years from refusing to recognise striking workers' actions during picketing as legitimate, denying them actions by virtue of *trespassing on real estate* or *trespassing on movables* and renouncing acts of violence – to recognising picketing and legitimacy of verbal violence.

In the Amgat Plastic case, the District Court issued a restraining order against the strikers' actions, which it perceived as trespassing. A similar opinion was repeated in the Dead Sea Works case, in which the National Court expressed its opinion that striking workers in the employer's premises without his permission may be considered trespassers. This approach changed in the Haifa Chemicals case. In the Makhteshim case, the judges of the National Labour Court already granted legal kosher status to picketing. But then the question of using violence while picketing came up for discussion. In this matter, too, there has been a change in the position of the Labour Court. If in the Makhteshim case Judge Elisheva Barak Ussoskin remained in a minority opinion allowing the strikers to use verbal threats, then in the Horn and Leibowitz case her opinion was adopted, according to which a strike is intended to be painful, and is allowed to include threats and verbal violence, as long as there is no deviation from the test of proportionality.¹⁰²⁶

13.4 Transfer of Pressure from the Organisational-Collective Level to the Individual-Personal Level

In recent decades we have witnessed the individual-personal aspect become present in areas that have hitherto been purely collective.

Transformation of the individual-personal aspect into a common tool in the workers' struggle began in the early 2000s with the advent of the new waves of unions. Then the heads of the Histadrut realised that although the new organisations were successful in the legal arena, they should be decided, finally, on the ground. And that legal moves are not sufficient, and that the decision will fall in the struggle of workers against management. The presence of the workers on the ground creates a balance of power against the employer, who fears the power of the workers. Therefore, the Histadrut's division for the organisation of workers developed an orderly *combat doctrine*, which includes a combat strategy in the field. The main innovations of this strategy were rallies of solidarity and support of old committees with new committees and picketing around the clock in front of the homes of company owners and their senior executives at regular times – early morning, evenings, Shabbat and holidays. These apply heavy and direct pressure leverage towards the decision makers, disrupting their daily routine and regular lifestyle.¹⁰²⁷

According to Mironi, the introduction of the individual-personal facet in the organisational-collective arena is probably related to two factors: First, a decline in the effectiveness of the traditional strike. This means that stopping work as a means of pressure to change the employer's positions has become too

¹⁰²⁵ Collective Dispute Appeal 1008/00 Horn and Leibowitz Ltd. – The Histadrut, ruling 35 145.

¹⁰²⁶ See, for example: Collective Dispute (Be'er Sheva) 51515-05-18 Company for Environmental Services Ltd. v. The New General Workers' Union. In this ruling, the court reiterated that the test of proportionality has three parts: a rational connection between the means and the end; choosing the minimum means which is necessary to achieve the end; and a reasonable ratio between the harm and the benefit

¹⁰²⁷ Danny Vazana, Meugadim [Unionised], (Schakim, 2017) pp. 140-141.

costly for workers. And in many cases, it is barren and inefficient. Second, the growing involvement of advertising and public relations firms in managing labour disputes. Due to these factors, there is a change in the rules of the game in the management of labour disputes. The focus for exerting pressure and collecting a price, shifts from the organisational-collective level to the individual personal level. Instead of the workers' representation being content in the event of a labour dispute to exert economic pressure on the employer through a strike or threat of a strike against the organisation, it attacks the managers personally, sometimes also in their private residence and with the involvement of their family members.¹⁰²⁸

Thus, for example, the news archives¹⁰²⁹ tell the stories of demonstrations over the past decade in front of the private homes of executives and employers of the Open University,¹⁰³⁰ Strauss,¹⁰³¹ HOT Mobile,¹⁰³² Milouoff,¹⁰³³ Ness Technologies,¹⁰³⁴ Pelephone,¹⁰³⁵ Arkia,¹⁰³⁶ and most recently – in front of the home of the CEO of Bezeq's subsidiaries: "Last Friday, the Alpha Committee held its first *wake-up event*, in front of Gur'on's home, but this event will not be the last. In a statement sent to company employees last week, the committee declared the future to come: "We are at the beginning of the road and starting from Friday and all of next week, we will have breakfast with the company's CEO – Ran Guron at 07:00 in the morning at his home in Ra'anana. We come to remind management that there are workers here who need to be taken care of instead of the capitalists".¹⁰³⁷

This strategy had been tried several times with great success. Two examples illustrate its use and the success it has had – in the Cellcom case and in the Partner case:

In the case of the **Cellcom** workers' union, the leaders of the union realised that the company's management had no intention of accepting the unionisation and recognising the Histadrut as the workers' representative organisation, "therefore, they adhered to a strategy according to which only decisive field activity would put pressure on Cellcom's management and lead to recognition of the organisation. "We

¹⁰²⁸ Mordechai (Moti) Mironi, *Privatization of Labour Relations and Labour Law* in the Steve Adler book, (Nevo, 2016), p. 349.

¹⁰²⁹ Access date of all below articles is 20/08/2021.

¹⁰³⁰ Einav Schiff, *The Open University Against Poetry?* (Walla, 12/05/2009), at the link: <https://e.walla.co.il/item/1483809>

¹⁰³¹ Gil Kalian, *Demonstration in front of Strauss CEO's home* (Calcalist, 06/12/2011), at the link:

<https://www.calcalist.co.il/local/articles/0,7340,L-3554402,00.html>

¹⁰³² Haim Bior, *HOT Mobile employees demonstrate in front of owner Patrick Drahi's home* (The Marker, 08/07/2014), at the link:

<https://www.themarker.com/career/1.2369843>

¹⁰³³ Unknown author, "The slaughterers at Milouoff demonstrated in front of their employer's house", and later the article: *The slaughterers equipped themselves with signs and speakers, and demonstrated in front of his house in the streets*. The demonstrators shouted: "This man is a huge criminal. He's a criminal. Selling the next world for money. He literally robbed us all of our livelihood" (Communist Party, 13/08/2014), at the link:

<https://maki.org.il/%D7%94%D7%A9%D7%95%D7%97%D7%98%D7%99%D7%9D-%D7%91%D7%9E%D7%99%D7%9C%D7%95%D7%A2%D7%95%D7%A3-%D7%94%D7%A4%D7%92%D7%99%D7%A0%D7%95-%D7%9E%D7%95%D7%9C-%D7%91%D7%99%D7%AA%D7%95-%D7%A9%D7%9C-%D7%94>

¹⁰³⁴ Unknown author, *Ness Technologies employees at Hadassah demonstrate this morning in front of the house of the company's CEO* (Ma'asikolog, 21/11/2018), at the link:

<https://www.maasikolog.co.il/%D7%94%D7%A4%D7%92%D7%A0%D7%94-%D7%A0%D7%A1-%D7%98%D7%9B%D7%A0%D7%95%D7%9C%D7%95%D7%92%D7%99%D7%95%D7%AA>

¹⁰³⁵ Miki Peled: *Escalating: Pelephone employees will demonstrate in front of the house of owner Shaul Elovich*, (Calcalist, 07/10/2012), at the link: <https://www.calcalist.co.il/local/articles/0,7340,L-3584245,00.html> And also: Gad Peretz, *Pelephone employees will demonstrate in front of the house of the company's CEO Ran Gurion*, ("Globes", 22/09/2019), at the link:

<https://www.globes.co.il/news/article.aspx?did=1001301562>

¹⁰³⁶ Sharon Yonatan, *Demonstrations in Herzliya against the owner and chairman of Arkia*, (Sharon Online, 29/07/2020), at the link: <https://sharonline.co.il/local-news/arkia/>

¹⁰³⁷ Mor Gafni Dor, *Bennett's Neighbours are Not Alone: A New Protest in Ra'anana in front of the House of Senior Executive Director of the Economy*, and further article: (Tzomet HaSharon, 20/07/2021), at the link:

<https://www.tzomet-ran.co.il/news/55141>

decided that from that moment on the CEO would not wake up in the morning without us, without us waking him in a demonstration outside his home. No longer would he wake up in the morning without seeing the members of the committee and the activists opposite his home, in his garden, in his life, on Friday and Saturday as well, on holidays, every day. [...] As the days passed, the field activity of the heads of the organisation increased. The harsh public criticism received by the company's CEO, Nir Stern [...] increased their determination [...] with the support of other committees, they increased their pressure on the company's CEO, picketed in front of his home and held stormy demonstrations in front of the company's facilities across the country. [...] On September 2, 2013, after a long and exhausting struggle that lasted about six months and during which the union faced a planned and rigid move to thwart it, Cellcom's management announced recognition of the Histadrut as the representative organisation of the company's employees".¹⁰³⁸

In the case of the unionisation at Partner, the leaders of the union also adopted a strategy of field activity, after the owners of the company refused to recognise the Histadrut as the representative organisation in the company. Management's position "forced workers to go into a heated struggle in the field, which included demonstrations in front of the CEO's home and loud protest riots morning and evening. The pressure bore fruit and four months later, on September 8, 2014, Partner's management recognised the Histadrut as the workers' representative organisation".¹⁰³⁹

This strategy, of personally attacking company directors in their private homes while involving their family members and neighbours, leads to a conflict of several constitutional rights: On the one hand, the right to organise, the right to demonstrate, the right to assemble, the right to congregate and freedom of expression in the public space of workers, and on the other – the right to privacy (a person's home is his castle) and the employer's right to privacy. Although conflicts of these rights have come up for discussion in the High Court, they have never revolved around a demonstration, protest, congregation or assembly in front of an employer's private home, except for two cases (below), which were also not heard in the Labour Court. And yet, their importance cannot be ignored in light of the frequent use made of them.

The order of the discussion will be as follows: First, we will examine the legislature's reference to the rights of demonstration, assembly and congregation. Second, we will examine the High Court's attitude to these rights. And third, we will discuss the court's reference to the use of these rights outside the employer's private home.

13.4.1 The Legislature's Attitude to the Rights of Demonstration, Assembly and Congregation

Clause 151 of the Penal Code prescribes the offense of congregation. According to this clause, a gathering of three or more people is considered an offense. These cases include the following: when the purpose of the gathering is to commit an offense; when the purpose of the gathering is lawful, but there is a reasonable basis for fearing that the gathering will violate the peace; when the purpose of the gathering is lawful, but there is a reasonable basis for fearing that the gathering will actually provoke other people, without need and without sufficient cause, to violate the peace; or a demonstration held without a license or not under the terms of the license where a license is required to demonstrate.

Clauses 83, 84 and 89 of the Police Ordinance¹⁰⁴⁰ stipulate that it is necessary to obtain a license from the district police chief to demonstrate if the following conditions are met cumulatively: it is a demonstration

¹⁰³⁸ Danny Vazana, Meugadim [Unionised], (Schakim, 2017) pp. 268-270.

¹⁰³⁹ Ibid, pp. 274-275.

¹⁰⁴⁰ Police Ordinance [new version], 5731-1971.

of 50 people or more; and these gather in the open air to hear a speech or lecture on a political issue or to discuss such a subject, or they gather in the open air to walk together from place to place.

Thus, according to the ordinance as worded today, an assembly or procession of less than fifty persons does not require a license. The same is true of a gathering that is not a procession and does not involve hearing speeches or lectures on a political issue, even if more than fifty people are participating.

In 2020, a bill amending the police ordinance was tabled in the Knesset. The explanatory memorandum to the bill states that “in recent years we have witnessed an increase in the phenomenon of holding demonstrations and protest vigils in front of the private homes of public employees. These demonstrations, the purpose of which is to influence those people to do or avoid an act, are in many cases also aimed at harassing those people and their family members and infringing on their privacy. In many cases, the protesters’ intention is that this harassment in itself will put pressure on the person against whom the demonstration is directed and, in this way, will cause him to do the act or influence the way he fulfils his role, as the protesters want. When demonstrators seek to exercise their freedom of demonstration in front of a private residence, certainly while these may be exercised elsewhere, the fear grows that the purpose of the demonstration is not to exercise the legitimate interests inherent in freedom of expression, but to exert illegitimate pressure and cause harassment to the person who is the object of the demonstration”.¹⁰⁴¹ Therefore, the proposal sought to stipulate that picketing against an act of a person near his residence would be conditional on obtaining a license, and that the district commander would not grant a license to hold such a demonstration unless it was found that it could not be held “in a more suitable place”.

The Attorney General’s directives state: “As far as the home of a public employee, who is not elected by the public, is concerned, a demonstration in front of his private home is a serious phenomenon that constitutes an attempt to intimidate him, as he carries out his duty in the mission of the state and to deter him from performing his duty. [...] The freedom of demonstration does not include the freedom to gather in front of the home of a public employee, if this can be done near his place of work”.¹⁰⁴²

13.4.2 The High Court's Attitude to the Right to Demonstrate

In his book *Human Rights Law in Israel*, Prof. Barak Medina wrote: “A demonstration – including a procession, an assembly and picketing – have been considered since the early days of modern democracy as a major means of expression on issues of public importance”.¹⁰⁴³ Indeed, High Court rulings have repeatedly proved this claim. The right to demonstrate in a public space has been discussed many times in High Court rulings, which stated that public and urban areas, roads, squares, plazas, parks and gardens are the main spaces where the right to demonstrate – which includes the right to picket – is exercised. “Roads and streets are meant for walking and driving, but that is not their sole purpose. They are also meant for processions, for parades”.¹⁰⁴⁴ In another case, the High Court ruled that the right to demonstrate is “one of the basic human rights in Israel. It is recognised, alongside the freedom of expression or by virtue of it, as belonging to the same freedoms that shape the character of the regime in Israel as a democratic regime”. But it is not an absolute right; It is a relative right and limited by other fundamental human rights, such as

¹⁰⁴¹ Bill to amend the Police Ordinance (Licensing Demonstrations), 5780-2020, 80/23/2025, tabled in the Knesset by MK Ariel Kellner on 24/08/2020. See the link: https://www.nevo.co.il/law_html/law04/2025_23_lst_581234.htm Accessed: 22/08/2021.

¹⁰⁴² *Freedom of Demonstration*, Guidelines by the Attorney General, Guideline No. 3.1200 dated 01/04/1983, last updated 19/08/2010.

¹⁰⁴³ Barak Medina, *Human Rights Law in Israel*, (Nevo, 2016), p. 558.

¹⁰⁴⁴ HCJ 148/79 Saar v. Minister of the Interior and Police, ruling 34 (2) 169, 177 (1979).

freedom of property and freedom of movement. It is also limited by the need to maintain public order and public security and the fabric of democratic life. The relativity of the right requires the creation of a balance between it and other rights.¹⁰⁴⁵ Every demonstration, by its very nature, changes the urban routine of life and creates a disturbance or nuisance to one degree or another. However, this does not create a regime of pre-licensing for any protest action and severely infringes on freedom of expression. “In the vast majority of cases the individual does not seek to hold a meeting in the desert. The individual seeks to hold a meeting in the bustling streets of the city, or on the quiet sidewalks of a residential neighborhood. He seeks to convey a message that will be perceived by others through physical presence, thus he may infringe on the rights of others and the public interest”.¹⁰⁴⁶ The fact that the very existence of a demonstration may lead to a disturbance of order, does not tip the scales towards a decision not to allow the existence of that demonstration. “In fact, the very existence of a demonstration may lead to a disturbance does not negate the freedom to demonstrate. A certain degree of violation of public order is a price we must be willing to pay in order to fulfil the right to demonstrate”.¹⁰⁴⁷

During the Covid crisis, the question of the right to demonstrate and its scope came up for discussion. The High Court has been required to address it several times, ruling that “there is no dispute about the high status of the right to demonstrate as an important derivative of freedom of expression and as a primary instrument for expressing opinions and raising social issues on the public agenda – both in general and in particular during the Covid crisis. However, the right to demonstrate, like any basic right, is not an absolute right and therefore it is sometimes necessary to restrict it in order to bring about a proper balance between all the rights and interests at stake”.¹⁰⁴⁸ And elsewhere: “Imposing a restriction that prevents demonstrators from choosing the place where they wish to exercise their right, therefore violates the core of the right to demonstrate” and that “the ruling emphasised that the location where picketing is held – in front of the official residence of the elected official – is therefore of particular importance in the modern era, as it is intended to attract the attention of decision-makers and the public”.¹⁰⁴⁹ In another hearing, High Court Judge Solberg noted that “the right to demonstrate is one of our cornerstones and must be protected from being violated. However, this does not mean that all other rights can be sacrificed on the altar of the freedom to demonstrate. The task of maintaining social balance and protecting public order is the responsibility of Israel Police. To do this, the police must act, with the tools at their disposal, to prevent a demonstration from turning into a riot; caution, common sense, and determination are the key words”.¹⁰⁵⁰

Therefore, then, the High Court has repeatedly recognised the right of demonstration, procession, assembly, and congregation in a variety of cases – including in these tumultuous days, the days of the Covid crisis.

13.4.3 The Court's Attitude to the Right to Demonstrate in Front of an Employer's Home

As stated, the reference in Israeli case law to demonstrations held in front of the employer's home is very poor. To this end, I would like to first discuss the demonstrations that are taking place in front of the

¹⁰⁴⁵ HCJ 153/83 Alan Levy v. Commander of the Southern District of the Israel Police, ruling 38 (2) 393.

¹⁰⁴⁶ HCJ 2481/93 Dayan v. Commander of the Jerusalem District, ruling 48 (2) 456, 474 (1994).

¹⁰⁴⁷ Remarks of the Honourable Justice D. Dorner, HCJ 12/96 Meretz v. Commander of the Jerusalem District, ruling 50 (2) 822 (1996).

¹⁰⁴⁸ HCJ 6916/20 *Citizens write a constitution, Citizens' Guard, Time for Change and Guarantors for each other*, Unincorporated Civic Organisations v. Israel Police.

¹⁰⁴⁹ HCJ 5469/20 National Responsibility Israel My House v. Government of Israel.

¹⁰⁵⁰ HCJ 346/21 Law, Truth and Justice Association v. Israel Police.

home of an elected official in order to try and draw a conclusion from them, and then, to discuss the issue in its entirety.

In the **Dayan** case, the court referred to a demonstration held in front of the private home of an elected official. The High Court ruled that freedom of assembly and freedom of expression does not mean granting permission to trespass on a person performing a public function and harass him and his family in their private lives in order to influence his public activities, and that the public member has the right to privacy in his home. The High Court expressed concern that permitting demonstrations near the private homes of public figures could deter potential public figures from engaging in public activities. If there are more demonstrations in front of a public person's residence, he, his family and neighbours will become the "hostages" of the demonstrators, because they will have to listen to things even though they are not interested. Hence, the High Court sought to create a distinction between the public person's private residence and his place of work or public activity. In the opinion of the High Court, a public figure, who largely exposes himself to the watchful eye of the public, finds protection in his private home, and this home should be protected as much as possible. The interest of the family and neighbours to prevent nuisance must also be taken into account.¹⁰⁵¹ In the case of **Mani Naftali**, the High Court continued this trend: "Protecting the public figure's right to privacy in his private residence and preventing nuisance and disruption to the daily routine of the public, his family and neighbours, as well as the right of a person 'to be left alone' in his home and not be a 'captive audience' to protesters' messages – have the potential to establish the legitimacy of a ban on demonstrations and protests near the private residence of a public figure, where there is an effective alternative to the place where the protest can take place".¹⁰⁵²

The conclusion, so far, is clear. The court distinguishes between the private residence of the elected official and his official residence or place of public activity. It also takes into account the circle of interests of those around the elected official – his family and neighbours – who have not chosen to engage in public activities, and are not supposed to *pay a price* just because of their residence near that elected official.

Now, we can examine how the court treats demonstrations in front of an employer's home. The employer is not elected by the public. He is an individual from the locality who owns or manages a factory. Hence, the laws reviewed so far in this chapter cannot be considered as *the final say*, but it may be possible to deduce from them in this issue as well. As stated, in Israel this issue has not been widely discussed in case law despite the increasing use of demonstrations in front of employers' homes in recent years, with the exception of one case that came up for discussion in court and even received a ruling.

This case involved a company whose employees held demonstrations in front of the company CEO's home. The CEO filed an application for an urgent injunction, under the Prevention of Threatening Harassment Law.¹⁰⁵³ In his application, he argued that employees are not allowed to transfer the organisational struggle to the employer's private space. The Tel Aviv Magistrate's Court accepted the CEO's claim on a one-sided basis (that is, without hearing the workers' claims) and issued an injunction prohibiting the workers from demonstrating in front of his home or approaching him at a distance of 150 meters. In its decision, the court noted that "there is no reason to deprive the respondents of any possibility of a demonstration, nor can it be done within the framework of an application to prevent a

¹⁰⁵¹ HCJ 2481/93 Yosef Dayan v. Superintendent Yehuda Wilk, Commander of the Jerusalem District ruling 48 (2) 456. A similar approach was also expressed in ruling – HCJ 6658/93 Am Kaliba v. Chief of Jerusalem Police, ruling 48 (4) 793.

¹⁰⁵² HCJ 1983/17 Mani Naftali v. Attorney General.

¹⁰⁵³ Prevention of Threatening Harassment Law, 5761-2001.

threatening harassment order. However, the right to demonstrate is not unlimited. The right to demonstrate in front of a person's home, and in particular a private person – does not exist. The right to disrupt his peace and the peace of his children – does not exist”.¹⁰⁵⁴

In two other cases, in which workers demonstrated in front of their employer's home, and which were heard in court, the issue was not decided in a ruling.

In the **Bromine Compounds** case, executives at the company petitioned for an order under the Prevention of Threatening Harassment Law against company workers, who harassed them by way of repeated demonstrations in front of their private homes, early in the morning and late at night, making noise and making threats and hanging signs condemning the applicants. This due to their attempt to bring their protest against dismissals in the company. The court did not rule on the question but remarked that “the respondents would do well to examine the usefulness of utilising the legal hearing. The pain of the respondents is clear and poignant, and their desire to express their protest is also understandable. However, even the legal ways of expressing their pain and protest are clear and limited. Effective but legal ways must be sought”.¹⁰⁵⁵

In the **Shlomo Insurance** case, the regional labour court referred to the conduct of workers: “On 29.3.2016, at 6:20, four members of the committee [...] stood in front of the CEO's home and held a loud and noisy demonstration while playing various slogans with amplification. The demonstration ended after about an hour and three quarters. The respondent sent a warning letter to the Histadrut regarding this demonstration and demanded that these actions not be repeated. The Histadrut responded by claiming that these were legal actions. Two days later, on 31.3.2016, in the early morning hours, the committee members demonstrated in front of the CEO's home once more. The demonstration was documented by the CEO. It shall be noted that the CEO testified that he received legal advice to take proceedings against the workers who demonstrated in front of his home, including filing a complaint with the police, but decided to refrain from doing so”.¹⁰⁵⁶

There is a striking difference between the three cases reviewed above, which is worth noting. While the last case was heard in the Labour Court, the first two were heard in the Magistrate Court. The reason for this lies in the fact that the authority of the Labour Court is explicitly defined in clause 24A of the Labour Court Law, 5729-1969. Clause 24B of the above law extends the authority of the court to hear the legislations specified in the Second Schedule to the Law. The Law for the Prevention of Threatening Harassment is not one of them. Moreover, clause 3 of the Law for the Prevention of Threatening Harassment explicitly states that the court competent to hear the provisions of the law is the Magistrate Court as well as the Family Court and the Juvenile Court. It follows that an employer who experiences demonstrations by his workers in front of his home, will have to find himself knocking on the gates of the Magistrate Court and not the Labour Court, which is the expert court for labour relations.

Precisely because of the paucity of Israeli case law on this issue, it is interesting to pay attention to foreign case law. The US ruling in *Frisby v. Schultz*,¹⁰⁵⁷ is the most cited ruling in the literature. In this case, a group of people held demonstrations against a doctor who performed abortions at a clinic that was

¹⁰⁵⁴ Assaf Biger: *How to deal with workers' demonstrations in front of an employer's private home*, (The Marker, 04/02/2013), at the link: <https://www.themarker.com/law/1.1921789>

¹⁰⁵⁵ Threatening Harassment and Protection Order (Tel Aviv) 45885-02-15 Ehud Nitzan v. Yaniv Deri.

¹⁰⁵⁶ Collective Dispute (Tel Aviv) 52024-03-16 The New General Workers' Union, Workers' Union Division v. S. Shlomo Insurance Company Ltd.

¹⁰⁵⁷ *Frisby v. Schultz*, 487 U.S. 474 (1988).

located in his home, in the town of Brookfield, Wisconsin. In response, the city council enacted a municipal bylaw restricting the possibility of demonstrating in residential neighbourhoods. The demonstrators petitioned against the law, claiming that it violated their right to freedom of speech and freedom of association, under the First Amendment to the Constitution, and the matter came before the High Court. In this case, the court upheld the law and prevented a protest outside the residence. In its ruling, the court ruled that the First Amendment to the Constitution was not violated. The majority opinion stated that the right to privacy and the right not to be disturbed in a private residence prevail over freedom of expression and freedom of demonstration even when it comes to demonstrations or assemblies of workers. The court found that the government has a significant interest in “protecting residential privacy”. The main reason given in the ruling for the recognition of municipal law is that the main purpose of the demonstration is not to convey a message, but to put pressure on the person against whom the demonstration is directed, by way of harassment. In the case of *Lawson v. Murray*,¹⁰⁵⁸ the ruling also expressed this approach when the court issued an injunction prohibiting a demonstration within a 100-meter radius of the residence of a doctor against whom the protesters sought to demonstrate. However, even the foreign ruling does not discuss a situation in which workers demonstrate in front of their employer’s home.

13.4.4 Interim Summary

In recent decades we have witnessed the individual-personal aspect becoming part of the space that has hitherto been purely collective. This trend is consistent with studies that have indicated the contribution that the choice of location for the demonstration, its size and other characteristics (such as the demonstrators’ fitness, unity, numerical power and commitment), to the extent of its impact.¹⁰⁵⁹ Worker representatives attack managers personally in their private home, involving their family members and neighbours. The main innovation in this strategy is picketing around the clock in front of the homes of company owners and their senior managers – waking them up in the morning, evening visits, bringing in the sabbath and holiday eves. All this with the aim of putting pressure on them, by disrupting their daily routine and regular lifestyle.

This strategy leads to a conflict of several rights: on the one hand, the right to organise, the right to demonstrate, the right to assemble, the right to congregate and freedom of expression, and on the other hand, maintaining public order, the right to privacy, and of course - a man’s house is his castle (as Sir Edward Cook wrote in 1628: “For a man’s house is his castle, et domus sua cuique est tutissimum refuim (and each man’s home is his safest refuge)”. The legislature and the courts in Israel have recognised the right to demonstrate and its importance, even in the face of the nuisance, suffering and damage it can sometimes cause. In Israeli case law, one can find many rulings that strengthen the right to demonstrate, but also those that reduce it in front of the private home of an elected official. On the other hand, with regard to demonstrating in front of the employer’s private home, there is only one ruling of the Magistrate Court, which is highly doubtful whether it has become a binding precedent. However, in light of what is stated in this ruling and what is stated in other cases reviewed in this chapter, it can be assumed that if similar cases are brought before the court in Israel in the future, the ruling will prefer the employer’s right to privacy in his home, precisely because he is not a public figure, he does not live in an

¹⁰⁵⁸ *Lawson v. Murray*, 515 U.S. 1110 (1995).

¹⁰⁵⁹ Ruud Wouters & Stefaan Walgrave, *Demonstrating Power: How Protest Persuades Political Representatives*, 82(2) *Am. Sociological Rev.* 361 (2017).

official residence and there is a desire to reduce the exposure of *hostages* – his family and neighbours – to the nuisance that accompanies the demonstration.

Medina and Vagshal also tend to agree with the notion that it is appropriate to be suspicious of demonstrations that take place near the residence of a person to whom they are directed. More than once these demonstrations serve as a means of exerting illegitimate pressure through severe harm to the public figure towards whom the demonstration is directed.¹⁰⁶⁰ Therefore, on the basis of all the above, I believe that in this respect, the strategy used by workers' unions to exert pressure in front of the employer's home from morning to evening, may indeed be effective as reviewed, but it is very doubtful whether it will be able to convince the courts of its necessity and legality, especially in light of the legislature's tendency (as stated in the bill) to restrict the right to demonstrate in front of private homes, so that trade unions will have to think of other weapons.

13.5 Activating a Strike Fund

We have learned that a worker who goes on strike is not entitled to wages for working days during which he was on strike.¹⁰⁶¹ This rule was reflected in the rulings of the Labour Court and also in the words of High Court Judge Zvi Baranzon, who said in this matter: "The strike is a test of strength, and in such a test every party should know and understand that in achieving its goals in a strike he must also risk something [...] The strike is not a game, in which luck is always a factor. Some win and some lose, and part of the game is that both sides will risk something real. The employer – the damage caused to him or the public; and the workers – at least the wages for the days of the strike".¹⁰⁶² In the **Israel Knesset** case, High Court Judge Eliakim Rubinstein wrote that "the various difficulties involved in a labour dispute, such as – and especially – the damage to workers' earnings during a conflict and during a strike, incentivise the workers' union to reach agreements with the employer and choose a strike only as a last resort".¹⁰⁶³

These remarks, by High Court Judges Branson and Rubinstein, seem to indicate that workers taking part in a strike endanger their wages on the days they strike, and this risk causes the workers' union to choose a strike as a last resort in their professional struggle. However, one of the ways workers' unions deal with the issue of wage loss is through the activation of a strike fund. This is a mechanism designed to compensate striking workers who are not paid during the strike period, thereby reducing the economic burden that rests on them during the strike period, in which they do not earn their livelihood, and allowing them to continue to strike.

Even before the establishment of the State of Israel, voices began to be heard calling for the establishment of a strike fund for the benefit of striking workers. As far as the author is aware, it seems that the first call that arose for the establishment of a strike fund took place in 1924, during the rule of the British Mandate in Israel. The Histadrut Building Council, which convened in those days, made a number of decisions, and voiced their opinion that they "consider it necessary to arrange a strike fund frequently, and demands that the Histadrut Executive Committee take all necessary measures to arrange this fund".¹⁰⁶⁴

¹⁰⁶⁰ Barak Medina and Dror Vagshal, *Between Protest and Threatening Harassment*, (Laws B, 2010), p. 251.

¹⁰⁶¹ There are two exceptions to this, as detailed in subclause 9.3.2.

¹⁰⁶² Zvi Baranzon, *Labour Relations in the State and Public Sector*, (Studies in Law IX, 5743-5744 [1984]), p. 467.

¹⁰⁶³ HCJ 6133/14 Gurevich Tania and others v. Knesset of Israel.

¹⁰⁶⁴ Unknown author, *Resolution of the Histadrut Building Council* (Haaretz, 05/08/1924), at the link:

<https://www.nli.org.il/he/newspapers/haretz/1924/08/05/01/article/15/?srpos=77&e=-----he-20--61--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

Some sectors did not wait for an orderly decision by the Histadrut, and initiated the establishment of strike funds in their favour by themselves. Thus, for example, the Diamond Workers' Committee decided to deduct 4% of the February 1944 wage in favour of the professional struggle it was waging.¹⁰⁶⁵ Jerusalem teachers also began the process of establishing a strike fund for their struggle in 1947.¹⁰⁶⁶

A review of media archives¹⁰⁶⁷ shows that in the following decades (the 1950s, 1960s and 1970s) calls for the *establishment of a strike fund* became a common practice when embarking on a professional struggle. In 1954, the doctors decided to "establish a strike fund of 30,000 IL, to be made available to the doctors in case the Medical Association decides to open a prolonged strike on June 1 [...] The fund will be established from a loan of 10 IL from every doctor in the Medical Association".¹⁰⁶⁸ In 1957, the leaders of the professional struggle at the ATA factory declared that "there is an intention to raise half a million IL in favour of a prolonged strike".¹⁰⁶⁹ A year later, The Center for the Histadrut of Engineers appealed to 4,000 hired engineers, chemists, architects and agronomists to hold a strike of solidarity with a thousand state engineers. A strike fund was established and a quota [tax – A.A.M.] was imposed on each member of the Engineers' Union of 3 IL.¹⁰⁷⁰ In 1959 the pharmacists went into a professional struggle and also set up a strike fund.¹⁰⁷¹ In 1960 the teachers also decided to set up a strike fund.¹⁰⁷² In 1961, cable and power line workers in Haifa set up a strike fund that raised funds from internal sources.¹⁰⁷³ In the same year, the newspaper Al HaMishmar reported that locked out diamond workers from Netanya gather daily at the Histadrut to receive a strike fee of 50%.¹⁰⁷⁴ In 1964, income tax workers in Haifa also decided to set up a strike fund. The workers gave up their Passover gift, a waiver that became the first income for the fund, and one of the workers even donated his reparations money received from Germany to the fund.¹⁰⁷⁵ In the

¹⁰⁶⁵ Unknown author, *Ultimatum of all the diamond workers' committees*, (HaBoker, 02/03/1944), at the link:

<https://www.nli.org.il/he/newspapers/hbkr/1944/03/02/01/?srpos=323&e=-----he-20--321--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁶⁶ Unknown author, *The Danger of the Teachers' Strike*, (Haaretz, 02/02/1947), at the link:

<https://www.nli.org.il/he/newspapers/haretz/1947/02/02/01/article/64/?srpos=68&e=-----he-20--61--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁶⁷ The date all the following articles were accessed is: 16/08/2021.

¹⁰⁶⁸ Unknown author: *The doctors decided to set up a strike fund in case of a prolonged strike on June 1*, (Haaretz, 20/05/1954), at the link: <https://www.nli.org.il/he/newspapers/haretz/1954/05/20/01/article/17/?e=-----he-20--1--img-txIN%7ctxTI-----1>

¹⁰⁶⁹ Unknown author, *A strike is about to break out today at the ATA plants*, (Herut, 10/05/1957), at the link:

<https://www.nli.org.il/he/newspapers/hrt/1957/05/10/01/article/104/?srpos=58&e=-----he-20--41--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁰ Unknown author: *The engineers will contact Ben-Gurion*, (Ma'ariv, 30/07/1958), at the link:

<https://www.nli.org.il/he/newspapers/mar/1958/07/30/01/article/41/?srpos=277&e=-----he-20--261--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷¹ Unknown author: *Pharmacists set up a strike fund*, (Ma'ariv, 02/02/1959), at the link:

<https://www.nli.org.il/he/newspapers/mar/1959/02/02/01/article/44/?srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷² Unknown author: *Teachers to set up a strike fund* (Haaretz, 17/06/1960), at the link:

<https://www.nli.org.il/he/newspapers/haretz/1960/06/17/01/?srpos=5&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷³ Unknown author: *Cable power line workers and in Haifa set up a strike fund*, (Al HaMishmar, 10/05/1961), at the link:

<https://www.nli.org.il/he/newspapers/ahr/1961/05/10/01/article/112/?srpos=11&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁴ H. Oshman, *Shit down diamond workers in Netanya are forced to register as unemployed* (Al HaMishmar, 10/12/1961), at the link:

<https://www.nli.org.il/he/newspapers/ahr/1961/12/10/01/article/94/?srpos=185&e=-----he-20--181--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁵ Dov Shoval: *Income Tax Workers in Haifa Establish a Strike Fund* (Al HaMishmar, 23/03/1964), at the link:

same year, the Secretariat of Teachers' and Engineers' Committees also convened to decide on the establishment of a strike fund.¹⁰⁷⁶ In 1965, JNF workers began raising funds for a strike fund.¹⁰⁷⁷ In 1971, customs workers considered setting up an internal strike fund.¹⁰⁷⁸ In 1975 the naval officers began to organise for a strike and started a fundraiser for the strike fund.¹⁰⁷⁹ It was also decided to establish a strike fund as part of the struggle of the income tax workers this year, in case of exacerbation of the struggle.¹⁰⁸⁰

It was only in December 1976 that a proposal was made to abolish the separate strike funds in the workers' councils and to include them in a national fund managed by the Histadrut's executive committee, following revelations about the misuse of strike funds in the Haifa and Ramat Gan workers' councils to cover deficits and debts.¹⁰⁸¹

The situation with the National Workers' Union was slightly different. In January 1951, a strike broke out in the metal industry. To help strikers, all members of the National Workers' Union contributed a day's work to the strike fund. At the beginning of 1954, the National Workers' Union established a *labour dispute fund*, which originated from the insurance and disability funds, and the *constructive fund*.¹⁰⁸² In this year, a strike also broke out in the diamond industry, at the end of which the Union paid its members strike money from the fund it established.¹⁰⁸³

If I summarise what we know up to this point, I can say that the calls for the establishment of strike funds accompanied the Jewish community even before the establishment of the State of Israel. The establishment of funds was usually done temporarily and independently by each sector of workers. Occasionally, Histadrut public institutions came to the aid of the strikers and opened their coffers (such as Clalit Health Fund, Bank Hapoalim, Lender Fund and HaSne Insurance Company), and apparently, the announcements of the establishment of loan funds were both a desire to cause psychological pressure on employers, and a desire to recruit workers to strike through the promise that their livelihood will not suffer during the strike.

<https://www.nli.org.il/he/newspapers/ahr/1964/03/23/01/article/38/?srpos=9&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁶ Unknown author: *Academics are preparing their strike for June 8. Tax workers set up a strike fund*, (Ma'ariv, 28/05/1964), at the link: <https://www.nli.org.il/he/newspapers/mar/1964/05/28/01/article/10/?srpos=17&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁷ Yaakov Ha'elyon, *JNF Employees Fight Against Board Member* (Ma'ariv, 24/06/1965), at the link: <https://www.nli.org.il/he/newspapers/mar/1965/06/24/01/article/138/?srpos=305&e=-----he-20--301--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁸ Unknown author: *Customs workers set up auxiliary committees for the committee*, (Ma'ariv, 07/10/1971), at the link: <https://www.nli.org.il/he/newspapers/mar/1971/10/07/01/article/81/?srpos=44&e=-----he-20--41--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁷⁹ Unknown author, *Naval Officers Organise for Strike*, (Davar, 28/07/1975), at the link: <https://www.nli.org.il/he/newspapers/dav/1975/07/28/01/article/46/?srpos=286&e=-----he-20--281--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁸⁰ Yeshayahu Aviam, *Income Tax Workers Decide to Increase Their Strike*, (Ma'ariv, 12/11/1975), at the link: <https://www.nli.org.il/he/newspapers/mar/1975/11/12/01/article/35/?srpos=31&e=-----he-20--21--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁸¹ Unknown author, *Hasson: A strike fund is not intended to cover deficits* (Davar, 26/12/1976), at the link: <https://www.nli.org.il/he/newspapers/dav/1976/12/29/01/article/65/?srpos=7&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁸² The term *constructive fund* refers to funds established, for the most part, for the benefit of charitable giving, loans on favorable terms and assistance in finding work. Such funds were common in the first decade of the state's existence and were established by the government, the Jewish Agency and the parties.

¹⁰⁸³ Yehoshua Ofir, *Sefer HaOved HaLeumi [National Worker's Book] – Part Two: The Years of the State*, (published by the Histadrut, 1987), pp. 97, 134-135.

13.5.1 Establishment of Histadrut and National Workers' Union Strike funds and Assessment of their Strength

In 1978, the Histadrut's Central Committee approved the recommendations of the special committee it set up, headed by Israel Caesar, to determine the procedures of the Central Strike Fund for all Histadrut members.¹⁰⁸⁴ The committee recommended a financial separation between the fund's management and the body that decides on declaration of a strike (the trade union division),¹⁰⁸⁵ determined that fund management would consist of eleven members (Histadrut treasurer, four workers' council secretaries, two national secretaries and four other members),¹⁰⁸⁶ and that the fund will be managed by the treasurers as a separate unit of account, and its income will come from the payment of membership fees to the Histadrut.¹⁰⁸⁷ It was further determined that the fund will not pay compensation to strikers for the first three days of their strike,¹⁰⁸⁸ the strike fee to be paid will be 50% of the wage from the fourth to the eighth strike day, and from the ninth strike onwards 75% of their wage,¹⁰⁸⁹ and a worker who worked during the strike or lockout at another place of work will be entitled to only half the strike fee.¹⁰⁹⁰

During the 1980s, there were repeated allegations that the Histadrut approved a strike lasting only two days (or less), that it decided to end a strike that lasted too long in its opinion, or that it asked workers' committees to waive compensation from the fund – due to its unwillingness to operate the strike fund. These allegations led to speculation about the accumulation of funds available to the fund, but an exact figure was never provided by the Histadrut. The official reason for this is learned from the words of Histadrut treasurer, Natan Almozlino, who said in 1983: “Just as the Chief of Staff will never disclose the amount of ammunition available to him, so the fund's management must not disclose to the public what amount is available to it, as a weapon in the professional struggle”.¹⁰⁹¹ But even these things did not end the rumour mill about the accumulation of funds available to the Histadrut and its revenues. It is clear that the higher this amount of money, the more evidence it has of the economic strength of the fund and its ability to ensure the resilience of strikers for a longer strike. The author would like to point out that even at the time of writing these lines, a question mark continues to hover around the amount of money accumulated in the Histadrut strike fund. Amendment to the Rules of Ottoman Law on Associations (Reporting and Transparency), 5781-2021, intended to increase the transparency of Ottoman unions, made it possible with Article 9 for unions such as workers' organisations and employers' organisations to continue to stipulate that the amounts relating to the strike fund (of workers or employers) remain confidential.

From the little published in the media, over the years, the following figures emerge: in 1981, the strike fund's revenues totalled ILS 10.84 million.¹⁰⁹² Between January and September 1982, the fund's revenues

¹⁰⁸⁴ Unknown author, *Procedures of the Strike Fund Approved* (Davar, 22/06/1978), at the link: <https://www.nli.org.il/he/newspapers/dav/1978/06/22/01/article/125?&srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%90%d7%95%d7%a9%d7%a8%d7%95+%d7%94%d7%a0%d7%95%d7%94%d7%9c%d7%99%d7%9d+%d7%a9%d7%9c+%d7%a7%d7%a8%d7%9f+%d7%94%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1> Accessed: 16/08/2021.

¹⁰⁸⁵ Clause 3 of the Central Strike Fund Regulations.

¹⁰⁸⁶ Clause 4 of the Central Strike Fund Regulations.

¹⁰⁸⁷ Clause A. 1A of the Central Strike Fund Regulations.

¹⁰⁸⁸ Clause 9A of the Central Strike Fund Regulations.

¹⁰⁸⁹ Clause 9B of the Central Strike Fund Regulations.

¹⁰⁹⁰ Clause 9E of the Central Strike Fund Regulations.

¹⁰⁹¹ Unknown author, Almozlino: The Histadrut's strike fund is immeasurably larger than ILS 70 million, (Davar, 07/02/1983), at the link: <https://www.nli.org.il/he/newspapers/dav/1983/02/07/01/article/42?&srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%90%d7%9c%d7%9e%d7%95%d7%96%d7%9c%d7%99%d7%a0%d7%95%3a+%d7%a7%d7%a8%d7%9f+%d7%94%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁹² Yosef Golan: The strike fund raised ILS 26 million, (Davar, 03/01/1983), at the link:

totalled ILS 14.9 million. During this period, the fund paid compensation to 148 workers in six [plants, for 105 days of strike.¹⁰⁹³ In January 1983, the fund paid ILS 1,136,558 in compensation for three approved strikes.¹⁰⁹⁴ In 1995, the fund paid more than ILS 4 million as strike money to workers in 22 factories where strikes took place, in 1996 the fund paid ILS 6 million, and in 1997 the fund paid ILS 9 million to about 3,000 workers who went on strike that year. The audit report of the Histadrut Comptroller, published in 1998, shows that until then, a considerable part of the fund's money had been pledged to banks as collateral for loans received by the fund and a number of workers' councils.¹⁰⁹⁵ In the struggle of the social workers, the Histadrut decided to give each worker who strikes a check for ILS 1,000. "This was the first time the strike fund was activated on a large scale and for such a large number of workers".¹⁰⁹⁶

During the 1990s, the fund's regulations were amended to adapt to changes and transformations that had taken place over the years in the labour relations. The first change was to set a strike fee at a rate of 85% of the wage for the days of the strike from the third day to the tenth day (compared to 50% of the wage previously paid for the fourth to ninth days). It was also stipulated that those entitled to compensation would only be workers who went on strike not for economic reasons (but for *ideological* reasons such as their desire to exercise the right to organise).¹⁰⁹⁷ The second change was the establishment of financial management and central management for the fund. Their duties are to check and approve claims and eligibility for compensation payment, and to determine channels for investing the fund's funds. An appeals committee has also been set up to deal with appeals submitted by workers who have received payment from the fund and who believe that an error has occurred in the payment they received.¹⁰⁹⁸

Up to this point, I have reviewed the resilience of the Histadrut strike fund. Although most is not known in everything related to this foundation, one can learn about its being vibrant, dynamic and essential to the various struggles to which it has contributed and the updates in its bylaws. This state of affairs is in conflict with the strike fund of the National Workers' Union. It was only at the end of 1996 that the above-mentioned organisation established the Alum Fund (Assistance and Relief for Workers), which was registered as an association on 12/11/1996. Its objectives – as stated before the Registrar of Associations – "Establishment and financing of activities for the purpose of charitable giving. Establishment and financing of activities of training centers and religious studies for youth and adults. Establishment and financing of activities of sports institutions, construction of sports fields and facilities".

<https://www.nli.org.il/he/newspapers/dav/1983/01/03/01/article/54?&srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%94%d7%a9%d7%91%d7%99%d7%aa%d7%94+%d7%a6%d7%91%d7%a8%d7%94+26+%d7%9e%d7%99%d7%9c%d7%99%d7%95%d7%9f+%d7%a9%d7%a7%d7%9c-----1> Accessed: 16/08/2021.

¹⁰⁹³ Yosef Golan: The strike fund raised ILS 26 million, (Davar, 03/01/1983), at the link:

<https://www.nli.org.il/he/newspapers/dav/1983/01/03/01/article/54?&srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%a7%d7%a8%d7%9f+%d7%94%d7%a9%d7%91%d7%99%d7%aa%d7%94+%d7%a6%d7%91%d7%a8%d7%94+26+%d7%9e%d7%99%d7%9c%d7%99%d7%95%d7%9f+%d7%a9%d7%a7%d7%9c-----1> Accessed: 16/08/2021.

¹⁰⁹⁴ Unknown author, Almozlino: The Histadrut's strike fund is immeasurably larger than ILS 70 million, (Davar, 07/02/1983), at the link: <https://www.nli.org.il/he/newspapers/dav/1983/02/07/01/article/42?&srpos=1&e=-----he-20--1--img-txIN%7ctxTI-%d7%90%d7%9c%d7%9e%d7%95%d7%96%d7%9c%d7%99%d7%a0%d7%95%3a+%d7%a7%d7%a8%d7%9f+%d7%94%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹⁰⁹⁵ Moti Netzer, *Strike Funds and Opposition*, (Management, August 1998), p. 28.

¹⁰⁹⁶ Unknown author: *The Histadrut will operate the strike fund for social workers*, (The Histadrut, 21/07/2020), at the link: https://www.histadrut.org.il/%d7%97%D7%93%D7%A9%D7%95%D7%AA_%d7%94%D7%94%D7%A1%D7%AA%D7%93%D7%A8%D7%95%D7%A17194290/%d7%94%D7%94%D7%A1%D7%AA%D7%93%D7%A8%D7%95%D7%AA_%d7%AA%D7%A4%D7%A2%D7%99%D7%9C_%d7%90%D7%AA_%d7%A7%D7%A8%D7%9F_%d7%94%D7%A9%D7%91%D7%99%D7%AA%D7%94_%d7%9C%D7%9E%D7%A2%D7%9F_%d7%94%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D_%d7%94%D7%A1%D7%95%D7%A6%D7%99%D7%90%D7%9C%D7%99%D7%99%D7%9D

¹⁰⁹⁷ Haim Bior, *The Histadrut bends the rules of the strike fund: Migdal workers will receive their full wages*, (The Marker, 29/01/2014), at the link: <https://www.themarker.com/career/1.2230218> Accessed: 18/08/2021.

¹⁰⁹⁸ Moti Netzer, *Strike Funds and Opposition*, (Management, August 1998), p. 28.

The association's bylaws stipulate, inter alia, that the association "shall establish a loan fund and/or scholarships for the purpose of granting loans on favorable financing terms to members of the National Workers' Union [...] serve as a strike fund for the members of the National Workers' Union". Since the Alum fund was registered as an association, it is subject to the obligation under the Associations Law¹⁰⁹⁹ to submit an annual report and a financial report on its activities. Alum does not employ an accountant, treasurer or salaried workers. Its financial resources, for 2020, were ILS 643,674 (which came from the National Workers' Union budget and loan treatment fees for members of the National Workers' Union), and these joined the financial reserve, which stood at ILS 2,849,230 at the end of the year. In this year, the National Workers' Union's expenses in favour of a strike amounted to ILS 1,000 in total.

13.5.2 The Courts' Attitude to Strike Funds

The preoccupation with the workers' unions' strike funds came up for discussion only a few times in the rulings of the various courts. But even from the small number of cases discussed within the walls of the court, one can learn quite a bit about the perception of the strike fund, its importance and responsibility in the eyes of the courts.

In the **Amit** case, the High Court referred, inter alia, to the power of the workers' union as a derivative of its economic power, on which the strike fund also depends: "The achievements of a workers' union are the result of the union's power, and the power of the union depends, in many cases, on the number of its members, the degree of trust and loyalty that prevails among them, and its financial condition. Therefore, it is only natural that the union should do its best to strengthen these foundations" (from Y. Zamir and P. Raday, *On the Right Not to Join a Workers' Union* [50], p. 291). Of the indices mentioned, the number of members in the union is the main touchstone for examining the strength of the union. This index has an independent status, and it reflects on the economic strength of the union, since "the funds needed by the union – to employ the mechanism, for the strike fund, to provide services to its members – come mainly from membership fees. Adding members, therefore, means adding income" (ibid [50], p. 292)".¹¹⁰⁰

In the **MetroDan** case, the company's management claimed that while it was suffering from real economic damage – since it was prevented from operating the service it provided, no parallel economic pressure was exerted on the striking workers. This is because these workers benefit during the strike period from their income from alternative work and money received through the strike fund of the workers' union. The court rejected the claims of the company's management, noting that the relationship between the Histadrut and the striking company's workers, including the rights of those workers to payments from the strike fund, is not a matter for the petitioner. Therefore, we do not consider it appropriate to address the petitioner's claims regarding funds received by the striking workers, who are actually working, from the strike fund – illegally".¹¹⁰¹

In the **Shitrit v. Arison** case, the District Court recognised the personal interest of Histadrut members in strengthening the economic status of the Histadrut so that it could increase the financial scope of its funds, such as the strike fund, thus enabling it to more effectively and efficiently protect the rights of workers-members, a purpose for which it is committed towards its members. The court noted that "this interest, as members of the Ottoman association called the Histadrut, is not insignificant and is not negligible. It has an economic and proprietary nature and is worthy of protection, in appropriate and

¹⁰⁹⁹ Associations Law, 5740-1980.

¹¹⁰⁰ HCJ 7029/95 The New General Workers' Union v. The National Labour Court et al.

¹¹⁰¹ Various Civil Applications 2816/04 MetroDan Be'er Sheva v. The New General Workers' Union of the Negev Region et al. (Dated 22.03.2005), clause 9 of the court's decision.

worthy cases, no less than the interests and proprietary rights that a shareholder in a company or a member of a cooperative association has”.¹¹⁰²

In the case of **Rabinowitz and Ben-Ari v. Sela**, a lawsuit was clarified for the destruction caused to a number of buildings that began construction. The destroyers were brought to the site by the Rehovot Workers’ Council, which is the local branch of the Histadrut. The District Court ruled that two secretaries of the Rehovot construction workers’ association (Rabinowitz and Ben-Ari) in fact bear personal responsibility, while the Histadrut bears vicarious responsibility for their actions. The court placed the responsibility on the shoulders of the Histadrut because after the event, the strike fund paid the workers’ transportation fees to the place of destruction. An appeal was therefore lodged with the High Court, which ruled: “The Histadrut’s central strike fund bears all expenses incurred in connection with strikes lawfully declared under the Histadrut constitution and pays strike fees to striking and locked out workers. There is no doubt that from a Histadrut point of view, the strike was declared lawfully and the strike fund had to bear its costs. Is it possible to say that due to such support, the Histadrut accepts liability for damages for everything that is done in connection with its members; strikes? It is clear to me that it is not”.¹¹⁰³

To summarise these cases, we learned that the court sees the power of the workers’ union also through economic glasses and in its ability to maintain a strike fund, as presented in the Amit case. The MetroDan case and the Shitrit v. Arison case teach us that the strike fund is not a matter for the employer, but it is certainly recognised as a personal interest of the workers. From the Rabinowitz and Ben-Ari v. Sela case we can learn that even when the union supports the illegal actions of strikers through the strike fund, this will not be an acknowledgment of their responsibility for the damages caused as a result of the financial support.

13.5.3 Interim Summary

From the above, the question arises as to whether the workers’ strike fund helps workers’ representatives and employers’ representatives to reach a faster end to the strike or to the lockout. Or does the use of the strike fund mechanism make striking workers more militant and cause them to fortify their positions, and as a result – does it have to exert heavier pressure on the employer? – and in other words: Is it an insurance fund or a battering ram?

It seems to me that opinions – at least those of the interviewees I spoke to¹¹⁰⁴ – are divided. As I reviewed, the data obtained from the strike fund are partial and missing. To date, no research has been conducted on the subject – descriptive or empirical, and this is probably due to the lack of a database. Therefore, hypotheses on the subject cannot be confirmed or refuted. At the same time, it must be taken into account that the compensation given by the strike fund (as well as the mutual fund of the employers) is only partial compensation, and as such it does not fully prevent the direct damages of the parties. Therefore, it can be assumed on the one hand, that the parties will try to end the conflict as quickly as possible. On the other hand, it can be assumed that when the strike or lockout breaks out against the background of an unsettled labour relationship and both parties see negotiation as a zero-sum game, the compensation they will receive from the funds will allow them to hold out longer, harden their positions and extend the strike or lockout.¹¹⁰⁵ Hence, the answer to these questions is more complex. And yet, there

¹¹⁰² Civil Case (Tel Aviv) 11745/00 Shitrit v. Arison Investments Ltd., ruling 5762 (1) 110.

¹¹⁰³ Civil Appeal 277/55 A. Rabinowitz et al. and the Histadrut v. Sela Ltd. et al.

¹¹⁰⁴ Between 17-18/8/2021, the author spoke with officials in the Histadrut and in the organisation Power to Workers. All parties asked to remain anonymous.

¹¹⁰⁵ Amnon Caspi Ruth Kastiel, *Labour Relations*, (The Open University, 2005), p. 270.

is no doubt that the very existence of the fund weighs against the positions of employers during strikes and labour disputes. For example, the chairman of the Histadrut, Avi Nissenkorn, announced the establishment of a strike fund for the benefit of McDonald's employees,¹¹⁰⁶ following a wage increase for employees initiated unilaterally by the company and during a professional struggle they took. In the struggle of the crane operators, the Histadrut also decided to operate a strike fund "in order to give a boost to their struggle and facilitate their preparation".¹¹⁰⁷

13.6 Enforcing a Strike

In order to carry out a strike, cooperation is required between the worker and the workers' union. This cooperation is a result of the fact that the strike is a complex and integrated operation, in which roles are assigned to both the worker as an individual and to the workers' union.

The roles that need to be fulfilled in a strike are divided by Ben-Israel in two: First, the decision to strike also includes declaration of the strike. Second, execution of the actual strike so that it will create pressure on the employer to meet the demands raised in the strike. In the State of Israel (and as we have learned, in most countries of the world, with the exception of France),¹¹⁰⁸ the workers' union is responsible for making the decision to hold a strike and declaring it, and the worker is responsible for performing the task of carrying out the actual strike. According to this division of roles, the leading role is that of the decision maker, since without it the strike will not start, and the secondary role is that of the worker as the one who implements the decision and strikes in practice. Admittedly, the worker's role is secondary in terms of the order of things, but it is paramount in its importance, since as long as the worker does not actually strike, a strike is not possible.¹¹⁰⁹ However, Ben-Israel does not refer in her remarks to the fact that even during the strike, the workers' union continues to be involved. They must mobilise the workers for the strike, explain its goals to them and continue to instil a *fighting spirit* in them. In addition, they must be alert to strike violators and implement a strategy that will reduce the strike violation. Hence, implementation of the strike by the worker as an individual, as stated, is not sufficient and does not guarantee the effectiveness of the strike. In order for the strike to bear fruit, in other words – to be effective, coordination between the striking workers is also required. What does this mean?

In the **Khatib** case, which was quoted many times in the ruling, a strike was defined as "a coordinated pressure action taken by a group of workers in the workers' professional struggle with an employer to obtain demands regarding their working conditions, or regarding demands of other workers presented to their employer" (emphases not in original).¹¹¹⁰ The obvious conclusion from these remarks is that in order for the actions taken as part of the strike to take place, coordination between the workers is required. Without this coordination – a strike is not possible (since a strike is a collective and not an individual action). Coordination is a consequence of understanding the goals of the professional struggle, believing in the justice of the struggle and solidarity between the workers. This is not an exhaustive list and it is

¹¹⁰⁶ Miki Peled: *Pending strike at McDonald's? The Histadrut will establish a compensation fund for employees*, (Calcalist, 15/07/2014), at the link: <https://www.calcalist.co.il/local/articles/0,7340,L-3636175,00.html> Accessed: 18/08/2021.

¹¹⁰⁷ Unknown author: *The struggle of the crane operators is stepping up a gear: a one-day warning strike and a nationwide protest rally*, (New Histadrut website, 21/07/2017), at the link: https://www.histadrut.org.il/%D7%97%D7%93%D7%A9%D7%95%D7%AA_%D7%94%D7%94%D7%A1%D7%AA%D7%93%D7%A8%D7%95%D7%A/2961/%D7%9E%D7%90%D7%91%D7%A7_%D7%94%D7%9E%D7%A0%D7%95%D7%A4%D7%90%D7%99%D7%9D_%D7%9E%D7%A2%D7%9C%D7%94_%D7%94%D7%99%D7%9C%D7%95%D7%9A%3A_%D7%A9%D7%91%D7%99%D7%AA%D7%AA_%D7%90%D7%96%D7%94%D7%A8%D7%94_%D7%91%D7%AA_%D7%99%D7%95%D7%9D_%D7%90%D7%97%D7%93_%D7%95%D7%9B%D7%99%D7%A0%D7%95%D7%A1_%D7%9E%D7%97%D7%90%D7%94_%D7%90%D7%A8%D7%A6%D7%99 Accessed: 18/08/2021.

¹¹⁰⁸ See Chapter 2.

¹¹⁰⁹ Ruth Ben Israel, *Strike and Lockout in the Mirror of Democracy*, (The Open University, 2003), p. 81.

¹¹¹⁰ HCJ 525/84 Nabil Khatib et al. v. The National Labour Court et al., ruling 40 (1) 673, 701.

certainly possible to think of other factors that result in the *coordination* necessary between the workers for the purpose of carrying out the strike.

The coordination between workers during a strike is not always complete and perfect. Not all workers are always ready to mobilise for the strike. Sometimes considerations of livelihood, comfort and being sufficiently satisfied with existing conditions, lack of understanding of the goals of the struggle, fear of the employer's retaliation or lack of faith in the workers' leadership or power may lead on the one hand, to workers violating a strike and on the other hand, to the enforcement of a strike by the strikers and their leaders.

In this subchapter I will examine – what is the attitude of the court towards strike violators? And how do labour unions and workers participating in the strike handle a strike violation?

13.6.1 Attitude of the Law to Strike Violators

We have learned that when an employee takes part in a strike, he stops his work, or is required to disrupt it. By participating in the strike, the worker does not fulfil the employment contract that he made with his employer, even temporarily, because this contract is suspended for the period of the strike.¹¹¹¹ Non-compliance with the obligations which the worker owes in the employment contract, at the time of the strike does not allow the employer to sue for breach of employment contract, as stated, in clause 62B of the Torts Ordinance “[...] strike and lockout will not be considered breach of contract”. Clause 19 of the Collective Agreements Law is also relevant to the discussion. This clause, which has also been discussed, states that “provisions in a collective agreement regarding working conditions, termination of employment, and personal obligations imposed under those provisions on a worker and employer and rights conferred on them (hereinafter – personal provisions), shall be regarded as an employment contract between any employer and any worker to whom the agreement applies, and shall be valid even after expiration of the collective agreement, as long as they have not been lawfully amended or revoked; Participating in a strike will not be considered a personal breach of duty”. Hence, participation in a strike is not considered a breach of employment contract and is not a breach of personal duty.

The very participation in a strike may have short-term consequences – on the worker's salary. In the long run – on the relationship between the worker and his employer and his professional future. Although the prohibition on harming a worker taking part in a strike is not directly stipulated in the law, it is subject to suspension, for example, in clause 33J of the Collective Agreements Law, which prohibits dismissal, worsening conditions and avoiding hiring a person due to his being a member of / active in a workers' union workers' committee. Although this clause does not provide for direct protection of a worker participating in a strike, the purposive interpretation will require that this clause be regarded as protecting the right to strike, which is a subsidiary right of the right to organise. The Equal Employment Opportunity Law¹¹¹² also does not directly stipulate prohibition of discriminating against workers due to their membership in a workers' union or due to their participation in a strike, but clause 2B of the law, *the basket* clause, also sees “the determination of conditions that are not of the kind in question as discrimination”, and as such can be seen as protecting strike participants.

So far – on the legislature's attitude to strike participants. How do the legislature and the Labour Court treat strike violators? Does a worker's refusal to take part in a strike enjoy constitutional protection, and if so, what is its scope?

¹¹¹¹ On the doctrine of the suspension of the employment contract – see Chapter 4.

¹¹¹² Equal Employment Opportunity Law, 5748-1988.

It is common to see the human right to strike as a two-dimensional right that includes a positive dimension and a negative dimension. The positive aspect of the right to strike is expressed in the worker's right to participate in the strike. In Israel, the positive dimension applies to all workers (whether they are members of a competing workers' union or are not members in any workers' union) and not just workers who are members of the workers' union. The negative aspect of the right to strike seeks to examine whether the workers employed in the workplace where the strike was declared have the right not to participate in the strike.¹¹¹³ There are countries that have explicitly guaranteed both aspects of the right to strike in legislation. This is the situation, for example, in the United States, which has recognised the law on both the positive and negative sides of the right to strike.¹¹¹⁴ In the United Kingdom, the law¹¹¹⁵ stipulates that a trade union may not take disciplinary action against a union member who refuses to participate in a strike, including his removal from the union, imposition of a fine denial of services provided by the union to its members.

In Israel, the question of participation in a strike has been recognised by the courts and therefore, it can be stated that the positive aspect of the right to strike has been given a place of honor and protection, as Haim Cohen, High Court Judge, aptly described, in stating that the strike is "a tradition so sacred that one is no longer allowed to reflect on it".¹¹¹⁶

On the other hand, the negative aspect of the right to strike has been unclear for years. In the **Zim** case, the National Labour Court recognised, for the first time, the right of a worker not to join the workers' union: "We learn that a workers' union is obligated to represent the public of workers under its authority in fairness, good faith and loyalty. A workers' union which, in a collective agreement, restricts the freedom of occupation of some of the workers to whom the agreement applies, with the irrelevant preference of others, violates the fiduciary duty it owes to workers whose working conditions it determines together with the employer".¹¹¹⁷ And from these words a propaganda arose, by way of analogy, that the court would also recognise the negative aspect of the right to strike.

In the case of **United Mizrahi Bank workers' union**, representatives of the workers' union came to the bank to talk to the workers who violated the strike. Security personnel, on the instructions of the bank's management, prevented the union's representatives from entering the bank. When the matter came before the Regional Labour Court, the Bank's management argued that the application of clause 33.8 of the Collective Agreements Law ("an employer shall not prevent a representative of a workers' union from entering a workplace where a worker is employed, for the purpose of promoting the right as stated in clause 33.8 and for the purpose of promoting workers' affairs, taking into account the needs of work and the privacy of the individual"), does not refer to a situation of strike, because in a workplace where a strike occurs, the goal was achieved, which is to preserve freedom of association. In these circumstances, there is no justification for the serious violation of the employer's property right. In addition, the right to enter the workplace exists taking into account *work needs*. When there is a strike there are no *work needs*. Since the worker is an *authorised person* or *invited*, if a strike breaks out, the worker loses the right to stay on the premises, not to mention the representatives of the workers' union. The workers' union responded that during a strike when a public worker decides not to respond to his representative's call and decides to work, the union's representatives have the right to enter the workplace and talk to the workers

¹¹¹³ Ruth Ben Israel, *Strike and Lockout in the Mirror of Democracy*, (The Open University, 2003), pp. 123-124.

¹¹¹⁴ Clause 7 of the National Labour Relations Law.

¹¹¹⁵ The Employment Act of 1988.

¹¹¹⁶ CA 25/71 Feinstein et al. v. Organisation of Upper Primary Schools, ruling 25 (1) 129, 131

¹¹¹⁷ Labour Court Hearing 52 / 12 - 4 The General Histadrut of Workers in Israel – Zim – The Israeli Sailing Company Ltd.

in order to try and persuade them peacefully to stop working. According to the workers' union, this is a *captive audience* that draws information only from the employer and therefore, the workers' union has the right to explain to that audience what the point of the strike is and the point of organising.

In its ruling, the court sought to distinguish between a place where a strike takes place in which all workers participate and a strike in which some of the workers continue to work and do not respond to the decision of the representative organisation to strike. Where there is a full strike and no one is working, the union representative will not have the right to enter the workplace for the simple reason that there is no workplace "where a worker is employed" as stated in clause 33.9. On the other hand, where a strike of some of the workers takes place while another continues their work, there are employed workers and entry of the union representative to the workplace is allowed to promote the union, including the right to strike and promote workers' affairs. The court explained that the provision in clause 33.9 is a practical expression of the exercise of the right to organise, and that the legislature found it appropriate and fitting to open the door of the workplace to the union's representative in order to promote freedom of association. This door should not be closed to him during a strike. The court further ruled that "it is clear that the union has an interest in convincing the worker who did not join the strike to change his mind. This attempt at persuasion should be made peacefully and by means that do not involve any violence, neither physical nor verbal. The union and its representatives are not allowed to threaten the worker or act by means that have aspects of intimidation and personal pressure".¹¹¹⁸

Similar things were said by the Labour Court in the case of **CLP Industries Ltd.** when the court ruled: "Just as the employer must not harm the striking worker, so in our position, the [worker's, me: A.M.] union must not harm the worker who opposes the strike. When the worker is given the freedom of choice, the union is not allowed to enforce the strike on a worker, when he is not interested. And although the union may order its members to strike from work, this does not mean that all barriers have been removed. As can be seen from the evidence presented to us, in writing, in photos and videos, it cannot be said that the union respected the right of the workers who chose not to strike. A union that carries the protection of workers on its banner, must be careful not to trample on the workers who are not among its members".¹¹¹⁹

This ruling of the Labour Court in the case of CLP Industries Ltd. was not at the heart of the ruling (which revolved around the question of how long the recognition of representation should be seen as valid and when there is room for re-examination). At the same time, the question of recognising the negative aspect of the right to strike has not been discussed in depth in Israeli case law, with the exception of what is stated in these two cases, so it should not be ignored. The rulings of the court must be examined within the Basic Law: Freedom of Occupation, which states that: "Every citizen or resident of the country has the right to engage in any work, profession or occupation".¹¹²⁰ With the enactment of the Basic Law: Freedom of Occupation, this basic right was granted constitutional recognition. It was granted legal status, and has become a protected fundamental right that stands at a higher normative level than *ordinary* legislation.¹¹²¹ According to Aharon Barak, freedom of occupation is also the freedom to act without interruption by other individuals or by the government. At its core, freedom of occupation is a *protective* right, designed to guarantee an individual a sphere of life without the intervention of others.¹¹²² From all

¹¹¹⁸ Collective Dispute (Tel Aviv) 154/05 Organisation of United Mizrahi Bank Employees Ltd. v. United Mizrahi Bank Ltd.

¹¹¹⁹ Collective Dispute (Be'er Sheva) 27328-05-14 Power to the Workers – Democratic Workers' Union v. CLP Industries Ltd.

¹¹²⁰ Clause 3 of the Basic Law: Freedom of Occupation.

¹¹²¹ Aharon Barak, *The Constitutional Revolution: Protected Basic Rights*, (Law and Government A, 5752-1991), p. 21.

¹¹²² Aharon Barak, *Interpretation in Law – Constitutional Interpretation*, Vol. III, (Nevo, 2004), p. 597.

of the above, it is clear that strike violators have the rights to work without anyone interrupting or interfering with their work.

It is also interesting to recall other laws in which the legislature gave its opinion on the employment of striking workers.

Clause 44 of the Employment Service Law,¹¹²³ called Non-Intervention in Strikes and Disruptions, provides: “The Employment Service Bureau shall not send workers to a workplace where there is a strike or lockout and shall not send striking workers to work, all the time of the strike or lockout. An employer who has employed striking or locked out workers, and workers who worked in a factory that has a strike or lockout, will not be prosecuted for it”.

Clause 37B (c) of the Labour Disputes Settlement Law allows employment bureaus to send workers to a workplace where there is an unprotected strike:¹¹²⁴ “An unprotected strike does not constitute a strike in the matter of the second paragraph of clause 44 of the Employment Service Law, 5719-1959, regarding sending workers to a workplace where a strike is taking place; However, a job seeker who has been offered a job by an employment bureau in a workplace where there is an unprotected strike and as a result he refused to accept said work, his rights under the regulations established by virtue of clause 41 of the said law will not be violated”. This clause, on the one hand, does not recognise an unprotected strike as a strike under the Employment Service Law, and therefore allows employment bureaus to send workers to public-sector enterprises where there is an unprotected strike. There is a kind of covert *encouragement* to violate the strike and an attempt to strengthen the negative aspect of the unprotected right to strike. On the other hand, this clause protects the right of a worker who refuses a job offer to work where there is an unprotected strike. In doing so, the clause also ensures the positive aspect of the job seeker’s right to strike.

13.6.2 How Worker Unions Handle Strike Violations

The issue of strike, its violation and enforcement has occupied the Jewish community and its livelihood since the beginning of the Zionist period, and has been one of the rocks of controversy between the Zionist Organisation movement and the Revisionist movement. The first strike in the Land of Israel can be attributed to the labour dispute that broke out at the Frumin biscuit factory in Jerusalem. The Jerusalem Workers’ Council demanded that the factory owner, Frumin, employ workers only through the Histadrut’s Labour Bureau, but the employer rejected the demand and hired workers who were identified as Beitar activists. In retaliation, the Histadrut declared a strike on October 7, 1932, which lasted, on and off, for four consecutive months. During the strike, Frumin reached an agreement with the workers’ union of the Revisionist Zionist Alliance and Beitar, in which it was agreed that 20 of them would start working in the factory, instead of the striking workers. In return, Frumin undertook to continue employing at least ten of them even after the end of the strike. The Histadrut saw this step as a strike break, and from there things escalated into an exchange of blows (in which 12 people were injured), a call by the Histadrut to boycott the factory’s products, and a counter-call by the Revisionist Zionist Alliance and Beitar to buy the factory’s products. In February 1933, an agreement was signed that put an end to the strike, which stipulated that twenty percent of all factory workers would be hired not through the Histadrut Employment Bureau.¹¹²⁵ During the strike, Jabotinsky published his famous article: “Yes, break!”, in

¹¹²³ Employment Service Law, 5719-1959.

¹¹²⁴ On unprotected strikes – see Chapter 5: *Types of Strike*.

¹¹²⁵ Yair Shalem (ed.), *The National Workers’ Union – Back to our Roots*, (published by the National Workers’ Union, 2016), pp. 26-27.

which he voiced his attitude to the strike and described it as one that does not conform to the Zionist idea: “As to the fact that our national interests in Israel do not rise at the same time as the class war, and especially with strikes, ninety percent of all those who read these lines agree, although I do not know what their party affiliation is”.¹¹²⁶

Here, then, among the leaders of the Jewish community there were ideological disagreements in their attitude to the strike and the duty to obey it, as early as a hundred years ago. Expressions of compliance have ranged, over the years, from verbal violence to physical violence, from condemnation¹¹²⁷ to shifts to prevent strike violation, as newspaper archives tell us. For example, in a strike that broke out in the Tel Aviv municipality in 1955, the strikers forcibly removed workers who came to work in the offices in a hand-to-hand brawl.¹¹²⁸ And in Esther quarries in 1967, workers attacked their comrades for violating a strike, and the press reported two wounded and the arrest of 14 workers by the police.¹¹²⁹ In 1970, the employees of Assaf Harofeh Hospital published an opinion in which they condemned the violators of the strike by their colleagues at Tel HaShomer Hospital: “We were amazed to hear about the violation of the strike by 40 nurses in the operating rooms of Tel HaShomer hospital, precisely in those moments when unity is required for our struggle”.¹¹³⁰ Nine years later, in 1979, the Workers’ Council in Ashdod tried to prevent new workers from entering Tribunal medicinal products factory by placing a picket line.¹¹³¹

There is no doubt that violating a strike brings with it hard feelings on the part of the striking workers, as can be learned from the testimony of Yafit Yitzhak, who took part in the strike that took place at the Open University in 2009: “One of the biggest frustrations of the strike keepers and its enforcers was the knowledge that the strike breakers would win twice, once when the strike broke and they continued to receive their wages, and a second time when their wages and status would be improved under the new wage agreement. For me, this behaviour of the strike breakers was particularly frustrating and outrageous, as I saw the hard work, voluntarily and out of complete faith, of the members of the negotiating team on behalf of all the faculty members. The strike breakers did not understand that breaking the strike was to *cut off the branch on which they were sitting*, because their actions weaken their co-workers during negotiations”.¹¹³² This perception does not see strike enforcement as *bullying*,¹¹³³ but rather an attempt to

¹¹²⁶ The article was originally published in Yiddish, on 04/11/1932, in the Polish daily Hynet. Translation of the article into Hebrew at the link: https://www.infocenters.co.il/jabo/jabo_multimedia/articles/hebrew/1932_28.pdf

¹¹²⁷ Condemnation of a strike is not unique to Israel. Already during the Industrial Revolution and especially in the 19th century, strike breakers were perceived as traitors because they sabotaged the chances of all workers to reach fairer living conditions. They earned nicknames (scab / blackleg / knobstick) that compared them to *black people* or *sick people*.

¹¹²⁸ M. Shmaryahu: Strikers from Tel Aviv municipality forcibly evicted workers who came to the offices, (Ma’ariv, 27/12/1955), at the link: <https://www.nli.org.il/he/newspapers/mar/1955/12/27/01/article/1/?srpos=156&e=-----he-20--141--img-txIN%7ctxTI-%d7%94%d7%a4%d7%a8%d7%aa+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>.

¹¹²⁹ Unknown author, Workers attack their friends for violating a strike (Ma’ariv, 07/12/1967), at the link: <https://www.nli.org.il/he/newspapers/mar/1967/12/07/01/article/29/?srpos=3&e=-----he-20--1--img-txIN%7ctxTI-%d7%94%d7%a4%d7%a8%d7%aa+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹¹³⁰ Unknown author, Employees of Assaf Harofeh condemn strike breakers at Tel HaShomer, (Davar, 10/07/1970), at the link: <https://www.nli.org.il/he/newspapers/dav/1970/07/10/01/article/52/?srpos=186&e=-----he-20--181--img-txIN%7ctxTI-%d7%94%d7%a4%d7%a8%d7%aa+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹¹³¹ Unknown author: Picketing for a strike violation at Tribunal in Ashdod, (Davar, 20/05/1979), at the link: <https://www.nli.org.il/ar/newspapers/dav/1979/05/20/01/?e=-----ar-20--1--img-txIN%7ctxTI-----1>

¹¹³² Yafit Yitzhak: *From Deprivation to Correction: The Struggle for the Establishment of Collective Labour Relations at the Open University – An Inside Look*, in: *Offensive Employment – Systematic Exclusion and Exploitation in the Labour Market*, edited by Daniel Mishori and Anat Maor, (Socio-Economic College and Achva Publishing, 2012), p. 287.

¹¹³³ Ido Cohen: *Breaking a strike is a privilege we do not have*, (TimeOut, 17/10/2018), at the link: <https://timeout.co.il/%D7%9C%D7%A9%D7%91%D7%95%D7%A8-%D7%A9%D7%91%D7%99%D7%AA%D7%94-%D7%94%D7%99%D7%90-%D7%A4%D7%A8%D7%99%D7%91%D7%9C%D7%99%D7%92%D7%99%D7%94-%D7%A9%D7%90%D7%99%D7%9F-%D7%9C%D7%A0%D7%95>

deal with *hitchhikers* or freeloaders who benefit from the fruits of the strike, without participating in its cost. This idea may be in line with the laws of making wealth but not in law. Friedman explains that in most cases, where a question of making a fortune arises, there is a loss of one corresponding to the profit of the other.¹¹³⁴ This is essentially similar to the loss of wages of the strikers, compared to the profit from the fruits of the strike and the wages at the end of the strike which the violators enjoy.

On the other hand, the striker violators explain that the sweeping ban on violating a strike is an anti-democratic norm, which demands unconditional obedience from the individual to the whims and interests of a small group of people and deprives them of their independent discretion.¹¹³⁵ To these arguments must be added the fact that going on strike involves a loss of wages, risking the relationship with the employer, *marking* the striking worker as doing the work of the workers' union and the fear that a future employment opportunity will not materialise. According to Sheldon Leader, the rationale for refusing to strike can be explained by four reasons. The first, *the lapse of time*: a decision to go on strike was right at the time, and it will not be the same at the time of execution. The second, *unexpected distress claim*: a strike inevitably carries the potential for loss of livelihood and harm to the worker and his family. Third, *competing loyalty claim*: The need to be sensitive to other competing loyalties that a union member may feel, which may cause him to refuse to comply with the union's directive to strike. Fourth, the *risk claim*: workers should have the right to judge for themselves whether they will be at risk as a result of participating in a strike.¹¹³⁶

Workers' unions also have had to give their opinion on strike violators and the proper way to deal with them.¹¹³⁷ Thus, among the principles of the National Workers' Union, it is stated that "the National Workers' Union considers the domination of the principle of arbitration a national obligation in all labour relations in the Hebrew economy, and establishment of neutral labour bureaus the only ways to create a normal relationship between Hebrew work providers and recipients in Israel and development of the Hebrew economy in Israel". Among researchers, it is common to see this principle as negating the need to take a strike as a means of pressure to achieve goals in the field of labour relations, and hence there is also no need to address a strike violation. Support for this can be found in the words of Joshua Ophir: "In the past, when there were disagreements between workers and employers in wage matters, the National Workers' Union took into account not only the narrow interests of the workers in one industry or another in the economy, but first and foremost gave its opinion to the general national interest. The National Workers' Union did not always jump on the waves of workers' demands, and there have been cases in the past in which the workers' unions demanded [...] wage increases and the National Workers' Union did not join these demands. On the contrary, they explained why the employers could not meet the workers' demands, and stood with the employers".¹¹³⁸

Compared to the National Workers' Union, the regulations of Power to the Workers expropriated certain decisions of the elected representatives (the assembly of representatives) which passed directly to the

¹¹³⁴ Daniel Friedman, Elkan Shapira Bar-Or, *Law of Making Wealth but Not in Law*, (Nevo, 2015), p. 102.

¹¹³⁵ Vered Noam: *Why, in fact, is it forbidden to violate a strike?* (Echoes 165, January 1993), p. 32.

¹¹³⁶ S. leader, *The European Convention on Human Rights, The Employment Act of 1988 and the Right to Refuse to Strike*, 20 Ind L.J (1991) pp. 35 – 59.

¹¹³⁷ For example, in 1983, the newspaper Davar reported that the Histadrut was considering sanctions against public sector striker violators during the wage struggle. See: Yosef Golan, *Sanctions against Strike Breakers*, Davar, 20/01/1983), at the link: <https://www.nli.org.il/he/newspapers/davar/1983/01/20/01/article/20/?srpos=121&e=-----he-20--121--img-txIN%7ctxTI-%d7%94%d7%a4%d7%a8%d7%aa+%d7%a9%d7%91%d7%99%d7%aa%d7%94-----1>

¹¹³⁸ Yehoshua Ofir, *Sefer HaOved HaLeumi – Part Two: The Years of the State*, (Published by Histadrut HaOvdim, 1987), p. 97.

decision of the members of the organisation – inter alia, the decisions to go on strike and stop a strike. The regulations stipulate that both the union's leadership and the assembly of representatives may declare, individually, a labour dispute and strike action to the extent and duration they deem appropriate. With regard to the cessation of the strike, the regulations distinguish between a strike of up to 48 hours and a strike longer than that. A strike that has been decided in advance to last less than 48 hours may be stopped by the body that decided on it. A strike decided in advance to last more than 48 hours or decided to take place indefinitely will be terminated only after a decision by a majority of votes, in which every member of the union and anyone who submitted a request to join the union during the strike and paid a one-year membership fee and participates in the strike can participate.¹¹³⁹

Eshet likens this situation to the occurrence of things in the Agora in the Greek polis, because it reduced the mandate given to the workers' representation.¹¹⁴⁰ On the other hand, by transferring the decision regarding going on strike or stopping it to all workers, worker participation in the decision-making process is extended as well as the possibility of exchanging ideas, convincing and being convinced of the necessity of the strike and its importance. Opponents of the strike, like its supporters, are given a platform to voice their support or reservations. A worker who does not make his arguments against the expected strike – will find it difficult to categorise against it later. And a worker who is discriminated against in persuading his colleagues to vote against it – he has already presented his arguments, which were rejected by the majority.

Regulations of the organisation Ma'an stipulate that declaration of an indefinite strike requires the approval of the national committee and a staff meeting to which all members of the association affected by the conflict will be invited, or alternatively, workers' approval in WhatsApp or by e-mail. Stopping a strike will be decided in two stages: in the first stage, consent of the national committee is required, and in the second stage, a meeting will be convened to which all members of the association concerned will be invited, who will approve or reject the decision by a simple majority of those present at the meeting. Such approval can also be obtained in a situation where a majority of employees who have responded to WhatsApp or e-mail messages have been obtained.¹¹⁴¹

The Histadrut's Workers' Committees Regulations stipulate that the right to vote and be elected to a workers' committee will be denied, subject to the approval of the Election Committee, by a person determined by the trade union to have broken a strike during the past term.¹¹⁴² In the Eini case, a committee member was accused of violating a strike, and the Histadrut's disciplinary committee approved a decision by the regional trade union to prevent him from participating in the workers' committee elections. The National Labour Court reviewing the issue, reversed the decision of the Regional Court and ruled that the ruling of the Regional Court was given in the absence of jurisdiction, since it was a matter to be clarified in the jurisdiction of the Histadrut. The National Court further ruled that there is no dispute that the right to choose and be elected to a workers' union is a right derived from the constitutional right to freedom of association.¹¹⁴³ In Savorai and Basha's view, the right to elect and be elected to the Workers' Committee is a tiny model of the aforesaid right in broader democratic systems,

¹¹³⁹ See Appendix *Strike Procedures and Labour Conflict as Approved at the December 2008 General Assembly* to the Power to the Workers – Democratic Workers' Union regulations.

¹¹⁴⁰ See fn. 62 to Ido Eshet's article, *The Model of Representation in Collective Labour Law – New Trends* (Mishpatim 46, July 2017).

¹¹⁴¹ Clauses 5-6 to Ma'an Workers' Union's Regulations.

¹¹⁴² Clause 8 (11) of Article B in Chapter 1 of the Histadrut's Workers' Committees Regulations.

¹¹⁴³ Labour Dispute 7882-11-12 Ofer Eini v. David Vazana.

including in the modern state itself. Just as in a country the right to vote and to be elected is broad and there are few restrictions on it, so too is the right to vote and be elected in workers' committees.¹¹⁴⁴

The ways in which workers' unions deal with the phenomenon of breaches of strikes differ, therefore, from one to another. These differences are reflected in the regulations of the workers' unions. This is the place to mention that International Labour Convention No. 87¹¹⁴⁵ stipulates the right of the workers' union to determine its regulations, subject to state law, and as long as this law does not contravene the right to freedom of association. The wording of regulations is not only a right, but also a duty, as in the **Amit** case, in which the High Court recognised the regulations of workers' unions and their necessity by stating that a workers' union "needs regulations that will determine the goals of the union, the institutions and the role of each institution, conditions for receiving members, the relationship between members and the union, and more".¹¹⁴⁶ Ben-Israel was also required to address the regulations of the workers' union and wrote that "the regulations confer rights and powers and impose obligations not only on the members of the union, but also on its institutions".¹¹⁴⁷

13.6.3 Interim Summary

The existence of a strike is conditional on both its declaration by the workers' union and its being carried out by the worker as an individual. In order for the employee to enlist in the professional struggle initiated by the workers' union, he must go through a *mental process* of recognising and understanding the goals of the struggle, be willing to pay with his wages and his relationship with the employer for his participation in the strike.

On the one hand, a workers' union seeking to strike in Israel should know that although the negative aspect of the right to strike has not been recognised in Israeli legislation, it has gained recognition in case law and the existing literature. On the negative side, a workers' union must not harm an employee who opposes a strike, it must not impose the strike on a worker and it must respect the right of the worker who wishes not to strike. On the other hand, violating the strike may erode the power of the workers' union and impair the chances of success of the professional struggle. Workers' unions have tried and are trying to prevent this. The ways in which workers' unions deal with strike violations and enforcement are different, but they do not change the fact that they must mobilise the worker to the struggle, and not force the struggle on him.

To me it seems that Francis Raday's remarks can shed light on the conflict between the collective seeking to secure the strike and the individual's desire not to take part in it: "When it comes to the freedom to organise, there is no room to defend freedom at the collective level (in the autonomy of workers' unions), to the point of thwarting freedom at the individual level (freedom of association of the individual worker). At the same time, it is not possible to give expression to individual freedom if one undermines the strength and efficiency of the workers' union – the freedom to unionise is realised through them. In finding the right balance between the branches of freedom of association, one must consider not only the legal and theoretical situation, but also the social and political reality, because the autonomy of workers'

¹¹⁴⁴ Moran Savorai and Amir Basha, *Workers' Committees Book – History, Theory and Practice of Workers' Unions and Workers' Committees*, (Nevo, 2019), pp. 96, 102.

¹¹⁴⁵ As discussed in Chapter 2 (*The Strike in International Law – Recognition by the International Labour Organization*).

¹¹⁴⁶ HCJ 7029/95 The New General Workers' Union v. The National Labour Court, Amit – Maccabi Workers' Union et al., ruling 51 (2) 63.

¹¹⁴⁷ Ruth Ben Israel, *Parties to a Collective Agreement*, (Studies in Law 12, 5747-1987), p. 54.

unions plays a very important role in the functioning of a free economy and in securing a democratic regime”.¹¹⁴⁸

13.7 Activating Exception Committees

One of the measures taken during strikes over the years by workers’ unions was the establishment of Exception Committees. These committees are set up during a strike, and their role is to discuss requests from strike victims who seek service from the strikers. The Exceptions Committee has the authority to waive the strike and determine that the applicant receive the service despite the strike.

The activities of these committees raise a number of questions that should be considered: Who are the members of the committees? What are the committees’ considerations? How does the Labour Court treat them and does its treatment of them affect its decision to approve or prevent the strike? Surprisingly, in the literature there is no reference to exception committees – although these have become common during strikes in the public sector. Hence, the answers to these questions can come, inter alia, from rulings of the labour courts and from articles in the media.

13.7.1 Examples of Exception Committees Discussed in Case Law

In the **Bank of Israel** case, the Labour Court partially granted the Bank’s management’s request to order the lifting of sanctions on Bank employees. The court ruled that, on the one hand, considerable importance should be attached to the full functioning of the executive departments of the Bank of Israel, as they are departments that supply oxygen to the financial system in the State of Israel. Hence, their workers must return to full-time work. On the other hand, the strike in the Foreign Currency Department and the Currency Department should not be prevented, provided that an exceptions committee is established “which will include the following representatives – a representative of management, a representative of the Histadrut and a representative on behalf of the workers who are well acquainted with the Foreign Exchange and Currency Department and the importance of their activities, who will deal with any request made by the department heads, to operate all or part of the departments, in order to carry out important and critical banking operations, such as the flow of cash from the applicant to the commercial banks”.¹¹⁴⁹

In the **IEC** case, IEC workers launched a general strike, against the background of the government’s intention to pass the Electricity Bill (Amendment No. 5) in an expedited legislative process in the Knesset. This strike was brought to the attention of the courts and finally, as part of a hearing held in the National Court, a partial ruling was given which stated that the workers were allowed to strike a protest strike and work in a *Shabbat format*, according to company practice. “In addition to IEC’s emergency centers, which operate in a *Saturday format*, there will be a joint exceptions committee for management and worker representatives. The exceptions committee will discuss public inquiries for work that deviates from the work performed in the *Shabbat format*”.¹¹⁵⁰

In the **Lawyers** case, the state petitioned the Regional Labour Court to order the Histadrut to allow a lawyer from the prosecutor’s office to appear for a request to extend the detention of his son Zisman, who was extradited from Romania after multiple efforts. The Histadrut, for its part, claimed that this was a legal strike that was lawfully declared on economic grounds, and that there was no justification for the court to intervene in it. It was further alleged that the lawyers had set up an exceptions committee for the

¹¹⁴⁸ Francis Raday, *Workers’ Unions – Privileges and Supervision*, (Studies in Law 9, 5743-5744 - 1984), p. 566.

¹¹⁴⁹ Collective Dispute (Jerusalem) 55/04 Bank of Israel v. Histadrut, clause 13 of the ruling.

¹¹⁵⁰ Request for leave to appeal (national) 196/07 The New General Union of Workers in Eretz Israel v. IEC Ltd.

purpose of examining applications in which the state requests a stay. In considering the application, the court took the fact that since the beginning of the strike they were dealing with only a second application submitted to the labour courts, which in the eyes of the court indicated that only when the State is of the opinion that this is an exceptional case, and its application for representation is rejected by the Exceptions Committee, does it apply to the court for relief. The court accepted the request in part, but chose to comment on the state's conduct, stating that "this state of affairs is improper and unfitting, and if the state intends to turn the court into an appeal against the decisions of the exceptions committee set up by the lawyers, then it is wrong".¹¹⁵¹

In the case of the **Medical Association**, the state petitioned to prohibit the association from taking organisational measures and to prevent it from taking a strike. The request was denied. The District Court ruled that an injunction should not be issued because the steps taken were reasonable and proportionate, including the fact that "the association also set up exception committees designed to respond to public inquiries, and the degree of response to requests and inquiries by the exception committees was very significant".¹¹⁵²

In the **National Insurance Lawyers' Strike** case, the Regional Labour Court ruled that a strike or taking organisational measures usually causes harm to the employer, and more than once to third parties. This fact in itself does not limit the right to strike. However, the fact that the National Insurance Institute is a social security institution, which by virtue of its role and the goals outlined for it, deals with the claims of weak and hard-working populations in need of the pensions provided by the institution, sometimes as much as oxygen. As stated, the freedom to strike, like any other freedom or right, is not absolute but relative, and must be balanced with other rights, considerations and interests. Naturally, the absence of lawyers for hearings, especially in the labour courts, where the insureds' claims are discussed, causes a delay in making decisions about their eligibility and status. Therefore, the court decided to reject the application for an injunction against the strike, subject to the establishment of an exceptions committee "to which the difficult cases requiring immediate treatment will be referred, such as the cessation of health insurance when urgent medical treatment is required, special cases in which an income support benefit is claimed, and the insured is left without any means of subsistence, and the like".¹¹⁵³

In the case of the **Nurses Union**, a request for the issuance of orders prohibiting the nurses from taking organisational measures that impair the proper work of the hospitals was denied. Among other things, it was ruled that the steps taken are proportionate. The Regional Labour Court came to this conclusion after hearing the chairman of the Israel Nurses Union: "According to them, every hospital and clinic has a committee whose job is to examine exceptional requests regarding the treatment of patients during the period of taking sanctions, which examines each case on its own merits [...] Even Prof. Afek, head of the Ministry of Health [...] told us [...] that there was a response from both the local committees and from Ms. Cohen and the rest of her staff to their requests. That is an important point [...]".¹¹⁵⁴

In another case that also dealt with the **Nurses Union**, the Regional Labour Court partially granted a request in a collective dispute to cancel the sanctions taken by the nurses, although they found that the steps taken by the strikers were proportionate, for the reason that it would endanger human life, and that

¹¹⁵¹ Collective Dispute (Tel Aviv) 59087-11-10 State of Israel v. The New Histadrut Arlozorov Branch, clause 11 of the ruling.

¹¹⁵² Collective Dispute (Tel Aviv) 3-06-11 State of Israel v. The Israel Medical Association, clause 22 of the ruling.

¹¹⁵³ Collective Dispute (Jerusalem) 43326-01-12 The National Insurance Institute v. The New General Workers' Union – Association of Lawyers, clause 10 of the ruling.

¹¹⁵⁴ Collective Dispute (Tel Aviv) 21074-12-12 State of Israel v. The New General Workers' Union – Nurses Union, clauses 4,8 of the ruling.

the damage that might be caused to waiting patients due to the workload of the strikers, exceeds the damage that will be caused due to non-performance of administrative work by the strikers. The court emphasised in its ruling, as stated, that the steps taken by the strikers were proportionate, and this conclusion is supported, *inter alia*, by the fact that since the nurses began the strike, an exceptions committee was set up to which three inquiries were actually made, all of which were answered and the fact that the state did not bring even one request from a patient who complained about the damage caused to him by the sanctions.¹¹⁵⁵

In the **IEC** case, company workers stopped payments to IEC's external suppliers. The court ruled that an exceptions committee had indeed been set up by the workers' representatives, which includes the heads of the workers' committees at IEC, whose job it was to discuss those urgent and exceptional cases during the strike. However, they found it difficult to see how IEC workers' exceptions committee could discuss the fate of its competitors, since the private producers are competitors of IEC, and the main concern of the company's management and workers is IEC and not its competitors. Accordingly, the court decided to prevent the strike measures that would stop transfer of payments to all suppliers and external parties of IEC.¹¹⁵⁶

In the case of the **Court Administration** workers, the administration sought to implement a strategic plan for the court system, which had significant implications for the working conditions of court administration workers. The National Labour Court ruled that once actual implementation of the plan began, workers had the right to strike in connection with the agreed arrangement regarding implementation of the plan and its implications for workers. The court accepted the Histadrut's position that the dialogue proceedings had been exhausted, and the time had come to use the strike weapon, and its discretion should not be interfered with, certainly in view of the fact that the parties had reached a dead end. The court remarked, as in similar cases, that the organisational measures might cause harm to the litigant public, and to a certain extent to the right of access of the public to the courts. At the same time, the nature of a strike is that it causes damage to the employer and third parties, and therefore there is no damage that will be caused in itself to constitute a ground for issuing an injunction. However, disproportionate harm to the litigants should be avoided. Therefore, in order to allow the courts' administration to prepare for the strike, and to give notice to the public, and to ensure prevention of disproportionate harm to litigants, the workers' representative must notify the courts 48 hours in advance of the organisational steps it intends to take, detailing their scope and duration. In addition, the court noted that it has recorded the commitment of the workers' representatives to operate exceptional committees: local and national, which will respond to urgent and exceptional cases.¹¹⁵⁷

In the case of **Enav Association**, the Regional Labour Court discussed a strike that broke out in dormitories for at-risk youth. In its first decision, the court refused to issue an injunction against the strike, relying on the union's announcement regarding the establishment of an exceptions committee "whose role will be to discuss special needs and urgent cases that require a solution. The committee will include instructors and at least one social worker". However, as the organisational steps continued, and a further hearing took place before the court, the Ministry of Welfare argued that the exceptions committee could not be trusted because it was not available at all hours. The court decided to reject the claims of the Ministry of Welfare regarding the problematic conduct of the exceptions committee, as it was convinced

¹¹⁵⁵ Collective Dispute (Tel Aviv) 58827-07-19 State of Israel – Israel Nurses Union.

¹¹⁵⁶ Collective Dispute (Haifa) 50534-03-14 IEC Ltd. v. The New General Workers' Union, clauses 16-17 of the ruling.

¹¹⁵⁷ Request for leave to appeal 7867-07-16 State of Israel – The New General Workers' Union.

the committee was acting in a professional, considerate and responsible manner and that any request to the exceptions committee was responded to. They reviewed the committee's decisions and found that these were reasoned and reasonable decisions and do not indicate problematic conduct. The court further ruled that the strike does not constitute a violation of the industrial silence clause in the collective agreements, but is a legitimate mixed strike with dominant economic aspects, the steps taken during it are proportionate and timely, after attempts at dialogue were unsuccessful and it was not found that the harm caused to the sponsors and the public justifies the restriction of the freedom to strike.¹¹⁵⁸

In the case of the **Environmental Services Company**, company management, which is a government company established for the treatment of waste, submitted a request for a temporary order that would prevent striking workers from closing the factory gates. Management emphasised in its application that it is not seeking an injunction against the strike itself, but only against closure of the company factory's gates, so that trucks are not allowed in for the purpose of unloading waste. The workers' representative informed the regional labour court that within the exceptions committee the workers' representative accepts the company's requests for treatment for certain customers / materials, and forwards them to experts in the field, and if the exceptions committee concludes that there is a possibility and a health / environmental hazard, then these materials are handled by company employees and the damage is avoided in advance. In their response, the Histadrut and the committee noted that two requests for entering the company were accepted (noting that the company had submitted dozens of requests in order to abuse this procedure). The court ruled that despite the violation of the company's property right, the striking workers should not be prevented from closing the factory gates, since such an order would significantly impair the effectiveness of the strike.¹¹⁵⁹

In the **Israel Railways** case, the Regional Labour Court heard urgent party requests in a collective dispute filed by railway management for temporary and provisional relief in a collective dispute, and ordered cancellation of the organisational measures taken by the striking workers because they cause disproportionate damage. In its ruling, the court referred to the wording of the committee's statement: "Pursuant to the labour dispute [...] we would like to inform you that as a legal organisational measure, the workers' representative will not allow any change from the status quo in operating the line. Any change in the above line, including works / addition of trains, etc., will not be possible. Any party, including third / fourth parties who find themselves injured, may apply to the exceptions committee to discuss his case. The exceptions committee is: Amit Hillel, representative of the Histadrut. Gila Edrei, chairman of the workers' committee". During the hearing, workers claimed that they were taking proportionate and reasonable steps and the workers' representative operates an exceptions committee whose purpose is to seriously discuss requests to exclude issues from the sanctions taken.¹¹⁶⁰

In the **Clalit Health Services** case, the Regional Labour Court was required to address a request to prevent a strike by Clalit Health Fund workers, who sought to update their wage agreements, during the Covid crisis. However, being a supported body, Clalit Health Fund cannot enforce its agreements with workers without them first obtaining approval of the payroll commissioner, who refused. The Histadrut undertook to establish a strike headquarters with an exceptions committee in each institution, which will

¹¹⁵⁸ Collective Dispute (Tel Aviv) 49146-12-17 Enav Association – Opportunity for Change v. Power for the Workers – Democratic Workers' Union.

¹¹⁵⁹ Collective Dispute (Be'er Sheva) 51515-05-18 Company for Environmental Services Ltd. v. The New General Workers' Union.

¹¹⁶⁰ Collective Dispute (Tel Aviv) 43393-03-19 Israel Railways Ltd. – The New General Workers' Union, clause 2 of the ruling.

discuss every request for providing service during the strike. In special cases, the exceptional request will be referred to a high exceptions committee headed by the chairman of the workers' union. The court ruled that there was room to limit the strike for reasons of proportionality and balance of convenience, given the damage that could occur to Clalit's insured public and the importance of the vitality of the services in question, and therefore approved an 8-hour warning strike and ordered relevant workers to work in *emergency mode*.¹¹⁶¹

In the **Tadiran Keshet** case, a factory that manufactures military communications equipment at a number of sites in the country, the collective agreement came to an end, and negotiations between the parties did not yield agreements. Therefore, the Histadrut declared a labour dispute and later, the workers went on strike, which lasted several weeks. Company management submitted a request to the Regional Labour Court to remove essential items from Tadiran's warehouses. After the request was granted, the Histadrut filed an appeal with the National Labour Court. The National Court noted in its ruling that it had "the Histadrut's announcement that Tadiran Keshet workers responded during the strike before the Ministry of Defense to release items that were necessary for the IDF from the factory's warehouses. The Histadrut also stated that if representatives of the factory's management provided the Histadrut with details regarding a specific transaction or specific items whose non-delivery would cause a *critical difficulty*, the workers would respond to the request favourably".¹¹⁶² Ultimately, the National Court accepted the Histadrut's appeal and overturned the order given by the Regional Court. They stated that employees of companies outside Tadiran should not be allowed to enter the factory and remove items from its warehouses.

13.7.2 Conclusions

A study of the variety of cases reviewed in this chapter may teach a number of conclusions.

The first conclusion: Almost all exceptions committees set up have been set up in the public sector, and only among services that may be considered essential such as health and medical services, electricity, transport, welfare and monetary services. With the exception of one committee set up in the private sector (in the Tadiran case), which was intended to serve a military need, no evidence was found in the ruling to establish an exceptions committee for strikes that broke out in the private sector.

The second conclusion: The main consideration the committees have when considering the approval of a service and/or treatment and thus excluding the strike from those who apply to them, is danger to life (body, mind), health, environment, etc. – in all those cases that require rapid and urgent intervention, which may otherwise cause irreversible damage to those applying to the committees.¹¹⁶³

The third conclusion: In examining the strike taken by the strikers, the court will first examine whether the strike is legal, whether the workers' union met the various restrictions that apply to the strike (such as a commitment to industrial silence, etc.) and whether it was taken as a *last resort*, and only then require a committee.

The fourth conclusion: The court does not consider itself an appellate court for the decisions of the exceptions committee. But at the same time, they can check its conduct, be impressed by the decisions it

¹¹⁶¹ Collective Dispute (Tel Aviv) 2750-07-21 Clalit Health Services – Executive Management – The New Histadrut.

¹¹⁶² Labour Appeal (National) 742/05 The New General Workers' Union, The Histadrut of Electricity, Metal and Electronics v. Tadiran Systems Ltd., clause 8 of the ruling.

¹¹⁶³ See considerations of the Exceptions Committee established during the social workers' strike – Meital Yas'ur Beit Or: *Welfare workers' strike – a quarter of citizens will be harmed*, (Ynet, 06/03/2011), at the link:

<https://www.ynet.co.il/articles/0,7340,L-4037884,00.html> Accessed: 05/08/2021.

makes, including its reasons and the reasonableness of its decisions. The court also reviews its availability to applicants and the number of requests submitted to the exceptions committee in total, and out of this amount – the number of referrals approved by it.

The fifth conclusion: The court's impression of the establishment of exceptions committees and the manner in which they are conducted in order to influence the manner in which it will determine whether the strike is proportionate, and as a result, decide whether to approve it in full or in part, or prevent its continued existence through a court order. Sometimes, the court will grant the existence of the strike on the establishment of an exceptions committee, if it has not yet been established. At the same time, and this is the main thing, establishment of an exceptions committee is not a guarantee for confirming the existence of the strike.

The sixth conclusion: From the moment the court orders the establishment of an exceptions committee, it approves in the same breath the existence of the strike, since an exceptions committee only acts during a strike. The court can also condition the existence of the strike on the establishment of an exceptions committee, if it has not yet been established.

The seventh conclusion: By setting up an exceptions committee, the workers' union takes on an additional restriction on the strike. A workers' union seeking to disable a public and/or essential service knows that the very undertaking to set up or continue to set up an exceptions committee may persuade the court (but as stated, does not guarantee this) to approve the strike or prevent the injunction against it. Hence the assumption that the workers' union would prefer to sacrifice a small portion of its right to strike in favour of the strike. The restriction that the workers' union assumes in establishing an exceptions committee and excluding certain activities from the strike, teaches us about the importance of the strike in the eyes of the workers' union.

The eighth conclusion: An exceptions committee serves the reputation of the workers' union (with customers / consumers) and may present it as a body that, on the one hand, fights for the rights of its workers and on the other, takes responsibility for not *throwing in the towel* and laying down strike weapons in exceptional cases.

To summarise the subject, the author would like to emphasise that so far, no research has been conducted on exceptions committees that have been activated during strikes. This topic seems to the author worthy of in-depth examination in the future. The issue of the exceptions committees raises interesting questions that are worth considering because they are topical in public strikes: How is the composition of the exceptions committees determined? Is the composition of the committee professional? What are the formal criteria the committee considers? Are there any hidden emotional, political or organisational biases in the decisions of committee members? What is the public's attitude towards a workers' union that uses strike weapons with and without an exceptions committee?

13.8 Collective Resignation

One of the steps taken by workers in their struggle (organisational or personal) against their employer was their resignation from their workplace. In a situation where a worker resigns from his workplace, the employer is required to recruit a new worker to replace him, for all that this entails: advertising the job, interviewing candidates, locating the best candidate and training him/her for work. In a collective resignation the employer finds himself faced with a wave of mass resignations of his workers, and he is required to perform the same actions many times over. The power of collective resignation is in paralysing a factory for a long time and placing a heavy burden (economic, image, etc.) on the employer.

Collective resignation raises a number of difficulties, which the Israeli courts have had to decide over the years, including: Can this resignation be seen as a strike? Does this resignation really bring an end to the employee-employer relationship? What is the fate of workers who have returned from their collective resignation? And what are the considerations that the employer and the court must consider during a collective resignation?

Before approaching these questions, it is worth considering the moral-legal framework in which these questions can be examined. In the era of the constitutional revolution, the rights of workers are of paramount importance, including their personal freedom to choose their workplace, enter into an employment contract with it and, of course, bring the termination of an employee-employer relationship to an end by resigning. These rights are but a stage in the sequence of human historical development – from the days when people were considered slaves or property, and the right to choose the workplace did not exist for them.¹¹⁶⁴ The bondage of a worker to a workplace of necessity has passed from the world, and is part of the conception of slavery that no longer exists.

The Israeli legislature has expressed its opinion that the worker's right to terminate an employee-employer relationship ends in a number of laws: the Contracts Law stipulates that no order will be issued for the enforcement of personal work;¹¹⁶⁵ the Prior Notice of Dismissal or Resignation Law enshrines a worker's right to resign provided he or she has given prior notice as required;¹¹⁶⁶ and of course, the Severance Pay Law.¹¹⁶⁷ The High Court also spoke in favour of the worker's right to choose his job, and also his employer, saying: "The worker's freedom to choose his employer is derived from the right to liberty, which is enshrined in the Basic Law: Human Dignity and Liberty and from the value of human dignity, which is the basis of the said Basic Law. Thus, in Israeli Law [...] this freedom of the worker is directly derived from the perception of man as a goal and not as a means. It forms the basis of the worker's freedom of choice, his autonomy of will and his freedom to shape his life and develop his personality as he wishes [...] the freedom of man not to be like this property passed from hand to hand is at the core of this value. And even if we thought that this freedom deprives the worker's property right somewhat – and it is very doubtful in our hearts if that is the case – then in the conflict between these two rights, freedom prevails".¹¹⁶⁸ It is clear, then, what is the rationale for recognising workers' resignation from their workplace. But why should the collective resignation not be recognised and what will be the considerations that will guide the court in discussing these questions? To answer this, three cases discussed in the Labour Courts and the High Court will be reviewed below: the Elco case, the Interns' case and the Hadassah Doctors' case.

13.8.1 Examples of Collective Resignation

In the **Elco** case,¹¹⁶⁹ Elco factory management decided to measure the productivity and output of the factory's workers, a step that was not acceptable to the factory's workers, so 18 workers (out of 26 technical department workers) decided to resign. They sent a joint collective resignation letter in which

¹¹⁶⁴ Amir Paz Fox explains that for centuries, the legal situation has established that workers and servants who left their masters in England and the United States have committed a criminal offense that carries imprisonment, and in fact the ban on escaping slaves is enshrined in the US Constitution under The Fugitive Slave Clause. See: Amir Fox Paz: *What is the Difference between Labour and Modern Slavery?* In the Steve Adler book, (Nevo, 2016), p. 241.

¹¹⁶⁵ Clause 3 (2) of the Contracts (Remedies for Breach of Contract) Law, 5730-1970.

¹¹⁶⁶ Clause 2 (b) of the Prior Notice of Dismissal and Resignation Law, 5761-2001.

¹¹⁶⁷ Severance Pay Law, 5723-1963.

¹¹⁶⁸ HCJ 8111/96 Histadrut v. IAI ruling 58 (6) 481, 595-597.

¹¹⁶⁹ HCJ 566/76 Elco Electro Mechanical Factory v. National Labour Court, ruling 31 (2) 197.

they protested the working conditions in the factory and announced their resignation. After a few days, the workers asked to return to work on the pretext that the collective resignation was a collective act of strike and that it was an organisational step and not a resignation. They showed up at the factory but found that their attendance cards were no longer in place. The High Court, which heard the case, asked itself whether resignation (and termination of an employer-employee relationship) are concepts from personal labour law only, or can they also be seen as part of collective labour law. The High Court's conclusion was learned from the wording of the letter which taught of a resolute intention to resign. This is how the factory's management saw things, and this is how the High Court saw things. The court emphasised that if they had considered the resignation a strike, this would not have resulted in the termination of the employment relationship in the factory.

In the **Interns'** case, the question of collective resignation came up again. After long and tedious negotiations that included organisational measures, a collective agreement was finally signed between the State of Israel and the Israel Medical Association. Immediately after signing the collective agreement, however, the interns claimed that the agreement did not guarantee their working conditions or rights, and therefore began a struggle – contrary to the position of the workers' union representing them, the Medical Association. An initiative by the leaders of the struggle of the resident doctors of delivering mass resignation letters was supported – and about a thousand doctors responded to the initiative and submitted their resignation letters at the same time and left the hospitals.

In the National Labour Court, **the discussion revolved around the question of whether the letters should be considered personal and legally valid letters or a coordinated collective action and organisational pressure measures against the validity of a legally signed collective agreement.** The court ruled that the resignation was void due to formal defects in its submission and due to its involvement in the organisational struggle. By their very nature, **the letters of resignation indicate a collective action aimed at exerting illegitimate pressure on the legally authorised bodies to conduct the negotiations – the Medical Association and the employers.**¹¹⁷⁰

Following cancellation of the resignation by the National Court, the interns resubmitted their resignation. And once again the state appealed to the National Labour Court. The court examined the evidence and ruled that the mass resignation of the interns was a coordinated collective action that serves as a means of pressure on the employer aimed at changing the collective agreement signed with the Medical Association. The examination of what type of resignation it is – authentic and lawful, or not, will be made in any case first and foremost according to its circumstances, and the burden of proof that it is a collective resignation cannot be on the claimant. Classification of the act of resignation will be made according to a substantive examination that includes various criteria: whether the notice of resignation meets the requirements of the Prior Notice Law; whether exercise of the resignation was conditional; whether the resignation intended to improve and promote working conditions; whether there a mass resignation to indicate pressure on the employer, by force or in practice. In this framework, weight is given to the number of people resigning; to all the circumstances that surrounded the notice of resignation in the first place and retrospectively, and to the damage caused or likely to be caused to the employer, the workplace, or the general public. Finally, the court ruled that this action was not approved by the representative workers' union (which under the Labour Disputes Settlement Law the body empowered to declare a strike), and the action taken is contradictory to the undertaking to maintain industrial silence. Hence the

¹¹⁷⁰ General Collective Dispute (National) 722-09-11 State of Israel Ministry of Health and Ministry of Finance v. Israel Medical Association.

court's concluded that this was a *strike in disguise*, and therefore ordered its cancellation and the continuation of an employer-employee relationship with the interns.¹¹⁷¹

In the **Hadassah Doctors'** case,¹¹⁷² four doctors in the haemato-oncology department decided to resign due to the decision of Hadassah Hospital management to perform a bone marrow transplant for children in the adult oncology department. Hospital management petitioned the Regional Labour Court, arguing that the resignation of the department's senior doctors is a collective step leading to an illegal strike and wildcat sanctions. The Medical Association claimed, in response, that this was not a collective step of the workers' union but an individual choice of each of the department's doctors. The Regional Labour Court ruled that the resignation was an individual personal act done by each of the doctors separately, given their belief about the correct professional way to treat children, and that it was not a matter of honor, standards, ranks and pay, but a professional matter of principle and values. The resignation was not an act done to get Hadassah to change their way, but due to the sincere faith of each of the doctors, and it was not an organisational step where they try to disguise a strike under the guise of resignation, but an authentic personal resignation. Accordingly, the court dismissed the petition stating that the collective resignation of the doctors was not a strike, and therefore it could not be required of them to continue their work.

13.8.2 Interim Summary

From the cases reviewed in this chapter, it appears that a collective resignation of employees can and will be recognised as a *strike in disguise*, according to the court, and can and will be recognised as authentic. If recognised as a strike in disguise, the court will nullify the collective resignation and view the employer-employee relationship as if it never came to an end. On the other hand, if recognised as authentic – the employer-employee relationship will come to an end.

The considerations that will guide the court on how to deal with a collective resignation will range from the technical level of the wording of the letter and formal flaws in it, to – without being exhaustive – examining the context under which the letter of resignation was submitted, emphasising whether in the mass resignation there is evidence of exerting pressure on the employer, where workers disguise the strike by resigning. In this regard, the words of Ido Eshet explain that in the interns' case, the doctors abandoned the channel of the collective labour relationship and sought to achieve collective achievements through the use of personal labour law, the court, as stated, did not support this. Eshet cites clause 19 of the Collective Agreements Law, which stipulates that participation in a strike does not constitute a breach of personal duty. There is thus a buffer between collective labour law and individual labour law. This is a message to the employer – 'You cannot come to terms with the worker participating in a strike, and dealing with your workers' strike must be done within the framework of collective labour law'. Respectively, neither can the worker *play* between the personal field and the collective field. Of course, the worker can terminate the employer-employee relationship, but termination of the relationship with his employer cannot be used as leverage for the worker in collective bargaining negotiations.¹¹⁷³ Doron Yefet also supports this conclusion, explaining that an action that is predicted to be a legal action in the field of

¹¹⁷¹ General Collective Dispute (National) 2376-10-11 State of Israel – Ministry of Health and Ministry of Finance v. Israel Medical Association. To complete the picture, it should be noted that after the ruling of the National Labour Court, three petitions were submitted to the High Court. Two of them were deleted, and the third continued to be clarified in the Regional Labour Court, followed by a mediation procedure led by Prof. Zamir and Prof. Mironi, in light of which a mediation document was signed in which additional agreements were anchored for the benefit of the interns.

¹¹⁷² Collective Dispute 34408-05-17 Hadassah Medical Association v. Israel Medical Association.

¹¹⁷³ Ido Eshet: *The Model of Representation in Collective Labour Law – New Trends*, (Mishpatim Mo, July 2017), p. 32.

personal labour law – such as individual resignation – may amount to a prohibited collective act as a strike, contrary to the principle of representation in collective labour law. Yefet explains that the principle of representation is an essential, cogent and sacred principle in collective labour law, and when there is a representative workers' union in the workplace, it is only allowed to take legal organisational measures during a professional struggle.¹¹⁷⁴

The conclusion of this sub-chapter is that collective resignation of workers under the guise of a strike will be rejected by the Labour Court, and if the court concludes that it is not a strike but an authentic resignation, it may be a double-edged sword against workers who did not genuinely plan to resign.

13.9 Summary

The right to declare a strike and open it is a right reserved for the workers' union. Therefore, ostensibly, the workers' union has great power – it chooses the type of strike it will launch, its timing and it can also choose its intensity.

However, during the strike the workers' union as a collective and the workers as individuals are harmed, as well as the employer, the residents and the consumers. The factor that is often portrayed as responsible for the damage of the strike is the workers' union, which started the strike. This fact obliges the workers' union to act in a considered and lawful manner – otherwise the court will regard the strike as illegal or disproportionate and order its cessation.

In this chapter, I have reviewed seven measures that a workers' union has employed and is employing to deal with the strike: hidden struggle; picketing; transfer of pressure from the organisational-collective level to the individual-personal level; setting up a strike fund; strike enforcement verses strike breakers; activation of an exceptions committee and collective resignation.

These tools help the workers' union reduce the damage of the strike - a *hidden struggle* and *setting up a strike fund* help to reduce the economic pressure on the workers' shoulders; can win the union public sympathy and support of the Labour Court – through *operation of an exceptions committee*; or allow it to continue to exert pressure on the employer – through *picketing, collective resignation, transfer of pressure from the organisational-collective level to the individual-personal level and enforcing the strike*.

The coping methods can be classified into the context planes of the workers' union: vis-a-vis the employer, the residents / consumers and the workers:¹¹⁷⁵

¹¹⁷⁴ Doron Yefet: *Strike in Disguise – On the Principle of Representation in Collective Labour Law*, (Roots in Law, 2011), p. 828.

¹¹⁷⁵ Hereinafter: Table 16.

Employer	Residents / Consumers	Workers
Hidden Struggle	Operating an Exceptions Committee	Setting Up a Strike Fund
Picketing	Picketing	Enforcing the Strike
Transfer of Pressure from the Organisational-Collective Level to the Individual-Personal Level		
Collective Resignation		

Table 16: The coping methods of the workers' union: vis-a-vis the employer, the residents / consumers and the workers.

These tools – as we shall see – are not without drawbacks:

In a hidden struggle the employer is required to prove whether it is indeed a strike, the burden of proof that the workers are indeed taking sanctions, rests with the employer. This is a burden that is not easy to prove, and is not easy for the Labour Court to decide. I have shown that the direct route for an employer who encounters a partial strike, which he is unsure of, is by applying to the court for a declaratory ruling regarding the existence of a partial strike. However, such an appeal is problematic due to the complexity of the evidence and the length of the proceedings in the court. Picketing – Although the court has granted permission for picketing, for many years workers had to deal with the refusal to recognise picketing as legitimate, and their actions were denied due to “trespassing on real estate” or “trespassing on movables”. In transferring the pressure from the organisational-collective level to the individual-personal level – the strategy used by the workers’ unions that exert pressure in front of the employer’s home morning, noon and night, may indeed be effective as I have shown, but it is very doubtful whether it will be able to convince the courts of its necessity and legality, especially in light of the legislature’s tendency to restrict the right to demonstrate in front of private homes, and in light of the trend of rulings to prefer the employer’s right to privacy in his home, because he is not a public figure, he does not live in an official residence and there is a desire to reduce the exposure of *hostages* – his family and neighbours – to the nuisance that accompanies the demonstration. In setting up a strike fund – the compensation given by the strike funds is, in most cases, only partial compensation and is conditional on a number of conditions that the workers and the strike must meet. Therefore, the compensation from the strike funds does not fully prevent the direct damage of the workers. In the attempt to enforce a strike – the negative aspect of the right to strike has been recognised in case law and literature. On the negative side, a workers’ union must not harm workers who oppose the strike, must not impose the strike on workers and it must respect the right of workers seeking not to strike. On the other hand, violating the strike may erode the power of the workers’ union and impair the chances of success of the professional struggle. In the establishment of exceptions committees for the strike, the workers’ union assumes an additional restriction on the strike. The workers’ union seeking to disable a public and/or essential service knows that the very undertaking to set up or continue to set up an exceptions committee may persuade the court (but does not guarantee it) to approve the strike or prevent an injunction against it. The court can also condition the existence of the strike on the establishment of an exceptions committee, if it has not yet been established. The court can examine its conduct, be impressed by the decisions it makes, including its reasons, the reasonableness of its decisions and its availability to those who apply to it. In collective resignation – the union risks that collective resignation be recognised as a *strike in disguise*, and if so, the court will disqualify the collective resignation and view the employer-employee relationship as if it never came to an end. On the

other hand, if the resignation is recognised as authentic – the employer-employee relationship will come to an end, and this may be a double-edged sword against workers who did not genuinely plan to resign.

The strike, then, is not just a means of pressure directed at the employer. It is also a test for the workers' union. During the strike the leaders of the union are required to show courage, charisma and faith in the goal in order to recruit workers; the union and its activists are tested on their ability to enforce the strike, the union is required to put in place economic measures to ensure that the workers' livelihood is not harmed, and it is forced to talk about the strike in the media so that its image is not harmed in the eyes of the public. The conclusion is that the use of strike weapons forces the union to act in several arenas, and sometimes simultaneously: in the legal arena: with the employer; in the economic arena: with the members of the union; and in the media arena: with the residents-consumers. All this, when sometimes the employer fights the strike, the workers may violate it and when there is no guarantee that the strike will bear fruit.

Having reviewed in previous chapters how the employer, the sovereign, third parties deal with the strike and in this chapter, how the workers' union does so, it is time to assess the strike as a means of pressure.

Chapter 14: Evaluating the Strike as a Pressure Tool

14.1 Introduction

In previous chapters I emphasised the importance of the strike as a tool for achieving goals in labour relations. I also looked at the damage caused by strikes and the ways in which players in the labour relationship deal with strike damage. I have shown the circles of damage as well as the many levels of damage involved in operating strike weapons. Among other things, I concluded that the strike is a means of pressure that can also be a double-edged sword for the workers' union that launched it, and that the strike has the potential to have a *domino effect*, and that strike damage does not only amount to the *here and now* but can occur over a continuous present (the number of damages that continues to increase in the present) and the damage can also occur in the future (unknown place and time in the future).

The conclusions of the previous chapters raise two questions:

1. When does a strike become too expensive a means of pressure to use?
2. Are there alternative means of pressure to strike that will reduce both the levels of damage and the circles of those affected by the strike?

Answering these questions will help me evaluate the strike as a means of pressure. And that is also the purpose of this chapter. To do this, I will review studies that have examined the strike as a means of pressure to achieve goals; I will examine the changes that the labour market underwent in the 20th and 21st centuries to assess the suitability of strike tools for the era in which we live; I will analyse the effectiveness of the strike; I will review various legal cases discussed in the courts to see how not only the Labour Court but also the parties to labour disputes see the strike as a means of pressure and finally, I will propose my own index for assessing the strike as a means of pressure, which I call the *practical index*. Using this index, I will further evaluate alternative means of pressure to strike later in the work.

14.2 Evaluation of the Strike as a Means of Pressure for Achieving Goals

Over the years, various studies have been conducted which sought to assess the strike as a means of pressure to achieve goals in the field of labour relations in the State of Israel. Before I review the main studies conducted in the field and the conclusions that can be drawn from them, it seems to me that it is imperative to point out the problematic nature of assessing the strike.

A strike that sets for itself to achieve one goal or another, can end in one of the following ways. On the one hand, the strike can be a complete success, so that all the demands of the strikers are accepted by the employer. On the other hand, the strike can fail miserably, so that none of the strikers' demands are met. Between these two extremes there are a number of additional results: the employer can meet only some of the demands, or the strike will be stopped by an external party (an injunction issued by the Labour Court that can also order the continuation of negotiations between the parties, a restraining order issued by the sovereign, transfer of the dispute to an arbitrator / mediator). These *middle* results raise difficulty in recognising whether at the end of the day, the strike was successful or not. In addition, assessment of the success of a strike may be completely different both in the eyes of the employer and the union, and in the eyes of the union and the workers.¹¹⁷⁶ I mentioned in my work that union leaders tend to start a labour dispute with excessive demands for the sake of negotiation, and they focus their demands as the strike

¹¹⁷⁶ See, for example, the Interns' case discussed in Chapter 12, *How the Workers' Union Handles the Strike*. In this case, as stated, the interns' representatives refused to accept the agreement signed between the Israel Medical Association, the trade union, and the Ministry of Finance.

goes on. Therefore, as long as their purpose is not precisely known, it is not possible to accurately determine the degree of success of the strike, but only to compare the stated goals with the final results. This does not summarise the problematic nature of assessing a strike. The length of time the strike lasted is also problematic to measure. As I surveyed, workers may embark on a hidden struggle – so it is not clear exactly when the sanctions broke out at the factory. Sometimes a focus strike breaks out, in which each time a different sector of workers strikes, and sometimes the sanctions intensify and as the conflict continues, more and more workers join it. Therefore, even the end date of a strike is not always clear when not all workers finish striking at the same point in time. The attempt to compare strikes between various sectors of the economy is also problematic, because they are not equal in their economic strength, in the degree of vulnerability of the employer, in their importance for the maintenance of normal life in the country, in their ability to create a crisis, their impact on the daily life of citizen and in the number of consumers who will be affected by the failure to provide various services.

The difficulties in assessing the strike are not always reflected in the various studies conducted over the years, and therefore their results must be taken with a measure of caution.

The study by Avraham Michael and Rafael Bar-El¹¹⁷⁷ on strikes in Israel between 1960 and 1969 is the most detailed study of the phenomenon of strikes in Israel. Although more than forty years have passed since publication of their study, it seems it is still relevant, with additional researchers (see below) citing this study or using the variables set forth in it. Therefore, I will dedicate most of my remarks to a review of this study.

In their book, the researchers identified the issue of strike as a dependent variable explained by endogenous and exogenous independent variables (in recent variables, the researchers referred to the economic, political, and social contexts that formed the background for the strike. The researchers refrained from investigating them because they were less accurate and reliable and called for further research on the subject). The endogenous variables examined – what type of strike, whether the union approved the strike, what the number of participants in the strike was (assuming a large number of strikers increases the chances of success of a strike due to the heavy pressure the strike puts on the employer and vice versa), and how long the strike lasted (assuming that a long-lasting strike contributes to increasing its chances of success). In order to determine a measure of the success of the strikes, Rafael and Bar-El created a quantitative index to which they classified success using four values: workers' demands were accepted in full; workers' demands were accepted in part; workers' demands were not accepted; and the dispute was referred to arbitration or further negotiations. Complete worker success was defined as 100 points, partial success, arbitration and negotiation as 50 points and failure as 0 points.

According to the established success index, it was found that *protection strikes* (in which workers strike to protect existing working conditions from worsening) ended with a success rate of 71 compared to 56 in *demand strikes* (in which workers strike to improve their situation under new conditions).¹¹⁷⁸ An examination of the connection between approval of a strike by the trade union and its success found a much greater success of strikes approved by the trade unions compared to strikes that were not approved. While the success rate of approved strikes reaches 75, that of unapproved strikes reaches only 50. The backing given to the strikes' claims by the union creates a new equation in the dispute: the parties are not the employer and the workers, but the employer and the trade union. This equation provides backing to

¹¹⁷⁷ Avraham Michael and Rafael Bar-El: *Strikes in Israel – Quantitative Approach*, (Bar Ilan University in collaboration with the Institute for the Advancement of Labour Relations, 1977).

¹¹⁷⁸ *Ibid*, pp. 243-246.

strikers and allows them to meet their demands for a long time with low risk of financial losses, explain their position, recruit additional workers to their side like public opinion, harden their position until accepted by the employer.¹¹⁷⁹ In examining the variable of the number of strike participants, the researchers found that in strikes in which up to 200 workers participated, the number of participants did not constitute an effective means of pressure on the employer. On the other hand, responding to claims by a greater number of strikers is harder for the employer, being aware of the future economic loss involved in this response (as opposed to responding to claims from a limited number of strikers). This consideration was found to carry more weight than the pressure exerted on the employer by disrupting work procedures. Therefore, the degree of success of strikes in which the number of participants is small is relatively large.¹¹⁸⁰ Examination of the variable of the strike duration found that the pressure exerted on the employer bears fruit mainly after a period of 15 to 24 days of strike. During this timeframe it is difficult for the employer to bear the damages caused to him by the prolongation of the strike: problems of regular supply begin to arise out of stock and his financial situation begins to deteriorate. Thus, the researchers concluded that as long as the workers manage to persist in their strike for a period of 15-24 days, they will be able to tip the scales in their favour and bring about the success of the strike, until the employer can no longer continue to bear the burden of the strike.¹¹⁸¹ The researchers also found different degrees of success between the different sectors. In the private sector, the weight of successful strikes was highest (67), followed by the public sector (57) and finally the Histadrut sector (51).¹¹⁸²

Aviad Bar-Haim analysed the strikes in Israel between the years 2004-2013, and he also used the same variables established in the study by Michael and Bar-El. Bar-Haim's conclusions largely confirm the conclusions reached by Michael and Bar-El:¹¹⁸³ **A.** Full strikes were more successful than partial strikes. **B.** Strikes involving a low or medium number of strikers were more successful than multi-participant strikes. **C.** Prolonged strikes were more successful than short strikes. **D.** Strikes approved by the union were more successful than strikes not approved. **E.** Wage withholding, as a reason for a strike, achieved the best result for the strikers (both full strikes and partial strikes). **F.** Prior notice to the labour relations commissioner of the union's intention to go on strike does not guarantee higher success rates for strikers. There is even a slight reverse tendency, according to which strikes in which there was no prior notice achieved better results for strikers. **G.** Public service strikes were more successful than strikes in other industries.

The results of Michael and Bar-El's research as well as Bar-Haim's analysis are not always consistent with other studies conducted in the world that have yielded different results. For example, in 1999 a study was conducted in Spain that found a negative relationship between the duration of the strike and the size of the change in wages.¹¹⁸⁴ That is, contrary to what has been said so far, it has been found that short strikes have resulted in large changes in wages.

Meir and Mevorach's study¹¹⁸⁵ already used variables other than those prevalent until then. These researchers wanted to test whether with the help of a strike, strikers in Israel succeed in achieving their

¹¹⁷⁹ Ibid, pp. 246-249.

¹¹⁸⁰ Ibid, pp. 250-259.

¹¹⁸¹ Ibid, pp. 259-264.

¹¹⁸² Ibid, pp. 249-250.

¹¹⁸³ Aviad Bar-Haim: *Human Resource Management, Unit 9: Labour and Employment Relations*, (Open University, 2018), p. 79.

¹¹⁸⁴ S. Jimenez-Martin, *Controlling for Endogeneity of Strike Variable in the Estimation of Wage Settlement Equation*, 17(3) *Journal of Labour Economics* (1999) 583 – 606.

¹¹⁸⁵ Roni Meir, Baruch Mevorach, *Strikes and Wages in Israel*, (Social Security 35, 1990).

goal of improving their wages and through this question, they believed, they would be able to examine whether the strike is an effective weapon in the hands of workers. Their study examined the years 1974-1983. It was conducted at two separate levels of analysis: the micro level (industry) in periodic analysis over the above years, and the macro level (economy as a whole), comparing the industries in light of their average situation over the years. The researchers examined the relationships between: A. The ratio between industry wages and the average wage in the economy per year is subject to the industry strike indices (frequency of strikes, number of strikers and number of working days lost to the economy due to strikes). B. The average industry nominal wage for the above industry strike indices. The results of the study taught the researchers a number of conclusions. **First**, the various strikes indices as well as the wage level are an outgrowth of a vague and problematic variable for quantitative measurement in the form of industry power or strength. **Second**, the effectiveness of strikes depends largely on the ability of strikers to intensify their struggle relative to the characteristics of the struggle of other industries in the economy, and hence the researchers concluded that their vision should be relative to parallel industries rather than narrow and internal industry. **Third**, a strong industry (such as the electricity industry) can reduce the use of strike weapons and even if the strike is carried out, the strike is more likely to end faster and result in a lower number of working days. **Fourth**, the researchers admit that they did not identify in their study a cause and effect in the context of strikes and wages, and such identification is likely to be highly artificial. The two mutually nourish each other and exchange roles in different contexts and at different times.

Comparison of the studies conducted in Israel with the famous Hicks model does not yield conclusions from which we can learn about the strike as a tool of pressure. Hicks has created a model based on two factors: The first, the expected duration of the strike and the second, the increase that the workers expect to receive and that the employer is willing to pay before the strike breaks out. This model assumed that the longer the strike is expected to last, the higher the level of risk – for both workers and employers. Workers risk losing their income and sometimes even losing their jobs, and the employers risks losing their income. Hence Hicks assumed that the longer the strike lasted, the lower the workers' demands, and at the same time the employer would be willing to offer a higher wage. Hence the strike will be avoided when in the long run it will be found that it does not pay off for either party to the conflict.¹¹⁸⁶ As stated, the Hicks model cannot teach us about assessing the strike in Israel as a means of pressure for two reasons. Both because of the fact that strikers in the public sector are not harmed by prolongation of the strike (even for the reason that they do not risk losing their jobs), and also because they put pressure on the general public, which in turn presses the government to end the strike. This pressure does not exist in Hicks' model, so public sector workers can continue to strike even beyond Hicks' predictions.¹¹⁸⁷

The Fishbein and Eisen model also fails to explain strikes as a tool of pressure. These researchers speculated that before workers went on strike they would consider their current level of benefits, the perceived price of the strike and the availability of employment alternatives.¹¹⁸⁸ History teaches us that the last two considerations are not part of the set of considerations of public sector workers, (Since in most cases, these workers enjoy tenure and their job is guaranteed). As for the private sector – the last consideration is not a consideration because the sword of dismissal against strikers is illegal.

¹¹⁸⁶ J.R. Hicks, *The Theory of Wages*, (London, Macmillan, 1932) 143.

¹¹⁸⁷ Amnon Caspi and Batya Ben Hador, *Virtual Strike*, *ibid*, p. 12.

¹¹⁸⁸ M. Fishbein & I. Ajzen Belief, *Intention & Behaviour: An Introduction to Theory and Research*, (Reading, MA, Addison Wesley, 1975). Quoted in: Amnon Caspi and Batya Ben Hador, *Virtual Strike*, *ibid*, p. 13.

So far, we have reviewed studies that examined the type of strike, its duration, the number of participants, the reasons for the outbreak of the strike (with an emphasis on workers' wages), the price of the strike, etc. The common denominator to all of these is the economic dimension. Other studies focus on the future effects of the strike, the media coverage that accompanies the professional struggle or the need for the parties to cooperate amongst themselves:

Garfinkel argues that the results of the strike should not be examined only in the immediate achievements and failures of the strikers, but also in the impact of the strike on government policy over time. Garfinkel describes strikes and struggles that led to a gradual improvement in working conditions, which were reflected in an increase in workers' wages and an improvement in their working conditions.¹¹⁸⁹

Other researchers compared strikes in San Jose to strikes in the Santa Clara Valley, concluding that a well-publicised event could help strikers achieve their goals because the sovereign or employer does not want the public to think the factory is falling apart and so they will reach an agreement with the workers.¹¹⁹⁰ Sometimes, however, workers may be deceived when the public puts pressure not on the employer as the strikers expect him to, but on the strikers themselves or he will not show understanding and sympathy with the strikers. Then the strike may begin to lose public legitimacy and public sympathy for the demands raised in it. Then the question also arises – how long will strikers last before withdrawing from their demands and before returning to the negotiating table? Weinstock has shown in his work, *Special Labour Report on Remedies for Strikes and Lockouts*, that strikes are less likely to succeed when they do not gain public support.¹¹⁹¹ According to Dahan et al.,¹¹⁹² the main context in which workers appear in the media is strikes. The longer the strike, and the more workers involved, the more negative the coverage, and the lower the public support for the strikers. Media reports highlight the damage to the economy and consumers, and the prevailing media perception is that strikes are detrimental to the normal and productive life of the economy. Workers are portrayed as caring only for themselves, not the public, who the protest is harming. The labour dispute is presented as if those most affected by the protest are unrelated to the conflict, such as industrialists and other factory workers who may be fired following the strike. A survey conducted by the Labour Relations Unit in October 2003 also found that most workers believed at the time that strike weapons were ineffective in achieving anything for the workers. Only 30% of them thought that in order to achieve anything, one had to strike, and only 15% preferred a strike over an agreed arbitration that was acceptable to 58% of the employees.¹¹⁹³

In conclusion, there are considerable difficulties in assessing the strike as a means of pressure to achieve goals. These difficulties are due, *inter alia*, to the following reasons:

- A. A strike can have *middling* results that make it difficult for us to decide whether the strike was successful or not.

¹¹⁸⁹ Boaz Garfinkel, *ibid*, pp. 147-171.

¹¹⁹⁰ Ana Rodríguez-Álvarez, Ignacio del Rosal and José Baños-Pino: *The cost of strikes in the Spanish mining sector: modelling an undesirable input with a distance function*, *Journal of Productivity Analysis*, Vol. 27, No. 1 (February 2007), pp. 73-83.

¹¹⁹¹ As appears in the research of Avraham Michael and Rafael Bar-El, on pp. 253 - 254.

¹¹⁹² Yossi Dahan, Shlomit Binyamin, Moti Gigi, Shlomit Lear, Mati Shmuelof, Naftali Shem Tov: *From the campus to the port: Coverage of strikes and lockouts in the Israeli media*, (*Israeli Sociology / Israeli Sociology*. 14 (1). 29-56. 5772-2012).

¹¹⁹³ *Public Workers' Positions on Labour Relations* (State of Israel - Ministry of Industry, Trade and Employment, Labour Relations Unit, November 2003), at the link:

https://employment.molsa.gov.il/About/Units/WorkingRelations/Documents/seker03_schirim.pdf Accessed: 26/10/2021.

- B. Assessment of the success of the strike may differ from one player to another in the labour relationship.
- C. The stated demands of the workers' unions upon opening the strike may be exaggerated for the purposes of negotiations.
- D. The length of time the strike lasted is problematic to measure. It is not always clear exactly when sanctions broke out and when they ended.
- E. The attempt to compare strikes between various sectors of the economy is problematic, because there is no identity between them in their economic power, in their importance for the maintenance of normal life in the country, etc.
- F. There are inconsistencies in the various studies that have sought to evaluate the strike manifested in the research fields, research methods, and variables used.
- G. There is a consensus in the literature that economic, political and social contexts are important for explaining strikes, but due to being less accurate and reliable they have not always been explored.

These difficulties prevent me from relying on an unequivocal measure to help me assess the strike. Therefore, I would like to present another index of my own for assessing the strike as a means of pressure. To do this, I will first look at the use of strikes as a means of pressure in the 21st century, and then I will examine the efficiency and effectiveness of the strike.

14.3 Evaluation of the Strike as a Means of Pressure in the 21st Century

In the twentieth century the labour market changed: we became acquainted with processes of employing workers in flexible employment patterns, collective agreements were neglected and employment in individual contracts increased, individual perceptions emerged that undermined the use of the traditional collective model of organising and collective struggles, and we witnessed the use of the virtual strike¹¹⁹⁴ and collective resignation.¹¹⁹⁵

At the beginning of the 21st century and in the midst of the Covid crisis, various processes took place in the world in general and in the labour market in particular, which raises the question of the nature of the collective struggles and the strike in the future. To answer this, one must examine the processes that the labour market underwent in the twentieth century to date: the process of globalisation and its impact on the labour market in Israel; Growth of unusual work patterns: Employment of workers by outsourcing and outsourcing contractors; The privatisation trend; Splitting trends: between the employer and the owner of the knowledge and expertise, and between the workplace and the employee; Working from home; Blossoming of individual trends in the workplace; Labour migration, brain circulation and foreign workers in Israel; Changes in the proportion of Israeli workers who are members of a workers' union; The Israeli public's attitude to strikes and professional struggles and the use of social networks.

14.3.1 The Globalisation Process

After World War II, in the 1950s and 1960s, the model of the welfare state began to spread in Western countries. But the rise in oil prices, in the 1970s, and the economic crisis that followed, as well as the rise of regimes with a conservative right-wing ideology in dominant countries in the world economy (in Germany: Helmut Kohl; in the United States: Ronald Reagan; in the United Kingdom: Margaret

¹¹⁹⁴ See Chapter 14: The Virtual Strike

¹¹⁹⁵ Collective resignation was discussed in the Interns' Case (see Chapter 12: *How the Workers' Union Handles the Strike*).

Thatcher) led to the adoption of a neo-liberal view, which advocated reducing government involvement in the economy (i.e., privatisation), weakening trade unions and significantly eroding social budgets. That is, a reversal of the perception of welfare policy.¹¹⁹⁶

The world has become a *global village*¹¹⁹⁷ in which mass media, telecommunications, computer communications and sophisticated information transmission enable the citizens of the world to be exposed to the culture of the other; Share information with the masses and acquire new knowledge; Conduct cross-border transactions, etc. These were the tools that allowed globalisation to develop and were also its catalyst. Local labour markets have become, to some extent, one large labour market, in which workers from all over the world participate, and employers from all countries. Unification of the global market into one economy – in terms of capital that can be transferred to places where the supply of workers is large and cheap and where taxes are low – has led to the transfer of a considerable part of the labour-intensive industries from Western countries to Southeast Asian countries. The result was an economic boom in Southeast Asian countries. At the same time, technological developments that increase productivity have made it possible to reduce the number of workers and have made entire worker populations redundant.¹¹⁹⁸ This is how the industrialised and welfare states, where the cost of labour is high, found themselves inferior and sought to compete for the hearts of foreign investors by temptations with incentives and benefits to invest in them. To do this, they sought to overcome their inferiority through the characteristics of neo-liberalism: weakening the bargaining power of trade unions, glorifying the private sector and reducing state spending, or by providing incentives such as tax benefits, operating subsidies, training grants, and so on. At the same time, multinational corporations relocated their businesses to countries where labour costs and taxes are very low, where there are no independent and strong trade unions, and therefore more convenient to produce or do business with. Therefore, unions are also required to show a willingness to accept the corporation's demands, in order to continue to ensure the existence of the factory, as received by, for example, General Motors workers in Arlington, Texas, thereby contributing to the closure of the corporation's factory in Ypsilanti, Michigan.¹¹⁹⁹

The idea of regulating and setting the rules of the game between capital and labour that were previously set by the state has faded because of globalisation. Thus, the state undergoes a change and withdraws from involvement in the economic sphere, opens its borders to free trade, privatises public property and reduces the regulation and supervision of economic activity. In general, it has withdrawn from the social commitment of the welfare state. In this situation, the capital can have a new relationship with labour. Instead of collective agreements with workers' unions, capital dictates flexible terms of employment and work, activities outside the sovereign territory (to avoid labour and tax laws), outsourcing and employment of manpower by employment contractors (to avoid any commitment to workers), temporary or partial employment of workers and capacity for immediate dismissal, employment of non-civilian immigrant workers (and therefore outside the political and public system) and moving production sites to places where labour costs are cheap and unprotected. All this under the headings *Flexibility* or *Efficiency*.

Globalisation creates a new division of labour and a new distribution of income both within the state and between states, while weakening the state. It disintegrates trade unions, makes private capital a major

¹¹⁹⁶ C. Pierson, *Beyond the Welfare State?* Cambridge: Polity Press 1991.

¹¹⁹⁷ The phrase Global Village is attributed to the media scholar Herbert Marshall McLuhan, (McLuhan) in his book: *The Gutenberg Galaxy: The Making of Typographic Man* (1962).

¹¹⁹⁸ A. Hoogvelt, *Globalisation and the Postcolonial World*, Baltimore: Johns Hopkins University Press 1997.

¹¹⁹⁹ C. Harlan and J. Mitchell, *Rage Relief and Warning to UAW Mark GM Decision on Closing Plant*, Wall Street Journal, 25 February, 1992, p. A8.

influence on socio-economic policy. In the global space, it is multinational capital that determines the rules of the game. The first interest of the capitalists is the unlimited movement of capital. The second interest is weakening local competitors. The third interest is to pay wages as low as possible to local workers.

In the context of globalisation, labour has crossed borders, but workers' unions, collective bargaining, and strike weapons remained grounded on a state basis. As a result, workers in Western countries, and their unions, are unable to retaliate when it comes to closing factories and relocating them to the Third World. Seemingly, the way to fight in the new world of labour seems to be by adapting traditional tools to the new reality, that is, by expanding the organisation and organised work and basing it on a state-like basis similar to the basis of the division of labour. However, this has drawbacks. Although workers in developing countries are interested in organising to improve their status and acquire rights at work, it is still in their interest to keep globalisation intact. Since cooperation between workers in developed and developing countries may cause workers in developing countries to lose the relative advantage they currently have and the process of globalisation will cease, as the viability of relocating factories will be lost. Because of the conflict between the interests of workers in developing countries and the interests of workers in developed countries, there is little chance of resorting to global organisation.¹²⁰⁰

14.3.2 The Impact of the Globalisation Process on the Labour Market in Israel

For many years, the Israeli economy was protected from international competition through government laws and regulations. Until the 1970s, the Israeli government also had a great deal of involvement in the economy – both in planning and regulating production and supervising it, and in initiating business organisations. In 1977, following the political upheaval, there was also an economic upheaval and economic liberalism advocated by the Likud Party. At the same time, the campaign against the Histadrut began by limiting its special manoeuvrability and funding.¹²⁰¹

In 1985, during the period of the national unity government led by Shimon Peres (Labour) and Yitzhak Shamir (Likud), the stabilisation policy was launched, which was a transition from the vision of the welfare state to the vision of globalisation. The stabilisation plan led to a structural change that was a recommendation of the International Monetary Fund and included budget cuts in the country, privatisation, lowering workers' wages and making budgets and resources available to the private sector (i.e., strengthening market forces and private companies). The main goal was to create conditions that facilitate the integration of these companies in the global space and at the same time enable appropriate conditions for the global space in Israel. Liberalisation policy and trade agreements opened the Israeli market, from that time, to competition. The result was that the European Social-Democratic model ceased to serve as a role model and was replaced by the American or global model of development based on a relatively thin layer of population and pushing large sectors in the population to the margins.¹²⁰²

Adoption of the American model caused a decrease in the number of workers unionised in Israel.¹²⁰³ The reduction in the power of the trade unions was accompanied by another process that weakened the workers in the face of capital and that is the decentralisation of collective wage agreements. In other words, there was an erosion in the nationwide or industry-wide wage policy, which was previously

¹²⁰⁰ Ruth Ben-Israel, *Labour Law – Vol. I*, (The Open University, 2002), p. 75.

¹²⁰¹ Uri Ram, *The Globalisation of Israel*, (Wrestling Publishing 2005).

¹²⁰² Shlomo Svirsky, *Israel in the Global Space*, in: D. Filk, A. Ram (Eds.), *Capital Rule – Israeli Society in the Global Age*, (published by the Van Leer Jerusalem Institute / United Kibbutz Publishing, 2004).

¹²⁰³ Uri Ram, *The Globalisation of Israel*, *ibid.* See also Chapter 14.3.9 below.

outlined through negotiations between the Histadrut, workers and the Ministry of Finance for nationwide agreements, and negotiations between the Histadrut and the Manufacturers' Association for industry agreements.¹²⁰⁴

These aspects affected employers and workers alike in labour-intensive industries. Workers had to face tough competition from abroad, which forced them to become frugal and efficient in their production methods. Strategies for reducing costs in the organisation included a wide range of tactics: reducing wages and deducting social rights, eliminating jobs or hiring through subcontractors, as detailed below.

Globalisation contributed to a downward shift in wages and working conditions and eliminated jobs at the local level. Labour-intensive manufacturing industries, such as textiles, relocated to sites where labour costs were very cheap. More than 25 Israeli textile factories transferred their production to neighboring countries (Egypt, Jordan, Turkey, and the Palestinian Authority). It is estimated that by 2004, about 150 Israeli companies from various fields had moved some of their production lines abroad. They set up businesses in East Asia, Eastern Europe, Turkey, Egypt, Jordan and more – and the loss to the Israeli economy was tens of billions of ILS per year.¹²⁰⁵

Another way of harming workers' conditions, reducing their wages and depriving them of their social rights in global Israel was employment through employment bureaus. Employment in this method frees the client from responsibility for workers and this passes to a subcontractor who serves only as an intermediary between the de-facto employer and the de-facto worker. Employment bureaus therefore serve as a conduit for employers seeking to lower workers' labour costs, avoid employee-employer relations and of course conduct collective bargaining with trade unions. As early as 2001, the State Comptroller noted that the employment of workers in this method over time is done "in order to avoid employer-employee relations and to bypass collective agreements that are inconvenient [to employers. Me: A.A.M]".¹²⁰⁶

14.3.3 Growth of Unconventional Work Patterns: Employment through Employment Contractors and Outsourcing

In recent decades, with the weakening of trade unions, increased competition, technological developments, the development of neoliberal norms and the transition to a global economy, managerial perceptions have changed. Employment organisations had to become more efficient, flexible and lower the cost of labour. Unusual work patterns of temporary or flexible part-time employment emerged in the labour market. From the pattern of work of these workers, the component of exclusivity and economic dependence has disappeared or there has been a change in it. These workers may be employed simultaneously by several employers and are not financially dependent on a particular employer. The fact that they are employed by different employers for different periods of time also creates a reality that they cannot accumulate rights with a particular employer. Employment of workers by employment contractors is one of the most flexible and unconventional forms of employment. In this pattern, the traditional two-dimensional relationship that existed between the work performer (the worker) and the user of his work (the employer) has been converted into a three-dimensional relationship. There are three factors involved in this system: the one in whose premises the work is done and the user – on this occasion his name is changed from employer to *user*, the worker who performs the work in the user's premises, and the

¹²⁰⁴ The Association for Civil Rights in Israel, Human Rights in Israel – Status Report 2004 (Report), p. 39. At the link: <https://law.acri.org.il/he/884> Accessed: 26/09/2021.

¹²⁰⁵ Ibid, pp. 62, 64.

¹²⁰⁶ State Comptroller's Report, Supervision of Employment by Personnel Contractors (Jerusalem, 2001).

employment contractor who hires the worker's services and serves as both a buffer and a link between the worker who performs the work and the user on whose premises the work is performed. Employing workers through an employment contractor disconnects the direct relationship between the employer and the worker, and converts the traditional work pattern into a fluid work pattern in terms of the number of hours of the position, its permanence or lack thereof, availability and duration.¹²⁰⁷

At the same time, outsourcing has evolved as a strategy that is justified in terms of economic efficiency, specialisation and reduction of uncertainty. The idea that developed was to take the model of the employment bureau and use it not only when it comes to temporary labour supply but also when it comes to employing regular manpower and even for a long period.¹²⁰⁸ Outsourcing removes some of the organisational functions, manpower, or both, outside the factory. This is how you find functions such as: data processing, marketing, employee sorting, office functions and more. Instead of permanent workers, the organisation maintains contact with subcontractors, self-employed workers or contractor workers. The direct formal relationship between the organisation and the worker is converted into an indirect relationship, through subcontractors. The workers are the subcontractor's workers but they perform their work for the organisation receiving the service. If the subcontractor does not meet his obligations to the satisfaction of the organisation, it is assumed that he can be replaced by another. Through outsourcing, the connection between workers and the organisation for which they work is loosened. Supervision of their work sometimes becomes the supervision of results and not of the work process or of the workers themselves. Investment in employees (in terms of training, creating motivation, etc.) is also small. Moreover, as a result of outsourcing, the boundaries between organisations are blurring. Self-employed workers, subcontractors and personnel contractor workers easily move from one organisation to another, and are able to serve several organisations simultaneously. One organisation becomes a subcontractor of another organisation and the corporate identity becomes problematic.¹²⁰⁹

Bar-Haim see labour organisations, in recent years, as resembling the clover leaf in their employment structure. A *clover* organisation is characterised by three partially overlapping circles: Core circle: The shrinking traditional organisation, a circle of contractor employment: through employment bureaus and outsourcing, and a circle of flexible occupations within the organisation that are constantly changing according to market needs and technology.¹²¹⁰

¹²⁰⁷ Ruth Ben-Israel, *Labour Law – Volume II*, (The Open University, 2002), pp. 454, 462 - 464.

¹²⁰⁸ Ruth Ben-Israel, *Outsourcing: Outsourcers Out: Employment of Workers by Personnel Contractors – Another Interpretation Converting Formal Employment into Authentic Employment*, (Labour Law Almanac 7, 5759-1999), p. 564.

¹²⁰⁹ Amira Galin, *Outsourcing: Outsourcers Out: The Organisational and Managerial Aspect*, (Labour Law Almanac 7, 5759-1999), pp. 45-46.

¹²¹⁰ Aviad Bar-Haim, *Human Resource Management, Unit 9: Labour and Employment Relations*, *ibid*, p. 96. Hereinafter: Figure 15.

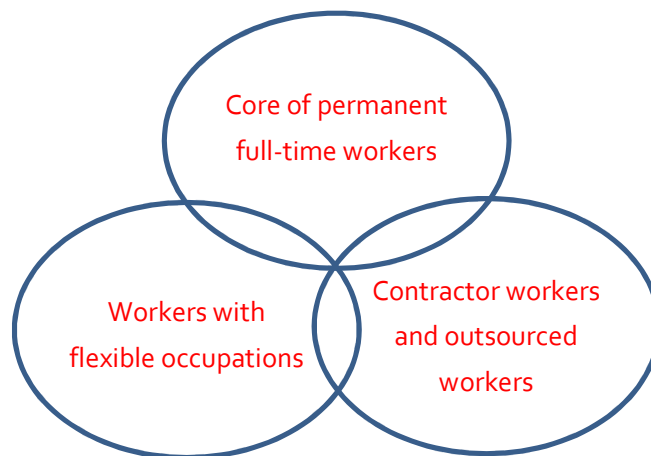


Figure 16: labour organisations as resembling the clover leaf in their employment structure.

What is the connection between outsourcing and a strike? Amira Galin explains that trade unions made it difficult to remove workers from the factory, established the rights of the workers with the factory and strengthened the stable and direct relationship between workers and the employer. The flexibility that accompanies outsourcing encourages individual negotiation between the employer and his workers, in contrast to collective bargaining, and accordingly a devaluation of the status of trade unions can be assumed, while strengthening the power of employers compared to individual workers and especially external workers. Through the outsourcing strategy, employers expect to break free from collective agreements. Moreover, since it is assumed that subcontractors and their workers are not organised in trade unions, it is expected that as part of outsourcing, no more factories will suffer from strikes. This assumption does not always stand the test of reality, as we have seen. Outsourcing workers have to put in more effort on their way to band together and operate the strike weapon. They cannot jointly set up a representative workers' union in the workplace where they are placed, because their direct employer is the contractor. There is, for the most part, also a disconnect between these employees that neutralises their attempt to organise.¹²¹¹ Dilution of the number of workers in direct employment harms the power of the representative workers' union (as far as it exists) in the customer's workplace, since the contractor's workers cannot join and be members of the union. Moreover, when subcontractors take organisational steps, the employer cannot always negotiate with them (because he does not have a clear address for such a negotiating partner) and therefore, it is also not always possible to reach agreements with them. Then the employer will suffer damages, which can also harm his customers.¹²¹² Rahamim adds that employment through contractors leads to an increase in the number of workers in individual contracts (in the relationship between the contractor and the employee), and indirectly causes damage to collective labour relations in the economy, and reduces the number of workers protected by collective labour laws. In addition, an attempt to organise the services of the contractor (in order to sign a special collective agreement with him) may prove worthless. The reason for this is that until the workers manage to get organised, there is a chance that the service contractor will stop providing his services to the same customer, and the contractor workers will move to the services of the new contractor, who won the tender

¹²¹¹ Yossi Rahamim, *The Modern Labour Market in the Age of Globalisation, and its Influence on Labour Law*, (Law 24, 5778-2018), pp. 437, 456.

¹²¹² Amira Galin: *Outsourcing: Outsourcers Out: The Organisational and Managerial Aspect*, (Labour Law Almanac 7, 5759-1999), pp. 47, 52-53, 56, 60.

with the customer, and re-establish labour relations with him. There is also a chance that the new contractor may not accept the services of the workers who led the previous contractor's attempt to organise, lest they try to do the same with him. These workers will be marked as *problematic* and thus may find themselves without a job.¹²¹³

14.3.4 Privatisation

Privatisation is the common term for describing a procedure in which the state transfers its assets to private hands, as well as a procedure for transferring activities in the field of infrastructure and services, which have hitherto been provided by the state, to private operators. Privatisation of a state-owned government companies is done by selling the state-owned company shares to private parties, by way of a tender. Privatisation of government activities, such as welfare, health, education, infrastructure or communications services, is done through a fixed-term contract between the state and private entities to carry out public activities. The phenomenon of globalisation and the rise of neo-liberal perceptions have led to trends in the privatisation of public services including communications, electricity and ports services, and the emptying of states of various powers, which have been transferred to private bodies.

Since the 1980s, the State of Israel has adopted a policy that supports privatisation processes, some of which have an impact on collective labour relations, since the state, as a unique employer in the economy, ceases to be the workers' employer. Mironi explains that as part of the privatisation process, several stages took place. Initially, various activities of local authorities were transferred to municipal companies, in which collective labour relations do not usually take place. In the second stage, in some cases, these bodies underwent massive processes of reductions and workers were deducted from the collective model. In the third stage, reduction of the manpower employed according to the collective model is done through tenders for granting licenses and operating franchises in areas of activity, in which collective labour relations took place, to private bodies in which there are no collective relations. And in the fourth and final stage, services previously provided by the public service and as part of the collective model employment are provided by private entities and by non-profit organisations from the third sector, which in most cases have no collective labour relations.¹²¹⁴

Raday and Noam claim that due to the high rate of companies in the public service, there is a direct relationship between privatisation and a decrease in the rate of organising.¹²¹⁵ Litor adds that if in the past the state directly provided public services and performed government functions within the framework of a model of a positive state – an intervening welfare state, then today there is a setback in this model. Following privatisation, there has been a shift from a governance model of a positive state, in which public services are provided directly by the state itself, to a model of a regulatory state. As part of the regulatory state model, the state formulates new mechanisms of regulation on the privatised service and activity in the markets.¹²¹⁶

14.3.5 Trends of Separation: of the Employer from the Knowledge and Expertise Owner, and of the Workplace and the Worker

In the twentieth century, we witnessed two main trends of separation. The first trend is the separation of the employer and the person with the knowledge and expertise. The set of roles within the factories has

¹²¹³ Yosi Rahamim, *ibid*, pp. 437-438.

¹²¹⁴ Mordechai (Moti) Mironi, *Privatisation of Labour Relations and Labour Law*, in: Steve Adler Book, (Nevo, 2016), p. 341.

¹²¹⁵ Frances Raday and Gil-Ad Noam, *ibid*, pp. 70-71.

¹²¹⁶ Lilach Litor, *Regulatory Legality in the Age of Privatisation and Strikes That Affect Competition: Between the Labour Court and the Antitrust Court* (Legal Studies 31, 5778-2018), pp. 404 - 405.

changed. The distinction between position holders (most of whom found themselves at the same hierarchical level or at close hierarchical levels) became blurred, and the number of position holders who played borderline roles between the factory and its external environment, grew. As a result, the characteristics of the managerial role have also changed, since from now on the manager's orientation is directed outwards, no less than inwards. The terms *supervisor* and *subordinate* lose their meaning to a great extent. For example, many workers are required to have broad professional judgment in their field of work. In such a reality, traditional organisational boundaries are blurred. Organisation workers do not have to work within the *walls of the organisation* and do not have to be associated with the organisation on a regular basis. The traditional roles of the manager (such as exercising authority, delegating authority, overseeing work processes) are losing their traditional meaning. In contrast, the principal roles of the manager focus on relationships with external factors, which have become an integral part of the organisational system.¹²¹⁷

Fisher also expresses a similar opinion. In his view, the penetration of information and communication technology has completely changed the world of work. This technology (which Fisher calls *online technology*) has made the workplace decentralised. It has challenged the distinction between different levels in the workplace and made them hollow. Power relations began to be decided on the basis of professional ability and not on the basis of ownership of the means of production. Power relations are not predetermined and are not fixed but vary according to a given task and the need it requires.¹²¹⁸

To summarise this point, it can be said that hierarchical labour relation systems have become horizontal, including work circles, work groups and work teams. But it seems that this change has not led to a noticeable change in everything related to the ways of working of workers' unions in Israel, which do not always express the need to be flexible in the workplace.

The second separation trend is the separation of the workplace and the worker. The technological changes that took place in the mid and late twentieth century – production of the personal computer, increasing use of satellite communications, marketing of cell phones and of course the Internet – enabled communication not only between countries and continents, but also between individuals and groups in different countries. This created cultural, political and economic ties. The new technological changes on the one hand, and globalisation on the other, as well as the blurring of geographical boundaries (as was the case with the collapse of the USSR, the fall of the Berlin Wall and the growth of the EU) created a world of work in which the significance of the geographical location of the worker or of the factory diminished. If by that time, enterprises or humans, under the auspices of globalisation, had migrated from industrialised countries to developing countries and factories had spread across geographical areas, then today, many workers do not work in the employer's premises, and many employers have no premises at all and the remote work model is becoming more common and more acceptable – for example, banks operate without branches, universities become *hybrids*, psychologists meet with their patients remotely and more. The separation trends – both of the employer from the knowledge owner, and of the worker and the workplace, affect, as stated, the labour relationship and consequently also the ability to activate the strike weapon. In doing so, the obvious question arises: how can anyone, if at all, strike against an employer – if he lives permanently abroad or has no place of work to which the workers can go?! There is

¹²¹⁷ Ruth Ben-Israel and Amira Galin: *Who is a manager in the 21st Century* (Labour Law Almanac, 1996), pp. 127 - 133.

¹²¹⁸ Eran Fischer: *Trapped in the Net: The Discourse of Network Technology and New Capitalism*, (Theory and Criticism 37, Fall 2010), p. 163.

no doubt that the new rules of the game have made the usual tool of struggle in labour relations a tool that is difficult to apply.

14.3.6 Working from Home

Work from the worker's home, or in the popular expression *working from home*¹²¹⁹ is actually an umbrella term for a job description, which is from any place but not from a workplace, which is still recognised today, where all the organisation's workers or at least the vast majority are. There are three types of work from home: in one work is done entirely from the home; in another, a few days a week or a few hours each day are from home; or work outside usual working hours (night hours / Fridays / holiday eves).¹²²⁰

The form of employment from home began to spread as early as the 1990s, when sophisticated media, the Internet and the post-Fordist form of production became more common and allowed workers and employers to maintain a personal connection between them, without physical meetings. At the same time, Atlan mentions that work from home preceded the Industrial Revolution, in the way of manual labour. This form of work from home continues to exist even in developed countries, so the tendency to think of workers from home only in terms of people sitting in front of their personal computer should be avoided.¹²²¹ During the Industrial Revolution the factory became the place of work, and the worker and the workman left the house, and the family and friends were left behind. The information revolution brings them back to their homes with their laptops, cell phones, WIFI, VPN and broadband Internet.

Employers benefit from this pattern of employment because they have significant savings in office costs (buying / renting), office maintenance costs (including taxes associated with maintenance and cleaning), related expenses for workers (travel expenses to and from work, subsistence, etc.) incurred for workers. But it seems that in respect of our case, employers hoped to become more efficient, through employment from home, also in the field of collective labour relations, because this form of employment severs the physical connection between the worker and the union, as will be explained below.

The legal and public consciousness of working from home has expanded especially since 1996, when the International Labour Organisation adopted Convention No. 177¹²²² and Recommendation No. 184 regarding workers from home. As of writing this, only ten countries have ratified the Convention: Finland (1998), Ireland (1999), Albania (2002), The Netherlands (2002), Argentina (2006), Bulgaria (2009), Bosnia and Herzegovina (2010), Belgium (2012), Macedonia (2012) and Tajikistan (2012).¹²²³ In 1997, a process of consultation began in Israel within the framework of the Joint Committee for the Government and the Representative Organisations of Workers and Employers, to examine the possibility of ratification of the Convention by the State,¹²²⁴ but this process has not been completed to date.

In 2019, only 4.4% of Israeli workers testified that they worked from home "most days of the week" – a lower-than-average rate in European countries, which stood at about 5.3% that year. At the same time, it is worth noting that even if the rates of work from home on weekdays in Israel were relatively low, the

¹²¹⁹ Other concepts for describing work from home that are common in the research literature are: *homework*, *telework*, *outwork*, *telecommuting*.

¹²²⁰ Kobi Spivak, *Working from Home*, (Net Plus 176, February 2005), p. 66.

¹²²¹ Michael Atlan, *Working from Home in Labour Law* in: Menachem Goldberg Book, (Sadan, 2001), p. 91.

¹²²² Home Work Convention 1996 (No 177).

¹²²³ According to the website of the International Labour Organisation. At the link:

https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:17396170742755:::P11300_INSTRUMENT_SORT:3 Accessed: 10/10/2021.

¹²²⁴ See fn. No. 4 to the article by: Michael Atlan, *Working from Home in Labour Law* in: Menachem Goldberg Book, (Sadan, 2001), p. 91.

trends show that in the last decade they have been on the rise and doubled (from about 2% in 2008 to 4.4% in 2019, as mentioned). A similar trend is also occurring in most EU countries, where there has been an average increase of about 13% in the rate of employed persons from home in the last decade. These processes reflect an endogenous response of the labour market to gradual changes in information and communication technology, which have expanded the possibilities of working from home. Studies have found that the ability of workers to work from home increases as they come from more socio-economically strong localities, the more educated the workers, and the more they belong to the information and communication industry (compared to accommodation, food, art, entertainment and leisure, wholesale and retail trade, health services, welfare and social services – where this ability is extremely low).¹²²⁵ It seems, therefore, that working from home is a privilege that is made possible for workers of high socio-economic status,¹²²⁶ and is only available to the already privileged segment of those employed in high-tech industries and services.

The changes in communication and information technology expanded remote work options even before the outbreak of the Covid pandemic, but with the spread of the pandemic and social distance restrictions, many businesses were forced to adopt teleworking technologies and expand their application to businesses already in use. A survey conducted by the Central Bureau of Statistics during the Covid crisis reported that 38.4% of businesses enable work from home, most of them in the high-tech industries, financial services, and technical professional services, postal, courier and more. That is, work from home is only suitable for a certain type of employment, which can be defined as computerised services, and is not suitable for manufacturing or construction work that involves material processing and physical work. Approximately 46.9% of the businesses that enabled work from home reported that work from home is *largely* and *very* effective. 16% of businesses that enabled their workers to work remotely responded that they were interested in increasing the employment rate from home to a great or very great extent.¹²²⁷

Working from home reduces the importance of the geographical proximity between the place of residence and the place of work, and therefore working from home also accelerates the neo-liberal revolution that is taking place in labour relations. Working from home is a huge step forward in the trend of privatising labour relations. It involves social and media segregation between workers, which weakens their bargaining power vis-à-vis employers and may also detract from workers' capacity to unionise, which is already being undermined in the neo-liberal era,¹²²⁸ and ultimately the power of the trade union. The predictions of some researchers are that the creeping process of moving to work from home will only be accelerated in the future.¹²²⁹ And that is precisely why the question arises – How can you strike when

¹²²⁵ Shavit Madhala and Binyamin Bentel, *The Ability to Work from Home Among Israeli Workers* (Taub Center for Social Policy Research in Israel, November 2020), pp. 4-6, 20.

¹²²⁶ A similar position is also expressed by Dafna Aviram Nitzan and Rachel (Heli) Zaken, *Survey of Work Characteristics from Home During the Covid Crisis* (Israel Democracy Institute, August 2020), at the link: <https://www.idi.org.il/media/14897/economic-poll.pdf> Accessed: 28/09/2021.

¹²²⁷ Central Bureau of Statistics: *Results of the Business Condition Survey with the Spread of the Covid Virus* (Wave 3), Release Date: 27/04/2020. At the link: https://www.cbs.gov.il/he/mediarelease/DocLib/2020/115/29_20_115b.pdf Accessed: 28/09/2021.

¹²²⁸ Uri Ram, *Working from Home*, (Israeli Sociology 21, April 2021), pp. 329-330.

¹²²⁹ *Overview of the labour market situation during the Covid pandemic* (Eli Horowitz Conference on Economics and Society 2021), page 91. The Ministry of Economy has also begun drafting a bill aimed at regulating work from home. See: Shirit Avitan Cohen and Daphne Bramley Golan: *A new law will regulate work from home: this is how the plan of the Minister of Economy will work*, (Globes, 26/10/2021), accessed: 03/11/2021 at the link: <https://www.globes.co.il/news/article.aspx?did=1001388575>

working from home?¹²³⁰ This question forces us to internalise that not only the nature of the work has changed but also the workplace has changed, but the form of struggle of the workers has not yet internalised these changes.

In a global economic reality where important business decisions are made quickly by business entities, which may be physically and legally distant from the worker, the need increases for the workers' unions to respond quickly and efficiently, and of course to protect all worker, including workers distant from the workplace. Ignoring this would be a violation of the duty of fair representation or the duty of loyalty that every union owes to its employees. Thus, it is necessary to think of other means of pressure, alternative or complementary, to the strike as a tool for achieving goals in collective labour relations. The way there requires workers' unions to locate workers outside the enterprise, share the information and service they provide to workers with them (protection of their rights, legal assistance, etc.), allow them to participate in union elections – and all to maintain contact with them, and strengthen solidarity with the union and its goals. The way a workers' union should do this, according to Pinchuk Alexander, is to acquire tools and skills in the field of information systems concentration. Wise use of information will greatly benefit workers as individuals and the worker union that represents them. A new distribution of information will ensure transparency and openness. The workers' union will be able to systematically disseminate information concerning the legal rights of workers and important legal battles between workers, workers' unions and employers. Increasing workers' awareness and understanding of the legal arena of labour relations may, firstly, enable every worker to protect his rights and improve his quality of life, and secondly, provide a backbone that will strengthen workers' unions because it puts them at the forefront of the fight against hostile employers. Workers' unions can work closely on these issues with other workers' unions around the world, with the goal of creating a global information network.¹²³¹

14.3.7 Development of Individual Trends in the Workplace

According to studies focusing on changes in the world of work, beginning in the 1980s, the old *psychological contract* has been replaced by a *new contract*. If in the old contract the worker devoted his full ability and loyalty to one employer for years in exchange for job security and fair payment, then in the new contract the employee provides his services at the highest price, gives up job security and lives in constant anxiety about the future. However, the new contract is characterised by mutual flexibility: on the one hand, the employer may lay off workers due to reductions or a slowing down in his business. Workers, on the other hand, are loyal to their career trajectory and may advance to the next job that offers higher pay and challenges. This flexibility is possible because the labour contract is individual and not collective, as in the past.¹²³²

What causes this flexibility on the part of workers and what is its effect on the trade unions? It seems that in the priorities of many workers there is a demand for improving quality of work and allowing for personal expression and self-fulfilment. The scale for success is no longer just the pay slip, but also interest in work, professional independence, personal expression and the ability to influence decision-making. A similar position is taken in the study of Sharabi and Harpaz, who tried to point out the changes in labour values in Israel and found that along with an increase in the importance of wages and job

¹²³⁰ This question was also raised at the Berl Katzenelson Foundation Conference. See: Yehuda Conforts: *How do you conduct a strike when working from home?* (People and Computers, 04/05/2021), accessed: 05/10/2021, at the link: <https://www.pc.co.il/featured/337411/>

¹²³¹ Nava Pinchuk Alexander, *ibid*, pp. 61-63.

¹²³² Nirit Toshav Eichner, *Changing the Rules of the Game in the World of Labour*, (Director of Research and Economics at the Ministry of Industry, Trade and Employment, February 2009), pp. 33-34.

security, workers in Israel want more freedom of action and especially more interesting work. The reason for this is the increasing exposure of Israeli society to the values of other cultures – which has contributed to an increase in the expressive values of interest, self-realisation, individualism, etc. and on the other hand to an increase in the instrumental values of better wages and conditions. This exposure is also accompanied by more individualism and less emphasis on collectivism¹²³³

Another expression of individualism that currently dominates workers' positions is a move away from institutionalised political activity. The working public today is unwilling to accept forms of organisation that do not express its positions as they are, and is much more sceptical than in the past about its leadership. As a result, the form of expression and integration of workers in their own organisation changes.¹²³⁴ With the transition to an individualistic approach in Israel, the Histadrut does not have much support from the public or the media.¹²³⁵ Harpaz explains this by the fact that the generation born in the 1960s and 1970s has accumulated resentment towards the Histadrut. The new Israeli workforce is much more individualistic and materialistic and less collective (compared to their parents). Personal achievements outweigh contribution to society. Young workers are much more educated, career-oriented and less involved in solidarity. Therefore, the Histadrut is a *dinosaur* to them, that will limit their achievements.¹²³⁶

Ido Eshet also recognises individual trends in the changing world of work. He points to three trends in the model of representation in the field of collective labour law. The first is the transition in workers' unions from centralised hierarchical control to a distributed and collaborative control structure characterised by a power flow axis *from the bottom up*. Support for this is in the establishment of the Power for the Workers organisation, based on decentralisation and cooperation. This organisation seeks to bring the union's activities closer to its members, and therefore, inter alia, it is the branch level that decides for itself and not clerks who are not part of the area in the factory. A bottom-up flow axis requires a higher level of sharing, in which every worker is allowed to engage in the *political* in the workplace which does not assign a special *professional* prestige to their representatives. A possible reason for this is the loss of trust in the representative and the rise of the demand for *new politics* – amateur politics, which are non-hierarchical and bureaucratic cooperative politics. The second trend Eshet points out is the movement to establish new-local-small workers' unions, *micro-organisations*. These organisations seek to represent only the interests of the specific workplace as part of the workers' union for collective bargaining with management and do not seek to have a part in representing broader interests. In Eshet's opinion, it is possible that this trend indicates that groups of workers choose to gather for the local and familiar within the framework of the collective representation instead of joining an institutionalised, general and centralised organisation. The third trend is that today more than ever, different groups in the workplace are no longer willing to find their place within the existing organisational hierarchy and within the relatively broad bargaining unit. A possible reason for this is the decline in general solidarity between worker groups and the desire to organise in micro-organisations. It is possible that the phenomenon of separation indicates a decrease in the collective agreement for the existence of a partnership of interests

¹²³³ Moshe Sharabi Yitzhak Harpaz, *The Influence of an Era, the Movement of Life and the Change of Generations on the Goals of Work in Israel*, (Labour, Society and Law IX, 2004), p. 60.

¹²³⁴ Nava Pinchuk Alexander, *ibid*, p. 56.

¹²³⁵ Yitzhak Harpaz, *Globalisation and Impact on Society, the Economy and the Labour Market in Israel*, *ibid*, p. 7.

¹²³⁶ Itzhak Harpaz, *The State of Trade Unionism in Israel*, Centre for the Study of Organisations and Human Resource Management, University of Haifa and Israeli Industrial Relations Research Association, 2007.

with different groups within the existing bargaining unit that shares similar but not identical community interests.¹²³⁷

14.3.8 Work Migration, Brain Circulation and Foreign Workers in Israel

In the twentieth century there was a mass movement of populations, migrating from developing countries to developed countries. Immigrants move in search of higher-paid work than in their countries of origin, in order to improve their economic situation. Workers in developing countries are often deprived of their rights at work, and do not enjoy a rich variety of rights enjoyed by workers in developed countries, thanks to protective labour law and collective labour law. Many workers in these countries are employed in deplorable working conditions, long working hours and very low wages. It is not for nothing that these factories have been awarded the dubious name *sweatshops*.

Development of land and air transport routes, and in particular the ability to communicate remotely thanks to the Internet and satellites, have made the migration process, and the search for a better job, easier than ever before. The phenomenon of migrant workers has had a significant impact on the nature of the modern labour market and the conditions of employment of local workers, on several levels: this phenomenon has opened up the local labour market to international competition, with certain positions for both domestic and foreign candidates. In this way, the chances of hiring the local worker become lower. One of the reasons employers prefer foreign labour, according to Omri Yadlin, is that foreign labour is cheaper than local labour. Most foreign workers come to Israel from countries where the customary wage and the cost of living are significantly lower than those of the workers in Israel and therefore, the wage demands of these workers are lower than the wage demands of workers in Israel. Hence the importation of foreign workers lowers labour and manufacturing costs for local firms. Restrictions on the import of foreign labour will lead to rising prices in the market, and to capital escaping to markets where there is more professional and cheaper labour. Opening the gates to a foreign workforce allows Israeli manufacturers to reduce the cost of their products and compete in the global market more effectively.¹²³⁸ The increase in demand for work (along with a decrease in the number of jobs offered in the economy) also causes a decrease in the bargaining power of local workers vis-à-vis the employer, in negotiations for the conclusion of their personal employment contract. The weakening of the workers' bargaining power may, as a direct result, lead to a decrease in their terms of employment and wages. Finally, the employment of foreign workers also helps employers to neutralise the power of organised workers in the factory, and to create a stratum of workers on personal contracts with a many fewer rights.¹²³⁹ This is possible because foreign workers are both scattered throughout the country and also compete with the weakest groups of workers in the country who have traditionally not been organised: construction, agriculture and personal services workers. Breaking the unity and solidarity between workers by employing foreign workers is one of the reasons for the decline in the power of workers' unions, and as a result – the ability to use the strike weapon.

In the pre-globalisation era, Israeli Prime Minister Yitzhak Rabin called Israelis emigrating away from Israel a “fallout of wimps”.¹²⁴⁰ These immigrants were also referred to as *Yordim* [translator's note: *Yored* in Hebrew means a person going down, the opposite of *Oleh* which means a person coming up, making Aliyah] and were subjected to harsh criticism by the *remaining*. Today, in the age of globalisation and

¹²³⁷ Ido Eshet, *The Model of Representation in Collective Labour Law – New Trends*, *ibid*, pp. 405 - 419.

¹²³⁸ Omri Yadlin, *Foreign Work in Israel*, in: Menachem Goldberg Book, (Sadan, 2001), pp. 340, 344-347.

¹²³⁹ Yosi Rahamim, *ibid*, pp. 429-431.

¹²⁴⁰ The phrase was first uttered by Yitzhak Rabin in an interview in honor of the 28th Independence Day of the State of Israel in 1976. Quoted by: Nirit Toshav Eichner, *ibid*, p. 55.

loosening of the meaning of geographical boundaries and advanced information technologies, life in one large global village exists and the phenomenon of multicultural workers is more legitimate in relation to the old world of work. In 21st century Israel, the phenomenon of brain draining to the West for the purpose of respectable and rewarding work and for a higher standard of living than in Israel, has become more widespread than before. At the global level, it is estimated that 1.8% of the working-age population lives in a foreign country. Global migration rates are 1.2% for low-skilled workers, 1.8% for medium-skilled workers and 5.5% for high-skilled workers (skilled workers). There are developing countries from which the migration of skilled workers reaches rates of 10%-30% of all skilled workers. Migrant workers are usually offered lower wage levels compared to the country of origin, especially if the worker is employed in a job that does not match his education, experience and skills. At times, the language barrier and lack of familiarity with local customs and culture intensifies the difficulty of being absorbed in work. It has been found that in Western countries workers' conditions deteriorated after workers from China, India and other developing economies entered the global labour market, which led to a doubling of the less skilled global labour force and as a result, the return on these workers in the West decreased and the return on capital and skilled workers increased.¹²⁴¹

Because of global trends, human resources have become extremely flexible, highly competitive and very available. Globalisation has enabled international employers to reduce costs (while threatening the permanent dismissal of local workers) thanks to the availability of alternative workers from other countries, or transfer of labour to countries where labour is cheaper or unprotected. This phenomenon encapsulates the familiar concept of *brain drain*, along with the term *brain gain*. Both concepts appear in the broader context of *brain exchange* or *brain circulation*, which describes a phenomenon of skilled workers migrating to places where they are offered a job that matches their skills and training. That is, brain mobility is a two-way flow of expertise between a country of origin and a country of destination, and is one of the characteristics of the transformations in the world economy. As an international labour market emerges, labour migration becomes an inevitable phenomenon: the departure of skilled workers from a particular country means their recruitment in other countries of the world. Brain drain occurs mainly from developing or poor countries to developed or rich countries. Countries tend to see migration of skilled labour as brain drain. This trend is of concern to them, and is particularly acute among developing and less developed countries. The source of concern lies in the position that the state also *loses* skilled labour to industrialised countries, and it also loses the return on investment in human capital when a person begins to be productive and pay taxes. The prevailing opinion is that the brain drain phenomenon imposes costs on the country and thus inhibits its economic growth.¹²⁴²

When it comes to foreign workers in Israel, it is difficult to gather information about them, because it is difficult to estimate the foreign and illegal labour force. At the same time, official data show that in March 2021, more than 117,000 foreign workers were employed in Israel. Of these: 96,755 are legal foreign workers, and 20,809 are illegal foreign workers. In addition to them, there were also 30,469 infiltrators in Israel, (Also known as Asylum Seekers from Eritrea and Sudan, who do not have work permits for Israel). Most foreign workers are employed in construction, agriculture, nursing, restaurants, industry and services.¹²⁴³ The fact that many of them are illegal and belong to the informal economy contributes greatly to their exploitation.

¹²⁴¹ Nirit Toshav Eichner, *ibid*, pp. 18-20.

¹²⁴² *Ibid*, pp. 26-27.

¹²⁴³ Population and Immigration Authority, *Data on Foreign Workers in Israel*, April 2021. At the link:

14.3.9 Changes in the Rate of Israeli Workers who are Members of a Workers' Union

At the beginning of the 1980s, the rate of membership in workers' unions of all workers in the Israeli economy was 80%.¹²⁴⁴ Following changes in the economy (including the enactment of a state health law that severed ties between the Histadrut and Clalit Health Fund), the proportion of unionised workers shrank to about 45% in 2000, to about 34% in 2006 and to about 24.7% in 2012.¹²⁴⁵ The latter figure should be read with extreme caution, because other studies have found that the percentage of organised workers in Israel is about 34%.¹²⁴⁶ In 2016, the percentage of organised workers in Israel climbed slightly to 27.1%.¹²⁴⁷ It is also interesting to consider the reasons why workers are not members of a workers' union. Respondents replied that they do not know about the possibility of being members of a workers' union and 5.7% said that membership in a union would not benefit them. But the main mass of respondents, 74.6%, said that they are not unionised because there is no union in their workplace.¹²⁴⁸

The decline in the rate of unionisation is not unique to Israel and in the last two decades it has been evident in all OECD countries, but the decline in Israel has been particularly sharp: In 1992, Israel belonged to the group of countries characterised by a high rate of unionisation, similar to the Scandinavian and Belgian countries, and in 2012 it belonged to the group of countries characterised by a medium-high unionisation rate, similar to countries such as Austria, Canada, the United Kingdom and New Zealand.¹²⁴⁹

As a derivative of the structure of the workers' union in Israel, three types of *classes* can be distinguished: *internal* workers who are members of a trade union and are covered by a collective agreement; *partial* workers covered by a collective agreement but not members of a trade union, and *external* workers who are not members of a trade union and are not covered by a collective agreement.¹²⁵⁰ One of the changes the Israeli labour market has undergone is a shrinking rate of internal workers and at the same time – a sharp increase in the share of external workers. The share of the latter has risen since 2000 from a third to

https://www.gov.il/BlobFolder/reports/foreign_workers_stats_q1_2021/he/foreign_workers_stats_q1_2021.pdf Accessed: 26/09/2021.

¹²⁴⁴ Yionon Cohen. Yitchak Haberfeld. Guy Mundlak. Ishak Sporta, *The Rate of Organised Workers in Workers' Unions and Coverage Rates of Collective Agreements: Past, Present, Future* (Labour, Society and Law, 2003).

¹²⁴⁵ Central Bureau of Statistics: *Social Survey 2012*, p. 46. At the link:

<https://www.cbs.gov.il/he/publications/Pages/2014/%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-2012-%D7%9B%D7%95%D7%9C%D7%9C-%D7%A0%D7%95%D7%A9%D7%90%D7%99%D7%9D-%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%D7%99%D7%9D-%D7%94%D7%A1%D7%93%D7%A8%D7%99-%D7%A4%D7%A0%D7%A1%D7%99%D7%94-%D7%95%D7%A4%D7%A8%D7%99%D7%A9%D7%94-%D7%95%D7%94%D7%AA%D7%90%D7%A8%D7%92%D7%A0%D7%95%D7%99%D7%95%D7%AA-%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D.aspx>

Accessed: 28/09/2021.

¹²⁴⁶ Guy Mondalek, Ishak Saporta, Yitchak Haberfeld and Yionon Cohen, *Union Density in Israel 1995–2010: The Hybridisation of Industrial Relations*, 52 *Industrial Rel.* (2013) 78, pp. 84–85.

¹²⁴⁷ Central Bureau of Statistics: *Social Survey 2016*, Table 31. At the link:

<https://www.cbs.gov.il/he/publications/Pages/2018/%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-%D7%9B%D7%95%D7%9C%D7%9C-%D7%A0%D7%95%D7%A9%D7%90%D7%99%D7%9D-%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%D7%99%D7%9D-%D7%AA%D7%A0%D7%90%D7%99-%D7%A2%D7%91%D7%95%D7%93%D7%94-%D7%95%D7%94%D7%AA%D7%90%D7%A8%D7%92%D7%A0%D7%95%D7%99%D7%95%D7%AA-%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D.aspx>

Accessed: 28/09/2021.

¹²⁴⁸ Central Bureau of Statistics: *Social Survey 2016*, Table 32. At the link:

<https://www.cbs.gov.il/he/publications/Pages/2018/%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-%D7%9B%D7%95%D7%9C%D7%9C-%D7%A0%D7%95%D7%A9%D7%90%D7%99%D7%9D-%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%D7%99%D7%9D-%D7%AA%D7%A0%D7%90%D7%99-%D7%A2%D7%91%D7%95%D7%93%D7%94-%D7%95%D7%94%D7%AA%D7%90%D7%A8%D7%92%D7%A0%D7%95%D7%99%D7%95%D7%AA-%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D.aspx>

Accessed: 28/09/2021.

¹²⁴⁹ Central Bureau of Statistics: *Social Survey 2012*, p. 46. At the link:

<https://www.cbs.gov.il/he/publications/Pages/2014/%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-2012-%D7%9B%D7%95%D7%9C%D7%9C-%D7%A0%D7%95%D7%A9%D7%90%D7%99%D7%9D-%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%D7%99%D7%9D-%D7%94%D7%A1%D7%93%D7%A8%D7%99-%D7%A4%D7%A0%D7%A1%D7%99%D7%94-%D7%95%D7%A4%D7%A8%D7%99%D7%A9%D7%94-%D7%95%D7%94%D7%AA%D7%90%D7%A8%D7%92%D7%A0%D7%95%D7%99%D7%95%D7%AA-%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D.aspx>

Accessed: 28/09/2021.

¹²⁵⁰ Tali Krystal, Guy Mundlak, Yitchak Haberfeld, Yionon Cohen, *Organisational Density in Israel 2006-2012: Division of Labour Relations* (Labour, Society and Law 14, 2015).

almost half of the workers. In addition, the proportion of part-time workers is about 20% of workers. Among these groups, the differences in salary and related benefits (pension, study fund, car ownership, etc.) stand out. An analysis of surveys conducted by the Central Bureau of Statistics reveals that the situation of internal workers is better in these two aspects, with the addition to the unionised worker being estimated at 16% also in relation to part-time workers. In contrast, part-time workers receive better ancillary benefits from external workers.¹²⁵¹

At the end of the first decade of the 21st century, we witnessed the opposite trend of private sector workers' unions in workplaces and industries that were not previously familiar with organised work, at unprecedented scales across age groups, workplace seniority, jobs, and earning thresholds. For example, if in 2011 only 9,580 new workers joined the Histadrut, then three years later about 43,000 new workers joined the Histadrut – an increase of almost four and a half times,¹²⁵² and in 2018 a quarter of Israel's salaried workers paid professional organisational handling fees.¹²⁵³ The statement that we are “witnessing a renaissance in workers' unions and their expansion” was even attributed to this trend in the **El Batuf**¹²⁵⁴ case.¹²⁵⁵

What are the reasons for the resurgence of the right to organise? A number of main reasons can be cited in response to this question. In 2010, the Histadrut established the Division for Worker Unionisation, whose role is to accompany workers who wish to establish new committees and support them. Prior to that, a new workers' union, Power for the Workers – a Democratic Workers' Union was established, and from here fierce competition began between it and the Histadrut over the workers' unions seeking to unionise. Increasing the activity of existing workers' unions, such as the National Workers' Union; The entry of energetic and aware MKs into the legislative arena led to many legislative amendments and also raised the status of the right to organise. For example, in 2001 and 2009 the Collective Agreements Law was amended to stipulate the worker's right to be a member of a workers' union,¹²⁵⁶ employers were prohibited from harming workers whether at the time of employment, during employment or dismissal due to their activity in a workers union / workers' committee,¹²⁵⁷ and the right of a representative of a trade union to enter a factory was established,¹²⁵⁸ and the duty of the employer to conduct collective bargaining with a trade union was established.¹²⁵⁹ The contribution of the Labour Courts and the High Court is also not absent from the discussion: there is no doubt that the new oxygen flowing in the arteries of the right of association is also and thanks to a series of rulings and precedents signed by the relevant courts in Israel. Among these, we will mention the ruling in the Pelephone case, which forbade the employer to speak on the matter of his workers organising, the ruling in the Hot Telecom case, which returned to work an employee who was fired due to his efforts to organise his colleagues in a trade union, the ruling in the SuperBus case, in which the Labour Court set a precedent in instructing the employer to hire a worker who was a partner in establishing a workers' union at his previous workplace, and the

¹²⁵¹ *Labour Relations in Israel: What is the Desired Model for a Workers' Union* (Israel Democracy Institute, 2016), p. 5.

¹²⁵² Faena Milman-Sivan, *The Right to Freedom of Association in the Mirror of the Values of Democracy – Developments in the Year 5774-2014* (Law and Reckoning 9, 5776-2016), pp. 562-563.

¹²⁵³ Workers Unions in Israel in the years 2014-2018 (Bank of Israel, 31/10/2021), Accessed: 03/11/2021, at the link: <https://www.boi.org.il/he/NewsAndPublications/PressReleases/Pages/31-10-21.aspx>

¹²⁵⁴ In this case, two labour organisations competed for representation among the workers of the Al Batuf Regional Council.

¹²⁵⁵ Claims Between Organisations (National) 31575-02-13 The National Workers' Union v. The New General Workers' Union.

¹²⁵⁶ Clause 33H of the Collective Agreements Law, 5717-1957.

¹²⁵⁷ Clause 33J of the Collective Agreements Law, 5717-1957.

¹²⁵⁸ Clause 33I of the Collective Agreements Law, 5717-1957.

¹²⁵⁹ Clause 33H1 of the Collective Agreements Law, 5717-1957.

ruling in the Amdocs case and in the Menora case in which the court refused to recognise independent workers' unions as representative organisations whose entire purpose is to prevent representation from another organisation or to prevent another organisation from signing a collective agreement.¹²⁶⁰

Mironi believes that despite the wave of unionisation at the beginning of the previous decade, the collective model and collective labour law are fading and continue to vacate their place in the center of the stage, as tools for working conditions and labour relations, in favour of individual labour relations and individual labour law. This phenomenon leads to a loss of hegemony and a devaluation of the relevance of collective labour law in daily life in favour of an appropriate increase in individual labour law.¹²⁶¹

In the opinion of Ruth Ben-Israel, the gap that developed in the collective representation also created a *judgment* of labour relations – the center of the discussion shifted to the legal arena as a result of a weakening of the collective agreement system.¹²⁶² Other scholars also express a similar opinion and they anticipate that as the collective model continues to decline, a series of labour law norms will be carried out by other actors: the legislature and the judiciary, through the labour courts.¹²⁶³ Hence it can be said that while the previous legal system stabilised a social system that preceded legal rule (referring to the establishment of the Histadrut and its collective actions even before and after establishment of the State of Israel), the new legal system will be required to fill content and shape the social system. Therefore, it is also clear why the struggle for the realisation of violated norms has become increasingly individualistic. More and more workers turn to the labour court, but in the vast majority of cases each applicant takes care only of himself, and there is no common and mutual activity and concern – typical of trade unions.¹²⁶⁴

14.3.10 Attitude of the Israeli Public towards Strikes and Professional Struggles

Public opinion in Israel was greatly influenced even in the pre-state days by the declared attitude of the labour movement, which sanctified the freedom of professional struggle, including the right to strike. The process that Israeli society has undergone in this field is a process both of a change in values – erosion of the freedom of professional struggle and attempts to place legal restrictions on it,¹²⁶⁵ and development of new employment methods that respond to the growing competition of firms. As a result of these changes, the workplace ceased to be as secure as in the past, and workers' certainty about their future diminished. Fisher explains this phenomenon on the devaluation that has taken place in the status of trade unions. In her opinion, the devaluation is a result of the lack of adapted tools of the unions to deal with the emerging economy.¹²⁶⁶ As a result of this process, working conditions are increasingly determined at the level of the individual factory. In such a situation the status of the workers' unions is harmed. Pinchuk Alexander also expressed a similar opinion in the early 2000s in writing, that “in recent years, the Histadrut's activity has been reduced to organisational power struggles through strikes and legal battles in the labour

¹²⁶⁰ Aviad Menashe, *Renewal of the Right of Association*, (Authority – Professional Journal for Managers in the Field of Labour Relations, Wages and Finance, 1, May 2016).

¹²⁶¹ Mordechai (Moti) Mironi, *Developments and Trends in Collective and Individual Labour Law 2010-2011*, (Law and Reckoning 8, 5774-2014), pp. 156, 194.

¹²⁶² Ruth Ben-Israel, *Judging Labour Relations – An Israeli Situation – Preliminary Reflections* (Labour Law Data A, 1989).

¹²⁶³ Mordechai (Moti) Mironi, *Developments and Trends in Collective and Individual Labour Law 2010-2011*, *ibid*, pp. 156, 194. And also: Yosi Rahamim, *ibid*, p. 459.

¹²⁶⁴ Tal Golan, *Typologies of Collective Powers of Workers: From Senior Workers in Paz to El Al Pilots*, (Work, Labour and Law 14, 2015), p. 62.

¹²⁶⁵ Yair Tzaban, *ibid*, p. 12.

¹²⁶⁶ Hannah Fischer, *The Trade Union in the Modern Economy, Challenges and Ways of Coping* (Institute for Economic and Social Research, 1994).

courts. This reduction significantly reduces the degree of interest that the working public shows in the Histadrut, the level of its involvement in the organisation's institutions, and the ability of the workers' union to influence daily life in the workplace".¹²⁶⁷ In addition, many workers who perceived themselves as skilled and necessary in the labour market did not see interest in a professional association. The identity of common interests, which had been such a crucial factor in joining trade unions in the past, began to disappear. Various researchers have argued that one of the main reasons for the weakening of trade unions was the feeling of workers in certain professions having more common interests with company management than with their peers.¹²⁶⁸

It seems that for years there was also a consensus among researchers regarding the negative perception of the Histadrut in the eyes of the Israeli public. According to Harpaz, although the Histadrut has taken positive steps to improve its image, most of the public is unaware of its actions or has not given the Histadrut credit for these measures.¹²⁶⁹ Caspi and Kastiel were blunter and more decisive in writing that "the main problem with the Histadrut's ability to expand and promote is the negative image it has in Israeli public opinion. It seems to be an institution that everyone loves to hate".¹²⁷⁰

In the 2020s, however, it seems that these negative trends in public opinion regarding the right of association in general and the Histadrut in particular, began to be reversed. A survey conducted by the Central Bureau of Statistics¹²⁷¹ in 2012 shows that 60% of workers believe that there is higher job security in organised workplaces compared to 23% who did not agree with this statement. That is, most respondents saw a link between unionisation and higher job security and better working conditions.¹²⁷² Another survey conducted by the CBS in 2016 shows that 89% of respondents answered that they agree with the statement that "workers have the right to unionise". 65.4% agreed that in unionised workplaces working conditions are better and an almost similar figure (63.7%) agreed that unionised workplaces have job security. It can be seen from these data that the majority of the public in Israel holds quite positive attitudes regarding workers' unions and their implications for economic activity. The increase in the legitimacy of the unions is also reflected in the increase in the number of unionised workers in the activities of the trade union (from 49.9% in 2012 to 55.9% in 2016).

14.3.11 Social Networks and their Effect on Workers' Unions and Labour Disputes

If in the past it was difficult to spread the word of the union in workplaces that are not unionised, to recruit workers for professional struggles, to document the employer's harassment of union leaders or the pressure attempts that employers tried to exert on participants in the professional struggle, today the rules of the game in the media arena have changed beyond recognition. The use of social networks affects models of representation and strike, and converts the traditional form of representation and struggle into new forms.

¹²⁶⁷ Nava Pinchuk Alexander, *ibid*, pp. 65-66.

¹²⁶⁸ Ehud Lam: *The Difference Between a Trade Union and a Union of Trade Unions*, (HaEyal HaKore, 2000).

¹²⁶⁹ Itzhak Harpaz, *The State of Trade Unionism in Israel*, Centre for the Study of Organisations and Human Resource Management, University of Haifa and Israeli Industrial Relations Research Association, 2007.

¹²⁷⁰ Amnon Caspi Ruth Kastiel, *Labour Relations in the Age of Globalisation*, (The Open University, 2010), p. 36.

¹²⁷¹ Hereinafter: CBS.

¹²⁷² CBS, *Social Survey 2012*, p. 46. At the link:

<https://www.cbs.gov.il/he/publications/Pages/2014/%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-2012-%D7%9B%D7%95%D7%9C%D7%9C-%D7%A0%D7%95%D7%A9%D7%90%D7%99%D7%9D-%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%D7%9D-%D7%94%D7%A1%D7%93%D7%A8%D7%99-%D7%A4%D7%A0%D7%A1%D7%99%D7%94-%D7%95%D7%A4%D7%A8%D7%99%D7%A9%D7%94-%D7%95%D7%94%D7%AA%D7%90%D7%A8%D7%92%D7%A0%D7%95%D7%99%D7%95%D7%AA-%D7%A2%D7%95%D7%91%D7%93%D7%99%D7%9D.aspx>

Accessed: 28/09/2021.

To understand what this means, one must first return to the basic terms we discussed at the beginning of this chapter. The global village, through mass communication, is erasing the distance limit. Suffice it to recall a series of founding events engraved in the collective memory of the twentieth century and which were disseminated through mass media: Thus, the Tet Offensive and the battles at the U.S. Embassy compound in Saigon (1968) during the Vietnam War, filmed by television crews, reached the homes of millions of viewers in the United States and around the world and led to a widespread outbreak of resistance to the war; The Islamic Fundamentalist Revolution against the Shah of Iran (1979) was operated remotely from Paris, where Ayatollah Khomeini sat and broadcast his sermons on audio tapes distributed throughout his country; The Chernobyl disaster (1986) was filmed by a French satellite and the images were distributed around the world – during the era of the Iron Curtain; The massacre of the Chinese government against the students in Tiananmen Square (1989) shocked the world when broadcast live; The attacks on the Twin Towers (2001) were also broadcast live; And the outbreak of the Arab Spring (which began on 12/2010) was attributed to social networks, called the *Internet Revolution* which won a wide field of research that sought to examine the connection between the revolutions that took place in Arab countries and social networks.¹²⁷³ With the help of the internet, the global village makes distance, time, language and culture differences irrelevant. Penetration of personal computers into private homes and of course workplaces, availability of the Internet and it becoming affordable for all, as well as the increase in smartphone distribution only intensified the global village and led to social, community, state, economic – and of course employment changes.

It seems that the adage “the owner of the wealth holds the opinion”¹²⁷⁴ does well to explain how the traditional media (press, radio, television) worked. Prior to the Internet age, citizens acquired their knowledge not directly, but through remote intermediaries such as journalists, politicians and stakeholders. In the traditional world the message written in the newspaper was dictated by a limited number of journalists, speakers, public relations people and advertising agencies. However, with the advent of the Internet, direct dialogue was possible, without intermediaries, without restrictions on distance and time, without cultural barriers and, for the most part, even without censorship restrictions. The Internet makes it possible to learn from each other, exchange attitudes, influence and be influenced. Internet consumers, then, have the option of being involved and active when they are not content with just reading, listening and passively watching traditional media. If in the past the prevailing view was that the new media would strengthen the power of governments, as George Orwell argued in his book *1984*, then in the late twentieth and early 21st century, we are witnessing the tattooing of a state monopoly on information.

But this does not diminish the effects of the Internet. The Internet creates a *digital nation* in which digital citizens break away from the traditional dichotomies (e.g., left and right, liberals and conservatives, etc.) created by traditional media and old political media, politicians and parties. The Internet enables a new kind of communication and relationship: many with many. Freedom from the traditional powers and rituals of past communication is made possible through e-mail, discussion groups (forums), blogs, chats, computer conferences, video calls, instant messaging apps (such as WhatsApp, Telegram that also allow

¹²⁷³ Zvi Bar’el: *Social networks were only a supporting actor in revolutions – two years into the Arab Spring* (Haaretz, 20.12.2012), at the link: <https://www.haaretz.co.il/news/world/2yearspring/1.1890219> Accessed: 10/10/2021.

¹²⁷⁴ The origin of the expression is in Yiddish: “Der bel deh iz der bel hmah”.

you to create newsgroups and mailing lists), and social networks where you can comment, post, tweet, share or just hit the Like button.¹²⁷⁵

In some of these interfaces, citizens are allowed to remain anonymous and not have their personally identifiable information exposed. This anonymity allows the digital citizen sitting in the living room of his home to express his voice, without any effort, since he is not required to make his way to the city square, since this is replaced by the social network, and anonymity allows him to express himself bluntly. Asher Idan called this reality the *wild weave*,¹²⁷⁶ in which the central ethic is freedom of information. In the new form of communication, the distance from the digital citizen is shortened, and therefore there is greater exposure, voluntarily and involuntarily, to the opponent's positions. The digital citizen is forced to be open: whether to see the other in all his components (and not just as a simplistic stereotype) or to expose himself, because the form of communication becomes participatory, interactive and multi-dialogical. Therefore, each individual can consume a bundle of facts from different and varied points of view, and it is he who will decide which one to stick to and which one to reject. In this regard, the words of McLean are particularly poignant, who argued that while the invention of print weakened the connection between people, electronic media would create closeness between them. Electronic media creates a linguistic tradition and common meanings between people. In his essay *The Medium is the Message*,¹²⁷⁷ McLuhan argued that we live in a global village where electronic communication allows everyone to feel involved in what is happening and events occur simultaneously that are not limited by geographical boundaries.

In the age of the wild weave, the notion that the owner of the wealth holds the opinion seems to have lost its power. The individual not only needs news, but also produces news himself. The messages to which digital citizens are exposed are written from personal, unedited, authentic perspectives, from the reality of their world and therefore can also gain greater resonance (exposure) on social networks and from here the road to *going viral*¹²⁷⁸ is very short. At the same time, there are opinions that state that as the state invented new forms of mind control when the Industrial Revolution or mass media was born, so it will look for new tools and new techniques to retain in its hands at least some of the control over the images, ideas, symbols and ideologies that come to its inhabitants through the new electronic infrastructure.¹²⁷⁹

According to Eshet, workers in the field of labour law will have to get used to the fact that it is no longer possible to *close* collective agreements and various understandings between the union representatives and the management's representatives. The chairman of the workers' union and the factory manager no longer enter the room, until the white smoke comes out and the strike ends. Assistance in the trend of reducing the mandate given to worker representatives can be found on social networks and in the technological infrastructure, which now allows regular and immediate updates from the conference room directly to the smartphones of each and every worker.¹²⁸⁰ Indeed, the results of the 2020 social survey conducted by the

¹²⁷⁵ Wikipedia defines the "Like" button as "A feature in communication software such as social networks, Internet forums, news sites and blogs where the user can express, like or enjoy certain content. Web services that include buttons usually show the number of users who liked each content, and may present a full or partial list of them. It's a quantitative alternative to other methods of expressing a response to content, such as writing a response in words".

¹²⁷⁶ *Weave* as a replacement for the word *web*. See: Asher Idan, *A Guide to the 21st Century*, (Dionon, 2000), pp. 195-196.

¹²⁷⁷ McLuhan, Marshall. *The Medium is the Message*, In the McLuhan, Marshall (Author), & Lapham, Lewis H. (Author), *Understanding Media: The Extensions of Man*. New-york: Singnet, 1964, pp.7-63.

¹²⁷⁸ On Wikipedia *viral marketing* is defined as "a marketing technique, which uses existing networks to increase awareness of a particular brand, by self-replicating viral moves, which are equivalent to the spread of a virus. This marketing is very effective for reaching many people in a short time".

¹²⁷⁹ Alvin Toffler, *The Power Revolution*, (Ma'ariv Library, 1992), p. 380.

¹²⁸⁰ Ido Eshet, *The Model of Representation in Collective Labour Law – New Trends*, *ibid*, pp. 415-416.

Central Bureau of Statistics showed that 86% of Israelis aged 20 and over use the Internet via their mobile phones. 73% of them felt that they dependant on their cell phone to some extent or to a large extent. 54% use their mobile phone for more than an hour a day.¹²⁸¹

In the limited mandate regime, the union representative will find himself committed to information systems and real-time persuasion to his constituents and at a very high level of transparency, which does not allow for secrecy that sometimes characterises collective bargaining. In this sense the work of the representative under the rules of the limited mandate is Sisyphean. He is required to regularly confront not only the employer but also workers and ad hoc changing employee groups, (whom Eshet calls *WhatsApp Coalitions* after the WhatsApp messaging app), streaming their positions through the great accessibility made possible by the technological means that have become available in recent years. Social networks have several implications on the ability to end strikes and the nature of collective relations: First, the perspective of the union representative sitting in the negotiating room is different from that of the workers who are not in the room, even though these are updated through social networks. Second, the representative is preoccupied with persuasion and publicity on a daily basis in front of the working public, as he is required for constant and renewed support on a daily basis, otherwise he will lose his legitimacy. Third, it seems it is more difficult to sustain the struggle to establish legitimacy at the same time as the struggle with the employer. Fourth, when the employer sits at the negotiating table with union representatives, he knows that the latter *cannot come to an agreement with him*, and that any agreement he reaches with union leaders will then require continued negotiation with all members of the organisation. These new rules of the game change the face of collective bargaining, the original areas of agreement that the representatives reach with them and their ability to reach, as stated, a solution that will put an end to the strike.¹²⁸²

In the face of the disadvantages inherent in the social networks Eshet mentions, there are also quite a few advantages. Naomi Landau explains that one of the reasons for the increase in the number of collective agreements signed in the 2000s is thanks to the Internet and Internet networks, which make the task of organising easier and faster. “If in the past it was necessary to gather all workers in a physical place, talk to them face to face and convince them – all under the watchful eyes of the employer, now they can do it right under the noses of employers, transfer information quickly and without restrictions and recruit a third of workers in the organisation, without the former knowing about it in the initial stages of organising and acting to thwart it. These technological tools have provided a significant advantage to workers who want to organise and significantly increased the chances of success of organising”.¹²⁸³

The value of documenting events by workers and leaders of associations in the age of social networks is becoming important and its use is diverse. Documenting the professional struggle between the walls of the factory and outside it and spreading it on social networks may unite the ranks of those who support the organisation and sway the undecided. Moreover, documenting worker injury incidents on the part of the employer, acts of harassment, covert and overt threats and exerting pressure on workers to abandon the idea of unionisation, may serve as crucial evidence in the labour court and generate public and media

¹²⁸¹ Collection of data from the 2020 Social Survey on the subject of the digital age: *Does the smartphone control the lives of Israelis?* (Central Bureau of Statistics, 24/08/2021), at the link:

<https://www.cbs.gov.il/he/mediarelease/pages/2021/%D7%9C%D7%A7%D7%98-%D7%A0%D7%AA%D7%95%D7%A0%D7%99%D7%9D-%D7%9E%D7%AA%D7%95%D7%9A-%D7%94%D7%A1%D7%A7%D7%A8-%D7%94%D7%97%D7%91%D7%A8%D7%AA%D7%99-2020-%D7%91%D7%A0%D7%95%D7%A9%D7%90-%D7%94%D7%A2%D7%99%D7%93%D7%9F-%D7%94%D7%93%D7%99%D7%92%D7%99%D7%98%D7%9C%D7%99-%D7%94%D7%90%D7%9D-%D7%94%D7%98%D7%9C%D7%A4%D7%95%D7%9F-%D7%94%D7%97%D7%9B%D7%9D-%D7%A9%D7%95%D7%9C%D7%98-%D7%91%D7%97%D7%99%D7%99-%D7%94%D7%99%D7%A9%D7%A8%D7%90%D7%9C%D7%99%D7%9D.aspx>

¹²⁸² Ido Eshet, *The Model of Representation in Collective Labour Law – New Trends*, ibid, pp. 421-422.

¹²⁸³ Naomi Landau: *Social Networks as a Tool for Organising Workers*, (Globes, 21/07/2016), p. 31.

sympathy through behind-the-scenes peer organisation. In the opinion of Vazana, the public's involvement in the professional struggle goes through presentation of the injustices caused to workers and this sympathy is significant both for encouraging the workers' spirit during their struggle and as a tool of deterrence towards the employer. "In an age where every worker owns a smartphone device with a camera, documentation is accessible and available to all. The videos taken with the personal phone with a shaking hand, from a diagonal angle under the desk, accompanied by a loud and blatant soundtrack by the foreman, have great awareness power".¹²⁸⁴ Thus, for example, in the **Electra** case, the Histadrut claimed that the chain's management tried to harm the workers' union by various means and thwart it. In one of those attempts, the company VP of sales was recorded trying to put pressure on the leader of the company's union in order to get him to destroy the workers' joining forms for the Histadrut: "You want to go by, by the rules... mister, you need to come to work on time, you're late three times you're done. Oh, and if you say bad things, there's a letter from the customer, you're done. You do something you shouldn't do according to management, tick, you're done. Today nobody is bothering you... you want (to finish with this) you are welcome to. No? Go on, be Don Quixote, bear the consequences. I'll tell you, and I'll tell you and I... don't be a big hero. You idiot. I'm explaining to you, you moron".¹²⁸⁵ This recording was circulated among the various media sites, and was the evidence that caused both the regional court and the national court to determine that the telephone conversations between the worker and his supervisor constituted a violation of the right to organise in violation of the Collective Agreements Law, which establishes a right to compensation under the law and the amount of compensation awarded to the company was set at ILS 100,000.

14.3.12 Where is the Strike Headed?

Researchers find it difficult to predict what will happen in the world of work, and explain the difficulty in the uncertainty of the field of technological developments that directly affect the world of work. However, there are a number of common beliefs about the future of work. Among them, that the future will not be based on agriculture, industry or services, but on information originating from the personal computer, on the infrastructure of communications and the Internet. Hence, that the world will continue to shrink into a global village.

It is estimated that every worker will be unemployed for several long periods, because by using computers and robotics the person's share in the production line, agriculture, industry, services and housework will be reduced. The pace of production will change and less time will be required for production, a phenomenon that will lead to a reduction in manpower. The needs of society will be met by few and a large class of unemployed will be created. This is Rifkin's prediction of "the end of the working age".¹²⁸⁶ According to him, the work that man performs is being systematically diminished, because it is overwhelmed by machines, robots and automation that make it unnecessary for millions of jobs and workers alike. A future contract where each person will be able to produce personal objects for himself through home printing, as part of the physical world which becomes part of the information flow in the network. Everything that is on the net we can turn into reality, and everything that is seen in reality, we can replicate and produce in our house for a wide variety of objects. Therefore, there will no longer be a need for the existing production, transportation and sales system. Each of these industries provides

¹²⁸⁴ Danny Vazana, *Meugadim* [Unionised], (Schakim, 2017), p. 142.

¹²⁸⁵ Collective Dispute appeal (National) 33142-04-13 Electra Consumer Products (1951) Ltd. – The New General Workers' Union.

¹²⁸⁶ J. Rifkin, *The End of Work. The Decline of the Global Labour Force and the Dawn of the Post-Market Era* (A. Jeremy P. Tarcher / Putnam Book, 1995).

employment for tens to hundreds of thousands of workers in the Israeli economy. It is difficult to see how the waves of dismissals resulting from the lack of demand for said services can be prevented.¹²⁸⁷ Sociologist Alvin Toffler also wrote in his book *The Future Shock* that the time allotted for work will be significantly reduced and that the rest of the time will be allotted for leisure.

Due to the expected waves of unemployment, international migration patterns are expected to continue. As the power and influence of trade unions continues to decline, every worker will have to fight his professional struggle without support and will have to deal alone with the employer.¹²⁸⁸

In the chimney smoke era, no worker had the power or ability to deal with the employer. Only a public of workers unionised together was able to force a stubborn employer to improve the wages or status of workers. Only collective action was able to slow down or stop production, as each individual worker could easily be replaced by another who would easily fill his place. This was the basis for the establishment of trade unions. In tomorrow's world there will be no need for masses of workers to paralyse production in one factory or another or cause harm to the employer. A computer virus or slight disruption of information in a database, are examples from current and future means of pressure available to the individual seeking to assert his rights. The *information strike* of the future could, according to Toffler, be the protest of the future. And no laws, clever plans and security arrangements that employers will take can give full protection against such actions. In tomorrow's world, as the job becomes more differentiated, the bargaining position of the skilled worker will be strengthened, and therefore also individuals and not just trade unions, will be able to put pressure on the employer to get what they want.

The Marxist approach pointed to the contrast between the factory worker and the pre-industrial craftsman – who owned his tools, and it concluded that workers would be powerless until they seized the *means of production* from the capitalist class that owned them. But today, we live in the age of information,¹²⁸⁹ and workers are demanding an increasing degree of access to information. Thus, we are witnessing a redistribution of knowledge (and power) that has become necessary because of the new market conditions and the new technologies themselves. A new type of worker is appearing before our eyes – to whom the means of production belongs. The future world of work will increasingly depend on the exchange of data, information and knowledge. The accepted factors of production – land, labour, raw materials and capital – will become less important as knowledge takes its place, and instead of money, electronic information becomes the real means of exchange. Workers will become less and less replaceable because they will own a critical, sometimes irreplaceable, part of the *means of production*. In addition, the producer and the consumer, who have been cut off from each other by the Industrial Revolution, will reunite in the cycle of wealth creation, where the consumer will contribute not only money but also information about the market and planning that is essential to the production process.¹²⁹⁰

¹²⁸⁷ Roi Tzezana, *The Guide to the Future*, (published by Roi Tzezana, 2013), pp. 29-47.

¹²⁸⁸ Nirit Toshav Eichner, *ibid*, pp. 8, 28-29, 46, 68.

¹²⁸⁹ The age of information (also called the *digital age* or the *information revolution*) is characterised by information technology. In this age the product is the information and it is also the ruler. The information is characterised by a wide wealth that is fed from websites, TV channels, radio stations, podcasts, blogs, social networks, etc. Information has no boundaries and even closed regimes cannot completely block it from reaching their citizens. It is customary to attribute the beginning of this era to the 1970s, and some see the information revolution as the third industrial revolution.

¹²⁹⁰ Alvin Toffler, *ibid*, pp. 23-234, 254-255.

In light of the social processes that took place in the Israeli (and parts of the world) labour market addressed in this chapter, it is no wonder that Karl Marx's calling for the workers of the world to unite¹²⁹¹ was difficult to implement from the middle of the twentieth century: workers began working from home, some found themselves employed as contractors or outsourced workers, others found themselves migrating or applying for a job with migrant workers, and in general, the proportion of unionised workers as surveyed decreased. In all of these processes the narrative described is the same, focusing on splitting the power of organised workers into separate bargaining units. In this way, the employer manages to isolate the workers and prevents them from being a united and strong bloc, capable of influencing.¹²⁹² It is not surprising why the use of strike weapons itself is declining, and it is clear what the difficulties are involved in operating it.

However, at the beginning of the 21st century, workers find solutions in the changing labour market that allowed them to put pressure on the employer even without the need to use strike weapons. These solutions can be –

- A. Field activities including demonstrations in front of the employer's home, through which the workers attack managers personally in their private home, while involving their family members and neighbours, all with the aim of exerting pressure on them, by disrupting their daily routine and regular lifestyle.
- B. Use of the media, including social networks, which allow workers not only to communicate, share and transmit information but also to use it as a means of pressure against the employer.
- C. Use of the *information strike* – by a single worker / group of workers (instead of masses of workers) to paralyse production in the factory or cause damage to the employer.

These solutions can be classified into space and a minority of participants –

1. Space: If in the past applying pressure on the employer would have taken place through a strike in the factory area, then in the 21st century application of pressure moves its location to the public area, the street, to the media or virtual and available space. Hence, the application of pressure can also be done *remotely* – from the home of the lone worker.
2. Minority of participants: If in the past masses of workers were needed to paralyse production in the factory or cause harm to the employer, then in the 21st century pressure can be exerted by a few individual workers.

14.4 Evaluation of the Strike as an Efficient Pressure Tool

In 1971, Steve Adler, who would later become president of the National Labour Court, wrote that “Israeli labour law assumes that collective bargaining benefits the public and that workers have a right to have their say when determining their terms of employment. Obviously, in collective bargaining, workers need to have the appropriate means to ensure that negotiations are conducted effectively or, in other words, that workers can put pressure on employers by threatening to strike, to achieve their demands or reach a

¹²⁹¹ The slogan: “Workers of the whole world unite” originally appeared in the *Manifest of the Communist Party* (German: Manifest der Kommunistischen Partei) as written by Karl Marx and Friedrich Engels, as co-author. In this call, the working class is called to unite according to class affiliation and according to the communist vision proposed in the manifesto.

¹²⁹² Yosi Rahamim, *ibid*, p. 456.

compromise. Workers generally do not have a more effective means than a strike threat to achieve their goal¹²⁹³ (emphasis not in original).

Adler did not distinguish between a threat of a strike and an actual strike. He also did not explain what an effective measure is and how it can be measured. Indeed, *efficiency* is a complex and ambiguous concept in economic thinking in general and in the field of labour law in particular, and the multiplicity of meanings carries with it ambiguity and confusion. Collective labour law emphasises the values of participation, representation and the voice given to workers. These values are difficult to quantify, and in any case difficult to combine with most classical efficiency indices. But despite these things, I will address the most common and important efficiency metrics and diagnose how they work with the definition of a strike as efficient. Evaluating the efficiency of the strike will also allow me to further evaluate the efficiency of the alternative means of pressure to strike.

The Italian economist Vilfredo Pareto created a way that makes it possible to compare the efficiency of economic alternatives without comparing or measuring the satisfaction or happiness of individuals.¹²⁹⁴ According to him, when an industry operates under conditions of perfect competition, reaches equilibrium, it enters an optimal state. This condition known as the Pareto Optimal is characterised by the fact that the happiness of none of the individuals operating in the system can be increased without compromising the happiness of another. In contrast to the Welfarism method, Pareto argued that the benefits of different people could not be compared (thus Pareto avoided having to compare the preferences of various individuals due to lack of knowledge and measurement difficulties, or situations involving both increase and decrease in welfare). According to him, if there is an economic alternative in which one can increase the happiness of one of the individuals without harming the happiness of any of the other individuals or increase the happiness of all or some of the individuals without aggravating another person's condition, this alternative will be an improvement (Pareto Improvement) over the existing alternative and must be selected.

Like Pareto, Ruth Ben-Israel also found it difficult to explain the question of benefit – and in our case the question of the benefit of the strike. According to her, the benefit of the strike is an economic question that cannot be considered, and she raises a number of questions that she left unanswered: Should the benefit of the strike be assessed according to an addition to the daily wage, the monthly wage or the annual wage? Will a wage increase for one employee or for all employees count? Will the increase in wages demanded by the strikers at the time of the outbreak of the strike or according to the achievements in retrospect be taken into account?¹²⁹⁵

Pareto's way can also be learned from a comparison with the criteria discussed in Hebrew law.¹²⁹⁶ The first case deals with a situation in which a person invades his fellow man's empty yard, while the latter is unaware of it and has not given his consent to it, and in the language of the Talmud: "Residing in the yard of his fellow man without his knowledge". According to the Talmud, the intruder is exempt from paying rent for use of the yard. The Talmud describes this situation as "one benefits and one does not lose" and it explains its conclusion by saying that the intruder benefits and the owner of the yard is not lacking, because he did not know about the invasion until it ended, he does not require the yard and therefore not damaged. This situation is consistent with the halakhic rule "coercion on the degree of Sodom",

¹²⁹³ Steve Adler, *Strikes and Lockouts*, (Labour Monthly, 15.6.1971) quoted in the ruling: Labour Court Hearing (National) 53-9-4 State of Israel v. Secondary Schools Teachers' Union.

¹²⁹⁴ V.J. Tarascio, *Pareto: A View of the Present Through the Past*, 84 J. Polit. Ec (1976) 109.

¹²⁹⁵ Ruth Ben-Israel, *Labour Law – Vol. IV* (Open University, 2002), p. 1568.

¹²⁹⁶ Bava Kamma sheet 20, p. 1-21.

according to which the court can force a person to perform a favour for his fellow man, which does not involve any hassle, loss or sorrow. The other criteria on which the sages of the Talmud gave their opinion are “one benefits and the other benefits”, and “one benefits and one loses”.¹²⁹⁷ In the latter situation (which is also the opposite of the situation “one benefits and one does not lose”), where the intruder does not benefit and the landlord loses (i.e., when the intruder has his own yard or house and the intruder spared no money, whereas the landlord could have leased his property if the intruder had not been living in it), the intruder is exempt from paying, since he does not benefit, and for the loss of the landlord he does not have to pay, because in the Talmud this is damage for which he is not obligated. It seems that Pareto would agree that the criterion “one benefits and one does not lose”, and certainly the criterion “one benefits and the other benefits” are the most effective. This is in contrast to the criterion “one benefits and one loses”, which Pareto would have considered ineffective.

From what has been said so far, I draw a number of conclusions. First, Pareto Optimal cannot reconcile with an *effective strike* as stated in the court rulings. As we shall see below,¹²⁹⁸ the court created in its rulings the formula *effective strike* = *painful strike*. The pain that accompanies a strike is pain caused by the damage it causes. From this, we learn that if all the strike damage is eliminated, the Pareto Optimal will take place, but then the strike will not be effective. Second, even a strike that achieves all its goals will not be effective according to Pareto because achieving all its goals will necessarily come at the expense of the employer (who has financial losses) or at the expense of consumers (who will now have to bear the price increase). Hence, the success of a strike cannot be reconciled with Pareto’s words. Third, in general, it is difficult to bring about changes in the allocation to a large number of people without harming anyone as a demand for Pareto Improvement and even when there is, in theory, a more efficient allocation it is more difficult to implement.

The latter conclusion leads us to alternatives that have emerged for defining efficiencies that are not based on direct allocation, and the well-known one is Kaldor-Hicks Efficiency. This efficiency is a measure of economic efficiency named after British economists Nicholas Kaldor and John Hicks.¹²⁹⁹ According to this index, a situation will be considered effective if the aggregate welfare of the collection of participants is maximum. That is, there is no other state near our current state. In other words, it is enough that the extent of the damage to the victims is less than the added benefit to the beneficiaries in order to justify the efficiency.

From a comparison of the two indices reviewed so far, it can be concluded that, in contrast to Kaldor-Hicks Efficiency, Pareto will not see a situation as effective if a participant’s well-being is harmed, even if this harm increases aggregate well-being.

While Kaldor and Hicks, as mentioned, advocate *aggregate welfare* as a key to understanding economic efficiency, there is agreement in the literature that this measure is also not suitable for defining an effective strike, since a strike not only does not increase aggregate welfare, but may also harm it in a manner similar to that of a cartel.¹³⁰⁰ Thus some propose to define the effectiveness of the strike in terms

¹²⁹⁷ There is another option “This one does not benefit and this one loses”. This possibility was not discussed in the Talmud.

¹²⁹⁸ See the chapter: *Evaluation of the Strike as a Means of Pressure as discussed in Rulings*.

¹²⁹⁹ Hicks, John (1939). *The Foundations of Welfare Economics*. Economic Journal (The Economic Journal, Vol. 49, No. 196) 49 (196): 696–712. Kaldor, Nicholas (1939). *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*. Economic Journal (The Economic Journal, Vol. 49, No. 195) 49 (195): 549–552

¹³⁰⁰ Almost all economists who have dealt with the issue agree that collective labour law (including a strike) does not contribute to efficiency, but is intended to turn the labour market into a cartel and thus enable workers to obtain higher wages. See: R.A. Posner; *Some Economics of Labour Law 51*, The University of Chicago Law Review (1984): 988,990.

of social policy or distributive justice, i.e. reducing power disparities in labour relations and ensuring a greater degree of fairness in labour dispute resolution proceedings and their outcomes.¹³⁰¹ Perry, for example, explains that strike laws redistribute power by imposing different costs on workers (who lose their wages) and employers (who lose their earnings), so labour laws can also change these costs by imposing restrictions on the parties and thus affecting the power relations between them.¹³⁰² This approach helps to understand why the concept of *efficiency* is received with suspicion in the field of labour law. From here arose the notion that labour relations deal with a human and unique product, intended to correct the built-in gap between the bargaining power of the worker and that of the employer and their purpose is to preserve human dignity.¹³⁰³

The Resource Mobilisation Theory approach argues that the success of social movements depends on resources (time, money, skills, etc.) and the ability to use them. It advocates the use of the right type of resource, at the right time and at the right price by using the right resources acquired and thus ensuring optimal use of it. The mobility approach wraps the term strike effectiveness with the term strike efficiency. This approach holds that the use of strikes increases as the strike serves as an effective and efficient means, as compared to other means available to workers.¹³⁰⁴

Similar to the mobility approach, other researchers do not always distinguish between the *efficiency* of the strike and the *effectiveness* of the strike, or they tie these two concepts together. Like, for example, O'Neill.¹³⁰⁵ She presents a case in which workers of a textile manufacturing company in the city of Star, Arkansas decided to strike to improve their bargaining position. In response to the strike, the company hired replacement workers to fill their jobs, and so it was able to fulfil its obligations and deliver the produce without being harmed for two years. O'Neill's thesis could explain the train drivers' strike, the seamen's strike, and the cooperatives' strike,¹³⁰⁶ all of which were ineffective because employers found alternative ways to sustain the work and provide their service to the public. Mironi also ties the efficiency of the strike with its effectiveness. He said the strike weapon had lost its power and had become problematic. The reason for this is that the economy has become more competitive and global, which does not allow for the existence of monopolies, sometimes not even in the public sector. The reasons for this were the workers' concern about losing customers, the destruction of markets and damage to reputation as well as the decline in solidarity, the fear of losing the job and the inability of the workers to

¹³⁰¹ An interesting example of this is in Canada, where the employer can be forced not only to conduct collective bargaining but also to sign a collective agreement, in the name of efficiency to prevent a strike and ensure continuous activity of the economy. Canada Labour Code (RSC, 1985, c. L-2), at the link: <https://laws-lois.justice.gc.ca/eng/acts/L-2/page-11.html> See also the words of Guy Davidov: "The Duty to Conduct Collective Bargaining" (Lecture at the Conference of the Labour Law Association, March 2009).

¹³⁰² Ronen Perry, *Strike Liability for Third Party Damages*, (Social Work and Law, 16), p. 318.

¹³⁰³ Elisheva Barak, *The Principle of GOOD Faith in Labour Law* in: Labour Law, Human Rights and Social Justice, (Roger Blanpain ed., 2001), P. 229.

Ben-Israel explains that human dignity was achieved only through labour law, which freed workers from subordination to market rules and established a framework for the exchange of labour for wages, which took into account both social and economic values. See: Ruth Ben-Israel, *Outsourcing: Outsourcers Out: Employment of Workers by Personnel Contractors – Another Interpretation Converting Formal Employment into Authentic Employment*, (Labour Law Almanac 7, 5759-1999), p. 570.

¹³⁰⁴ Edward Shorter and Charles Tilly, *The Shape of Strikes of France, 1830 – 1960*, Comparative Studies in Society and History 1971, pp. 60-86.

¹³⁰⁵ Emily C.M. O'Neill, *The Right to Strike: How the United States Reduces it to the Freedom to Strike and How International Framework Agreements Can Redeem it*, (Labour & Employment Law Forum, Volume 2, 2012).

¹³⁰⁶ As reviewed in Chapter 10: *How the Employer Handles the Strike*.

endure a long strike.¹³⁰⁷ That is how, in his opinion, the strike became a “barren, inefficient and ineffective tool”.¹³⁰⁸

So far, I have argued that even the classic efficiency metrics cannot provide a good enough explanation for defining an effective strike, and that there is confusion (or at least a term binding) in the study of strikes between *efficiency* and *effectiveness*. This confusion seems to be a consequence of the translation of the word Effective into Hebrew (which does not always distinguish between effective and efficient, and sometimes even uses one term as an explanation for the other term).¹³⁰⁹ Hence, I would like to briefly point out the nature of the differences between these two terms.

The Hebrew Language Academy¹³¹⁰ first turned to translate the term Efficiency in 1944, defining it as *efficiency*.¹³¹¹ In 1973, the academy re-defined this term as effective and added: “The nature of performing work, in which the right action is performed at the right time by the right person”.¹³¹² Today, the academy’s website defines *effective* as “purposeful, impressive, with which to achieve the expected result”.¹³¹³ And *efficiency* is defined as “bringing the most benefit, both beneficial and cost-effective”.¹³¹⁴ The Webster Dictionary¹³¹⁵ also defines efficient as “Productive without waste” and therefore also emphasises the potential savings from the waste or damage that may be caused. On the basis of the above, it can be determined that *efficient* – is used to examine the ratio of inputs to outputs, and it emphasises *smart* use of resources, and at what costs.¹³¹⁶ And *effective* – is used to learn the achievement of goals, objectives and outputs, and in what qualities.

In previous chapters,¹³¹⁷ I dealt with the damage of the strike, those damaged from it and their ways of dealing with the damage of the strike. As a starting point that will advance me in the interpretive discussion for a strike assessment, I would like to see these chapters as a mirror image for defining an inefficient strike. Now, in order to understand the quality of the result expected from a strike, that is, what is an effective strike, I will review rulings discussed in the various courts in which the court is required to assess the strike as an effective means of pressure.

14.5 Evaluation of the Strike as a Means of Pressure as discussed in Rulings

I have already discussed the definition of a strike, as adopted in rulings: “Coordinated pressure action, taken by a group of workers in the professional struggle of workers against an employer to meet demands

¹³⁰⁷ Mordechai Mironi, *Restructuring and Innovation in Negotiating and Resolving Conflicts in the World of Labour*, (Law and Business 3, 2005), pp. 85-86.

¹³⁰⁸ Mordechai (Moti) Mironi, *Privatisation of Labour Relations and Labour Law*, Ibid, p. 349.

¹³⁰⁹ Thus, as an alternative to the word *effective*, the Hebrew Language Academy offered the words *useful*, or *resultant*.

¹³¹⁰ Hereinafter: *The Academy*.

¹³¹¹ Page 177 in the Dictionary of Psychological Terms. See the link:

<https://srikot.hebrew-academy.org.il/MaagarMunnahim/64/book.pdf> Accessed: 08/11/2021.

¹³¹² Page 20 in the Dictionary of Labour Research Terms. See the link:

<https://srikot.hebrew-academy.org.il/MaagarMunnahim/15/book.pdf> Accessed: 08/11/2021.

¹³¹³ <https://hebrew-academy.org.il/keyword/%D7%90%D7%A4%D7%A7%D7%98%D7%99%D7%91%D7%99%D7%95%D7%AA> Accessed: 08/11/2021.

¹³¹⁴ <https://hebrew-academy.org.il/?s=%D7%99%D7%A2%D7%99%D7%9C%D7%95%D7%AA#gsc.tab=0&gsc.q=%D7%99%D7%A2%D7%99%D7%9C%D7%95%D7%AA&gsc.page=1> Accessed: 08/11/2021

¹³¹⁵ M. Webster’s Collegiate Dictionary (10th Edition), Springfield, Massachusetts, 199.

¹³¹⁶ For example, the Hand formula in tort literature examines costs and efficiency in the same breath: “An efficient precaution is a precaution that costs less than the expectation of the damage it was able to prevent”. See: Ehud Gotel, *Negligence, Hand Formula and Strategic Precautions*, (Law and Business I, 2008).

¹³¹⁷ See Chapter 9: *Strike Damages*, and the chapters concerning how the employer, the sovereign, third parties and the workers’ union handle strike damages.

regarding their working conditions, or regarding demands of other workers presented to their employer”.¹³¹⁸ In this chapter I will seek to examine how the Labour Court assesses the strike as a means of pressure.

In the rulings I will review below, the phrase *strike effectiveness* is intertwined, more than once, in the narrative. This expression, it seems, allows the court to be impressed by the power of the strike and to evaluate it. The questions that arise in this context are – how does the court decide what is an effective strike? And how is that *effectiveness* measured?

14.5.1 Examples of the Evaluation of the Strike as a Means of Pressure as discussed in Rulings

The terms *pressure* and effectiveness were linked to the strike in three cases: the Kiryat Gat Municipality case, the Bicurei HaShikma case and the MetroDan case.¹³¹⁹

In the **Kiryat Gat Municipality** case, a petition was filed for injunctions prohibiting workers from taking various actions as part of organisational measures. The court granted the request in part, noting that “in order for the right to strike to fulfil its purpose of constituting a means of pressure to promote workers’ rights, the strike must be effective and there is no escape from harm to the employer and when it comes to a public employer, to the public in general”.¹³²⁰

In this case, the Regional Labour Court linked the terms *means of pressure* to *effective strike*, but it did not elaborate and did not explain what it meant.

In the case of **Bicurei HaShikma**, the Regional Labour Court ruled that the employer violated the right of his workers to organise, inter alia, by bringing in alternative workers who came to work in place of his striking workers. “In our case, the respondent explicitly clarified that one of the purposes of reinforcing the employment of replacement workers through employment companies is to reduce the damages of the strike and deal with those workers who refrained from coming to work in the period from 8/12/15. We believe that the continued employment of replacement workers through employment contractors by the respondent will change the balance of power between the parties by reducing the effective power of the strike which is the main tool available to the respondent’s workers in their struggle to organise and improve their working conditions. Through the replacement workers, the respondent will be able to withstand the strike. The continued employment of the replacement workers will create pressure on the respondent’s workers to resign from the organisation. Similarly, the continued employment of replacement workers may create pressure on the respondent’s workers to agree to move to work in the Rami Levy network, in accordance with the respondent’s wishes and the conditions he dictates. Therefore, we believe that the right to organise should be validated, in practice, and consequently the right to strike, so that the respondent should be prevented from continuing to employ replacement workers through employment contractors replacing the striking workers, in order to reduce the strike damages. Their continued employment will drain the effective power of the strike”.¹³²¹

In the **Bicurei HaShikma** case, too, the court linked the terms – but unlike other cases, this time the court examined the pressure that the employer may create on his striking workers by employing replacement workers. In this case, the court explains that the balance of power between the parties to the labour

¹³¹⁸ HCJ 525/84 Nabil Khatib et al. v. The National Labour Court et al., ruling 40 (1) 673, 701.

¹³¹⁹ All emphases in the rulings below are not in the original.

¹³²⁰ Collective Dispute (Be’er Sheva) 1019/04 Kiryat Gat Municipality v. The New Histadrut.

¹³²¹ Collective Dispute (Be’er Sheva) 14979-12-15 The New General Workers’ Union v. Bicurei HaShikma Ltd.

relationship also depends on maintaining the “effective power of the strike”, this power carries with it the potential to cause harm to the employer.

The **MetroDan** case¹³²² is the third case in which the Regional Labour Court linked the terms *pressure* and *effective strike*, and did so excessively. Although an appeal was filed against the ruling of the Regional Court, which was also upheld, examination of the conclusions of the Regional Court as expressed in its ruling are the most extensive and therefore also the most important for this discussion.

In this case, the question arose as to whether the decision of the Minister of Transportation to issue an additional and temporary license to Kavim to operate public transportation lines in the city of Be'er Sheva constitutes a violation of the right of MetroDan workers to strike and/or organise, which justifies issuing an injunction against the Minister of Transportation. The Histadrut claimed before the Regional Labour Court that the Minister of Transportation was acting to break the strike. The state, in response, claimed, inter alia, that its actions do not interfere with the relationship between MetroDan and its workers, but only allow Be'er Sheva residents to receive regular transportation services, not through MetroDan.

The court stated that it accepted the Histadrut's claim that “an employer seeking to hire workers in order to fill the place of the striking workers harms the effectiveness of the strike. This is a violation of the freedom to strike, and the right to organise. The employer reduces his damages when workers he hired perform the work that the striking workers were originally supposed to do [...] the same principle should apply to third parties involved in the strike, insofar as their action impairs the effectiveness of the strike. In other words, if a third-party action causes the employer to accept the work, but from other workers, his damages are small and the effectiveness of the strike is reduced”.¹³²³ And later in the ruling: “When the petitioner claims that this is a strike break, he meant that the degree of effectiveness of the strike is harmed. In order to examine the effectiveness of the strike, we must know its purposes”.¹³²⁴ “The effectiveness of a strike is always measured in relation to the damage it causes to the employer and not in relation to the public”.¹³²⁵ “In the case before us, the effectiveness of the strike was harmed in relation to the public, whose harm was reduced following the entry of the additional operator, and operation of all public transportation lines in Be'er Sheva in a partial format. But this, as stated, is irrelevant in terms of the effectiveness of the strike, towards the employer – MetroDan”.¹³²⁶

The Histadrut filed an appeal against the ruling of the Regional Labour Court with the National Court, which, as stated, was upheld. The National Court's ruling did not address the effectiveness of the strike as analysed extensively in the case, but National Court President Steve Adler found it appropriate to point out that “In our opinion, the Regional Court erred in believing that a strike by an employer that provides a service to the public should be aimed at inflicting economic damage on the employer only. Such a strike is intended not only to inflict economic damage on the employer but to motivate public opinion”¹³²⁷ and that “the result of the minister's decision is a fatal blow to the efforts of MetroDan workers to organise, since in this way all public pressure was taken from their strike”.¹³²⁸

¹³²² Collective Dispute (Be'er Sheva) 1001/05 The New Histadrut in the Negev Region v. State of Israel – Ministry of Transportation, Minister of Transportation.

¹³²³ Clauses 59-60 of the ruling.

¹³²⁴ Clause 61 of the ruling.

¹³²⁵ Clause 77 of the ruling

¹³²⁶ Clause 78 of the ruling.

¹³²⁷ Collective Dispute Appeal (National) 57/05 The New Histadrut v. State of Israel – Ministry of Transportation, Minister of Transportation Mr. Meir Sheerit, Clause 16 of the ruling of the President of the National Court, Steve Adler.

¹³²⁸ Ibid, clause 19 of the ruling of the President of the National Court, Steve Adler.

From the MetroDan case we learn three important conclusions. First, in order to test the effectiveness of a strike, its objectives must be examined. Second, the effectiveness of a strike is measured in relation to the damage it causes to both the employer and the public. Third, reducing strike damage reduces the effectiveness of a strike.

Although in the MetroDan case the court analysed the effectiveness of the strike in detail, this was not the first time that this issue was discussed within the walls of the court. The right of precedence is reserved for the **Makhteshim Chemical Factories** case. In this case, there was a labour dispute that revolved around the employment of contractor workers. Therefore, the striking workers picketed at the factory gates. The workers approached the contractor workers in an attempt to persuade them not to enter the factory as identification with their professional struggle. The factory's management appealed to the Regional Labour Court and asked for a restraining order instructing workers to refrain from any action and act with which they interfere with the use of their land or movables, including closing gates, and to refrain from any act that prevents invited guests from entering their premises. The Histadrut, which represented the striking workers, appealed to the National Court, which unanimously decided to accept the appeal. Judge Elisheva Barak Ussoskin ruled that "any strike, including picketing, causes some damage. In fact, the goal of the organisational struggle by way of a strike is that it will hurt. A strike will only be effective if it hurts. Picketing will only be effective if conducted near the factory against which the protest is taking place and on the road that harms the same factory, which will hurt the factory against which the protest is taking place".¹³²⁹

In the Makhteshim Chemical Factories case, the National Labour Court created the following equation: Effective strike = painful strike. From then on, the Labour Court began to link more and more between *effectiveness* and *difficulty, damage, injury and pain* as learned from the cases of the Sports Center, Rotem Amfert, Tadiran Keshet, the Environmental Services Company and the Unilever Shefa Israel case, as quoted below.

In the **Sports Center** case, the Histadrut submitted a number of requests to the Regional Labour Court, including returning dismissed workers to work who were fired only for their attempt to unionise the workers of the Sports Center in the Histadrut. The court ordered the workers be returned to work, stating that "at the end of the day, the court must balance the need to allow workers to exercise their right to strike effectively, that is, in a way that will cause difficulties for the employer and even the public, and other rights and principles – the employer's property right, the rights of third parties, the duty to act in good faith and more. The court must consider, on the one hand, the paramount importance of providing real and effective protection of the workers' right to organise and the right to strike, and, on the other hand, other rights and principles: the property right of the employer, from which derives the employer's right to dismiss; the duty of all parties to act in good faith and reasonably even during a strike; rights of third parties and the general public and more".¹³³⁰

In the **Rotem Amfert** case, the employer submitted a request to the Regional Labour Court for an order to stop sanctions and a strike taken by the workers. The strike, it is alleged, was damaging the company's reputation, its relationships with its customers and the contractors with whom they work. The employer explained that the workers' actions caused damage to the company's customers and the supervisors' ability to supervise and manage, that payments to contractors could not be made, no entry was allowed

¹³²⁹ Labour Court Hearing 57/41-27 The Histadrut et al. – Makhteshim Chemical Factories Ltd.

¹³³⁰ Collective Dispute (Tel Aviv) 1070/01 The New General Workers' Union – The Histadrut in the Tel Aviv-Yafo Area v. Tel Aviv National Sports Center Ltd.

for the contractor and his workers and therefore there is financial damage of hundreds of thousands of dollars per month. Due to the customers' lack of sulfuric acid provided by the company, customers will be required to stop production processes, which will cause a safety and ecological problem. The court granted the request in part (in a manner that instructed, inter alia, workers to refrain from removing sulfuric acid) but noted that "economic, safety, and ecological damage caused to Rotem and its customers, severe as they may be, is not a reason to determine that restrictions should be placed on the organisational measures taken by the workers other from those previously mentioned. This is the price of a strike, which in order to be effective has to damage and hurt the employer".¹³³¹

In the **Tadiran Keshet** case, a dispute arose concerning the right of striking workers to carry out ancillary actions to the strike, on the land of an employer, in a manner that harms his ability to enter his factory, operate it not through the striking workers, and remove goods and equipment belonging to him. The employer filed an application for an injunction against the strikers' actions, and the Regional Labour Court rejected his application, stating that: "The assumption throughout the ruling, even in the past, was that a strike by its very nature causes damage to the employer (and possibly also to third parties such as the employer's customers or the public), while these damages are in themselves an integral part of the strike's effectiveness [...] we ostensibly believe that the purpose of the legislature, in enacting these clauses [the reference is made to clause 44 of the Employment Service Law, 5717-1959, which prohibits the employment bureau from sending workers to a workplace where there is a strike, and clause 16 of the Employment of Workers by Manpower Contractors Law, 5756-1996, which prohibits manpower contractors from employing workers from a workplace participating in a strike - me: A.M.] was to give the freedom to strike practical effect, in a way that would prevent the employment of replacement workers for the striking workers and emptying the content of the effective content of the strike. [...] That is, it was clear to the legislature that in order for a strike to be effective, and achieve its goals (allow workers power in negotiations with the employer), it must cause some damage to the employer, damage that cannot be immediately remedied by employing replacement workers. Therefore, legislature found it appropriate to impose explicit prohibitions in this regard against third parties, who are not at all part of the collective labour relations system. This expresses an explicit position on the part of the legislature, in favour of providing real content for the freedom to strike".¹³³²

In the case of the **Company for Environmental Services**, a request was submitted for a temporary order that would prevent striking workers from closing the factory gates, in a manner that prevents entities invited by the company from entering the factory. The Regional Labour Court rejected the request and ruled that "it was clear to the legislature that in order for a strike to be effective, and to achieve its objectives (allow workers power in negotiations with the employer), it must cause some kind of damage to the employer, damage that cannot be ignored immediately, since in our case once the factory gates are open, there is no effectiveness to the strike since the materials are received by the factory, and the service is provided to the company's customers. This expresses an explicit position on the part of the legislature, in favour of providing real content for the freedom to strike [...] For the purpose of this decision, we note that the strike is in its early days and therefore this is the stage where the strike is effective".¹³³³

In the **Unilever Shefa Israel** case, the company's management turned to the Regional Labour Court and asked for an order to evacuate striking workers from the factory premises. The court accepted the request,

¹³³¹ Collective Dispute 1006/05 Rotem Amfert Negev Ltd. v. The New Histadrut / Union Division.

¹³³² Collective Dispute (Tel Aviv) 342/05 Tadiran Keshet Ltd. v. The New General Workers' Union.

¹³³³ Collective Dispute (Be'er Sheva) 51515-05-18 Company for Environmental Services Ltd. v. The New General Workers' Union.

stating that “Needless to say, in our opinion, the strike today is an effective strike that could harm the employer, while the disputed factory is a major factory in the operations of the Unilever conglomerate in Israel and supplies about 40% of the off-the-shelf products marketed by them. The testimony of the applicant’s witnesses further indicates that the stock of products in the Maman complex is limited and can guarantee delivery for only about ten working days. The factory operates energy and recycling units, which involves direct costs for the applicant, even if production is shut down as it is at present”.¹³³⁴ In other words, the court was under the impression that accepting the employer’s request to evict the factory workers in the present case would not counter or infringe on the right to strike, because it was effective enough.

It seems to me that the discussion regarding the question of the effectiveness of the strike and the accompanying damage was well summed up by the Regional Court in the **IEC** case, in which the company’s management submitted requests for urgent remedies concerning the prevention of organisational measures taken by IEC workers, in view of the reform plan in the electricity sector, which had implications for their terms of employment and employment security, and when the dialogue between the parties reached a dead end. The Regional Labour Court rejected the requests for the most part and ruled that “when we examine the proportionality of the strike in a situation where workers are struggling for their employment conditions and job security, we should allow them to take such strike measures that will be effective and fulfil the purpose of the strike, and in other words, cause the state to give due weight to the significant implications of the reform it is promoting, on the working conditions and job security of IEC workers. This is validated especially in view of the continuing state of the same impasse over the years”.¹³³⁵

The effectiveness of a strike can be fatally damaged by hiring replacement workers, instead of striking workers. This conclusion is learned from three cases: Tal Hel Yaska, HaMeir and Milouoff, and Yehuda Steel Chains.

In the **Tal Hel Yaska** case, a number of issues were discussed, including whether the Power for the Workers Union is the representative organisation of the company’s workers, whether the company’s management should conduct collective bargaining with them, and whether the management violated its workers’ right to organise; Work prevention; Bringing in replacement workers instead of organised workers; Expressing an inappropriate position in connection with the negotiations that have taken place so far; Incidents of violence; Issuing hearing letters to workers who were involved in the organising process. The Regional Labour Court ruled that the Power for the Workers Union is the representative organisation in the company, and that the company’s management must pay compensation for violating the right of initial organisation of its workers. In their ruling, the court also referred to the MetroDan case: “We believe that the right to organise should be validated in practice and, as a result, the right to strike, so that an employer should be prevented from employing replacement workers to the striking workers, as this would empty the meaning of the strike (for another ruling that prevented emptying the effective power of a strike – even at the cost of harming the public and revoking the Minister of Transport’s

¹³³⁴ Collective Dispute (Be’er Sheva) 20290-12-10 Unilever Shefa Israel Ltd. v. The New General Workers’ Union – Negev Region.

¹³³⁵ Collective Dispute (Haifa) 50534-03-14 Israel Electric Company Ltd. v. The New General Workers’ Union.

decision – see also the MetroDan case above). In our opinion, in order for a strike to achieve its goals, it must not be allowed to be *cancelled* by employing replacement workers”.¹³³⁶

In the case of **HaMeir and Milouoff**, the Power to the Workers Union submitted an application to the Regional Labour Court for the continued employment of the slaughterers and supervisors employed by the HaMeir at Milouoff in the same job scope, salary and terms and conditions as before they were fired, both as HaMeir workers and Milouoff workers. The court was also asked to allow HaMeir workers to continue the strike and to prohibit the employment of replacement workers in place of the striking workers. The court ruled that all HaMeir employees will return immediately to full and regular work at Milouoff in the positions they performed on the eve of the strike, and that the work of the replacement workers who were hired at Milouoff after the strike broke out will end immediately, and Milouoff will not recruit and/or employ replacement workers during the entire period of negotiation between the parties. The court reached this conclusion after ruling that “the continued employment of the replacement workers by Milouoff will change the balance of power between the parties by reducing the effective power of the strike which is the main tool available to HaMeir workers in their struggle to organise and improve their working conditions. Through the replacement workers, Milouoff will be able to withstand the strike [...] therefore, we believe that the right to organise should be validated, in practice, and consequently the right to strike, so that Milouoff should be prevented from continuing to employ the new slaughterers and/or supervisors taken on after outbreak of the strike, in order to reduce the damage of the strike. Their continued employment will drain the effective force of the strike”.¹³³⁷

In the case of **Yehuda Steel**, the Power to the Workers Union submitted a request for a declaratory order according to which it is the representative organisation. They also petitioned for an order against the employer to refrain from actions to thwart the organisation and wage deductions and to charge him to pay compensation in the amount of ILS 300,000 due to allegations of violation of the right to organise. The Regional Labour Court rejected the request by a majority and ruled that “although an employer is not allowed to hire replacement personnel during a strike to replace striking workers so as not to infringe on the freedom of association and the effectiveness of the strike” but in the circumstances, the workers’ organisation did not prove that workers hired by the employer were brought in to replace striking workers.¹³³⁸

Examination of the effectiveness of the strike is also affected by the timing in which it is activated, or by the timing that the court approve it, as learned from the **Enav Association** case. In this case, the Ministry of Welfare issued a new tender to operate dormitories for at-risk youth and informed the association that the contract with it will end on 31.1.18. In the Regional Labour Court, the discussion revolved around the question of whether the strike constitutes a violation of the *industrial silence* clause in the special collective agreements, and the question of whether an injunction should be issued against the strike. Power for the Workers Union argued at the hearing that the Ministry of Welfare has no real desire to speak out, and that there is a grave concern that the ministry is trying to gain time in order to undermine the effectiveness of the strike. The court rejected the request for an injunction against the strike, stating that it was a proportionate step taken at an effective time, after attempts at dialogue were unsuccessful

¹³³⁶ Collective Dispute (Tel Aviv) 27800-01-14 Power for the Workers – Democratic Workers’ Union et al. v. Tal Hel Yaska Ltd.

¹³³⁷ Collective Dispute (Haifa) 21365-08-14 Power to the Workers – Democratic Workers Union v. HaMeir Ltd.

¹³³⁸ Collective Dispute (Be’er Sheva) 35543-11-16 Ma’an Workers’ Union v. Yehuda Steel Ltd.

and it was not found that the damage to the sponsors and the public justifies restricting the freedom to strike.¹³³⁹

Through effective strikes, sectors which it was not clear whether they could incorporate or strike, can achieve goals in labour relations and change world orders for them, as learned from the Bar-Ilan University case and the Mikud Israel Security Services and Personnel.

In the **Bar-Ilan University** case,¹³⁴⁰ the High Court discussed whether a workers' union, of which the pensioners are members, may declare a strike against the employer regarding the rights of retirees, even though there is no longer an employer-employee relationship between the retirees and the employer, and whether such a strike should be recognised as a protected strike according to labour law. The High Court answered these two questions in the affirmative and unanimously. According to Judge Ayala Procaccia, "The main means of the workers' union in its struggle to advance the interests of the workers is collective activity [...] without the power to conduct collective bargaining with the aim of entering a collective agreement, and in the event of a dispute, to use the collective power through the means provided by the union, including a strike, the union has been deprived of the effective power to fight to achieve its goals and achieve results in its struggle". According to Judge Procaccia, this interpretation is strengthened in light of the special normative status of the right to strike, which is intended to give the union a secondary power in conducting collective bargaining. Without it, the power of the union is greatly weakened. The right to strike, as a means of organising workers in collective bargaining, is intended not only to serve the interest of the active worker to promote his working conditions, but also to give the union an effective safeguard to advance the interests of retirees and prevent erosion in their economic and social status.

In the case of **Mikud Israel Security Services and Personnel**, the Regional Labour Court was required to ask: Are traffic inspectors – contractor workers, who are assigned to work as part of their job only in the projects of the service customer (Netivei Israel), allowed to strike in order to regulate their working conditions, rights and employment security, which are affected as a result of the terms of a tender issued by the service customer? The court ruled that the strike was intended to regulate the conditions of employment, rights and employment security of the inspectors as a result of the terms of the new tender. This is a proportionate step that was taken at the most effective time, and this is while Netivei Israel rejected the Histadrut's request for dialogue and the dialogue with T&M Protection failed. There is no dispute that the strike will cause significant damage to the applicants and Netivei Israel and will even harm projects and work plans, but this is exactly the purpose of the strike. "Preventing the strike today and postponing it to a later date when bids have already been submitted for the new tender may make the strike ineffective, as at that stage the parties may be limited in their ability to resolve the dispute, given the bids submitted to Netivei Israel based on the new tender terms".¹³⁴¹

14.5.2 Conclusions

1. To test the effectiveness of a strike one must first examine the goals of the strike. The effectiveness of a strike is derived from the goals of the strike. Hence the effectiveness of one strike is not the same as the effectiveness of another strike, since no two strike targets are the same.

¹³³⁹ Collective Dispute (Tel Aviv) 49146-12-17 Enav Association – Opportunity for Change v. Power for the Workers – Democratic Workers' Union.

¹³⁴⁰ HCJ (Tel Aviv) 1181/03 Bar-Ilan University v. The National Labour Court.

¹³⁴¹ Collective Dispute (Tel Aviv) 53402-05-17 Mikud Israel Security Services and Personnel Ltd. v. The New General Workers' Union – The National Union of Security Workers.

2. The effectiveness of a strike is measured in relation to the damage it causes. There is no doubt that there should be a relationship between the strike and the damage caused to the employer, but the novelty in the determination of the National Labour Court in the MetroDan case is that an effective strike should motivate public opinion by creating public pressure on it. Therefore, the effectiveness of a strike must be measured by the ratio between it and the damage it causes to all those damaged. In this regard, Francis Raday wrote that “during the strike, while damage was caused to third parties such as the employers’ service recipients, customers or suppliers, without this damage, the strike would not have been able to exert economic pressure on the employer”.¹³⁴²
3. The balance of power between the employer and the workers’ union depends on maintaining the *effective power of the strike*. This balance of power is a derivative of the formula established in the court’s rulings: *effective strike = painful strike*. The pain that accompanies a strike is pain caused by the damage it causes. Hence, reducing the strike damage will lead to a reduction in the effectiveness of the strike. Thus, for example, the effectiveness of the strike can be harmed by its breaking – such as when the employer hires replacement workers to fill the place of the striking workers, because through the alternative workers, the company will be able to withstand the strike. In this context, Ruth Ben-Israel wrote that “the additional consequences arising from the use of these alternative tools by virtue of the strike must be examined. The use of these alternative tools will be legitimate only if the violation of the right to strike does not empty it of content”.¹³⁴³
4. Examination of the effectiveness of the strike is also affected by the timing in which it is activated, or by the timing that the court allows it to be activated. A strike activated at a late time will allow the employer to organise for it and thus its effectiveness will be harmed.
5. Through effective strikes, sectors which it was not clear whether they could incorporate or strike, could achieve goals in labour relations and change world orders for them.

14.6 The Practical Strike

In this chapter I reviewed studies that sought to evaluate the strike as a tool of pressure to achieve goals and I showed the difficulty of drawing unequivocal conclusions from the various studies in the field. Hence, I turned to the search for other variables that could help assess the strike as a pressure tool. I examined the changes in the labour market to understand whether a strike could be an appropriate means of pressure for use in the 21st century. In addition, I have shown that there is a relationship and sometimes an unconscious confusion, between the two terms *efficiency* and *effectiveness*. I discussed the widespread use of these terms in the literature to assess strikes, as well as the differences between them, and finally I turned to case law to examine how the court decides what an effective strike is and how it is measured as *effective*.

On the basis of what is stated in this chapter, I would now like to propose a new index for assessing the strike as a tool of pressure. I call this index the Practical Index, and through it I seek to make use of recurring terms in the research literature while distinguishing between them (and at the same time neutralising the variables on which there is disagreement or inconsistency in the literature), and the ideas developed in this chapter. Using the practical index, I will also seek to assess strikes, and later also alternative means of pressure for strikes.

¹³⁴² Francis Raday, *Freedom to Strike, Third Party Claims and Compulsory Arbitration*, *ibid*, p. 145.

¹³⁴³ Ruth Ben-Israel, *Strike and Lockout in the Mirror of Democracy*, *ibid*, p. 142.

The word Practical is translated by the Hebrew Language Academy into *suitable* or *useful*.¹³⁴⁴ Some dictionaries define this term as “a feature of something that can be done, practicality, applicability”, or as something “that may be effective or bring about good results, that has a practical benefit; that is either easy to perform or apply; suitable”.¹³⁴⁵ Either way, it seems to be possible to agree that practicality is something that is doable, and hence that it is suitable, useful or applicable.

Based on this definition, I expect that a strike can be assessed as practical if it succeeds in creating a new balance between workers and the employer, while being adapted for use in the 21st century labour market, which has the power to put pressure on the employer that will bring him to respond to the demands of the workers as much as possible and with a minimum of damage. That is, the practical strike index consists of three cumulative variables: effectiveness, efficiency, and suitability for use in the 21st century:

1. **An effective strike that achieves the result expected by workers.** In other words: a strike that strives to maximise compliance with the workers’ demands.

Under this index I am prepared to adopt the definition of strike success as set forth by Raphael and Bar-El, using four values: (a) the demands of the workers were accepted in full, (b) the demands of the workers were accepted in part, (c) the demands of the workers were not accepted, (d) the dispute was transferred to mediation, arbitration or further negotiations.

2. **An efficient strike in which compliance with the strikers’ demands will be done with a minimum of damage to the employer, the factory, the sovereign, third parties (consumers / citizens, suppliers, etc.), the workers’ union and the workers themselves.**

Under this index I would be willing to see a strike as effective if –

- A. The levels of damage from the strike are limited relative to the potential levels of damage in the first place. This is the place to mention the levels of damage I have already discussed: economic, political, social, image and damage to the relationship of trust between the parties and the labour relationship.
 - B. The actual circle of victims from the strike is limited in relation to the circle of potential victims in the first place. I will mention that the possible circles of victims of the strike are the employers, the workers, the residents and the consumers, business entities that are in trade relations with the employer, the government and the workers’ union.
 - C. In addition, / alternatively, there will be a *gradual application of pressure* (i.e. – use of measures that get worse as the labour dispute progresses and the workers’ demands are not answered).
3. **The strike is adapted to use in the labour market of the 21st century**, and as such it takes into account, for example, the trend of working from home, blossoming of individual trends in the workplace, changes in the proportion of unionised workers, and so on. The strike may involve field activities including demonstrations, use of media including social networks and/or use of information strikes.

Adapting the strike to the 21st century is done by activating it:

¹³⁴⁴ Hebrew Language Academy website, at the link:

<https://hebrewacademy.org.il/?s=%D7%A4%D7%A8%D7%A7%D7%98%D7%99#gsc.tab=0&gsc.q=%D7%A4%D7%A8%D7%A7%D7%98%D7%99&gsc.page=1> Accessed: 09/11/2021.

¹³⁴⁵ Rav Milim website, at the link: <https://www-ravmilim-co-il.elib.openu.ac.il/Default.asp> Accessed: 09/11/2021.

- A. In the public, media or virtual and available space.
- B. Through a minority of workers: If in the past masses of workers were needed to paralyse production in the factory or cause harm to the employer, then in the 21st century pressure can be exerted by a few individual workers.

The choice of which space will be used to put pressure on the employer, and activation of the strike by a minority of workers give a significant touch to the practical strike – because they make it easier to implement. If in the previous chapters I pointed out the difficulties facing the workers’ union seeking to go on strike and maintain it, then in the practical strike these difficulties are neutralised: For example, because few workers disrupt work, there is no need to worry about breaking a strike, there is no need to worry about strike enforcement and there is no need to worry about diluting the strike fund.

That is, the more effective, efficient and adapted the strike to the 21st century, the more practical it will be:

**(1) Effective Strike + (2) Efficient Strike + (3) A Strike
Adapted to the Labour Market in the 21st Century = A
Practical Strike**

To illustrate the practical strike index, I will present the Alpha Group case and analyse it according to the practical index. The analysis will be done according to a systematic review of current affairs articles,¹³⁴⁶ the ruling of the Labour Court and an interview I conducted with committee members.¹³⁴⁷

14.6.1 Analysis of the Strike in the Alpha Group Case According to the Practical Index

The management of Alpha Group (which includes employees of Bezeq’s subsidiaries: Pelephone, Bezeq International and Yes), decided to dissolve Bezeq International, and merge its operations with Yes, (while the subsidiary will be taken over by Yes, which will absorb Bezeq International’s private Internet activity into it) and to split the company’s integration division into a separate company.

This decision by company management was intended to be a preemptive action to the decision of the Ministry of Communications to cancel the split between supplier and infrastructure, which could severely damage Bezeq International, which is one of the largest suppliers in Israel. Management approached the Pelephone workers’ committee, and offered to take on the company’s 500 employees from Bezeq International and Yes. The workers’ committee refused to cooperate with the dissolution of the other companies, and set the following stated goals.¹³⁴⁸

- A. Joint negotiations for all company employees so that their organisational strength is ensured.
- B. Prevention of the liquidation of Bezeq International.

¹³⁴⁶ All articles below were accessed on 09/11/2021.

¹³⁴⁷ Interviews were conducted on 22/11/2021 and the details of the interviewees have been retained by the author.

¹³⁴⁸ As learned from the notice of the labour dispute, submitted to the Chief Labour Relations Officer. See: Unknown author, *Labour dispute declared at Alpha – Pelephone and Bezeq International*, (Histadrut, 23/06/2021), at the link: <https://www.histadrut.org.il/%D7%97%D7%93%D7%A9%D7%95%D7%AA-%D7%94%D7%94%D7%A1%D7%AA%D7%93%D7%A8%D7%95%D7%AA/17626745/%D7%94%D7%95%D7%9B%D7%A8%D7%96-%D7%A1%D7%9B%D7%A1%D7%95%D7%A-%D7%A2%D7%91%D7%95%D7%93%D7%94-%D7%91%D7%97%D7%91%D7%A8%D7%95%D7%AA-%D7%90%D7%9C%D7%A4%D7%90-%D7%A4%D7%9C%D7%90%D7%A4%D7%95%D7%9F-%D7%95%D7%91%D7%96%D7%A7-%D7%91%D7%99%D7%A0%D7%9C%D7%90%D7%95%D7%9E%D7%99>

C. Ensuring employment security of company workers and an overall regulation of their rights.

With the opening of negotiations between the workers and the company, the workers' representative demanded that it be recognised as one representative for the employees of the three companies, i.e. - one bargaining unit, with the aim of reaching a single agreement that would preserve the workers' rights. This demand was rejected by the group's management, which announced that it would conduct negotiations only regarding Bezeq International employees. This was the signal for the start of a struggle that lasted for more than five months (from 23/06/2021, when the labour dispute was declared, until 01/11/2021), in which the group's workers gradually intensified the organisational steps.¹³⁴⁹

1. They unionised under one workers' committee, in order to unite forces and reach a single agreement with the group's management. The union was made under the auspices of the Histadrut and with its support.
2. They embarked on comprehensive and Sisyphean outreach activities to persuade company employees to join the fight. "Employees certainly asked 'what does this have to do with us', but we explained the logic, showed the map of interests that might be hidden".¹³⁵⁰
3. They built work teams whose job was to learn from employees how they could "create maximum pressure with a minimum of employees taking organisational steps",¹³⁵¹ understand how similar struggles were conducted in the economy in the past, and how key figures in company management dealt with strikes in the past (such as the VP of Human Resources at the company, who took on shutting down Magen while working at the Hadera Paper Factory).
4. They conducted field activities. As part of this, they demonstrated daily in front of the homes of the company's senior executives, including the homes of the board members, the home of CEO Ran Guron and the home of one of Bezeq's controlling shareholders, the capital owner David Fohrer. In the latter case, the police sought to deprive the workers of the right to demonstrate on the grounds that he was a public figure, even though he did not hold any public office. In response, the workers turned to MK and the chairman of the Knesset's Constitution, Law and Justice Committee, who convened a discussion in the committee on the importance of the right to demonstrate, which allowed the workers to continue demonstrating in front of Fohrer's house. In addition, workers hung giant signs on bridges and intersections across the country with a picture of Fohrer, and the caption: "David Fohrer the tycoon is laughing, the public is crying".
5. They stopped the festive launch of the iPhone 13, and prevented the company's customers from purchasing it.
6. They stopped the upgrade work of the network (including 5th generation) and did not make installations and repairs for business customers in the IT services.

¹³⁴⁹ The organisational measures were not shared by Yes employees, for the reason that they are affiliated with the Histadrut, and in the midst of the struggle (15/08/2021) they even signed a collective agreement that regulated their social rights, wage increases and grants for company employees.

¹³⁵⁰ Nitzan Zvi Cohen, *Leaders of the struggle of Alpha workers: we went with our sense of justice and truth and did not apologise*, (Davar, 05/11/2021), at the link: <https://www.davar1.co.il/343437/>

¹³⁵¹ Remarks by the Chairman of the Alpha Workers' Committee. See: Nitzan Zvi Cohen, *Leaders of the struggle of Alpha workers: we went with our sense of justice and truth and did not apologise*, (Davar, 05/11/2021), at the link: <https://www.davar1.co.il/343437/>

7. They stopped the services of Bezeq International's logistics center, which provided services to many large entities in the economy, and later they stopped the supply of equipment and goods to private customers as well.
8. They stopped the joint work (synergy) between three alpha companies.
9. They announced cancellation of maintenance work and night shifts.
10. For three months, they prevented bills being sent to the company's millions of customers and stopped collecting and making charges to the credit card companies, which affected the companies' cash flow and also put pressure on the customers themselves, who began to experience a slowdown online when their packages ended.
11. They shut down the service and support centers for the company's customers.

After the company's management informed the chief labour relations officer on 19/10/2021 of its intention to go on a protective strike and impose it on workers participating in sanctions and those whose work is affected by the sanctions, the workers' committee placed the entire customer service system at both companies on strike and threatened a general strike. The group's management applied to the Regional Labour Court for an injunction against the strike. The court ordered management to freeze the hundreds of personal letters it sent to workers (in which it threatened a lockout) and on the other hand, banned the full strike but clarified that workers could continue the partial sanctions they had hitherto taken in the labour dispute. The court also called on the parties to negotiate between them.¹³⁵² Shortly after, the company's CEO filed defamation lawsuits against committee members.¹³⁵³

In late October, it was reported in the media that the mediation process was underway between the parties, at the end of which an outline of agreements was signed, according to which the workers' sanctions were stopped and negotiations began between them to regulate workers' rights as part of the merger of Bezeq International into Yes and the splitting of the integration division into a separate independent company, as well as regarding the absorption of employees and maintenance of the cellular network on Pelephone.

Results of the Struggle:

1. Committee demands to conduct negotiations and sign a joint collective agreement for the employees of the three companies remained in dispute, and it was determined that it would be discussed in the negotiations. On the other hand, during the organisational struggle, the company's management already begun to negotiate with the unionised committee and this may have something to teach about their future intentions.
2. At the end of the mediation process, it was announced that Bezeq International is expected to disband (at the same time, any Bezeq International employee who wishes to do so will be able to be accepted as a Yes employee under a collective agreement with the Histadrut. Employees who choose not to be employed by Yes will enjoy favourable retirement conditions). A few months

¹³⁵² Collective Dispute (Tel Aviv) 63127-08-21 Pelephone Communications Ltd. – The New General Workers' Union.

¹³⁵³ Asa Sasson: *The conflict in Pelephone escalates: the CEO filed a personal defamation lawsuit against some of the employees*, (The Marker, 27/10/2021), at the link: <https://www.themarker.com/advertising/premium-1.10330792>

after the mediation process, the group's management announced to the stock exchange that it had withdrawn from the plan to liquidate Bezeq International.¹³⁵⁴

3. It was agreed that the employees of Bezeq International's international calls system will be employed by Pelephone.
4. It was agreed that Pelephone and Yes employees will be entitled to a special grant to be paid to employees at the beginning of 2022.
5. At Pelephone, attempts to outsource and lease the cellular network were stopped.

Analysis of the Alpha Group case using the Practical Strike Index leads to a number of conclusions:

1. Effectiveness of the Strike:

The organisational struggle which the workers began ended with the management's decision not to dissolve Bezeq International. Therefore, I would classify the effectiveness of this strike as (a) the demands of the workers were met in full.

2. Efficiency of the Strike:

A. The levels of actual damage caused by the strike were limited relative to the potential levels of damage in the first place. I come to this conclusion from comparing the actual damages to the damages that could have been caused:

Actual Damage:

- Economic damage to the employer: due to non-collection of bills and non-sale of iPhone 13 devices. But this damage is damage that is mostly temporary: at the end of the strike, the bills were collected from the company's customers, and the company's customers who wanted to purchase the iPhone could do so (unless in the meantime they had purchased it from competitors).
- Image damage to the employer: Pelephone has a bad history when it comes to labour relations. The struggle for the establishment of the committee at Pelephone is considered one of the most difficult in the wave of associations of workers in companies in the past decade, which culminated in precedent rulings in the National Labour Court and the High Court. In order to assess the extent of the damage to the employer's image in this strike, further research is needed, but it is clear that the strike did not improve the employer's status in the eyes of the public or the media.

This strike did not cause any political, social, and image damage to the relationship of trust between the parties and the labour relations system. With regard to the last level of damage, suffice it to mention the words of the chairman of the Histadrut at the end of the struggle: "The

¹³⁵⁴ Nitzan Zvi Cohen: *Victory to the United Committee: Bezeq Withdrew from the Plan to Dissolve Bezeq International*, (Davar, 17/03/2020), at the link: <https://www.davar1.co.il/368903/>

outline of the agreements formulated is a confidence-building step that allows the parties to return to the negotiating table.¹³⁵⁵

B. The actual circle of those damaged from the strike was small in relation to the circle of potential victims in the first place. I come to this conclusion because the ones who experienced the pressure of the strike were the employer and the customers.

1. The Employer:

- Experienced a stop in cash flow and revenue.
- Sales of the iPhone 13 is considered a significant event for the cellular companies, which in the face of fierce competition and declining revenues from services have increased efforts in recent years to sell mobile devices. “At Pelephone, which places technological leadership as their motto, it is a painful blow to the soft underbelly ... In the long run, assuming that the labour dispute is resolved in the coming weeks, it is not certain that this harm will be reflected in monetary value. Pelephone has stock for sale and the new iPhone will not lose its charm until the launch of a new model in a year”.¹³⁵⁶

2. Customers:

- Customers found themselves at the end of the strike with a much larger bill, for a longer period of time than they were used to until then. But this damage also seems to have been resolved as the company’s management sent a letter to each customer at the end of the sanctions apologising for the accumulated charge, announcing that the charges would be divided and collected in two instalments and ensuring assistance to the company’s customers (by way of several payment, for example).
- Customers who had used their entire packages experienced a slowdown in surfing speed;
- Supply of equipment and goods to private customers was stopped;
- Towards the end of the struggle – customers experienced a strike in the service and support centers.
- Customers could not purchase the iPhone 13 device, and were forced to enter the waiting list for the end of the sanctions, or purchase the device from competing companies. And despite everything, during all the days of the strike, all the company’s customers were able to continue using the company’s basic product – surfing the Internet.

3. Workers, the workers’ union, business entities in trade relations with the employer, and the government:

At the height of the strike, the company’s CEO filed defamation lawsuits against two board members, and the company deducted wages for another board member who took

¹³⁵⁵ Nitzan Zvi Cohen: *End to sanctions on Pelephone and Bezeq International: The Workers’ Committee and the Histadrut reached agreements in principle with management*, (Davar, 01/11/2021), at the link: <https://www.davar1.co.il/342543/>

¹³⁵⁶ Roi Bergman, *The iPhone that broke Ran Guron’s back*, (Calcalist, 21/10/2021), at the link: https://www.calcalist.co.il/local_news/article/hkiq83tsf

part in the emerging negotiations. According to media reports, the lawsuit is likely to be dismissed and the employee's salary will be refunded.¹³⁵⁷ Hence, that the workers' organisation did not experience any damage.

Workers, business entities in trade relations with the employer, and the government also did not pay a price due to the strike.

C. Due to the graded nature of both the struggle measures taken by the workers (which exacerbated as time went on) and their avoidance of a general strike (and as they said at the start of the struggle "create maximum pressure with minimum workers taking organisational measures"), it can be said that the strike was efficient as it caused damage that gradually got worse (large for the employer, and small to medium for the public), until it brought management to announce the strike, and from there the parties sat down at the negotiating table. It is clear that if the struggle had started with the shutdown of the service and support centers (which in practice was the last step in the struggle), my determination would have changed.

3. Adjustment to the 21st Century:

During the struggle, union leaders had to persuade the workers to get involved in the conflict, as they found it difficult to see their connection to it. In this, one can see individual trends of the workers, as they questioned the justification of the struggle and the discretion of their leadership.

The employees also took a series of steps, from which I would like to delay on their decision to go out to field activities and demonstrate in front of the company's senior executives, and decided to stop collecting payments and prevent the sale of the iPhone 13 device.

In their first decision, the workers moved the arena of struggle to the public space. The advantage of this form of struggle is that it draws the attention of the public and the media. The public was exposed to the organisational struggle and was not harmed by it, and thus the struggle also received sympathetic media coverage, which for example reported that the shutdown announced by the company "is considered particularly extreme and has hardly been taken to date (in the economy)".¹³⁵⁸ In their second decision, the workers continued to provide service to the company's customers but stopped the cash flow to company management. This step was made possible thanks to a number of individual workers in the credit departments who disrupted the collection system. Thus, the prevention of the sale of the iPhone device was made possible thanks to disruptions taken by logistics workers.

In addition, the workers made use of social networks, an effective information system and the activation of Knesset members for the purpose of holding a discussion in the Constitution, Law and Justice Committee – something that raised the right to demonstrate to the agenda.

Therefore, it can be said that the strike was adapted for use in the labour market of the 21st century.

Hence, my final conclusion is that the strike taken in the Alpha case was a practical strike.

¹³⁵⁷ Nitzan Zvi Cohen, *Leaders of the struggle of Alpha workers: we went with our sense of justice and truth and did not apologise*, *ibid.*

¹³⁵⁸ Nitzan Zvi Cohen, *Leaders of the struggle of Alpha workers: we went with our sense of justice and truth and did not apologise*, *ibid.*

14.7 Summary

The purpose of this chapter was to evaluate the strike as a means of pressure. To do this I reviewed studies that sought to evaluate the strike as a tool for achieving goals and showed the difficulty of drawing unequivocal conclusions from the various studies in the field. Hence, I turned to the search for other variables that could help assess the strike as a pressure tool. At the same time, I addressed the changes that have taken place in the labour market to this day. The Covid crisis is the most relevant example to illustrate these changes: During the crisis, millions of workers around the world, as well as in Israel, moved to work remotely and from home. The implications of this pattern of work, which in our case is becoming more and more common,¹³⁵⁹ is a disconnect between the worker and the factory as a workplace. Hence, that the *classical* strike as well as other forms of pressure that accompany it (picketing, for example) become irrelevant in a factory that no one enters or exits (and hence they are also impractical).

The highlight of this chapter was the development of the practical index for assessing the strike as a means of pressure.

The conclusions of this chapter lead me to the third section of my work that deals with alternative means of pressure to strike. In this section I will diagnose alternative means of pressure to strike and their practicality, using the practical index. If I conclude that a particular means of pressure will succeed in bringing the employer's maximum response to workers' demands, with minimal damage to the parties while being adapted for use in the 21st century, then it will also be possible to determine that this means of pressure is an alternative and practical means of strike.

¹³⁵⁹ For example: the bill to regulate work from home that is currently being formulated by the Ministry of Economy (which I discussed above), or the package deal in the economy signed on 11/2021 as part of which – in the appropriate professions in the public sector, it will be possible to work from home one day a week, following the pilot that began during the Covid crisis.

Chapter 15: Summary of Section B

The purpose of Section B, the second section to my work that includes six chapters, was to understand why a strike is a means / tool of pressure. My starting point for understanding this question passed through understanding the damages that the strike causes or may cause.

In the Chapter Nine, *Strike Damages*, I sought to understand what damage strikes may cause besides economic damage, I posited that a strike may cause political, social, image damage and damage to the relationship of trust. I examined the factors damaged by strikes and learned that the factors exposed to the greatest number of levels of damage from the strike are the employer and the workers' union, each of which is exposed to four levels of damage. Next, I asked 'How can the damage of strikes be estimated?' and we learned that there is no consensus on how to do this and that there are also damages that cannot be estimated. This indicates a thousandfold the complexity of the strike as a means of pressure.

From Chapter 10 to Chapter 13, I discussed how the employer, the sovereign, third parties, and the workers' union handle the strike and its damages:

In Chapter Ten, *How the Employer Handles the Strike*, I showed how employers seek to see strikes come to an end by a variety of means, which can be categorised according to their timing and legality, which led to the conclusion that an employer dealing with a strike may find itself dealing with a minority of useful and legal tools during the strike and, therefore, it is understandable why dealing with a strike is in no way simple or easy, and is even stressful. Further conclusions were that not one of the measures taken by employers is merely a response to the actions of the workers' union or workers; not all measures are possible for employers, because not all of them are applicable; some measures are accompanied by an additional price that employers have to deal with; and *sitting on the fence, dragging feet*, coming to terms with the strike or severing contact during a strike are not always possible.

In Chapter Eleven, *How the Sovereign Handles the Strike*, we learned about the ways in which the sovereign tries to deal with the strike phenomenon: through restraining orders or through declarations and bills seeking to promote the use of mandatory arbitration. I showed how over the years, use of restraining orders has increased, what the court's position is towards them and I stated their advantage. With regard to Mandatory arbitration, I reviewed the historical chain of events regarding mandatory arbitration, from the period of the Jewish Settlement in Eretz Israel, to new bills for the Knesset table that seek to require the use of mandatory arbitration.

In Chapter Twelve, *How Third Parties Handle the Strike*, we learned that the way for third parties, who have nothing to do with the striking workers, to recover from the damage of the strike is difficult and complex. I discussed the attempts of various courts to respect the right to strike and distinguish between the damage caused to the employer as a result of the strike and the damage caused to the public – and particularly the weakened public. And I explained that the legal pendulum ranges from protecting the right to strike to protecting the interests of third parties.

In Chapter Thirteen, *How the Workers' Union Handles the Strike*, I reviewed seven measures a workers' union employs to deal with the strike: covert struggle; protest shifts; transfer of pressure from the organisational-collective level to the individual-individual level; setting up a strike fund; enforcement of a strike against strike breakers; activation of an exceptions committee and collective resignation. These tools help the workers' union reduce the damage of the strike; can win the union public sympathy and support of the Labour Court; or allow it to continue to put pressure on the employer. I have also shown how these tools are not without flaws.

Chapter Fourteen, *Evaluating the Strike as a Pressure Tool*, which closes this section, sought to evaluate the strike as a means of pressure. In order to do this, I reviewed studies that sought to evaluate the strike as a tool of pressure to achieve goals and showed the difficulty of drawing unequivocal conclusions from the various studies in the field. Hence, I turned to search for other variables that could help assess the strike as a pressure tool. At the same time, I reviewed the changes that have taken place in the labour market to this day. The highlight of this chapter was the development of the practical measure for assessing the strike as a means of pressure. In the next section I will present three means of pressure – which I hope – can be called *alternative means of pressure to the strike*.

Section C

Chapter 16: Virtual Strike

In this chapter I will discuss the nature of a virtual strike, its characteristics in the world and in the State of Israel, and I will evaluate the possibility of a virtual strike as an alternative and practical means of pressure to strike.

16.1 What is a Virtual Strike?

Under a virtual strike, workers continue to perform their work as usual, and organisational measures are reflected in the fact that the employer does not receive the income from the sale of his commodities (or his workers' labour) because that income is transferred, temporarily and during the strike, to a third-party trust account. This puts economic pressure on the employer.

The idea of a virtual strike was proposed by Goble,¹³⁶⁰ but this idea was not widely applied and developed during his time, and as I will show later, even today the idea of a virtual strike has not yet gained a real foothold in Israeli labour relations.

16.2 The Virtual Strike Around the World

A review of the literature on virtual strikes shows only two countries in which there is real recognition and status for the virtual strike: the United States and Italy. Apart from them, characteristics of a virtual strike were found in professional struggles taken in other countries, as explained below.

A. The American Model

From a review of the literature one can learn about the first documentation of the virtual strike that took place in the US, during World War II in a factory for the production of valves for the US Navy.¹³⁶¹ Despite it being one of the first of its kind, this strike did not receive as much attention as was expected. In contrast, the virtual strike that occurred in 1960 at the Miami Bus Company in Florida, is mentioned many times: As a result of the mayor's intervention, the parties agreed to go on a *semi-strike*: as part of the bus strike, the public did not pay for the use of public transportation services, so the company was denied income, workers continued to work without pay and the public continued to receive bus services as usual.¹³⁶² Both parties agreed not to receive financial assistance from any third party. The semi-strike began according to an agreement between the parties, but the passengers chose to express their support for the drivers by giving them tips or donations. This unexpected assistance angered the company, and it rescinded its support for the arrangement at the end of just four days.¹³⁶³

The virtual strike in the United States was also voluntarily regulated, and an example of this is the so-called *Strike Work* agreement, signed in 1964 between the Dunbar Furniture Corporation of Indiana, Berne, Indiana and the America workers' Union, Upholsterers' International Union of North America. The agreement covered many issues, including an agreement that the workers' union would suspend its right to declare a strike and the employer would suspend its right to declare a lockout; the workers will give up half of their wages. The amount saved will be transferred to a deposit in an agreed bank account;

¹³⁶⁰ George W. Goble, *The Non-Stoppage Strike*, Labour Law Journal (February 1951), pp 105-114.

¹³⁶¹ Amnon Caspi, Batya Ben Hador, *Virtual Strike*, (Labour and Social Work 11, 2005), p. 16.

¹³⁶² Anonymous: *Strikes that don't harm the business* 29 (1) International Management (1974) 4. Quoted in: Amnon Caspi, Batya Ben Hador, *ibid*, fn. 39 on p. 16.

¹³⁶³ Ran Hermesh, *Virtual Strikes*, (Parliament 61, published by the Israel Democracy Institute, 31/03/2011). At the link: <https://www.idi.org.il/parliaments/11092/11093> Accessed: 03/03/2021.

the employer will transfer the same amount each week to the bank account in question; both the employer and the workers undertook to refrain from receiving assistance from any other third party.¹³⁶⁴

From the American model of the virtual strike, we learn that the strike is conducted with the consent of both parties and is not limited in time. Work is conducted as usual; the workers are not paid and there is no income for the employer. All proceeds from the factory during the strike are transferred to the state treasury or to charitable purposes.¹³⁶⁵

B. The Italian Model

In Italy, the virtual strike is limited in time and is conducted with the consent of both parties. There is no harm to the day-to-day running of the company's operations. The strike is activated mutually: the workers do not receive wages and the employer agrees that all the company's income during the strike is transferred to a special fund designated for charity. The final adjudicator in any matter concerning the virtual strike is the arbitrator.¹³⁶⁶

An example of an Italian virtual strike is the strike that broke out at the Italian airline Meridiana. The strike lasted four hours, the air crew worked as usual and the employer donated the proceeds to charity.¹³⁶⁷

C. Characteristics of Virtual Strikes in Professional Disputes in Other Countries

Evidence of the characteristics of virtual strikes taken in professional struggles in different countries can be found throughout the network. All the struggles that will be reviewed below can be called *cash register strikes*, which means not collecting money from the passengers for their travel.

On January 27, 2016, a community coalition in Grand Rapids **Michigan**, led by United Students Against Sweatshops, organised groups of passengers who boarded buses and refused to pay their fare in support of drivers. In January 2017, **Australian** public transport drivers announced a *free travel day* as part of their professional struggle and refused to accept payment from passengers.¹³⁶⁸ And they repeated that again six months later.¹³⁶⁹ This tactic was also used in Okayama **Japan** in May 2018. The drivers of the Ryobi bus company continued to pick up passengers as usual, but they covered the money boxes in the buses and refused to accept payment from bus passengers.¹³⁷⁰

As mentioned, in each of these struggles, public transport drivers continued their work as usual, and did not charge the traveling public a fee. Continuation of regular work on the part of workers and the continued provision of the service to the public, while *punishing* the employer and deducting income from it are the hazards of the virtual strike.

¹³⁶⁴ Ran Hermesh, *Virtual Strikes*, *ibid.*

¹³⁶⁵ Amnon Caspi and Ruth Kastiel, *Labour Relations in the Age of Globalisation*, (The Open University, 2005), p. 58.

¹³⁶⁶ *Ibid.*

¹³⁶⁷ Ido Eshet, *On the Good Virtue of the Virtual Strike*, (Labour and Social Work 11, 2005), p. 37.

¹³⁶⁸ Michelle Brown, *Sydney bus drivers let commuters ride free in protest against privatisation*, (ABC NEWS, 01/01/2017), <https://www.abc.net.au/news/>

¹³⁶⁹ Ruth McCosker, *Fare-free buses Thursday, but no buses Friday afternoon as drivers' strike*, (Brisbane times, 25/07/2017), <https://www.brisbanetimes.com.au/national/queensland/farefree-buses-thursday-but-no-buses-friday-afternoon-as-drivers-strike-20170725-gxi8zz.html>

¹³⁷⁰ Mark Engler, *There's More Than One Way to Strike the Boss*, (JACOBIN, 19/06/2018), <https://www.jacobinmag.com/2018/06/strike-collective-action-work-to-rule>

16.3 The Virtual Strike in Israel

There are three records of virtual strikes in Israel, as presented below.

A. 1998 Nature and National Parks Authority Case

In the days before Sukkot 1998 and against the background of the merger between the Nature Reserves Authority and the National Parks Authority, workers of these authorities wanted to declare a strike, which would have prevented the Israeli public from touring nature and parks during the holiday. On the recommendation of the National Labour Court,¹³⁷¹ authority workers took a virtual strike. In this strike, authority workers undertook to work in a full and routine manner during the Sukkot holiday and for the next sixty days, they operated the gardens and allowed visits to them, charging entrance fees from visitors, workers' salaries were paid, but the authority's income during the holiday period was transferred to an account (and released upon completion of negotiations between the parties) in the trust of the parties' lawyers, and an arbitrator was appointed to resolve the labour dispute.

This was the first time that a virtual strike was taken in Israel.

B. 2003 Israel Rail and the Airports Authority Case

In December 2003, there was a strike in the economy that encompassed several organisations and public units. At a hearing in the National Labour Court, the court judges ordered workers of Israel Rail and the Airports Authority to take a virtual strike. The workers worked as usual and received their wages as usual, while all fees and income were deposited in trust accounts in the name of the Airports Authority and Israel Rail, and according to the court: "On the one hand, we issue an order preventing a strike in its *normal* format and stipulate that until the date of the above hearing, the Histadrut will not carry out any strike in the workplaces of the applicants and their members, including the essential services, as specified in the parties' requests. On the other hand, we allow a *virtual strike* in that this order is conditional on the arrangements specified below regarding the deposit of funds in a joint trust account. This order will enter into force on 19.11.2003 at 01:00 and will remain in force until a different decision is rendered by this court at a hearing to be held on 25.11.2003. The Histadrut will be allowed to hold one information meeting in each workplace, lasting no more than 30 minutes in order to clarify the situation to the workers".¹³⁷²

C. 2005 IEC Case

A third and final case in which the solution of the virtual strike was adopted in Israel is the labour dispute between the Histadrut and IEC in 2005. In this case, IEC turned to the Haifa Regional Court for assistance against sanctions imposed by the National Secretariat and IEC workers. The court ruled that: "In the circumstances of the case, it seems to us more efficient and practical to adopt the virtual strike model, adapted to the circumstances, in such a way that instead of the sanctions that mean the coal ships shall not be unloaded by workers (subject to the easing of sanctions that we had to set, in order to maintain a reasonable and necessary amount of coal to maintain the demand levels of electricity consumers), workers will actually unload all the coal ships arriving at state ports as usual, immediately

¹³⁷¹ Labour Court Hearing 98/8-41 The Nature Conservation and National Parks Authority v. Azoulay et al. (Given on: 04/10/1998).

¹³⁷² Collective Dispute 13/03 Chamber of Commerce v. Histadrut (18/11/2003); Collective dispute 14/03 The Israel Manufacturers Association, the Israel Banks Association, the Ports Authority, Israel Railways Ltd. and the Israel Airports Authority v. The New Histadrut (14/12/2003).

upon depositing the cost of the damage prevented to the electricity company following the regular unloading of the coal ships arriving at the port by the workers, in a joint trust account, whose authorised signatories will be, the power of attorney of IEC, and in the case of the respondents, when the money that will accrue in it will be invested in accordance with the directives of the Director General of the Ministry of Finance. The funds will remain in the account until the end of negotiations, and a wage agreement is signed”.¹³⁷³

D. Additional cases in which the use of Virtual Strikes is discussed

Besides these three documentations in the rulings of the Labour Court on the subject of the virtual strike, over the years there have been requests from employers and workers’ unions to allow a virtual strike in their factory instead of the traditional strike,¹³⁷⁴ or professional struggles carried the characteristics of a virtual strike, even without specifically calling it one”.

For example, in July 1997, **Bezeq** workers declared a *damage-free* strike, which created a front of Bezeq workers, the company’s management and the Minister of Communications against the Government Companies Authority and the Ministry of Finance.¹³⁷⁵

In the Discount Bank case – disruptions taken by the workers were expressed in their refusal to issue financial reports intended for trading in the capital market. The President of the National Labour Court, Steve Adler, ruled that: “On the one hand, there is weight to the claim of the Histadrut’s representative that the organisational measure taken by the workers, in the form of not producing reports for the Securities Authority, does not harm the majority of the public. This is a kind of *virtual strike* that mainly harms the state, as the controlling shareholder in the bank, although there may also be harm to the other shareholders. Moreover, according to the Histadrut, the bank’s workers continue to perform their normal work, serving the bank’s customers and are entitled to pay. On the other hand, the organisational measure taken by the union does harm the credibility of the bank and the activity of the capital market. There are types of organisational measures in which a handful of workers can cause serious harm to the employer. Thus, the refusal of a small number of officials to open the bank safes or repair the fallen computer network, could paralyse most of the bank’s activities. In this case, a group of workers at the bank is not carrying out an operation with a defined and limited scope of preparing the reports for the Securities Authority, but the damage caused to the bank as a result is extensive, as is the damage to capital market credibility.”¹³⁷⁶

When **Egged Transport** workers went on strike in March 2015, they did so in the form of a *cash register strike*,¹³⁷⁷ which of course did not harm a third party, in this case the passengers. The company’s management responded with a preventative lockout. This step by management was interpreted by the workers as an exploitation of the non-offensive strike in order to present the strikers as having decided irresponsibly and hastily, to harm the public of customers.

¹³⁷³ Collective Dispute (Haifa) 30-05 The New Histadrut in Israel – Israel Electric Company Ltd.

¹³⁷⁴ The last of these applications – General Collective Dispute 40815-07-13 Tel Aviv and the Center Chamber of Commerce, Association of Chambers of Commerce – The New Histadrut.

¹³⁷⁵ Effie Landau, *Bezeq’s Strange Strike*, (Globes, 23/07/1997). At the link:

<https://www.globes.co.il/news/clause.aspx?did=121563> Accessed: 27/03/2022.

¹³⁷⁶ General Collective Dispute 1013/04 Discount Bank Ltd. v. The New Histadrut – Derivatives Market Association.

¹³⁷⁷ Zvika Gronich, *Tomorrow: Another Strike at Egged Transport*, (Shabbat Square, 25/05/2015). At the link:

<https://www.kikar.co.il/167139.html> Accessed: 27/03/2022.

In July 2015, **social workers and psychologists at mental health clinics** announced that as part of the organisational measures they were taking, they would continue to provide service to patients as usual, but would not charge them.¹³⁷⁸

In November 2011, the **Committee of Court Workers** announced the cessation of the collection of all court fees and fines until further notice.¹³⁷⁹

16.4 Comparison between the Virtual Strike in Israel and the Virtual Strike in the US and Italy

From the examples described above we can see that there are a number of differences between the virtual strike practiced in Israel compared to the virtual strike in Italy or the United States, which can be presented in the following table:¹³⁸⁰

	Israel	US	Italy
Initiation	The strike is initiated by the National Labour Court and sometimes with the consent of both parties	The strike is with the consent of both parties	The strike is with the consent of both parties
Time	Not limited by time	Not limited by time	Not limited by time
Employer Income	No employer income	No employer income	No employer income
Wages	Worker wages paid	Worker wages not paid	Worker wages not paid

Table 17: Comparison between the Virtual Strike in Israel and the Virtual Strike in the US and Italy.

The most striking difference between the Israeli virtual strike and its Italian or American counterpart is that the Israeli virtual strike is a coercive virtual strike, meaning that the National Labour Court imposes it on the parties, while abroad it is a voluntary agreed-upon tool between the parties. This raises a number of issues. First, forced labour has the effect of interfering in labour relations and violating the right of workers to exercise their right to strike. Second, in order to strike, the workers' union must obtain consent of the court. This adds another restriction on the right to strike.

Another difference is the entitlement to wages during a virtual strike. While when Italian and America workers go on a virtual strike they are not entitled to wages, the Israeli workers who take part in a virtual strike receive their wages in full. Failure to receive pay during a strike is an incentive for the workers to end the strike as soon as possible and therefore also encourages them to come to the negotiating table willingly.

16.5 Evaluating the Virtual Strike as an Alternative and Practical Means of Pressure to the Strike

How can the virtual strike be evaluated as an alternative and practical means of pressure to the strike? Since there are not many examples in which the virtual strike was actually activated, I will address in my remarks the views of various researchers and the advantages and disadvantages of the strike.

¹³⁷⁸ Amir Basha and Moran Savorai, *A Strike that Helps Customers: Mental health practitioners at HMOs are not charging*, (Sicha Mekomit [local conversation], 07/07/2015), at the link:

<https://www.mekomit.co.il/%D7%A9%D7%91%D7%99%D7%AA%D7%AA-%D7%90%D7%A0%D7%A9%D7%99-%D7%91%D7%A8%D7%99%D7%90%D7%95%D7%AA-%D7%94%D7%A0%D7%A4%D7%A9> Accessed: 27/03/2022.

¹³⁷⁹ Avishai Grinzig, *The Court Workers' Committee suspends the strike in order to complete negotiations* (Globes, 10/11/2021). At the link: <https://www.globes.co.il/news/clause.aspx?did=1001390385> Accessed: 27/03/2022.

¹³⁸⁰ Hereinafter: Table 17.

Ran Hermesh, explains that the **first virtual strike in Israel**, in the 1998 Nature and National Parks Authority case, is **positive evidence of the virtual strike's contribution to labour relations**. Although it was operated in a very convenient context, it is nonetheless not entirely unique, as authority workers are not regular workers. Many of them are nature lovers and have a sense of purpose in their work. Their workers' union was, of course, convinced of the justification of its demands, but at the same time it had to comply with the positions of its members, who sought to minimise any harm to their workplace and the public. In this context, the President of the National Labour Court had no difficulty in bringing the parties to the agreements detailed. In his opinion, in the case of Israel Rail and the Airports Authority in 2003, the state challenged the very right of the Histadrut to negotiate with it on the issues in dispute; and since in the absence of negotiations, the Histadrut showed no interest in moderating its claims, and since the extent of the harm to both parties was moderate, **the virtual strike became ineffective**. When the time came for another hearing in court, the state announced that non-removal of the restrictions imposed on it would lead to cessation of the movement of trains, and thus the court had no choice but to end the virtual strike. With regard to the IEC case in 2005, Hermesh finds it difficult to assess the effectiveness of the Regional Labour Court's decision, as IEC management initiated additional legal proceedings – including another application to the Regional Labour Court and an application to the National Labour Court. These proceedings focused on the substance of the conflict and did not address the issue of the virtual strike.¹³⁸¹

In a virtual strike, the employer makes the means of production available to the workers (and does not initiate a lockout,¹³⁸² for example), and the workers continue their work. The big advantage of the virtual strike is that the public is not harmed by the organisational steps taken by workers, because it continues to receive service. The virtual strike has additional benefits. As for the workers (in Israel), they continue to receive their salaries. As far as the employer is concerned, there is no loss of product (or impairment of labour productivity). The image of the workers' union and the employer is not harmed either – the workers' union is not accused of *having their hand on the trigger* and going on strike too early, and the employer is not accused of being tough or causing harm to the workers' working conditions.

However, the virtual strike also has drawbacks. As with the traditional strike, even in the virtual strike the employer experiences a cash flow injury, and this is no small matter, but it can be assumed that a temporary cash flow injury is preferable to damage to the product provided by the company (an injury that does not exist during a virtual strike). Also, in a virtual strike, there is no incentive for the workers' union to end the strike (since the workers' income is not always harmed). In addition, while the workers' union is independent in operating the traditional strike weapon, in the virtual strike it depends on the approval of the court.

The advantages and disadvantages of the virtual strike compared to the traditional strike can be summarised in the following table:¹³⁸³

¹³⁸¹ Ran Hermesh, *Virtual Strikes*, *ibid.*

¹³⁸² See Chapter 10: *How the Employer Handles the Strike.*

¹³⁸³ Hereinafter: Table 18.

	Traditional Strike		Virtual Strike	
	Advantages	Disadvantages	Advantages	Disadvantages
Employer	The employer is aware that the workers are not receiving wages, and can then stall for time to try and incentivise the workers' union to end the strike.	<ul style="list-style-type: none"> • Harm to image • Losses in products and work productivity • Harm to cash flow 	<ul style="list-style-type: none"> • No harm to image • No losses in products and work productivity 	<ul style="list-style-type: none"> • Harm to cash flow • No incentive for workers' union to end the strike
Individual Worker	(None)	Harm to wages	No harm to wages (for the Israeli worker)	(None)
Workers' Union	<ul style="list-style-type: none"> • The right to strike is an independent right and no permit is required from the High Court to activate it. • Option for ending the dispute quicker by applying pressure on the public. 	Harm to Image	No harm to the image of the workers' union	<ul style="list-style-type: none"> • No right to activate the strike (court permit required for authorising the strike) • The public does not feel the strike and therefore, there is no public pressure on the employer
Public (consumers, residents, etc.)	(None)	Suffering: the public is perceived as <i>hostages</i>	No suffering	(None)

Table 18: Comparing the advantages and disadvantages of the virtual strike compared to the traditional strike.

Perusal of the above table shows that the virtual strike is not without its drawbacks. In this strike the public is not a *hostage* of the workers' union. No pressure is applied on the public and therefore, they do not experience the labour dispute or the organisational steps taken by the workers' union directly, but there is a catch – because the public does not experience the conflict it also does not put pressure on the employer to comply. In addition, the ability to activate a virtual strike is limited – the workers' union requires the approval of the court.

Hence the question arises whether one side should be allowed to force the other to activate a virtual strike arrangement? Goble says no to this. He argues that there is no point in forcing a party to a dispute to use the proposed tool, since success of the virtual strike depends on the willingness of the parties to meet its limitations.¹³⁸⁴ Indeed, one of the main reasons for the failure of the virtual strike in resolving labour disputes in the public sector in Israel in 2003 was the unwillingness of the government to submit itself in good faith to its limitations. In this regard Marceau and Musgrave offer a different approach. They argue that in highly essential industries, a virtual strike should be the only course of action allowed for workers' unions and according to them, the President of the United States should publish in advance a

¹³⁸⁴ George W. Goble, *The Non-Stoppage Strike*, Labour Law Journal (February 1951), pp 83-86.

list of essential workplaces where a conventional strike should be banned and only the virtual strike be allowed.¹³⁸⁵

Ido Eshet believes that the virtual strike in the Nature and National Parks Authority case and the Israel Rail and Airports Authority case creates an unbalanced situation between the parties in a labour dispute and upsets the balance of the use of collective power. The first distortion that Eshet points to is the lack of external pressure. The pressure exerted by the public on the traditional strike is an incentive to end the conflict. In a virtual strike this pressure does not exist. The second distortion is the change in the internal incentive. In the Israeli virtual strike, workers are not required to pay a price due to the strike, since their salary is paid as usual.¹³⁸⁶

Regarding the distortion in the internal incentive, Eshet explains that during a virtual strike, the worker continues to fulfil his part in his employment contract, in other words – the employment contract is not suspended. Hence, he is entitled to full compensation for his work. However, even this explanation does not solve the problem of the internal incentive.¹³⁸⁷

Ran Hermesh also proposed, as a public representative in the Israel Rail and Airports Authority case in 2003, a number of tools for overcoming the distortions of the virtual strike and turning it into an effective pressure mechanism. Among his suggestions: the Histadrut will be allowed to declare a strike on any scale, provided it exceeds 10,000 workers; employers will be released from the obligation to pay their workers' wages on strike days; a mutual fund will be established to which the amounts saved for the economy and employers will be transferred due to the Histadrut's waiver of the actual suspension of work in various sectors of the economy; the government will make daily contributions to the mutual fund of an amount equal to the value of the damage to the economy that was avoided due to the Histadrut's waiver of the use of standard strike weapons. The government will not transfer the money it has saved for wages to the fund; if the Histadrut chooses to reduce the strike to a partial strike, it will also reduce the estimate of the strike damages and at the same time the scope of the government's deposits into the mutual fund; the Chief Government Statistician or the person appointed by him shall serve as the Trustee's Professional Adviser on behalf of the court. It is the statistician who will estimate the extent of the damage; employers who decide not to pay wages to their workers during the productive strike will transfer the amount saved to a mutual fund; use of the funds will be determined by the Histadrut and the Ministry of Finance by agreement. The funds can be used to partially finance the costs of the collective agreement when they are due. Behind Hermesh's proposal to set a minimum number of striking workers was the fear that the Histadrut would prefer to lockout a small number of workers in key positions. Thus, the Histadrut would maximise the damage of the strike and minimise damage to strikers.¹³⁸⁸

Caspi and Ben Hador also address the distortions created by the virtual strike and propose anchoring it in primary legislation and adding a number of possible solutions: Parties to a collective agreement may include in their collective agreement a clause in which they will abandon the traditional strike and instead allow a *virtual strike*. During the strike no wages will be paid to workers. The workers' union strike fund will treat the virtual strike as a strike for all intents and purposes (and as such it will entitle workers to a payment from the strike fund for the wages deducted from them due to their part in the strike). If it is found by the court that the workers have not continued their work as usual, the employer is more likely to

¹³⁸⁵ Roy L.E. Marceau and Richard A. Musgrave, *Strikes in Essential Industries: A Way Out*, Harvard Business Review (1949) pp 286- 292.

¹³⁸⁶ Ido Eshet, *ibid*, pp. 35-37.

¹³⁸⁷ *Ibid*, p. 39.

¹³⁸⁸ Amnon Caspi, Batia Ben Hador, *ibid*, p. 19.

use some of the funds deposited to indemnify for damages. Caspi and Ben Hador also address the employer's income: Organisations that have income – all income received during the strike period will be transferred to a mutual fund, which will be managed by a public trustee who will be jointly elected by the parties and the administration. Organisations that have no income at all – a professional body will determine the equivalent of a day / hour of strike and the state will transfer said amount to the mutual fund.¹³⁸⁹

Guy Davidov is willing to see the virtual strike as a useful tool, in cases where workers and the employer choose it as a substitute for a *traditional* strike by consent. Similarly, when the court deems it appropriate to turn a strike that causes damage to the public into a virtual strike that prevents the same damage, Davidov will be willing to accept the virtual strike as a proportionate remedy, that is, a remedy that achieves the goal with as little harm as possible to the right to strike.¹³⁹⁰

Can the virtual strike really be an alternative and practical means of pressure to the traditional strike in the State of Israel?

I expect that a virtual strike can be assessed as practical if it proves to be effective, efficient and suitable for use in the 21st century.

If the virtual strike achieves the result expected by workers, then it will be **effective**.

If compliance with the strikers' demands is done with a minimum of damage (to the employer, to the factory, to the sovereign, to third parties to the workers' union and to the workers themselves) then it will be defined as **effective**. Under this index I am willing to accept the virtual strike as effective because of its two main characteristics:

- A. The levels of damage actually harmed by a virtual strike will always be limited relative to the potential levels of damage in the first place.
- B. The actual circle of victims from the virtual strike is limited in relation to the circle of potential victims in the first place, which involves harm to third parties.

At the same time, it should be remembered that in the Israeli virtual strike the workers continue to earn their wages and therefore, the *price* of the strike for the employer can rise. Hence, there is no complete certainty that the virtual strike is indeed more effective than the traditional strike.

Finally, the virtual strike is **adapted for use in the labour market of the 21st century**, and as such it can occur, for example, through a minority of workers, as happened in the **Alpha Group** case.¹³⁹¹

16.6 Summary

The Israeli virtual strike does not include any sanction on workers. It does not hurt their pockets and does not encourage them to end the strike. In the words of Eshet, the "virtual strike designed by the National Court does not create a fair environment for negotiations between the parties. The National Court has chosen an ineffective legal solution. Its solution creates an inappropriate imbalance in the bargaining power of the parties. Its solution encourages workers to behave unreasonably at the expense of the employer".¹³⁹² The solution proposed by Eshet to maximise the effectiveness of the virtual strike is that a

¹³⁸⁹ Ibid, p. 22.

¹³⁹⁰ Guy Davidov, *A strike as one stage in a sequence of events and a virtual strike (with wages) as a proportionate remedy*, (Labour, Society and Law 11, 5766-2006), p. 57.

¹³⁹¹ And discussed in Chapter 14.

¹³⁹² Ido Eshet, *ibid*, p.42.

certain percentage of the wages of the workers who take part in a virtual strike will be donated to charity as long as the strike continues. The rate will change as a function of strike time: the longer the strike, the higher the rate of deduction from the worker's wages to charity up to the maximum rate to be determined. This sanction will improve the system of balances between the parties.¹³⁹³ I find Eshet's proposal logical and one that might ensure the effectiveness of the virtual strike, because it would still ensure that it would be cheaper to the parties than the traditional strike, but it would reduce the second distortion pointed out by Eshet. For this reason, I also find Caspi and Bar Hador's suggestion not to pay any wages to the striking workers wrong.

Furthermore, one can also think about the possibility in which the workers' union and the employer decide that the nature of the strike will be of a voluntary nature, so that the virtual strike will be agreed between them, similar to Italy and the US, and not imposed on them. In this way, the parties maintain their power in operating the strike weapon and do not depend on or bother the court, the parties maintain direct communication channels both near the strike and when it occurs – which may accelerate the end of the conflict between them.

¹³⁹³ Ibid, p. 43.

Chapter 17: Shaming

17.1 Introduction

A Google search on March 30, 2022 yielded 2,180,000 results for *shame*, 80,100 results for *shaming* [translator's note: the word in Hebrew], 212,000 results for *shaming* (in Hebrew [translator's note: phonetically]) and 62,600,000 results for *shaming*. These results are in line with Porat's statement that "the Western world has recently rediscovered the phenomenon of public shaming, which has been gaining momentum in the world in recent years as part of the online space".¹³⁹⁴ Evidence of this is the constant increase in shaming incidents in Israel. Thus, 80,000 shaming incidents were recorded in Israel in 2018 alone.¹³⁹⁵ Other countries around the world have also begun to use the tool of shaming not only in a criminal context but also in broader regulatory contexts, including administrative violations, civil violations and misconduct (which is not prohibited by a formal legal norm).¹³⁹⁶

And indeed, the phenomenon of shaming exists in all social spaces and at all ages. In the world of work, it can revolve around criticism of an employer or poor service, negligence in fulfilling a role, behaviour that is considered abnormal and more.

In this chapter I will discuss the nature of shaming and examine whether it can be an alternative means of pressure to strike. To do so, I will first address the general meaning of shaming; I will then address shaming from a historical-global and Jewish perspective; I will discuss the expression of shaming on the internet and social networks; I will examine the purposes of shaming, and the results of shaming; I will refer to shaming in Hebrew law and shaming in Israeli law; I will evaluate shaming as an alternative means of pressure to strike; and I will evaluate shaming as a means of pressure and practicality for a strike through a number of test cases from Israel and the world in which this tactic has been tried. Finally, I will present my conclusions.

17.2 What is Shaming?

Despite the age and scope of the shaming phenomenon, it has not been given a clear and agreed-upon dictionary definition, nor a legal definition in Israeli law or any other legal system. What are the reasons for this? And how can shaming be defined?

Shaming is something we **may** recognise when it appears, but it is difficult to define. This must be related to the fact that it is a matter of understanding emotions. The law does not often deal with the meaning of feelings in general, and of the feeling of shame in particular.¹³⁹⁷ The Even Shushan dictionary defines shaming as "humiliation, contempt, causing disgrace".¹³⁹⁸ and the Sapir Dictionary defines shaming as "contempt, humiliation, causing shame and disgrace, insults, abuses and profanity".¹³⁹⁹ But these definitions are not acceptable as to the substantive content of the concept of shaming.

High Court Judge Mishaal Cheshin ruled that "the concepts of shaming and contempt are related, and in some contexts even identical in their intention [...] shaming will sometimes be contempt and other times

¹³⁹⁴ Assaf Porat, The phenomenon of shaming on the internet and social networks – systematic legal mapping, (Law and Business 23, 5781-2021), p. 119.

¹³⁹⁵ Hagar Bohbot: *Shame on you: 80,000 shaming events a year in Israel* (Ynet, 21/05/2019). At the link: <https://www.ynet.co.il/clauses/0,7340,L-5512864,00.html> Accessed: 06/04/2022.

¹³⁹⁶ Sharon Yadin, *The Expressive Space of Regulation: Should the State Be Shaming?* (Law and Business 23, 5781-2021), p. 624.

¹³⁹⁷ Guy Zeidman, *Introduction to Shaming*, (Law and Business 23, 5781-2021, December 2020), pp. 2-3, 5.

¹³⁹⁸ Avraham Even-Shoshan, *Even-Shoshan Concentrated Dictionary*, (Kiryat Sefer Ltd., 5748-1988), p. 63.

¹³⁹⁹ Eitan Avnion, *Sapir Dictionary: A concentrated Hebrew-Hebrew dictionary in the present* (Lashon Had Artzi, 1997).

will not be contempt, and the meaning depends on the context”.¹⁴⁰⁰ Seidman suggested the following definition of shaming: “Shaming is deliberate advertising, especially through the internet and social networks, of information that is usually fundamentally true but unpleasant to the subject of the publication, with the intention of causing him discomfort and emotions of shame, which will motivate him to change his ways in the way the shamer aspire to”. Seidman cites a number of reasons for choosing this definition, and I would like to dwell on three. **First**, the information published is intended to indicate that the shamed person violated a social norm, accepted in the community to which the shamer, the shamed and the audience who witnessed the shame belong. **Second**, in order for an act to be considered shaming, the involvement of a third party – an audience – is needed, who will *receive* the information that the shamed person has violated a social norm that is acceptable to this audience. The center of gravity in the shaming event is at the axis of the relationship between the shamed and the public. **Third**, shaming is a *tool*, and can be used for construction or demolition. Publication of personal information without consent that is intended to encourage certain behaviour and suppress another. Shaming uses complex and powerful psychological mechanisms in the human psyche.¹⁴⁰¹

The psychoanalytic literature has a tradition of fragmented writing about the origins of shame and its effects. The clinical discourse dealing with shame sees it as a central effect in pathological and normal human interactions, a central conflict issue in certain types of pathology and one of the formative sensations in the early development of a child. Interpersonal approaches in psychoanalysis see shame as a central component in the development of identity and hint at its dialectical status. Some see shame as an identity-shaping experience and some see it as an experience that indicates a distortion in the shaping of identity.¹⁴⁰²

In the socio-political context, shame serves as a tool for controlling subjects as obedient citizens, indicating a forbidden deviation from the norm and announcing it. Shame is the marker of the relationship with the norm. It determines the conditions of the possibility of the subject’s existence, since it marks what is outside it – the abyss of lack of recognition or denial of identity. Subjective longing for recognition forces it to create attention and alert systems for the confirmation of its identity or the threat of exclusion. Shame is not just a subjugating mechanism. Ziv distinguishes between shame as emotion and shame as an effect (physical). He calls the first *social shame* and the second *physical shame*. Social shame examines the ways in which the social is charged to the biological and produces it, while physical shame examines the ways in which the biological produces or loads the social.¹⁴⁰³

According to Kamir, shaming is an integral part of social interactions in societies that contain elements of a “culture of dignity and shame”. This culture defines the value and status of each member of the group in relation to the value and status of each other member, all of whom are placed on an axis: every social move of every member affects their positioning on the axis (and consequently also the positioning of other members, because the dignity *table* is a kind of *zero-sum* game. Dignity is structured and perceived as a limited and valuable social resource, which every person seeks to acquire for himself as much as he can. The convention is that the more dignity a person gains, the greater his value and it increases in relation to that of others, and therefore his status is strengthened and he ascends the social ladder). Every dignified society determines that in order to achieve and accumulate dignity, its members must abide by

¹⁴⁰⁰ Criminal Appeal 6255/03 Anon. v State of Israel, Ruling 58 (3) 168, 183.

¹⁴⁰¹ Guy Seidman, *ibid*, pp. 2, 12.

¹⁴⁰² Efi Ziv, *Between the Glove and Resistance: The Dialectic of the Mechanisms of Shame*, (Theory and Criticism 32, 2008), pp. 99 - 105.

¹⁴⁰³ Efi Ziv, *ibid*, p. 101.

the social order and its norms. Hence, shame is the other side of the coin: those who have not been able to gain dignity or have been deprived of it – have gained shame in its place. This diminishes their value and pulls them down the social ladder.¹⁴⁰⁴

17.3 Shaming in the Historical Perspective

The concept of honor is a mirror image of shame. The discourse on honor, like the discourse on shame, embraces space and time that spread across different dimensions of existence and across diverse periods and cultures.¹⁴⁰⁵ Indeed, shaming punishments were common in the past in the various religions and were gradually adopted by the secular authorities beginning in the late Middle Ages.¹⁴⁰⁶ In ancient Rome a Latin **letter** was **branded** on the offender's forehead marking the offense; In Asia, it was customary for more than 1,000 years to shackles the offender to a **pillory**; In medieval Europe the pillory was also used but additional despicable punishments were invented: victims were dressed in **shaming clothing**, experienced **public banishment** in special carts, were forced to ride backwards on animals, had their **organs amputated**, were ordered to carry **guilt signs** that specified their sin, experienced **public flogging** with a whip (a punishment used in England even in the twentieth century), **women's hair was shorn** and they were **stripped of their clothes**. Aside from the physical suffering inflicted on the punished, they were publicly displayed to shame them and passers-by used to spit on them, throw mud and stones at them and even beat them to death.¹⁴⁰⁷

Individuals as well as groups of the Jewish people also experienced the phenomena of shame in modern times that have also been enshrined in the global collective memory. The first example of shaming an individual is the public shaming ceremony performed for Captain **Alfred Dreyfus** on January 5, 1895. During the shaming ceremony, the indictment convicting Dreyfus was read, then his ranks were torn and thrown to the ground, his sword and sheath broken – all in the presence of crowds of civilians shouting “Death to the Jews”. This humiliating ceremony left a deep mark on Benjamin Ze’ev Herzl, who covered the event as a journalist and brought hi, to act for the establishment of a Jewish state. The second example of shaming the many is the **yellow badge** that the Jews were forced to wear on their clothes under Nazi German rule, and then in every country they occupied. The yellow badge was intended for identifying the Jews, separating them from the rest of the population and humiliating them. The Nazis did not stop there. Led by the Minister of Propaganda, Josef Goebbels, they presented the Jews in the written press, on radio and in the cinema as *subhuman*, and it is enough to recall the 1940 film *The Jew Ziss*, which was a great success.

Beginning in the early 19th century, there was a decline in shaming penalties in the United States and later in Europe, which is explained by two factors: **first**, development of cities that allowed residents to live in relative anonymity, and at the same time a transportation system that allowed mobility and immigration. **Second**, values of democracy and equality began to rise, and the courts preferred to deprive criminals of their liberty as an effective (and also egalitarian) way of social condemnation over shaming.¹⁴⁰⁸ But shaming as a social phenomenon has not disappeared. Today, shaming is characterised as the behaviour

¹⁴⁰⁴ Orit Kamir, *Shame: Violation of Dignity, Varieties and Types, Policy Considerations and Discussion of Sexual Harassment*, (Law and Business 23, 5781-2021), pp. 23, 30-31.

¹⁴⁰⁵ Haim Hazan, *And They will not be Shamed: Conditions of Lack of Shame*, (Theory and Criticism 32, 2000), p. 261.

¹⁴⁰⁶ Jörg Wettlaufer, *Neurohistorical and Evolutionary Aspects of a History of Shame and Shaming*, 6 RCC PERSP. 49, 50 (2012), p.50.

¹⁴⁰⁷ Asaf Porat, *ibid*, pp. 127-128.

¹⁴⁰⁸ Hadar Danzig-Rosenberg and Anat Peleg, *Attitudes of Victims of Sexual Offenses Towards Shaming Their Attackers on Social Networks* (Law and Government 21, 5780-2020), pp. 78-79.

of individuals, especially online. In the cyber age, the local-physical arena of shaming is transformed into the international-virtual arena.

17.4 Shaming Online and on Social Networks

Use of the internet and social networks for shaming intensifies the harm to the object of the exclusion or shaming for the following reasons:¹⁴⁰⁹

- A. **Distribution:** Information about the shamed on social media can spread anytime, anywhere, like wildfire, in widespread rapid and viral distribution, thanks to accessibility of the internet and social networks to the masses and due to the difficulty of supervising and monitoring them, compared to traditional media.
- B. **Commemoration, documentation and lack of refuge:** Information disseminated on social networks is immortalised, can be located long after the act of shaming and its removal involves a complex process that is sometimes impossible. Therefore, the phenomenon of online shaming accompanies the victim wherever he goes and also in his own home.
- C. **Virtual lynching:** Social networks allow community members to post supportive comments on any published information, add to it and refine it. This sometimes creates a wave of agitation and escalation of the original publication, which intensifies the distress of the subject of the publication and creates in him a sense of social siege that intensifies over time.
- D. **Anonymity and virtual distancing:** The internet and social networks allow the shamer to use a false identity or to act in a completely anonymous manner. Under the auspices of anonymity, an *online disinhibition effect* is created, which may encourage publication of inappropriate content out of a sense of immunity, and it even frees the person posting from natural barriers that in the real world would have prevented him from publishing the shameful information.

17.5 The Goals of Shaming

Expecting emotion is a powerful motivator for action, no less than the emotion itself. It has been found, for example, that the expectation of people to feel a negative emotion if they violate social norms causes them to act according to the rules of morality and norms as a preventive action.¹⁴¹⁰ Indeed, moral feelings such as shame, guilt, mortification, etc., are our compass for proper behaviour in society and we feel them when we violate a norm or social law. These feelings develop from childhood and affect our behaviour in a variety of ways.¹⁴¹¹ When it comes to shaming, which is within the bounds of true advertising (as opposed to false advertising), a person or company is condemned for misconduct, and the public is required by the advertiser to take practical sanctions against the shamed: to distance oneself from him, avoid social contact with him, harm his livelihood and the like, in order to make him change his wrongful

¹⁴⁰⁹ Yaron Unger, *Legal Dealing with Exclusion and Shaming Among Minors on Social Networks*, (Knesset – Legal Bureau – Field of Legislation and Legal Research, June 2021), p. 2.

¹⁴¹⁰ Svensson, R., Weerman, F. M., Pauwels, L.J., Bruinsma, G. J., & Bernasco, W. (2013). *Moral emotions and offending: Do feelings of anticipated shame and guilt mediate the effect of socialisation on offending?* Eur. J. Criminol. 10 (1), 22-39.

¹⁴¹¹ Danit Ein-Ger, Sharon Arieli: How does the expectation of *shaming* on social networks affect intentions? (Innovations in Management 4, May 2019), p. 37.

ways.¹⁴¹² Hence shaming can be performed in different contexts and serve different purposes, positive and negative.¹⁴¹³

Positive goals include the desire to **inform and warn** others about the victim's behaviour and negative actions and thus protect the public from it; **deter** the shamed or others and prevent them from behaving in a certain way; **punish** the victim for his behaviour by humiliating him. In this context the literature explains that shaming will often be used when the justice systems is not able to properly deal with the actions of the shamed; to **correct injustices** by raising public awareness of the existence of those injustices while creating public pressure for change; **enforce social norms** by raising awareness of them, defining and demarcating them, and criticising those who violate them.

Justification for shaming can be found in the words of John Stuart Mill, one of the forefathers of modern liberalism. Mill stated that every person has the right to exercise his individuality. However, the other person also has the right to express disgust at his behaviour if it does not seem appropriate, even though it is legal. The public can act in different ways that do not suppress the individuality of a person but realises his individuality: "Thus, for example, we do not have to ask to be in his company; it is our right to exclude ourselves from him, for it is our right to choose the society that is most suitable in our eyes. It is our right, and perhaps even our duty, to warn others against him, if we believe that his example or discourse may adversely affect the people whose company he shares".¹⁴¹⁴ Aharon Barak also referred to the issue indirectly and wrote that "freedom of expression contributes to social stability. Thanks to freedom of expression, social pressure finds expression in burden and not in action. Social steam finds expression in the quiet path of expression, not in the violent path of deeds".¹⁴¹⁵

Among the negative goals of shame are the desire or need for cheap **entertainment** at the expense of the other; **revenge and harm**; and subjective feelings associated with **personal glorification**. According to Padva, in retrospect, shaming has a horrific history of exploiting the victim to vent sadistic passions, giving the mob permission to vent their anger on helpless defendants, use of mass degrading ceremonies as a means of liberating social steam in a particularly violent manner, and endless manipulations of discipline, morality, offenses, sins and shame to enforce a forceful, arrogant, religious-fanatic, nationalist and ruthless racist agenda.¹⁴¹⁶

17.6 The Consequences of Shaming

What are the consequences of shaming and how should they be treated? According to Porat, this is not a one-size-fits-all phenomenon, but a complex and diverse phenomenon.¹⁴¹⁷ Harduf also agrees with this claim. According to him, shaming also has a positive social aspect, related to affirming values and norms in society, going out against abusive phenomena, refusing to come to terms with reality and calling for change.¹⁴¹⁸ Ziv claims that shaming opens the door to action and interpretation that do not lead to a single, fixed and clear result.¹⁴¹⁹ On the one hand, the damage to victims of shaming can be very great

¹⁴¹² Iris Brown (Hoisman), *Supervised and Controlled Despair: Contemporary Hebrew Law in the Face of the Challenge of Social Networks*, (Law of Israel 33, 5780-2020), p. 22.

¹⁴¹³ Reknes, I., Einarsen, S., Pallesen, S., Bjorvatn, B., Moen, B. E., & Mageroy, N. (2016). *Exposure to bullying behaviours at work and subsequent symptoms of anxiety: The moderating role of individual coping style*. *Industrial Health*, 54, 421-432.

¹⁴¹⁴ John Stuart Mill, *On Liberty*, (Shalem Publishing, 2006), p. 52.

¹⁴¹⁵ Aharon Barak, *Freedom of Expression and Its Restrictions*, (Advocate 40, 5751-1991), p. 9.

¹⁴¹⁶ Gilad Padva: *There is no limit to the shame – past, present and future of Shaming*, (Liberal, 12/2016).

¹⁴¹⁷ Asaf Porat, *ibid*, p. 117.

¹⁴¹⁸ Asaf Harduf, *The Procedure is Shaming: Shaming of the Criminal Procedure*, (Law and Business 23, 5781-2021), p. 415.

¹⁴¹⁹ Efi Ziv, *ibid*, p. 99.

and can include image, economic and psychological damage. There were those who, as a result of being shamed, lost their jobs, some businesses closed and there have even been suicides as a result of shaming.

In Israel, two cases of suicide following shaming are especially remembered. The first is that of David-El Mizrahi, 15, who committed suicide by hanging in January 2011 after three offensive posts were posted on his Facebook page. The second case is of Ariel Ronis, director of the Tel Aviv Population Bureau, whose social networks erupted following a post accusing him of racism towards a woman who came to the bureau. Ronis denied the allegations, but could not bear the unrestrained violent behaviour towards him and as mentioned, took his own life on May 23, 2015. The day of Ronis' death is marked in Israel as Shaming Awareness Day. But these were not the only cases in Israel or in the world.¹⁴²⁰

Cyberbullying has significant negative consequences for the victim. Furthermore, it was found that victims of cyberbullying experienced deeper psychological consequences than those found among victims of bullying not conducted online. A link has been found between victims of cyberbullying and a decrease in self-esteem, depression, anger, avoidance of social situations and suicidal tendencies.¹⁴²¹ One reason for this is that the insults or comments can remain documented online, and the victim may see them again and again and experience the harm repeatedly.¹⁴²² According to Sahar Association (Assistance and Listening Online), a victim of shaming may feel a wide range of extremely negative and painful feelings: loneliness and rejection from the society that condemns, rejects and alienates him. Sometimes the shaming will be accompanied by feelings of humiliation and embarrassment that will scar and damage the basis of the victim's self-identity, damage to self-confidence and self-worth, frustration, helplessness, despair, sadness and frustration because the victim will feel out of place, so he may also feel vulnerable, exposed, haunted and suffocated. Additional feelings may be anger, rage, disgust and hatred towards a specific person or society as a whole. Sometimes the victim will shut himself off from society and become introverted.¹⁴²³ It has been found that after people have behaved non-socially and the environment reacted to them in a way that made them ashamed, they preferred to avoid similar social situations, stay away from the presence of others and even refrained from demonstrating pro-social behaviour to thwart the possibility of being shamed again.¹⁴²⁴ In cases where it is not possible to act to compensate and restore self-worth, the feeling of shame may lead to a decrease in pro-social behaviour, social disengagement and becoming introverted.

The dire consequences of shaming prompted the Justice Minister, in July 2015, to establish the Public Committee for the Formulation of Measures to Protect the Public and Public Service Officers from Offensive Publication Activities as well as Cyberbullying, headed by retired High Court Judge Edna Arbel. The committee recommended, inter alia, establishment of a dedicated body that will be a central focus on the issue of offensive publications on the Internet; court certification for a content removal team;

¹⁴²⁰ Amanda Todd, 15, of Canada, committed suicide in 2012 following insults that surfaced in response to a nude photo of her posted online. Rebecca Ann Sedgwick, 12, of Florida, jumped from a tower in 2013 after being abused by two girls who urged her to commit suicide. Isabel Lexmana, a 13-year-old from Washington, D.C., committed suicide by jumping into a busy road in 2015 after experiencing online shaming by her father, who uploaded a video to YouTube in which he was seen cutting his hair as punishment and scolding her.

¹⁴²¹ Ayelet Noam Rosenthal, *Online Violation: Cyberbullying*, (Meeting Point, February 5, 2013), p. 23.

¹⁴²² Brunstein Klomek, A., Sourander, A., & Gould, M.S. (2011). *Bullying and suicide: Detection and intervention*. *Psychiatric Times*, 28, 1-6.

¹⁴²³ Sahar Association, at the link:

<https://sahar.org.il/%D7%A9%D7%99%D7%99%D7%9E%D7%99%D7%A0%D7%92-%D7%9E%D7%90%D7%A4%D7%99%D7%99%D7%A0%D7%99%D7%9D-%D7%A1%D7%99%D7%9B%D7%95%D7%A0%D7%99%D7%9D-%D7%95%D7%93%D7%A8%D7%9B%D7%99-%D7%94%D7%AA%D7%9E%D7%95%D7%93>

Accessed: 28/03/2022.

¹⁴²⁴ Cohen, T. R., Wolf, S. T., Panter, A. T., & Insko, C. A. (2011). *Introducing the GASP scale: A new measure of guilt and shame proneness*. *J. Pers. Soc. Psychol.* 100(5), 947-966.

launching a government campaign to encourage respectful discourse; development and implementation of technological tools to promote appropriate online discourse; development of a national education program; teacher training and activities for parents and more.¹⁴²⁵

On the other hand, it is common to regard shaming as a positive tool when it is done in order to raise public awareness and warn against bad behaviour. Shaming can, in some situations, can be beneficial. Widespread distribution makes it possible to criticise and condemn acts of injustice, publish negative acts and in this way deter wrongdoers and put pressure on them to stop the injustice. Publicity and condemnation can be used as a tool for weak links in society, who do not have the ability and power to defend against those perpetrators of injustice. Publicity can also serve as a kind of punishment for those bodies, and as an incentive for other bodies that, following the publicity and condemnation, will be careful, stay away from them and defend themselves from them.¹⁴²⁶

To summarise this subchapter, it can be said that there is a consensus that in order for shaming to be effective and achieve its results, it must meet seven conditions: **1.** The person responsible for shaming must be bothered by the offender; **2.** There must be a disparity between the desired behaviour and the existing behaviour; **3.** Lack of punishment – no prohibition in law or no enforcement; **4.** The shamer must have an effect on the shamed; **5.** The audience / public must trust the shamer; **6.** The shaming must be directed to the place where profit is greatest; **7.** Careful planning of the act of shaming (location, frequency, style).¹⁴²⁷

17.7 Hebrew Law's Attitude to Shaming

Shaming, as mentioned, is not a new phenomenon. It is as ancient as human society itself. The earliest example is the Mark of Cain. Supposedly, the purpose of the mark of Cain was to indicate the will of God that Cain, the murderer of his brother Abel, would remain alive: “And the Lord set a mark upon Cain, lest any finding him should kill him”.¹⁴²⁸ The mark did indeed save Cain from death, but did not allow him to escape his identity as a murderer. Hence, the mark of Cain became synonymous with a sign of disgrace.

According to Hebrew law, a person's shame and humiliation is “whitening of his face”, as is written in the scripture: “Jacob shall not now be ashamed, neither shall his face now wax pale”,¹⁴²⁹ the face of the shamed changes, and becomes blushed, and then he pales.¹⁴³⁰ A great principle not to embarrass others and not to offend their dignity is one of the fundamental principles in the world of Judaism, as it is written: “The tongue has the power of life and death”.¹⁴³¹ Indeed, the sages of Israel have amended many regulations on the subject, designed to prevent facial shame from the people. Rabbi Elazar says: “And he who whitens the face of his fellow man in public... even though he has Torah and good deeds in his hand, he has no part in the next world”.¹⁴³² “And whoever whitens his fellow man's face as if he were shedding

¹⁴²⁵ Report of the Public Committee for the Formulation of Measures to Protect the Public and Public Service Officers from Offensive Publication Activities as well as Cyberbullying (Jerusalem, November 2020). At the link: https://www.gov.il/BlobFolder/generalpage/arbel_committee/he/ArbelCommittee.pdf Accessed: 29/03/2022.

¹⁴²⁶ Yehuda Zoldan, Public Shaming on Social Networks, (Tehumin 37, 5777-2017), p. 295.

¹⁴²⁷ Jennifer Jacquet, Christoph Hauert, Arne Traulsen & Manfred Milinski, Shame and Honour Drive Cooperation, 7 BIOL. LETT. 899 (2011), pp. 98 – 117.

¹⁴²⁸ Genesis 4:15.

¹⁴²⁹ Isaiah 29:22.

¹⁴³⁰ Aviad HaCohen: *Place everyone above me! The prohibition to shame a person and the duty to preserve his dignity*, (Parashat HaShavua, 273, 5767-2007), fn. 3.

¹⁴³¹ Proverbs 18:21.

¹⁴³² Mishnah, Tractate Avot, 3, 11.

blood”,¹⁴³³ adding, “It is better for a man to cast himself into the fiery furnace and not to whiten his fellow man’s face in public”.¹⁴³⁴ Rabbi Nehorai says: “Everyone who shames his fellow man’s face, in the end he is ashamed, and no more but the guardian angels push him and harass him from the world and show his disgrace to everyone in the world”.¹⁴³⁵ The Rambam also referred to the prohibition of shaming: “That we have been prohibited from shaming a fellow man. And the is the sin as shall be read: “Whitening the face of a fellow man in public”. And the warning is written: “You must admonish your neighbour and not bear sin because of him”.¹⁴³⁶

Rabbi Yehuda Zoldan explains that shaming, the purpose of which is punishment and revenge, is forbidden, but it is permissible to shame if the purpose is to create pressure on the perpetrator to correct his actions. Shame is a kind of means, but not an end.¹⁴³⁷ One of the prevalent examples today of legitimate shaming is that which is done to those who refuse to divorce, by the courts publishing the names of those who refuse and their picture online, along with a warning that they should not be given any service, whether religious or otherwise.¹⁴³⁸ Indeed, if that wrongdoer is ashamed of his deeds and returns from his evil ways, then shame is part of his process of repentance. And so it is said in the Gemara: “And Rabbi Hinana Saba said it is written from heaven: Whoever commits an offense and is ashamed of it – forgive him for all his sins”.¹⁴³⁹ Chaffetz Chaim detailed seven conditions: **A.** The shamer and advertiser have seen the thing for themselves and is not content with just hearing from others, unless it has become clear to him that this is indeed true. **B.** It is clear to the shamer and advertiser that this is an act of injustice that is prohibited by law. **C.** The shamer and advertiser first proved the perpetrator in soft language. **D.** The shamer and advertiser do not increase the injustice but rather relates in a focused and accurate way what happened. **E.** The purpose of the shamer and the advertiser is only to pressure the wrongdoer to stop his actions and correct his ways, and he has no other purpose. **F.** There is no other way to get the perpetrator to take back his actions but only through pressure from people who speak out in his condemnation, publicise his actions and shame him. **G.** No greater harm be done to the perpetrator of the injustice as a result of the condemnation and publicity, compared to the harm he would have suffered if the matter had been adjudicated in a court of law.¹⁴⁴⁰

Brown details a number of differences, regarding the prohibition of defamation, between Israeli law and Jewish law – legally, morally-socially and in terms of values. The Defamation Prohibition Law is a law with *teeth*, which contains criminal and civil sanctions against those who violate it. At the level of criminal offenses, this is an offense of the misdemeanor type, i.e., of moderate severity. In Hebrew law, the picture is almost the opposite. For many years this subject was not considered a halakhic prohibition, but rather belonged to the realm of morality. Almost all the sources in the sages’ literature that refer to defamation are by fable and in fact the sages’ sources do not even have a definition of the prohibition of defamation. The Rambam was apparently the first to address the question of the prohibition and distinguish between gossip, defamation and giving a fellow man a bad name. He ruled that they were all forbidden and presented them according to their severity (starting with gossip, ending with giving a

¹⁴³³ Bava Metzia, 58:72.

¹⁴³⁴ Berakhot, 43:72.

¹⁴³⁵ Tractate Kallah, 1:8.

¹⁴³⁶ Sefer Mitzvot, 303.

¹⁴³⁷ Yehuda Zoldan, *ibid*, p. 301.

¹⁴³⁸ Yitzchak Meir Yavetz: *Shaming for Refusing a Divorce*, (Domains 37, 5777-2017), p. 307.

¹⁴³⁹ Tractate Berakhot, 12:2.

¹⁴⁴⁰ Chaffetz Chaim: *Defamation!* Quoted in Yehuda Zoldan, *Public Shaming on Social Networks*, (Tehumin 37, 5777-2017), pp. 303-304.

fellow man a bad name, while defamation was in between). According to Chazal, the reason why there is no sanction for the prohibition of defamation in Hebrew law is that in order for there to be a liability in tort law, the harm must be tangible, physical and not mental. Only when the tangible injury is accompanied by an injury in the mental field will the person be entitled to compensation for this injury as well, whereas when the injury is only mental, he is not entitled to compensation. Throughout the ages, however, the possibility of imposing a sanction on defamation has been recognised. In Israeli law, on the other hand, there is a legal sanction against publishers of defamation. However, the desire to maintain freedom of expression does not allow the sanction to be applied except sparingly. This is reflected in the rate of compensation accepted in Israel, which is relatively low compared to other countries.¹⁴⁴¹

17.8 Israeli Law's Attitude to Shaming

According to Yuval Karniel, "Shaming, in all periods, is associated with disintegration and a loss of trust in the justice systems to the point of self-judgment".¹⁴⁴² And indeed, as we shall see below, the Israeli legislature was aware of this fact and therefore in Israeli law there are provisions whose purpose is to prevent a person from being harmed. These provisions include clause 2 of the **Law for the Amendment of the Rules of Procedure (Examination of Witnesses), 5717-1957**: "[...] The court will not allow an examination that involves insult, intimidation, deception or contempt [...]"; clause 7 of the **Remedies Services Regulations (Procedural Procedures in Appeals Committees), 5726-1965**: "[...] and the Committee shall not allow an examination which may insult, intimidate, misrepresent or shame which is not relevant to the matter in question and is not fair"; and clause 45 of the **Civil Service Regulations (Discipline) (Rules of Court Procedure), 5724-1963**: "[...] and in particular the court shall not permit an examination in which insults, intimidates, misrepresents or shames in an irrelevant and unfair manner".

It seems that the main piece of legislation regarding the prevention of shaming is clause 1 of the **Prohibition of Defamation Law, 5725-1965**, which states: "Defamation is something whose publication may – **1.** Humiliate a person in the eyes of the people or to make him a target for hatred, contempt or ridicule on their part; **2.** Shame a person for acts, conduct or attributes attributed to him; **3.** Harm a person in his job, whether a public job or another job, in his business, profession or occupation. **4.** Demean a person because of his race, origin, religion, place of residence, age, gender, sexual orientation or disability". At the same time, this clause does not prohibit shaming, does not define shaming as defamation and therefore does not impose sanctions on the publisher of shaming. Therefore, a bill was tabled in the Knesset seeking to amend the Prohibition of Defamation Law, and expand the current definition of *media editors* contained therein, since the law does not apply to digital media and the Internet (The current definition states that the responsibility for publishing defamation includes only television and the press).¹⁴⁴³ Another bill that submitted is the **Protection of Workers Under Personal Attack** bill, which was formulated following the suicides of public servants and in the face of severe hardship suffered by social workers and judges due to shaming.¹⁴⁴⁴ Needless to say, these bills did not pass the legislative stages.

And indeed, there is a consensus among researchers that the phenomenon of cyberbullying makes it possible to hold *field trials* against individuals or companies whose criminal guilt or civil liability has not been proven. Porat explains that, in the criminal context, the phenomenon of shaming violates the right to

¹⁴⁴¹ Iris Brown (Hoisman), *ibid.*, pp. 22-30.

¹⁴⁴² Quoted in: Gilad Padva, *ibid.*,

¹⁴⁴³ Prohibition of Defamation Bill (Amendment – Publication of Defamation on the Internet), 2015 (P/1363/20). Tabled in the Knesset on 08/06/2015.

¹⁴⁴⁴ Protection of Employees Under Personal Attack Bill, 5776-2015 (P/2238/20). Tabled in the Knesset on 11/23/2015.

a fair trial in most of its derivatives: strengthens innocence, through the rules of natural justice and the right of representation, to the right to conduct a public and fair trial. In the civil context, the phenomenon of shaming violates the basic right to a public and fair civil procedure before a professional, neutral, objective and independent judge, while respecting the right of argument, the right of representation and the right to cross-examination.¹⁴⁴⁵ Kamir, who also addressed the issue, explains that online shaming is not based on evidence beyond a reasonable doubt, does not recognise the duty of due process or the presumption of innocence and does not guarantee justice. Online shaming, in her opinion, is a tool devoid of balances and brakes.¹⁴⁴⁶

Legally, offensive publications can be divided into three types. **One** is publications that allegedly amount to various criminal offenses, such as threats, incitement to racism, incitement to violence, solicitation for suicide, invasion of privacy, violation of legal provisions or judicial orders regarding publication bans, insulting a public official and criminal defamation. The **second** is wrongful publications, which establish a cause of action for damages, such as invasion of privacy, defamation and breach of statutory duty. The **third** type are offensive publications that are not necessarily prohibited per se under existing law, but their accumulation and the context in which they are raised cause deep damage to the object of publication, such publications are classified as shaming. This category of publications currently lacks precise legal coverage, which will define them and determine a prohibition for them, a cause of action or right to relief in order to prevent further damage.¹⁴⁴⁷

Among the legal tools commonly used to deal with the effects of shaming on social networks are protection arrangements and liability arrangements.¹⁴⁴⁸ The **defence arrangements** focus on removing the offensive content and preventing its future distribution. Defence arrangements have three versions:

- A. Notification and Removal Mechanism – which places the responsibility for removal of the content on the content provider, and provides him with an incentive for the removal of offensive content in the form of an exemption from liability for the distributed content, subject to conditions set by law. In Israel, there is no statutory arrangement regarding removal of offensive content or restriction of access to it, or the issuance of an order directing the offender to cease the infringement. However, the courts' ruling has established a *notification and removal* mechanism regarding offensive content distributed online, and it has been stated more than once that website operators, search engines, social network administrators, etc., are required to act in accordance with this mechanism, and they do not, they may bear liability for the damage caused by publication of the content.
- B. Removal at the request of a state body - a mechanism that places the responsibility for removing the content on a statutory body entrusted with the protection of network users. Israeli law does not authorise any state body to require the removal of offensive content from the Internet or social networks. Nevertheless, the Cyber Department of the State Attorney's Office usually contacts the social networks and requests removal of content that constitutes a violation of the provisions of criminal law applicable in Israel.

¹⁴⁴⁵ Asaf Porat, *ibid*, pp. 140-141.

¹⁴⁴⁶ Orit Kamir: *The Silvan Shalom affair: Shaming is not the answer*, (Haaretz, 21/12/2015). At the link: <https://www.haaretz.co.il/opinions/premium-1.2803307> Accessed: 29/03/2022.

¹⁴⁴⁷ Haim Wismonsky: *Indictment of Online Harassment and Test Cases of Harassment of Public Employees and Minors in the Online Space*, (Law and Business 23, 5781-2021), p. 347.

¹⁴⁴⁸ Yaron Ungar, *ibid*, pp. 2-10.

- C. Removal by Judicial Order – which imposes the responsibility for removing content, restricting access to it or preventing its future distribution to the court. This issue, too, has not yet been regulated in legislation in Israel, except in the context of specific proceedings, such as in defamation lawsuits, in which the court is authorised to issue an injunction for the purpose of “prohibiting distribution of copies of the publication”.¹⁴⁴⁹ A similar authority is given to the court also in privacy protection proceedings and in proceedings under the Law on Authorities for the Prevention of Committing Crimes Through Use of an Internet Site, 5777-2017.

Liability arrangements are intended to allow the injured party to claim compensation from the offender or the social network, or even to deter them by imposing criminal liability for distributing the prohibited content. In principle, the liability for distribution of offensive content can be placed on three parties: the network intermediaries (who allow use of the Internet, social networks for the distribution of offensive content), the content distributor and various parties required by law to monitor the content distributors’ activities. Regarding the liability of the network’s intermediaries, there is no legislation in Israel that clarifies that liability can be imposed for distribution of offensive content on the network’s intermediaries. With regard to the imposition of liability on content distributors – the courts already impose liability for damages or criminal liability for content distributors. In order to impose civil liability on the content distributor, it is sometimes necessary to reveal his identity. In this regard, the court ruled that Internet access providers should not be required to disclose their identity.¹⁴⁵⁰

17.9 Shaming as an Alternative Means of Pressure to the Strike

Shaming today is the technological and up-to-date incarnation of placing a man in the town square and stoning him, at the risk of losing human life. Moreover, while in the past shaming was carried out physically, and its arrows were aimed only at humans, today, in its technological incarnation, it is also directed towards corporations.

Although corporations have an independent legal personality, which allows them to bear rights and as a result they are eligible to sign contracts, their liabilities are separate from their owners, they can rent buildings and take out loans, but this is not a natural personality, similar to that of human beings. A corporation does not have an independent think tank that allows it to formulate intentions (such as criminal intent or negligence) and does not have the physical capacity to take actions that establish legal liability (such as evading tax). That is, a corporation lacks the psychological and physiological entity that characterises a natural person. Despite these limitations, corporate law makes it possible to attribute intentions and thoughts to the corporation through Organ Theory. This makes it possible to copy the actions and thoughts of organs in the corporation, such as the CEO or the director, to the company itself.¹⁴⁵¹

There are two salient benefits to corporate shaming. The first is **low cost** – advertising a corporation as an offender has only a low cost – hence it is a utilitarian argument that focuses on shaming as a quick, simple and inexpensive tactic in relation to enforcement alternatives. In principle, regulatory shaming is done through online advertising, at no cost at all, and involves nothing but expression, with the expectation that the threat of exposure will leverage the effectiveness of deterrence. The second benefit is **increasing the effectiveness of shaming within the organisation** – when a corporation is despised, its internal enforcement systems begin to operate and look for those responsible for the shameful behaviour,

¹⁴⁴⁹ Clause 9A (1) of the Prohibition of Defamation Law, 5725-1965.

¹⁴⁵⁰ Leave for Civil Appeal 4447/07 Rami Mor v. Barak ETC (1995) Bezeq International Services Company Ltd.

¹⁴⁵¹ Sharon Yadin, *ibid.*, pp. 620-621.

regulate the problem so that it does not reoccur, thus encouraging deterrence.¹⁴⁵² In addition to these advantages, there are two other reasons for justifying the use of shaming:¹⁴⁵³

1. Shaming promotes cooperation, democratic values and trust between the state and the citizens who take an active part in the shaming, in an age where their trust in the government and the bureaucratic and regulatory systems, as well as in the corporations themselves, is declining. Shaming may address trust gaps by entrusting control mechanisms to citizens. The choice of the shaming tool is particularly suitable for situations where the regulator is not interested in intervening directly in the market.
2. Shaming is not offensive to corporations subject to regulation in the same way that governmental shaming harms the psychological-emotional sense of flesh-and-blood citizens, and therefore can serve as a soft and proportionate tool compared to alternative enforcement strategies.

Many critics of shaming claim that it is inhumane, it offends a person's dignity and personality, is cruel and immoral and therefore, our initial tendency is to agree with the position that it should be prohibited to fight it by legal means.¹⁴⁵⁴ Unlike civil and governmental shaming of individuals, there is a significant difficulty in talking about the shaming and shame of corporations in terms parallel to those attributed to a flesh-and-blood legal entity. When it comes to shaming corporations, it is not about hurting the corporation's feelings, but about influencing aspects related to its status and prestige. In response to these possible criticisms, it can be said that shaming is a regulatory means of achieving a public interest. Therefore, it is justified to use it even at the cost of certain damage to our property and the good name of the corporation. Although the corporation is an artificial entity, it cannot be ignored that it actually expresses an accumulation of individuals. Corporations that are strongly identified with their owners. But other corporations may also be sensitive to reputational vulnerabilities that *trickle down* to shareholders or their executives (and even their employees) and damage their reputation.¹⁴⁵⁵ A similar argument is made by Bar-Mor. According to her, the directors and senior executives are recognised as having a high sensitivity to reputation among the affiliation communities, and therefore may be harmed by damage to the corporation's reputation. Bar-Mor further argues that shaming can fulfil the consequential goal of punishment – deterrence by increasing the involvement of senior officials in the court-initiated process, as an institution capable of exercising objective discretion. “Disclosure of a corporation's name may embarrass it and cause it economic harm, thus strengthening the intensity of the sanction imposed on it and the chances of deterrence. The cost of a shaming sanction is not financially quantifiable, hence its importance: an employer will not be able to measure the *viability* of the breach of duty [...]. The ambiguity surrounding the relevance of the threat to it and its *price* may increase the concerns of an employer with a business sensitivity to public opinion, and is therefore likely to increase the likelihood of providing good protection for employees”.¹⁴⁵⁶ An example of this can be seen in China's decision in 2017 to publish the names of employers who violate labour laws, specifying details of the offenses (such as wage withholding, non-payment of social security for workers, violation of working hours, rest or vacation laws and violation of the laws of protection of working women). With this decision, China sought to encourage employers to be up-to-date on labour laws and implement them in practice, otherwise

¹⁴⁵² Hadara Bar-Mor, *Shaming a Corporation with Sexual Harassment Claims*, (Law and Business 26, 5771), pp. 464-475.

¹⁴⁵³ Sharon Yadin, *ibid.*, pp. 611-620.

¹⁴⁵⁴ Gershon Gontovnik, *An Internal Cultural Boycott as a Means of Enforcing Cultural Norms* (Law and Business 23, 5781), p. 183.

¹⁴⁵⁵ Sharon Yadin, *ibid.*, pp. 621-623.

¹⁴⁵⁶ Hadara Bar-Mor, *ibid.*, pp. 465, 508.

the publicity involved in their shaming will damage their businesses.¹⁴⁵⁷ Another example is the *Japanese Strike* – in which workers continue to work, but at the same time they wear black straps (or in other cases, colourful headbands) that are perceived in traditional Japanese society as an effective means of shaming against employers.

17.10 Evaluation of Shaming as an Alternative and Practical Means of Pressure to the Strike

Labour relations in Israel are laden with examples of employer shaming, even “calling a spade a spade”. A review of the various cases (below) that involved shaming tactics shows that the purpose of shaming was to put pressure on the employer, assuming it would cause him harm, forcing him to accept the workers’ demands. These examples show that the practice of shaming has not only a firm grip on Israeli society, but also on its labour relations.

In the **Bank Hapoalim** case, the Bank’s management decided, in December 2002, to lay off 900 bank employees. As part of its fight against the dismissals, the Histadrut launched a personal campaign against Shari Arison, the bank’s main controlling shareholder. Arison convened a special press conference to express her support for the bank’s management, in which she attacked the Histadrut, which she said had made her a “target for defamation” in the campaign. In response, the Histadrut sharpened its tone and decided to further focus its war on the bank in a personal attack on Arison. Through the billboard company Poster Media, the Histadrut began publishing posters on billboards and hundreds of bus stops around the country, which read: “Sherry Arison is laughing... 900 families are crying”. Arison was quick to send a letter through her attorneys, demanding the posters be removed, noting that she was considering filing a defamation lawsuit against Poster Media and the Histadrut. Following the letter, Poster Media (which later revealed that Arison holds 6.4% of their shares as well) decided on the same day to remove all billboards against Arison.¹⁴⁵⁸ The attack on Arison was also joined by journalist (and later MK) Shelly Yachimovich, who in a Channel 2 newscast attacked Arison’s conduct, describing her as a *rich lady* trying by methods of threats and intimidation to shut the mouths of the fired workers. In response, Arison’s communications consultant sent a letter to 500 senior media and economic figures in Israel attacking Yachimovich, but the letter only added fuel to the fire that erupted around Arison. Arison’s reaction to her being shamed was later revealed: “She cried for half an hour and asked ‘why do I deserve this? What did I do that people are talking about me like that?’”.¹⁴⁵⁹ In the end, the bank employees were fired – but in her response Arison revealed a low sensitivity threshold to the shaming she experienced, and it is not known if the outcome of the struggle might have been different if she had not been a controlling shareholder in Poster Media.

In the **Coffee Bean** case, workers recruited the world’s largest workers’ unions in the field of food and beverage (the World Food Workers’ Union, the Starbucks Workers’ Union, the American Fast Food Workers’ Union) to exert their influence on the management of the network, and these announced protest measures against the US management of Coffee Bean. The shaming exerted on the chain’s management bore fruit, and within a few days the chain’s owners took off for Israel and ordered the CEO of the Israeli chain to stop fighting the workers and open negotiations with them.¹⁴⁶⁰

¹⁴⁵⁷ Nurit Yohanan: *Positive shaming: In China, a problematic employer will be reported*, (Ynet, 22/12/2016). At the link: <https://www.ynet.co.il/articles/0,7340,L-4897050,00.html> Accessed: 06/04/2022.

¹⁴⁵⁸ Idan Greenbaum: *Poster Media fears Arison: Histadrut campaign removed*, (Ynet, 14/01/2003). At the link: <https://www.ynet.co.il/articles/1,7340,L-2372434,00.html> Accessed: 06/04/2022.

¹⁴⁵⁹ Unknown author: *Sherry Arison is not laughing*, (Haaretz, 28/01/2003). At the link: <https://www.haaretz.co.il/misc/1.858029> Accessed: 07/04/2022.

¹⁴⁶⁰ Danny Vazana, *ibid*, p. 120.

In the **Pelephone** case, the company's management confiscated the vehicles of committee members and striking workers in the dead of night. This move was met with sharp media criticism. Workers interviewed by the media said that they were forced to send their children to school without safety seats or strollers left in their confiscated vehicles, and thus the company management was also perceived as harming the safety of the workers' children.¹⁴⁶¹ Shaming the company's management did not make them stop in their fight against the workers, but after the strike lasted 28 days, including demonstrations in front of the company's branches and in front of the houses of company managers and owners – the company agreed to recognise union representations and negotiate with them.

In the **Kellogg's** case, social networks erupted after the cereal maker announced in December 2021 that it would permanently replace its 1,400 striking workers, and its executives were called scabs [defamatory term for translators note: strike breakers], and erected an inflatable doll in the shape of a three-and-a-half-foot-tall rat with horror-evoking eyes and yellowing teeth. Pictures of the company's product packaging with shaming slogans were spread throughout the network: "Shame on Kellogg's for using scabs", "We eat scabs for breakfast" and the tiger figure representing the company in its products was blackened and carried the slogan: "I'm greedy". Finally, the wave of protests and shaming against the company that lasted more than two months, and brought trade unions around the world as well as the US President to express support for the workers' struggle, ended successfully in the signing of a collective agreement guaranteeing workers' rights.

In a topical case that has not yet come to an end, a **labour dispute at the Foreign Ministry**, workers produced a satirical network series called *The Substitute* mocking Foreign Minister Yair Lapid (Yesh Atid). The purpose of the series was to present the workers' dissatisfaction with the minister's performance in the labour dispute, flood the workers' demand (including additional standards, payment for standby hours, finding solutions for the children of diplomats and more) through shaming the minister. An actor was hired to play the role of the minister for the series filmed at the Ministry of Foreign Affairs, to show how essential the workers are and the importance of meeting their demands.¹⁴⁶²

Based on what has been said so far, I will now seek to assess shaming as a tool for alternative and practical pressure to strike, through a discussion of the **Alpha Group** case.¹⁴⁶³ On October 29, 2021, news sites reported that the group's CEO, Ran Guron, had filed a defamation lawsuit in the amount of ILS 400,000, against the chairman of the workers' committee and another committee member, on the grounds that the workers had incited and used shaming against him. In a letter sent to company employees upon filing the lawsuit, Guron noted: "Unfortunately, some employee representatives have exceeded the legal limit and have carried out a growing list of **slander**, threats [...] and ongoing harassment of managers and employees in companies, inside and outside the workplace. **These are personal measures, which harm people** who come to earn a living in society, just like the striking workers. **These are measures that come to personally hurt and humiliate employees, managers and others** – not as part of a functional protest – but in a **personal bullying** manner. **No person should be exposed to curses, insults, personal slander** – when he is fulfilling his role, even if there is a labour dispute [...] there is no room to allow personal injury – neither to others nor to the CEO. It is time to bring the debate to its legal and human dimensions – no **more deliberate personal injuries** – they have no

¹⁴⁶¹ Yuval Goren: Pelephone's management confiscated vehicles of committee members and strikers, (nrg., 11/12/2012). At the link: <https://www.makorrishon.co.il/nrg/online/1/ART2/421/585.html> Accessed: 06/04/2022.

¹⁴⁶² Haim Shmueli: *Unprecedented: Produced a film mocking the senior minister*, (In the Haredi Rooms, 29/12/2021). At the link: <https://www.bhol.co.il/news/1316940> Accessed: 06/04/2022.

¹⁴⁶³ As discussed in Chapter 14: *Evaluating the Strike as a Pressure Tool*.

place in our country, they have no place in our society, not even under the guise of a legitimate workers' struggle" (emphases not in original). He added that if he wins the case, he intends to donate the compensation money to an association that deals with preventing shaming on social networks.¹⁴⁶⁴ In response, the defendants stated that they are preparing to file a statement of defence and "conduct the legal proceedings that may take years". Only two days later, the company's management announced its intention to conduct collective negotiations with the Histadrut, which announced the end of the organisational steps.

The question arises – was the shaming against Guron in the Alpha Group case that which led to the end of the strike and to the fact that "the demands of the workers were fully accepted"?

In this case (as described in detail in Chapter 14), as in other cases reviewed in this subchapter, the shaming was accompanied by additional organisational measures. Thus – for example – in the **Bank Hapoalim** case, the Histadrut organised transportation of workers from all over the country to demonstrations in front of the bank's offices, a national conference of workers' committees, a petition against the bank and they called on workers' committees to close their accounts at the bank; In the **Pelephone** case, the workers organised loud and passionate protests every day in front of the CEO's house, which sometimes got out of hand. Three days before the end of the strike, the National Labour Court issued a precedent-setting and dramatic ruling forbidding the company's management from taking a position on initial organisation, revoking almost all its actions in the conflict and giving dramatic support to the workers' struggle; In the **Coffee Bean** case, all Histadrut workers mobilised for demonstrations in front of the chain's branches in three shifts around the clock, including Friday and Saturday. The loud protests were joined by dozens of members of the HaNoar HaOved VeHaLomed Youth Movement who called for a boycott of the place, and in the second week the chain's branch on Ibn Gvirol Street in Tel Aviv was completely deserted; In the **Kellogg's** case, company employees managed to persist in their strike both thanks to the *great resignation* phenomenon in the US following the Covid crisis and also thanks to a virtual campaign in which thousands of fake resumes were sent to the company's offices.

From this, I learned that shaming does not stand as a measure in itself and as an alternative-exclusive means of strike, but as a complementary and accompanying measure. At the same time, there is no reason to underestimate shaming as a tool of pressure. The resources invested by various employers listed in this subchapter indicate real pain and mental distress that should not be taken lightly and as Guron puts it, "these are personal steps that harm human beings".

17.11 Summary

If in the past workers' union have placed all their hopes on strike weapons, then in recent years there has been a growing understanding that strikes, stormy and prolonged as they may be, may encounter employers willing to invest many resources in thwarting them and impatience and hostility from the public. Therefore, unions have come to the understanding that humiliating employers by exposing information that will embarrass the employer and erode his and the shareholders' image, may be more effective. Today, social media provides unions with direct, accessible, free and widespread access.¹⁴⁶⁵ It may provide exposure of their day-to-day activities, create a sense of identification with them and unite

¹⁴⁶⁴ Asa Sasson: *The conflict at Pelephone is escalating: the CEO filed a personal lawsuit against some of the employees* (The Marker, 27/10/2021). At the link: <https://www-themarker-com.elib.openu.ac.il/advertising/premium-1.10330792> Accessed: 08/04/2022.

¹⁴⁶⁵ Danny Vazana, *ibid*, pp. 404-405.

both workers and the public around them. Further to this claim, some agree that the thing that leads companies to ethical action is often embarrassing media exposure or their unethical actions.¹⁴⁶⁶

In this chapter we learned that shaming is not carried out as an alternative means of pressure to strike, but as a complementary or accompanying measure to other organisational measures taken by workers. In this respect, the shaming tactic as reviewed in the various cases in this chapter, cannot replace the strike. In the same breath it should be remembered that employers are people like the rest of us and are well aware of the power of shaming and experience it – as any person – as pain and distress. Even when shaming is directed towards a corporation, its senior executives as well as its shareholders, they cannot ignore it or be indifferent towards it. It is clear to them that filing a defamation suit against the workers or the union may turn out to be years in court, and until then the shaming will continue, and the image of the employer will be marred. In so doing, they illustrate the ancient adage: “A name is better than good oil” [translator’s note: meaning that a good reputation is the most important].¹⁴⁶⁷

¹⁴⁶⁶ Yaniv Mano, *ibid*, p. 744.

¹⁴⁶⁷ Kohelet, 7:1.

Chapter 18: Consumer Boycott

18.1 Introduction

A boycott is a damaging social phenomenon. In its most basic sense, it involves a full or partial prohibition of contact, of the environment with the boycotted. The boycotters wish to ostracise the boycotted, shame him sully his name, to justify the ban on contact with him. The boycott, then, involves humiliation. This is an act that is intended to cause damage. At its core, is a desire to inflict mental, social, and economic distress¹⁴⁶⁸ on the boycotted. The scope of the boycott can be different and varied: it can be realised on intimate levels – in the closest circles of life (family and friends) and in wider circles. It can even rise to heights in terms of its applicability, to political and international levels, and be expressed, inter alia, in a boycott of nations and states.¹⁴⁶⁹ In this chapter I will focus on consumer boycott.

The consumer boycott has two objectives. The first objective is an immediate one. Such a boycott is called an *instrumental boycott*, and operates in the physical world, for example by not buying certain products, and its purpose is to lower prices. Another objective is achieved by an *expressive boycott*, which reflects a conscientious position, the voice of protest against policies or actions that could infringe on the other rights of humans, animals, and the environment. The expressive boycott expresses resentment and a desire to maintain *clean hands*, not to be tainted with products tainted with unethical behaviour. The boycott serves as a mouthpiece for underprivileged groups or for groups in inferior positions which can express their worldview in a way that should not cause irreversible damage to the target to which it is directed. Since the boycott is often fuelled by a particular ideology, it is a key factor in the democratic game and serves as a sword for the world of ethics.¹⁴⁷⁰

A consumer boycott is intended to change a business conduct that is perceived as improper. The consumer public participating in the boycott does not purchase the products of the boycotted company, nor does it visit its stores and branches. It may lead to positive outcomes, such as encouraging business factors to the public feelings and making markets fairer and more considerate. This boycott is a tool of protest against corporations' treatment of consumers, communities, minorities, animals, and the environment. Hence the boycott may be considered a “democratic protest tool in the economic, social and political market game”.¹⁴⁷¹

In this chapter I will discuss the meaning of a consumer boycott and examine whether it can be an alternative means of pressure to the strike. To do this, I will divide the chapter into five parts, and in each chapter, I will ask and answer a different series of questions. **In the first part** of this chapter, I will address a boycott in its general meaning. I will do this by answering the questions: How was the boycott expressed in Hebrew law? What are the manifestations of the boycott towards the Jewish community and

¹⁴⁶⁸ Gershon Gontovnik: *An Internal Cultural Boycott as a Means of Enforcing Cultural Norms* (Law and Business 23, 5781), p. 184.

¹⁴⁶⁹ It seems that the initiator of the boycott tool as an international pressure tool was President of the United States, Woodrow Wilson, who in 1919 tried to justify the use of international sanctions as an alternative pressure tool for wars:

“A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist”.

Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott: *Economic Sanctions Reconsidered: History and Current Policy*, (Peterson Institute for international Economics, 1991), p.9

¹⁴⁷⁰ Yaniv Mano: *Consumer Boycott: The Ethical Weapons of Consumers*, (Law 15 (2), 5771), p. 749.

¹⁴⁷¹ Gershon Gontovnik, *ibid*, p. 187.

later the State of Israel, how did they deal with the boycott directed against them? What are the mental effects of a boycott? And how can the use of a boycott be justified? **In the second part** of this chapter, I will move on to discuss the consumer boycott. I will dwell on the meanings of consumer culture, corporate responsibility and review significant consumer boycotts in the world and in Israel. At the end of all this I will present my conclusions as to the implications of a consumer boycott. **In the third part** of the chapter, I will move on to discuss the main question I started with – can a consumer boycott be an alternative means to the pressure of the strike? To address this question, I will present a few test cases from Israel and the world in which this tactic has been tried. **In the fourth part** of the chapter, I will assess the consumer boycott as alternative and practical means of pressure to the strike. Finally, **in the fifth** and final part of the chapter, I will present my conclusions.

Before approaching any of these, it is worth dwelling a little on the etymology of the term boycott in the English language. The English name *Boycott* is derived from a historic event that took place in Ireland. In 1880, Irish farmers threatened to cease their business relations with their landlord, Count Charles Cunningham Boycott who ruled County Mayo because he had raised their rent. Henceforth Boycott's name became synonymous with boycott, while the original English term for boycott is Ostracise.¹⁴⁷²

18.2.1 How is the Boycott Expressed in Hebrew Law?

The term *boycott* has been given different meanings over the years and has been assigned different roles over the generations, as Gideon Leibzon explains. In biblical times the meaning of boycott was the secretion of a thing or a person to annihilation,¹⁴⁷³ or a dedication to the exalted.¹⁴⁷⁴ From the end of the Second Temple period and especially after its destruction, Jewish public institutions weakened and since then this concept has begun to take on the meaning of physical exclusion and segregation from the public, whether as punishment or as a means of coercion or discipline. In the time of the Geonim, the term boycott wore another attire – a mere boycott (which is not imposed on a particular person explicitly named, as opposed to an explicit boycott that explicitly mentions the name of the person on whom the boycott is imposed). By the end of this period the boycott became a means of strengthening public regulations. In the Middle Ages, the *foreclosure boycott*, the *settlement boycott* and the boycott as a means for settling debts between individuals developed.¹⁴⁷⁵

Use made of the boycott raises many interesting questions. I would like to dwell on some of the relevant ones in continuation of the discussion: What is the difference between a boycott and ostracism? What are the reasons for a boycott? What was the prevalence of the use of boycott? What was the meaning of the boycott? And of course – what is the attitude of Hebrew law towards imposing a consumer boycott? I will answer these questions in their order.

What is the difference between boycott and ostracism? There is controversy in this matter. On the one hand, the comparison between the Babylonian Talmud and its Eretz-Israel counterpart shows that the boycotted is equivalent to the ostracised: “What they called in the land of Israel ostracised they called in

¹⁴⁷² Yaniv Mano, *ibid*, p. 748.

¹⁴⁷³ Thus, the people of Israel were commanded concerning the people of Canaan, when they took possession of the land: “For you shall boycott them, the Hittite, and the Amorite, the Canaanite, and the Perizzite, the Hivite, and the Jebusite; as the LORD God commanded thee. (Book of Deuteronomy, Chapter 20, verses 16-17).

¹⁴⁷⁴ In the book of Leviticus, for example, it is a boycott for the Lord: “But nothing that a person owns and devotes to the Lord – whether a human being or an animal or family land – may be sold or redeemed; everything so devoted is most holy to the Lord” (Leviticus, chapter 27, verse 28).

¹⁴⁷⁵ Gidon Leibzon, *Why Ostracise? (Causes of boycotts in the Land of Israel and in Babylon in the Mishnah and Talmudic Period)*, (Hebrew Law Yearbook II, 5735-1975), p. 293.

Babylon boycotted, and what they called in the land of Israel a reprimand they called in Babylon ostracism".¹⁴⁷⁶ On the other hand, some argue that the imposition of a boycott is more serious than ostracism, because in the first version, the word *cursed* appears.

The question arises – **What are the reasons for the boycott?** Rabbi Yehoshua Ben-Levi explained in the Babylonian Talmud that “in twenty-four places the Beit Din (court) ostracises for the honor of the rabbi, and all were taught in our Mishnah”.¹⁴⁷⁷ And based on this it was ruled that “for twenty-four things a person is ostracised, whether a man or a woman”, and so did rule the great arbitrators the Jewish people had: The Rambam¹⁴⁷⁸, Ba'al ha-Turim [Rabbi Jacob Ben Asher] and Rabbi Yosef Caro. According to Leibzon, it seems that during the time of the Amoraim it was not a closed list of grounds for ostracism, but an open and broad list used by the Amoraim of Babylon, where their autonomy to impose punishments according to their terms of punishment was limited by the authorities to whose mercy they were subject. The use of ostracism developed and expanded gradually in all areas of the system of life in Babylon, and its use was made according to the circumstances of time and place. During the Amoraim period, ostracism served both as an instrument of coercion and discipline, and as a means of punishment. Ostracism as a means of discipline was used mainly for the purpose of maintaining the unity of Halacha. Later in the Amoraim period, ostracism became an instrument of coercion against the public only, in order to ensure appearance before the courts and obedience to the rulings of the sages. From the coercive instrument in matters of prohibition and permission, the use of ostracism also extended to torts and fines. The main goal in these areas in the eyes of the sages was to protect the rights of the Jews from the intervention of the foreign environment and to prevent contact with this society. Towards the end of the Amoraim period, the use of ostracism as a means of coercion expanded, serving the courts in other areas, both to maintain the effective procedures in court and as a means of supervising and disciplining its actions. It is possible that the use of ostracism as a means of punishment preceded its use as a means of coercion and discipline, but in light of the few sources available from this period, it is difficult to be certain in this matter.¹⁴⁷⁹ After the period of the Geonim, a boycott was used by Rabbi Gershom ben Judah. During the Second Crusade, the Rashbam, Rabbeinu Tam and other rabbis boycotted every Jew who would sue a Jew in a Gentile court. In 1656, a boycott was imposed on Baruch Spinoza, and later, on Sabbatai Zevi Hassidism and scholars. From the end of the 18th century, European rulers (Prussia, France, Russia) began to ban boycotts.

The sources indicate that ostracism was actually used in the Land of Israel only in a small number of cases – for example, during the period of Akabia ben Mahalalel,¹⁴⁸⁰ Eliezer ben Hanoah,¹⁴⁸¹ Eliezer ben Hurcanus¹⁴⁸² and Yossi ben Tadaï.¹⁴⁸³ On the other hand, there are a large number of cases in which ostracism was used only as a means of intimidation – this is the case with Honi HaMa'agal,¹⁴⁸⁴ Elazar ben Azaria,¹⁴⁸⁵ Todos Ish Romi,¹⁴⁸⁶ Hananiah ben Achi,¹⁴⁸⁷ Rabbi Yehoshua and more. In Babylon, on the

¹⁴⁷⁶ Gidon Leibzon: *Ostracism and Exile in the Eyes of the Tannaim and the Amoraim*, (Hebrew Law Almanac 6, 1939), p. 190.

¹⁴⁷⁷ Babylonian Talmud, Tractate Berakhot, sheet 19, p. 1.

¹⁴⁷⁸ The Rambam, Tractate Talmud Torah, Chapter 6.

¹⁴⁷⁹ Gidon Leibzon, *Why Ostracise? (Causes of Ostracism in the Land of Israel and in Babylon in the Mishnah and Talmudic Period)*, *ibid*, pp. 340 - 342.

¹⁴⁸⁰ Mishnah, Seder Nezikin, Tractate Eduyot 85.

¹⁴⁸¹ Mishnah, Seder Nezikin, Tractate Eduyot 85 46.

¹⁴⁸² Babylonian Talmud, Seder Nezikin, Tractate Bava Metzia, 59 72.

¹⁴⁸³ Babylonian Talmud, Seder Nezikin, Tractate Derech Eretz, 1.

¹⁴⁸⁴ Babylonian Talmud, Seder Mo'ed, Tractate Ta'anit 23 71.

¹⁴⁸⁵ Babylonian Talmud, Seder Mo'ed, Tractate Shabbat, 54 72.

other hand, ostracism was even used against scholars – as it was used against other people, at least up to the third generation of the Amoraim. From then on, a change began in the attitude of the sages regarding ostracism of sage students.¹⁴⁸⁸

What was the meaning of the boycott/ostracism? Did the boycott / ostracism include banishment and expulsion from society, or only isolation in a state of humiliation and disgrace? It seems that the answer to this question is that removal of the ostracised did not entail his complete banishment (both in the Land of Israel and in Babylon), but only imposed restrictions on him in defined areas. Removal of the ostracised was the essence of the ostracism but in addition, the purpose of the sages was to grieve the ostracised and humiliate him by markings on his body and clothing similar to mourning customs – such as the prohibition to wear sandals,¹⁴⁸⁹ the prohibition to get a haircut and shave. After the death of the ostracised, they also used to stone his coffin. A special phenomenon in Babylon was that the ostracised was not only banished and cursed by the people, but also banished and cursed by the heavens. That is, it was not only the ostracised who suffered, but also his descendants – and thus a mutilation was inflicted on the seed of the outcast.¹⁴⁹⁰

Consumer boycott according to Halacha. One of the tools for dealing with overcharging is a consumer boycott. Tanna Rabban Shimon ben Gamliel demanded from sellers of pigeons for sacrifice to lower the prices of the pigeons, otherwise he would exempt those bringing the sacrifice from bringing it, a successful threat.¹⁴⁹¹ Amora Shmuel warned the myrtle sellers to sell uncut myrtle at their true value,¹⁴⁹² and at another time he warned the pottery sellers that if they did not sell their wares at true value, he would allow the use of old pottery after Passover.¹⁴⁹³ In all these cases, the threat of a boycott was of essential products for observance of the commandments, the threat of a boycott was led by community leaders who initiated it and in all of them – the fear of a consumer boycott was successful.¹⁴⁹⁴

In conclusion, the roots of the boycott phenomenon draw from the ancient world and have a place in the chronicles of all monotheistic religions, including Judaism. Despite modification of its meaning and the changes in its forms and functions, the concept of boycott has kept throughout the times the original meaning of separation or setting aside of an object or person from all things or from all human beings. Boycott/Ostracism has two faces: one, which is the essence of ostracism, people moving away from the ostracised. And second, the ostracised must himself practice mourning customs both to differentiate himself from the congregation of Israel and to grieve and humiliate himself by differentiating himself. In places where political power was available to the established religion, the executions of infidels in various and strange deaths can be found. At the same time, the boycott also developed in the Christian world, the imposition of which condemned its victims to *civil death*. At the root of the boycott was a curse, and it included expulsion of the ostracised from the congregation of believers.¹⁴⁹⁵ The purpose of the boycott in the ancient world was not only to persuade the ostracised to mend his ways and return to the bosom of the

¹⁴⁸⁶ Babylonian Talmud, Seder Zeraim, Tractate Berakhot 19 1.

¹⁴⁸⁷ Babylonian Talmud, Seder Zeraim, Tractate Berakhot, 63.

¹⁴⁸⁸ Gideon Leibzon, "Ostracism and outcast in the Eyes of the Tannaim and the Amoraim," *ibid.*, Pp. 178-184.

¹⁴⁸⁹ In contrast to the Eretz-Israel Talmud, the prohibition on wearing sandals is a question that remains open in the Babylonian Talmud.

¹⁴⁹⁰ Gidon Leibzon: *Ostracism and Exile in the Eyes of the Tannaim and the Amoraim*, *ibid.*, pp. 193-201.

¹⁴⁹¹ Babylonian Talmud, Tractate Keritot, Sheet 7, p. 1.

¹⁴⁹² Babylonian Talmud, Tractate Sukkah, Sheet 30, p. 2.

¹⁴⁹³ Babylonian Talmud, Tractate Pesachim, Sheet 30, p. 1.

¹⁴⁹⁴ Yehuda Zoldan, Consumer Boycott, (Tehumin 32, 5772-2012), pp. 139-140.

¹⁴⁹⁵ Gershon Gontovnik, *ibid.*, p. 190.

community, but also to show the remaining members of the group what the fate of those who deviated from its ways would be.

18.2.2 What are the Manifestations of the Boycott Towards the Jewish Community and later – the State of Israel?

Judaism-Israel has a long history of coping with boycotts, beginning even before establishment of the State of Israel.¹⁴⁹⁶ Even in the Diaspora, Jewish communities had to deal with various kinds of boycotts, by society and/or by the authorities. For example, on April 1, 1933, the Nazi government imposed an economic boycott against German Jews. The Jewish community and later the State of Israel also had to deal with various types of boycotts – all of which can be classified into four areas: political, cultural, academic, and economic. These boycotts were ultimately influenced by Israel's status and the Arab world's attitude toward it. I will briefly address the areas of boycotts and will specifically focus on the economic area, as a level of reference that will serve us later in the course of affairs of this chapter.

A. The Political Sphere

After the War of Independence, Arab countries signed armistice agreements with the State of Israel, due to their declared refusal to sign peace agreements with their new neighbour in the Middle East. Corroboration of the political boycott occurred after the Six Day War at the Khartoum Conference (29/08/1967 – 01/09/1967), in which the leaders of eight Arab countries met and declared the three Nos: “No recognition of Israel, No peace with Israel and No negotiations with Israel”. The political boycott of Arab countries towards Israel also entailed a boycott of the African Union towards Israel, a ban on entry into countries boycotting Israeli passport holders and culminating in Resolution 3379 of the UN General Assembly comparing Zionism to racism (1975).

The political boycott of Israel began to crumble with the peace agreement between Israel and Egypt (1979), disintegration of the Soviet Union (1991) and disintegration of the Arab-Soviet bloc against Israel, the political process with the Palestinians (1993), the peace agreement signed with Jordan (1994) and the Abraham agreements signed with the United Arab Emirates, Bahrain, Sudan and Morocco (2020).

Today, it seems that the main manifestation of the political boycott is boycott of the settlements that Israel has established beyond the Green Line.¹⁴⁹⁷ This boycott carries three main expressions: cultural – refusal of artists to perform in the settlements; academic – a call for the boycott of the academic staff of Ariel University or its students; and economic – in which products produced in the settlements are boycotted (by marking products).

B. The Cultural Sphere

Over the years, a cultural boycott has been instituted against the State of Israel. This boycott has taken on and off various forms of expression. Thus, various artists, in various fields, who have performed in Israel or supported it (such as Marilyn Monroe, Elizabeth Taylor, Lewis Armstrong, Frank Sinatra, Harry Belafonte, Kirk Douglas, Jerry Lewis, Paul Newman and Sophia Loren) experienced a boycott imposed on them by Arab countries. Other artists cancelled planned visits/performances in Israel (such as Elvis

¹⁴⁹⁶ Dan S. Chill, *The Arab Boycott of Israel: Economic Aggression and World Reaction*, New-York: Praeger, 1976.

¹⁴⁹⁷ One of the latest expressions of this boycott is *Guidelines on the Right of Israeli Entities and Their Activities in the Occupied Territories of Israel Since 1967 to EU Grants, Prizes and Financial Means from 2014 onwards*, published by the EU Council in July 2013.

Costello, Roger Waters, Annie Lennox, Lauren Hill), either due to sympathy with the boycott against the State of Israel or due to the pressure exerted on them to boycott Israel.

Sometimes, as part of the cultural boycott, cultural activities of Israeli artists abroad were disrupted. Sports activities were also disrupted under the auspices of the boycott, such as the cancellation of players from the American Football League (NFL) in February 2017 or cancellation of the Argentina-Israel football match in June 2018.

C. The Academic Sphere

The boycott of Ariel University, which was imposed by Israelis and foreigners on the grounds that it has been established and operates outside the Green Line, is particularly well known. Among the boycotts imposed on it, the boycott of architecture students in the International Architecture Competition¹⁴⁹⁸ is particularly remembered. In April 2021, the High Court ruled that Prof. Oded Goldreich would not receive the Israel Prize that year. The High Court ruling was passed after members of the award committee had petitioned against the Minister of Education, who refused to grant Prof. Goldreich the award because he signed a petition calling on the EU to boycott Ariel University.¹⁴⁹⁹

In the last two decades, there have also been calls for a boycott of Israeli academia. These calls have led academics in Europe and America to support this boycott.¹⁵⁰⁰ The year 2013 inevitably carried a series of calls for an academic boycott of Israel. The first was when the Association of Lecturers in Ireland called for an academic boycott of Israel. Subsequently, the American Association for Asian American Studies in the United States decided by a 66% majority to support the academic boycott against Israel and became the largest American organisation that supported the boycott. The union explained in a statement that the decision was made following Israeli violations of international law and UN resolutions, including imposing occupation on Palestinian academics and students and violating their rights.¹⁵⁰¹ That year, Prof. Stephen Hawking also joined the academic boycott, which made waves in view of his international status.¹⁵⁰² In 2011 the University of Johannesburg severed its ties with Ben-Gurion University due to “its participation in violations of Israel’s human rights, including the theft of Palestinian water”.¹⁵⁰³

Despite all this, Efrati states that all attempts to impose an academic boycott on Israel caused a great deal of noise but little real impact, and in support of his remarks he pointed to the decisions of the British National Student Association and the American Anthropologists Association to sever their ties with Israeli universities – which failed, such as the fact that there has been a significant increase in total contributions, grants and budgets for research and development given to academic institutions in Israel from abroad.¹⁵⁰⁴

¹⁴⁹⁸ Yaheli Moran Zelikovich: *Spain boycotts Ariel College – in the Occupied Territories*, (Ynet, 22/09/2009), at the link: <https://www.ynet.co.il/articles/0,7340,L-3779734,00> Accessed: 21/12/2021.

¹⁴⁹⁹ Tamar Trabelsi Haddad: *Galant in the wake of the High Court: I will not support granting the Israel Prize to a boycott supporter*, (Ynet, 09/04/2021), at the link: <https://www.ynet.co.il/news/article/ryaTk00pH00> Accessed: 21/12/2021.

¹⁵⁰⁰ Lasson, K. *Scholarly and Scientific Boycotts of Israel: Abusing the Academic Enterprise*, *Touro Law Review* 21, 2005. Accessed: 21/12/2021.

¹⁵⁰¹ Shahar Chai: *5,000 American lecturers: Boycott Israel*, (Ynet, 16/12/2013), at the link: <https://www.ynet.co.il/articles/0,7340,L-4466205,00.html> Accessed: 21/12/2021.

¹⁵⁰² Harriet Sherwood and Matthew Kalman, *Stephen Hawking joins academic boycott of Israel*, (The Guardian, 08/05/2013), <https://www.theguardian.com/world/2013/may/08/stephen-hawking-israel-academic-boycott>

¹⁵⁰³ BDS Website: <https://bdsmovement.net/academic-boycott> Accessed: 12/27/2021.

¹⁵⁰⁴ Amit Efrati: *Who is afraid of the BDS? Do the attempts at economic and academic boycott constitute a strategic threat to the State of Israel?* (Strategic Update, Vol. 19, Issue 4, January 2017), p. 42.

D. The economic Sphere

In 1931, the Palestinian Arab Executive Committee turned to “The noble Arab nation [...] to remember Palestine and to treat the Jews in their countries of residence in the same way that the Jews treat the Palestinian Arabs, by boycotting and oppressing them”.¹⁵⁰⁵

After the Nazi Party came to power in Germany in 1933, the Mufti visited the German consul in Jerusalem, congratulated him on the Nazi victory and expressed the Arabs’ desire to join the anti-Jewish boycott organised by the Nazis and spread the idea of boycott among Muslims worldwide.¹⁵⁰⁶

In 1937, the Defense Conference for Palestine in Syria boycotted Jewish products.¹⁵⁰⁷

On January 1, 1946, the *Arab Boycott* against Jewish goods in Israel came into effect, at the initiative of the *Arab League*. The official reason for the boycott was the need to “defend ourselves by peaceful means in order to maintain Arab sovereignty over the Land of Israel”.¹⁵⁰⁸ The Arab boycott continued to exist even after establishment of the State of Israel and was conducted by the *boycott bureau*, initially in Cairo and as of 1951, in Damascus. The purpose of the bureau was to suppress the development of Jewish settlement in the Land of Israel. To do this, Arab countries took initiatives to boycott the State of Israel directly (primary boycott) and indirectly by boycotting organisations and businesses that traded with Israel (secondary boycott), by including them in a *blacklist*. Thus, for example, according to a report by the newspaper Davar in 1959, the French company Renault surrendered to the Arab boycott, violating its contract with the Israeli company Kaiser-Pfizer in exchange for the boycott bureau’s promise to delete its name from the blacklist. Beginning in 1967, car manufacturers Toyota, Nissan, Honda, Mazda and Mitsubishi joined the boycott.¹⁵⁰⁹ Coca-Cola also refused to allow the production of the popular drink in Israel, for business reasons, but was given foreign considerations stemming from fears of losses in Arab countries as a result of the Arab boycott. In response, American Jews, led by the Anti-Defamation League, began organising a boycott of Coca-Cola. Announcement of the boycott received successful cooperation from the American Jewish community – families and corporations, which led the company to reverse its decision and open a beverage factory in Israel in 1968.¹⁵¹⁰

After the Yom Kippur War, Arab countries imposed bans and restrictions on the sale of oil to Western Europe and the United States, in order to pressure them to withdraw their support from the State of Israel. Oil prices rose, and the Israeli solution was to immobilise cars one day a week.

In an effort to end the Arab boycott, a law was enacted in 1977 in the U.S. Congress¹⁵¹¹ that prohibited American companies from participating in a foreign country’s boycott of another country unless the United States also participated in that boycott. The law provided for civil and criminal penalties for

¹⁵⁰⁵ Joshua Porat, *From Riots to Rebellion: The Palestinian Arab National Movement*, (Am Oved Publishing, 1978), pp. 52, 61, 260.

¹⁵⁰⁶ *Ibid*, p. 101

¹⁵⁰⁷ Moshe Maoz: *The Boycott Weapon in the Arab-Jewish Conflict: From Hebrew Labour to the BDS*, Kaveret, June 2016), p. 17.

¹⁵⁰⁸ Ofer Aderet: *From the Mandate through Toyota and McDonalds to BDS: An Introduction to the Boycott of Israel* (Haaretz, 20/07/2021), at the link: <https://www.haaretz.co.il/digital/haarchion/premium.HIGHLIGHT-TIMELINE-1.10015425> Accessed: 08/12/2021.

¹⁵⁰⁹ *Ibid*.

¹⁵¹⁰ Chen Melul: *Operation Coca-Cola: This is How We Defeated the Arab Boycott*, (National Library, 08/05/2017), at the link: <https://blog.nli.org.il/cocacola> Accessed: 07/12/2021.

¹⁵¹¹ Tax Reform Act of 1976.

violators.¹⁵¹² In 1979, US Congress enacted another and more specific law¹⁵¹³ against the Arab boycott. The law stipulated that a fine would be imposed on American companies cooperating with the Arab boycott. In 2017, an attempt was made in the United States to enact the Anti-Boycott Act of 2018 that imposes bans on boycotts taken by US citizens or entities against US-friendly states. The purpose of this bill, which was born against the background of the growth of the BDS organisation, is to allow states in the United States to enact laws that require various suppliers to sign an undertaking not to boycott any goods from Israel.

Success of the Arab boycott can be learned from a statement of a senior in the Foreign Ministry at a Knesset Economics Committee held in late 1991: “The fact is that Europe is one of the arenas of struggle and success of the boycott. There is little investment from Europe. If there are investments, they are from Jews. There is little industrial cooperation with Europe, and the situation is bad especially in countries like Britain, which is perhaps the most submissive to the Arab boycott; so is France, despite existing legislation, and we will see this in the last L’oreal case; and in Germany as well”.¹⁵¹⁴

A series of historical events, including the peace agreement with Egypt, the Gulf War, the Oslo Accords, and the peace agreement with Jordan, led to the decline of the Arab boycott.

Beginning in 2005 and following the second intifada, the Second Lebanon War, Operation Cast Lead, and establishment of the BDS (Boycott, Divestment, Sanctions) movement, Israel has known a series of campaigns calling for a boycott of Israel, withdrawal of investments from it and sanctions against it and its affiliates. The BDS movement calls for an economic, cultural, and academic boycott of Israel in order to achieve three official goals: “End the occupation and colonisation of Arab lands and demolition of walls; Israeli recognition of the basic rights of its Arab-Palestinian citizens; and promotion of Palestinian refugee rights to return to their homes”.¹⁵¹⁵ Most of its activity focused on European countries (especially Ireland, the United Kingdom, Italy and Spain) and North America.¹⁵¹⁶ Among the products that were boycotted or threatened to be boycotted were Dead Sea Ahava products, SodaStream and Barkan Wineries which relocated their factories from Ma’ale Adumim and Ariel to Rahat and Hulda respectively. The latest company is the American ice cream giant Ben & Jerry’s which announced cessation of sales of its products in the settlements.

18.2.3 Jewish-Israeli Handling of Boycotts

The fear and pressure of boycotts imposed on the Jewish community and the State of Israel did not allow the Jewish-Israeli leadership to sit by idly for a long time and forced it to deal with the boycotts.

Thus, in the face of the economic boycott, the Zionist institutions led by Ben Gurion took advantage of the Arab boycott activity to encourage Hebrew labour, create an infrastructure for self-supply of agricultural and other products, and even establish a Hebrew port in Tel Aviv. Israeli industry developed impressive independent production capabilities; found markets that did not succumb to the pressures exerted on them to participate in the boycott; and in certain industries it bought and sold either in straw

¹⁵¹² U.S Department of State, Congressional Research Service, Arab League Boycott of Israel, Martin A. Weiss, December 2013.

¹⁵¹³ Export Administration Act of 1979.

¹⁵¹⁴ Remarks by Y. Cohen, Head of the Economics Division at the Ministry of Foreign Affairs. Minutes No. 346 of the meeting of the Economics Committee dated 04/12/1991, at the link: https://fs.knesset.gov.il/12/Committees/12_ptv_458361.PDF Accessed: 27/12/2021.

¹⁵¹⁵ BDS Website: <https://bdsmovement.net/academic-boycott> Accessed: 12/27/2021.

¹⁵¹⁶ Amir Perger, *BDS Movement Achievement Lists*, (Strategic Update, Vol. 22, Issue 1, April 2019), pp. 35, 37.

companies (which would export goods to Arab countries mainly through Cyprus and Greece)¹⁵¹⁷ or indirectly while covering their tracks.¹⁵¹⁸ Vis-a-vis the academic boycott, the Committee of Heads of Universities in Israel (CHU) worked in cooperation with their colleagues;¹⁵¹⁹ and strategies were developed to deal with the boycott of academics going on sabbaticals, conferences and studies abroad.¹⁵²⁰ Israeli diplomacy turned to outreaching, pressured foreign officials and/or entities close to the State of Israel (such as the Anti-Defamation League or members of parliament) in the United States and Europe and boycotted international companies that succumbed to boycotts and was assisted by Jewish companies abroad and the USA government.¹⁵²¹ Israeli leaders also sought to impose counter-boycotts, for example, Ma'ariv newspaper reported that following the Arab boycott, Menachem Begin demanded that the world Jewry impose their own boycott on Arab products.¹⁵²² The announcement by the Prime Minister of Israel, Benjamin Netanyahu, in June 2015 that the BDS campaign poses a strategic threat to the State of Israel and must be fought, harnessed pro-Israel organisations from around the world and Israeli media bodies that initiated outreach conferences with foreign journalists.¹⁵²³

In 2010, a bill was introduced in the Knesset called the *Law for Prevention of Damage to State of Israel through Boycott, 5771-2011*.¹⁵²⁴ The explanatory memorandum to the proposal states that “this law is intended to protect the State of Israel in general and its citizens in particular from academic, economic and other boycotts imposed on the State, its citizens and corporations because of their connection to the State of Israel”. The bill matured into a final law in 2011.¹⁵²⁵ The law defined *boycott of the State of Israel* as “intentional avoidance of economic, cultural or academic contact with a person or other entity, only because of its affiliation with the State of Israel, an institution of its institutions or an area under its control, which could harm it economically, culturally, or academically”.¹⁵²⁶ The law stipulates that any public call for a boycott is a civil tort, which constitutes a ground for a civil tort claim by the same person or entity, when there is a reasonable possibility that the call will lead to a boycott and that the publisher is aware of such a possibility.¹⁵²⁷ The law also allows the Minister of Finance to impose the following restrictions on anyone who knowingly published a public call for a boycott of the State of Israel or on anyone who undertook to participate in such a boycott: restriction of participation in a tender,¹⁵²⁸ denial of recognition of such an institution as a public institution apropos clause 46 of the Income Tax Ordinance,¹⁵²⁹ denial of eligibility for funds from the Sports Betting Council,¹⁵³⁰ denial of recognition as a public institution for support under a budget section,¹⁵³¹ denial of state guarantee,¹⁵³² denial of its

¹⁵¹⁷ Moshe Maoz, *ibid*, p. 17.

¹⁵¹⁸ Remarks by Y. Cohen, Head of the Economics Division at the Ministry of Foreign Affairs. Minutes No. 346 of the meeting of the Economics Committee dated 04/12/1991, at the link: https://fs.knesset.gov.il/12/Committees/12_ptv_458361.PDF Accessed: 21/12/2021.

¹⁵¹⁹ Adir Yanko, *Official: Britain Opposes Academic Boycott of Israel*, (Ynet, 03/06/2018), at the link: <https://www.ynet.co.il/articles/0,7340,L-5277730,00.html> Accessed: 22/12/2021.

¹⁵²⁰ Reut Cohen, Or Krispil, Eli Avraham, *Strategies for Dealing with the Academic Boycott* (University of Haifa, March 2016).

¹⁵²¹ Moshe Maoz, *ibid*, p. 17.

¹⁵²² Unknown author: Begin demands a boycott for a boycott, (Ma'ariv, 29/07/1957).

¹⁵²³ Amit Efrati, *ibid*, p. 35.

¹⁵²⁴ P/2505/18 Bill for the Law for Prevention of Damage to State of Israel through Boycott, 5771-2011.

¹⁵²⁵ Law for Prevention of Damage to State of Israel through Boycott, 5771 - 2011. (Hereinafter: The Law).

¹⁵²⁶ Clause 1 of the Law.

¹⁵²⁷ Clause 2 of the Law.

¹⁵²⁸ Clause 3 of the Law.

¹⁵²⁹ Clause 4(1) of the Law.

¹⁵³⁰ Clause 4(2) of the Law.

¹⁵³¹ Clause 4(3) of the Law.

entitlement to benefits under the Law for the Encouragement of Capital Investments, 5719-1959, or under the Law for the Encouragement of Research and Development in Industry, 5744-1984.¹⁵³³

The law passed by a majority of 47 to 38, with the latter justifying their position on the importance of freedom of expression as a value of a democratic state.

Petitions were filed against approval of the Law in the High Court seeking to repeal it. The petitions focused on the law restricting political freedom of expression in relation to government policy. The petitioners' main contention was that the boycott is a legitimate democratic tool for all intents and purposes, and that it is similar in these contexts to a demonstration or a procession, which are also legitimate democratic procedures. Therefore, imposing a ban on a boycott means a sweeping violation of the freedom of expression, which does not pass the tests of constitutionality and the conditions of the restriction clause. Petitioners' other arguments were that the law discriminates between boycotts of different types and in relation to various factors, and that in their opinion there is a logical failure in the Law – while the Law prohibits a call for a boycott, it does not prohibit the boycott itself. The High Court of Justice, with an expanded panel of 9 judges, approved most of the provisions of the Law but unanimously repealed clause 2C of the Law, which concerned compensation without proof of damage, for being disproportionate.¹⁵³⁴ The majority judges, who approved most of the provisions of the law, proceeded from the premise that prohibition of a boycott constitutes a violation of the freedom of expression. In the opinion of Yaakov and Schneebaum, reading the ruling of the High Court shows that the Court did not explicitly deal with the *proper purpose* (which is an element in the limitation clause that allows disqualification of the Law) and the impression is that even if the judges acted out of deep inner conviction that such purpose does exist, they lacked the conceptual tools to formulate it. And thus, the question of how the judges balance the freedom of expression of the boycotters with the freedom of expression of the boycotted remains unanswered.¹⁵³⁵

The State Comptroller's report for 2015, which examined how the State of Israel fights the international boycott, revealed the incompetence of government ministries in dealing with the boycott, and found that the Israeli government does not have an action strategy with clear vision, defined and realistic targets, tangible goals, and success measures.¹⁵³⁶

In conclusion, from the many examples of boycotts or threats of boycotts against Israel that I have reviewed so far, it appears there have been four possible responses that Israel has taken over the years:

- A. Diplomatic and outreach activities.
- B. Undermining the foundations on which the boycott was imposed.
- C. Imposing counter boycott.
- D. Prohibition on calling for or participating in a boycott by law (Israeli or foreign).

¹⁵³² Clause 4(4) of the Law.

¹⁵³³ Clause 4(5) of the Law.

¹⁵³⁴ HCJ 5239/11 Uri Avnery v. the Knesset.

¹⁵³⁵ Assaf Yaakov and Galia Schneebaum, *Boycott, Law and Public Space – Rethinking the Order of Boycotts Following the Boycott Law* (Law Reviews 2, 2020), pp. 539-542.

¹⁵³⁶ Shaul Amsterdamski: *The Foreign Ministry does not have an action strategy against the boycott in Israel*, (Calcalist, 24/05/2016), at the link: <https://www.calcalist.co.il/local/articles/0.7340.L-3688809.00.html>, Accessed: 10/01/2022.

18.2.4 What are the Mental Effects of a Boycott?

[Translator's note: In Hebrew, the word for *Boycott* and *Shunning* is the same word]

Katznelson, who wrote about being shunned in childhood and adolescence, explains that the experience is one of the most difficult experiences a child may have in his or her life. Shunning can irreversibly damage self-esteem, cause feelings of loneliness, introversion and seclusion, intensify feelings of mistrust and suspicion, and in extreme cases even cause suicide. Shunned children experience themselves as unworthy, weak, and transparent. They develop jealousy of others, foster feelings of revenge, may drop out of school and deteriorate into delinquency and violence.¹⁵³⁷ A study conducted on students found that about half of those who experienced social rejection in adolescence perceived the event as traumatic and that it had a significant impact on their lives in adulthood. The effects of the rejection can be post-trauma and on-going depression.¹⁵³⁸

The characteristics of traditional boycotts among individuals or in groups have been moved in recent decades into cyberspace. This means that dissemination of the boycott has become faster, easier to carry out and is accompanied by the anonymity of the boycotters and participants – who sometimes do not hesitate to participate in dissemination of the shun and cooperate with it.

According to Sami Argon, although the boycott is always offensive, there are differences between different types of boycotts and even in the degree of harm caused to the boycotted. Unlike boycotts that were previously distributed through posters or pashkevils, which eventually fall off the wall or are removed from it, a boycott through social networks is perpetuated and distributed everywhere and may even spread to populations that are not necessarily related to it. It is indeed possible to remove a boycott page or an abusive video from the network, however with the advancement of technology it becomes more difficult and locating the boycotters has also become more complex, as these are hidden under a cloak of anonymity, and respectively finding evidence of boycott contents also becomes more problematic (due to apps that conceal information within seconds).¹⁵³⁹

The intensity of the harm as a result of a boycott in the age of social networks has become more severe, more immediate, lasting and sweeping and has the potential for many damages and has more fateful consequences than harm occurring in the physical space. There are several possible reasons for this: easy access to the victim's privacy, spreading the messages quickly and widely (email, social networks, chats, discussion groups such as WhatsApp or Telegram, etc.). Unlike the material world, a boycott on social media may be revealed to the victim only at a late stage when the boycott messages have already been spread everywhere. Anonymity and the lack of presence or physical contact between the boycotters and the boycotted also intensify the boycotters' daring. The immediate result of the boycott and its intensification while *encouraging* participants causes the victim to face the invisible and the unexpected. The boycott can go so far as to *erase* victims from their peer group, isolate them to the point of pain and bring them to extreme acts such as suicide.¹⁵⁴⁰ For example, it was found that the boycott of Jews in Germany in April 1933 led to relatively high suicide rates compared to the rest of the population in Germany. The boycott manifested in defamation, isolation, physical harm, and dismissal led to high

¹⁵³⁷ Ada Katznelson, *Shunning in Childhood and Adolescence*, (Kaveret, June 2016), p. 23.

¹⁵³⁸ Notman-Schwartz, A. et. al., *The Experience of Social Rejection in Adolescence: A Traumatic Event with Implications for Long-Term Psychological Well-Being*, (Violence 1, 2007), quoted in: Ada Katznelson, *Shunning in Childhood and Adolescence*, (Kaveret, June 2016).

¹⁵³⁹ Sami Argon, *Violence on Social Networks among Children and Adolescents*, (Kaveret, June 2016), pp. 35, 39.

¹⁵⁴⁰ Susie Ben Baruch, *Cyberbullying – The Boycott*, (Kaveret, June 2016), pages 33, 34.

suicide rates, with researcher Kwiet estimating that between 300 and 400 Jews committed suicide due to the boycott and after Kristallnacht in 1938, another 300 to 500 Jews committed suicide.¹⁵⁴¹

Another study conducted on the BDS campaign found that the noise created by the campaign to boycott Israel psychologically affects the Israeli public and the local media, which choose to measure the success of the rating campaign it receives, rather than its practical ability to harm the State of Israel. According to Efrati, it is possible that this psychological deception lies in fear of the escalation of negative attitudes around Israel and its policies, and fear of a quiet boycott during which foreigners will avoid making contacts with Israeli elements from various fields, due to fear of future consequences.¹⁵⁴²

18.2.5 What are the Justifications for Using a Boycott?

The use of a boycott can be justified on sociological, economic, or legal grounds.

From a **sociological** aspect, social control agents respond to norm-breakers in one of two ways. The first, through the exercise of official sanctions, which are limited to the violation of norms contained in that law and the sanctions are the penalties provided for in that law. The second way is by enforcing unofficial sanctions against the violator, one of which is boycott. Studies have found that informal sanctions are more effective than official ones,¹⁵⁴³ so it can be said that the use of types of boycotts may be most effective and influential.

According to the **economic** rationale, boycotts may result in direct and indirect losses to company revenues, produce a negative image advertisement for the employer, the company, or its products. Boycotts create economic incentives by disrupting economic interactions with the company, and the renewal of such interactions is conditional on meeting specific requirements. The boycott, therefore, creates an economic incentive to comply with it, provided the cost of complying with the moral requirements of the boycotters will be lower than the price of income that will be lost if the boycott continues.¹⁵⁴⁴

The **legal** justification for a boycott stems from personal freedoms such as freedom of expression, freedom of engagement and even freedom of association, which are granted to every person, allowing him the right to act and express himself as he wishes and in accordance with his conscience. These justifications for the boycott are based on liberal theories that perceive any state intervention in individual affairs as negative. In contrast, there are also theories that justify imposing restrictions on the life of the individual in the name of the need to prevent harm to the individual, society, and the state.¹⁵⁴⁵

Yaakov and Schneebaum are willing to justify a boycott in the term of *legitimate use of collective power*. Their conclusion is that different types of boycotts should be distinguished according to the degree of legitimacy of the use of force inherent in them. Another conclusion is that political boycotts, which involve the illegitimate use of force, entail – in addition to harming the direct abstainers of the boycott – also harming significant public interests, such as diluting political discourse and harming democratic procedures. A third conclusion is that these interests constitute competing values for freedom of

¹⁵⁴¹ Lester, D. *Suicide and the Holocaust*. (New-York: Nova Science Publishers, 2005 Quoted in Karin Gur, *Boycott: Its Many Faces*, Kaveret, June 2016), p.10.

¹⁵⁴² Amit Efrati, *ibid*, p. 45.

¹⁵⁴³ Shoham, G. et al., *Offenses and Punishments: Introduction to Phenology*, (Ach Publishers, 2009), p. 26, Quoted in: Karin Gur, *Boycott: Its Many Faces*, (Kaveret, June 2016), p. 10.

¹⁵⁴⁴ Valentin Beck, *Consumer Boycotts as Instruments for Structural Change*, (Journal of Applied Philosophy, Vol. 36, No. 4, August 2019), p.546.

¹⁵⁴⁵ Isaiah Berlin, *Two Concepts of Liberty*, 1958, in: *Four Essays on Liberty*, Oxford University press, 1969.

expression, which must be taken into account when formulating the legal regulation of a boycott, and that their definition as public values have an impact on the question of the legal industry appropriate to deal with the boycott.¹⁵⁴⁶

According to Gontovnik, the boycott should not be banned legally, despite the damage it may cause, provided that it does not deviate from certain red lines. Gontovnik mentions that a boycott is one of the means available to cultural groups to try to enforce their norms of conduct on their members, and that it is less abusive compared to other means, such as violence, which should always be out of bounds, and legal exclusion, which may undermine excessively cultural change¹⁵⁴⁷. Beck also shares this view. In his opinion, a consumer boycott should be treated as a legitimate and purposeful instrument for positive structural change, through which civil society agents can encourage corporations to meet their responsibilities, provided the boycotters meet two procedural normative requirements: proportionality and transparency. Proportionality is ensured by choosing a legitimate target for the boycott, and by ensuring that the concrete requirements of the boycotters are proportionate. In order to meet this criterion, campaigners must indicate what corporate behaviour needs to change. A campaign should inform the company before public advertising, in order to give it an opportunity to rectify its ways and avoid negative publicity. Boycott organisers need to reveal their identities and agenda. Meeting the transparency requirement will give the boycott campaign more credibility, the ability to provide more accurate information and ensure that the boycotters do not resort to false accusations. If the boycott is not transparent, then consumers and citizens will not be able to ascertain whether their support will really contribute to such a change, and the campaign may fail its purpose to provoke an effective public debate.¹⁵⁴⁸

18.3.1 Consumption Culture

The society we live in has been dubbed the *consumption society*, and not for nothing. Unlike Fordism, which encourages the individual to accumulate savings and consume only what it needs in a measured way, post-Fordism encourages identity fostering based on massive consumption of products. Private consumption is the engine of the global capitalist economy. In this society the consumer is supposed to be the strongest and most influential factor in all areas of life.

Aviva Geva lists six main characteristics of culture and their impact consumer behaviour:¹⁵⁴⁹

1. Culture is a way of life.

The way we dress, think, eat, spend our money, and spend our time – all the *big* and *small* things that fill our days are elements of culture. There are universal elements common to all cultures (such as, for example, language, law, religious rites, class differences, etc.). The universal components of culture differ in character and style from culture to culture, but these distinctions do not last forever thanks to demographic, economic and political changes and the acceleration of globalisation which undermine the same cultural characteristics and reinforce global common patterns.

¹⁵⁴⁶ Assaf Yaakov and Galia Schneebaum, *ibid*, p. 531.

¹⁵⁴⁷ Gershon Gontovnik, *ibid.*, P. 185.

¹⁵⁴⁸ Valentin Beck, *Consumer Boycotts as Instruments for Structural Change*, (Journal of Applied Philosophy, Vol. 36, No. 4, August 2019), pp. 551-554.

¹⁵⁴⁹ Aviva Geva, *Consumer Behaviour – The Consumer in His Environment*, (The Open University, 2015), pp. 67-74.

2. Culture sets norms.

Culture is a human creation common to all members of society. It provides a person with largely fixed and stable life patterns, which allow him to define and understand himself and his environment and to cooperate with others. Culture sets values and norms of proper behaviour. Appropriate behaviour is appreciated while deviant behaviour entails activation of social sanctions, which can be expressed in various ways of condemnation and social pressure.

3. Culture is acquired.

Culture does not come to a person from birth but is acquired in a process of socialisation – a process of learning the ways of thinking, values, rules, and patterns of action accepted in society. In this process, the individual forms his identity as one who defines in his uniqueness on the one hand and his belonging to the social environment on the other. It is the processes of socialisation that give our behaviour as consumers its cultural significance. In their course we acquire a set of cultural contents that allows us to integrate into different consumption frameworks, define our identity as consumers and give this individuality a behavioural expression.

4. Culture evolves.

Culture is in constant formation. Demographic changes, developments in technology and science, economic and political changes – all these lead to adaptive responses of consumer culture.

5. High culture and low culture.

If in the past there was a distinction between primitive culture and high culture, then in the postmodern era Cultural Relativism prevailed, according to which there is no room to define one behaviour more or less cultural than others.

6. Culture is a set of symbols.

Cultural contents are expressed by ways of symbolism. The symbolic meanings of prevailing behaviour in society determine inwardly a cultural common denominator for all its members, while outwardly they delineate the cultural boundary between one society and another.

The Israeli economy has undergone far-reaching changes in consumption, recreation, and leisure patterns from its earliest days to the present day, in which it is characterised as a developed Western consumer society, subject to considerable global influences. Beginning in the mid-1980s, the neo-liberal ideology in Israel, which advocated privatisation and a free market economy, has strengthened, along with minimal government intervention. Changes in the standard of living have led to changes in the culture of recreation and leisure. The increase in disposable income of the expanding middle class in Israeli society has led to an increase in hours spent outside the home. As a result of the spread of globalisation, privatisation and rising living standards, more and more malls have sprung up in Israel. Simultaneously with the expansion of shopping centers, Israel was washed away by a wave of international chains. Until 2008, Israel was the fourth country in the world in terms of commercial space in relation to the size of the population – 31 square meters per capita.¹⁵⁵⁰ These processes reflect the dimensions of change that have taken place in Israel in recent decades and illustrate its transformation from a society under construction to a quasi-American consumer society.¹⁵⁵¹

¹⁵⁵⁰ Uri Ram and Danny Filk, *Daphne Leef's July 14th: The Rise and Fall of Social Century*, (Theory and Criticism 41, 2013), p. 28.

¹⁵⁵¹ Omri Shamir, *From the Polls to the Market – Political Consumerism in Israel*, (Pardes, 2017), pp. 23-27.

18.3.2 Corporate Social Responsibility

There is no doubt that businesses affect their social and ecological environment. But the question that has provoked a sharp debate in the past, of whether businesses also have a social responsibility beyond their purpose as a for-profit institution, has already given way to the question of how businesses should exercise their social responsibility in their day-to-day operations. There is now a broad consensus, common to both the business sector, the governing authorities that supervise it and the social organisations that criticise its operation, according to which the role of the corporation is not limited to yielding profits. It also has a responsibility to act to promote the well-being of the company in its external and internal environment and within it: employees, customers, creditors, suppliers, the community, and the public in general.¹⁵⁵²

Consistent with this approach, most forms of struggle against corporations are based on the recognition that capitalism is not about to pass from the world in the foreseeable future and therefore, public pressure on *recalcitrant* corporations from the mid-1990s began to manifest itself – consciously or not – *inter alia*, in consumer boycott, selling shares and pressure on institutional bodies to sell holdings in *irresponsible* companies, in demonstrations, lawsuits, public shaming¹⁵⁵³ and increasing pressure for new corporate regulation. Old organisations such as Human Rights Watch, which in the past focused on government activities regarding human rights, are devoting more and more resources to examining corporate behaviour. At the same time, new organisations are emerging whose entire activity is directed at corporations. Some of these new organisations are investing efforts in tracking corporations attempting to curb their behaviour.¹⁵⁵⁴

The idea of corporate social responsibility has become a field of economic and political struggle with many ramifications. The ramifications are on the form of activity of multinational corporations on the one hand, and on the form of the fight against social injustices that corporations produce during their business activities, on the other hand. Conceptually, it can be argued that the basic dialectic that characterises the intensification of global capitalism is that as public space is privatised, so does public interest in private space increase. As the power of the market grows, new forms of resistance and protest emerge that mark the transfer of the center of gravity of the political action of social activism and of institutional entrepreneurship, from the state towards the market, from governments towards multinational companies. Many corporations no longer share the classic notion that they are solely responsible to their shareholders and that their sole obligation is to increase their profits as much as possible. They are not just trying to deny their commitment to expanding circles of different stakeholders and communities. On the contrary, many corporations have begun to be actively involved in various representations of social responsibility.¹⁵⁵⁵

These social struggles take many forms: from *cultural disruption* and destruction of advertisements by students in the US to sit ins and protests by farmers in India, from product boycott campaigns in Europe to organisations of environmental protest movements in Africa, from attempts to recruit corporations to participate in protecting various communities to attempts to embarrass corporations through negative

¹⁵⁵² Aviva Geva, *Morality and Business: Parallels Meet*, (Kibbutz HaMeuchad Publishing – The Center for Ethics in Jerusalem, 2011), p. 273.

¹⁵⁵³ See Chapter 17 on this

¹⁵⁵⁴ Ronen Shamir, *Private Market and Public Pressure: On Design of the Concept of Corporate Social Responsibility*, in: Herzog, H. Kochavi, T. Vetzlinger, S. (Eds.) *Generations, Spaces, Identities: Contemporary Perspectives on Society and Culture in Israel* (Van Leer Institute and Kibbutz HaMeuchad Publishing, 2007), p. 239.

¹⁵⁵⁵ *Ibid*, pp. 240-241

publicity, and from an effort to persuade corporations to act to promote vulnerable populations to lawsuits in an attempt to impose the human rights regime applicable under international law on governments on multinational corporations.

What will be the reaction of a company or corporation dealing with a boycott? A possible answer seems to lie in the Luders model.¹⁵⁵⁶ According to this model, disregard is unreasonable and therefore there are two possible ways of responding: cooperate with the call for social change (and override the boycott) or oppose the call for change (and deal with a possible boycott). These two ways of responding entail two types of costs that must be recognised by the business. The first type is *disruption costs* – the costs that the business may incur due to its refusal to cooperate with the initiator and comply with his demands (such as: consumer boycott, negative media coverage, demonstration outside the business). The second type is *surrender costs* – the costs that the business may incur due to cooperation with the initiator and compliance with its requirements. These costs can hurt the business revenue, as it is required to change its behaviour. Depending on these costs, the corporation draws the balance between them – when it can choose between surrender, adaptation, resistance, or it will sway (it will react inconsistently to the demands addressed to it).¹⁵⁵⁷

Corporations' response to growing pressures and expectations is based on the movement of forceps. On the one hand, a war of attrition in attempts to establish an enforceable legal regime, which will serve as a global mechanism for controlling the social consequences arising from the activities of multinational corporations. On the other hand, adoption of the idea that corporations have a duty to demonstrate and implement social responsibility, while actively participating in shaping the meaning and scope of the very concept of responsibility. As mentioned, one of the main strategies adopted by multinational corporations in the face of protests against them was to become active players in the field organised around the concept of *corporate social responsibility*. In general, corporations tend to attribute to the concept of social responsibility a voluntary and altruistic spirit, emphasising fairness towards investors, launching charity-oriented *good citizenship* campaigns, and an attempt to adopt consents in varying degrees of detail of voluntary self-regulation.¹⁵⁵⁸ Some argue that the money in the consumer's wallet symbolises his ballot. Therefore, more corporations are involving the consumer in the manufacturing of the product, taking into account its needs and meeting those needs.¹⁵⁵⁹

18.3.3 Consumer Boycotts in the World and in Israel

The literature indicates that in the first two decades of the 21st century there has been a marked increase in the number of consumer boycotts announced.¹⁵⁶⁰ But in fact, the consumer boycott is not a new phenomenon and in the history of many peoples the consumer boycott has been used as a tool for political, social, or economic change. In this chapter I will review some of the most important consumer boycotts in the world and in Israel.

¹⁵⁵⁶ Luders, J. (2006). The economics of movement success: Business responses to civil rights mobilization. *American Journal of Sociology*, 111 (4), 963-998.

¹⁵⁵⁷ Omri Shamir, *On Accessibility and Sensitivity: Political Consumerism, Socio-Political Entrepreneurship and Social Justice in Israel*, (Social Security 92, October 2013), pp. 140-141.

¹⁵⁵⁸ Ronen Shamir, *ibid*, p. 248.

¹⁵⁵⁹ Yaniv Mano, *ibid*, p. 738.

¹⁵⁶⁰ Daniel Diermeier, *When Do Company Boycotts Work?* (Harvard Business Review, August 2012 See also: Valentin Beck, *Consumer Boycotts as Instruments for Structural Change*, (Journal of Applied Philosophy, Vol.36, No. 4 August 2019).

A. Consumer Boycotts in the World

Boston Tea Party: The background to the Boston Tea Party is the heavy taxation imposed by Britain on the inhabitants of the British colonies in America, which provoked unrest among some of the settlers and led them to declare a consumer boycott of tea made in Britain. Following the boycott, the company's tea sales dropped from about 146,000 kg to only about 236 kg, and it fell into heavy debt. The consumer boycott did not prevent three British ships with a cargo tea from arriving at Boston Harbour in December 1773. On the night of December 16, 1773, a group of Americans dressed as Native Americans threw, under the auspices of the boycott, all the cargo of tea on the docked ships into the harbour. This event is considered to this day to be a ground breaking event in American history that ultimately led to the United States Declaration of Independence.

Gandhi's Salt March: The Salt March is the name of a consumer boycott, which Mahatma Gandhi began on March 12, 1930, towards the fishing village of Dandi in India. The boycott was born after the British government restricted the local supply of basic goods (including salt), to force the people of India to purchase them from them. During the journey, which lasted over 300 km and 24 days, thousands of people joined Gandhi and eventually Gandhi and his supporters began to dry water to produce salt on their own. The march received extensive global media coverage and is considered one of the processes on the road to India's independence. In the Salt March, Gandhi aspired to the spiritual liberation of the Indians, which would begin with liberation from economic enslavement to the British.

Montgomery's Bus Boycott Case: On December 1, 1955, Rosa Parks refused to vacate her seat on the bus for a white passenger. Following her refusal, she was arrested, tried, and convicted. In response, the National Association for the Advancement of Coloured People declared a boycott of the bus company which lasted 381 days. The African American residents cooperated with the boycott, and at the same time there was an organisation of transportation of residents with vehicles. In the short term, the boycott led to significant losses for the bus company. In the long run the boycott was one of the links in the civil rights organisations' struggle that eventually led to enactment of the Civil Rights Act (1964) and the Voting Rights Act (1965).

Consumer Boycott of Russian Products: This was a consumer boycott born in Ukraine following annexation of the Crimean Peninsula by Russia in 2014. As part of the boycott, Russian products were boycotted – including gas stations, films, art, and culture shows. The boycott spread to Eastern European countries (Latvia, Lithuania, Estonia, Poland, Moldova, Georgia, the Czech Republic) and even the United States.

B. Consumer Boycotts in Israel

Since the beginning of the Jewish-Arab conflict, the Zionist institutions boycotted Arab work and Arab products. The boycott of Arab labour in Jewish localities was activated in order to favour Hebrew labour and to provide a livelihood for unemployed new immigrants. This trend was unsuccessful, due to the desire of many Jewish employers to favour Arab workers with low wage with quarrying and stonemasonry skills. The Weizmann-Faisal Agreement of 1919 also called for "tightening the joint economic action between the two peoples [...] and not to declare a public boycott of Arab labour and not to act to push Arab workers out of the Jewish factories".¹⁵⁶¹ In the 1930s, the Association of Industrial Owners initiated the encouragement of the purchase of Hebrew-made products. This campaign was

¹⁵⁶¹Eliyahu Elyashar, *Living with the Palestinians*, (Sephardic Communities Committee, 1975), p. 25.

accompanied by a standard mark, the symbol of the country's product, designed to facilitate identification of the product, its introduction into the market and its distribution.¹⁵⁶²

In the following years, and especially in recent decades, Israel has known quite a few calls to impose a consumer boycott on one company or product or another. Only a few of these calls have received the cooperation and response of the public, so only a few of the boycotts have led to the desired change. Below is an overview of the major consumers boycotts in Israel.

Consumer boycott of German-made products: the buds of a boycott of German-made products appeared as early as 1934, even before the Holocaust. The leaflets distributed in the Jewish settlement and signed by the Temporary Boycott Committee read: "Germany has been under Hitler's rule for over a year. The sworn optimist promises that the situation of the Jews in Germany would improve over time have been dashed. The economic and especially moral condition of our brethren in Germany is becoming more and more terrible day by day while our shops and stores are full of German goods to the brim. And the crowd snatches and buys and is not interested in the source of the goods and their origin".¹⁵⁶³

After the establishment of diplomatic relations with West Germany and when opposition to the reparation's agreement subsided, German products began to appear in the young State of Israel, when at that time, a boycott of German products arose, which was common and very acceptable among broad strata of Israeli residents, who saw in this act the unwritten will of the millions killed in the Holocaust. The official Israeli establishment of those years was also careful not to purchase products made in Germany. For example, in those years, Israeli ministers drove American cars and then the Swedish Volvo.¹⁵⁶⁴ The main reason for choosing the Swedish car was that "it is not German".¹⁵⁶⁵ Israeli importers had to be attentive to this boycott, and therefore were careful not to mention the German origin of the products they marketed. Thus, it was written on the products that they were international products or that they were made in Europe. Blurring the traces allows Israeli consumers to enjoy products made in Germany without feeling remorse. From the 1980s with the opening of international markets and the unification of Germany, reservations about German brands softened, and the caption *Made in Germany* became overt.¹⁵⁶⁶

National consumers' boycott: on 29/01/1973, the Histadrut initiated a national consumers' boycott, after inflation prices reached 14% and the prices of products soared. At 4:00 p.m. Histadrut activists blocked entrances to shops, encouraged customers not to enter and affixed stickers to their lapels as a sign of appreciation for their commitment to the struggle. Despite many places where customer traffic slowed, the boycott failed for several reasons: it was limited in time, its geographic scope was limited and information about it was not accessible to the general public.¹⁵⁶⁷

¹⁵⁶² ¹⁵⁶² Omri Shamir, *From the Polls to the Market – Political Consumerism in Israel*, ibid, p. 48.

¹⁵⁶³ National Library website, at the link:

[https://web.nli.org.il/sites/NLI/Hebrew/digitallibrary/pages/viewer.aspx?docid=NNL03_EDUSP4232&presentorid=NLI_EDU&searchurl=http%3A%2F%2Fweb.nli.org.il%2Fsites%2Fnlis%2Fhe%2Feducation%2Fpages%2Fresults.aspx%23%3Fquery%3Dany%2Ccontains%2C%25D7%2597%25D7%25A8%25D7%259D%2520%25D7%2592%25D7%25A8%25D7%259E%25D7%25A0%25D7%2599%25D7%2594%26institution%3DNLI%26vid%3DNLI_EDU%26loc%3Dlocal%2Cscope%3A\(NNL_EDU1\)%26sortField%3Dpopularity%26indx%3D1%26bulkSize%3D10](https://web.nli.org.il/sites/NLI/Hebrew/digitallibrary/pages/viewer.aspx?docid=NNL03_EDUSP4232&presentorid=NLI_EDU&searchurl=http%3A%2F%2Fweb.nli.org.il%2Fsites%2Fnlis%2Fhe%2Feducation%2Fpages%2Fresults.aspx%23%3Fquery%3Dany%2Ccontains%2C%25D7%2597%25D7%25A8%25D7%259D%2520%25D7%2592%25D7%25A8%25D7%259E%25D7%25A0%25D7%2599%25D7%2594%26institution%3DNLI%26vid%3DNLI_EDU%26loc%3Dlocal%2Cscope%3A(NNL_EDU1)%26sortField%3Dpopularity%26indx%3D1%26bulkSize%3D10) Accessed: 28/12/2021

¹⁵⁶⁴ Noam Wind: *Almost 70 years later: no one is interested in a boycott of vehicles made in Germany*, (mako, 08/04/2013), at the link <https://www.mako.co.il/cars-magazine/articles/Article-e7839acfa26ed31006.htm> Accessed: 27/12/2021.

¹⁵⁶⁵ Daniel Shmil: *Leaders' Service Cars: From Ben Gurion's Cadillac to Berlusconi's Maserati*, (The Marker, 06/11/2010), at: <https://www.themarker.com/dynamo/cars/1.591151> accessed:27/12/2021

¹⁵⁶⁶ Yael Elnatan: *Made in Germany / We once boycotted German products, today we adore them – and maybe there is another way*, (Davar, 12/04/2018), at the link <https://www.davar1.co.il/120560/> Accessed: 28/12/2021.

¹⁵⁶⁷ S. Cohen, *Consumers' strike against soaring prices today*, (Al HaMishmar, 29/01/1973), at the link:

Consumer Boycott on Remedia: The Remedia affair began in November 2003 with a series of deaths and illness among infants, following a lack in vitamin B₁ in a factory-based compound of baby food, made by the German company Humana which was marketed by the Israeli company Remedia. The affair, which received high media coverage, led to criminal proceedings against employees at Remedia and the Ministry of Health. At the same time, civil proceedings were also conducted against the company. All of this led consumers, the parents of children, to vote with their pockets against the company's milk substitutes – and its market shares plunged into the abyss, until it closed permanently.¹⁵⁶⁸

Consumer Boycott on Aroma: On October 19, 2004, Sahar Shefa, one of the owners of the Aroma coffee shop chain, arrived at the offices of Colmobil in Rosh HaAyin when the purpose of his visit was to obtain a service certificate for a Mercedes from the importer, which he intended to import personally, and he was asked to wait for Mali Shalev, who would handle his request. After a long wait, he angrily said the following to Shalev: “You see my skin color, I'm white and you are black [...] this white will teach you a lesson [...] you are a black spot [...] you are a black and inferior woman [...] you're stupid [...] you're zero, and I make \$800 a minute”. In respect of these statements, Shalev filed a defamation lawsuit against Shefa, and the Court ruled that Shefa must compensate her in the amount of ILS 100,000.¹⁵⁶⁹

Upon publication of the ruling, calls began to be heard throughout the Internet to boycott the network and were not satisfied with the amount of compensation that the Court ruled. Demonstrations soon took place (some at the initiative of the Mizrahi Democratic Rainbow Coalition) in front of the chain's branches, calling on customers to boycott the chain, with signs: *Aroma of racism, White Coffee – Direct Racism, One black free of racism*.¹⁵⁷⁰ The boycott calls led shareholders to hire the services of a public relations office to manage the crisis, to hold a press conference, be interviewed by the media in which they renounced Shefa's words, worked to remove him from the network and demanded ILS 20 million from him for damage to reputation.¹⁵⁷¹

A review of media reports found a contradictory reference to the impact of the boycott on the network's revenues.¹⁵⁷² Tests conducted by the newspaper Globes at the chain's various branches (Jerusalem, Haifa, Be'er Sheva, Netanya, and Tel Aviv) led it to determine that although the chain's customers were aware of the affair, they did not cooperate with the calls for a boycott, and that “Israelis are not ready for a consumer boycott”.¹⁵⁷³

Consumer Boycott on Cellular Companies: In December 2004, the great rabbis called on the entire ultra-Orthodox public not to use cellular devices available on the market because of the *impure* content

<https://www.nli.org.il/he/newspapers/ahr/1973/01/29/01/article/90/?srpos=13&e=-----he-20--1--img-txIN%7ctxTI-%d7%a9%d7%91%d7%99%d7%aa%d7%aa+%d7%a7%d7%95%d7%a0%d7%99%d7%9d-----%d7%a2%d7%91%d7%a8%d7%99%d7%aa-----1> Accessed 20/09/2022.

¹⁵⁶⁸ Shlomi Donner: *Not by Knockout, but by Victory*, (Ynet, 14/01/2005), at the link:

<https://www.ynet.co.il/articles/0,7340,L-3032211,00.html> Accessed: 05/01/2022.

¹⁵⁶⁹ Civil Case (Tel Aviv) 11138/05 Shalev Mali v. Shefa Sahar (dated 06/11/2006).

¹⁵⁷⁰ Doron Teichman: *Aroma of a Wasted Boycott*, (Ynet, 21/11/2006), at the link:

<https://www.ynet.co.il/articles/1,7340,L-3330289,00.html> Accessed: 28/12/2021.

¹⁵⁷¹ Gali Berger: *The owners of Aroma Israel will sue Saar Shefa for ILS 20 million for damaging the company's reputation* (The Marker, 16/11/2006), at the link: <https://www.themarker.com/law/1.386807> and also: Vered Sharon Rivlin and Ran Rimon: *Aroma owners sue Sahar Shefa for ILS 20 million for damage to reputation and are working legally to remove him from the network* (Globes, 16/11/2006), at the link: <https://www.globes.co.il/news/docview.aspx?did=1000153212>

Accessed: 28/12/2021.

¹⁵⁷² Ibid.

¹⁵⁷³ Orly Peleg Mizrahi: *Consumer boycott? Not in Aroma*, (Globes, 19/11/2006), at the link:

<https://www.globes.co.il/news/article.aspx?did=1000153930> Accessed: 28/12/2021.

services provided on these devices. The rabbis clarified that the boycott will remain in effect until the cellular companies begin marketing a kosher phone, which will only allow calls. For the purpose of managing contacts with the cellular companies, a Rabbinical Committee for Communications was established, whose members were authorised to check and determine which telephones are permitted for use.

The Rabbinical Committee presented companies with a detailed list of requirements as a condition for providing a kosher stamp for the phone, including blocking Internet surfing, blocking the possibility of sending or receiving SMS and e-mail messages, playing games or downloading videos, and more. The cellular companies were not happy to respond to the ultra-Orthodox ultimatum, which involved giving up huge profits generated by their content services. Finally, Mirs was the first to respond to the challenge, and in March 2005 introduced the first kosher telephone that was approved by the Rabbinical Committee. A few months later, the other companies also introduced their own kosher phones.¹⁵⁷⁴

Consumer Boycotts of El Al: In November 2006, El Al operated a flight on Saturday, following a lockout at Ben-Gurion Airport. Operation of the flight led to an ultra-Orthodox consumer boycott that lasted more than a month. In the end, company management undertook to refrain from flying on Saturdays, and it was agreed that exceptional cases in which the company would be forced to operate flights on Saturdays would be examined by a Rabbi to be appointed for the matter.¹⁵⁷⁵

In November 2018, an El Al flight from the USA took off for Israel, but instead of landing at Ben-Gurion Airport, the flight landed in Greece before Shabbat. The company initially claimed that ultra-Orthodox passengers on the plane went on a rampage, forcing the pilots to land in Greece, but following a threat of imposing an ultra-Orthodox consumer boycott, the company announced that it “did not blame the secular, religious or ultra-Orthodox public”.¹⁵⁷⁶

Consumer Boycott on Shefa Shuk Chain: Shefa Shuk was a supermarket chain with forty branches, with high kosher status and its main target audience was the ultra-Orthodox sector. At its peak, the chain reached a sales turnover of about ILS 1 billion. The ultra-Orthodox boycott of the Shefa Shuk chain was imposed in early 2008 after Alon Group, Mega’s parent company, **acquired** the AM:PM supermarket chain, which operates on Saturdays. The boycott began after the ultra-Orthodox newspaper HaModi’a published a news item stating that those who ever purchases Shefa Shuk is endangering their money because it would allow the Alon Group to continue operating AM:PM branches on Saturday. The boycott also included pashkevils and the ultra-Orthodox press’ refusal to publish Alon Group’s advertisements.

Imposing the boycott resulted in a loss of sales of hundreds of millions of shekels in a short period of time. The network’s situation deteriorated, and Mega was forced to convert most of its branches to other formats. Mega’s attempt to rebrand the chain under the name Zol BeShefa was also to no avail, sales did not rise and from forty branches only thirteen remained. The boycott lasted eight years and ended only

¹⁵⁷⁴ Omer Levy: *Cell phone with Badatz approval: The Story of the Telephone for the Ultra-Orthodox [Haredim]*, (Ynet, 06/01/2009), at the link: <https://www.ynet.co.il/articles/0,7340,L-3650344,00.html> Accessed: 30/12/2021.

¹⁵⁷⁵ *After more than a month of consumer boycott: compromise between representatives of the ultra-Orthodox public and El Al*, (Globes, 05/01/2007), at the link: <https://www.globes.co.il/news/article.aspx?did=1000169799> Accessed: 30/12/2021.

¹⁵⁷⁶ *Saturday flight: El-Al will compensate passengers with a return flight ticket to Europe*, (Calcalist, 26/11/2018), at the link: <https://www.calcalist.co.il/local/articles/0,7340,L-3750631,00.html> Accessed: 30/12/2021.

after the trustees of the Mega food chain, appointed by the Court, reached an understanding with officials in the ultra-Orthodox sector to remove it.¹⁵⁷⁷

Consumer Boycott on Electra: In June 2011, senior rabbis in the ultra-Orthodox sector declared a boycott of Electra Consumer Products, due to a partnership it had with Electra Real Estate in a hotel construction project in Jaffa, where the ultra-Orthodox claimed graves were located. The pashkevils hung in the ultra-Orthodox cities read: “We obey the great men of the generation. We do not buy Electra products, desecrators of the tombs in Jaffa”. At the peak of the boycott, company technicians who arrived at service calls in the cities of Beit Shemesh, Bnei Brak and Jerusalem were violently attacked. In one case, a company employee was lynched, and the company’s property was damaged. The boycott was lifted only after six months of lengthy negotiations between the parties, and after the rabbis accepted Electra’s position that it had no ability to influence the very existence or execution of works.¹⁵⁷⁸

The Cottage Cheese Consumer Boycott (Protest): In June 2011, a protest group was organised, via Facebook, against the price of cottage cheese. In a short time, over one hundred thousand surfers joined the group, much of it thanks to the media coverage that was given to the protest. This protest was the first virtual organisation of Israeli consumers, which was later renamed the Cottage Cheese Protest. The protest merged with a wider civil protest against food prices, prices of services, housing shortages, growing centralisation in the economy and more. Many civic organisations, such as the National Student Union, began to join the protest. The wave of demonstrations culminated on September 3 when 400,000 men and women demonstrated across the country under the slogan “The people demand social justice”, and by all estimates, was considered the largest demonstration ever held in Israel, and without a doubt – the largest demonstration around social issues.¹⁵⁷⁹

In the short term, it can be said that following the protest there has been a significant drop in the sales of cottage cheese, which has finally led dairy companies to lower its price. But about six months after the end of the protest, it was reported that food chains increased their revenue in the last quarter of 2011 by 3.5 percent.¹⁵⁸⁰ In the long run, following the protest, a number of government and public committees were set up (the Trachtenberg Committee, the Committee for Increasing Competitiveness in the Economy, the Sheshinski 2 Committee, etc.) and some of the committee’s conclusions were anchored in legislation. In addition, new social organisations arose that sought to bring about the desired change in the social sphere. The considerable success of the cottage cheese boycott that took the Israeli consumer out of its consumer indifference shows, according to Shamir, that political consumerism can also succeed in Israel among the general public, in light of a reality in which the degree of social security is declining.¹⁵⁸¹

18.3.4 Implications of the Consumer Boycott

“Citizens do not have to settle for exercising the right to vote in elections when they want to influence the character of the country – they add to that the power inherent in their pockets and use it as a tool in

¹⁵⁷⁷ Yaki Adamker: *The boycott: weapon of the ultra-Orthodox that ensures obedience to the rabbis’ rules*, (Walla, 11/10/2016), at the link: <https://news.walla.co.il/item/3004524> Accessed: 30/12/2021.

¹⁵⁷⁸ Ilanit Hayut: *The ultra-Orthodox lifted the boycott of Electra Consumer Products*, (Globes, 26/1/2011), at the link: <https://www.globes.co.il/news/article.aspx?did=1000618469> Accessed: 30/12/2021.

¹⁵⁷⁹ Uri Ram and Danny Filk, *Daphne Leef’s July 14th: The Rise and Fall of Social Century*, (Theory and Criticism 41, 2013), pp. 18-20, 24.

¹⁵⁸⁰ David Levin: *The Cottage Cheese Boycott, A Meeting Between Media Logic and Network Logic*, (Keshet 43, 2012), p. 28.

¹⁵⁸¹ Omri Shamir: *On Accessibility and Sensitivity: Political Consumerism, Social-Political Entrepreneurship and Social Justice in Israel*, *ibid*, p.150.

various political struggles”.¹⁵⁸² This saying seems to explain well how the process of consumption has turned in recent years from a private process to a social action.

The social action, which is the consumer boycott, is essentially considered a collective activity, and it depends on quantitative cooperation. If consumers act as a group, they will most likely be able to achieve more effective results. Moreover, people influence each other. When a group of people works together, information can be disseminated more efficiently among group members and create the same ideological basis. Today, consumers are highly aware of how their consumer decisions affect the environment, to the point that some see it as the formation of a new kind of consumer – the *ethical consumer*. Corporations, which have traditionally been in no hurry to prioritise ethics, have also begun to realise that this is more than a passing fad, especially when they come to know that consumers have learned to use the powerful weapon in their hand – the consumer boycott. From the point of view of market efficiency, it seems that use of a boycott creates, even if only at times, a balance or equality point because corporations are forced to be more attentive to consumer feelings. Thus, instead of dictating the exclusive consumption patterns, the boycott sends a message to corporations that it is better for them economically to have a dialogue with the value preferences and economic expectations of consumers.¹⁵⁸³

The literature sees consumers as increasingly aware of their role as citizens in society, especially through social networks and thus, the communication process, which often seemed one-way – from companies to consumer, is today described as a two-way process, and includes ethical consumerism.¹⁵⁸⁴

Ethical consumerism encourages the consumer to give some thought before paying for a particular product or service. The current global trend is to encourage consumers to attach meaning not only to the use of the product, but also to the accompanying process from its inception. This fact does not go unnoticed by corporations, and they try to align with consumer entities and struggles, in order to avoid a consumer clash and thus pave the way for the hearts (or rather, the pockets) of consumers. Corporations have begun branding their merchandise by sending a message to the consumer that the product or service they are purchasing are not just functional tools for fulfilling a focused need, but a way of life, personal experience, realisation of fantasy and a way to improve the quality of life. In the eyes of the ethical consumer, the benefit, enjoyment, and quality achieved from the product no longer depend solely on the final product, but on the chain of actions that led to the product. If this chain is morally damaged and evokes a scent of exploitation and harm, then the consumer will want to redefine its identity detached from the product and the corporation behind it and improve its personal image through the products of a corporation that takes these factors into account.¹⁵⁸⁵

Ethical consumerism is also recognised in the literature as political consumerism, or conscious consumerism and can be seen as an unofficial or institutional pattern of political participation and as a way of expressing political protest. Omri Shamir’s main argument, in his book *From the Polls to the Market – Political Consumerism in Israel*, is that political consumption in Israel is not a negligible or transient phenomenon but rather the opposite: it is a phenomenon that is growing and intensifying recently due to three main structural processes. **The first**, a poor political culture that is aggravated in light of the crisis of democracy and the failures of the administration and reveals problems in the state’s

¹⁵⁸² Renan Netzer: *Every pocket is crucial: Consumerism as a means of expressing a political position*, (Globes, 11/03/2017), at the link: <https://www.globes.co.il/news/article.aspx?did=1001180026> Accessed: 06/01/2022.

¹⁵⁸³ Yaniv Mani, *ibid*, pp. 729, 731, 749.

¹⁵⁸⁴ Breno de Paula Andrade Cruz, *Social Boycott*, (Review of Business Management., São Paulo, Vol. 19, No. 63, p. 5-29, Jan./Mar. 2017), p.6.

¹⁵⁸⁵ Yaniv Mano, *ibid*, pp. 730, 740-741.

ability to conduct consistent and appropriate public policy on various issues. **Second**, expansion of the influence of the processes of globalisation and liberalisation and, as a result, an increase in the power of economic actors in general and in the political arena in particular. **Third**, strengthening of post-materialist values that emphasise concern for society and the environment. Under these conditions, new social problems arise that require a new solution, and at the same time, entrepreneurs are emerging who express public dissatisfaction with the way the state treats these problems and demand redress. Entrepreneurs' choice of consumerism as a channel of political action stems mainly from low self-esteem of the effectiveness of formal channels of action, and the desire to bypass it and turn directly to the market.¹⁵⁸⁶

The consumer voting power holds within it the idea that consumers who purchase products relate, inter alia, to their moral aspect. This idea makes it possible to distinguish between the political consumer and the non-political consumer. While the choice of the former is based on and reflects a variety of considerations including moral, social and economic attitudes and values and principles, for the non-political consumer, consumerism is a fundamentally detached experience: a means of satisfying personal interests – like need, taste or cost-benefit and no more.¹⁵⁸⁷

18.3.5 Success and Failure Factors of a Consumer Boycott

From a review of the consumer boycotts discussed so far in this chapter, we learn that a consumer boycott can cause a variety of direct and indirect damages to the employer – from a decrease in his income, a negative image of him, the company, or its products and even liquidation of his business. At the same time, not every consumer boycott ends successfully, and Israeli society has known many calls for consumer boycotts, so much so that experts from various fields involved in the Israeli consumer world have for many years shown great scepticism regarding the willingness of the Israeli consumer to mobilise for consumer struggles and to use the power inherent in their pocket to bring about social and political change. The prevailing opinion among them was that the general public is incapable of using its consumer power.

Aviva Geva explains that most consumers oppose the exploitation of cheap labour of the defenceless, but they do not see themselves personally responsible for fixing the world and they do not believe that these issues relate to their buying decisions. According to the perception of the average consumer, the law authorities, governments, corporations, and the media are responsible for the proper functioning of the market, and not he himself. The socio-ethical consideration is not at the forefront of the average consumer's mind, he is preceded by personal considerations such as price, quality, and familiarity with the brand. Ethical issues seem to become important to the consumer when they have a direct bearing on his personal well-being. If the consumer feels that he has been personally harmed by the unethical conduct of a business company, he will take protest actions. A consumer boycott is a doomsday weapon. Intentions to protest always exist, but the gap between intentions and execution is large.¹⁵⁸⁸ Contrary to this claim, Omri Shamir states that we are exposed to the buds of change when it comes to adopting consumer power as a political tool. As a basis for this claim, Shamir presents the campaigns of the Israeli Association against Animal Experiments that boycotted the products of companies conducting such experiments; The boycott announced in 1997 by Gush Shalom Organisation on the products of factories manufacturing in the West Bank, which led to a wave of boycotts by countries and organisations that

¹⁵⁸⁶ Omri Shamir: *From the Polls to the Market – Political Consumerism in Israel*, ibid, pp. 9-11, 39.

¹⁵⁸⁷ Ibid, p. 43.

¹⁵⁸⁸ Aviva Geva: *Consumer Behaviour – The Consumer in His Environment*, ibid, pp. 288-289.

boycott such products; And the tourism boycott against Turkey in 2010 which led to a sharp decline in the number of Israeli tourists visiting it.¹⁵⁸⁹

What, then, are the reasons for success of a consumer boycott and the factors that can prevent that boycott from succeeding? Various researchers have addressed to the question of what causes success of a consumer boycott. There seems to be a consensus in the literature that a number of variables are necessary for success of a boycott: the price of participation in the boycott is, for the most part, low, the issue of the boycott is clear, and the boycott receives extensive and sympathetic media coverage.¹⁵⁹⁰

The price of participating in the boycott should be low. Participation in a consumer boycott involves some price on the part of the consumer. This price can be economic (which is reflected in a higher payment for a product), psychological (such as sacrifice or waiver of a product) or a price paid in personal time and leisure values (when the consumer is required to look for an available alternative product). Thus, it can be assumed that a consumer boycott will be more successful when the banned product has substitutes among its competitors. If it is a unique product, which has no alternatives or the cost to the consumer is too high for his taste, it will be difficult to succeed in maintaining a consumer boycott over time. The same is true of the monopolistic service provided by the state.

The subject of the boycott must be clear and simple, concise, and understandable. In the Remedia case, the message sent to consumers was *life-threatening* for toddlers, and the children's parents did not take unnecessary risks. In the cottage cheese case, the message was that the simple, basic, and so Israeli consumer product – made it possible to connect it to wider populations. Focusing on one product or one manufacturer will also make it easier for consumers to identify and distinguish it from others,¹⁵⁹¹ thus contributing to the simplification of the boycott for them.

Extensive and sympathetic media coverage. According to Levin, protesters can mobilise support through the web, but the shift from support to action is in the hands of the veteran media, which can motivate public opinion¹⁵⁹² by flooding consumer issues and controlling the public agenda by designing or formulating an appropriate consumer consciousness. At the same time, it can be assumed that a high number of boycotts that compete for the consumer's attention will be tantamount to *biting off more than one can chew*, since the consumer public cannot mobilise repeatedly for consumer boycotts.

Additional variables can also be added to the list of these variables:

1. **Backup and support from public bodies.** It can be assumed that receiving backing and support from public bodies such as leaders, celebrities, politicians, rabbis, etc. will encourage consumers to join the boycott.
2. **Participation of the individual's reference group in the boycott.** If the reference group to which the individual compares himself participates in a boycott, his tendency will be to act like them, since he will act in accordance with the norms expected of the members of this group.¹⁵⁹³ A similar argument was made by Klein et. al., who stated that joining a consumer boycott is a way to

¹⁵⁸⁹ Omri Shamir: *On Accessibility and Sensitivity: Political Consumerism, Social-Political Entrepreneurship and Social Justice in Israel*, *ibid*, p.137.

¹⁵⁹⁰ Daniel Diermeier, *When Do Company Boycotts Work?* (Harvard Business Review, August 2012).

¹⁵⁹¹ Omri Shamir: *From the Polls to the Market – Political Consumerism in Israel*, *ibid*, p. 137.

¹⁵⁹² David Levin: *The Cottage Cheese Boycott, A Meeting Between Media Logic and Network Logic*, (Keshet 43, Summer 2012), p. 27. See also: Valentin Beck, *Consumer Boycotts as Instruments for Structural Change*, (Journal of Applied Philosophy, Vol. 36, No. 4, August 2019), p.545

¹⁵⁹³ Yaniv Mano, *ibid*, p. 752.

identify with fashionable attitudes and important moral values – often at a minimal cost and thus enjoy strengthening the sense of self-worth.¹⁵⁹⁴ The consumer does not always find out the details of the boycott for sure, but cooperates with the boycott out of social pressure.¹⁵⁹⁵ Thus for example, when the religious leaders of the ultra-Orthodox sector impose a boycott, they impose an *edict* or a *mitzvah* with religious and rooted meanings, as I have shown, that the ultra-Orthodox individual is expected to keep.

3. **Ideological commitment.** Boycott participants must be imbued with passion and commitment to the issue. Consumers around the world are becoming increasingly aware of ideological and ethical aspects. Examples include – vegan and organic food, freedom eggs, eco-friendly products, products that have not been tested on animals or products that have been manufactured while preserving the rights of breeders or workers.¹⁵⁹⁶ In the various cases reviewed in this chapter, I have shown how the ultra-Orthodox sector operates as a collective with a principled interest, driven by halakhic-ideological rather than financial aspects, and due to its unique characteristics it has even been successful time and time again. Such were the boycotts imposed on El Al and Shefa Shuk (the reason was the desecration of Shabbat), the boycott on Electra (the reason was desecration of graves) and the boycott on the cellular networks (the reason was exposure to abomination).

On the other hand, the question arises – what are the factors that prevent a consumer boycott from succeeding?

1. **Predictive efficiency.** It is not at all guaranteed that the boycott will lead to the desired result and therefore the sacrifice of the consumer may be in vain. On the same weight – a consumer will be more willing to take part in a boycott if he feels that his contribution can decide whether the boycott will succeed or fail.¹⁵⁹⁷
2. **The parasite / hitchhiker problem.** Many consumers refrain from taking part in group activities and leave the organisation and the creation of pressure to other consumers so that they enjoy the fruits of the boycott without paying the price of participating in it.
3. **Difficulty in coordinating interests.** The larger the group that is getting organised, the more difficult it is to coordinate the different interests of its members.¹⁵⁹⁸
4. **Incompatibility between the damage and joining the boycott.** The damage incurred to the individual consumer is usually small and does not justify investing resources.¹⁵⁹⁹
5. **Lack of awareness.** Many consumers are unaware of their rights, and the lack of awareness undermines the chances that consumers will unite and fight against one injustice or another.

¹⁵⁹⁴ Klein, J. g., Smith, N.C. & John, A. (2002) *Why we boycott: Consumer motivations for boycott participation*. Journal of Marketing, 68: 3 (July), 92 -109.

¹⁵⁹⁵ Ariel Bar-Eli, *Consumer Boycott*, (Avnei Mishpat 13, 2011), pages 187, 191.

¹⁵⁹⁶ Shmulik Bachar, *Consumer boycott: there is such a beast*, (Israel Consumer Council, June 2008), at the link: https://www.consumers.org.il/default.asp?catid=%7B9503CD9E-A453-45B6-9E4F-468F0B45F732%7D&details_type=1&itemid=%7B2909BD52-0B20-49DE-9EFD-416175965A06%7D Accessed: 04/01/2022.

¹⁵⁹⁷ Yaniv Mano, *ibid*, pp. 752-754

¹⁵⁹⁸ Shmulik Bachar: *Internet surfers have united*, (The marker, 21/03/2007), at the link:

<https://www.themarker.com/technation/1.438191> Accessed: 04/01/2022.

¹⁵⁹⁹ *Ibid*.

6. **Difficulty changing habits.** Companies that have been selling their products for many years have acquired a devout consumer audience that will not be in a hurry to abandon or replace the familiar product.

Regarding Israeli society, there are other factors that can also make it difficult for a consumer boycott to succeed:

7. **Fatigue of Israeli society.** Israeli society is characterised as a particularly *recruited* society in the field of security and in some years, it has even perceived itself as a society fighting for its survival, which pushes civic and consumer issues into the corner and does not easily allow for the growth of a favorable social and economic climate for consumer boycott. This means that even in periods of *calm* in terms of security where security incidents do not make headlines, the public may feel tired and not enlist in another struggle that does not threaten its life.
8. **Israeli society – a divided society.** The success of a consumer boycott characterises a society with a high level of social capital, i.e., of trust and mutual guarantee that play the role of the mediator and the unifier between groups and individuals, thus enabling effective cooperation in promoting a joint effort such as consumer struggle. Israeli society, on the other hand, is characterised as a divided society and the level of social capital in it is among the lowest in the Western world; the exception is the ultra-Orthodox society.¹⁶⁰⁰
9. **Absence of change in values.** Although the consumer culture has placed Israel on a par with the developed countries in the world, it has not been accompanied by extensive value changes concerning the recognition of human, civil, animal, and environmental rights. Instead, the price of the product remains the main consideration of the Israeli consumer.

18.4 Consumer Boycott as an Alternative Means of Pressure to Strike

The literature explains a consumer boycott as a decision to refrain from buying a product when the society in which the consumer lives preaches values, concepts or beliefs that the consumer seeks to share, while at the same time it is seeking not to purchase goods or services from a corporation whose reputation is of a corporation that does not identify or adopt those values or the same beliefs shared by society and consumers. The literature has given its opinion to a situation in which a boycott of a third party (other than the employer) and related to a business relationship with the employer is taken by a trade union, in order to put pressure on the employer to improve the employment conditions of the workers. Such a boycott is called a *Secondary Boycott* and according to American law, such a boycott constitutes improper practice.¹⁶⁰¹ Nor has the literature ignored a *work boycott*, a boycott that occurs when the consumer stops buying from a corporation, whose working conditions are perceived by him as semi-slavery or as violating human rights.¹⁶⁰² In this chapter, I will seek to examine a situation in which consumers boycott a corporation, not because of slavery or human rights violations, but as a substitute for striking workers, struggling for their rights, improving their wages and/or working conditions.

It seems that the review of the various cases (below) involving consumer boycotts as an alternative or complementary means of pressure to strike, shows that the purpose of the consumer boycott was to put

¹⁶⁰⁰ Omri Shamir: *From the Polls to the Market – Political Consumerism in Israel*, *ibid*, p. 179.

¹⁶⁰¹ Irving Kovarsky, *A Social and Legal Analysis of the Secondary Boycott*, 35 Or. L. Rev. 11, 223 (1956); also see: Barbara J. Anderson, *Secondary Boycotts and the First Amendment*, 51 U. Chi. L. Rev. 811 (1984).

¹⁶⁰² Breno de Paula Andrade Cruz, *Social Boycott*, (Review of Business Management., São Paulo, Vol. 19, No. 63, p. 5-29, Jan./Mar. 2017), p.7, 9.

pressure on the employer, assuming it would cause him severe economic harm, forcing him to accept the boycotters' demands. One current example of this is the call for a consumer boycott of the retail giant, Amazon in 11/2021, just before Black Friday. The campaign was led by the Make Amazon Pay Coalition of seventy organisations (among them Greenpeace, Oxfam and Amazon Workers International), with the aim of getting Amazon to raise wages and extend paid sick leave given to its employees, to compel it to give access to trade unions at its work sites and reduce its carbon footprint by 2030.¹⁶⁰³

The use of a consumer boycott as an alternative means of pressure to strike is a tactic in workers' struggles, which has not taken root in Israel so far. Admittedly, there is documentation of consumer boycott as a means of pressure already during the British Mandate (in a labour dispute that broke out in the Frumin biscuit factory in Jerusalem in 1932,¹⁶⁰⁴ in which apart from the employer, the Histadrut and the Revisionist Zionist Alliance [Hatzohar] and Beitar workers' union were involved. At the peak of the conflict, the Histadrut called on consumers to boycott the factory's products, and Hatzohar and Beitar issued a counter-call to buy the factory's products). But since the struggle at the Frumin factory, this tactic has hardly been tried in the struggles of workers in Israel, and the attention paid to it in the literature is minimal. This fact raises the question – How will the Labour Court treat the consumer boycott call by the employees towards their employer? A partial answer to this question can be found in the **Hot case**. In this case, Hot employees tried to join the Histadrut in late 2011. The company's management began to try and persuade in various ways and while exerting pressure on the employees, not to join the Histadrut, or to cancel their membership in it. The Regional Labour Court ruled that the employer's statement regarding getting organised in the workplace, in the circumstances of initial organisation, prior to the establishment of a representative organisation, establishes a presumption of prohibited influence and unfair pressure on the worker regarding getting organised, and therefore obliges Hot to compensate the Histadrut for violating the freedom of association.

I would like to address several actions taken by Histadrut activists in this case, which are relevant to our discussion:

1. In November 2011, an event was launched on Facebook under the headline "Hot management is trying to break a workers' union, I am disconnecting". The event was initiated by Doron Gesheidet, who is not a Histadrut employee, but is active in the Dror Israel movement (a movement related to HaNoar HaOved VeHaLomed Youth Movement, which operates within the Histadrut). Representatives of the Histadrut shared the event through their Facebook pages, marked with *Like* and referred to it.
2. On November 28, 2011, activists arrived at Hot's points of sale, located in malls. Activists handed out information sheets about the attempt to organise at Hot and called on passers-by to disengage from Hot so that it would recognise the union. In other words, they called on mall visitors to boycott Hot. A similar action took place on 12/12/2011 when Histadrut representatives organised another protest action near the Festigal show venue.
3. In addition, on November 17, 2011, a letter was sent to Hot CEO from Miko Tzarfati, Chairman of the Electric Company workers' committee united in the Histadrut. In the letter Tzarfati expressed his support of the organisation move at Hot, his reservations about Hot's conduct

¹⁶⁰³ From the website: Make Amazon Pay: <https://makeamazonpay.com>

and from: Ethical consumer: <https://www.ethicalconsumer.org/ethicalcampaigns/boycott-amazon>

¹⁶⁰⁴ On the labour dispute at the Frumin plant, see Chapter 13.

towards the move and warned that if Hot did not change its ways, IEC employees would consider continuation of their cooperation with it.

In retaliation, Hot filed a lawsuit against the Histadrut on the ground of breach of contract.¹⁶⁰⁵

The court made the following rulings.¹⁶⁰⁶ **First**, the event on Facebook was opened by a social activist and this does not prove that the event was opened on the initiative of the Histadrut or under its direction. The fact that the members of the action committee and the representatives of the Histadrut *Liked* the call, does not constitute an improper action and certainly does not justify charging them to pay any compensation.¹⁶⁰⁷ **Second**, and regarding the very actions to boycott Hot in malls and near the Festigal, the court ruled that the call for consumer boycott on a corporation to protest its conduct, is an accepted means of pressure that has also gained momentum in recent years. However, “parties to a labour contract are subject to an increased duty of trust. Encouraging an act that may cause harm to the employer’s business, by a worker, constitutes a breach of fiduciary duty, which is a basic condition inherent in any employment contract. A call by Hot employees to disconnect from Hot could have caused damage to the company”.¹⁶⁰⁸ Nevertheless, the court rejected Hot’s claim for compensation, while Hot did not present any evidence of the damages it allegedly suffered (such as data on the number of customers who left the company with the Histadrut’s encouragement), and since no financial damage was proven, no compensation could be awarded for breach of contract.¹⁶⁰⁹ **Third**, the court held that it had not been proved that the letter was issued by Mr. Tzarfati at the request of the Histadrut or under its influence. The implicit threat in the letter regarding disengagement of IEC employees from Hot was not realised, and therefore this letter did not lead to an actual *breach of contract*. The court also noted that it does not consider it “inappropriate to recruit a strong workers’ committee to support an initial unionisation”.¹⁶¹⁰

In this case, although the court rejected the claim for compensation for the calls for boycott of the employer, it expressed its opinion that on the one hand, a call for a boycott is an “acceptable means of pressure”. On the other hand, it considered it inappropriate that as part of getting organised there was a call by union activists to boycott the employer and that this action actually cuts off the branch on which the workers who seek to get organised are sitting.

Is there in the court’s rulings a precedent for other future cases? It seems to me that the answer to this is negative. I reach this conclusion from the arguments of the court in the case. **First**, the court cleared the Histadrut (although people close to it opened the event on Facebook calling for a boycott of Hot) and demanded a high standard of proof linking the event to the union. Even when it was proven before the court that union activists and Hot employees shared the event and clicked the Like button, the court did not change its position. **Second**, the court eagerly demanded clear evidence of the pecuniary damages caused to it as a result of the consumer boycott against it. Hence, an employer who seeks to sue for pecuniary damages caused to it due to a consumer boycott will have to prove the consumers’ reasons for cancelling the contract with it and link these reasons to a boycott against it. Then these arguments will be examined under strict legal glasses (which may even require the accompaniment of the employer’s claim in affidavits from the company’s customers), which will make the claim impossible to prove. **Third**, the

¹⁶⁰⁵ Clause 62A of the Torts Ordinance.

¹⁶⁰⁶ Collective Dispute (Tel Aviv) 15391-12-11 The New Histadrut v. Hot Telecom Limited Partnership (hereinafter: The Ruling).

¹⁶⁰⁷ Clause 127 of the Ruling.

¹⁶⁰⁸ Clause 128 of the Ruling.

¹⁶⁰⁹ Clause 132 of the Ruling.

¹⁶¹⁰ Clause 131 of the Ruling.

boycott can be temporary. Upon terminating the boycott, the company's customers will be able to renew their engagement with the employer. **Fourth**, in the age of social networks, the ability to hide in cyberspace under the guise of anonymity, fake profiles, messages that are deleted after reading them – makes the ability to prove wrongdoing by a breach of contract impossible. **Fifth**, Chairman of the Labour Party, MK Shelly Yachimovich,¹⁶¹¹ who, as we know, enjoys immunity from prosecution, also joined the calls to boycott Hot. It is clear that a call for a boycott coming from the direction of a political leader shuffles the cards of the employer's claim seeking compensation for his damages.

As stated, the Hot case is one of the few cases in which a workers' struggle in Israel was accompanied by a consumer boycott. Thus, I will review, below, two cases in which a consumer boycott tactic has been tried around the world. Following this review, I will assess the consumer boycott as an alternative and practical means of pressure to strike through an Israeli test case review.

18.4.1 Nike

A. Background

In June 1996, Life magazine published an article about Pakistani children stitching Nike soccer balls.¹⁶¹² Publication of the article turned the spotlight on Nike's deplorable working conditions in its factories outside the USA, led to a negative public outcry and eventually led to the world's first consumer boycott against a multinational company. From that time on, information also began to be published about difficult working conditions and low wages for workers in the factories that Nike operated across the world. In 1997, it was revealed that workers at a Nike factory in Vietnam were exposed to toxic fumes up to 177 times the permitted standard.¹⁶¹³ In Indonesia, it was found that the production costs of a pair of shoes sold in the West for several hundred dollars amounted to a few dollars. At that time, the annual payment to the basketball star who led the advertisement for Nike shoes, Michael Jordan, reached \$ 20 million – more than the total cost of wages in all five Indonesian factories that produced the shoes.

B. Consumer Boycott Against Nike

Nike suffered from public criticism due to child exploitation, harsh working conditions and low wages in which workers were employed in sweatshops. The effective consumer boycott conducted against it caused it significant sales losses¹⁶¹⁴ and forced it to consider the condemning public's opinion and incorporate social responsibility into its business strategy.¹⁶¹⁵ The turnaround occurred in May 1998 when the company's CEO, Phil Knight, delivered a ground breaking speech in which he acknowledged the image problem created for Nike following the consumer boycott against it:

“The Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse. I truly believe the American consumer doesn't want to buy products made under abusive conditions”.¹⁶¹⁶

¹⁶¹¹ Roi Shoshan: *Hey, this is Shelly: The chairman of the Labour Party calls for a boycott of consumers on Hot*, (People and Computers, 09/07/2013), at the link: <https://www.pc.co.il/thenewcom/123713/> Accessed: 28/01/2022.

¹⁶¹² Schanberg S.H. (1996) *On the playgrounds of America, Every Kid's Goal is to Score: In Pakistan, where children stitch soccer balls for Six Cents an hour, the goals are to Survive*, Life Magazine, pp. 38-48.

¹⁶¹³ Burhan Wazir: *Nike accused of tolerating sweatshops*, (The Guardian,20/05/2001), <https://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver>

¹⁶¹⁴ Nike product sales fell nearly 8 percent in 1999, and Nike shares fell 15 percent.

¹⁶¹⁵ Aviva Geva, *Morality and Business: Parallels Meet*, ibid., p. 103.

¹⁶¹⁶ Max Nissen, *How Nike Solved Its Sweatshop Problem*, (Insider, 10/05/2013) <https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>

C. Results and Evaluation of the Consumer Boycott

In 1999 Nike founded the Fair Labour Association, a non-profit association that combines corporations, human rights representatives, and workers to promote independent monitoring and a code of conduct desirable for Nike and other corporations and encouraged other corporations to join the association. In following years, it also joined the Better Work Programme, a joint project of the International Labour Organisation (ILO) and the International Finance Corporation (IFC), designed to monitor workers' conditions.¹⁶¹⁷

Between 2002 and 2004, Nike conducted about 600 audits (internal and external, by surprise and in advance) at its factories, and in 2005 it became the first corporation in the world to publish a social responsibility report. The first reports were prepared by the Global Alliance (an external-objective group which was established thanks to cooperation between the World Bank, Nike, Gap and others) which was supposed to ensure reliability of the reports, revealed the supply chain and production of those companies;¹⁶¹⁸ showed that abusive employment conditions in factories outside the United States include sexual, physical and verbal harassment, denial of access to toilets and drinking water, and forcing workers to work overtime.

Following Nike's Social Responsibility Report, the most profitable companies in the world¹⁶¹⁹ (including Gap, H&M, and Victoria's Secret) began publishing annual Social Responsibility Reports, in which they began to report on working conditions in their overseas factories.

Following publication of the reports pointing to deplorable working conditions in factories outside the US, Nike and other corporations announced a severance of ties with factories with inadequate working conditions¹⁶²⁰ and were generally forced to align with the calls to consider basic human considerations in their business.

18.4.2 Wendy's

A. Background

Wendy's is one of the fast-food giants, employing an estimated 14,000 workers worldwide.¹⁶²¹ The background to the consumer boycott against it was its refusal to join the Fair Food Programme (FFP).¹⁶²² This plan is a legal agreement between the Tomato Growers in Florida and the Coalition of Immokalee¹⁶²³ Workers.¹⁶²⁴ The programme promises Florida tomato workers in the US improved wages, safety and health standards, a code of conduct that includes zero tolerance policies for sexual, verbal or physical abuse and forced labour and options for monitoring complaints or violations of these norms in

¹⁶¹⁷ Ibid.

¹⁶¹⁸ See, for example, interactive map of the production chain on the Nike website <https://purpose.nike.com/nike-statement-on-forced-labor>

¹⁶¹⁹ According to a survey conducted in 2004 by Account Ability. See: News agencies: *Following the audit: Nike reveals information about its factories*, (Ynet, 13/04/2005), at the link: <https://www.ynet.co.il/articles/1,7340,L-3072089> Accessed: 24/01/2022.

¹⁶²⁰ For example, Gap severed its business ties with 136 factories in 2003, and in 2004 rejected 15% of the new factories that sought to manufacture its clothing. See: News agencies: *Gap: There is an improvement in working conditions in factories overseas*, (Ynet, 14/07/2005), at the link: <https://www.ynet.co.il/articles/0,7340,L-3112709,00.html#n> Accessed: 24/01/2022.

¹⁶²¹ As of 2020, see:

<https://www.statista.com/statistics/823995/number-of-employees-of-wendy-s-by-type/> Accessed: 25/01/2022.

¹⁶²² Hereinafter: The Programme.

¹⁶²³ Immokalee – An unincorporated community in Collier County, Florida, United States.

¹⁶²⁴ Hereinafter: CIW

the supply chain.¹⁶²⁵ The programme was joined by large companies (McDonald's, Burger King, Subway, Aramark, Walmart, Taco Bell, Chipotle, Pizza Hut, Trader Joe's, Stop & Shop, Whole Foods, KFC), which also pledged to pay an extra cent per kilo tomatoes and buy only from growers who meet the plan.

Wendy's rationalised their opposition to joining the programme stating that they do not believe that joining a fair food programme was the only way to act responsibly, and that the company prides itself on long-term relationships with industry-leading vendors who share a commitment to quality, integrity, and ethics. In addition, they claimed that Wendy's has a Code of Conduct for Vendors that includes human rights and practices and that the company conducts quality assurance audits for all vendors. Except for the Code of Conduct, the Company declined to disclose additional information or details about the practices and audits it employs to ensure human rights.¹⁶²⁶

B. Consumer Boycott Against Wendy's

With Wendy's refusal to join the programme, a consumer boycott was launched against it in January 2013, initiated by the CIW, the Alliance for Fair Food, and the Student/Farmworker Alliance. The boycott included demonstrations across the US, protests at colleges and universities (in which students from campus administrations demanded that Wendy's be barred from operating in their area), a virtual campaign on social media, a requirement for shareholders to share information on securing human rights in the supply chain and more.¹⁶²⁷

Following the consumer boycott, Wendy's announced the move to purchase its tomatoes from hydroponic greenhouses operating in the US and Canada. According to boycott organisers, Wendy's issued misleading statements on the subject including the claim that greenhouses have built-in benefits of safe and original working conditions, and they backed up their claims with workers' testimonies, indicating that greenhouses are affected by workers' rights issues, and that Wendy's made the change just to improve its public image as a brand that uses organic and sustainable produce.¹⁶²⁸

C. Results and Evaluation of the Consumer Boycott

The media reported that since the outbreak of the boycott Wendy's has not operated any new branches, and in November 2020 they issued a public statement to acquire 400 of their branches in the context of bankruptcy.¹⁶²⁹ At the same time, it seems to me that at this stage it is too early to judge the success of the consumer boycott on Wendy's.

18.5 Evaluating a Consumer Boycott as an Alternative and Practical Pressure Tool for a Strike

Based on what has been said so far, I will now seek to assess the consumer boycott as a tool for alternative and practical pressure to strike, by presenting an Israeli test case – the **Coffee2Go** case.

A. Background

¹⁶²⁵ From Wikipedia: https://en.wikipedia.org/wiki/Fair_Food_Program Accessed: 25/01/2022.

¹⁶²⁶ Thaddeus Mast: *Use our Voices: Protesters challenge Wendy's to protect farmworkers*, (Naples Daily News, 11/04/2021), <https://www.naplesnews.com/story/news/local/2021/04/11/protestors-challenge-wendys-protect-farmworkers/7181271002/>

¹⁶²⁷ From: *Boycott Wendy's*, <http://www.boycott-wendys.org/>

¹⁶²⁸ Carmen Russo: *Wendy's Exposes Itself as The Ultimate Performative Ally*, (The Interlude, 23/09/2020), <https://medium.com/the-interlude/wendys-exposes-itself-as-the-ultimate-performative-ally-4f4ed178ffef>

¹⁶²⁹ Ron Ruggless, *Wendy's makes bid for about 400 units in NPC bankruptcy case*, (The Nation's Restaurant News, 19/11/2020), <https://www.nrn.com/quick-service/wendy-s-makes-bid-about-400-units-npc-bankruptcy-case>

The Elite Coffee2Go café was located in the main entrance plaza to Tel Aviv University. It was also the chain's largest branch and in 2007 had 45 employees.

In July 2007, a group of workers (including waiters, cooks, and bartenders) organised, contacted the Tel Aviv University Workers' Rights Clinic¹⁶³⁰ and complained that the café's workers were not paid for vacation, sick leave, convalescence and overtime. The representation also claimed that the café's management (which is 51% owned by the Strauss company) illegally imposes fines on employees for various deficiencies or malfunctions. But the issue burning in their bones was how the tips that the café's customers used to leave for workers were distributed. The representation claimed that management helped itself to the tips in several forms: some it kept for itself, with another part it filled in gaps in its till, some it distributed to workers in a way that benefited those *close* to management, and some was used to pay for "extra work on days off".¹⁶³¹

The Clinic, with the help of Power to the Workers organisation, approached the café's management and asked to open collective negotiations. The request was answered in the affirmative and at the end of several meetings, many demands of the representation for all the workers were met – regarding the protective rights, but their demands regarding tips were rejected. In October 2007, the representation declared a labour dispute, followed by a strike.

B. The Strike at Coffee2Go and the Consumer Boycott Against it

The strike lasted 13 days (from 23/10/2007 to 05/11/2007), and 36 workers took part. The café's management prepared for the strike in advance and recruited new waiters to break it. They also hired security guards who prevented the striking workers from entering the café, imposed surveillance on the strikers and threatened others.

To overcome the thwarted strike, the strikers began arriving at the café every day, standing with signs and persuading the customers – students, faculty staff and local residents, to identify with their struggle and boycott the café. During the picketing, flyers were distributed, posters were hung, and coffee and its products were sold independently and at a symbolic price in support of the struggle. The boycott received a great deal of media attention and cooperation of factors in the local community, and of students and academic staff organisations at Tel Aviv University, who in a message to all their members recommended a consumer boycott of the café.

The filing of a defamation lawsuit, amounting to half a million shekels, by the café's management against the leaders of the struggle, only exacerbated the consumer boycott: supporters were asked to email all their contacts; emails were sent by customers who supported the waiters' struggle, including notices of boycotting the café; a *guerrilla culture* event was organised that included public singing and music in the presence of poets and cultural figures; and a *solidarity picnic* with mats, refreshments, in front of the café. Gradually, social and political activists also began joining the calls for a boycott of the café (Students for Social Justice, HaNoar HaOved VeHaLomed Youth Movement, the Young Labour Party, the Socialist Struggle Movement, Bizchut Organisation – The Center for Human Rights of Persons with Disabilities), and spontaneous picketing in front of other branches of the network across the country. And so, the bustling café emptied of its occupants and remained more desolate than ever.

¹⁶³⁰ Hereinafter: The Clinic.

¹⁶³¹ Merav David: *They do not sit idly by: the waiters are also on strike*, (Ma'ariv, 24/10/2007), at the link: <https://www.makorrishon.co.il/nrg/online/1/ART1/650/279.html> Accessed: 26/01/2022.

C. Results

After 13 days of strike, the following agreements were reached between the parties:

- It was decided that 88% of the tip money would be transferred to the workers, and not be distributed by the management, at its will and on an unequal basis.
- It was decided that there would be joint control of the tip box, and management would have no access to it except in the presence of the waitress' representative.
- It was decided that payment of the Shabbat supplement to workers who worked during the Shabbat, through the tips, as was customary until then, would be stopped.
- It was decided that workers will be entitled to the payment of protective rights (vacation, illness, convalescence, and overtime).
- It was agreed that the defamation lawsuits filed by management would be deleted.¹⁶³²

D. Evaluation of the Consumer Boycott on Coffe2Go as a Practical Alternative Means of Pressure

1. Effectiveness of the consumer boycott:

The struggle which café workers began ended in acceptance of almost all their demands. Their demand for full control of the tip money was accepted almost completely (it was determined, as stated, that 88% of the tip money would be transferred to the workers). Therefore, I would classify the effectiveness of the consumer boycott between “workers’ demands were accepted in full” and “workers’ demands were accepted in part”.

2. Efficiency of the consumer boycott:

A. The levels of damage actually caused by the strike were limited relative to the potential levels of damage in the first place. I reach this conclusion from comparing the actual damages to the damages that could have incurred:

Actual damage caused:

- Economic damage to the employer: due to loss of income from the sale of coffee and its products during the struggle period.
- Image damage to the employer: following the negative media coverage he received.

Damage that could have been caused:

- Image damage to the workers’ union.
- Damages to the relationship of trust between the parties and the labour relationship.

B. The actual circle of damage as a result of the consumer boycott was small in relation to the circle of potential damage in the first place. I reach this conclusion because the ones that experienced the pressure were the employer and the workers.

1. The employer

- Experienced a stop in cash flow and revenue.

¹⁶³² Merav David: *Victory for the striking waitresses at Coffe2Go*, (Ma’ariv, 05/11/2007), at the link: <https://www.makorishon.co.il/nrg/online/1/ART1/655/346.html>, Accessed: 26/01/2022.

- Experienced image damage as a result of the negative media coverage.

2. The workers

- Did not receive payment for 13 days of strike.
- At the height of the struggle, the café's management filed defamation lawsuits against three workers. But at the end of the struggle, the lawsuits were dropped.

The café's customers were not harmed by the struggle, because they could buy coffee and various products from the strikers at a symbolic price. The workers' union was not harmed by this strike either – neither in its image, nor in its pocket (since it did not reach into its coffers to compensate the workers for their strike days).

3. Adaptation to the 21st century:

The workers called on café's visitors to boycott it. The calls for a boycott were made on several levels:

- Picketing: During picketing, the strikers came to the café every day, stood with signs, distributed flyers and hung posters – thus convincing the locals to boycott the café. By picketing, the workers moved the arena of struggle to the public space, drawing the attention of the public and the media.
- Sale of coffee independently and at a symbolic price to passers-by: In doing so, the workers continued to provide a *quasi*-service to the café's customers but stopped the cash flow for management.
- The workers used social networks, on-going blog updates, emails (supporters were asked to email all their contacts) and emails were sent by customers who supported the waiters' struggle, including notices of boycott of the café; students and academic staff at the university sent emails to all their friends with a recommendation to impose a consumer boycott on the café.
- A *guerrilla culture* event was organised that included public singing and music in the presence of poets and cultural figures; and a *solidarity picnic* was held with mats and refreshments, in front of the café. In support of this is Sandra Schaal's explanation that songs have the power to give expression to stronger feelings and to evoke feelings of dedication and belonging to the world or community. The explanation for this lies in the fact that an audience listening to poetry tends to participate in it and therefore, the effects of poetry can be mental and physical. The power of poetry goes beyond the limited confines of written words.¹⁶³³

All these actions enabled the rapid broadcasting of the call to boycott.

Hence, my final conclusion is that the consumer boycott taken in the Coffee2Go case was a practical means of pressure.

Is it possible to conclude from the consumer boycott in the Coffee2Go case that there is a possibility of activating a future consumer boycott in the State of Israel as a substitute for a strike? It seems to

¹⁶³³ Schaal, Sandra. *Discovering Women's Voices. The Lives of Modern Japanese Silk Mill Workers in Their Own Words*, Leiden, Brill, 2022, pp.73-74.

me that the answer to this question goes under a number of prisms. **First**, the boycotting audience in this affair is a *captive* audience. In any case, they passed in front of/near the café doors. Hence the element of *social pressure* that exists, for example, in the ultra-Orthodox sector is also reflected in this case: due to the geographical proximity between the café and the university, and between the boycotters and the public who were asked to join the boycott. This element does not exist in all consumer boycotts. **Second**, this audience is an academic audience, whether it is of the student ranks or an academic faculty member. Some are operators and some are volunteers at the Workers' Rights Clinic. This is an audience that has often been involved in social struggles in their essence. And therefore, there is an expectation that they will either harness or at least be aware of the importance of securing the protective rights of workers. But the boycotting audience in this case does not represent the Israeli population. Thus, the ultra-Orthodox sector accounts for about 13% of the total population, which is 1,175,000 people,¹⁶³⁴ and is not fully represented among all students occupying the study benches in institutions of higher education in Israel (the percentage of ultra-Orthodox students is only 4%).¹⁶³⁵ Nonetheless, the ultra-Orthodox sector is a sector that is committed, more than any other sector, to consumer boycotts.¹⁶³⁶ **And third**, the message in the case was clear and simple, accompanied by sympathetic media coverage, the price of participating in the boycott was low and an alternative was provided to consumers. It is not inconceivable that all of these played a role in the success of the consumer boycott.

18.6 Summary

Some propose to separate the success of a boycott from the effectiveness of a boycott. An effective boycott is a boycott in which the sales volume of the boycotted product is significantly reduced. A successful boycott, on the other hand, is a boycott whose results are a change in policy and achievement of its broad goals.¹⁶³⁷ In this respect, the fight against Coffee2Go marked the beginning of an important awakening of unincorporated workers, inspired them to unionise in their workplaces and claim their rights.

What does this mean? The struggle at Coffee2Go was the first organised strike of waiters in Israel. Given the fact that most of the those working at waiting at tables belong to a younger age group and that this is a temporary job, the agreement signed at the end of the strike was a precedent-setting and historic agreement. The echoes of the struggle also affected other workers and encouraged them to band together and fight for their rights. Itai Svirsky, who accompanied the workers' union, notes that "the prominent and well-publicised struggle and its success has led to a significant increase in the number of referrals to

¹⁶³⁴ This figure is correct at the end of 2020. See: Gilad Malach and Lee Kahaner: Almanac of ultra-Orthodox Society in Israel 2020, (Israel Democracy Institute, 2020), p. 11.

¹⁶³⁵ Ibid, p.30

¹⁶³⁶ The characteristics of the ultra-Orthodox sector, which also contribute to the success of boycotts imposed by its leaders, are: 1. Absolute commitment and mobilisation, in terms of "done and heard". The ultra-Orthodox community is characterised by obedience to its leaders, without appealing their decisions. 2. High solidarity – the ultra-Orthodox community is characterised by a crowded and homogeneous lifestyle, so the option of organising for a boycott is also simpler. 3. The crowded lifestyle of the ultra-Orthodox community allows friends and neighbours to *monitor* each other and make sure that everyone obeys the boycott. 4. The leaders of the sector make sure, prior to the announcement of the boycott, that they will be able to win the boycott and that no decree will be issued on the public that it will not be able to comply with it. See: Nofar Sinai: CEO of an ultra-Orthodox advertising agency: When the ultra-Orthodox boycott a product, he knows for sure that this is how all his friends and acquaintances will act, (The marker, 03/02/2007), at the link: <https://www.themarket.com/advertising/1.432793> Accessed: 04/01/2022.

¹⁶³⁷ Yaniv Mano, *ibid*, p. 749.

the Clinic asking to accompany unionisation in both additional restaurants and other workplaces”.¹⁶³⁸ And indeed, at the end of January 2008, only two and a half months after the end of the strike at Coffee2Go, another strike broke out at Coffee Bean. During this strike too, workers turned to the hearts of the diners to boycott the place.¹⁶³⁹ The struggle against Coffee2Go also encouraged Knesset members (MK Dov Khenin of Hadash, MK Shelly Yachimovich from Labour) to promote a bill that sought to guarantee the rights of waiters in the industry in general, and in particular the issue of tips.

It seems to me that the strike at Coffee2Go should be evaluated from the following starting point: Despite the strike, the employer was able to operate the cafe, both through new workers and through security guards who prevented the striking workers from entering. In doing so, the employer made the strike redundant. And yet, the alternative means of pressure, which is a consumer boycott combined with sympathetic media coverage, tipped the scales, and caused management to accept the workers’ demands. In this respect, the strike at Coffee2Go could have been practical if management had not broken it, but in breaking the strike the workers became vulnerable and the resolution to their problems moved further away. Thus, consumers became effective and efficient change agents when they stopped buying from the café.¹⁶⁴⁰

What is between a strike and a consumer boycott? Like a strike, a consumer boycott is essentially considered a collective activity, and like a strike it depends on quantitative cooperation. However, the factor that drives the collective action is not the same. A strike occurs when workers disrupt their work arrangements, and the union must declare a strike. In contrast, a consumer boycott is set in motion if consumers operate as a cohesive and united group. In a strike, the product is temporarily depleted for the period of the strike or there is a disruption in the provision of the service as long as the strike is valid and until an agreement is reached with the employer. The likelihood of a strike catching the attention of the media, and all the more so the citizen (and thus exerting pressure on the employer) depends on the quality of the product, its uniqueness, and the monopoly that the employer has over its supply. In addition, the strike harms the image of the employer and the union. In contrast, in a boycott a huge number of consumers refrain from purchasing the product or service. This creates negative exposure in the media and harms the image of only the employer. According to this approach, it can be assumed that boycotts can achieve more efficient and effective results. It is clear to me, then, why employers are afraid of consumer boycotts against them and even against their competitors – more than strikes.

In conclusion, behind my argument that a consumer boycott can be an alternative means of pressure to strike, is the assumption that through an educated use of collective power by workers (which can be expressed in calling for a consumer boycott) and being the largest consumer group in the economy, workers can translate their economic power into political power. This power also draws from the simple fact that all workers’ unions in the State of Israel have consumer clubs,¹⁶⁴¹ which give members and their retirees discounts, special conditions, where they can purchase products and services at discounted prices in businesses and retail chains, which encompass different and diverse consumer areas such as culture, sports, leisure, cars, fashion, food, electricity, and electronics and more. In this respect, the workers in the

¹⁶³⁸ Itai Svirsky: *Not on the Law Alone; Not on the Histadrut Alone: Promoting Organisation of Workers as an Effective Tool for Self-Enforcement of Rights and Social Empowerment*, (Law Review B, 2009), p. 94.

¹⁶³⁹ Dani Vazana, *Unionised*, (Schakim Publishing, 2017) p. 120.

¹⁶⁴⁰ Breno de Paula Andrade Cruz, "Social Boycott", (Review of Business Management., São Paulo, Vol. 19, No. 63, p. 5-29, Jan./Mar. 2017), p.12

¹⁶⁴¹ Thus, for example, the new Histadrut operates the *Beyahad Bishvilha* [Together for You] club, the Teachers’ Union operates *Ashmoret* [Watch], the State Workers’ Union the *Mo’adon Nachon* [The Right Club] and the National Histadrut the *Shave* [Worth it] club.

State of Israel, as a large purchasing power, constitute a de facto interest group of considerable weight. Through a consumer boycott as an alternative tool of pressure to strike, workers can gain achievements that cannot be achieved through association or strike (due to the many restrictions on the right to go on strike and the difficulty of realising it); or that the damage expected from the strike will be too *expensive* and not worthwhile, and the boycott is expected to *lower* the price of the strike for the individual (since they can continue to work and their salary will not be deducted).

Chapter 19: Summary of Section C

In the third section of this work, I examined three alternative means of pressure to strike: the virtual strike, shaming and the consumer boycott.

Chapter 16 was devoted to an examination of the **Virtual Strike**. In this chapter, I discussed the nature of the virtual strike, its various models, its advantages and disadvantages. I came to the conclusion that the virtual strike can indeed be an alternative and practical means of pressure to the traditional strike in the State of Israel. The reasons for my conclusions were that the virtual strike may achieve the result expected by workers, and therefore it will be effective; that compliance with strikers' demands will be done with a minimum of damage (to the employer, to the factory, to the sovereign, to third parties, to the workers' union and to the workers themselves) and will therefore be defined as efficient; and finally, the virtual strike is adapted for use in the labour market of the 21st century, and as such it can occur, for example, through a minority of workers.

Chapter 17 was devoted to the examination of **Shaming**. I explained, inter alia, what shaming is, what its goals and consequences are; I addressed the question of how Hebrew and Israeli law treat shaming and, of course, examined shaming as an alternative means of pressure to the strike. My conclusion was that the practice of shaming has not only a firm grip on Israeli society, but also on its labour relations. We learned that shaming does not stand as a step in itself and as an alternative-exclusive means of strike, but as a complementary and accompanying step or additional organisational steps taken by workers. At the same time, there is no reason to underestimate shaming as a tool of pressure. The resources invested by the various employers I listed have taught about real pain and mental distress that should not be taken lightly.

Chapter 18 was dedicated to the latest means of pressure, the **Consumer Boycott**. I addressed the manifestations of the boycott, justifications for its use, and its effects. I demonstrated how a consumer boycott is manifested in the world and in Israel, what its meanings are and the reasons for its success and failure. My conclusion in this chapter is that a consumer boycott can be an alternative means of pressure to the strike. Through a consumer boycott workers can achieve achievements that cannot be achieved through unionisation or strike (due to the many restrictions on the right to strike and the difficulty of realising it); or the damage expected from the strike will be too *expensive* and not worthwhile, and the boycott is expected to *lower* the price of the strike for the individual (since he can continue to work and his salary will not be deducted from it).

Now, it is time to summarise the work, present my conclusions as well as my critique and proposal for further research.

Section D

Chapter 20: Summary, Conclusions and Proposal for Further Research

20.1 Summary

The strike is a complex, stratified and multidimensional phenomenon. Therefore, an in-depth discussion took place in this study and reference was made to various fields of knowledge and fields of research.

In Israel, workers' unions, and as a result strikes, began during the period of the Jewish settlement and continued with the establishment of the State of Israel. In the first decades of the State of Israel, the strike was, **ostensibly**, an absolute right in stark contrast to any other state and received unreserved support from all the governing authorities, even though it did not appear in writing. Admittedly, it was recognised as a norm belonging to the human rights space and therefore, also enjoyed greater protection, development in case law and many protections in both tort law and labour law. In this respect, Israel was more like many other countries which saw the right to strike as a right of the highest order and included it explicitly in their constitutions. But at the same time and as we have learned, the governments of Israel in these decades did not hesitate to break strikes that were inconsistent with the goals or perceptions of the government.

As of the 1980s, the use of strike weapons became increasingly common in the Israeli reality, especially among public sector workers. Over the years, the power of the Histadrut began to weaken, as I showed. Over the years, High Court rulings reduced the weight of the right to strike, and tipped the scales in favour of the workers' duty and in favour of ending the strike. The trend that began to take shape in Israel was preference of the public's right to a continuous supply of services and products over the right of workers to strike in order to advance their interests in the field of collective labour relations. This preference was expressed in the imposition of various restrictions on the freedom to strike, starting with means of postponement, such as extending the period of prior notice before a strike and ending with precedents and new rules – from the High Court and the National Labour Court – which restricted, demarcated and defined the strike time and time again, until in the 21st century, when use of the term strike cannot be in the context of *right* but in the context of *freedom* or *liberty*. Bar-Mor explains that despite the multiplicity of laws, the status of the right to strike and its scope in Israel have always been controversial: “A comparative examination between the rulings of the Labour Courts and the High Court will reveal that there have always been differences between the perceptions of judges in the courts and the purpose and way of judging in the various courts, regarding the nature of the right to strike and how this right should be understood”.¹⁶⁴²

Nevertheless, in recent years, while the trend of weakening unions around the world continues, more than 150,000 new workers¹⁶⁴³ have joined forces in Israel and the number continues to climb. The establishment of new workers' unions in Israel led to “competition and a free market in the field of workers' unions, encouraged organising in new workplaces and awakened the labour relations system in Israel”.¹⁶⁴⁴ It can be stated that the right to organise now operates in a different, dynamic and vibrant space than the one we are used to, and as a result of all this we are also witnessing frequent use of strike

¹⁶⁴² Hadara Bar Mor, *The Strike and its Genetic Classification* – following HCJ IEC, (Labour Society and Law 16, 2020), p. 267.

¹⁶⁴³ Nitzan Zvi Cohen: *The secret is in trust and security*, (Words of the Workers in the Land of Israel, 09/07/2018). At the link:

<https://www.davar1.co.il/136448/>

¹⁶⁴⁴ Steve Adler and Efrat Koka, *The Right to Organise in the Mirror of Changes in Labour Relations in Israel*, *ibid*, p. 325.

weapons in the private sector, unlike in the past. For example, in 2015, the percentage of strikes in the private sector was equal to that in the public sector. This figure was repeated in 2017.

Simultaneously with the rise of the right to organise, processes began in Israel of rising individualism and moving to individual contracts that undermined the traditional collective model of collective struggles. Liquid, external and temporary employment patterns, such as the employment of contractor workers and freelancers, also led to the weakening of workers' unions, the formation of a uniform collective agreement and a uniform representation to suit the various interests of the workers.¹⁶⁴⁵ Restrictions on the freedom to strike, whether as a result of legislative deliberations or as a result of rulings, have made it more and more difficult for workers' unions to maintain their existing organisation, fulfil their role and persuade workers who are not unionised to organise and, of course, carry out the strike. The current result is that the scope of the right to strike has become more flexible than before, unstable and subject to fluctuations.¹⁶⁴⁶

I began the second chapter in my work by describing the first strike known to mankind – the strike that broke out in the days of Ramesses II. Critical reading of this strike story will teach us now that even then the strike was accompanied by measures designed to put pressure on the authorities to accept the demands of the workers: calls for rebellion against the monarchy and demolition of the walls of the necropolis. These measures achieved their goal and the workers got what they wanted.

What will be the nature of the strike in the 21st century? Although the freedom to strike has been recognised and praised by High Court and Labour Court judges, it is clear that calls for its restriction, reduction and prohibition as frequently heard from Israeli legislators raise the fear that it will not continue to stand firm in the same format we know today in the 21st century, despite its vitality for strengthening and defending Israeli democracy. It is also clear that continued imposition of restrictions and reductions on the strike will make it difficult for workers to exercise their right of association. The fact that both the global and Israeli labour markets are experiencing many changes and especially in the nature of employment of workers also sharpens this question. We are currently, more than ever, witnessing the transition of workers to work from home, their separation from the workplace and as a result – the separation between workers. These are already making it difficult today to use the strike weapon as it is known to us, and in my opinion these difficulties are only likely to worsen. There is no doubt, therefore, why workers began to make use of new means of pressure such as collective resignation or the use of technologies and social networks that influence models of strikes and allow the traditional form of representation and struggle to be converted into new forms. This study shows that even when the workers' arsenal in the form of strikes are reduced and continue to be limited, additional means of pressure will continue to be available to them, even those not reviewed in my work. An example of this was the struggle of Egged workers in May 2022, who decided to fight for their working conditions without disrupting the bus lines, but by wearing protest shirts that read "Egged workers are fighting for honor".¹⁶⁴⁷ It is also clear that as technology develops and cyberspace gaps narrow, workers will be able to make greater use of existing means (such as changing their profile picture on social networks to identify with their struggle, virtual petitions, etc.).

¹⁶⁴⁵ Lilach Litor, *ibid*, p. 46.

¹⁶⁴⁶ Hadara Bar Mor, *The Strike and its Genetic Classification* – following HCJ IEC, (Labour Society and Law 16, 2020), p. 268.

¹⁶⁴⁷ Nitzan Zvi Cohen: It is embarrassing being a driver, (Davar, 09/05/2022). At the link: <https://www.davar1.co.il/378956/> Accessed: 12/05/2022.

At the same time, and towards the conclusion of this study, I assume that even given additional means of pressure – alternative or complementary to the strike, effective and efficient as they may be – there is no guarantee that the workers’ unions will be quick to house the right to strike. Despite its heavy costs, which are also borne by the workers and the union, it is clear that when a workers’ union goes on strike, it proves its strength in recruiting workers to face the employer. Using a strike conveys power, and conveys a belligerent and aggressive message not only to the employer, but also to the workers, the sovereign and the public. The strike gathers workers around a common goal, allows them to release pressure, builds the union a reputation as a tough partner in collective bargaining,¹⁶⁴⁸ and may elevate labour relations to a stage where the worker sees the union and workers as equals in power. These are the benefits of a strike that should not be taken lightly, because they are a deterrent to employers. Therefore, any means of pressure in the strike must be at least as deterrent as the strike so it can be called an “alternative means of pressure to the strike”.

20.2 Conclusions

I began this study in asking –

1. Why is the strike perceived as a pressure tool?
2. Are there alternative pressure tools for the strike, and if so, what is their nature?

As for the first research question, this study is to the best of my knowledge, the first systematic study that examined the effects of strikes on levels that were not limited to the field of economic research, but extended the examination of strikes to other fields of study, and examined how the players in the labour relationship perceive the strike and its effects – in an attempt to explain why the strike is a tool of pressure. This is the first contribution of the study.

After examining what pressure is, and showing that it is a concept borrowed from the physiological and psychological realm, I went on to examine the damage that strike causes or may cause to various parties, and from there I deduced the nature of strike as a tool of pressure. As stated, the research literature on the subject is devoted to the economic damages that accompany a strike and seeks to estimate them. In this study, I also looked at other levels of damage that may be caused by a strike in addition to the economic damage: political, social, image and trust.

I listed the factors that may be harmed by the strike: employers, workers, residents and consumers, business entities that are in trade relations with the employer, the government and the workers’ union, and I explained how their damages would be reflected. Next, I elaborated on the likelihood of occurrence of the strike damage and the exposure of various factors to the damage from the strike.

In addition, I proposed an index for assessing the strike as a means of pressure – the **Practical Index**, which consists of three cumulative variables: effectiveness, efficiency and suitability for use in the 21st century. Using this index, I sought to assess a strike as practical if it succeeds in creating a new balance point between workers and the employer, while being adapted for use in the 21st century labour market, which has the power to put pressure on the employer that will cause him to respond to the demands of the workers as much as possible and with a minimum of damage.

As for the second research question, I presented three means of pressure in my work: virtual strike, shaming and consumer boycott. Can these measures really replace the strike institution we know? The

¹⁶⁴⁸ Sharon Rabin-Margaliot, Behavioural Explanations of Labour Law and Labour Relations, (Law and Business C, 5765-2005), fn. 101 on p. 149.

answer seems to be complex. As I have shown, shaming is a *complementary* means of pressure to strike and does not come in its place, but rather it accompanies it. Hence not every means of pressure is necessarily an *alternative* to a strike. In addition, the means of pressure are not necessarily suitable for the entire Israeli population, which, as I explained, is not homogenous. For example, the ultra-Orthodox sector uses *Pashkevils*, but their presence is absent from social networks. Moreover – this sector is highly experienced and committed to consumer boycotts, in contrast to the secular sector, where this means of pressure is less applicable.

The disadvantage of pressure measures is that they do not reduce feelings of resentment between the parties and they do not build a proper relationship for cooperation. At the same time, even a strike does not have these features. Hence, I will move on to examine the benefit of pressure measures in my research.

The first advantage that can be pointed out is that the means of pressure enable a controlled and gradual escalation in the struggle. Today, when a workers' union is in disagreement with the employer, it is forced to move from a state of industrial silence to a strike. In fact, the workers' union has no pressure tools in their *formal* arsenal other than the strike. This study *discusses other* means of pressure that will allow a controlled and gradual escalation, and should they fail in their goal – it will always be possible to turn to the strike. In such a situation, the union could claim to have exercised *softer* measures but the employer did not give in and did not cooperate. For this reason, it will also be possible to justify the use of strike weapons before the Labour Court and persuade it to refrain from issuing an injunction against the strike: before the workers and to harness them to strike; and before the general public – to try and mobilise their sympathy and support in the struggle. Especially in light of the fact that public opinion has deepened and penetrated regarding the opinion that “the strike is the workers' weapon”. In this respect, it is appropriate that the use of strike weapons should be a last resort, and that the safety catch – in the form of pressure measures – should precede its use.

The second advantage that can be pointed out is the neutralisation of the difficulty in realising the strike as a means of pressure. As I have shown, the union is measured by a strike. In the strike, the union is required to act on several fronts: it must mobilise workers to the strike, instil in them courage and faith in order to prevent them from being broken by workers who do not support the struggle, it must show economic resilience in the form of a strike fund that can ensure that workers receive their livelihood, it must fight the employer in court to avoid an injunction against the strike, it must speak its intentions to create sympathy for its goals. Not every workers' union has the resources to declare and run a strike, so the pressure measures allow the workers' union to overcome this difficulty. The means of pressure are also suitable for new unions, which do not necessarily meet the requirement of representation, specified in clauses 3 and 4 of the Collective Bargaining Law.

The third advantage that can be pointed out is adaptation of the means of pressure for use in the 21st century. I showed that the world of work has undergone many changes – from separating ownership and management in the factory, to performing the work that could and would take place from the worker's home. In a situation where the employer lives, for example, abroad, burning tires outside the factory does not make sense. But in the age of the global village and social networks, the means of pressure are intensifying and can also in turn bring about change – like online shaming that crosses national and state borders.

The advantage of the means of pressure can be illustrated by means of a number of axes on which I will place the strike against the means of pressure studied:

1. Axis of innovative means of pressure versus obsolete means:

As we have learned, shaming has a historical record in ancient Hebrew law and in human history. In contrast, the virtual strike is the fruit of the twentieth century. The consumer boycott is in the middle between these two measures.

2. Axis of pressure means with the potential for maximum harm to the employer:

In the virtual strike, the consumer public does not shy away from the employer's business. On the contrary, consumers continue to consume employer services. In a consumer boycott, the employer becomes *exiled* and his business is desolate, so the economic damage to him is also greater. In the middle is shaming – the employer is called to change his policy, and it is possible that his image will suffer damage. However, this damage is infinitely smaller compared to the expected economic damage from a consumer boycott or strike.

3. Axis of means of pressure data for regulation and governance:

We have learned that a strike is subject to restrictions based on laws, legislature developed in the courts, collective agreements and regulations of workers' unions. Unlike a strike, which can be prevented or stopped by means of injunctions or by means of restraining orders, shaming and consumer boycotts cannot be regulated and they are not subject to legal restrictions. They can be done *remotely* and anonymously. Hence their potential for harm – and hence the pressure effect – intensifies.

In contrast, the Israeli virtual strike in its current form is a result of the decision of the Labour Court (as we will learn, the Israeli virtual strike is a forced virtual strike, i.e., the National Labour Court imposes it on the parties).

4. Axis of pressure means applicable in Israel:

In order for a consumer boycott and shaming to materialise, it is necessary for the public to be aware of the labour dispute, to show a deep commitment to the goals of the struggle and, finally, to cooperate with the boycott or shaming.

If these tools do not achieve the desired result, the result may be a general strike whose negative effects on the public will be more significant compared to the sacrifice and effort that will be required of them when they boycott an employer or demand to take part in shaming him. Thus, the public also has an incentive to cooperate with the workers' struggle.

In contrast, in the virtual strike, the public continues to consume the service, is not necessarily aware of the labour dispute and its cooperation with the struggle is minor.

From all of the above, the question arises whether the means of pressure listed in this work are applicable in the public sector and/or in the private sector? Allegedly, the employer in the private sector is more exposed to the damage of the various means of pressure. However, the answer seems to be that the means of pressure are appropriate for both sectors: both the private sector employer and the sovereign as a public sector employer are afraid for their image – hence shaming may be threatening to them. The consumer boycott can collapse the employer's business in the private sector, but also create havoc in the public coffers, and of course a virtual strike is possible in both sectors.

This is the place to go back to the words of Ruth Ben Israel, who outlined the foundations of the strike and distinguished between the plane of its action, the nature of its action and its purpose. The plane of

action, according to Ben Israel, is a collective action taken by the workers together. The nature of the action is a cessation of work without severing the employment relationship. The purpose of the action is a request for the fulfilment of the workers' demands.¹⁶⁴⁹ This study offers an alternative approach to the foundations of the strike: the purpose of the action remains the same: the workers will continue to insist on their demands, but it is not necessary that the plane of action be carried out by all or even most of the workers. As I have shown in the age of knowledge of the 21st century, there are quite a few individual workers who can paralyse a company's systems. The nature of the action also changes in this study: work does not stop due to all the means of pressure I have mentioned.

20.3 Proposals for Continued Research

During the course of the study, I discussed various measures taken by the actors in the labour relationship that have not been given research attention so far. Among these, I would like to dwell specifically on the exceptions committee, the impact of strikes on stock trading, and faming (glorification).

Exceptions Committee: To date, no study has been conducted on exceptions committees activated by strikes. This topic seems to the writer worthy of in-depth examination in the future. The issue of the exceptions committees raises interesting questions that should be considered because they are topical in public strikes: How is the composition of exceptions committee members determined? Is the composition of the committee professional? What are the formal criteria the committee considers? Are there any hidden emotional, political or organisational biases in the decisions of committee members? What is the public's attitude towards a workers' union that uses strike weapons with and without an exceptions committee?

Impact of strikes on stock trading: Companies that are traded on the stock exchange are subject to volatility of supply and demand as well as market pressures. Further research on the subject will be able to examine how the possibility of potential harm to the value of the company's shares as a result of a strike, constitutes a means of pressure that will lead shareholders and board members to exert pressure on the employer to negotiate with workers.

Faming (glorification): The phenomenon of faming is now being integrated into the world of work through two phenomena that have begun to become more and more common: employer branding and employer rating. At the same time and as reviewed, one of the important parameters for Israelis in the workplace is labour relations. It seems to me that employer faming may teach not only about the capital, time and effort that employers invest in existing and new employees or in the company in general, but also about a mirror image of employers who are shamed and want to broadcast normal labour relationships. As far as the author is aware, the phenomenon of faming has not yet been investigated, and hence there is room to consider conducting further research on this topic.

In the author's opinion, there is also room to conduct a follow-up study that will examine the public's participation in the use of the means of pressure reviewed in this work, while answering the following question: What are the variables that cause the Israeli public to participate in protests? For this purpose, further research will be required to examine Israeli protests on political, military-security and social issues and to examine how these protests have been covered by the media and social networks.¹⁶⁵⁰ My

¹⁶⁴⁹ Ruth Ben Israel, *The Strike in the Mirror of Public Law: The Strike, The Political Strike and Human Rights* (Baranzon Book, Vol. III, Golel, 5767-2007) p. 113.

¹⁶⁵⁰ An example of such a study is the study of Yossi Dahan et al. who examined the media coverage of the senior staff strike at universities (2001), the port workers' strike (2004) and the temporary workers' strike at Ben Gurion Airport (2006): Yossi Dahan, Shlomit Binyamin, Moti Gigi, Shlomit Lear, Matti Shmuelof, Naftali Shem Tov: *From Campus to the Port: Coverage*

starting point is that there are strikes that will be received with greater understanding by the media and/or the majority of the public – such as strikes that broke out in protest of the violence used against education, transportation or medical workers.¹⁶⁵¹ This study will also need to examine the characteristics of *non-violent protest* (also called *non-violent resistance / action*), which has been gaining momentum in recent decades around the world and in Israel.¹⁶⁵²

In addition to these, there is room to examine two means of pressure in particular that deserve further research attention:

1. **Threat of a Labour Dispute**

One of the most famous is “the strongest strike is the one that did not occur”. Indeed, the threat of a labour dispute and a strike is a sword of democracy that often hovers over the head of the Israeli economy, narrowing the power gap between the employer and his workers.¹⁶⁵³ As early as 1986, Mironi addressed this issue and wrote that “it is generally accepted that the element that ensures the free nature of negotiations, their very existence, efficiency and success is the ability of workers and employers to exert pressure on the other side through the use or threat of strike or lockout. Thus, it is not surprising that the right of workers to strike or threaten to strike is perceived in the world of action and is legally defined as a right involving or derived from the right to organise and hold free collective bargaining”.¹⁶⁵⁴ Davidov also discussed this issue in writing that “the way workers work to deal with employer behaviour and try to improve their situation is through collective bargaining, whose success depends on their ability to threaten a strike and carry out this threat if necessary”.¹⁶⁵⁵

Further research on the subject could be based on the economic theory in which there is a distinction between reliable and unreliable threats. If there is no price on the part of the workers to shut down the factory, or the price is low, the threat of a strike becomes credible and the workers will be able to achieve what they want, with or without actual use of the strike.

2. **Recruitment of the Political Sovereign**

The strike, especially in the public sector, seeks to turn residents and consumers into *hostages* so that those in turn will put pressure on decision-makers. But in media strikes that have taken place in recent decades, we have witnessed a phenomenon in which workers tried to harness elected officials, from junior-level officials to the prime minister (as in the Teva case in 2017) to their

of Strikes and Lockouts in the Israeli Media (Israeli Sociology 14 1, 2012). This study, as mentioned, focused on the coverage of only three strikes, and examined only one question – how the media construction and framing mechanisms worked in each of these strikes.

¹⁶⁵¹ One example of sympathetic media coverage of a strike that broke out in protest against violence is the strike announced by the Medical Association on 19/05/2022, following violence against medical staff at Hadassah Hospital in Jerusalem. The media that covered this strike extensively quoted the response of hospital management, the Medical Association, the Medical Association Interns’ Forum, and the Interns’ Association *Mirsham*. In addition, some media outlets cited the support of the Minister of Health and top officials of the Ministry of Health for the strike.

¹⁶⁵² **Worldwide:** The Orange Revolution in Ukraine 2004-2005; The revolution in Egypt in 2011; **In Israel:** The Disengagement Plan in 2005; The Cottage Cheese Protest in 2011; and a protest against political corruption in 2020.

¹⁶⁵³ Ronen Perry, *Liability for strikes for third party damages*, (Labour, Society and Law, 16), p. 311.

¹⁶⁵⁴ Mordechai Mironi, *Arbitration as a Substitute for a Strike – A Framework of Thinking and Clarifying Basic Concepts*, (The Hebrew University, 1986), p. 16, fn. 8.

¹⁶⁵⁵ Guy Davidov, *A Strike as a One-Stage in a Sequence of Events and a Virtual Strike (with Wages) as a Proportional Remedy*, (Labor, Society and Law 11, 2005), p. 54.

struggle even before the strike. The attempt to put pressure on the sovereign is made through a direct or indirect measure, by using the media and social media.

20.4 Final Summary

In 1978, the Tel Aviv District Court ruled that “it is true that in the case of labour disputes – there are workers who believe that every person is a law unto himself – and all means of pressure are justifiable, but this opinion did not receive the blessing of the law, and various acts are criminal offenses and civil injustices even when their purpose is a means of pressure to achieve just and proper working conditions”.¹⁶⁵⁶

Since the court’s ruling, much water has flowed under the bridge, and it is now clear that additional means of pressure to strike can be considered, beyond those reviewed in this work, whether or not they received the “blessing of the law”. Only recently, the chairman of the Histadrut, Arnon Bar-David, said the following words: “We do not want to return to the place where we hold a tire in our left hand and a megaphone in our right hand. **Those days are over**”.¹⁶⁵⁷ From this explicit statement we can learn about the heartfelt feelings of the leaders of the largest workers’ union in Israel and the understanding and internalisation that strike prices are heavy. It seems to me that the words of the chairman of the Histadrut illustrate more than anything the long journey that the labour relations system in Israel has gone through – from a situation in which the strike was perceived as a single, main and exclusive means of pressure to a situation in which other means of pressure were actually used (such as demonstrations in front of employers’ houses, shaming, etc.), whether these are alternative or complementary means of strike.

¹⁶⁵⁶ Laws of Taxes (Tel Aviv) 2832/78 Amgat Plastic Ltd. v. Zeev Ya’ari et al., tax ruling 5738-1978 (1) 434.

¹⁶⁵⁷ Quoted in: Sonia Gorodsky: *We will not return to the era of megaphones and tires*, (Israel Today, 06/05/2022). At the link: <https://www.israelhayom.co.il/magazine/hashavua/article/10659461> Accessed: 12/05/2022.

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6. Legislation

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6.2 Secondary Legislation - Israel

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6.5 International Conventions

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6.6 Foreign legislation

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In Germany

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In England

The Employment Act of 1988.

In the USA

National Labor Relations Act of 1935.

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7. Court Ruling

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La grève en Israël comme moyen de pression et moyens de pression alternatifs

Aviad Avraham MENASHE

Résumé de la thèse

Chapitre 1: Introduction

La documentation la plus ancienne d'une grève dans l'histoire humaine date de 1158 avant Jésus Christ, du temps de Ramsès III: les ouvriers assignés à la construction des tombes se révoltèrent à cause de la faim et du non-paiement de leur salaire. Ce n'est qu'après des négociations réussies et la promesse de subvenir à leurs besoins que les grévistes consentirent à reprendre le travail. D'autres documentations de grèves existent également dans des sources juives antiques et même du temps du Temple¹.

La première grève ayant éclaté en Israël de l'ère moderne, la Palestine de l'époque, se déroula en 1902, pendant la domination ottomane. Les ouvriers imprimeurs de Zukerman exigèrent de raccourcir leur journée de travail et de signer avec eux des contrats collectifs semestriels. La grève fut finalement écrasée et les grévistes ne purent enregistrer qu'une réussite partielle: les associations d'ouvriers imprimeurs furent interdites, mais tout autant les organisations d'employeurs. À partir des années 1920, les luttes ouvrières et les grèves en Israël devinrent plus fréquentes. Le pays, qui à ce stade était placé sous mandat britannique, se caractérisait par une économie largement dominée par le secteur privé, tandis que le nombre d'ouvriers salariés citadins allait en augmentant. Cette situation fut la toile de fond de crises répétées entre les employeurs privés et les travailleurs: ainsi le nombre de grèves passa de 23 en 1923 à 46 en 1924, puis 61 en 1925. Le nombre de grévistes augmenta respectivement de 579 à 1.585 puis 2.638².

Ces chiffres continuèrent de grossir pendant les années 1930 et reflétèrent le conflit aigu qui se faisait déjà jour entre les deux camps politiques (la confédération générale³ et le camp de gauche, d'une part, et le camp révisionniste⁴ d'autre part, par le biais de la confédération des travailleurs nationaux et le camp de droite), et devait se prolonger jusqu'à nos jours, concernant le droit de grève et sa place dans la réalité israélienne. Dès les années 1930, le mouvement révisionniste voulut briser le pouvoir de la confédération en subvertissant les grèves. Zeev Jabotinski, le leader du mouvement, s'opposa à l'institution de la grève et proposa de créer une instance d'arbitrage obligatoire en remplacement de la grève. C'était la toile de fond des "accords de Londres" signés entre Jabotinski et Ben Gourion en octobre-novembre 1934. Ces accords tentèrent de régler la question des grèves et de l'arbitrage obligatoire au sein de l'agglomération juive de l'époque et stipulèrent que le mouvement concurrent ne pourrait pas briser une grève et qu'étant donné un certain pourcentage de travailleurs appartenant à un même mouvement dans un certain lieu de travail, un arbitrage obligatoire serait proposé à l'employeur avant l'entrée en grève. Ces accords furent rejetés le 24 mars 1935 au cours d'un référendum qu'organisa la confédération générale parmi ses membres: en fait, la confédération repoussait tout arrangement avec le mouvement révisionniste, qu'elle considérait comme mouvement fasciste⁵.

La grève continue à accompagner l'agglomération juive et le jeune État d'Israël, même pendant la Guerre d'indépendance. En juin 1948, les enseignants demandèrent et reçurent une augmentation de salaire. Deux mois plus tard, l'union des fonctionnaires d'État menaça d'entrer en grève sur la toile de fond des difficultés

¹ Concernant ces grèves, voir le chapitre 1.2.

² Sur cette question, voir le chapitre 3.3.

³ Les membres de la troisième vague d'immigration (celle des années 1918-1924, qui compta environ 35.000 personnes) voulurent fonder une organisation unique de tous les ouvriers hébreux, et c'est ainsi que fut créée, en décembre 1920, "La confédération générale des travailleurs hébreux en Eretz Israël", ci-après "la confédération"). Elle réunit en son sein les partis ouvriers et son action fut liée à celle de la confédération sioniste.

⁴ Le mouvement révisionniste fut créé en 1934 pour concurrencer la confédération générale dans la représentation des travailleurs. Il prônait le libre marché, la libre entreprise et les droits du capital privé.

⁵ Sur cette question voir le chapitre 11.2.

financières dans les lesquelles étaient plongés les fonctionnaires chômeurs dans Jérusalem assiégée. Et en septembre, quatre mois avant la fondation de l'État, la première grève éclata dans la station nationale de radio Kol Israël [la Voix d'Israël], à la stupéfaction des dirigeants du pays.

Au fil des ans, le statut de la grève en Israël se transforma. On peut distinguer trois périodes essentielles dans cette évolution. La première s'étend de la fondation de l'État aux années 1970. Comme je l'explique plus loin, le statut de la grève était alors apparemment illimité et même absolu. Aucune loi ne la limitait et aucun contrat collectif ne lui fixait des restrictions. La confédération générale était la plus grande organisation ouvrière et était étroitement associée à l'establishment politique, alors largement dominé par le parti travailliste Mapai. On peut sans exagérer affirmer que le syndicat et le parti avaient grandi sur le même terreau idéologique et en effet, les personnages-clé, de part et d'autre, ressentaient la même communauté de destin et entretenaient des relations étroites, claires et déclarées. Cette période se caractérisa aussi par la cassure de grèves qui ne correspondaient pas à l'esprit de l'institution politique et syndicale – telles les grèves des cheminots, des marins et des coopératives⁶. La seconde période s'étend du milieu des années 1970 au milieu des années 1990: les défenses du droit de grève furent réduites, que ce soit par le législateur ou par les tribunaux⁷. La troisième période, qui commença au milieu des années 1990 et se poursuit jusqu'à nos jours, se caractérise par un renforcement sans précédent du droit de grève, suite aux sentences du tribunal du travail⁸. Gnayinski affirme que ce renforcement a conduit à la vague de grèves qui se sont produites ces dernières années et "il semble qu'aujourd'hui, tout le secteur de l'emploi attend le moment propice pour faire grève, et l'arme de la grève est de nouveau une arme majeure dans la lutte ouvrière. [...] Depuis le début de la seconde décennie du 21^e siècle, la grève est redevenue un élément essentiel dans la vie de tout un chacun en Israël, qui s'en trouve affecté d'une manière ou d'une autre⁹."

Ces affirmations sont soutenues par des données quantitatives et objectives qui nous renseignent sur l'utilisation fréquente de l'arme de la grève: il s'agit du nombre de journées de grève en Israël, du nombre de grévistes et du nombre de journées de travail perdues pour l'économie nationale. Comme dit plus haut, jusqu'au début des années 1970, la grève était un événement inhabituel dans le jeune État d'Israël. Cette tendance commença à s'inverser vers la fin des années 1970. Ainsi, par exemple, si en 1974 le nombre de grèves s'élevait à seulement 71, cette donnée grimpa de façon suivie au fil des ans: en 1984 on en comptait 149 et 156 en 1988. En 1974, le nombre de grévistes atteignait le nombre imaginaire de seulement 24.141 travailleurs. En 1979, il atteignait 250.000 hommes et femmes. En 1982 on enregistrait le record de tous les temps avec 838.000 grévistes. Le nombre de journées de travail perdues renforce lui aussi cette tendance. En 1974, il atteignait un peu plus de 51.000 journées. En 1979, ce nombre franchissait le record de tous les temps avec plus d'un million huit cent mille journées. L'année 2007 enregistra un nouveau record avec 2.548.627 journées perdues¹⁰. De même, le fait qu'au milieu de la seconde décennie des années 2000 le nombre des grèves dans le secteur privé ait commencé à égaler celui du secteur public, nous renseigne sur la fréquence des grèves en Israël.

Si en Israël l'utilisation de la grève a commencé à devenir fréquente à partir des années 1980, la comparaison avec les pays européens montre une tendance inverse. Au cours des années 1990 et au début des années 2000, Israël était leader mondial en nombre de travailleurs ayant participé à des grèves et en nombre de journées de grève. Une recherche effectuée en 1993 et en 2001, qui a comparé Israël à huit autres pays (États-Unis, Canada, Angleterre, Australie, Nouvelle Zélande, Japon, Espagne et Danemark) a établi que la

⁶ Sur cette question, voir le chapitre 10.2.

⁷ Sur cette question, voir le chapitre 3.6.1.

⁸ Que j'étudie tout au long de cette recherche.

⁹ Nir Gnayinski, *Le statut constitutionnel du droit de grève*, Nebo, 2014, p. 23. [Sauf indication contraire, tous les textes référencés dans les notes ci-après ont été publiés en hébreu.]

¹⁰ Sur ces indices, voir le chapitre 3.4.2.

moyenne annuelle des journées de grève et la moyenne annuelle des travailleurs ayant participé des grèves en Israël étaient les plus élevées. Un résultat identique fut trouvé par une recherche effectuée en 2002 et 2003, qui compara Israël à dix autres pays (Danemark, Irlande, Italie, Japon, Hollande, Nouvelle Zélande, Norvège, Espagne, Suède et Allemagne). Au cours des années 2002-2006, la moyenne annuelle des journées de grève dans les pays membres de l'OCDE était de 31 jours pour mille employés, dans les pays de l'Union européenne elle était de 41 et en Israël, elle atteignait 476¹¹. Dans un autre rapport, celui de l'organisation internationale du travail, qui a recensé les années 2004-2016, Israël a été classée au sixième rang mondial pour le nombre de journée de grèves pour mille travailleurs. Il ressort d'un rapport publié par l'OCDE en juin 2021, qu'entre 2008 et 2018, chaque 1,000 travailleurs israéliens ont perdu en moyenne plus de 80 jours de travail par an à cause de conflits du travail, contre 40 jours en Italie, environ 30 en Irlande et en Finlande, 20 en Angleterre et quelques jours seulement aux États-Unis, en Nouvelle-Zélande, en Hongrie et en Pologne. D'après ce rapport, Israël est à la troisième place avant la fin concernant la perte de jours de travail à cause des grèves¹². Tout cela montre comment Israël est devenu un des pays leaders dans le monde détenant le titre de "champion des grèves".

L'utilisation grandissante du droit de grève et les dommages que celle-ci cause n'ont pas échappé au législateur israélien, et à partir des années 2000 ont été déposées non moins de dix-huit propositions de loi demandant à modifier le statut de ce droit en Israël. On peut affirmer que ces dernières années, à chaque session parlementaire, au moins une proposition de loi a été déposée, demandant à redéfinir le droit de grève¹³. Même les accords de coalition destinés à la formation des gouvernements se sont référés à la limitation de la grève et l'ont placée au centre de l'ordre du jour du pouvoir israélien.

On peut trouver dans le vécu culturel populaire des témoignages du rapport ambivalent et complexe de la société israélienne au caractère souhaitable de la grève. La parolière et compositrice Naomi Shemer, auteure de très nombreux classiques de la chanson israélienne, écrivit en 1980 le "tube" humoristique "Je n'ai pas un moment de libre", qui décrit la réalité locale dans ses moments d'euphorie et de désespoir: "La puéricultrice est en grève, l'instituteur est en grève; on m'a fermé la banque et la police", puis: "On m'a fermé le Néguev, on m'a ouvert El Al, on m'a laissé les ordures, on a pris le courant." Ephraïm Kishon, un des humoristes et des réalisateurs israéliens les plus connus au monde, a également consacré sa plume à la description du pays et de la grève en ces termes: "C'est un pays qui a surmonté le boycott arabe, mais non la grève des enseignants¹⁴." Le fait que les œuvres de ces auteurs, tous deux lauréats du prestigieux Prix d'Israël, soient encore diffusées de nos jours¹⁵, prouvent leur pertinence et montre qu'elles réussissent à exprimer non seulement le sentiment du citoyen israélien moyen, mais également la perception complexe de la grève dans l'atmosphère israélienne, en tant qu'elle préoccupa et préoccupe toujours politiciens, théoriciens, juristes, employeurs, membres d'organisations ouvrières et intellectuels gravitant dans les cercles sociaux et culturels.

On peut sans exagérer affirmer que dans la société israélienne en général, et dans le monde du travail israélien en particulier, s'est enracinée l'hypothèse selon laquelle la grève est le principal moyen de pression, et parfois le seul, dont disposent les travailleurs dans leur lutte contre les employeurs. Cette conception a de nombreux adeptes dans le domaine des relations de travail, depuis les leaders syndicaux jusqu'aux politiciens qui y croient, en passant par les juges des tribunaux du travail, les chercheurs et les intellectuels. Il n'empêche que pour cette raison même, certains cherchent toujours à limiter le droit de grève.

¹¹ Naama Afik, *Revue des grèves en Israël en comparaison internationale*, 2005, cité par Assaf Shapira, *La grève d'un point de vue comparatif*, 2001.

¹² Rapport de l'OCDE: "The Public Sector Pay System in Israël", June 2021.

¹³ Sur les propositions de grèves déposées, voir le chapitre 11.2.6.

¹⁴ Ephraïm Kishon, *Le calot tricoté et quelques autres satires pro-israéliennes*, librairie Beït El, 1993. Voir aussi son œuvre *C'est un pays*. Sur le boycott arabe, voir le chapitre 18.2.2.

¹⁵ On peut trouver dans le répertoire israélien d'autres chansons consacrées aux grèves, telles celle de Méïr Ariel ("Grève", en 1980), ou celle du groupe de hip-hop "Le poisson serpent" ("Grève", en 2004).

On trouve confirmation de cette conception dans les propos du juge Itzhak Zamir concernant l'affaire Amit: "Le principal outil du syndicat, dans sa lutte pour la promotion des intérêts des travailleurs, est l'activité collective [...]. En cas de conflit entre travailleurs et employeur, le syndicat peut mettre en œuvre son pouvoir collectif au moyen de sanctions contre l'employeur, et surtout au moyen de la grève."¹⁶ L'ancien président du tribunal national du travail, Steve Adler, a même été plus incisif en déclarant que "la grève est un moyen 'violent', toutefois, dans l'état actuel des choses, le syndicat ne dispose pas d'autre moyen qui puisse l'aider dans la promotion de ses intérêts face à l'employeur."¹⁷ La chercheuse Michal Shaked s'est elle aussi penchée sur le sujet et a écrit que "dans la configuration des relations de travail, on n'a pas encore trouvé de substitut à la grève."¹⁸ Mais il semble que l'expression la plus tranchante et la plus claire sur ce sujet est celle de l'ancien président de la confédération générale des travailleurs, M. Avi Nissenkorn, dans le cadre de la lutte du syndicat pour l'augmentation du salaire minimum: "Nous avons choisi la grève car nous avons constaté qu'autrement, on ne tient pas compte des travailleurs. Ils sont transparents et c'est une honte pour l'État."¹⁹ La présidente du syndicat des infirmières soutient également cette déclaration: "Malheureusement, dans ce pays, tant qu'on ne déclare pas la grève, on ne reçoit rien, zéro"²⁰.

On comprend donc pourquoi la grève se trouve au centre de nombreuses recherches universitaires, tant en Israël que dans le monde. Toutefois, bien qu'il existe un large consensus selon lequel la grève constitue un instrument de pression, il semble que la littérature sur cette question se soit plutôt focalisée sur les champs de recherche juridiques ou économiques, et on n'y trouve pas de référence sortant de ces champs-là. Raison pour laquelle la capacité à déduire des conclusions qui ne soient pas réduites à ces mêmes champs est problématique et pêche par défaut (j'y proposerai par la suite une solution).

Le premier champ de recherche qui fut consacré à la grève est le champ juridique, partant de l'hypothèse que la grève a des conséquences dans les domaines du droit commun et contractuel, et plus particulièrement dans le domaine des dommages et celui du droit du travail. En 1969 fut créé en Israël le tribunal du travail et il semble que ce fut un appel aux chercheurs du droit du travail pour qu'ils consacrent leur énergie et leur attention à ce domaine, qui était jusqu'alors dédaigné.

En règle générale, on peut dire que la littérature juridique des années 1970 fut consacrée à la **description historique** du droit du travail dans le droit hébraïque, puis pendant la période du mandat britannique, jusqu'à l'État d'Israël moderne. Telles furent les recherches de Shilem Werhaftig²¹, Zalman Chen²² et Itzhak Zamir²³. La recherche de Michaël et Bar-El déborda de ce cadre, et j'y reviendrai. Cette description historique ne fut pratiquement pas consacrée à la description de la grève elle-même, mais plutôt au droit du travail. Pour mémoire, jusqu'au milieu des années 1970, le phénomène de la grève en Israël était plutôt rare et c'est probablement la raison pour laquelle la recherche en ce domaine fut limitée.

La fréquence grandissante des grèves et les dommages qui s'ensuivirent commencèrent à se manifester dans les recherches entreprises dans les années 1980. Telles furent les recherches qui traitèrent des **différents**

¹⁶ Haute-Cour de justice 7029/95, la Nouvelle confédération générale des travailleurs contre le tribunal national du travail et autres, verdict 51(2) 63, 91 [en hébreu].

¹⁷ Contestation de conflit collectif (national) 1013/04, Discount Bank LTD contre la Nouvelle Confédération Générale, paragraphe 10 du verdict rendu par le président du tribunal du travail, M. Steve Adler [en hébreu].

¹⁸ Michal Shaked, "Théorie de l'interdiction de la grève politique", *Annales de droit du travail* 7, 1999, p. 187 [en hébreu].

¹⁹ Tsvi Lavi, "Nissenkorn: sans la grève, on ne tient pas compte des travailleurs", site Ynet, 24.11.2014 [en hébreu].

²⁰ Attila Schumpelbi, "La présidente du syndicat des infirmières: tant qu'on ne déclare pas la grève, on ne reçoit rien, zéro", site Ynet, 16.7.2020.

²¹ Shilem Werhaftig, *Le droit du travail dans le droit hébraïque*, Tel Aviv, Moreshet, 1969.

²² Zalman Chen, *Développement dans la législation du travail et ses conditions pendant la période du mandat. Manuel pour le travailleur*, Am Oved et le ministère du travail, 1971.

²³ Itzhak Zamir, "Proposition de loi sur le tribunal du travail et de l'assurance sociale – 1967", *Le droit I*, 1967.

types de grèves (la grève partielle²⁴, la grève politique²⁵, la grève sauvage²⁶, etc.). Les types de grève ne sont pas nés au parlement israélien mais bien au tribunal et dans la littérature professionnelle. En règle générale, on peut dire que le type de grève dérive de l'acteur contre lequel est dirigée la grève et des exigences qui lui sont adressées. La reconnaissance ou la non-reconnaissance d'un type particulier la rendra légitime ou illégitime²⁷. À partir de là est apparue une autre vague dans la littérature de recherche, consacrée cette fois aux possibilités **de surveiller, de réduire ou de limiter le droit de grève** par le biais de l'arbitrage ou des ordres de réquisition²⁸, d'imposer une surveillance des organisations ouvrières²⁹ ou des restrictions pouvant s'appliquer à la grève³⁰.

Les années 1990 furent caractérisées par la continuité de la recherche entreprise jusqu'alors. Telles furent les recherches sur les grèves politiques³¹. Parallèlement, des recherches furent publiées sur l'utilisation des ordres de réquisition³² et de l'arbitrage³³ comme moyens d'empêcher ou de réduire le droit de grève.

L'affaire des usines de véhicules d'Ashdod³⁴, qui se déroula à la fin des années 1980-début des années 1990, et au cours de laquelle fut reconnue pour la première fois l'obligation de prudence incombant aux grévistes, donna le signal des premières publications sur **la confrontation avec les dommages causés par la grève**. Toutefois, ces recherches examinèrent les dommages en question à travers un prisme économique et étroit³⁵, ou en référence au droit des dommages, dans l'intention d'examiner la responsabilité juridique due aux dommages causés par la grève³⁶ - comme par exemple le préjudice de négligence ou le préjudice menant à rupture de contrat. Telles furent les recherches de Ruth ben Israël³⁷ et de Nilly Cohen³⁸, qui furent abondamment référencées dans la littérature et la jurisprudence.

Les recherches des années 2000 se caractérisèrent par une multiplicité de tendances, comme par exemple les **types de grève** – grève de sympathie³⁹, grève virtuelle⁴⁰, etc.; les **tendances dans les sentences** des tribunaux qui traitèrent du fonctionnement du tribunal du travail en temps de grève⁴¹; les débats sur **le droit**

²⁴ Francis Radaï, "La multiplicité des solutions aux grèves partielles – le plat n'a-t-il pas brûlé à cause de trop nombreux cuisiniers?", *Le droit* 10, 1980.

²⁵ Ruth Ben Israël, "La grève politique en Israël", *Études juridiques* 11, 1986, p. 622.

²⁶ Ruth Ben Israël, "Le statut et les conséquences de la grève sauvage", *Le Juriste* 37, 1987, p. 158.

²⁷ Comme je l'explique au chapitre 5.2.

²⁸ Voir par exemple les recherches de Mordechai Meroni concernant l'arbitrage et les ordres de réquisition, largement recensées au chapitre 11.2.

²⁹ Francis Radaï, "Les organisations ouvrières, privilèges et surveillance", *Études juridiques* IX, 1993-1994.

³⁰ Menachem Goldberg, "La grève au regard de la loi, de la convention collective et de la jurisprudence", *Le juriste*, 1987.

³¹ Francis Radaï, "Grèves politiques et changement radical dans la structure économique du lieu de travail", *Le droit*, 1994; Michal Shaked, "Théorie de l'interdiction de la grève politique", *Annales du droit du travail* VII, 1999.

³² Motti Netzer, "Implication du gouvernement dans les grèves et les conflits du travail par le biais des lois d'exception et des ordres de réquisition", *Mensuel des ressources humaines*, 111, mars 1997.

³³ Francis Radaï, "La liberté de faire grève, requêtes de tiers et arbitrage obligatoire", *Annales du droit du travail* V, 1995.

³⁴ Sur cette question, voir le chapitre 12.3.

³⁵ Adrian Zeiderman et Shoshana Neuman, "Le coût économique des grèves en Israël – l'approche investissement-rendement", *Les annales des affaires*, 1991; Roni Méir et Baruch Mevorach, "Grèves et salaire en Israël", *Sécurité sociale* 35, 1990.

³⁶ Nilly Cohen, "Les dommages causés par la grève, la négligence intentionnelle, le dommage économique et la rupture de contrat", *Études juridiques* 14 (1), 1989.

³⁷ Ruth ben Israël, "La responsabilité due aux dommages causés par la grève", *Études juridiques* 14 (1), 1989.

³⁸ Nilly Cohen, *art. cit.*

³⁹ Haïm Berenson et Assaf Berenson, "La grève de sympathie, son statut et sa proportionnalité", *Le livre Berenson-Benny Sabra*, 2000.

⁴⁰ Ido Eshet, "Sur les vertus de la grève virtuelle", *Travail, Société et Droit* XI, 2005; Amnon Caspi, Batia ben Hador, "La grève virtuelle", *Travail, Société et Droit* 11, 2005; Guy Davidov, "La grève comme étape dans une suite d'événements et la grève virtuelle (avec salaire) comme assistance proportionnée", *Travail, Société et Droit* 11, 2005.

⁴¹ Steve Adler, "Le liberté de faire grève à la lumière de la jurisprudence", *Le livre Berenson-Benny Sabra*, 2000; Guy Mundlak et Itzhak Harpaz, "Entre les luttes: examen empirique du rôle du tribunal du travail pendant les grèves", *Études juridiques* 26, 2002.

de grève comme droit juridique ou comme droit de l'homme⁴². Les années 2000 furent également marquées par la création de nouvelles organisations ouvrières⁴³, la lutte entre syndicats, des questions juridiques qui n'avaient pas encore été débattues et les prévisions concernant le droit du travail au 21^e siècle⁴⁴.

Le second champ de recherche consacré aux grèves est le champ économique, et on y trouve en bonne place la recherche d'Abraham Michaël et Raphaël Bar-El⁴⁵, qui ont étudié les grèves en Israël sous l'angle quantitatif. Ces chercheurs, qui ont rédigé le travail le plus exhaustif et le plus cité⁴⁶ sur les dommages de la grève en Israël, ont essayé d'estimer les pertes en rendement dus au travail chômé et au capital chômé pendant la grève. Ils ont établi dans leur livre la question de la grève comme variable dépendante, expliquée par des variables indépendantes endogéniques et exogéniques (ces dernières se rapportent aux contextes économiques, politiques et sociaux constituant la toile de fond des grèves. Les auteurs se sont abstenus de les étudier, du fait de leur manque de précision et de fiabilité. Ils ont appelé à poursuivre la recherche dans ces domaines). Dans les variables endogéniques ont été examinées les questions suivantes: les types de grève, le syndicat a-t-il certifié la grève, combien de travailleurs ont participé à la grève (en supposant qu'un grand nombre de grévistes accroît les chances de réussite de la grève du fait de la pression massive exercée sur l'employeur, tandis qu'un petit nombre produit l'effet inverse), et combien de temps a duré la grève (en supposant qu'une grève de longue durée contribue à accroître ses chances de succès). Afin d'établir un indice de réussite de la grève, Raphaël et Bar-El ont créé un indice quantitatif grâce auquel ils ont classé la réussite au moyen de quatre valeurs: les exigences des travailleurs ont été entièrement satisfaites, elles ont été partiellement satisfaites, elles ont été rejetées, le conflit est passé au stade de l'arbitrage ou de la poursuite des négociations. Ils ont toutefois reconnu que la méthode de calcul ainsi élaborée ne prétend en aucune manière déterminer le coût économique exact des grèves.

On retrouve ces conclusions dans une autre analyse économique de 2006: "D'une manière générale, il n'existe pas de méthode précise pour calculer le dommage économique représenté par la grève. Le propriétaire d'un champ agricole dépendant d'un approvisionnement fréquent en eau peut perdre toute sa production saisonnière en une seule grève, tandis qu'une société de haute technologie qui ferme ses portes pendant quelques jours supporte un dommage à cause du retard pris, mais elle peut le rattraper et reprendre son activité courante. Dans le cas des ports maritimes, les conséquences sont encore plus graves, car les grèves renchérissent les produits locaux et le commerce international. Du point de vue de l'exportation, les grèves répétées dans les ports affectent la fiabilité des délais d'approvisionnement et ajoutent un dommage collatéral significatif. Du point de vue de l'importation, l'incertitude accroît le risque pris par les importateurs et entraîne une augmentation des prix⁴⁷." Cette problématique explique pourquoi, ces dernières décades,

⁴² Michal Horowitz, "Le liberté de faire grève – proportionnalité et respect réciproque dans le droit du travail", Travail, Société et Droit 13, 2012; Nir Gnayinski, *Le statut constitutionnel du droit de grève*, Nebo, 2014.

⁴³ Itai Sabirski, "Non seulement le droit, non seulement la Confédération: promotion de l'organisation ouvrière comme moyen efficace d'auto-imposition de droits et de renforcement social", Actes juridiques 2, 2009.

⁴⁴ Michaël Atlan, "Le télétravail dans le droit du travail", dans *Le livre Menachem Goldberg*, Sadan, 2001; Nava Pintchuk-Alexander, "Orientations pour le renouvellement de l'organisation ouvrière au 21^e siècle", Travail, Société et Droit, 10, 2004; Stéphane Adler et Efrat Kuka, "Le droit à l'organisation au miroir des changements dans les relations de travail", *Livre Steve Adler*, 2016; Ido Eshet, "Le modèle de la représentation dans le droit du travail collectif – nouvelles tendances", Le Droit 46, juillet 2017; Yossi Rahamim, "Le marché du travail moderne à l'ère de la mondialisation et son impact sur le marché du travail", Le Droit 24, 2018.

⁴⁵ Abraham Michaël et Raphaël Bar-El, *La grève en Israël – approche quantitative*, université de Bar-Ilan, en collaboration avec l'institut pour la promotion des relations de travail, 1977. Sur cette recherche, voir le chapitre 14.2.

⁴⁶ Ainsi par exemple Aviad Bar-Haïm, qui a analysé les grèves en Israël pendant les années 2004-2013, a utilisé les variables établies par Michaël et Bar-El, dans l'intention de mesurer la réussite des grèves. Ses conclusions ont largement confirmé celles auxquelles avaient abouti Michaël et Bar-El. Voir: Aviad Bar Haïm, "Gestion des ressources humaines, unité 9: Relations de travail et emploi", L'université ouverte, 2018.

⁴⁷ Amir Feder, Michaël Sarel et Tsvia Zicherman, "Les organisations ouvrières en Israël, analyse économique et recommandations de législation", Forum Kohélet pour la politique n° 25, mars 2016.

n'ont été effectuées que très peu de recherches quantitatives tentant d'estimer l'influence des grèves sur l'économie nationale⁴⁸.

Avant de présenter les questions de recherches qui accompagneront cette recherche, je voudrais préciser qu'à ma connaissance, il s'agit de la première étude ayant examiné les influences de la grève, non seulement dans le champ de la recherche économique ou juridique, mais aussi dans d'autres secteurs de recherche débordant du cadre du droit et de l'économie – tels que l'histoire, la sociologie et la communication. C'est aussi sa première contribution, en ce qu'elle ne se réduit pas à un champ de recherche spécifique mais prend comme point de départ l'idée selon laquelle la grève est un phénomène complexe, stratifié et multidimensionnel, et qu'il est faux d'ignorer d'autres domaines de recherche pouvant l'éclairer et apporter de nouvelles considérations.

Pour répondre aux questions de recherche, mon travail se réfèrera à ces secteurs, intégrera analyse de contenu et analyse qualitative de divers textes (recherches et enquêtes, sentences, reportages, propositions de loi, lois, discours de législateurs israéliens), ainsi qu'une description de l'état des lieux dans le domaine étudié en Israël et comparativement à d'autres pays. Le travail comprendra aussi la lecture et l'analyse de textes traitant d'aspects théoriques et pratiques de la grève et des moyens de pression alternatifs. Il sera mis un accent particulier sur des **cas d'étude**, dans le cadre desquels seront examinés des grèves effectives et des moyens alternatifs.

Le sujet de la recherche étant novateur et n'ayant été, pour une large part, jamais traité, j'ai dû m'adresser à des organismes étatiques, ainsi qu'à des organisations de travailleurs et d'employeurs, pour obtenir des données, les analyser et réaliser des entretiens avec des personnes qui ont affronté – et affrontent encore – la grève, ses dommages et son efficacité. La littérature universitaire utilisée comprend des livres et des essais dans les domaines de recherche spécifiés plus haut. De même, seront utilisées des conférences données dans des forums professionnels, ainsi que les jurisprudences israélienne et étrangère. Il sera fait place aux opinions de juges, de spécialistes en droit, de psychologues, d'économistes et de sociologues.

Le but de ce travail sera donc de répondre aux **questions de recherche suivantes, qui se complètent l'une l'autre** :

1. Pourquoi la grève est-elle considérée comme un moyen de pression ?
2. Existe-t-il des moyens de pression alternatifs, et dans ce cas, quels sont-ils ?

Pour répondre à la première question de recherche, j'explique dans un premier temps comment se manifeste le phénomène de la grève dans le monde et en Israël. J'insiste sur ses significations et ses facteurs, puis sur les dommages que la grève cause ou est susceptible de causer. Je dénombre les acteurs affectés par la grève, ou susceptibles de l'être: non seulement les acteurs du système des relations de travail, parmi lesquels on compte traditionnellement les employeurs, les organisations ouvrières et le souverain politique, mais également le travailleur isolé, les habitants et les consommateurs, ainsi que les milieux d'affaire ayant des liens commerciaux avec l'employeur. J'explique aussi comment vont s'exprimer tous ces dommages. J'insiste ensuite sur la probabilité qu'ont les dommages de la grève de se produire et sur l'exposition éventuelle des différents facteurs à ces mêmes dommages. J'étudie aussi des niveaux de dommage supplémentaires pouvant être causés par la grève, mis à part les dommages économiques: politiques, sociaux, en termes d'image et de relations de confiance. Pour évaluer la grève, je propose dans mon travail un nouvel indice, que j'appelle **l'indice pratique**, composé de trois variables accumulées: effectivité, efficacité et adaptation à l'utilisation au 21^e siècle. Par le biais de cet indice, j'ai proposé d'évaluer une grève comme pratique si elle réussissait à

⁴⁸ Exception faite de l'étude du ministère des finances qui a estimé qu'en 2003, les pertes salariales se sont élevées à un milliard de shekels, en multipliant le salaire moyen national par le nombre de journées de grève perdus.

créer un nouveau point d'équilibre entre les travailleurs et l'employeur, capable d'exercer une pression sur ce dernier qui le conduise à accéder de manière optimale aux exigences des travailleurs, avec un minimum de dommages. Une autre contribution de cette recherche sera de proposer une approche alternative aux fondements de la grève (comme l'a esquissé Ruth ben Israël⁴⁹ et comme cela se répète dans la recherche et la jurisprudence), qui différencie entre le niveau d'action, l'essence de l'action et son but.

L'importance de la seconde question réside dans l'hypothèse selon laquelle la grève va se modifier au cours du 21^e siècle, que ce soit du fait de fréquentes propositions de loi demandant à la limiter, ou à cause du caractère changeant et dynamique du marché du travail, dans lequel commence à se créer un mode de télétravail qui porte atteinte à la grève et à son efficacité. Par le biais de la seconde question, cette recherche voudra examiner de quels moyens de pression disposeront les travailleurs pour atteindre leurs objectifs, si leur capacité à concrétiser le droit de grève venait à être réduite. L'importance de cette question réside également dans l'examen du potentiel qui permettra aux travailleurs d'atteindre leurs objectifs sans avoir besoin d'utiliser le droit de grève (ou même dans son intégralité), et en conséquence, réduira le potentiel de dommages causés par la grève aux travailleurs, aux employeurs, au souverain politique et à la société.

Je ferai tout cela en divisant le travail en quatre parties :

La première partie comprend sept chapitres. Dans le premier, j'ai établi les définitions qui sous-tendent l'ensemble de la recherche. Dans le second, **La grève dans le droit international**, je considérerai les diverses péripéties de la grève depuis son interdiction par la loi jusqu'à sa reconnaissance par l'ONU par le biais de l'organisation internationale du travail, puis dans le cadre des constitutions ou des lois de divers pays. Dans le troisième, **La grève en Israël**, je décrirai l'évolution du droit de grève en Israël, depuis l'époque de l'agglomération juive d'avant la création de l'État jusqu'au 21^e siècle. Dans le quatrième, **Signification de la grève**, j'examinerai les diverses significations découlant du recours à la grève: juridiques, intra-syndicales, économiques et religieuses. Dans le cinquième, **Les types de grève**, je distinguerai entre la grève économique, la grève politique, la grève pseudo-politique et la grève de soutien. Je proposerai ensuite d'autres distinctions et montrerai quelles possibilités de grève sont envisageables en Israël. Dans le sixième, qui traitera des **Facteurs de grèves**, j'essaierai de comprendre ce qui pousse les travailleurs en Israël à déclarer la grève et à y participer. Enfin, dans le septième chapitre, **La grève comme moyen de pression**, je me pencherai sur le recours fréquent au concept de "pression" pour caractériser l'action de la grève. Il faudra alors examiner concrètement en quoi le grève est un moyen/un instrument de pression. Pour ce faire, il faudra passer par la compréhension des dommages qu'elle cause ou peut causer.

La seconde partie comprend six chapitres et son but est de comprendre pourquoi la grève est un moyen/un instrument de pression. Mon point de départ passe par la compréhension des dommages que la grève cause, ou peut causer, partant de l'hypothèse que ces dommages sont le facteur qui conduit à la pression. Dans le neuvième chapitre, **Les dommages causés par la grève**, je m'efforcerai de comprendre quels dommages la grève peut causer, en plus du dommage économique. Dans le dixième chapitre, **L'employeur face à la grève**, je montrerai comment les employeurs veulent voir la grève toucher à sa fin par tout un éventail de moyens. Dans le onzième chapitre, **L'État face à la grève**, j'étudierai quels moyens utilise l'État pour affronter la grève. Dans le douzième chapitre, **Les tiers face à la grève**, nous apprendrons que la manière dont des tiers, qui n'ont rien de commun avec les grévistes, subissent les dommages causés par la grève, est difficile et complexe. Dans le treizième chapitre, **Le syndicat ouvrier face à la grève**, je recenserai les moyens utilisés par l'organisation ouvrière pour affronter la grève. Ces moyens l'aident à réduire les dommages causés par la grève. Ils peuvent le faire bénéficier de la sympathie du public et du soutien du tribunal du travail, ou lui permettre de continuer à faire pression sur l'employeur. Dans le quatorzième

⁴⁹ Ruth Ben Israël, "L'obligation d'arbitrage dans le service public", Études juridiques vol. 8, 1981-1982, p. 113.

chapitre, Évaluation de la grève comme moyen de pression, j'évaluerai à quel point la grève est un moyen de pression. Le couronnement de ce chapitre sera le développement d'un indice pratique d'évaluation de la grève comme moyen de pression.

Dans la troisième partie j'examinerai trois moyens de pression alternatifs à la grève. Le seizième chapitre sera consacré à l'examen de **la grève virtuelle**. Je préciserai quelle est son essence, quels sont ses modalités, ses avantages et ses inconvénients, et je me demanderai si, en effet, elle peut être un moyen de pression alternatif pratique à la grève traditionnelle en Israël. Le dix-septième chapitre sera consacré à l'examen de l'humiliation en ligne (**shaming**). J'expliquerai en quoi elle consiste, quels sont ses buts et ses résultats et je l'examinerai comme moyen de pression alternatif à la grève. Le dix-huitième chapitre sera consacré au dernier moyen de pression, **le boycott des consommateurs**. J'examinerai ses manifestations, ses justifications et ses influences, et s'il peut être un moyen de pression alternatif à la grève.

Dans la quatrième partie je résumerai le travail, je présenterai mes conclusions et je proposerai des possibilités de recherche ultérieure.

Première partie, chapitre 2: la grève dans le droit international

Le tour d'horizon effectué pour ce chapitre m'a éclairé sur l'évolution de la grève. Depuis les temps où elle était interdite par la loi jusqu'à ce qu'elle soit reconnue par l'ONU par le biais de l'organisation internationale du travail, puis par les constitutions ou les lois des différents États.

J'ai pu voir qu'il existe également des différences entre les pays concernant la reconnaissance de la grève. Alors que certains d'entre eux l'ont reconnue dans leurs textes et de manière directe, d'autres l'ont fait par le biais de sentences juridiques et de manière indirecte, comme découlant d'autres droits, tel le droit d'organisation. Ce n'est pas négligeable. D'une part la reconnaissance explicite, directe et claire de la grève (ou d'un autre droit) induit envers elle un engagement et une reconnaissance plus grande, et de ce fait, lui procure une protection plus large. D'autre part, quand une constitution ignore la grève (ou un autre droit), celle-ci se trouve abandonnée au bon vouloir des tribunaux.

Quoi qu'il en soit, on peut dire qu'aucun État n'est resté indifférent au phénomène de la grève et que chacun d'eux l'a considéré dans ses lois ou sa jurisprudence. On peut donc en déduire que le statut du droit de grève et les limitations qui lui sont imposées varient d'un État à l'autre.

Il y a des pays dans lesquels, à côté de la reconnaissance du droit de grève, on s'est efforcé de désigner d'un même élan ses limitations : préavis de grève, tenue d'un vote, épuisement des procédures, etc. Le dénominateur commun à toutes ces limitations est la volonté de "refroidir" la grève, de l'empêcher ou d'assurer un service minimum pendant son déroulement, compte-tenu des dommages qu'elle peut causer.

On peut classer ces limitations en trois catégories:

- a. Celles s'appliquant à certains groupes de travailleurs, comme en Allemagne, en France ou aux USA.
- b. Celles imposées quand il risque d'y avoir disproportion entre les buts de la grève et les dommages potentiels, comme en Allemagne ou en Suisse.
- c. Celles visant à assurer un service public minima pendant la grève, comme en France.

Ressemblances et différences entre les diverses limitations du droit de grève, par pays recensé dans ce travail:

Pays	Reconnaissance explicite du droit de grève	Obligation de préavis	Obligation de vote parmi les travailleurs	Autres limitations	Limitations imposées au secteur public/vital
U.S.A.	Non reconnu dans la constitution mais reconnu <i>de jure</i>	Non	La loi nationale sur les relations de travail (LNRT) permet d'imposer un vote confidentiel	La LNRT exige d'épuiser les procédures	Il est interdit aux employés du service public de faire grève. Un service vital peut être limité par une loi d'État
Canada	Non	Oui (dans certaines provinces)	Non	Il y a parfois obligation d'orienter le conflit vers l'arbitrage	Le droit est retiré aux fonctionnaires de police, aux agents des services de santé et aux sapeurs-pompiers. Dans la plupart des domaines de juridiction il y a obligation de continuer à fournir des services vitaux
Allemagne	Non	Non	N'est pas obligatoire mais peut être volontaire	Les grévistes doivent réaliser les travaux d'urgence et de maintenance nécessaires à la protection de la propriété de l'employeur. La grève est soumise aux limitations de la proportionnalité, à l'obligation de paix et d'équité et doit être le dernier recours de la lutte.	Ne sont pas autorisées à faire grève les fonctionnaires dont l'emploi est régi par la loi, ainsi que les juges et les soldats. Les services vitaux sont: produits alimentaires, santé, énergie et eau, transports, postes, communications, pompiers, enterrements, gestion des déchets, défense et sécurité nationale
France	Oui	Obligation d'informer l'employeur cinq jours avant la mise en route	Non	La grève doit être professionnelle (et non politique), elle n'est limitée ni	Dans le service public, il y a obligation de continuer à fournir un service minima,

		effective de la grève		dans sa durée ni dans son ampleur. Seuls les syndicats représentatifs sont autorisés à déclarer la grève	même pendant la grève. Le droit est retiré aux policiers, aux services pénitenciers, aux juges, aux soldats, aux services aéronautiques, aux employés de la radio et de la télévision
Grande Bretagne	Oui	Non	Obligation de voter avant la grève; les intérimaires ont aussi le droit de vote	La loi a limité l'immunité des grévistes et permet aux travailleurs de ne pas faire grève	Le droit est retiré aux policiers et aux soldats
Suisse	Oui	Non	Non	La grève est soumise aux limitations de la paix économique, à la proportionnalité, aux procédures de conciliation ou de médiation, Elle doit être le dernier recours. Obligation de se conduire équitablement	Le droit n'est pas octroyé aux fonctionnaires d'État ou du service public et aux cadres directeurs supérieurs
Japon	Non	Obligation d'un préavis de 10 jours dans les services vitaux	Non	Non	Approche réductrice du droit de grève concernant le secteur vital et public
Australie	Oui	Obligation d'un préavis de 3 jours	Non	Les grèves sont supervisées au niveau fédéral, à celui de l'État ou du territoire	Il est possible d'empêcher les grèves dans les services vitaux
Nouvelle Zélande	Oui	Oui, mais seulement pour les employés du service public – pas moins de 14 jours et pas plus tard que 28 jours avant	Oui	Les grèves sont supervisées et il y a possibilité de médiation et de rapprochement	Les employés des services vitaux dans le secteur public sont autorisés à faire grève

		l'entrée en grève			
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Les conditions préalables à la grève peuvent conduire à différents résultats. Le premier sera la réduction de la mise en œuvre du droit de grève à cause de limitations bureaucratiques/procédurales. En conséquence, les travailleurs ne disposeront pas de plateforme légitime pour décharger leur tension face à l'employeur, ce qui peut être dangereux car susceptible de conduire à un dévouement violent et incontrôlé. Le second résultat est que des conditions favorables peuvent conduire à une forte solidarité entre les travailleurs et leur syndicat, suite à une campagne justifiant le recours à la grève, ainsi qu'à une utilisation renforcée de celle-ci et à une moindre retenue de la part du syndicat, comme ce fut le cas en Angleterre⁵⁰.

La limitation du droit de grève par arbitrage n'est possible que dans les cas où la grève peut être limitée et même interdite, c'est-à-dire dans les services publics vitaux dont l'interruption peut mettre en danger la vie, la sécurité personnelle ou la santé publique, même partiellement. L'arbitrage doit être indépendant et désintéressé, afin de jouir de la confiance durable des deux parties en présence.

Le droit de grève dans les services publics et vitaux peut être limité et même interdit dans la mesure où la grève risque de mettre le public en difficulté sérieuse, à condition que ces limitations soient assorties d'une garantie adéquate comme par exemple des procédures de médiation accessibles aux deux parties à tout moment, les décisions adoptées étant pleinement et immédiatement appliquées par les deux parties. On peut également obliger les employés des services publics non vitaux à fournir un niveau de service minimum, au cas où l'ampleur et la durée de la grève provoqueraient une crise nationale qui mettrait en danger les conditions de vie ou toucherait les services publics d'importance fondamentale.

Première partie, chapitre 3: la grève en Israël

Le but de ce chapitre est de décrire l'évolution du droit de grève en Israël.

La reconnaissance du droit de grève s'est développée dès l'époque de l'agglomération juive d'avant la création de l'État. Comme mentionné précédemment, ce droit a aussi été reconnu par la communauté des peuples au moyen de conventions internationales et l'adhésion d'Israël à ces conventions l'a obligé à reconnaître la grève comme droit fondamental au niveau étatique. La liberté de grève est une partie organique et fondamentale de la tradition sociale-démocrate sur la base de laquelle l'État d'Israël a été édifié à ses débuts⁵¹. Toutefois, jusque dans les années 1970, la grève n'était pas un événement fréquent dans le jeune État. La confédération générale était la plus grande organisation ouvrière et était étroitement associée à l'establishment politique, alors largement dominé par le parti travailliste Mapai. On peut sans exagérer affirmer que le syndicat et le parti avaient grandi sur le même terreau idéologique et en effet, les personnages-clé, de part et d'autre, ressentaient la même communauté de destin et entretenaient des relations étroites, claires et déclarées. De ce fait, la tenue de la grève, pendant les premières décades de l'existence de l'État, en particulier dans le secteur public syndiqué au sein de la confédération générale, était considérée comme un événement exceptionnel et ponctuel. Le recours même à la grève, à cette époque, était un événement inhabituel.

Durant de longues années, la confédération générale s'est abstenue de s'adresser aux instances juridiques concernant les conflits collectifs en général et les grèves en particulier. Les décisionnaires – tant au sein du gouvernement qu'au sein de la confédération générale – réussirent à chaque fois à s'entendre. Ainsi, il n'est

⁵⁰ International Encyclopedia of Labour Law, "Great Britain" (suppl. 134 – April 1992), p. 269 par. 494.

⁵¹ Michal Shaked, *art. cit.*, p. 187, note 1.

pas surprenant que suite à la publication de la sentence concernant l'école Léo Baeck⁵², fin 1962, le parlement ait amendé l'ordonnance sur les dommages civils pour assurer la protection du droit de grève.

Mais à la fin des années 1960, début des années 1970, le recours à la grève devint plus courant. Suite à la perte de prestige de la confédération générale, son influence diminua, les frictions avec les décisionnaires du gouvernement augmentèrent et cette évolution se manifesta par un recours grandissant à la grève.

Le tribunal du travail fut créé à cette époque, avec pour slogan justificateur "le jugement au lieu de la grève". La loi sur le règlement des conflits du travail fut amendée de telle façon qu'elle obligeait désormais l'organisation ouvrière à donner un préavis de deux semaines avant la mise en œuvre de la grève, sinon elle devrait supporter les dommages qu'elle causerait. Ce fut la première limitation, mais non la dernière, et c'est ainsi que s'effritèrent les frontières du droit de grève. En 1972, la loi sur le règlement des conflits du travail fut à nouveau amendée, le législateur divisant les grèves dans le secteur public en "protégées" et "non protégées".

Durant les années 1980, le recours à la grève continua à battre les records en référence aux indices recensés: le nombre de grèves, le nombre de grévistes et le nombre de journées de travail perdues pour l'économie nationale. Ces années-là connurent des précédents et des règles sans cesse renouvelées – aussi bien de la part de la Haute-Cour de justice que du tribunal national du travail – qui chaque fois limitèrent, délimitèrent et définirent la grève, en établissant que la grève est une action collective, qu'elle vaut comme proposition d'un nouveau contrat de travail temporaire, qu'elle n'est pas reconnue pour la concrétisation de droits, qu'elle doit être proportionnée et être le dernier moyen de lutte, qu'il faut la traiter de bonne foi, que la grève politique n'est pas reconnue, que la grève en général est responsable de ses conséquences, qu'il est interdit d'agir violemment pendant son déroulement, qu'il faut veiller à l'équilibre entre elle et les autres droits, etc. Il ne fait aucun doute que seule une minorité de limitations fut votée par le législateur, la majorité étant due aux instances juridiques.

On peut répartir ces limitations d'après les fonctions qu'elles se proposent de remplir : limitations règlementant la grève, celles qui l'empêchent et celles qui tendent à la résoudre. Dans la liste des moyens règlementant la grève on trouve l'obligation de donner un préavis de deux semaines, les limitations de la grève non protégée dans le service public, etc. Mordechai Mironi explique que ces limitations ont en commun le fait qu'elles empêchent le recours à la grève comme moyen de pression et qu'elles ne contribuent pas au rapprochement des deux parties jusqu'à la conclusion d'un accord, mais il est clair qu'elles ont une influence sur l'équilibre des forces, et en conséquence, sur la disposition des parties à perpétuer une situation de désaccord, et même à aggraver la lutte. Dans la liste des moyens empêchant totalement la grève, on trouve les dispositions d'urgence, la loi sur le travail en période d'urgence et les ordres d'assignation. Ces limitations ne prétendent ni conduire les parties à un accord ni trancher les différends à leur place⁵³. Dans les limitations destinées à résoudre le conflit, on trouve la nécessité de ne considérer la grève que comme dernier recours.

Si pendant les années qui ont précédé la création de l'État d'Israël et durant les premières décades qui l'ont suivie le droit de grève était absolu, contrairement à tout autre pays, et si ce droit jouissait du soutien inconditionnel de toutes les instances du pouvoir, bien qu'il ne fut pas inscrit dans les textes, il en va tout autrement au 21^e siècle: l'utilisation du concept de grève ne peut se faire dans un contexte de "droit" mais bien plutôt dans celui de "liberté", et il semble que les propos des députés, en 1972, reflètent bien ce point.

⁵² Dans cette affaire, l'organisation des enseignants du secondaire présenta comme condition à l'annulation de la grève le versement du salaire d'un des enseignants limogé. Au début, le tribunal publia un ordre à surseoir qui interdit la tenue de la grève, mais par la suite il se rétracta et de ce fait, la direction de l'école fit appel en Haute Cour de justice, qui entérina l'ordre en question et interdit la tenue de la grève.

⁵³ Mordechai Mironi, "L'arbitrage comme substitut à la grève – cadre de réflexion et clarification de concepts fondamentaux", (l'université hébraïque, 1986), p. 19.

Uri Avneri: "Au cours du débat sur la constitution de tribunaux du travail, certains députés, dont je fais partie, ont exprimé la crainte que les tribunaux ne se transforment, contrairement à ce qui a été dit, en instrument destiné à briser les grèves [...]. Entretemps, l'expérience s'est accumulée et les tribunaux sont bien devenus cet instrument [...]." Le député Abraham Levenbraun partageait cette opinion: "En effet, une des fonctions pour lesquelles ont été créés les tribunaux du travail est d'empêcher d'avoir recours à des moyens collectifs, afin d'assurer la paix domestique industrielle. En clair, cela signifie: empêcher les grèves, ou toute autre sorte de lutte des travailleurs pour satisfaire leurs revendications. Et la réalité a prouvé que l'on utilise de plus en plus les tribunaux du travail pour maîtriser et freiner les luttes du public ouvrier⁵⁴."

Première partie, chapitre 4: signification de la grève

Nous avons appris dans ce chapitre que le recours des travailleurs à la grève revêt différentes significations. Elles dépassent le cadre juridique et se manifestent dans les secteurs intra-syndical, économique et même religieux.

Les significations juridiques peuvent être: suspension / rupture du contrat de travail. La théorie de la suspension du contrat de travail signifie que celui-ci n'est pas rompu pendant la grève mais suspendu jusqu'à ce qu'elle se termine. Non-interruption de la continuité de l'emploi: comme résultant de la théorie de la suspension, la grève n'interrompt ni la continuité des droits ni leur accumulation. Non-violation de l'obligation personnelle: la participation à la grève ne constitue pas une violation de l'obligation personnelle du travailleur à effectuer un travail, conformément au contrat qui l'engage. Interdiction de licencier et interdiction d'aggraver les conditions de travail: depuis 2001, la loi sur les conventions collectives stipule qu'il est interdit de licencier un travailleur, d'aggraver ses conditions de travail ou d'éviter de recevoir un travailleur à cause de "sa participation ou son activité au sein d'un syndicat, ou son activité pour les besoins de la constitution d'un syndicat [...]"⁵⁵ Interdiction de remplacer des grévistes par d'autres travailleurs: la loi sur le service de l'emploi (1959) et la loi sur l'emploi de travailleurs par des fournisseurs de main-d'œuvre (1996) interdisent d'employer des travailleurs pendant une grève. Réduction de la capacité à requérir des dommages de travailleurs en grève: les travailleurs israéliens sont dégagés de responsabilité envers les dommages causés par la grève et ce en vertu de l'exemption permanente contenue dans la clause 62 de l'ordonnance sur les dommages traitant des causes de violation d'accord. Cette protection a été réduite en cas de grève dans le secteur public, et un travailleur ou un employeur qui constituaient une des parties impliquées dans la grève peuvent déposer une requête en dommages et intérêts pour cause de violation d'accord, mais un tiers touché par la grève ne peut le faire.

Significations intra-syndicales. La grève ne constitue pas seulement une arme dans la lutte des travailleurs contre les décisions de l'employeur, elle est également un instrument par le biais duquel le syndicat rassemble les travailleurs autour d'un sujet commun; un instrument d'apaisement des esprits; un instrument manifestant la puissance du syndicat vis-à-vis d'éléments politiques concurrents (tel un autre syndicat voulant rassembler les travailleurs sous son égide); un instrument organisé, légal et légitime destiné à exprimer la colère et la frustration des travailleurs; un instrument destiné à manifester le pouvoir du syndicat vis-à-vis de l'employeur; une tactique de gestion des pourparlers: "montrer à la direction qui détient le pouvoir"; un instrument destiné à manifester la vitalité du syndicat vis-à-vis des travailleurs; un instrument destiné à mettre fin aux conflits du travail et une démarche ramenant les parties à la table des négociations; un instrument permettant la poursuite du travail et la coopération entre les parties engagées dans les relations de travail.

⁵⁴ Protocole de la 368^e session du septième parlement, p. 844, 19.12.1972.

⁵⁵ Clause 33(10) de la loi sur les conventions collectives, 1957.

Significations économiques. Les grèves causent l'interruption ou la réduction de la productivité. De ce fait, les recettes de l'employeur sont elles aussi touchées. Le déclenchement d'une grève peut aussi influencer sur les actions d'une société cotée en bourse, sur la solidité économique de l'employeur et sa capacité à honorer ses engagements, etc.

Significations religieuses. Israël est défini comme "État juif et démocratique"⁵⁶. La société juive en Israël compte trois groupes principaux de référence: les laïcs, les traditionnalistes et les religieux. De ce fait, il y a lieu d'examiner le statut de la grève dans les sources rabbiniques, qui éclairent la ligne de conduite de certains des groupes de référence. Les avis divergent sur la question de savoir s'il est permis à des travailleurs de faire grève de manière organisée. Selon un de ces avis, la grève n'est permise que si elle ne cause pas de dommages à l'employeur. Toutefois, si celui-ci ne rétribue pas le travailleur comme il se doit d'après la loi, il peut faire grève. Selon le second avis, il faut s'en remettre à un tiers neutre, mais tandis que le rabbin Abraham Itzhak Hacohen Kook soutenait la constitution d'un tribunal, cet avis soutient l'arbitrage.

Première partie, chapitre 5: les types de grève

Ce chapitre traite des différents types de grève par le biais de diverses méthodes de classement. Comme dit plus haut, la jurisprudence et la littérature professionnelle distinguent entre la grève économique, la grève politique, la grève pseudo-politique et la grève de soutien. Je me suis penché sur les différences entre ces grèves et j'ai pu voir que le point de divergence entre elles se réduisait à l'élément vers lequel la grève est dirigée et les exigences qu'elle exprime.

Comme je l'ai montré, chacune de ces grèves diffère par ses conditions, et de ce fait, par la reconnaissance dont elle bénéficie. On peut concrétiser ces conclusions dans le tableau suivant.*

	Le facteur contre lequel se tournent les grévistes	Les exigences émises dans le cadre de la grève	Reconnaissance de la légitimité de la grève en Israël	Limitations supplémentaires de la grève en Israël
Grève économique	L'employeur direct	Les conditions / les relations de travail	Reconnue	Aucune
Grève politique	L'État (mais qui n'est pas l'employeur)	Autres raisons	Non	Aucune (car grève non reconnue)
Grève pseudo-politique/grève mixte	Autre que l'employeur	Les conditions de travail mais également la politique de l'État	Reconnue sur la base de son but principal: tant qu'elle est essentiellement économique, elle est légale	Courte durée seulement
Grève de sympathie	N'est pas tournée contre l'employeur direct	Les conditions de travail d'autres travailleurs	Reconnue	Les exigences doivent être légitimes

J'ai également examiné la distinction entre les grèves du point de vue de leur ampleur, du moment de leur déclenchement (avant ou après la signature d'une convention collective) et de leur légalité (grève conforme à la loi ou grève sauvage).

⁵⁶ Le paragraphe 1a de la loi fondamentale sur la dignité de l'homme et sa liberté stipule que son but est "d'ancrer dans la loi fondamentale les valeurs de l'État d'Israël comme État juif et démocratique." Le paragraphe 2 de la loi fondamentale sur la liberté de l'emploi utilise le même langage. La loi fondamentale sur le Parlement stipule au paragraphe 7a que ne pourra prendre part aux élections une liste électorale niant "l'existence de l'État d'Israël comme État juif et démocratique".

* Ci-après: tableau 7.

Selon Aharon Barak, le droit constitutionnel à la grève – comme dérivant de la dignité de l'homme – n'est pas limité à tel ou tel type de grève. Toute action de grève relevant de l'autorité du syndicat entre dans le cadre de la grève dans son sens constitutionnel. Les distinctions en question relèvent en fait de l'équilibre entre le droit de grève et la liberté de l'emploi, la liberté de mouvement, etc.⁵⁷

Michal Shaked ne partage pas l'avis d'Aharon Barak. Elle pense qu'il y a lieu d'annuler le classement des grèves, celui-ci étant né dans le système juridique (et non chez le législateur), dans le but déclaré de réduire le droit de grève. Elle affirme que le classement des grèves permet au tribunal de déclarer que certaines grèves sont illégitimes et de cette manière, il réduit le recours à la grève. À son avis, le tribunal agit de la sorte car il se base sur une conception néolibérale désireuse de réduire la reconnaissance des droits sociaux et des droits du travail. Il s'ensuit que Shaked aurait vivement critiqué l'approche de Menachem Goldberg, qui soutenait la possibilité que le tribunal soit celui qui définit ce qu'est une grève: "Il serait peut-être bon que ce sujet soit laissé à l'appréciation des tribunaux, pour la bonne raison que les besoins et les situations, dans les domaines des relations de travail et du droit du travail, sont dynamiques et changeants, tandis que la définition par la loi, qui est par nature rigide, ne change qu'avec le temps et pourrait représenter un obstacle au moment où le tribunal devrait appliquer la loi."⁵⁸

Comparativement à Barak et Shaked, Ruth Ben Israël représente la voie moyenne. D'après elle, il est non seulement souhaitable de réviser le statut juridique du droit de grève en Israël mais également d'examiner les limites de la grève comme institution⁵⁹, et même "d'élargir la validité de la grève institutionnalisée dans le droit du travail et d'inclure dans ce cadre des comportements comportant un certain aspect politique."⁶⁰ Elle base sa conclusion sur le fait que le gouvernement est devenu un facteur actif dans les relations de travail et dans les pourparlers salariaux. Qui plus est, le gouvernement est le plus grand employeur du pays: le secteur public s'est sensiblement élargi et le système des relations de travail, qui était bilatéral (entre le syndicat et l'employeur), est devenu un système trilatéral au sein duquel le gouvernement mène aussi des pourparlers.

Au premier abord, il semblera à l'observateur qu'il n'y a pas de lien entre les types de grève, mais on peut supposer que la grève économique peut être générale (ou partielle), légale (ou non) et qu'elle est possible avant (ou après) signature d'une convention collective. À ce stade de la discussion, on peut insister sur ce point. Il semble que l'examen des limites du classement des grèves par le biais du tableau suivant peut conduire à certaines conclusions dignes d'intérêt.

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Ampleur de la grève	Générale	1 V	2 X	3 V	4 V
	Partielle	5 V	6 X	7 V	8 V
Légalité de la grève	Selon la loi	9 V	10 X	11 V	12 V
	Sauvage	13 V	14 X	15 V	16 V
Choix du moment de la grève	Avant signature d'une	17 V	18 X	19 V	20 V

⁵⁷ Aharon Barak, *La dignité de l'homme – le droit constitutionnel et ses apparentés*, Nébo 2014, p. 860.

⁵⁸ Menachem Goldberg, "La grève au regard de la loi, de la convention collective et de la jurisprudence", *Le Juriste*, 1987, p. 52.

⁵⁹ Ruth Ben Israël, "Le statut et les conséquences de la grève sauvage", *Le juriste* 37, 1987, p. 158.

⁶⁰ Ruth Ben Israël, "La grève politique en Israël", *Études juridiques* 11, 1986, p. 622.

	convention collective				
	Après signature d'une convention collective	21 X	22 X	23 V	24 V

Parmi les 24 éventualités de grève décrites dans les cases 1-24 ci-dessus, nous constatons qu'en Israël il n'en n'existe tout au plus que 17. Pas une de plus.

On remarquera que les grèves de soutien et les grèves pseudo-politiques touchent par définition des sujets qui ne sont pas compris dans l'accord collectif (cases 23 et 24 ci-dessus), et de ce fait, elles ne violent pas l'engagement à préserver le calme économique. Elles entrent donc en ligne de compte comme grèves éventuelles.

Considérant la revue des types de grève, leurs caractéristiques et les limitations du droit de grève, on peut tirer la conclusion que les types de grève les plus fréquents et ceux qui bénéficieront de la protection du tribunal seront: la grève économique générale (case 1), la grève économique partielle (case 2), la grève économique selon la loi (case 9), et la grève économique avant signature d'une convention collective (case 17). D'entre ces éventualités, les grèves qui bénéficieront très probablement de l'entière protection du tribunal seront les grèves économiques: générale ou partielle, selon la loi et avant signature d'une convention collective.

Il y a deux raisons à cette réduction des éventualités de grèves (17 au lieu de 24). La première est que la grève politique, sous tous ses aspects, ne peut exister en Israël, pour les motifs recensés plus haut. La seconde est qu'il est également interdit de faire grève après signature d'une convention collective. Il s'ensuit qu'en Israël, les limites de la classification des grèves ne se rencontrent pas toutes. Ainsi, par exemple, une grève politique-sauvage, après signature d'une convention collective, est impensable et le tribunal ne la permettra pas.

Première partie, chapitre 6: les facteurs de grève

Dans ce chapitre, j'ai voulu comprendre ce qui conduit les travailleurs israéliens à déclarer la grève et à y prendre part. J'ai recensé les motifs de grève, tels qu'ils ont été établis et permis par la loi, les motifs de grève tels qu'ils apparaissent dans les rapports du chargé principal des relations de travail, ainsi que les théories existantes dans la littérature de recherche et expliquant la tenue de grèves.

Caspi et Kastiel affirment que l'obtention d'un salaire élevé, de conditions de travail améliorées et de la sécurité de l'emploi, au moyen de pourparlers collectifs, ont de tout temps été les buts principaux des organisations ouvrières. Depuis les lendemains de la Seconde Guerre mondiale, jusqu'aux années 1980, celles-ci ont revendiqué et obtenu des conditions de travail améliorées par le biais de pourparlers collectifs, et en cas de besoin, elles les ont imposées aux employeurs par la grève⁶¹. Les motifs de déclenchement des grèves, tels que présentés dans ce chapitre, soutiennent cette conclusion.

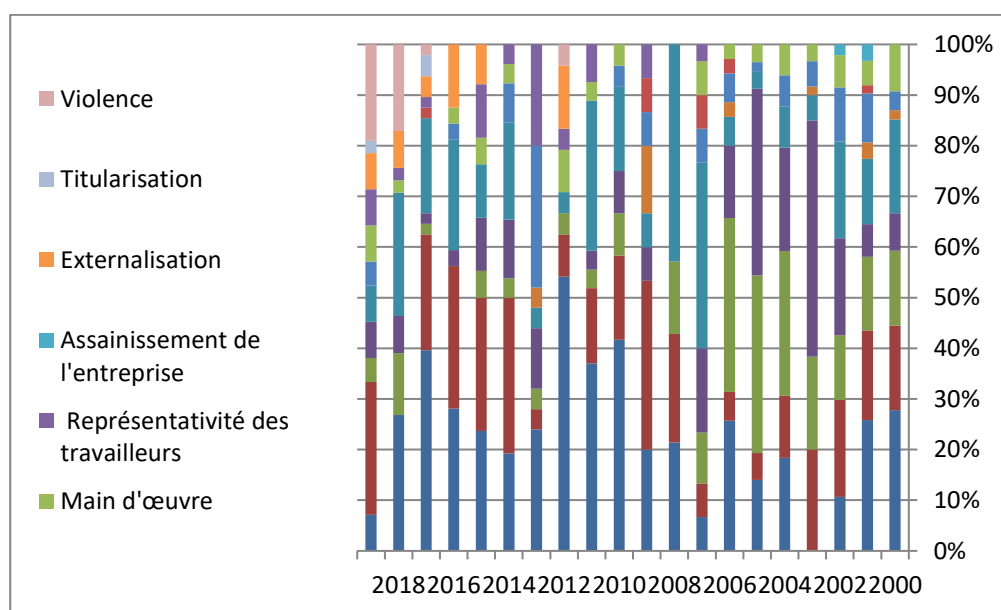
J'ai également recensé différentes approches destinées à expliquer le phénomène de la grève. Il semble qu'il soit aujourd'hui convenu d'expliquer la grève par l'approche éclectique, c'est-à-dire par la combinaison de plusieurs facteurs de tension agissant simultanément, parallèlement ou séparément. **Tensions économiques:** causées par l'écart entre les revendications des travailleurs dans les domaines du salaire et des conditions de

⁶¹ Amnon Caspi et Ruthy Kastiel, *Les relations de travail à l'ère de la mondialisation*, L'Université ouverte, 2010, p. 43.

travail, et la disposition et la capacité des employeurs à les satisfaire, que ce soit à cause de la concurrence ou pour d'autres raisons. **Tensions sociales**: entre différents groupes sociaux et non spécifiquement entre employeurs et travailleurs. Ces tensions sont créées par des écarts dans les richesses, dans le statut socio-économique, dans le statut ou les idées politiques (on ne peut expliquer les grèves dans le fonctionnariat d'État, et dans le secteur public en général, par la tension économique entre employeurs et employés). **Tensions psychologiques**: entre les détenteurs de l'autorité (directeurs, employeurs) et ceux qui doivent appliquer les instructions (les travailleurs). Ces tensions peuvent se développer pour diverses raisons, telles que la différence dans les caractéristiques des personnalités de part et d'autre, le manque de formation des directeurs ou la non implication des travailleurs dans la solution des problèmes les concernant directement, etc. **Tensions organisationnelles** découlant de l'école gestionnaire dominante dans l'organisation (la gestion scientifique, les rapports humains, les ressources humaines). Chaque école gestionnaire a sa réponse propre à la question "comment doit se comporter l'organisation et quels sont les fondements de son activité ?".

Ce chapitre comprend aussi une revue des motifs de grève, tels qu'ils apparaissent dans les rapports annuels du chargé principal des relations de travail. La fréquence des motifs de déclenchement des grèves nous enseigne qu'à partir des années 2000, les raisons "économiques" et la sécurité de l'emploi sont les principaux facteurs de grève en Israël: revendications salariales et autres améliorations; licenciements; accords de travail; changements organisationnels; retenues sur salaire. Viennent ensuite des raisons "pseudo-économiques": dégradation des conditions de travail; ressources humaines; représentativité des travailleurs; délocalisation. Enfin, les raisons les moins fréquentes, au cours de l'époque mentionnée, sont des "raisons panier" comprenant les relations de travail et la discipline; la violence; les conditions physiques; l'assainissement de l'entreprise.

Les motifs les plus fréquents de grève pendant les années 2000-2019 sont, dans l'ordre: exigences salariales et autres avantages, licenciements, conventions collectives, changements organisationnels, retenues sur salaires, détérioration des conditions de travail, main d'œuvre, représentativité des travailleurs, externalisation, relations de travail et discipline, violence, conditions physiques, assainissement de l'entreprise, titularisation. On peut concrétiser cette fréquence par le graphe suivant:



On peut également représenter la fréquence des motifs de grève par le tableau suivant:

Type de motif	Fréquence en 2000-2019 ⁶²
Exigences salariales et autres avantages	471,76%
Licenciements	335,73%
Conventions collectives	315,38%
Changements organisationnels	240,17%
Retenues sur salaire	230,91%
Détérioration des conditions de travail	98,93%
Main d'œuvre	80,83%
Représentativité des travailleurs	67,46%
Externalisation	51,36%
Relations de travail et discipline	26,94%
Violence	23,32%
Conditions physiques	19,89%
Assainissement de l'entreprise	5,36%
Titularisation	4,17%

Les raisons économiques et une partie des raisons pseudo-économiques peuvent amener à considérer les grèves comme des "grèves économiques", contenant des revendications touchant aux conditions de travail, aux relations de travail, aux directives d'acceptation et de licenciement des travailleurs et aux obligations découlant des relations de travail. Comme clarifié dans le chapitre sur les types de grève, ces grèves-là sont légales et légitimes, et il n'est donc pas surprenant que les motifs "formels" et déclarés de grève, même en apparence, soient les motifs économiques.

Première partie, chapitre 7: la grève comme moyen de pression

On utilise souvent le terme de "pression" pour caractériser l'action de la grève. Ce terme est fréquent dans les sentences des tribunaux, dans les publications des chercheurs et même dans le jargon des leaders d'organisations ouvrières et de grèves. Le but de ce chapitre est de nous faire progresser vers les questions qui constituent le cœur même de cette recherche, à savoir: pourquoi la grève est-elle considérée comme un instrument de pression? Quels sont les moyens de pression pouvant constituer une alternative à la grève?

La grève fut et est encore considérée par les instances juridiques comme une action, comme moyen ou comme instrument de pression dont se servent les travailleurs dans le cadre de leur lutte professionnelle. En fait, cette conception a été reprise au fil des ans comme un fil conducteur dans les sentences de la Haute Cour de justice et celles du tribunal du travail. Une des premières sentences dans laquelle a été utilisé le terme de "pression" pour qualifier l'action de la grève a été prononcée dans l'affaire Hatib⁶³. Dans sa sentence, la Haute Cour de justice expliqua que le concept de "grève" n'est pas expressément clarifié dans la loi israélienne et qu'il peut revêtir différentes significations selon le contexte dans lequel il apparaît. Raison pour laquelle elle essaya de définir ce qu'est une grève et établit que: "le grève est une **action de pression** coordonnée, entreprise par un groupe de travailleurs dans le cadre de sa lutte professionnelle avec l'employeur pour la satisfaction d'exigences liées à leurs conditions de travail, ou en rapport avec les

⁶² Les pourcentages sont supérieurs à 100% car ils se réfèrent à l'ensemble des cas s'étant produits au cours des années 2000-2019.

⁶³ Dans cette affaire, des enseignants d'origine druze, habitants du Golan, proclamèrent une grève de protestation contre l'application de la loi israélienne au plateau du Golan, et de ce fait, ne se présentèrent pas à leur travail. Quatre mois environ après le déclenchement de la grève, le ministère de l'éducation nationale mit en garde les grévistes qu'il rejetait leur grève et qu'ils devaient reprendre le travail, sous peine d'être considérées comme démissionnaires. Le ministère ayant demandé à employer d'autres enseignants en lieu et place des grévistes, ceux-ci déposèrent une requête au tribunal du travail, qui remonta jusqu'à la Haute Cour de justice.

exigences d'autres travailleurs ayant été présentées à leur employeur⁶⁴." Finalement, la Haute Cour de justice conclut que l'absentéisme des enseignants n'était pas le produit d'un conflit du travail mais une décision politique prise par des acteurs politiques et refusa de considérer l'action des enseignants comme une grève.

Cette définition fut souvent reprise dans la jurisprudence et dans la littérature⁶⁵ et il est de ce fait souhaitable de s'y attarder. Son examen nous apprend qu'en effet, pour qu'une grève soit reconnue comme telle et jouisse d'une défense juridique, elle doit remplir quatre conditions cumulées:

L'acteur entreprenant la grève = Un groupe de travailleurs +
Le caractère de l'action = Coordination des travailleurs +
Le moment de l'action = Conflit du travail +
Le but = Satisfaction des exigences des travailleurs

Une grève remplissant ces conditions est aussi une action de pression. Les juges israéliens se sont également exprimés, dans d'autres sentences, sur la pression accompagnant la grève, et comme dit plus haut, ont repris la définition du concept établie dans l'affaire Hatib.

Pour ces raisons, je voudrais insister sur la définition de la grève comme moyen de pression, tant dans la littérature que dans le jargon des leaders syndicaux.

Ruth Ben Israël a expliqué que: "De nos jours, dans de nombreuses grèves, **la pression de la grève** est dirigée contre le public et non directement contre l'employeur. Le public devient un otage aux mains des grévistes, qui espèrent que celui-ci **fera pression** sur le gouvernement, qui **fera lui-même pression** sur l'employeur, qui à son tour satisfera les exigences des grévistes. La **pression** est exercée sur le public, qui n'est pas lié au conflit et ne peut ni accepter ni rejeter les exigences des grévistes. Toutefois, le gouvernement, qui prend en considération l'opinion publique, est poussé à intervenir dans de tels conflits du travail pour ne pas perdre le soutien des électeurs potentiels⁶⁶." Et autre part: "La grève est l'exercice d'une **pression** économique sur l'employeur. Il lui incombe de décider s'il doit accéder aux exigences des travailleurs et quoi qu'il en soit, il subit les dommages causés par la **pression** économique exercée par les grévistes⁶⁷."

⁶⁴ Haute Cour de justice 525/84, Nabil Hatib et al. Contre le tribunal du travail et al., sentence 673 (1) 40, 701.

⁶⁵ Voir par exemple les propos de la juge Ayala Prokatcha dans la Haute Cour de justice 1181/03, université de Bar Ilan contre le tribunal national du travail, sentence 204 (3) 44. Haïm Berenson et Assaf Berenson, "La grève de sympathie, son statut et sa proportionnalité", *Le livre Berenson-Benny Sabra*, 2000, p. 766.

⁶⁶ Ruth Ben Israël, "La grève politique" (remarques à propos de la Haute Cour de justice 525/84, Nabil Hatib et al., contre le tribunal national du travail et al., et propos de tribunal du travail 3-29/54 l'État d'Israël – Nabil Hatib, et al.), *Etudes juridiques* 11, 1986, p. 619.

⁶⁷ Ruth Ben Israël, *Droit de travail – volume 4, L'université ouverte*, 2002, p. 1434.

La pression n'est pas qu'une expression apparaissant dans des sentences de l'instance juridique ou la littérature professionnelle. En fait, son utilisation et la compréhension de son importance ont également filtré dans la pratique courante des organisations ouvrières. Ainsi, en 2010, l'organisation des employés de la banque Discount pour les prêts hypothécaires, qui venait d'être créée, "tenta de faire **pression** sur la direction de la banque et déclara [...] qu'elle allait déclencher une manifestation bruyante contre la direction. [...] À 4 heures du matin, la direction de la banque Discount annonça qu'elle reconnaissait l'organisation naissante, à condition que la manifestation soit annulée. Ce fut la meilleure manifestation qui ait jamais eu lieu. [...] Nous avons réussi à amener la direction à reconnaître l'organisation en ne faisant qu'**exercer une pression**⁶⁸."

L'étude des sentences des tribunaux comme celle des propos d'érudits et de leaders syndicaux nous apprend que la grève est une action, un instrument ou un moyen de pression. Aux yeux de l'instance juridique, la pression peut être ou ne pas être légitime, mais en tout état de cause, elle doit être coordonnée entre les travailleurs, ce qui signifie qu'il s'agit d'une action collective qui ne peut être le fait d'un individu. L'objectif de la pression était traditionnellement l'employeur, mais au fil des ans, d'autres acteurs sont eux aussi devenus des objectifs: le public, les consommateurs, les fournisseurs, etc.

En conclusion de ces propos, le concept de pression est devenu beaucoup plus clair. Mais cela ne suffit pas. Il faut comprendre pourquoi la grève est perçue comme une action / un moyen / un instrument de pression. Cela passe en premier lieu par la compréhension des dommages que la grève cause ou peut causer.

Première partie, chapitre 8: conclusion intermédiaire

Dans cette conclusion intermédiaire figurent plusieurs conclusions importantes:

Dans le second chapitre, **La grève dans le droit international**, j'ai examiné les différentes métamorphoses de la grève, depuis son interdiction conformément aux lois étatiques jusqu'à sa reconnaissance par l'ONU par le biais de l'organisation internationale du travail, puis dans les constitutions ou dans les lois des divers États. J'ai également examiné les différences entre différents États concernant la reconnaissance du droit de grève. La conclusion du chapitre était qu'aucun d'entre eux n'est resté indifférent au phénomène de la grève et que le statut du droit de grève et les limitations qui lui sont imposées varient d'un État à l'autre.

Le troisième chapitre, **La grève en Israël**, décrit le développement du droit de grève en Israël. Depuis les années 1930 jusqu'au début des années 1970, le recours à la grève est devenu plus fréquent. Dans les années 1980, ce recours a continué à battre des records selon tous les indices recensés. Ces années ont connu des prescriptions sans cesse renouvelées, tant de la part de la Haute-Cour de justice que de celle du tribunal national du travail, qui ont chaque fois limité, encadré et défini la grève. J'ai montré que seule une minorité de ces limitations a été établie par le législateur, la majorité l'ayant été par les instances juridiques. Si jusqu'aux premières décades de l'État d'Israël la grève était un droit absolu, contrairement à tout autre pays, et bénéficiait du soutien inconditionnel du pouvoir, au 21^e siècle le recours à la grève ne se situe plus dans le contexte d'un "droit" mais dans celui d'une "liberté"⁶⁹.

Dans le quatrième chapitre, **La signification de la grève**, j'ai examiné les différentes significations dérivant du recours à la grève: significations juridiques, intra-syndicales, économiques et sociales.

⁶⁸ Danny Vazana, *Organisés. Rénovation du travail organisé en Israël*, Schakim, 2017, p. 151.

⁶⁹ L'octroi du statut de "droit" à la grève lui accordera une reconnaissance juridique et lui permettra de bénéficier d'un statut légal amélioré, qui ne réduira en rien son pouvoir. Considérant qu'en Israël le droit de grève n'est pas ancré dans les textes et considérant les limitations qui lui sont imposées, son statut n'est que celui d'une liberté.

Dans le cinquième chapitre, **Les types de grèves**, j'ai distingué entre grève économique, grève politique, grève pseudo-politique et grève de soutien. J'ai ensuite proposé des distinctions entre les grèves du point de vue de leur ampleur (générale ou partielle); entre les choix du moment de grève (avant ou après signature d'une convention collective); entre la grève selon la loi et la grève sauvage. En conclusion, il est apparu que contrairement aux apparences, la distinction entre les grèves n'est pas dichotomique. J'ai montré que sur les 24 éventualités de grève existant en Israël, seules 17 sont susceptibles d'être concrétisées. J'ai également montré quels étaient les types de grève les plus fréquents et ceux qui bénéficieraient de la protection du tribunal.

Dans le sixième chapitre, qui traite des **Facteurs de grève**, j'ai voulu comprendre ce qui amène les travailleurs en Israël à déclarer la grève et à y prendre part. J'ai recensé les motifs de grève établis et permis par la loi, ceux reflétés par les rapports du chargé principal des relations de travail, ainsi que les théories existant dans la littérature de recherche et expliquant la tenue des grèves.

Dans le septième et dernier chapitre de cette partie, **La grève comme moyen de pression**, j'examine la fréquente utilisation du concept de pression afin de caractériser l'action de la grève. Ce concept est courant dans la juridiction, dans les publications des chercheurs et comme je l'ai montré, dans le jargon des leaders d'organisations ouvrières et de grèves.

Seconde partie, chapitre 9: les dommages causés par la grève

Les grèves causent des dommages. Par le biais de ces dommages, les syndicats veulent faire pression sur l'employeur pour qu'il accède à leurs requêtes. Ainsi, des suites de la pression exercée par la grève, peuvent être touchés non seulement les travailleurs mais aussi des acteurs économiques ayant des liens commerciaux avec l'employeur, des sociétés / des consortiums locaux et étrangers, des consommateurs de services, des habitants et le gouvernement lui-même.

Ces facteurs ne se trouvent pas toujours du côté subissant les dommages, ni en tout temps ni à chaque grève. Mais la longue liste de dommages éventuels nous apprend que la grève a le potentiel d'entraîner un "effet domino". Ainsi, par exemple, une grève éclatant dans un État-nation quelconque peut influencer sur une entreprise entretenant avec lui des relations économiques et se trouvant dans un autre État-nation. Il s'ensuit que le dommage ne se limite pas à "ici" et "maintenant" mais qu'il peut se produire pendant un présent prolongé (le nombre de ceux qui en pâtissent continue à augmenter au présent) et même dans le futur (lieu et temps encore inconnus). Il s'ensuit que l'accession à la pression d'une certaine grève peut conduire, de manière paradoxale, à une multiplication de grèves dans le futur. Ce sont "les ondes de choc" qui constituent des facteurs significatifs de pression au moment où une grève est déclarée.

Nous avons également vu dans ce chapitre que la grève peut causer des dommages économiques, politiques, sociaux, ainsi que dans les domaines de l'image et des rapports de confiance entre les parties. J'ai passé en revue les différentes méthodes se proposant d'évaluer les dommages causés par la grève et j'ai montré qu'il n'y pas de consensus sur la manière de calculer ces dommages, d'autant qu'il existe des dommages qu'on ne peut évaluer. Cela témoigne sans aucun doute possible de la complexité de la grève comme moyen de pression. La recherche a aussi prêté une attention particulière aux dommages économiques, mais s'est moins penchée sur les autres dommages causés par la grève ou les a même ignorés. Cela pourrait servir de toile de fond à une recherche ultérieure. Une des conclusions de ce chapitre est que les acteurs exposés au plus grand nombre de niveaux de dommages sont les employeurs et les syndicats, en ce que chacun d'eux est exposé à quatre niveaux: économique, politique, image et rapports de confiance. Il s'ensuit que le recours à la grève par le syndicat peut s'avérer être une épée de Damoclès. C'est là une conclusion particulièrement surprenante, car la tendance naturelle et de penser que l'employeur est l'acteur principal, sinon le seul, touché par la

grève⁷⁰. Selon Rabin-Margalio, la juridiction des grèves est un exemple de mode de comportement qualifiable de réciprocité négative: les travailleurs sont prêts à subir un dommage personnel, tel que le non versement de leur salaire durant la grève, afin de causer un dommage économique à l'employeur, perçu comme quelqu'un qui ne se comporte pas avec eux de manière honnête dans le cadre des négociations collectives. Elle ajoute que la grève est destinée à ramener en fin de compte les parties à la table des négociations, en instaurant à nouveau des relations basées sur une réciprocité positive. Sans la possibilité de reculer de la réciprocité positive vers la réciprocité négative (la grève), il serait impossible de maintenir à long terme le mécanisme des négociations collectives. De son point de vue, le droit de grève est le pouvoir de "punir" l'employeur qui s'écarte du cadre de la réciprocité positive, afin de le ramener à un système de relations dans lequel chaque partie veut le bien de l'autre, bien qu'il n'y soit pas obligé⁷¹. Une autre explication du recours à la grève, bien qu'elle cause de lourds dommages au syndicat et aux travailleurs eux-mêmes, se trouve dans la pensée selon laquelle le dommage causé par la présente grève servira le syndicat au cours des futures négociations avec l'employeur, considérant que le pouvoir de tractation du syndicat augmentera avec chaque grève qui aura porté préjudice à l'employeur.

En conclusion de ce chapitre, on peut avancer que malgré les questions encore en suspens concernant le calcul des dommages causés par la grève, on a pu progresser dans la compréhension de la question "pourquoi la grève est-elle un moyen de pression, et quels dommages est-elle susceptibles de causer?". À ce stade de la recherche, nous savons qu'il existe différentes formes de grève, que les grèves partielles peuvent être plus nuisibles que les grèves générales⁷², que les grèves causent des dommages en partie impossibles à évaluer et qu'elles touchent un grand nombre de personnes. Il est indéniable qu'aucun État ne pourrait résister aux dommages prolongés causés par des grèves. Mais en Israël, qui supporte déjà la charge de guerres répétées, se trouve dans une situation sécuritaire instable, et comprend des secteurs n'exploitant pas tout leur potentiel salarial (plus particulièrement les secteurs arabe et ultra-orthodoxe), le résultat est d'autant plus problématique. Le seul fait pour un employeur de se savoir exposé aux dommages de la grève sur quatre niveaux le met en situation de pression. Nous pourrions maintenant examiner dans les chapitres suivants la question "comment l'employeur, des tiers, l'État et le syndicat affrontent la grève?"⁷³

Seconde partie, chapitre 10: l'employeur face à la grève

J'ai déjà montré que la loi, en Israël, ne permet pas de remplacer des travailleurs en grève par des travailleurs titulaires ou temporaires extérieurs au tableau des effectifs à la veille de la grève. Du côté de l'employeur, une grève ne peut être résolue en la brisant. La loi et le tribunal ne le permettront pas. Un employeur désirant remplacer ses employés pendant la grève et faire de cette manière pression sur les grévistes, s'expose à un échec juridique au tribunal et ce, tandis que ses employés grévistes peuvent être occupés à des tâches temporaires pendant la grève, la pression se retournant contre lui. Les employeurs se basant sur une indemnité budgétée par le fonds mutuel des employeurs doivent savoir que ce fonds n'est pas sans inconvénients: il exige de ses membres de confirmer à l'avance l'intention de mettre l'entreprise en grève, il ne couvre pas la totalité du dommage causé par la grève ou la mise en grève, il interdit d'employer des travailleurs grévistes ou ayant été mis en grève et interdit tout paiement (sous quelque forme que ce soit) aux

⁷⁰ Il est à remarquer qu'en 1989, Ruth Ben Israël a écrit que "le paradoxe de ce changement dans le caractère de la grève est que les travailleurs, en tant que collectif, sont à la fois les grévistes et ceux qui en subissent les conséquences immédiates." (Voir: Ruth Ben Israël, "Responsabilité due à des dommages causés par le grève", *id.*, p. 150). Ce propos est toutefois resté limité à une simple remarque et n'a pas été approfondi.

⁷¹ Sharon Rabin-Margalit, "Explications comportementales au droit du travail et aux relations de travail", *Droit et affaires* 3, 2005, p. 142-143, 148-159.

⁷² Voir par exemple le protocole du tribunal national du travail 38/4-13, l'union nationale des journalistes d'Israël – quotidien "Haaretz", verdict 9 415, paragraphe 6: "Il arrive que des grèves qui ne sont partielles et discontinues nuisent plus à l'entreprise qu'une grève générale et continue."

⁷³ On peut penser aux moyens d'affrontement mis en œuvre par d'autres personnes touchées (par exemple des consommateurs de services), mais il me semble que cela n'ajouterait rien de particulier à la compréhension de la grève, ses dommages et sa capacité à être un facteur de pression.

travailleurs en grève ou ayant été mis en grève. Les employeurs ne peuvent pas se baser sur le fait que le tribunal publiera une ordonnance à surseoir contre la grève dans leur entreprise. Nous avons appris que ces ordonnances n'empêchent pas la grève mais sont un instrument destiné à imposer par des moyens juridiques les limitations fixées dans le cadre des limitations règlementant la grève en question. Depuis la fin des années 1990, on a pu constater une baisse significative (d'environ 50%) dans le nombre de demandes adressées au tribunal du travail pour publier des ordonnances à surseoir: celui-ci mène en fait une politique réductrice contre ces ordonnances, pour autant que les grèves se déroulent selon leur procédure légale. En ce qui concerne la mise en grève, le tribunal du travail a fixé une série de conditions cumulées pour la tenue d'une grève selon la loi. Il a fixé que la charge de prouver que la mise en grève est une mise en grève protectrice incombe à l'employeur. Le non-respect de ces règles transforme la mise en grève en grève illégale, et dans ces circonstances, le tribunal peut ordonner son interruption ainsi que le versement du salaire aux travailleurs qui n'ont pu travailler pendant la mise en grève, y compris des intérêts et des indemnités dues à la retenue sur salaire. Un employeur désirant effectuer des déductions salariales doit savoir qu'il y a une chance non négligeable pour qu'il soit obligé de suivre des procédures épuisantes au tribunal du travail. Le désir de faire tourner l'usine malgré la grève, parallèlement à la possibilité qu'il a de fixer un salaire digne, lui imposent de faire un travail préparatoire approfondi, travail qui sera examiné le moment venu par le tribunal. Quand les employeurs s'obstinent à opérer des déductions de salaire, ils sont obligés de mener des négociations concernant les modes de versement de salaire aux travailleurs ayant fait grève. Ces négociations découlent de la jurisprudence, et en tant que telles, elles doivent être menées de bonne foi. Dans de nombreux cas, les grèves peuvent se terminer quand le gouvernement accepte de renoncer à son droit de mettre en œuvre l'arrangement de déduction salariale. Un comportement négatif des employeurs, sous toutes ses formes, désirant empêcher l'organisation des travailleurs et la grève elle-même, se heurte à des sanctions sous forme d'indemnités accrues et même à une aide de la part du tribunal du travail dans l'imposition du contrat de travail.

C'est le moment de demander: quelles sont les conclusions communes à toutes les confrontations recensées dans ce chapitre?

La première conclusion, est que les employeurs désirent voir les grèves se terminer, soit en faisant pression économique sur les travailleurs en empêchant le travail, soit en portant atteinte au salaire, soit en brisant la grève, soit en utilisant des moyens juridiques.

Exercer une pression économique sur les travailleurs en les empêchant de travailler ou en touchant à leur salaire: sous cette catégorie on peut dénombrer les moyens suivants: refus du travail partiel, mise en grève de l'entreprise, mise en congé forcé (avec ou sans salaire), déduction salariale et salaire digne. Briser la grève: remplacement des grévistes par de nouveaux travailleurs temporaires ou titularisés, licenciement des grévistes, emploi de travailleurs extérieurs, utilisation de travailleurs non grévistes, accroissement de la production dans les autres entreprises de l'employeur, établissement de liens commerciaux alternatifs, continuation de la fourniture de produits à l'ère de la mondialisation, accumulation de stock. Utiliser des moyens juridiques: appel aux instances juridiques pour obtenir une ordonnance à surseoir, exigence d'ancrer la paix économique dans les conventions collectives.

La seconde conclusion est qu'on peut diviser les différents moyens recensés ci-dessus selon le moment de leur mise en œuvre: ils peuvent l'être avant la grève, pendant son déroulement ou après elle.

Moyens qui seront utilisés avant la grève	Moyens qui seront utilisés pendant la grève	Moyens qui seront utilisés après la grève
Accumulation de stock	Refus d'accepter du travail partiel	Exigence d'ancrer la paix économique dans les accords collectifs
Exigence d'ancrer la paix économique dans les accords collectifs	Mise en grève	Appel au fonds mutuel des employeurs
	Mise en congé forcé	
	Déductions salariales et versement de salaire digne	
	Remplacement des grévistes par de nouveaux travailleurs temporaires ou titulaires	
	Licenciement des grévistes	
	Emploi de travailleurs extérieurs	
	Utilisation de travailleurs non grévistes	
	Accroissement de la production dans les autres entreprises de l'employeur	
	Etablissement de liens commerciaux alternatifs	
	Continuation de la fourniture de produits à l'ère de la mondialisation	
Appel aux instances juridiques pour obtenir une ordonnance à surseoir		

La troisième conclusion touche la légalité des moyens: ils peuvent être légaux, illégaux ou de légalité douteuse, dû au fait que le législateur ou le tribunal n'ont pas encore donné leur avis les concernant.

Moyens légaux	Moyens illégaux	Moyens de légalité douteuse
Accumulation de stock	Mise en congé forcé	Accroissement de la production dans les autres entreprises de l'employeur
Exigence d'ancrer la paix économique dans les conventions collectives	Remplacement des grévistes par de nouveaux travailleurs temporaires ou titulaires	Etablissement de liens commerciaux alternatifs
Refus d'accepter du travail partiel	Licenciement des grévistes	Continuation de la fourniture de produits à l'ère de la mondialisation
Mise en grève (seulement mise en grève protectrice)	Emploi de travailleurs extérieurs	---
Déductions salariales et versement de salaire digne	---	---
Utilisation de travailleurs non grévistes	---	---
Appel aux instances juridiques pour obtenir une ordonnance à surseoir	---	---
Appel au fonds mutuel des employeurs	---	---

L'examen du tableau récapitulant les moments de mise en œuvre des moyens nous apprend que l'arsenal dont dispose l'employeur avant la grève est presque vide: la plupart des moyens recensés dans ce chapitre ne peuvent être utilisés qu'au cours de la grève. Toutefois, nombre d'entre eux sont également illégaux, comme nous l'enseigne le tableau sur la légalité des moyens. Finalement, l'employeur confronté à la grève peut se retrouver disposant d'une minorité de moyens utiles et légaux pendant la grève, et c'est aussi la conclusion de ce chapitre. On comprend mieux pourquoi la grève représente pour l'employeur un facteur dont l'affrontement n'est ni simple ni facile, et peut même mettre sous pression.

La quatrième conclusion est que plus d'une fois, les moyens utilisés par l'employeur ne sont qu'une réaction aux actions du syndicat ou des travailleurs eux-mêmes. De ce point de vue, il n'a presque pas l'initiative et ne fait que réagir. Les exceptions sont l'accumulation de stock et l'exigence d'ancrer la paix économique dans les conventions collectives, avant ou après la grève.

Même quand l'employeur réagit aux actions des grévistes, ses réactions ne sont pas toujours directement tournées contre eux. Ainsi, quand il choisit de mettre l'entreprise entière en grève en cas de grève partielle, il se propose de faire pression sur les travailleurs non impliqués afin qu'eux-mêmes fassent pression sur les grévistes.

La cinquième conclusion est que pas tous les moyens n'entrent en ligne de compte du point de vue des employeurs, car ils ne sont pas tous applicables. Ainsi, par exemple, l'accumulation de stock exige de l'employeur qu'il loue ou acquiert des espaces d'entreposage. Cela a évidemment un coût économique et il est clair que pas tous les employeurs ne disposent de produits stockables.

La sixième conclusion est qu'une partie de ces moyens s'accompagne d'un coût supplémentaire que les employeurs doivent supporter, tel que l'image de marque ou la réputation, qui sont touchées pendant la grève, et l'employeur qui choisira de les utiliser devra en subir les conséquences.

La septième conclusion est que quel que soit le moyen utilisé par l'employeur, il doit assurer qu'il le fait de bonne foi. Ainsi que le déclara le tribunal national du travail dans l'affaire des usines de la Mer morte: "Dans les relations de travail, il ne s'agit pas de guerre mais d'une lutte unique en son genre, mais même dans la guerre il y a des règles à respecter. De par l'essence même des relations de travail, il apparaît qu'il n'y a pas de place pour les subterfuges dans la conduite de la lutte. Ces relations exigent la bonne foi à toutes les étapes, même dans la lutte, car les relations contractuelles se poursuivent même dans les cas où elles sont suspendues. Des actes débordant de la lutte légitime et de l'obligation de bonne foi ne bénéficieront d'aucune protection⁷⁴".

La huitième conclusion est qu'on peut envisager des moyens supplémentaires de confrontation n'ayant pas été recensés dans ce chapitre⁷⁵ et n'ayant pas été interdits par la loi. Toutefois, dans l'affaire de la First International Bank, le tribunal a fixé dans ces cas aussi des restrictions: "Aux dires de la banque, on peut déduire le positif du négatif, c'est-à-dire: tant qu'il n'y a pas d'autre interdiction dans la législation concernant la défense contre la grève, il faut y voir l'autorisation de faire tout ce que la loi n'interdit pas. **À notre sens, ce n'est pas le cas. De par nature, la législation ne peut couvrir tous les domaines de la vie et tous les cas particuliers. La jurisprudence de la Haute Cour de justice et celle du tribunal du travail ont ajouté des interdictions et des restrictions au-delà des propos de la législation**, découlant "de changements intervenus dans les conceptions de base de la société israélienne [...]" (propos du président Aharon Barak au cours du débat supplémentaire 4191/97, Ephraïm Recanati contre le tribunal national du travail). Même concernant notre affaire, **au-delà des interdictions fixées par la loi, des restrictions supplémentaires ont**

⁷⁴ Protocole du tribunal du travail 41/4-18, la confédération générale des travailleurs, le conseil ouvrier de Beer Sheva et al. – usines de la Mer morte LTD, sentence 14 225, p. 247.

⁷⁵ Par exemple: la prolongation des négociations collectives avec le syndicat ou l'emploi de conseillers en communication.

été imposées au fil des années à l'employeur [...] ⁷⁶ (passages soulignés par l'auteur de ces lignes). En d'autres termes, un employeur qui penserait à une solution "créative" peut devoir affronter des conséquences financières et juridiques, comme l'a découvert la société Composés de brome lorsqu'elle a refusé de recevoir du travail temporaire et a déclaré la mise en grève. Quand le président du comité d'entreprise a informé la direction de la fin des sanctions, celle-ci a refusé d'assurer la reprise du travail, à moins que le comité ne déclare par écrit s'abstenir de mettre en œuvre des sanctions quelles qu'elles soient dans le futur, ou tout au plus des sanctions entre les périodes de travail et non pendant l'effectuation même du travail. Le tribunal régional du travail a établi dans ce cas précis qu'on ne peut imposer des limitations à une grève future comme condition à la fin d'une grève présente ⁷⁷.

La neuvième conclusion: "rester sur la touche", "faire traîner les choses", prendre son parti de la grève ou couper tout contact pendant la grève, ces conduites ne sont pas toujours possibles. Les employeurs qui décident de se taire parce qu'ils "ne mènent pas de négociations sous la menace" peuvent être confrontés à un dommage économique ou aux conséquences de la loi. Dans la sentence Bezeq, le tribunal a établi que l'employeur est tenu de parlementer afin d'épuiser toutes les possibilités et de réduire les dommages que la grève causera aux concurrents et aux consommateurs: "[...] Sur la base des documents et des témoignages qui nous ont été présentés, il apparaît clairement que la direction avait effectivement connaissance, ou tout au moins devait l'avoir, des sanctions prises par ses employés contre les opérateurs concurrents. Malgré cela, elle n'a pas pris les mesures nécessaires pour clarifier l'ampleur de ces sanctions et leur localisation précise et n'a pas agi avec détermination pour y mettre fin [...]" ⁷⁸

Seconde partie, chapitre 11: l'État face à la grève

Nous avons étudié dans ce chapitre par quels moyens l'État – les députés ou les ministres – essaie d'affronter le phénomène de la grève: par le biais d'ordonnances de réquisition ou de propositions de loi destinées à promouvoir le recours à l'arbitrage obligatoire.

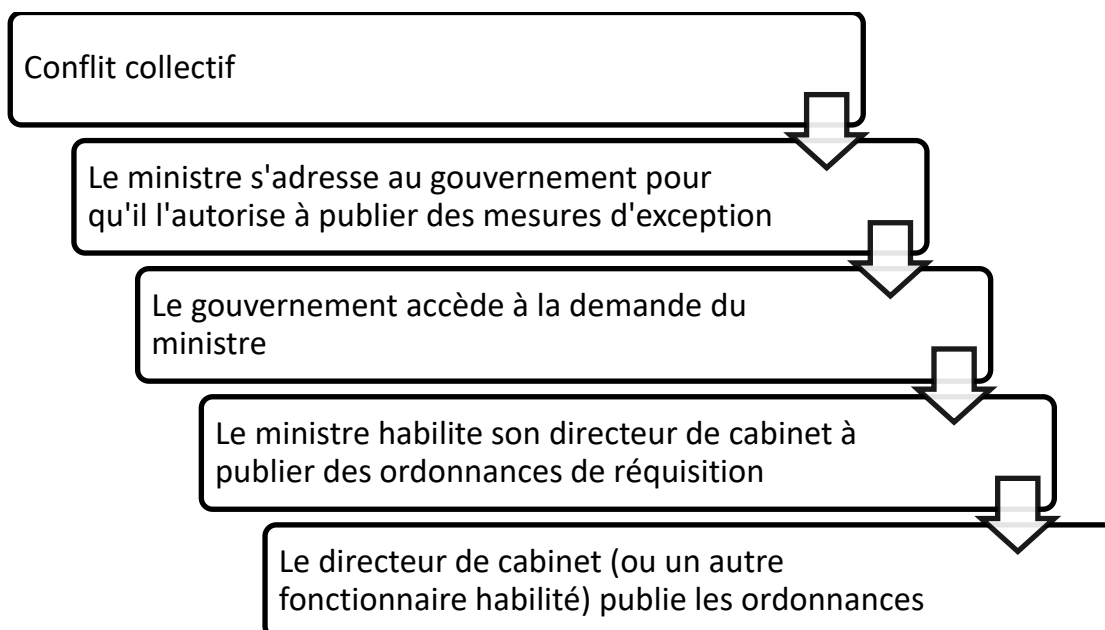
Concernant les ordonnances de réquisition, il semble qu'au fil des années, et en particulier depuis 1977, leur utilisation soit devenue de plus en plus fréquente. Toutefois, le tribunal a bien établi que ces ordonnances sont un moyen draconien, qu'il faut les utiliser avec pondération et qu'elles ne doivent être publiées qu'en dernier recours. J'ai examiné leurs avantages: leur capacité à renouveler la fourniture régulière de services vitaux, leur rapidité, leur souplesse et leur efficacité, et j'ai rappelé les arguments qui s'y opposent.

On peut représenter par le graphe suivant l'ordre des actions pour la publication d'ordonnances de réquisition:

⁷⁶ Conflit collectif (régional Tel Aviv) 269/06, la nouvelle confédération générale – confédération des employés administratifs et techniques – la division des employés de banque – the First International Bak LTD (en date du 20.11.2006), paragraphe 24 de la sentence.

⁷⁷ Conflit collectif (régional Beer Sheva) 54634-01-05, la Nouvelle confédération générale des travailleurs, région du Negev, contre la société Composés de brome LTD.

⁷⁸ Restrictions commerciales 801/08, Bezeq, la société israélienne de communication LTD contre le chargé des restrictions commerciales, paragraphe 31 de la sentence.



Concernant l'arbitrage obligatoire, j'ai passé en revue son déroulement historique, depuis la période de l'implantation avant la création de l'État, la mise en place de la commission des arbitres en 1964, la tentative pour introduire "l'arbitrage-conseil" dans la loi sur le tribunal du travail, l'amendement de cette loi et l'ancrage du chapitre 3 traitant de l'arbitrage, ensuite – la création de l'institut d'arbitrage consenti, qui a gelé dans les faits les conséquences de l'arbitrage dans la loi sur le tribunal du travail concernant les fonctionnaires d'État, jusqu'à ce jour, c'est-à-dire la directive du conseiller juridique du gouvernement de s'abstenir de tout recours à l'arbitrage obligatoire et de toute modification de cette politique. J'ai terminé par les propositions de loi sans cesse déposées au parlement et réclamant le recours à l'arbitrage obligatoire.

Voilà déjà plus de quarante ans, Ruth Ben Israël écrivait à propos du paragraphe 37(e) de la loi sur le règlement des conflits du travail: "(C'est) une institution à laquelle, bien qu'elle soit présente dans le code juridique depuis presque huit ans, on n'a pas eu recours... Il est surprenant de constater que le gouvernement, qui considère l'arbitrage obligatoire dans les relations de travail comme une panacée, n'exploite pas cette institution, tel que cela découle de sa capacité d'employeur dans le service public.⁷⁹" Ces propos sont toujours d'actualité. De ce point de vue, aucun des gouvernements qui se sont succédé n'a pris la peine d'utiliser cet instrument, que ce soit en tant qu'arbitrage obligatoire ou dans le cadre de l'institut d'arbitrage consenti. Ce qui ne les a pas empêchés d'en appeler à l'amendement de la juridiction afin d'y ancrer l'obligation d'arbitrage.

On peut donc se demander pourquoi l'arbitrage n'a pas été utilisé et pourquoi de nouvelles propositions de loi sont déposées à ce sujet. Je vois deux réponses principales:

1. Pendant des années, la confédération générale des travailleurs s'est efforcée de faire échouer, d'affaiblir ou de faire disparaître de l'ordre du jour public les idées réclamant l'arbitrage obligatoire. Au final, toutes ses actions découlaient de sa volonté de continuer à brandir l'arme de la grève, de sa crainte du fait que l'arbitrage puisse servir de substitut à sa force de dissuasion et de ce qu'elle n'atteindrait pas ses objectifs par le biais d'arbitres professionnels et objectifs, non soumis comme l'État à la pression publique.
2. Contrairement à la confédération générale, l'État ne s'empresse pas de confier des pouvoirs à un autre organisme qui deviendrait actif et central dans le façonnage des relations et des conditions de travail dans le secteur public (raison pour laquelle, par exemple, il a limité le pouvoir de l'institut

⁷⁹ Ruth Ben Israël, "L'obligation d'arbitrage dans le service public", *Études juridiques* vol. 8, 1981-1982, p. 173.

d'arbitrage consenti). Pour autant, il existe une autre hypothèse de travail selon laquelle, par le truchement des propositions de loi visant à imposer l'arbitrage, l'État fait signe aux employés du secteur public qu'il repousse la pression qu'ils veulent exercer sur lui dans le cadre de conflits spécifiques du travail et qu'il devraient plutôt peser leurs démarches, au risque de voir l'obligation d'arbitrage ancrée dans le code juridique.

Seconde partie, chapitre 12: les tiers face à la grève

Nous avons vu dans ce chapitre que la manière dont des tiers, qui n'ont rien de commun avec les grévistes, évitent les dommages causés par la grève, est difficile et complexe. En toute logique, l'aggravation des atteintes aux tiers causées par les grèves aurait dû entraîner une adaptation de la situation juridique et la création de moyens tenant également compte de leurs intérêts. Mais le législateur israélien a laissé le domaine en l'état et ceci a amené les tiers à essayer d'influer, par l'intermédiaire des tribunaux, sur la manière d'obtenir des dédommagements, tout en recourant à des actions injustes pour réduire leurs dommages, comme par exemple la réduction du droit de grève⁸⁰.

J'ai montré comment le tribunal appliquait aux organisations ouvrières la défense fixée contre le facteur de violation de contrat, et je me suis penché sur la distinction qu'il a faite entre une grève protégée, continuant à bénéficier de l'exemption fixée au paragraphe 62 B de l'ordonnance sur les dommages, et une grève non protégée, qui n'en bénéficie pas. J'ai examiné les obstacles auxquels se heurtent ceux qui veulent se protéger des dommages, en s'appuyant sur les préjudices de la négligence, de la violation d'obligation inscrite et de la nuisance causée au public.

J'ai expliqué pourquoi la sentence prononcée dans l'affaire des Usines de véhicules d'Ashdod est la sentence directrice et centrale concernant le rapport entre le droit de grève et d'autres droits contraires, protégés par les lois sur les dommages. Dans cette sentence, la Haute-Cour de justice a établi que la liberté de grève a des limites et que les grévistes ont obligation de prudence envers des tiers susceptibles d'être touchés par la grève. Elle a établi qu'il y a obligation de prudence de la part des grévistes envers un tiers, qui n'est pas leur employeur, pour un dommage qui lui aurait été causé pendant la grève.

Depuis ces décisions novatrices, des requêtes concernant les intérêts de tiers ont été présentées aux tribunaux. Diverses instances ont essayé, semble-t-il, de respecter le droit de grève et de distinguer entre le dommage causé à l'employeur et celui causé au public, en particulier le public socialement affaibli. On trouve un exemple probant de cette conclusion dans l'affaire de l'institution d'assurance nationale [Sécurité sociale] contre la nouvelle confédération ouvrière générale – la confédération des fonctionnaires d'État. L'institution d'assurance nationale s'est adressée au tribunal régional du travail pour demander l'annulation de sanctions prises par les employés de l'institution. Le tribunal a rejeté la demande, sauf en ce qui concerne la réception du public, à la lumière de l'atteinte injuste envers des populations affaiblies, et a intimé aux employés de recevoir à nouveau le public: "En considérant la question de savoir si les sanctions prises par les répondants sont proportionnées ou non, nous devons distinguer entre l'atteinte à l'employeur – le requérant, et l'atteinte aux tiers, en l'occurrence le public s'adressant à l'institution. Alors que l'atteinte à l'employeur est considérée comme proportionnée, et ne comporte rien qui puisse imposer des limites aux moyens organisationnels utilisés par les travailleurs [...], il faut voir l'atteinte à des tiers, en l'occurrence le public s'adressant à l'institution, sous un autre jour. L'institution d'assurance nationale dessert l'ensemble de la population israélienne, toutefois une partie de ceux qui demandent à recevoir des pensions et autres soutiens de la part du requérant comptent parmi les populations faibles, ils ont besoin d'aide et frappent aux portes des

⁸⁰ Ruth ben Israël, "Le rôle et la place du tribunal du travail dans le système juridique israélien", *Le juriste*, livre du jubilé, décembre 1993, p. 437.

agences à travers le pays, parfois pour recevoir de l'aide au financement de moyens de subsistance élémentaires [...]. Devant cet état de fait, nous pensons que ce moyen, mis en œuvre par les répondants, est disproportionné et qu'il porte atteinte au public au-delà de ce qui est nécessaire. On peut raisonnablement supposer que le dommage causé à l'ensemble du public, et plus particulièrement aux populations faibles ayant besoin des services de l'Institution d'assurance nationale, est important et de ce fait, nous pensons qu'il est souhaitable de limiter les sanctions à ce seul domaine [...]⁸¹".

Ilan Itach soutient cette conclusion en expliquant que le pendule juridique oscille entre le droit de grève et la défense des intérêts des tiers. Le passage à une économie moderne et développée, dans laquelle existe une interdépendance entre les différents acteurs, a fait que de nombreuses grèves causent à de larges publics de graves dommages, même si cela ne touche pas particulièrement les services publics ou vitaux⁸². Il semble que cette conclusion, bien qu'elle ait été rédigée il y a plus de vingt ans, trouve encore son expression dans les tribunaux.

Par la suite, j'ai examiné la possibilité de se protéger des dommages causés par la grève en déposant une requête représentative. La conclusion a été que le chemin à parcourir pour qu'elle soit validée passe par une demande de validation – que le tribunal ne s'empresse pas de donner. Une autre conclusion est qu'on ne peut déposer une telle requête contre un syndicat ou un comité d'entreprise, et de ce fait, c'est l'employeur qui devient celui contre lequel elle est déposée. Dans l'affaire Sagit Pen, une des plus citées dans la juridiction, le tribunal a justifié le dépôt de la requête contre l'employeur. Il a établi que celui qui doit supporter les dommages causés par la grève à un tiers est l'employeur. Pour être dégagé de cette responsabilité, il doit prouver au tribunal qu'il a tout fait pour empêcher l'atteinte aux tiers, que son activité a été sans tache et plus exactement – il doit entretenir des voies effectives de communication avec le syndicat et exploiter au mieux les négociations avec lui.

Seconde partie, chapitre 13: le syndicat face à la grève

Le droit de déclarer la grève et de la mettre en œuvre est réservé au syndicat. Il s'ensuit qu'apparemment, celui-ci détient un pouvoir important: il choisit le type de grève, son *timing* et peut même décider de son amplitude.

Toutefois, au cours de la grève, le syndicat, en tant que collectif, et les travailleurs, en tant qu'individus, subissent des dommages, de même que l'employeur, les consommateurs et les habitants en général. L'acteur souvent considéré comme responsable de ces dommages est le syndicat, en tant qu'il a déclaré la grève. Ce fait l'oblige à agir de manière pondérée et légale, au risque de voir le tribunal déclarer que la grève est illégale, ou disproportionnée, et ainsi ordonner son interruption.

Dans ce chapitre, j'ai passé en revue sept moyens qu'utilise un syndicat pour affronter la grève: lutte dissimulée; permanences de protestation; transfert de la pression du niveau organisationnel-collectif au niveau individuel-personnel; mise en place d'un fonds de grève; imposition de la grève face à ceux qui la brisent; mise en œuvre d'une commission d'exceptions et démission collective.

Ces moyens aident le syndicat à réduire les dommages causés par la grève. Ainsi la lutte dissimulée et la mise en place d'un fonds de grève aident à diminuer la pression économique exercée sur les travailleurs. Ces moyens peuvent amener le public à estimer le syndicat et le tribunal du travail à le soutenir – par le biais de la mise en œuvre d'une commission d'exceptions. Ils peuvent lui permettre de continuer à faire pression sur

⁸¹ Conflit collectif (Jérusalem) 11/09, L'institution d'assurance nationale contre la nouvelle confédération ouvrière générale – la confédération des fonctionnaires d'État.

⁸² Ilan Itach, "Requêtes de tiers concernant des dommages causés par la grève", Net Plus, juillet 2001, p. 84.

l'employeur – par le biais de permanences de protestation, de démission collective, de transfert de la pression du niveau organisationnel-collectif au niveau individuel-personnel ou d'imposition de la grève.

On peut classer les moyens de confrontation selon les niveaux de liens du syndicat: face à l'employeur, face aux habitants /consommateurs et face aux travailleurs:

Employeur	Habitants/consommateurs	Travailleurs
Lutte dissimulée	Mise en œuvre de la commission d'exceptions	Mise en place d'un fonds de grève
Permanences de protestation	Permanences de protestation	Imposition de la grève
Transfert de la pression du niveau organisationnel-collectif au niveau individuel-personnel	---	---
Démission collective	---	---

Mais on peut voir que ces moyens ne sont pas sans inconvénients:

Dans la lutte dissimulée, l'employeur doit prouver qu'il s'agit bien d'une grève. C'est sur lui que repose la charge de prouver que les travailleurs pratiquent des sanctions. Ce n'est pas une démarche facile et le tribunal aura du mal à trancher. J'ai montré que la voix royale, pour un employeur se heurtant à une grève partielle dont il n'est pas certain, est de s'adresser au tribunal pour obtenir une sentence déclarative concernant la tenue d'une grève partielle. Une telle adresse est toutefois problématique du fait de la complexité de la preuve et de la durée de la procédure.

Dans la permanence de protestation, le tribunal en a bien autorisé la tenue, mais pendant longtemps, les travailleurs ont été obligés d'essuyer le refus de reconnaître ces permanences comme protestation légitime et leurs actions ont été rejetées pour cause de "violation de propriété immobilière" ou "violation de propriété mobilière".

Dans le transfert de la pression du niveau organisationnel-collectif au niveau individuel-personnel, la stratégie adoptée par les syndicats pour maintenir une pression quotidienne face au domicile de l'employeur peut en effet être effective. Il n'est pourtant pas certain qu'elle puisse convaincre les instances juridiques de sa nécessité et de sa légalité, plus particulièrement considérant la tendance du législateur à limiter le droit de manifester devant les domiciles privés, et considérant la tendance de la jurisprudence à privilégier le droit à la privauté de l'employeur dans son domicile, vu qu'il n'est pas une personnalité publique, qu'il ne vit pas dans une "demeure officielle" et qu'il y a une volonté de limiter l'exposition d'"otages" – sa famille et ses voisins – aux nuisances accompagnant la manifestation.

Dans la mise en œuvre d'un fonds de grève, l'indemnité versée par le fonds n'est en général que partielle et dépend d'une série de conditions que les travailleurs et la grève doivent remplir. Il s'ensuit que les dédommagements versés par les fonds de grève n'empêchent pas complètement les dommages directs causés aux travailleurs.

Dans la tentative d'imposer la grève, l'aspect négatif du droit de grève a bénéficié de la reconnaissance de la jurisprudence et de la littérature. Dans ce cadre, il est interdit au syndicat de porter atteinte aux travailleurs s'opposant à la grève, il lui est interdit de leur imposer la grève et il doit respecter le droit de ceux qui ne veulent pas faire grève. D'autre part, la violation de la grève peut affaiblir le pouvoir du syndicat et porter atteinte aux chances de réussite de la lutte professionnelle.

Dans la création de commissions d'exceptions à la grève, le syndicat assume une limitation supplémentaire à la grève. Le syndicat désirant mettre en grève un service public et/ou vital sait que l'engagement à créer une telle commission, ou à maintenir son existence, peut convaincre le tribunal (sans que le syndicat puisse en être assuré) de valider la grève ou d'empêcher la publication d'une ordonnance à surseoir contre elle. Le tribunal peut également faire dépendre l'existence de la grève de la mise en place d'une commission d'exceptions, si cela n'a pas encore été fait. Il peut examiner sa conduite, considérer les décisions qu'elle prend et leur vraisemblance, y compris ses arguments, ainsi que sa disponibilité envers ceux qui s'adressent à elle.

Dans la démission collective, le syndicat prend le risque de voir cette mesure reconnue comme "grève déguisée", auquel cas, le tribunal l'annulera et considèrera les relations travailleur-employeur comme n'ayant jamais été interrompues. Par contre, si la démission est reconnue comme authentique, ces relations cesseront et cela peut devenir une épée de Damoclès contre les travailleurs, qui n'avaient pas véritablement projeté de faire grève.

La grève n'est donc pas seulement un moyen de pression dirigé contre l'employeur. Elle est aussi une épreuve pour le syndicat. Pendant la grève, les leaders syndicaux doivent faire preuve d'audace, de charisme et de foi en leur cause afin de mobiliser les travailleurs. Le syndicat et ses militants sont jugés sur leur capacité à imposer la grève et ses dirigeants doivent mettre en place des moyens économiques assurant la subsistance des travailleurs. Le syndicat doit promouvoir la grève auprès des médias afin que son image aux yeux du public ne soit pas entachée. La conclusion est que le recours à la grève contraint le syndicat à jouer sur plusieurs tableaux, parfois même simultanément: sur la scène juridique – face à l'employeur; sur la scène économique – face à ses membres; sur la scène médiatique – face aux habitants-consommateurs. Tout cela, tandis que l'employeur lutte parfois contre la grève, que les travailleurs risquent de la briser et qu'il n'y a aucune garantie de succès.

Seconde partie, chapitre 14: évaluation de la grève comme moyen de pression

Dans ce chapitre, j'ai passé en revue des recherches se proposant d'évaluer la grève comme moyen de pression destiné à atteindre des objectifs et j'ai montré la difficulté à tirer des conclusions univoques desdites recherches. Je me suis donc tourné vers la recherche d'autres variables susceptibles d'aider à cette évaluation. J'ai examiné les changements intervenus sur le marché du travail pour comprendre si la grève peut être un moyen de pression adapté au 21^e siècle. De plus, j'ai montré qu'il y a mélange et souvent même confusion inconsciente entre les concepts d'efficacité et d'effectivité. J'ai examiné l'utilisation courante de ces termes dans la littérature traitant de l'évaluation des grèves, ainsi que leurs différences, et je me suis finalement tourné vers la jurisprudence pour examiner comment les tribunaux décident de ce qu'est une grève effective et comment est mesurée cette effectivité.

Le couronnement de ce chapitre est le développement d'un nouvel indice, l'indice pratique, pour évaluer la grève comme moyen de pression. Par le biais de cet indice, je me propose d'utiliser les concepts souvent répétés dans la littérature de recherche, tout en les distinguant (et dans le même temps, en neutralisant les variables sujettes à désaccord ou à incohérence dans la littérature) et en y ajoutant les idées développées dans ce chapitre. L'indice pratique me permettra d'évaluer des grèves et par la suite, des moyens de pression alternatifs.

J'espère qu'il sera possible d'évaluer une grève comme pratique si elle réussit à produire un nouveau point d'équilibre entre les travailleurs et l'employeur, tout en étant adaptée à l'utilisation sur le marché du travail au 21^e siècle; une grève pouvant exercer une pression sur l'employeur qui l'amènera à répondre de manière optimale aux exigences des travailleurs, en causant le minimum de dommages. En d'autres termes, l'indice de

la grève pratique est composé de trois variables accumulées: effectivité, efficacité et adaptation à l'utilisation au 21^e siècle.

1. Une grève effective est celle capable d'obtenir le résultat espéré par les travailleurs. En d'autres termes, une grève aspirant à maximiser l'accession aux exigences des travailleurs. Sous cet indice, on peut adopter les critères à partir desquels Michaël et Bar-El proposent de définir la réussite de la grève: (a) l'employeur a accédé à toutes les exigences des travailleurs; (b) ces exigences ont été partiellement acceptées; (c) elles ont été rejetées; (d) le conflit revêt de nouvelles formes: rapprochement, arbitrage ou poursuite des négociations⁸³.

2. Une grève efficace est celle dans laquelle l'accession aux exigences des travailleurs se fera en causant le minimum de dommages à l'employeur, à l'entreprise, à l'État, aux tiers (consommateurs/citoyens, fournisseurs, etc.), au syndicat et aux travailleurs eux-mêmes. Sous cet indice, on peut considérer qu'une grève est efficace si:

- a. Les niveaux de dommages effectifs seront réduits par rapport aux niveaux de dommages potentiels existant au départ. Je rappelle ici les niveaux de dommage déjà examinés: économiques, politiques, sociaux, en termes d'image et dommages causés à la confiance entre les parties impliquées dans le système des relations de travail.
- b. Le cercle des personnes effectivement touchées par la grève sera réduit par rapport au cercle potentiel existant au départ. Je rappelle que les cercles possibles comprennent les employeurs, les travailleurs, les habitants et les consommateurs, les acteurs commerciaux en relations d'affaires avec l'employeur, le gouvernement et le syndicat.
- c. De plus / ou bien, on assistera à "la mise en œuvre d'une pression graduelle" (c'est-à-dire l'utilisation de mesures allant en s'aggravant au fur et à mesure que le conflit avance et que les exigences des travailleurs ne sont pas entendues).

3. La grève adaptée au marché du travail au 21^e siècle est celle qui utilise des moyens ayant été développés ou perfectionnés au 21^e siècle, comme dit dans ce chapitre. On pourra reconnaître de tels moyens (tels que l'utilisation des médias, y compris les réseaux sociaux; l'utilisation de la grève d'information; le travail à domicile), à condition que leur utilisation soit bon marché/gratuite, disponible et répandue à grande échelle.

Plus la grève sera effective, efficace et adaptée au 21^e siècle, plus elle sera pratique:

**(1) Grève effective +
 (2) Grève efficace +
 (3) Grève adaptée au marché du travail au 21^e
 siècle
 = Grève pratique**

Pour concrétiser l'indice de grève pratique, je l'ai appliqué comme cas d'étude à l'affaire du Groupe Alpha. L'analyse a été effectuée à partir d'une revue systématique de reportages d'actualité, de la sentence du tribunal du travail et d'un entretien que j'ai eu avec les membres du comité d'entreprise. Ma conclusion est que la grève mise en œuvre dans l'affaire Alpha a été une grève pratique.

⁸³ Abraham Michaël et Raphaël Bar-El, *La grève en Israël – approche quantitative*, université de Bar-Ilan, en collaboration avec l'institut pour la promotion des relations de travail, 1977.

Les conclusions de ce chapitre me conduisent à la troisième partie de ce travail, qui traite des moyens de pression alternatifs à la grève. J'y examine, par le biais de l'indice de grève pratique, dans quelle mesure ils sont également pratiques.

Troisième partie, chapitre 15: conclusion

Le but de cette partie était de comprendre pourquoi la grève est un moyen / un instrument de pression. Pour ce faire, je suis passé par la compréhension des dommages que la grève cause ou est susceptible de causer.

Dans le neuvième chapitre, **Les dommages causés par la grève**, j'ai voulu comprendre quels dommages la grève peut causer, en plus du dommage économique. Il s'est avéré que ceux-ci peuvent être politiques, sociaux, en termes d'image et dans les relations de confiance. J'ai examiné les facteurs touchés par la grève et j'ai appris que ceux qui étaient exposés au plus grand nombre de niveaux de dommages sont l'employeur et le syndicat, chacun étant exposé à quatre niveaux. J'ai demandé par la suite "Comment peut-on évaluer les dommages causés par la grève?" et j'ai appris qu'il n'y a pas de consensus sur cette question. Qui plus est, il y a des dommages impossibles à évaluer. Tout cela témoigne de la complexité de la grève comme moyen de pression.

Du chapitre 10 au chapitre 13 j'ai examiné les quatre types de **confrontation avec la grève**: celle de l'employeur (chapitre 10), celle de l'État (chapitre 11), celle des tiers (chapitre 12) et celle du syndicat (chapitre 13).

Le chapitre 14, **Evaluation de la grève comme moyen de pression**, qui clôt cette partie, se propose d'examiner la possibilité d'une telle évaluation. J'ai passé en revue un certain nombre de recherches et j'ai montré qu'il est difficile d'en tirer des conclusions univoques. Je me suis donc tourné vers la recherche d'autres variables qui puissent aider en la matière. Parallèlement, j'ai examiné les changements intervenus jusqu'à nos jours sur le marché du travail. Le couronnement de ce chapitre a été le développement de l'indice de grève pratique pour l'évaluation de la grève comme moyen de pression.

Troisième partie, chapitre 16: la grève virtuelle

J'ai examiné dans ce chapitre la grève virtuelle, ses caractéristiques dans le monde et en Israël et j'ai évalué son éventualité comme moyen de pression alternatif et pratique à la grève classique. Dans le cadre de la grève virtuelle, les travailleurs continuent à travailler comme de coutume et les mesures organisationnelles s'expriment par le fait que l'employeur ne perçoit pas les recettes de ses ventes car elles sont versées, le temps que dure la grève, sur le compte fiduciaire d'un tiers. C'est ainsi qu'une pression économique est exercée sur l'employeur. L'idée de grève virtuelle a été émise par Goble⁸⁴, mais elle n'a pas bénéficié à l'époque d'une attention particulière, et comme je le montrerai par la suite, elle n'a pas de nos jours non plus d'ancrage véritable dans les relations de travail en Israël.

Les avantages et les inconvénients de la grève virtuelle par rapport à la grève classique peuvent être résumés dans le tableau suivant:

⁸⁴ George W. Goble, "The Non-Stoppage Strike", Labor Law Journal (February 1951), pp 105-114.

---	Grève classique		Grève virtuelle	
---	Avantages	Inconvénients	Avantages	Inconvénients
L'employeur	Il est conscient que les travailleurs ne perçoivent pas de salaire et risque de "laisser traîner" pour inciter le syndicat à terminer la grève	<ul style="list-style-type: none"> • Atteinte à l'image • Perte de produit et de productivité • Atteinte à la trésorerie 	<ul style="list-style-type: none"> • Pas d'atteinte à l'image • Pas de perte de produit et de productivité 	<ul style="list-style-type: none"> • Atteinte à la trésorerie • Le syndicat n'est pas incité à terminer la grève
Le travailleur singulier	(Néant)	Atteinte au salaire	Pas de perte de salaire (pour le travailleur israélien)	(Néant)
Le syndicat	<ul style="list-style-type: none"> • Le droit de grève est un droit indépendant et ne nécessite pas l'autorisation du tribunal pour le mettre en œuvre • Possibilité de terminer le conflit plus rapidement en faisant pression sur le public 	Atteinte à l'image	Pas d'atteinte à l'image du syndicat	<ul style="list-style-type: none"> • Le tribunal doit autoriser la mise en œuvre de la grève • Le public ne ressent pas la grève et de ce fait il n'exerce pas de pression sur l'employeur
Le public (consommateurs, habitants et autres)	(Néant)	Souffrance: Le public est considéré comme "otage"	Pas de souffrance	(Néant)

La revue de la littérature de recherche dans ce domaine nous apprend que seuls deux états reconnaissent cette grève et lui accordent un véritable statut: l'Italie et les États-Unis. En 1960 eut lieu une grève virtuelle dans la compagnie des autobus de Miami, en Floride. Suite à l'intervention du maire, les parties acceptèrent de mettre en œuvre une "semi-grève": le public ne paya pas pour l'utilisation des transports publics et ainsi la compagnie fut privée de recettes. Les travailleurs continuèrent à travailler sans recevoir de salaire et le public continua à utiliser les autobus comme à l'habitude⁸⁵.

Le modèle américain de la grève virtuelle nous enseigne qu'elle se déroule d'un commun accord et n'est pas limitée dans le temps. Le travail s'effectue comme d'habitude, les travailleurs ne reçoivent pas de salaire et l'employeur ne perçoit pas de recettes. Durant la grève, toutes les recettes sont versées au Trésor public ou à des œuvres de bienfaisance. En Italie, par contre, cette grève est limitée dans le temps et le cours normal de l'activité n'est pas perturbé. Autre différence: les recettes de l'entreprise sont versées à un fonds de bienfaisance spécifique. Celui qui a le dernier mot, pour toute question relative à la grève virtuelle, est l'arbitre désigné.

⁸⁵ Anonymous "Strikes that don't harm the business" 29 (1) International Management (1974) 4.

On peut trouver sur la toile des témoignages sur les caractéristiques de grèves virtuelles ayant été déclarées au cours de luttes professionnelles dans divers pays. On peut appeler toutes les luttes recensées "grèves de caisses", c'est-à-dire non-prélèvement de paiement de la part des voyageurs. Dans chacune de ces luttes, les conducteurs ont poursuivi leur travail comme de coutume mais n'ont pas prélevé le montant des billets. La poursuite du travail, de la part des travailleurs, et la continuité du service proposé au public, tout en privant l'employeur de ses recettes, sont la quintessence de la grève virtuelle.

Il existe en Israël trois témoignages de grèves virtuelles: l'affaire de l'Autorité des parcs nationaux en 1988, l'affaire de la Compagnie nationale des trains et de l'Autorité aéroportuaire en 2003, et celle de la Compagnie nationale d'électricité en 2005.

On peut présenter comme suit les différences entre ces dernières et celles d'Italie et des États-Unis:

	Israël	États-Unis	Italie
Initiative	La grève a lieu sur l'initiative du tribunal national du travail et parfois d'un commun accord entre les parties	La grève a lieu d'un commun accord entre les parties	La grève a lieu d'un commun accord entre les parties
Durée	Illimitée	Illimitée	Limitée
Recettes de l'employeur	Pas de recettes	Pas de recettes	Pas de recettes
Salaire	Le salaire est versé	Pas de salaire	Pas de salaire

Les grèves virtuelles en Israël ne comportent aucune sanction contre les travailleurs. Elles ne touchent pas leur portefeuille et ne les encourage pas à y mettre fin. Comme l'écrit Eshet: "La grève virtuelle, telle qu'elle a été façonnée par le tribunal national [du travail] ne crée pas un environnement équitable pour la conduite de pourparlers entre les parties. Le tribunal a choisi une solution juridique inefficace. Elle crée un déséquilibre indésirable dans le pouvoir de tractation de chacune des parties. Elle encourage les travailleurs à se conduire de façon déraisonnable, au détriment de l'employeur⁸⁶". La solution qu'il propose pour optimiser la grève virtuelle est qu'un certain pourcentage du salaire des travailleurs qui y prennent part soit versé à des œuvres de bienfaisance tant que dure la grève. Ce pourcentage variera selon la durée de la grève: plus elle durera, plus ce pourcentage sera élevé, jusqu'à un plafond qui sera fixé. Cette sanction améliorera l'équilibre entre les parties. Je trouve que cette proposition est logique et qu'elle est susceptible de garantir l'effectivité de la grève virtuelle, car elle peut assurer que celle-ci coûtera moins cher aux parties que la grève traditionnelle, tout en réduisant le second travers dont parle Eshet. Pour cette raison, je trouve que la proposition de Caspi et Ben Hador⁸⁷, de ne pas verser du tout de salaire aux grévistes, est erronée.

On peut également envisager que le syndicat et l'employeur décident de donner à la grève un caractère volontaire: ils en conviendraient ensemble, comme en Italie et aux États-Unis, et elle ne leur serait pas imposée. De cette manière, les parties conserveraient leur pouvoir dans le recours à la grève, ne dépendraient pas du tribunal et elles conserveraient des voies directes de communication, tant à l'approche de la grève que pendant son déroulement – ce qui pourrait accélérer la fin du conflit qui les oppose.

La grève virtuelle peut-elle être un moyen de pression alternatif et pratique à la grève traditionnelle en Israël? J'estime qu'on pourra le vérifier si elle se montre effective, efficace et adaptée au 21^e siècle. Si elle obtient le résultat espéré par les travailleurs, elle sera **effective**. Si l'accession aux exigences des travailleurs cause un

⁸⁶ Ido Eshet, "Sur les vertus de la grève virtuelle", Travail, Société et Droit 11, 2005, p. 42.

⁸⁷ Amon Caspi, Batia Ben Hador, "La grève virtuelle", Travail, Société et Droit 11, 2005.

minimum de dommages, elle sera définie comme **efficace**. Toutefois, il faut rappeler que dans le modèle israélien, les travailleurs continuent à toucher leur salaire et de ce fait, le "coût" de la grève pour l'employeur peut augmenter. Il n'est donc pas certain que la grève virtuelle soit effectivement plus efficace que la grève traditionnelle. Enfin, **elle est adaptée à l'utilisation sur le marché du travail au 21^e siècle**, et comme telle, elle peut se produire, par exemple, grâce à une minorité de travailleurs, comme ce fut le cas dans l'affaire du groupe Alpha⁸⁸.

Troisième partie, chapitre 17: l'humiliation en ligne

J'ai examiné dans ce chapitre l'essence du procédé d'humiliation en ligne, plus connu sous le vocable anglais de "shaming", et je me suis demandé s'il pouvait être un moyen de pression alternatif à la grève. Pour ce faire, j'ai d'abord considéré ce procédé dans sa signification générale; puis je l'ai considéré dans une perspective historique, mondiale et juive; j'ai étudié ses expressions sur la toile et dans les réseaux sociaux; j'ai examiné ses buts et ses résultats; je l'ai considéré dans le droit hébraïque et dans le droit israélien et je l'ai évalué comme moyen de pression alternatif à la grève et comme moyen de pression pratique, par le biais d'un certain nombre de cas, tant en Israël que dans le monde, au cours desquels cette tactique a été expérimentée.

Malgré son ancienneté et son ampleur, le phénomène d'humiliation (qui plus est, l'humiliation en ligne) n'a pas encore bénéficié d'une définition lexicale claire et convenue, ni d'une définition juridique, tant en Israël que dans tout autre système juridique. C'est une chose que nous savons **peut-être** identifier quand elle apparaît, mais elle est difficile à définir. C'est certainement lié au fait qu'il s'agit de la compréhension des sentiments. Le droit ne traite pas particulièrement des sentiments, encore moins du sentiment de honte⁸⁹. Il existe un certain nombre de définitions lexicales, mais elles ne font pas l'unanimité concernant le contenu essentiel du concept. Il existe dans la littérature psychanalytique une tradition d'écriture fragmentaire sur les origines de la honte et ses influences⁹⁰, et dans le contexte sociopolitique, on peut dire que la honte sert de moyen de contrôle des sujets en tant que citoyens obéissants, elle pointe un débordement interdit de la norme.

Le discours sur la dignité et sur la honte recouvre des espaces, des dimensions existentielles, des périodes et des cultures variées. En effet, des punitions d'humiliation publique furent pratiquées par le passé dans les différentes religions et furent progressivement adoptées par les autorités laïques, à partir du Moyen-âge tardif⁹¹. L'exemple le plus ancien en est "le signe de Caïn"⁹². Apparemment, Dieu voulait prouver par là qu'il était prêt à protéger Caïn contre toute atteinte, bien qu'il ait tué son frère, et en effet, le signe lui sauva la vie. Mais il ne lui permit pas de fuir son identité comme assassin. À partir de ce moment, il devint synonyme d'infamie. Le peuple juif aussi, qu'il s'agisse des individus ou du collectif, a subi à l'ère moderne des manifestations d'humiliation publique désormais inscrites dans la mémoire collective mondiale. Un exemple d'humiliation publique d'un individu fut la cérémonie de destitution du capitaine Dreyfus, le 5 janvier 1895. Un exemple d'humiliation publique d'un collectif fut l'étoile jaune que les Juifs durent porter sous le régime nazi (en Allemagne et ailleurs). Depuis le début du 19^e siècle, on note une baisse des punitions d'humiliation publique aux États-Unis et par la suite en Europe. Mais le phénomène social lui-même n'a pas disparu. Aujourd'hui, l'humiliation en ligne est plutôt le fait d'individus, surtout dans l'espace informatique: à l'ère du cyber, la scène physique s'est transformée en scène nationale-virtuelle.

⁸⁸ Tel qu'étudié au chapitre 14.

⁸⁹ Guy Zeidman, "Introduction à l'humiliation publique", Droit et Affaires 23, décembre 2020, p. 2-3, 5.

⁹⁰ Efi Ziv, "Entre sujétion et résistance: la dialectique des mécanismes de la honte", Theory and Criticism 32, 2008, p. 99-105.

⁹¹ Jörg Wettlaufer, Neurohistorical and Evolutionary Aspects of a History of Shame and Shaming, 6 RCC PERSP. 49, 50 (2012), p.50.

⁹² Voir la Genèse 4, 15.

Le recours à la toile et aux réseaux sociaux renforce l'atteinte portée à l'objet de l'humiliation, grâce à sa large diffusion, à l'information parachutée et documentée à laquelle on ne peut échapper, au lynchage virtuel exécuté au travers de l'invective et de l'escalade dans la formulation et au fait que l'humiliation en ligne est lancée de manière anonyme.

Au nombre des buts positifs de ce procédé, on peut compter: **informer et alerter** le public et ainsi le prémunir contre des agissements préjudiciables; **dissuader** la cible ou d'autres personnes et les empêcher de se conduire d'une certaine façon; **punir** la cible pour son comportement; **corriger des injustices** en rendant le public plus conscient de leur existence et en créant une volonté de changement; **imposer des normes sociales** en rendant le public plus conscient de leur nécessité et en critiquant ceux qui les transgressent. Au nombre des buts négatifs on peut compter la volonté ou le besoin de **distraktion** bon marché au détriment de l'autre; **la vengeance** et **l'offense**; les sensations subjectives liées à la **glorification personnelle**. Il s'ensuit que l'humiliation en ligne n'est pas un phénomène univoque, mais complexe et varié⁹³. Dans son aspect social positif, elle est liée à la validation de valeurs et de normes, à la critique de phénomènes préjudiciables, au refus d'accepter la réalité et à l'incitation au changement⁹⁴. Par contre, les dommages causés aux victimes du procédé peuvent être très importants et comprendre un préjudice économique, psychique et en termes d'image. Certains en perdu leur travail, des affaires ont fermé et il y a même eu des cas de suicide des suites d'une telle humiliation. Ces dures conséquences ont amené la ministre israélienne de la justice, en 2015, à créer une commission publique dont j'ai étudié les conclusions⁹⁵.

Il existe dans le droit israélien des directives destinées à empêcher l'humiliation d'une personne. L'instrument législatif majeur en la matière est l'article premier de la loi sur l'interdiction de la diffamation – 1965. Mais cet article n'empêche pas l'humiliation en ligne, ne la définit pas comme diffamation, et de ce fait ne fixe pas de sanctions contre celui qui publie des propos de ce genre. Différentes propositions de loi ont bien été déposées au parlement dans le but d'amender cette loi, mais elles n'ont pas abouti.

De nos jours, l'humiliation en ligne est l'avatar technologique et actualisé de l'acte au cours duquel on traînait une personne en place publique pour la lapider, au risque de causer sa mort. Plus encore: tandis que par le passé il s'agissait d'un acte physique dirigé contre des individus, il est aujourd'hui dirigé tout autant contre des corporations. L'humiliation corporative en ligne comporte deux avantages majeurs: elle ne coûte pas cher et elle augmente l'efficacité du procédé dans le cadre intra-organisationnel⁹⁶.

J'ai passé en revue dans ce chapitre diverses affaires (Bank Hapoalim, Coffee Bean, Pelephone, Teva, Kellogg's, un conflit du travail au ministère des affaires étrangères, groupe Alpha) dans lesquelles étaient mêlées des tactiques d'humiliation en ligne et dont il ressort que le but du procédé était de faire pression sur l'employeur, partant du principe que cela lui causera un tel dommage qu'il devra accéder aux exigences des travailleurs.

Ma conclusion a été que l'humiliation en ligne n'est pas une mesure en soi ou un moyen alternatif-exclusif à la grève, mais une mesure l'accompagnant et la complétant. De ce point de vue, la tactique d'humiliation en ligne, telle que recensée dans les différentes affaires ci-dessus, ne peut remplacer la grève. Toutefois, elle n'est pas à négliger comme moyen de pression. Les ressources investies par les employeurs dont il a été question dans ce chapitre témoignent d'une douleur et d'une détresse véritables, qu'il ne faut pas négliger.

⁹³ Assaf Porat, "Le phénomène d'humiliation publique sur la toile et dans les réseaux sociaux – cartographie juridique systématique", Droit et affaires 23, 2020, p. 117.

⁹⁴ Assaf Harduf, "Le procédé est l'humiliation: l'humiliation de la procédure pénale", Droit et affaires 23, 2020, p. 415.

⁹⁵ Voir: "Rapport de la commission publique pour l'élaboration de moyens destinés à protéger le public et les fonctionnaires contre les publications préjudiciables et la brutalité sur la toile", Jérusalem, novembre 2020.

⁹⁶ Hadara Bar-Zohar, "Humiliation en ligne d'un employeur corporatif dans des requêtes contre abus sexuels", Droit et affaires 23, 2020, p. 464-475.

Même quand l'humiliation en ligne est dirigée contre la corporation en tant que telle, ses cadres et ses actionnaires ne peuvent l'ignorer ou y être indifférents. Ils comprennent que le traitement juridique d'une plainte en diffamation contre les travailleurs ou le syndicat risque de durer des années et qu'entretemps, l'humiliation en ligne continuera et l'image de l'employeur sera ternie. En cela, ils confirment l'adage biblique: "Une bonne renommée vaut mieux qu'une bonne huile"⁹⁷.

Troisième partie, chapitre 18: boycott de consommateurs

Le boycott est un phénomène social préjudiciable. Dans son sens le plus élémentaire, il interdit tout contact de l'entourage avec le boycotté. Ceux qui boycottent veulent bannir le boycotté, lui faire honte et le discréditer, de manière à justifier cette interdiction. Le boycott est donc lié à l'humiliation et on trouve à sa base la volonté de créer chez le boycotté un embarras psychique, social et économique.

Le boycott de consommateurs est destiné à provoquer un changement dans une conduite commerciale perçue comme impropre. Les consommateurs y prenant part n'achètent pas les produits de la société incriminée et ne fréquentent ni ses magasins ni ses succursales. Il peut amener des acteurs commerciaux à encourager les sentiments du public, ou contribuer à rendre les marchés plus équitables et plus attentifs. Il peut être un moyen de protestation contre le manque de considération des corporations envers les consommateurs, les communautés, les minorités, les animaux et l'environnement. On peut donc y voir un "moyen de protestation démocratique dans le jeu du marché économique, social et politique"⁹⁸.

J'ai étudié dans ce chapitre la signification du boycott de consommateurs et j'ai examiné dans quelle mesure il peut représenter un moyen de pression alternatif à la grève. Pour ce faire, j'ai divisé le chapitre en cinq parties et j'ai à chaque fois posé une série différente de questions. **Dans la première partie**, j'ai étudié la signification générale du boycott, en réponse aux questions: comment s'exprime-t-il dans le droit hébraïque? Comment s'est-il manifesté envers l'implantation pré-étatique, puis après la création de l'État? Comment ces instances ont-elles réagi au boycott dirigé contre elles? Quelles influences psychiques véhicule-t-il? Comment justifier son utilisation? **Dans la seconde partie**, j'ai débattu du boycott de consommateurs. J'ai examiné les significations de la culture de consommation, ainsi que la responsabilité corporative et j'ai recensé des boycotts significatifs en Israël et dans le monde. **Dans la troisième partie**, j'ai étudié la question majeure par laquelle j'ai commencé: le boycott de consommateurs peut-il représenter un moyen de pression alternatif à la grève? Pour ce faire, j'ai présenté un certain nombre de cas d'étude, en Israël et dans le monde, dans lesquels cette tactique a été employée. **Dans la quatrième partie**, j'ai évalué le boycott de consommateurs comme moyen de pression alternatif et pratique à la grève. Enfin, **dans la cinquième partie**, j'ai présenté mes conclusions.

J'insisterai ici sur deux des cas d'étude. Dans la première affaire, le magazine *Life* a publié en 1966 un reportage sur des enfants pakistanais cousant des ballons de football de la société Nike⁹⁹. Ce reportage eut un écho négatif et finit par conduire au premier boycott de consommateurs au monde contre une multinationale. Cette campagne fut menée efficacement: elle causa à Nike des pertes significatives, l'obligea à considérer l'opinion publique et à intégrer la responsabilité sociale dans sa stratégie commerciale¹⁰⁰. En 1999, Nike créa "L'association du travail équitable" (Fair Labor Association), sans but lucratif, qui mêle corporations, représentants de droits de l'homme et travailleurs, pour promouvoir une surveillance indépendante et un code

⁹⁷ L'Écclésiaste 7, 1 ["Bonne renommée vaut mieux que ceinture dorée"].

⁹⁸ Gershon Gontovnik, "Le boycott culturel interne comme moyen d'imposer des normes culturelles", *Droit et affaires* 23, 2020, p. 187.

⁹⁹ Schanberg S.H. (1996) "On the playgrounds of America, Every Kid's Goal is to Score: In Pakistan, Where children stitch soccer balls for Six Cents an hour, the goal is to Survive.", *Life Magazine*, pp. 38–48.

¹⁰⁰ Aviva Geva, *Morale et affaires: des parallèles qui se rencontrent*, Hakibbutz Hameuchad – le centre pour l'éthique, Jérusalem, 2011, p. 103.

de conduite souhaitable, tant pour Nike que pour ses partenaires, et encourager d'autres corporations à rejoindre les rangs de l'association. Dans les années suivantes, Nike s'est également jointe au "Programme pour un meilleur travail" (Better Work Program), projet commun à l'Organisation Internationale du Travail (ILO) et à la Corporation Internationale des Finances (IFC), destiné à surveiller les conditions d'emploi des travailleurs. Suite au rapport sur la responsabilité sociale publié par Nike, les sociétés les plus rentables au monde (dont Gap, H&M et Victoria Secrets) ont commencé à publier des rapports annuels dans lesquels elles rendaient compte des conditions de travail dans leurs entreprises à l'étranger. Suite à la publication de rapports qui pointaient des conditions exécrables dans les usines hors des États-Unis, Nike et d'autres corporations ont annoncé qu'elles rompaient leurs liens avec les usines incriminées, et plus largement, elles durent s'aligner sur les appels à envisager dans leurs affaires des considérations humaines élémentaires.

Dans la seconde affaire, celle de Coffee-to-Go, une grève éclata en 2007, qui dura 13 jours. La direction avait pris les devants et recruté de nouveaux serveurs pour la briser. Pour surmonter la grève entravée, les grévistes commencèrent à se présenter tous les jours au café, brandissant des pancartes, et réussirent à convaincre les clients de s'identifier à leur lutte et de boycotter l'établissement. Ainsi, le café tant fréquenté se vida et devint plus désert que jamais. La lutte des travailleurs se termina par l'accession à presque toutes leurs exigences. Les niveaux de dommages effectifs furent réduits par rapport aux niveaux potentiels estimés au départ. Le cercle des personnes effectivement touchées par le boycott fut lui aussi plus réduit. Les appels au boycott furent lancés par le biais de permanences de protestation, de vente indépendante de café pour un prix symbolique, de recours aux réseaux sociaux, de mises à jour courantes dans les blogs et par courriels. Divers événements de "guérilla culturelle" furent organisés, dont des chansons en public et de la musique¹⁰¹ et un "pique-nique de solidarité" face au café. Toutes ces actions sont adaptées au 21^e siècle, comme expliqué plus haut. Ma conclusion a été que dans le cas de Coffee to Go, le boycott de consommateurs a bien été un moyen de pression pratique. C'est une des raisons pour lesquelles les employeurs craignent les boycotts de consommateurs, même contre leurs concurrents, plus que les grèves.

Au final, derrière ma thèse selon laquelle le boycott de consommateurs peut servir de moyen de pression alternatif à la grève, se trouve l'hypothèse selon laquelle quand les travailleurs recourent à leur pouvoir collectif de façon raisonnée (et celui-ci peut trouver son expression dans un appel au boycott), et vu qu'ils représentent le groupe de consommateurs le plus important du pays, ils peuvent traduire leur pouvoir économique en pouvoir politique. Ce pouvoir puise également au simple fait que toutes les organisations ouvrières en Israël possèdent des clubs de consommateurs¹⁰² qui octroient à leurs membres et à leurs retraités des réductions et des conditions particulières d'achat de produits et de services, dans les domaines les plus variés. De ce point de vue, en Israël, les travailleurs détiennent un immense pouvoir d'achat et représentent *de facto* un groupe d'intérêt particulièrement puissant. Par le biais du boycott de consommateurs comme moyen de pression alternatif à la grève, ils peuvent obtenir des résultats inatteignables par l'organisation syndicale ou la grève (à cause des nombreuses limitations imposées au droit de grève et de la difficulté à le concrétiser). De plus, le dommage causé par la grève risquerait d'être trop élevé tandis que le boycott "abaisserait" le prix à payer par chaque individu.

¹⁰¹ À ce sujet, les propos de Sandra Shaal sont pertinents. Elle explique que les chansons peuvent exprimer des sentiments forts et éveiller des sentiments de dévouement et d'appartenance au monde et à la communauté. Ceci s'explique par le fait que les auditeurs du chant tendent à y prendre part et il s'ensuit que ses influences peuvent être physiques et mentales. Le pouvoir du chant dépasse les limites réduites du mot écrit pour un lecteur. Sandra Shaal, *Discovering Women's Voices – The Lives of Modern Silk Workers in their Own Words*, Brill, 2022, pp.73-74.

¹⁰² Ainsi par exemple, la nouvelle confédération met en œuvre le club "Ensemble pour vous", la confédération des enseignants – le club "Veillée", la confédération des fonctionnaires d'État – le "Juste Club" et la confédération libérale – le club "Égal".

Quatrième partie, chapitre 20: conclusions et propositions de recherches ultérieures

En Israël, les organisations de travailleurs, et de ce fait, les grèves, ont commencé dès la période pré-étatique et se sont poursuivies avec la création de l'État. Durant les premières décennies, la grève était **apparemment** un droit absolu, contrairement à tout autre pays, et elle bénéficiait du soutien inconditionnel des autorités, bien qu'elle ne fût pas consignée dans les textes. En effet, elle était reconnue comme norme appartenant à l'espace des droits de l'homme, et de ce fait, elle bénéficiait de développements juridiques et de nombreuses protections dans les domaines des dommages et des lois du travail. De ce point de vue, Israël ressemblait à de nombreux autres pays qui considéraient la grève comme un droit de haut rang et l'intégraient explicitement dans leurs constitutions. Toutefois, durant ces mêmes années, les gouvernements israéliens n'ont pas hésité à briser les grèves qui ne convenaient pas aux buts ou aux conceptions du pouvoir.

Au cours des années 1980, le recours à la grève devint de plus en plus courant, plus particulièrement au sein des employés du secteur public. Au fil des ans, le pouvoir de la Confédération générale des travailleurs commença à s'affaiblir. Les verdicts de la Haute-Cour de justice réduisirent le droit de grève et firent pencher la balance du côté de l'interruption de la grève. La tendance qui se fit jour fut de préférer le droit du public à un approvisionnement courant en marchandises et en services, au détriment du droit des travailleurs à faire grève pour promouvoir leurs propres intérêts. Cette priorité se manifesta par l'imposition de diverses limitations au droit de grève, émanant de la Haute-Cour de justice et du tribunal national du travail, jusqu'à ce qu'au 21^e siècle, l'utilisation du terme de "grève" ne peut plus se faire dans un contexte de "droit" mais dans celui de "liberté". Bar-Mor explique que malgré la multiplication des prescriptions, le statut et l'ampleur de la grève en Israël ont toujours été controversés¹⁰³.

Pourtant, ces dernières années, tandis que se poursuit la tendance à l'affaiblissement des syndicaux, se sont syndiqués en Israël plus de 150.000 nouveaux travailleurs, et leur nombre ne fait que grandir. La création de nouveaux syndicats a conduit à "une concurrence et un libre marché dans le domaine des organisations ouvrières; elle a encouragé l'organisation dans de nouveaux lieux de travail et réveillé le système des relations de travail en Israël"¹⁰⁴. On peut avancer qu'aujourd'hui, le droit à l'organisation se concrétise dans un espace différent, beaucoup plus dynamique que celui auquel nous étions habitués, et il s'ensuit que contrairement au passé, nous sommes témoins du recours fréquent à la grève dans le secteur privé. Ainsi par exemple, en 2015, le nombre des grèves dans ce secteur a été égal à celui du secteur public, et cette donnée s'est répétée en 2017.

Parallèlement au succès du droit à l'organisation, sont apparus en Israël des processus d'individualisation et de passage à des contrats de travail personnels qui ont ébranlé le modèle traditionnel des luttes collectives. Des modalités d'emploi fluides, extérieures et temporaires ont ainsi conduit à l'affaiblissement des organisations ouvrières, à l'élaboration de conventions collectives et à une représentation uniforme, adaptées à la diversité des intérêts en jeu¹⁰⁵. Les limitations imposées à la liberté de grève ont rendu difficiles la préservation des organisations existantes; les syndicats ont du mal à remplir leur rôle, à convaincre les travailleurs non organisés de les rejoindre – et bien entendu à mettre en œuvre des grèves. Le résultat actuel est que l'ampleur du droit de grève est devenue plus souple que par le passé, instable et fluctuante¹⁰⁶.

Quel sera le caractère de la grève au 21^e siècle? Bien que la liberté de grève ait bénéficié de la reconnaissance et des éloges de la part des instances juridiques, il est clair que les incitations à la limiter, à la

¹⁰³ Hadara Bar-Mor, "La grève et sa classification génétique", Travail, Droit et Affaires 16, 2020, p. 267.

¹⁰⁴ Stéphane Adler & Efrat Kuka, "Le droit de s'organiser au miroir des changements dans les relations de travail", Livre Steve Adler, 2016, p. 325.

¹⁰⁵ Lilach Latour, *La grève. Droit, histoire et politique*, l'université ouverte, 2019, p. 46.

¹⁰⁶ Hadara Bar-Mor, "La grève et sa classification génétique", Travail, Droit et Affaires 16, 2020, p. 268.

réduire ou même à l'interdire, telles qu'elles sont fréquemment formulées par des législateurs israéliens, font craindre qu'elle ne se maintienne pas dans le format que nous connaissons et ce, bien qu'elle soit vitale pour la défense et le renforcement de la démocratie dans le pays. Le fait que le marché du travail, tant en Israël que dans le monde, subit de nombreux changements, en particulier dans la manière d'employer les travailleurs, rend cette question encore plus épineuse. Nous sommes témoins de nos jours du passage au travail à domicile, de l'éloignement du lieu traditionnel de travail et de ce fait, de l'éloignement des travailleurs les uns des autres. Tous ces facteurs rendent encore plus difficile le recours à la grève tel que nous le connaissons, et j'estime que ces difficultés ne vont que s'amplifier. Raisons pour lesquelles les travailleurs ont commencé à recourir à de nouveaux moyens de pression qui transforment les modèles de la grève classique et permettent de remplacer la représentation et la lutte traditionnelles par de nouvelles formes. La présente recherche prouve que malgré toutes les réductions et limitations, les travailleurs disposent d'autres moyens de pression, dont certains qui n'ont pas été recensés ici. Un exemple probant a été la grève des conducteurs de la compagnie de transport public Egged, en mai 2022, qui ont décidé de lutter pour leurs conditions de travail sans perturber les lignes d'autobus, mais en portant des chemises de protestation sur lesquelles était imprimé le slogan "Les employés d'Egged luttent pour la dignité". Plus la technologie se développera et plus se réduiront les écarts dans l'espace virtuel, plus les travailleurs pourront faire une utilisation accrue des moyens déjà disponibles.

Toutefois, je suppose que même en considérant des moyens de pression supplémentaires (alternatifs ou complémentaires, aussi efficaces et effectifs soient-ils), rien ne prouve que les syndicats se presseront pour renoncer à leur droit de grève. Malgré les coûts élevés, tant pour les travailleurs que pour les syndicats, il est clair que lorsqu'une organisation ouvrière entame une grève, elle prouve sa capacité à recruter des travailleurs face à l'employeur. Le recours à la grève émet de la puissance et adresse un message combatif non seulement à l'employeur mais aussi aux travailleurs, à l'État et au public. La grève cristallise les travailleurs autour d'une cause commune, leur permet d'atténuer la pression, forge au syndicat une renommée de coopération et de partenaire endurci aux négociations collectives, et peut faire parvenir les relations de travail à un stade où l'employeur verra dans le syndicat et les travailleurs des partenaires de force égale à la sienne. Tels sont les avantages de la grève, qui ne sont pas à prendre à la légère, car ils constituent un facteur de dissuasion de l'employeur. C'est pour cela que tout moyen de pression alternatif à la grève doit être au moins aussi dissuasif que la grève elle-même pour pouvoir être considéré comme tel.

Conclusions

Nous sommes partis de deux questions de recherche:

1. Pourquoi la grève est-elle perçue comme un moyen de pression?
2. Existe-t-il des moyens de pression alternatifs à la grève, et auquel cas, quels sont-ils?

Concernant la première question, ce travail est à ma connaissance la première recherche systématique ayant examiné l'influence de la grève sur des plans qui ne soient pas exclusivement économiques. Qui plus est, il a examiné comment les acteurs présents dans le système des relations de travail perçoivent la grève et ses influences, et a essayé d'expliquer pourquoi la grève est un moyen de pression.

Après avoir examiné ce qu'est la pression, j'ai montré que c'était un concept issu de la physiologie et de la psychologie et je suis passé à l'examen des dommages que la grève cause ou peut causer aux différentes parties. J'en ai conclu que dans son essence, la grève est bien un moyen de pression et qu'elle peut porter atteinte à d'autres niveaux de dommages: politiques, sociaux, en termes d'image et de relations de confiance. J'ai aussi largement examiné dans quelle mesure ces dommages peuvent se produire et comment ils sont susceptibles de toucher les différents acteurs (employeurs, travailleurs, habitants et consommateurs, facteurs commerciaux, le gouvernement et le syndicat lui-même).

Enfin, j'ai proposé un indice d'évaluation de la grève comme moyen de pression, **l'indice pratique**, composé de trois variables accumulées: effectivité, efficacité et adaptation à l'utilisation au 21^e siècle. Par le biais de cet indice, j'ai proposé d'évaluer une grève comme pratique si elle réussissait à créer un nouveau point d'équilibre entre les travailleurs et l'employeur, capable d'exercer une pression sur ce dernier qui le conduise à accéder de manière optimale aux exigences des travailleurs, avec un minimum de dommages.

Concernant la seconde question, j'ai présenté trois moyens de pression alternatifs: la grève virtuelle, l'humiliation en ligne et le boycott de consommateurs. Peuvent-ils vraiment remplacer la grève telle que nous la connaissons? Il semble que la réponse soit complexe. L'humiliation en ligne s'est avérée être un moyen "complémentaire" qui peut accompagner la grève, non la remplacer. Il s'ensuit que tous les moyens de pression ne sont pas nécessairement alternatifs à la grève. De plus, les moyens de pression ne conviennent pas tous à l'ensemble de la population israélienne (le secteur ultra-orthodoxe par exemple, contrairement au secteur laïque). L'inconvénient de ces moyens est qu'ils ne diminuent pas le ressentiment entre les parties et ne contribuent pas à établir un juste système de coopération. Mais on peut en dire autant de la grève.

Le premier avantage est que les moyens de pression alternatifs permettent une escalade contrôlée et graduelle de la lutte. De nos jours, quand apparaît un différend entre l'employeur et le syndicat, ce dernier doit passer d'une situation de "paix économique" à la grève. Il n'a pas d'autres moyens dans son arsenal "formel". C'est pourquoi cette recherche propose d'utiliser des moyens de pression; s'ils échouent, on peut toujours se retourner vers la grève. Ainsi, on pourra justifier ce retour vis-à-vis du tribunal du travail et le persuader de ne pas publier d'ordonnances à surseoir contre la grève; vis-à-vis les travailleurs en les impliquant dans la grève, et vis-à-vis du public, en essayant d'obtenir sa sympathie et son soutien. De tous ces points de vue, il est souhaitable que l'arme de la grève soit le dernier recours et que la goupille de sécurité – les moyens de pression – le précède.

Le second avantage est la neutralisation de la difficulté à concrétiser la grève comme moyen de pression. L'épreuve de vérité du syndicat est la grève. Pendant son déroulement, il doit agir sur tous les fronts: impliquer les travailleurs, leur insuffler du courage et de la foi dans la cause et empêcher que des travailleurs s'opposant à la grève la brisent; il doit faire preuve de solidité financière en créant un fonds de grève; il doit lutter contre l'employeur auprès des instances juridiques; il doit promouvoir ses intentions pour créer de la sympathie envers ses causes. Tous les syndicats ne disposent pas de telles ressources et c'est pour cela que les moyens de pression peuvent lui permettre de surmonter cette difficulté. Ils conviennent également aux nouvelles organisations, qui ne répondent pas nécessairement à l'exigence de représentativité mentionnée aux paragraphes 3 et 4 de la loi sur les conventions collectives.

Le troisième avantage est l'adaptation des moyens de pression à l'utilisation au 21^e siècle. Le monde a subi de nombreuses transformations, depuis la séparation entre la propriété et la gestion de l'entreprise jusqu'au travail que l'on peut accomplir à domicile. Dans la situation où, par exemple, l'employeur vit hors des frontières du pays, il est dénué de sens de faire brûler des pneus à l'extérieur de l'usine. Mais à l'ère du village global et des réseaux sociaux, les moyens de pression montent en puissance et peuvent à leur tour provoquer des changements – telle l'humiliation en ligne, qui dépasse les frontières nationales et étatiques.

On peut concrétiser ces avantages selon des axes sur lesquels se situe la grève par rapport aux moyens étudiés:

1. L'axe des moyens de pression novateurs par rapport aux moyens plus anciens:

Le procédé d'humiliation est déjà consigné dans le droit hébraïque ancien et dans l'histoire humaine. Par contre, la grève virtuelle est une invention du 20^e siècle. Le boycott de consommateurs se trouve entre les deux.

2. L'axe des moyens de pression pouvant porter une atteinte maximale à l'employeur:

Dans la grève virtuelle, les consommateurs continuent à fréquenter l'entreprise de l'employeur et même à consommer ses produits. Dans le boycott de consommateurs, l'entrepreneur devient indésirable et son entreprise est désertée, d'où un dommage économique plus grand. Entre les deux se trouve l'humiliation en ligne: l'employeur est appelé à changer de politique et son image peut subir un dommage. Toutefois, celui-ci est sensiblement réduit par rapport aux dommages économiques susceptibles d'être causés par un boycott de consommateurs ou par une grève.

3. L'axe des moyens soumis à régulation et encadrement:

La grève est sujette à des limitations basées sur des lois, des jugements élaborés par les instances juridiques, des conventions collectives et les règlements des syndicats. À l'opposé, on ne peut encadrer le boycott de consommateurs ou l'humiliation en ligne car ils ne sont pas soumis à des limitations légales. On peut les mettre en œuvre à distance et de manière anonyme. Il en découle que leur potentiel de dommage – ainsi que l'effet de pression – se renforcent.

Par contre, la grève virtuelle israélienne, sous sa forme actuelle, résulte d'une décision du tribunal national du travail: celui-ci l'impose aux parties en présence.

4. L'axe des moyens de pression applicables en Israël:

Pour qu'un boycott de consommateurs ou une humiliation en ligne se réalisent, il faut que le public soit conscient du conflit, qu'il manifeste un engagement profond envers les objectifs de la lutte et enfin, qu'il coopère avec les moyens en question.

Si les résultats espérés ne sont pas atteints, cela peut conduire à une grève générale qui aura de graves répercussions sur le public, comparativement au sacrifice et à l'effort qui lui seraient demandés s'il boycottait l'entrepreneur ou prenait part à son humiliation en ligne. Ainsi, le public est aussi encouragé à prendre part à la lutte des travailleurs.

Par contre, dans la grève virtuelle, le public continue de consommer produits et services, n'est pas nécessairement conscient du conflit et sa coopération avec la lutte engagée est mineure.

De tout ce qui précède ressort la question de savoir si les moyens de pression recensés dans ce travail sont applicables au secteur public et/ou privé. L'employeur privé est plus exposé aux dommages causés par les différents moyens. Malgré cela, il semble que la réponse soit positive dans les deux cas: l'employeur privé, tout autant que l'État, sous sa casquette d'employeur public, craignent pour leur image – raison pour laquelle l'humiliation en ligne les effraie. Le boycott de consommateurs peut faire crouler l'entreprise de l'employeur privé mais provoquer également un désastre dans le trésor public. La grève virtuelle est bien entendu une éventualité dans les deux secteurs.

C'est le moment de revenir aux propos de Ruth Ben Israël, qui a esquissé les fondements de la grève et a distingué entre le plan de l'action, l'essence de l'action et son but. Le plan de l'action est l'action collective engagée ensemble par les travailleurs. L'essence de l'action est l'interruption du travail sans rupture des relations de travail. Le but de l'action est l'exigence d'accéder aux requêtes des travailleurs¹⁰⁷. La présente recherche propose une alternative à ces fondements. Le but de l'action reste inchangé, mais il n'est pas nécessaire que le plan de l'action soit le fait du collectif ou même de la majorité des travailleurs. À l'ère de l'informatique, il suffit d'un nombre restreint de travailleurs pour paralyser les systèmes d'une société. L'essence de l'action prend elle aussi un tournant: le travail n'est pas interrompu dans tous les cas de figure recensés.

¹⁰⁷ Ruth Ben Israël, "La grève au miroir du droit public: la grève, la grève politique et les droits de l'homme", Livre Berenzon, vol. 3, 2007, p. 113.

Propositions de recherche ultérieures

J'ai examiné dans ce travail différents moyens mis en œuvre par les acteurs sociaux, qui n'avaient pas, à ce jour, suscité l'attention des chercheurs. Je voudrais insister ici sur quelques-uns d'entre eux.

Commission d'exceptions: elles n'ont pas encore été étudiées. Ce sujet semble digne d'un examen approfondi. Autour de ce sujet apparaissent des questions intéressantes sur lesquelles il serait bon d'émettre une opinion, du fait de leur actualité dans les grèves publiques: comment est fixée la composition des commissions? Est-elle professionnelle? Quels sont les critères formels considérés par la commission? Existe-t-il des déviations affectives, politiques ou organisationnelles cachées dans les décisions prises? Comment le public considère-t-il le syndicat recourant à la grève avec commission d'exceptions ou sans elle?

L'influence des grèves sur le commerce des actions en bourse: les sociétés cotées en bourse sont sujettes à des fluctuations et aux pressions du marché. Une recherche ultérieure pourrait étudier comment une atteinte potentielle à la valeur des actions d'une société, résultant d'une grève, représente un moyen de pression pouvant conduire les actionnaires et le directoire à faire pression sur l'employeur pour qu'il négocie avec les travailleurs.

Valorisation/glorification ("faming"): ce phénomène s'intègre aujourd'hui au monde du travail par le biais de deux démarches devenues de plus en plus fréquentes: labellisation et classement des employeurs. Dans le même temps, un des paramètres les plus importants aux yeux des Israéliens dans la considération de leur lieu de travail est les relations de travail. Il me semble que la valorisation d'employeurs peut nous renseigner non seulement sur le capital, le temps et les efforts que ceux-ci investissent vis-à-vis de travailleurs existants et nouveaux, ou vis-à-vis de la société en général, mais également sur le reflet d'employeurs qui craignent l'humiliation en ligne et demandent à mettre en valeur des relations de travail correctes. Ce phénomène, dans son ensemble, n'a pas encore été étudié et il y a lieu d'y penser.

La coopération du public avec les moyens de pression recensés ici, tout en répondant à la question suivante: quels sont les variables qui entraînent le public israélien à prendre part aux protestations? Pour ce faire, il faudra étudier des protestations concernant des sujets politiques, militaires-sécuritaires et sociaux, et examiner comment ces contestations ont été passées en revue dans les médias et sur les réseaux sociaux. Mon hypothèse de départ est qu'il existe des grèves susceptibles d'être mieux perçues par les médias et/ou la majorité du public – comme les grèves qui ont éclaté pour protester contre la violence envers les personnels enseignants, les transports ou les personnels médicaux¹⁰⁸. Cette recherche devra également étudier les caractéristiques de "la protestation non-violente" (appelée également "résistance/action non-violente"), qui s'accélère ces dernières décades en Israël et dans le monde¹⁰⁹.

Il y a également lieu d'envisager plus particulièrement deux moyens de pression dignes d'attention et de recherches ultérieures:

1. Menace de conflit de travail

Ne dit-on pas que "la grève la plus forte est celle qui n'a pas eu lieu"? Et en effet la menace de conflit et de grève est une épée de Damoclès qui plane souvent sur l'économie israélienne, en tant qu'elle réduit le rapport de forces entre l'employeur et les travailleurs¹¹⁰. Dès 1968, Meroni

¹⁰⁸ Un exemple de ce genre est la grève déclarée par la confédération médicale le 19.5.2022.

¹⁰⁹ Dans le monde: "La révolution orange" en Ukraine dans les années 2004-2005; la révolution en Egypte en 2011. En Israël: la protestation du fromage blanc en 2011; la protestation contre la corruption politique en 2020.

¹¹⁰ Ronen Peri, "Responsable des grévistes pour cause de dommages à des tiers", Travail, Société et Droit 16. P. 311.

s'exprimait sur ce sujet et écrivait: "Il n'est pas surprenant de voir que le droit des travailleurs à faire grève ou à menacer de le faire est perçu dans les faits et défini juridiquement comme un droit lié ou dérivé du droit à s'organiser et à engager des négociations collective libres"¹¹¹. Davidov lui aussi s'est penché sur ce sujet et a écrit: "Le moyen dont disposent les travailleurs pour affronter le comportement de l'employeur et tenter d'améliorer leur sort est l'engagement de négociations collectives, dont le succès dépend de leur capacité à menacer de grève et à la mettre à exécution le cas échéant"¹¹².

Une telle recherche pourra se baser sur la théorie économique distinguant entre menaces fiables et celles qui ne le sont pas. S'il n'y a pas de prix à payer de la part des travailleurs pour la mise en grève de l'entreprise, ou si ce prix est bas, la menace de grève devient faible et les travailleurs pourront atteindre leurs objectifs, avec ou sans mise à exécution de la grève.

2. Implication du souverain politique

La grève, en particulier dans le secteur public, veut transformer les habitants et les consommateurs en "otages", pour qu'à leur tour, ils fassent pression sur les décideurs. Mais dans les grèves médiatisées qui se sont déroulées ces dernières décades, nous avons été témoins d'un processus au cours duquel les travailleurs ont essayé, bien avant la grève, d'impliquer des élus dans leur lutte, des échelons subalternes jusqu'au premier ministre (comme dans l'affaire Teva en 2017). Cette tentative de faire pression sur le souverain s'effectue de façon directe ou indirecte par le biais des médias et des réseaux sociaux.

Conclusion de la conclusion

En 1978, le tribunal de haute instance de Tel Aviv a stipulé: "Il est vrai que dans le cadre des conflits du travail, il existe des travailleurs estimant qu'il n'y a ni loi ni juge et que tous les moyens sont bons. Toutefois, cette assertion n'a pas reçu l'aval de la loi et divers actes sont des délits pénaux et des préjudices civils, même quand leur but est d'exercer une pression pour obtenir des conditions de travaux justes et dignes"¹¹³.

Depuis cette sentence, beaucoup d'eau a coulé sous les ponts, et il est clair aujourd'hui qu'on peut envisager des moyens de pression s'ajoutant à la grève, au-delà de ceux recensés dans ce travail, qu'ils aient ou non reçu "l'aval de la loi". Tout dernièrement, le président de la nouvelle confédération générale, Arnon Ben David, s'est exprimé en ces termes: "Nous ne voulons pas retourner à l'époque où nous tenions de la main gauche un pneu et de la main droite un haut-parleur. **Ces temps-là sont révolus**"¹¹⁴.

Ces propos nous renseignent sur l'état d'esprit qui règne au sein de la direction du plus grand syndicat du pays et sur la compréhension du fait que la grève coûte cher. Il me semble qu'ils concrétisent plus que tout quel long chemin a parcouru le système des relations de travail en Israël, depuis une situation dans laquelle la grève était considérée comme le moyen de pression exclusif jusqu'à celle où sont utilisés d'autres moyens de pression (tels que les manifestations face au domicile de l'employeur, l'humiliation en ligne, etc.), qu'il s'agisse de moyens alternatifs ou complémentaires à la grève.

¹¹¹ Mordechai Meroni, "L'arbitrage comme substitut à la grève – cadre de réflexion et clarification de concepts fondamentaux", (l'université hébraïque, 1986), p. 16, note 8.

¹¹² Guy Davidov, "La grève comme étape dans une suite d'événements et la grève virtuelle (avec salaire) comme assistance proportionnée", Travail, Société et Droit 11, 2005, p. 54.

¹¹³ Prescriptions d'imposition (Tel Aviv) 2832/78, Amgat Plastic LTD contre Zeev Yaari et al., sentence de haute instance 1978 (1) 434.

¹¹⁴ Cité chez Sonia Gorodiski, "Nous ne retournerons pas au temps du pneu et du haut-parleur", quotidien "Israël Hayom", 06.05.2022.

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La grève en Israël comme moyen de pression et moyens de pression alternatifs

Résumé

Dans le monde du travail israélien, la grève est considérée comme le principal moyen de pression dont disposent les travailleurs pour s'opposer à leurs employeurs. La thèse présentée examine ce concept, qui semblait avoir perdu de sa pertinence, surtout durant la crise du Covid 19, qui a vu l'apparition de nouvelles formes de travail et la transformation des relations de travail. Elle traite des questions de recherche suivantes: (1) Pourquoi la grève est-elle considérée comme un moyen de pression? (2) Existe-t-il des moyens de pression alternatifs et auquel cas, quelle est leur nature? Pour y répondre, j'ai fait appel à cinq disciplines: le droit, l'économie, la psychologie, la sociologie et les médias. Ma recherche a constaté que la grève est une action limitée, du fait de certains types de restrictions ayant obligé les syndicats à se remettre en question. De plus, des changements technologiques et sociaux ont sensiblement élargi la panoplie des moyens dont disposent les syndicats pour préserver et promouvoir les intérêts des travailleurs. Ces moyens de pression peuvent compléter la grève, sous réserve de la complexité des relations de travail en Israël.

Mots-clés: Grève, relations de travail en Israël, la société israélienne, moyens de pression, humiliation, grève virtuelle.

Résumé en anglais

In the Israeli working life, a strike is considered the main or even the only tool of pressure employees may impose on their employers. This thesis examines this concept which might have lost its grip especially during the Covid-19 crisis, when different forms of employment began to evolve and labor relations changed. The study addressed the following research questions: (1) Why is a strike viewed as a tool of pressure? (2) Are there alternative pressure tools other than strike and if so, what is their nature? To answer these questions, five disciplines were used: law, economics, psychology, sociology and communication. The study found that a strike is a limited action, due to multiple types of restrictions; these restrictions forced employee organizations to go through process adaptation. In addition, technological and social changes positively expanded employee organizations' toolbox used to promote and maintain employee interests. These means of pressure can replace or complement the strike, subject to the complexity of the Israeli labor relations.

Keywords: Strike, labor relations in Israel, Israeli society, means of pressure, consumer boycott, shaming, virtual strike.