First presented at the ICPP conference in Singapore

Labor constitutionalism in public services and liberal constitutions:

The rise of an anti global doctrine and a constitutional right to strike

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Abstract

The paper explores the application of international labor rights standards -in a context of liberal constitutions –in Canada, United States and Israel- and its implications on the freedom to strike in public services and the capacity of the state to regulate labor disputes and guaranty the supply of public services

The article distinguishes between three approaches possible - a global integrative constitutional doctrine, according to which labor constitutionalism is based on the application of International labor standards and global human rights governance, an anti global constitutional doctrine and a liberal political doctrine.

The article suggests the embracement of an anti global doctrine, which includes a wide protection of labor interests irrespective of possible restrictions in international ILO standards.

Introduction

The application of labor constitutionalism raise a conflict between labor collective interests and the democratic responsibility of the state to regulate strikes in the labor market and design public policy regarding strike action. In this respect, mainly a few interests are in collision – The interest of employees, whose work is considered essential or important to have decent terms of employment, and the public interest in receiving public services. the nation state's prerogative to manage and regulate the labor market in the globalization era (Etherington 2009).

These conflicts revolve the issue of the recognition of the freedom to strike as a constitutional right. The application of constitutionalism regarding strike action in public services lays a burden on the state to enable a wide possibility of collective action. The recognition of a constitutional status of the right to strike might also be a basis for judicial review over legislation and decisions of the executive branches that limit strike action, in regard to certain public services or specific public tasks.

This raises the question of whether and in what conditions should a right to strike as a constitutional right be recognized by the courts , and what kind of approach should the courts embrace, regarding these conflicts. The issue of recognizing labor freedoms as fundamental rights has been discussed by various scholars (Bog and Ewing 2012; Langille 2009; Tucker 2012). The aim of this article is to discuss constitutionalism of labor rights within the specific issue of the right to strike in public services in the globalization era.

The recognition of the freedom to strike as a constitutional right raises several concerns in the age of globalization. Different scholars discussed the transformation of the rule of the law and constitutionalism in the age of globalization (Jayasuriya 2001). Some of them emphasized that the wider role of international law in the globalization era should be captured as the rise of a new mode of governance (Kumm 2004). Other scholars emphasized that in the globalization era supra national labor institutions, such as the International labor organization, play a bigger role. In regard to these issues, Judy Fudge, discussed the development of transnational global

constitutionalism, in which international human rights standards are applied in order to recognize a constitutional status of the right to strike (Fudge 2015).

The current article discusses the rise of a different new mode of governance in regard to the specific issue of labor constitutionalism in the age of globalization. In the framework of different varieties of constitutionalism in the globalization era, the paper presents a new notion- that of an anti global constitutional doctrine. According to the anti global doctrine, the right to strike is derived from other constitutional rights, which are included in domestic constitutional documents, such as the right to dignity or liberty. The anti global approach applies constitutionalism in order to counter balance the effects of the globalization process on the labor market, while denying the application of various international standards. Hence, the article claims that an important development in the age of globalization, is not only the embracement of a global labor governance by some courts, but also the development of local anti global constitutionalism by other judiciaries.

The article explores how judiciaries in countries with liberal constitutions differ in the application of integrative global human rights governance and its implications on collective constitutionalism

In this respect the paper claims that it would be fruitful to distinguish between three approaches possible regarding labor constitutionalism in public services- The anti global constitutional doctrine vis a vis the global integrative constitutional doctrine and the liberal – political doctrine. According to the global integrative constitutional approach, constitutionalization of strike action is based on the application of international labor standards of the International Labor Organization (hereinafter "ILO") in the interpretation of domestic constitutional documents. While, according to the anti global constitutional approach, the constitutionalization of strike action is based on existing constitutional documents[1]. Whereas, according to the liberal –

[1] The ILO standards enable the restriction of the right to strike in public and essential services in various circumstances. The anti global approach enables a wider protection of human rights, since it does not necessarily apply the specific limitations of the right to strike in public services, that are included in international law.

political doctrine, strike action is considered mostly as a negative freedom, and labor constitutionalism is denied as long as the freedom to strike is not included specifically in domestic constitutional documents

Different judiciaries differ in their willingness to recognize a constitutional right to strike and apply global integrative approach. The article discusses the developments regarding the implementation of labor constitutionalism in public services in the rulings of two different judiciaries- The Supreme Court of Canada, American jurisprudence and the Israeli courts .

The article claims that in some jurisdictions courts developed a dominant role regarding strikes in public services by applying an anti global constitutionalism in regard to the right to strike, whereas other courts applied the global integrative doctrine. While the former applied extensive judicial review over laws and executive branches' decisions that limit collective action, the latter considered wide restrictions on strikes in public services-embodied in international standards- as necessary. Nevertheless, courts might embrace the liberal political doctrine and deny the application of labor constitutionalism altogether.

The paper argues that courts should embrace the anti global doctrine, which is aimed at counterbalancing the globalization's effect on public employees. Thus, the negative effects of the globalization process and of New public managements reforms in which market approaches are adopted into the public sector (hereinafter "NPM"), should result in recognizing a constitutional right to strike, as a means of regulating the labor market.

The article will be constructed as following: The first chapter discusses the freedom to strike and international labor law standards. The second chapter discusses the effects of the globalization process and of neo liberal agendas of the political actors on public employees and then presents the three different doctrines for labor constitutionalism in public services in the globalization era -A liberal political

doctrine, an anti global doctrine and a global integrative doctrine, within global human rights governance. The third chapter presents the development of labor constitutionalism and an anti global doctrine in Israeli jurisprudence., The fourth chapter presents the jurisprudence of the Supreme Court of Canada and the embracement of a global integrative doctrine . The fifth chapter discusses the issue of the application of an anti global labor doctrine in the age of globalization vis-à-vis the other labor constitutionalism doctrines.

1.Collective action and International law

Collective freedoms are stated in the international convent of social and economic rights[2]. Article 8 of the convent includes the right to organize – the right to form trade unions and join trade unions and the right of trade unions to function freely. Article 8 also includes the right to strike. In regard to public services, the convent specifically states that it does not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or the police or by the administration of the state. The right to organize is also included in international treaties of the ILO, such as convention number 87[3] and convention 98 of the right to organize[4]. That is, strike action by itself is not included directly in the ILO conventions. Yet the ILO committees have recognized in their decisions and resolutions a right to strike, which is derived from the right to organize[5]. Even though the ILO committees on the application of ILO conventions have recognized

[2] International Convent on Social Economic and Cultural Rights United Nations 1967.

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

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

[5] ILO General Survey-ILO Freedom of Association and collective bargaining : A general survey of conventions No. 87 and No. 98 conducted in 1994 by the Committee of experts on the application of conventions and recommendations (ILO 1994a); ILO CFA Digest- ILO Freedom of Association: Digest of decisions and principles of the freedom of association. Committee of the governing body of the ILO (ILO 1996d)

the right to strike in their decisions, the dispute over the status of collective action still continues within the ILO institutions and beyond (Swepston 2013)[6].

Nevertheless ILO standards enable the regulation of collective action of public employees, whose tasks are likely to impact the supply of public services. According to the ILO principles, legislative restrictions could define certain public servants whose right to strike is limited due to their special duties and the implication of these duties on the supply of public services . Thus, it is possible to establish limitations on specific public servants who exercise authority in the name of the state due to their special tasks[7]. It was also stated by the ILO committees that the right to strike could be denied or restricted in essential services. Essential services are defined as those services of which interruption would endanger the life, health or personal safety of the whole or part of the population[8].Furthermore, In strikes in public utility services of general interest, it is possible, according to the ILO standards, to demand a minimum supply of services by the striking workers.[9].

Indeed international bodies disagree upon the extent to which the right to strike is protected under international labor law. The question of the enforcement of a right to strike through the application of a global integrative approach, versus political liberal approach or an anti global collective approach , is discussed below.

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[6] *Ibid*

[7] ILO General Survey-ILO Freedom of Association and collective bargaining : A general survey of conventions No. 87 and No. 98 conducted in 1994 by the Committee of experts on the application of conventions and recommendations (ILO 1994a). para 158 (here and after" committee of experts on the application of the conventions and recommendations 1994).

[8] Committee of Experts on the Application of Conventions and Recommendations 1994, para.159, 214; Digest of decisions and principles of the freedom of association committee of the governing body paras. 532,534,.; ILO 1996 d; Committee of Experts on the Application of Conventions and Recommendations 1994, para.164,

[9] Digest of decisions and principles of the freedom of association committee of the governing body paras. 532,534,.; ILO 1996 d

Different approaches to labor constitutionalism in public services-

and the globalization process

(1) The effects of globalization process and of neo liberalism and NPM reforms within the public sector

The globalization process describes a growing cross border relations between countries , and it designates a growth in interdependence. Rapid technological changes and heightening international competition are fraying the job markets of industrialized countries and the globalization process has created inequality and a retreat of the welfare state. Growing income inequality, job insecurity and unemployment are widely seen as a flip side of globalization. (Kapstein1996). The globalization process has also effected trade unions and union density has declined in most industrialized countries.

Within the public sector itself the globalization process and the rise of neo liberalism have introduced NPM reforms, in which market practices are adopted into the public sector. NPM reforms are aimed at improving efficiency and reducing public sector costs. NPM reforms include the process of downsizing the public beureucracy by privatization, outsourcing and embracing patterns of precarious employment (Cohen 2016). Thus, NPM reforms are characterized by fragmentation of the public labor market, and temporary and part time work. The Implementation of market oriented practices and development of precarious employment in the public service, have all effected public employees and weekend the labor force.

Hence, despite a growing boom in international trade and finance , inequality and job insecurity have worsened and union density has declined. The negative effects of the globalization process and the retreat of the welfare state have all created a need for another method of regulation for regulating the labor market. It stressed the need for labor constitutionalism as a means of insuring worker's interests and counterbalancing the negative influence of globalization on the public sector employees.

(2) Different doctrines regarding labor constitutionalism in the globalization era

Collective action has been a major tool in industrial relations ever since the industrial revolution. Despite their dominant role, labor freedoms, and especially the freedom to strike, have not always been included in constitutional documents. Thus, strike action has been considered along the years in various countries, such as Israel and Canada, merely as a freedom (Mundlak2012; Savage 2009)

The enforcement of labor rights raises the issue of imposing duties on the state regarding public services, and of the horizontal application of collective rights on public employers (Tushnet 2003)

Thus, It would be fruitful to distinguish between three approaches possible for addressing the issue of the application of a constitutional right to strike in public services– a political liberal approach, an anti global constitutional approach and a global integrative constitutional approach within international human rights governance. The global integrative approach, within human rights global governance, applies international labor standards issued by international organizations -mainly the ILO- in the interpretation of constitutional documents in domestic law (Pegram 2015; Tucker 2012).

According to the liberal – political doctrine, collective freedoms should be treated as merely freedoms and not as rights, unless included specifically in domestic constitutional documents. The liberal doctrine is related to a narrow model of labor freedoms (Bog and Ewing 2012; Tucker, 2012). That is, the liberal political doctrine includes the understanding that the distinction between freedoms and rights should be considered when dealing with labor disputes.

In general, the narrow concept of labor freedoms protects trade union's interests to a lesser extent (Bog and Ewing 2012; Tucker 2012). The narrow conception means that these freedoms protect mainly individual rights of employees to join trade unions of their choice and act individually within labor associations (Langille 2009). The political liberal doctrine has embraced such narrow concept. According to the liberal political doctrine, labor freedoms, including the freedom of association , collective bargaining

and strike, are captured as negative individual liberties, and not as fundamental rights, unless included in domestic constitutional documents.

Scholars noted that in the globalization process effected the approach of the nation state and the judiciaries to labor constitutionalism. In this respect, Eric Tucker claimed that a multi level labor constitutionalism could be developed, in which global constitutionalism will be dominant (Tucker 2012). Judy Fudge, drawing on Eric Tucker's idea of labor's many constitutions, discussed the development of transnational global constitutionalism, in which international human rights standards are applied in order to recognize a constitutional status of the right to strike (Fudge 2015).

Within the global integrative constitutional doctrine, labor constitutionalism is implemented via the application of international labor standards. Hence, international labor standards of the ILO are applied as a basis for the recognition of labor freedoms as constitutional rights. The embracement of ILO labor standards is used as a means of interpreting existing constitutional documents. Thus, the recognition of a constitutional right to strike, via the application of human rights governance enables the realization of labor rights. Nevertheless, the exercise of a global integrative approach also enables the applications of restrictions on the right to strike, that are embodied in international standards, such as limitations on strikes in essential services , which have been established by the ILO.

As opposed to the global integrative doctrine, the application of labor constitutionalism according to the anti global constitutional doctrine, is based on other constitutional rights that are included in domestic constitutional documents.

According to the global approach, the recognition of a constitutional status of collective action is based on existing constitutional rights which are individually oriented rights-such as the right to dignity, property or liberty . The anti global doctrine is based on the general rejectionism approach to globalization, which suggests a reaction against the harmful effects of neo liberalism and the globalization process (Scholte 2005). The rejectionist anti global movement calls for a

de globalization process. For their part rejectionists have extrapolated from the failing of laissez faire globalization to conclude that the globalization process have negative consequences. Hence, only with a revision to national and local spheres can people rebuild a good society .

The anti global approach is a wide doctrine, which ensures a constitutional protection of the right to strike as a collective right, and imposes a duty on the state to ensure the implementation of this right. It denies the application of some international ILO standards, which enable the restriction of strike action in public services in various situations- including for instance the possibility to place restrictions on strikes in essential services.

Different judiciaries differ in their willingness to embrace the global integrative doctrine. The Israeli judiciary will be discusses below and it will be followed by a presentation of the American system and the Supreme Court of Canada's jurisprudence.

3. The implementation of labor constitutionalism in Israeli labor market-Embracing an anti global constitutional doctrine

A. The issue of recognizing a constitutional status of the right to strike in Israel

An unwillingness of Israeli courts to establish labor constitutionalism in regard to the freedom to strike has been apparent only up until the end of the first decade of the millennium. The right to strike, has been enforced though, in the last few years in the Israeli labor market . Indeed, the field of constitutionalism regarding collective action demonstrates the movement of the Israeli judiciary away from a liberal political doctrine toward the new embracement of an anti global doctrine regarding labor constitutionalism.

In Israel, labor constitutionalism was adopted in response to the decline of the corporatist regime. In general judges in Israel have responded to developments in the labor market and the decline in union density (Mundlak 2007). Hence, In Israel,

the courts exercise judicial review that attempts to reserve social rights, that were enacted during the 1960s- 1980' in the period when Israel could be defined as a positivist- corporatist welfare state regime. The constitutionalism of labor rights is oriented towards the protection of participants in the labor market. Thus, it attempts to enhance empowerment of employees and preserves the values of the welfare state and the democracy. Historically, Israel was characterized by a high union density , corporatism and strong collective bargaining. Since the 1980s there has been a drastic decline in union density and also in the corporatist regime and an adoption of neo liberal agendas (Mundlak 2012). The reality in the labor market has pushed judges to develop new workplace protections via the application of labor constitutionalism.

In the beginning of the 1990s two basic laws of human rights were constituted in Israel- Basic law of the Freedom of Occupation and the Basic Law of Dignity and Liberty, which are considered as constitutional norms[10].

Nevertheless, collective labor freedoms have not been included in the Israeli human rights basic laws, which include only liberal individual freedoms, such as the right to dignity and property. Strike action has been considered in Israel along the years and up until recently only as a negative freedom. The freedom to strike was not included in Israeli basic laws on human rights and the traditional jurisprudence treated it merely as a negative freedom [11].Hence the context of the application of labor fundamental rights in Israel is a context of a liberal constitution.

Throughout the years Israeli courts dealt with the issue of whether a constitutional right to strike should be recognized especially within the area of strikes in public services. This jurisprudence will be discussed below.

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[10] Supreme court case 6821/93 ***Bank Hamizrahi v. Migdal*** . supreme court cases vol. 49(4) 221 (1995)

[11]Supreme court case 593/81 ***Ashdod Vehicle planets v. Sizik*** vol. 41 (3) 169, 190 (1987)

D. <u>Labor rights constitutionalism in Israel in the public services arena</u>

Contrary to the traditional jurisprudence , the Israeli courts have recognized, in the last few years, the right to strike as a constitutional right, while applying an anti global doctrine. Thus, the recognition of the right to strike as a constitutional right was aimed at counterbalancing a few processes of the globalization era- including the decline in union density.

Firstly, , the enforcement of a constitutional right to strike, was aimed at overcoming a legislation that forbids strike action. One of these cases is the **Bar Ilan** case. The **Bar Ilan** case involved an attempt of the union to take collective measures in demand of a rise in the pensions of the working place's pensioners. The Israeli Collective Agreements Law 1957 and the Israeli Labor Disputes law 1957 enabled the declaration of a strike only regarding employees' interests. According to the Israeli law, the union was not entitled to declare a strike regarding the pensioner's interests. Even thought the law itself did not include the option of such a strike, the court ruled, using labor constitutionalism, that the labor organization was able to take such collective measures.

In the **Bar Ilan** case the right to strike was captured as an integral part of the right to human dignity, on the basis of the worker's autonomy to fulfill his goals and aspirations regarding the workplace by taking a positive collective action[12]. The Israeli supreme court held that the right to strike could be also derived from the statutory constitutional right to occupation[13]. The reasoning of the court refereed to the fact that the freedom of occupation includes one's right to a fair conditions at work. The court ruled that the right to strike is included in the statutory right for property as well, since workers have various economy interests regarding the

[12] ECJ 1181/03 ***Bar Ilan University v. The Israeli National Labor Court (***2011). The right to dignity is included in the Israeli Basic Law of Human Dignity and Liberty.

[13] ECJ 1181/03 ***Bar Ilan University v. The Israeli National Labor Court (***2011). The right to occupation is included in the Israeli Basic Law of Occupation.

working place. Thus, the right to strike could be derived from the right to property, since the struggle of workers to improve their employment terms involved property aspects[14].

The court emphasized that in the age of globalization the protection of the rights of elderly people and pensioners is of special importance. The need for the protection of their rights has been accelerated due to the retreat of the welfare state in the globalization era. The recognition of the right to strike as a constitutional right was also considered as included in the constitutional freedom of expression, which by itself was considered as included in the right to dignity[15]. The strike is one of the major means for the workers' voice to be heard and a means of presenting their common interests. Thus the court recognized the constitutional status of the freedom to strike, using various statutory rights and the principle of human dignity.

Thus, , the Supreme Court applied an anti- global approach in the **Bar-Illan** case. The recognition of a constitutional right to strike was derived from other existing constitutional rights and the court emphasized that the implementation of labor constitutionalism was aimed at counterbalancing the results of a few processes that took place in the age of globalization. Mainly, the age of globalization has brought with it a retreat in the welfare state model, which effects the interests of elderly people and their right to a dissent standard of living and causes a rise in the poverty rate among the elderly population. These phenomenon along with the rise in life expectancy have created a need for the protection of the rights of the work place pensioners by the union, and a need for the application of labor constitutionalism.

Secondly, labor constitutionalism regarding strike action was applied as a basis for avoiding the restriction of strikes in essential services

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[14] ECJ 1181/03 ***Bar Ilan University v. The Israeli National Labor Court (***2011). The right to dignity is included in the Israeli Basic Law of Human Dignity and Liberty.

[15] The freedom of expression itself has been recognized as a constitutional right that is included in the statutory constitutional right to dignity. National Labor court case 1017/04 ***The general health services v. The general Histadrut*** (2005); National Labor court case 2547609/12 ***The general Histadrut v. Pelephon celolar co.***

In Israel in principle the law does not restrict strikes in public services or even in essential services. Nevertheless, the Israeli law denies a right to strike of members of the armed forces –The army, the police, prisons and the secret services.

The Israeli labor court held in the ***Mekorot*** case, which involved work stoppages in water supply services, that in principle essential services workers enjoy a fundamental right to strike[16]. In the ***Mekorot*** case the court emphasized that even though a supply of minimum service could be demanded, in principle the regular strike law- including the demand of proportionality- should also apply to strikes in essential services . Even though the Israeli national labor court mentioned, in the ***Mekorot*** case, the ILO conventions, it did not apply the specific ILO standards that enable the denial of the right to strike in essential services and concluded that in essential services workers enjoy in principle a regular right to strike.

In some cases the court refrained from issuing an injunction against strike action in services that the court considered as essential, while emphasizing that the freedom to strike is a fundamental right. For instance, in the ***Teachers strike*** case the labor court refrained for a period of two months from issuing an injunction against a general strike in the whole Israeli high school education system[17]. In this case the court rejected the claim that the strike, that revolved a suggested reform in the education system, was an illegitimate political strike. Education services are not likely to be classified as essential services according to the ILO principles. Even though the court emphasized that education services are considered as essential services, the court let the collective action go on for two months before it issued an injunction. The court applied the anti global doctrine and emphasized that the implementation of a fundamental right to strike in these public services was aimed at counterbalancing processes that took place in the age of globalization- Mainly the decline in union density and in the capacity of unions to lead up struggles.

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[16]Labor collective dispute case 19/99 ***Mekorot –the water company v. General Histadrut*** (2001)

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

Thirdly, in some other cases the application of labor constitutionalism was used in order to counterbalance the application of N.P.M. reforms within the public sector in the globalization era. One of these cases is the ***Shmira*** case , in which labor constitutionalism was used in order to deal with NPM reforms and the privatization of security services. The court dealt with the question whether the legislation, that denies the right to strike in National public security services (such as the army and the police), should also apply to the privatized security services.

The Israeli labor court addressed this question in the ***Shmira*** case[18]. In this case the recognition of a constitutional right to strike was a basis for the denial of the implementation of the law that forbids strikes in public security services.

The ***Shmira*** case revolved the security services for public officials including the ministers. Usually the personal security services to public officials such as the prime minister, the president and the chief judge of the supreme court, are operated by the "Shabak" – the internal security organization of Israel- which is a governmental organization. Yet, since the personal security services of ministers have been privatized, they were operated by private commercial contractors. When the employees of the private firm "Moked" started a strike, the labor court had to determine whether such a strike is legitimate. The "Moked" firm, that employed 170 guards, supplied personal security services to the ministers. In this case the government claimed that the personal guards' work is essential and their absence might expose the ministers to security risks.

The labor court ruled in the ***Shmira*** case that the public labor law norm could not be extended to a privatized security service. According to the national labor court, once the security services were privatized, the public law norm no longer applied, since the employer was a private body. Thus, despite the law that forbids strikes in public services of the armed forces, the court held that since the security services of the "shabak" had been privatized, the legislative restriction on the right to strike did not apply.

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[18] National Labor court case 8299/06113 ***Shmira v. The Histadrut*** (2012)

The court emphasized the constitutional status of the right to strike as a basis for its ruling. Thus, the constitutionalism of the right to strike enabled the court to overcome the relevant legislation. The willingness of the Israeli courts to apply a constitutional right to strike in this case extended the boundaries of the possibility to strike. The court applied a collective anti global approach which was aimed at counterbalancing the impact of the neo liberal reform of outsourcing the security services.

The Israeli courts embraced an anti global doctrine and the application of a constitutional right to strike also regarding strikes in utility services and the issue of replacing striking employees The application of the anti global doctrine and the constitutionalism of labor strike has also reflected on the issue of hiring replacement for the workers that are involved in a strike. One of the cases, in which an anti global doctrine was embraced, is the **Metrodan** case[19]. In the **Metrodan** case after the privatization of the transportation services in the city of Bear Sheva , the private bus company's drivers started a strike. The drivers of the private bus company were not organized and the aim of the strike was to start negotiations with the employer over collective agreement. Because of the strike, the transportation minister gave another bus company a temporary license to operate bus services in the city of Bear Sheva. Although the bus transportation services are not considered as essential services, they are utility services of great importance to the public.

Even though in that case the stoppage of bus services was very long, as the strike lasted three months, the court did not issue an injunction against the strike . The court ruled, using labor rights constitutionalism, that the minister's decision was void. The reasoning was based on the fact that the decision violated the employees' right to strike, which as the court declared was a constitutional right. In this case the application of a constitutional right to strike was used in order to overcome the decisions of the transportation minister. The decision to give a temporary license was aimed at addressing the public need of bus transportation. The application of

[19] Labor collective dispute 57/05 ***The General Histadrut v. Metrodan*** (2005)

labor constitutionalism was aimed at counterbalancing the effects of the globalization process on the labor market in protecting the interests of unorganized workers. Nevertheless, the court in this case preferred the employees' interest over that of the public .The court implemented the anti global approach, and it did not apply the specific ILO standards. Despite the fact that the ILO standards enable a minimum service supply demand, the court held that the minister's decision was void. The court held that hiring a temporary replacement for the workers that were involved in the collective action violated their right to strike . The denial of the option to hire temporary replacement was based on the constitutional status of strike action.

. The American system **-Embracing a liberal political doctrine.**

The American constitution is a liberal constitutionand does not include the freedom to strike. The United States has not ratified ILO conventions 87 and 98 on the right to organize and the American judiciary has not applied the ILO global labor standards and embraced a liberal political doctrine.

The national labor act (hereinafter NLRA) grants employees of the private sector the right to strike[20]. Nevertheless, most public employees are not allowed to strike. The Federal Labor Relations act denies a right to strike from all federal employees. Most states also deny a right to strike from state and municipal employees as well.

Employees of the private sector that supply essential services – such as electricity or medical services – under state regulation or via contracting out with the government, are considered as regular employees under the NLRA . They enjoy a right to strike. As long as private sector employees that supply essential services are concerned, the Mackay doctrine is prevalent. The American judiciary held in the *Mackay* case that employers may hire either temporary or permanent replacement for workers that strike over wages and working conditions[21]. In the *Mackay* case, it

[20] National Labor Law 49 stat. 449, 29U.S.C

[21] *NLRB v. Mackay Radio and Telegraph Co*. 304 U.S. 333, 345-47 (1938)

was established that employer may fill vacancies left open by economic strikers, and is not obliged to discharge the hired replacement to create space for workers who wish to return at the end of the strike. The Mackay doctrine weakens the right to strike[22]. The Mackay doctrine violates ILO standards- The ILO committee states in its resolutions that hiring permanent replacement violates the right to strike[23].

6. The Supreme court of Canada:

Embracing a global integrative constitutional doctrine

The jurisprudence of the supreme court of Canada in the last decade is characterized by the embracement of a global integrative constitutional doctrine. The Canadian charter includes liberal oriented rights, and does not include labor rights. Hence the context in Canada is of liberal constitution and a liberal regime. Even though the charter does not include a right to collective bargaining and strike, the supreme court recognized a constitutional right to strike under the s2(d) right to freedom of association of the charter based on international labor rights governance. Nevertheless, leaning on international labor governance enables wide restrictions on strikes in essential services.

Canada is characterized by a regulatory pluralist regime, in which the legislation itself addresses strikes in public services. The legislation of the different provinces therefore regulate strikes in essential public services . In most cases the legislation restricts strikes in essential services.

In the years prior to 2007, the Canadian supreme court has been reluctant to recognize collective rights as human rights with a constitutional status (Fudge 2008).In a few cases known as the "labor trilogy" the Canadian supreme court had ruled, prior to 2007, that the right to collective bargaining and the right to strike are

[22] Emily C.M. Oneill, The right to strike: How the United States reduces it to freedom to strike. American University labor and employment law forum 199

ILO complaint against the government of the United States 92 case 1543. Report NO. 272 (1991)[23]

not constitutional rights[24]. The court held that these collective rights are not derived out of other statutory rights that are included in the Canadian charter, and mainly the freedom of expression (Langille 2009).

In the ***Dummore*** case[25] the court dealt with the issue of whether the government of Ontrio was under the obligation to provide legislative protection to agriculture workers, in order to enable them to join trade unions. Even though the court made reference to the ILO conventions, the court did not extend the freedom of association to include collective bargaining. In the ***Fraser*** case, the court held that the Ontario legislation that allowed agriculture employees to form employee association but prohibited them from forming unions was constitutional. The act was aimed to guarantee the supply of food and was needed because the field is based mainly on small farms[26].Even though the court made reference to the ILO convention on the freedom of association, the court rejected the claim that the act was unconstitutional.

In the last few years, though, the supreme court of Canada has applied constitutional labor rights regarding essential services. The first step was the recognition of a constitutional right to collective bargaining in a case, involving legislation which invalidated provisions in collective agreements that prevented reorganizations in the workplace .The court interpreted the association right- , acknowledged in the charter, in a way that enables labor constitutionalism[27] . This was based on the application of international labor standards. The Canadian supreme court ruled that the 2(d) article of the freedom of association in the Canadian Charter of rights and freedoms, protects the possibility of employees to require collective bargaining and strike.

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[24] Reference re public service employee relations act (Alta) 1987. SCR 313 (Alberta reference); ***PSAC v. Canada*** (1987) 1 SCR 424.;***rwdsu V. Sakatchewan*** (1987) 1 SCR 313

[25] *Dummore v. Ontrio(attorney general) 2001 S.C.J No. 87. 35cr*

[26] *Attorney general of Ontrio v. Fraser* 2011 S.C.C 20

[27] Health Services v. British Columbia. 2007 scc 2007

In Canada the legislation regarding strikes is determained by each government. A restriction on strikes in certain essential services is considered as legitimate. In the ***Saskatchewan*** case the supreme court had overruled its previous position held in the labor trilogy serious of cases, that statutory rights of the charter do not include the freedom to strike[28]. The court refered to international labor standards and decisions of ILO supervisory bodies as a basis for constitutionalism of strike action.

The ***Saskatchewan*** case involved the essential services act, introduced in 2008[29]. It was the first statutory scheme in Saskatchewan to limit the ability of public sector employees who perform essential services to strike. It prohibits designated essential services employees from participating in any strike action against their employer. The employees were required to continue the duties of their employment in accordance with the terms of the last collective agreement.

No meaningful mechanism for resolving bargaining impasses is provided in the act. Under the act a public employer had the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classification of employers who must continue to work during the work stoppage, the number and names of employees within each classification of employees who must continue to work during the work stoppage, the number and names of employees within each classification and the essential services that are to be maintained. Even when an employee has been prohibited from participating in a strike, the act does not determine his responsibility to the performance of essential services alone.

The court held that the provisions of the act go beyond what is reasonably required to ensure the uninterrupted delivery of essential services in strikes. Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses such as arbitration. The court emphasized that when strike action is limited in a way that substantially Interferes with a meaningful process of collective bargaining , it must

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[28] ***Saskatchewan v. Saskatchewan Federation of Labor, [2015] S.C.R 245***

[29] Public service essential services act s.s. 2008 c. p-42.2

be replaced by one of the meaningful dispute resolution mechanisms , commonly used in labor relations.

The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses justify the conclusion that the act is unconstitutional. The Canadian Supreme Court ruled that in this case the prohibition on essential service employees participating in strike action accounts to substantial interference with a meaningful process of collective bargaining and therefore violates 2(d) of the charter.

The application of a constitutional right to strike enables judicial review over laws that limit the right to strike. Thus the Canadian Supreme Court has held that a constitutional right to strike should be applied in the context of public essential services. The ruling was based on the application of international labor standards of the ILO and on the fundamental status of the freedom to strike in ILO resolutions.

Nevertheless the application of the global doctrine enabled placing restrictions on strikes in essential services, as long as other means to resolving collective disputes are introduced or in cases where collective agreements settle which employees are considered essential . The legislation can demand such a restriction. Hence the application of a rather restricted right to strike in public services is likely to follow the application of the global doctrine, since it is in accordance with the ILO resolutions, that enable the restriction of the right to strike in public services.

7. The issue of the application of an anti global doctrine vs-a-vis a liberal political approach and a global doctrine

A. An anti- global doctrine versus liberal political doctrine and a global integrative doctrine

As we suggested, it would be fruitful to distinguish between three approaches possible regarding the right to collective action in public services–A liberal political approach, and an anti global approach vis-a-vis a global integrative approach, which is based on global human rights governance. This raises the issue of which doctrine should be embraced.

There are a few claims that can be brought up in favor of a liberal political doctrine. Firstly,. industrial relations and labor interests have been originally set up in the private sphere by labor organizations and other interest groups. Thus it could be claimed that collective struggles should indeed take place within the political arena and not through litigation(Tucker 2012). Secondly, human rights are originally aimed at setting up obligations on the public authorities within the relationship of citizens and the state. Therefore the fact that labor disputes usually occur at the private sphere and between employers and employees, cast doubt on the ability to apply human rights discourse.

Thirdly, embracing human rights discourse regarding the right to strike raises difficulties because it lays an extra burden on the state to consider labor rights. In fact, in the public sector, the concern over the ability of the state to design regulation regarding strike action is accelerated due to the fact that public sector employees and unions, that enjoy monopolistic power, may deprive society of a given set of services. Thus the concern is that the application of constitutional litigation might place certain labor rights above the democratic fray (Oliphant 2012).

Furthermore, whereas in the private sector, strike is an economic weapon, strike in public services is often captured as a political tool (Malin 1993). Working conditions of public employees frequently involve political questions of public policy. Un like the private sector- where strikes cause the loss of revenues –and therefore motivate the employer to settle labor disputes, in public services it does not have the same effect. Since the state as a public employer continues to collect taxes during a strike, the strike does not create an economic motivation to settle up the dispute. In fact, the public union's goal in with drawl of the supply of public services is to cause sufficient political costs, in a way that would motivate the government to settle the dispute in

a more favorable conditions. It could be claimed that a right to strike in public services effects the political process by empowering public service unions in a decision making arena, from which other interest groups have been excluded.

Fourthly, the enforcement of a constitutional right to strike requires courts to make decisions that have large scale consequences, regarding governmental labor market policies (Tushnet 2003), in a way that extends the role of courts beyond their original duty. A Part of this intervention of courts is done by the declaration of legislation and executive decisions, concerning strikes in public services, as void(Tucker 2012).

Indeed, it might be claimed that the application of a constitutional right to strike restricts legislators by denying them the flexibility needed to ensure the proper balance of the three competing interests – those of employees, the public employers and the public in general.

Despite these claims, it seems that courts should reject the liberal political doctrine. Hence, the rejection of the liberal political doctrine means that labor constitutionalism regarding the right to strike could be applied, even when the freedom to strike is not included in domestic constitutional documents.

A few arguments can be brought up in support of the application of labor constitutionalism regarding strikes in public services and in response to the above mentioned claims. Firstly, the gap between the bargaining power of the public employer and the power of the employees, creates a need to recognize a constitutional right to strike. Secondly, due to the incapability of the individual worker to lead up struggles in the work place on his own, the recognition of a constitutional right to organize is of great importance. In fact, the very recognition of a right to strike is needed in order to enable a meaningful right to organize and to bargain collectively. Thus, the recognition of a constitutional right to strike promotes equality in the working place. It is therefore the possibility to strike which enables workers to negotiate their employment terms on a more equal basis. Thus, the recognition of a constitutional status of the right to strike is justified due to the

crucial role of strike action in collective bargaining. Where negotiations break down, the ability to engage in a strike is a necessary component of the bargaining process.

Fourthly, the decline in union's political power in the age of globalization stresses the need to strengthen collective rights. As long as labor unions have enjoyed substantial power and had the capacity to influence labor market policy, constitutionalism and the intervention of courts were not necessary. Nowadays when unions have lost their power, and their ability to influence labor policy, it is crucial to embrace different ways to protect labor's interests. The rise of neo liberalism in most western countries and the general decline of labor parties, makes it difficult to fulfill labors' interests within the political process. (Fudge 2008).

When we wish to apply a constitutional right to strike, there are two doctrines that might be considered – the global integrative doctrine and the anti global collective doctrine. Hence, there are a few claims that can be brought up in favor of a global doctrine ,which recognizes a constitutional right to strike, via the application of international labor standards. Firstly, the application of global labor human rights governance is justified in a globalized world since there is a need to further develop global Unitarian standards of labor rights. In this respect, scholars stressed out the need to extend principles of human rights and justice beyond the political boundaries of the nation state (Dahan , Lerner and Milman Sivan 2016). Those scholars emphasized the advantage, in the age of globalization, in developing global justice principles of international labor rights.

Secondly, the application of an anti global doctrine might be problematic, in a way that emphasizes the advantages of the global integrative doctrine. Thus, In various countries the constitution includes only individually oriented constitutional rights. In this case, applying a collective anti global constitutional doctrine is hard to justify, since it could be based only on individual human rights discourse, which allegedly does not fit as a basis for advancing collective interests and on extensive intervention of courts (Savage 2009) . Hence, deriving a right to strike, in some countries, from the right to dignity or liberty is problematic, since the right to dignity refers to rights of individuals, whereas the right to strike is a right of workers to act collectively.

Despite the above mentioned claims, courts should embrace the anti global doctrine. There are a few arguments that can be brought up to justify the application of the anti global constitutional doctrine and in response to the above mentioned claims.

Firstly, as a few scholars noted, the issue of the recognition of a right to strike depends on the particular features of the strike in question which are variable (Sheldon 2009). When dealing with strike in public services or essential services there are a few specific factors that should be considered. One of the major concerns regarding the application of labor constitutionalism is over the sovereignty of the state to design regulation regarding strikes in public services (Oliphant 2012),.This concern is accelerated in the course of the application of a global approach, since the very application of human rights global governance undermines the capacity of the nation state to act and determine the proper policy regarding public services. Thus the application of the global integrative approach is related to the issue of the changing role of the state in the globalization era and globalization's effect on the ability of the state to determine public policy regarding the labor market. The transformation of the role of the state in a globalized world challenges the perception of constitutionalism and the rule of law regarding labor relations. The transformation of the rule of law and constitutionalism in the age of globalization is reflected in the bigger role that international law takes vs-a-vis the nation state (Jayasuriya 2001). That is, the application of global integrative approach and the adoption of international labor law in the interpretation of domestic constitutional documents, undermines the capacity of the state, including the local judiciary itself ,to regulate strike action and determine labor policy. Thus it creates a democratic deficit which challenges the capacity to protect workers' interests and apply labor constitutionalism.

Secondly, the political anti global doctrine is characterized by flexibility and allows a wide discretion for the domestic actors and the judiciary to regulate labor disputes in public services, regardless of international standards. Furthermore, the application of an anti global doctrine, which is based on domestic constitutional documents, is characterized by a democratic legitimacy, since it does not undermine the

sovereignty of the nation state and, thus enables a wider protection of labor's interests.

Thirdly, In the globalization era, the rise of neo liberalism and the decline in union density have raised new challenges for labor interests. The retreat of the welfare state, in which organized labor and workers' rights were central within the political arena and the decline in union power, have all created a need for another method of governance regarding collective disputes . It stressed the need for the application of a certain labor constitutionalism, which is aimed at counterbalancing globalization's negative effects..

Furthermore , within the specific arena of the public sector, the age of globalization has also brought up the embracement of NPM reforms into the public sector (Cohen 2016). The Implementation of market oriented practices and development of precarious employment in the public service, have all effected public employees. These phenomenon have weakened labor force and reduced the capacity of unions to lead up struggles within the workplace, while stressing the need for new means of regulation of labor disputes. Thus, the globalization's effect on the working force and the embracement of NPM practices have raised the need for the application of an anti global doctrine and the constitutionalization of the right to strike as a means of counterbalancing the effects of these processes on public sector employees. indeed labor constitutionalism could create a change in the reality and strengthen the workforce, the state of individual employees in the age of the retreat of the welfare state and NPM reforms and the ability of workers to organize.

Furthermore, the anti global doctrine is based on the notion of socio economic equality and Marshal's idea of social citizenship (Marshall 1992). It is aimed at reducing inequality in the society and within the labor market in general. In the age of globalization there is a growing inequality within the labor market. The outcome of the globalization process, NPM reforms and the patterns of outsourcing of the working force in the public sector, have created inequality between different kinds of employees within the public sector. The growing of that inequality in the age of globalization justifies the application of an anti global doctrine which is aimed at re

gaining equality. The socio economic processes that took place in the age of globalization and their effect on the working force- the weakening of unions and the decline in union density- justify the development of an anti global doctrine. In the age of globalization and NPM reforms when employees' interests are at stake, it is critically important to apply labor constitutionalism. Furthermore, courts have a general role in protecting various kinds of human rights and the protection of labor rights is an integral part of it.

Conclusion

The article reviewed the jurisprudence of two different courts and their willingness to apply labor constitutionalism regarding strikes in public services and the application of human rights global governance.

The challenges to labor interests and public employees in the age of globalization and the decline of the interventionist state, raise the question of the proper doctrine that courts should embrace regarding collective action in public services. The article distinguished between three approaches - A liberal political doctrine , according to which strike action is a negative freedom, an anti global constitutional doctrine and a global integrative constitutional doctrine. A global integrative doctrine recognizes a positive protection of strike action as a fundamental right, even when such freedom is not included in constitutional documents. Thus, in the Canadian Supreme Court a global integrative doctrine has been embraced, whereas in Israel the application of the global doctrine has been declined.

The paper introduced the notion of the anti global doctrine, in which the right to strike is derived from other constitutional rights which are included in local constitutional documents, such as the right to dignity. As opposed to the global doctrine, which bases constiututionalism on global labor standards- ILO conventions and resolutions, the anti global doctrine is based on interpretation of domestic constitutional documents . Within the anti global model, labor constitutionalism is

aimed at counter balancing the effects of the globalization process on labor interests.

In the United States a context of regulatory pluralist extreme regime led to a denial of labor constitutionalism in regard to public services. In Canada a context of a liberal constitution and regulatory pluralist regime led to laying on international standards of the ILO as a basis for labor constitutionalism. It enabled the application of a constitutional right to strike, while restricting strikes in public services according to the restrictions prevalent in ILO standards. Whereas in Israel courts based labor constitutionalism on local domestic constitution, deriving a right to strike from other constitutional rights and rejecting the restrictions on strikes in public services that are embodied in ILO standards. The decline of corporatism in Israel crated the need to embrace an active judicial role. Basing labor constitutionalism on local constitutional documents enabled the Israeli courts a vast protection on labor's interests. The application of labor constitutionalism regarding the right to strike raises difficulties. Extensive judicial review and the imposition of new obligations in these circumstances could be seen as interfering with the public policy doing of the legislators and executive branches regarding collective disputes. Indeed such social constitutionalism could create a change in the reality and strengthen the workforce, the state of individual employees and the ability of workers to organize.

The denial of the political liberal doctrine is needed in the light of a the worldwide decline in union density and the rate of organized employees. It is also needed in order to counterbalance the impact of a few processes that took place in the age of globalization- The rise of the neo liberalism , and NPM reforms within the public sector and the decline of unions' political power. These processes effected labor rights and the ability of employees to organize in employee organizations.

Thus, Courts should embrace the anti global approach in interpreting current constitutional documents. In fact,, the denial of human rights global governance approach strengthens the capacity of the nation state to regulate strikes in public services in a flexible manner, regardless of international standards. Thus, the anti global doctrine allows a wide discretion for the domestic actors and the judiciary to

regulate labor disputes in public services. Furthermore, the application of an anti global doctrine, which is based on domestic constitutional documents, is characterized by a democratic legitimacy, since it does not undermine the sovereignty of the nation state, in a way that enables a wider protection of labor's interests.

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