UNBOUND: SOME COMMENTS ON ISRAEL'S JUDICIALLY-DEVELOPED LABOR LAW

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I. INTRODUCTION

Israel's labor and employment laws (hereinafter together labor law) have gone through dramatic transformations in recent years. The shrinking union density and the proliferation of various new methods used by employers to evade labor laws and resist unionization have made some response necessary. With the legislature generally silent on such matters, the National Labor Court has stepped in to develop a significant number of new employment protections. Two specific areas that have undergone significant change in recent years are the law concerning the managerial prerogative and the regulation of wrongful dismissals. Globalization processes and other pressures of the New Economy have made changes in the workplace much more frequent, and the Court had to rethink the boundaries and limitations of the managerial prerogative. The decline of job security arrangements, which in turn made dismissals much easier, has similarly prompted the Court to respond by developing alternative modes of protection. This article provides a description and analysis of these changes.

The development of Israeli law in these two contexts can be of interest to labor lawyers from other legal systems as well, given the similarities in the underlying conditions (global competition, lower union density, etc.) that triggered these changes. Moreover, a study of these developments could contribute to the more general debate

† Faculty of Law, Hebrew University of Jerusalem. This article was prepared for the conference on Comparative Mediterranean Labor Law, held in Athens on January 2008. Many thanks to the participants for their comments, and in particular to Matt Finkin for envisioning and overseeing such an original and engaging conference, and to Stacey Ballmes and the hosts at the European Public Law Center for organizing it so superbly. Thanks also to Faina Milman-Sivan for insightful comments on an earlier draft. All judgments referred to in this article are of the Israeli National Labour Court, unless otherwise stated. Unfortunately most of these judgments have not been translated to English, so the reference is to their Hebrew publication.

about the sources influencing the development of law, and in particular the argument that "legal origin" plays a crucial role in this development. While discussing the Israeli law concerning the managerial prerogative and wrongful dismissals, I will pay some attention to the way Israeli courts have gone about developing these laws in recent years. What are their sources of inspiration? To what extent do they rely on foreign jurisprudence? To what extent do they feel free to invent new solutions based on normative (public policy) considerations? To what extent is the Israeli legal origin imposing certain solutions? Using the two specific contexts as examples, I will argue that in recent years Israel's labor courts are for the most part unbound by legal origin and feel themselves free to develop the law as they see fit. They sometimes use comparative law, but mainly by way of support for their own normative conclusions.

This appears to contradict the empirical findings of Juan Botero and his colleagues, who argued—based on a study of eighty-five countries—that legal origin has great influence over the choice of labor regulations.[1] This study is part of a line of studies by a group of economists—Rafael La Porta and his colleagues—that has been highly influential and generally asserts the overarching importance of legal origin, and for the most part claims the superiority of the common law tradition over the civil law.[2] Obviously one country could simply be an exception to the rule, so the current study does not purport to refute the findings of the wide-ranging quantitative empirical study of Botero et al. However, a case study of one specific country can be used as an example that sheds doubts about the methodology of the Botero et al. study, and also highlights some additional factors that a crude empirical index of numerous countries cannot possibly consider.

1. Juan C. Botero et al., *The Regulation of Labor*, 119 Q. J. ECON. 1340 (2004).

2. The first publications which came out of this project are Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997), and Rafael la Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998). These two articles started a wealth of additional research as well as critiques, including two in this journal: Sanford M. Jacoby, *Economic Ideas and the Labor Market: Origins of the Anglo-American Model and Prospects for Global Diffusion*, 25 COMP. LAB. L. & POL'Y J. 43, 68–69 (2003); David E. Pozen, *The Regulation of Labor and the Relevance of Legal Origin*, 28 COMP. LAB. L. & POL'Y J. 43 (2007). For a recent review of the "legal origin" literature and an attempt to respond to critiques see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, J. ECON. LIT. 285 (2008). For an example of the practical impact of this literature, see the World Bank's *Doing Business* project (http://www.doingbusiness.org), which ranks countries according to the strictness of their regulations. Their ranking of labor and employment regulations is based on Botero et al., *supra* note 1.

The Botero et al. index has rightly been criticized for looking only at "law on the books" and ignoring the "law in action,"[3] for example the extent to which laws are actually being enforced; the size and characteristics of the informal economy (i.e., the scope of labor law's actual application); and the impact of extra-legal norms that dictate employment standards, possibly making some legislative interventions unnecessary.[4] Indeed, it is poignantly inaccurate, and seriously misleading, to quantify employment standards in Sweden or Germany (for example) without taking into account standards set by collective agreements;[5] or to measure labor laws in India without considering its enormous informal economy.[6] Not less important, however, is a full and accurate understanding of the "law on the books." Regulation of employment and labor relations is quite often judge-made in many countries, so any attempt to quantify labor laws must include case law alongside legislation. Yet Botero et al. pretty much ignored the existence of judge-made law.[7]

In a recent study, Simon Deakin and his colleagues, who performed their own quantitative research,[8] have tried to provide a fuller picture of the law rather than just a snapshot of legislation. Their index, which covers only five countries, delves much more into the details of the law, and includes some references to case law. Nonetheless, they seem to rely too heavily on legislation as well. Issues such as the managerial prerogative, that are entirely or mostly judge-made, are excluded from the analysis, and the coding seems to give much less weight to case law. To take just one example: when

3. *See*, *e.g.*, Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 LAW & SOC. REV. 865, 882–84 (2007); Pozen, *supra* note 2, at 47; Paul Benjamin & Jan Theron, *Costing, Comparing and Competing: Developing an Approach to the Benchmarking of Labour Market Regulation* (Dev. Policy Research Unit, Working Paper No. 07/131, 2007, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139034).

4. A survey among "labor practitioners" around the world has indeed produced somewhat different results. See Davin Chor & Richard B. Freeman, *The 2004 Global Labor Survey: Workplace Institutions and Practices Around the World* (Nat'l. Bureau Econ. Research Working Paper No. 11598, 2005). In fact, even such a survey is not likely to provide a full and accurate account of the law.

5. Consider, for example, the fact that there is no minimum wage legislation in these countries, but wage regulation through collective bargaining is widespread.

6. *See* Kamala Sankaran, *Protecting the Worker in the Informal Economy: The Role of Labour Law*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 205 (Guy Davidov & Brian Langille eds., 2006).

7. The article itself provides very little information on how the data on each country was assembled and what exactly it includes. The dataset, which the authors made *available at* http://www.economics.harvard.edu/faculty/shleifer/dataset, does not provide additional information on these matters.

8. Simon Deakin, Priya Lele & Mathias Siems, *The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes*, 146 INT'L LAB. REV. 133 (2007).

measuring the regulation of dismissals in the United States, the authors note that "there is no unjust dismissal legislation in the USA,"[9] coding it as zero for the entire period they examine from 1970 through 2006. They add that "only a few states have deviated from the employment at will rule, and such deviations are relatively minor by comparative standards." This statement is certainly true, but nonetheless, seems to downplay the importance of "wrongful discharge" exceptions that American courts have developed over the last few decades,[10] as well as to ignore the existence of "just cause" protection in collective agreements. Although the overall protection against dismissals in the United States is famously minimal in comparative terms, simply describing it (numerically) as non-existent seems overly-simplified.

Deakin et al. also attempted to rectify another problem of the Botero et al. study. While the latter team coded only the law as it was in the mid-1990s, Deakin et al. added a longitudinal factor, to be able to examine the *development* of the law. Rejecting the "strong" legal origin effect—the idea that historical association with a certain legal tradition automatically dictates future outcomes—they examined the existence of a "weak" effect. Acknowledging the relevance of legal origin, Deakin and his colleagues added that it stands against pressures for convergence (whether through regulatory competition or through multi-national standard setting), so the actual impact of legal origin changes over time and context. In practice, however, it seems that once again their measures often downplay the *judicial* factor in the development of the law. To take the example of American dismissals law again, there have been significant changes over the examined period (spanning the last four decades) that the study neglects to mention or consider.

This is not to suggest that the empirical studies of the Botero and Deakin groups are not helpful, important, or even "correct." The first study, with its impressive attempt to compare numerous countries, certainly has its strengths. The second study adds many strengths of its own. The purpose of this article is not to contradict them, but rather to complement them. My argument is that the story coming out of these studies is incomplete, at the very least, because they provide a very limited and partial picture of the development and current state of the law in each country. It may be useful to perform

9. The full dataset and explanations on the variables are *available at* http://www.cbr.cam.ac.uk/pdf/Labour%20index%20data%20and%20variable%20lists.xls.

10. *See*, *e.g.*, Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84 (2007).

quantitative analyses on a grand scale, for some purposes, but it could also be misleading. Rather than making general rough estimates on the contents of numerous laws in numerous countries in a given time, this article provides an in-depth examination—a case study—of the development of the law over time in a couple of specific contexts in one particular country. Before we can make any assertions about the way Israeli labor law has been developing, we must study the specifics.[11]

The next two parts of the article describe and analyze the development of Israeli law in the areas of managerial prerogative and wrongful dismissals, respectively. The conclusion then connects this discussion back with the more general debate about the importance of legal origin to the development of law in different legal systems.

II. THE MANAGERIAL PREROGATIVE

The managerial prerogative has been part of Israeli labor law from its inception. Kahn-Freund's strong assertion—that "[t]here can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'"[12]—aptly describes the long-standing understanding of Israeli labor lawyers and judges as well. In the last few decades, this "power to command" is usually framed legally as a "managerial prerogative"—the right of an employer to make unilateral decisions with regard to the business/workplace, including decisions that affect its employees. While the basic acceptance of the managerial prerogative has not changed much over the years, its regulation certainly has. Obviously there are no rights without limits, and the managerial prerogative has its limits as well. The purpose of this section is to describe and critically consider the Israeli law setting the prerogative's boundaries. Sections A and B discuss the law dealing with the managerial prerogative in *individual* employment relations and in *collective* labor relations, respectively. They each include a brief historical overview, summarizing the main milestones in the development of regulation in

11. *Cf.* Benjamin & Theron, *supra* note 3 (examining the validity of the Botero et al. index, as updated by the World Bank, in the South African context). Like Benjamin & Theron, I focus on one specific country, in a way that exposes the limitations and shortcomings of the index. However, Benjamin & Theron considered the (in)correctness of the index in light of the current state of the law, while my own focus is on the *development* of the law and whether legal origin is driving it.

12. PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 18 (1983).

this field, as well as an analysis of the current state of the law. An attempt is also made to reflect upon the law's origins and comparative sources of inspiration.

A. Individual Employment Relationships

The individual employment contract is highly regulated in Israel. Although by default the regular laws of contract apply, and although a number of attempts to pass a law dedicated to the contract of employment have failed,[13] there are numerous "protective laws" that regulate almost every aspect of this contract. Thus, for example, although the parties are generally free to set the wage as they wish, they are bound by the Minimum Wage Law of 1988 to set it above a certain minimum, and in the public sector they are also prohibited by the Budget Foundations Law of 1985 from setting it above a certain maximum. Similarly, although the parties are in principle free to agree on the hours of work as they see fit, in practice the maximum hours of work per day and per week is limited by the Hours of Work and Rest Law of 1951. These common protections that can be found in most countries are joined in Israel by numerous other regulations, setting minimum employment standards on various aspect of the contract, including vacations, sick pay, notice before termination, severance pay, and more.

In stark contrast, there is nothing in legislation to affect the rights and duties of the parties when they wish to make changes to the status quo of their relationship. The legislature chose to ignore the unique feature of the employment contract—the fact that changes to the status quo are unavoidable during the life of the contract—and left it for regulation by the courts. The general contract laws are obviously unsatisfactory because employment contracts are characterized as being "relational" contracts[14]—and particularly, they are characterized by an open-ended "subordination" clause. While the employer is bound by concrete contractual obligations, such as the obligation to pay a specific amount as the wage, the employee has to submit herself to the command and control of the employer, without knowing in advance what this duty will entail.[15] This arrangement is necessary in

13. Contract of Employment Bill 1985 (rejected as a result of fierce employers opposition). The same bill has been tabled several times over the years by individual members of the Knesset (the Israeli Parliament), but always rejected.

14. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 746 (1974).

15. *See generally* Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002); Guy Davidov, *The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though*

order to minimize transaction costs[16] given the changing circumstances and demands in such a long-term relationship.

The flip-side of the worker's subordination (i.e., his duty to obey the changing orders of the employer) is the employer's "prerogative." This term refers to the employers' right—as developed by the courts—to make managerial decisions, including changes in the workplace that affect the employees. The current section is dedicated to reviewing the development of this doctrine in Israel and assessing its future potential.

1. The Wide Latitude Approach

The term prerogative first appeared in Israel in the context of the employment relationship in the National Labor Court's jurisprudence of the mid-1970s.[17] The cases usually referred to dismissals or to disciplinary steps that resulted in demotion of some sort—the legal questions being whether the dismissal was legally justified, or whether the disciplinary steps taken by the employer amounted to constructive dismissals, justifying in turn a claim by the employee for severance payments. Underscoring the power of an employer to manage the business as she sees fit—including making changes that affect the employees—the Court has not deviated from earlier precedents, but the explicit framing of this power as a legal right ("prerogative") has probably helped to fortify it.[18]

The Court made it clear that the managerial prerogative is subject to limitations as set out by legislation, collective agreements, or an individual employment contract. From this point of view, the prerogative has shrunk significantly over the years from the inception of the Israeli state in 1948 through the mid-1970s. The extent of protective laws and collective agreements has grown significantly over this period. It is perhaps more useful, however, to describe the managerial prerogative as the sphere allotted to employers to make unilateral decisions on matters *not resolved by legislation, collective agreements, or an individual employment contract*. The doctrine does

Overly-Used) Legal Concept, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 133 (Guy Davidov & Brian Langille eds., 2006).

16. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

17. *See* Mekorot Water Co. Ltd. v. Tsvi Markovits, 6 PDA 125 (1974); Ramat-Gan Municipality v. Leibo Merchel, 6 PDA 337 (1975); Zim v. Ze'ev Ne'eman, 10 PDA 225 (1979).

18. In Itzhak Guy v. Tel-Aviv-Yaffo Municipality, 15 PDA 409 (1984), the Court noted that the term "power" is more suitable than "prerogative," as the latter could be identified with arbitrariness. But soon afterwards the Court went back to use the same term, and continues to do so today. *See* Binymain Gur-Arie v. The State of Israel, 17 PDA 61 (1985).

not come into play—and legal questions are not raised—when the issue is already settled by one of these sources. The Court refers to the prerogative—and considers its boundaries and limits—when neither of these sources determines whether a particular change to the *status quo* is allowed.

From this perspective, the early cases in which we find reference to the concept of "prerogative" reveal wide latitude given to employers to make changes as they see fit. This approach is exemplified in the case of Mr. Ganani, who was employed as the secretary and treasurer of a cooperative settlement (Moshav).[19] He was engaged under certain conditions, most of which—as is often the case in employment relationships—had not been agreed to explicitly, but were rather based on the shared understandings of the parties. Either way, it was not disputed that there were certain work conditions that the Moshav wanted to change, following some changes in the composition of its administration. In the past Ganani had flexible working hours—later they wanted him in the office from 8 a.m. to 4 p.m. In the past he was allowed to use the car that he got from the Moshav for personal purposes (after work) as well—later they prohibited it. Moreover, Ganani was required by the new Moshav administration to coordinate its tourism activities, a significant task that was not within his responsibilities before. He was further asked to report daily on his schedule and prepare written reports on his activities, which he did not have to do in the past. The National Labor Court ruled that *all* of these changes—including changes that can be characterized as affecting work conditions—are within the employer's prerogative and could be introduced unilaterally.

This approach rests (usually implicitly) on three grounds: first, the view that efficiency-wise it is imperative to give the managers/employers wide latitude to make managerial decisions, and this is beneficial for the economy as a whole; second, the view that the business/workplace is the property of the employer, which in turn gives her the right to "control" it and make unilateral decisions; and finally, a view of the employment contract as being "open-ended" and "loose"—as the Court sometimes put it, a contract that could be likened to a tree, with new branches growing and old ones falling down from time to time.

19. Uri Ganani v. Amirim, 19 PDA 419 (1988).

2. The Contractual Approach

The National Labor Court never explicitly said that an employer could change the contract of employment unilaterally. The Court's approach regarding the contract remained rather vague, but it appeared from the earlier case law (up until the late 1980s) that work conditions could often be changed by the employer, without the employee's consent, whatever the contractual explanation for this phenomenon may be.

This approach did not resonate well with Justice Aharon Barak of the Supreme Court, when the issue came before him in 1987. While in principle there is no appeal on judgments of the National Labor Court in Israel, the Supreme Court sitting as the High Court of Justice is sometimes willing to hear petitions against the Labor Court and intervene when it believes the issue to be of general importance and considers the Labor Court's decision to be grossly mistaken. The case of Mr. Milfelder and his colleagues, a group of firemen, was one of those rare cases in which the Supreme Court overturned the Labor Court's judgment.[20] The firemen had an implicit agreement with their employer, according to which when they worked over the weekend (a shift starting on Friday evening and going on until Sunday morning) they were entitled to a thirty-six-hour rest during the next week. The employer then decided, unilaterally, to limit the rest period to twenty-five hours. The National Labor Court concluded that the thirty-six-hour rest, although it was not put in writing, became over time part of the (implicit) contract between the employer and each of the firemen. Nonetheless, it added that this does not mean that the employer was prevented from introducing changes—the issue was open for renegotiation. To this last part the Supreme Court vehemently disagreed.

Justice Barak, who wrote the judgment for an unanimous Court, expressed the view that a contract of employment should be analyzed like any other contract—a party cannot (and is not allowed to) "tear out" parts of that contract or otherwise change it unilaterally. Although a contract of employment is usually for an indefinite term, and so can be terminated by each party at any time (subject only to reasonable notice, and to other legal limitations), it does not follow from the right to bring the contract to an end that there is also a right to bring *parts of it* to an end during the term of the contract. So while

20. Yeoshua Milfelder v. The Nat'l Labor Court, 41(2) PD 210 (1987) (Supreme Court of Israel).

the employer could certainly approach the firemen and ask to renegotiate the terms of the contract, and perhaps could also threaten to end the contract if they disagree (subject to limitations flowing from their collective agreement), until any changes are agreed upon by both parties that contract is binding and the employer must continue to give the same rest period. This way, the Court reasoned, the best balance is achieved between the managerial prerogative and employees' rights.

Justice Barak added that there are various ways in which the parties could agree on changes to the contract, including, for example, an explicit or implicit stipulation that allows one party to make changes. Although the Court did not refer to the managerial prerogative in this context, its approach provides an excellent way to understand the prerogative. Alongside the concrete terms of the contract (X wages, Y hours of work, etc.) there is a more open-ended term—an agreement (usually implicit) of the employee to follow the directions of the employer and its managerial decisions. As long as a decision falls within the managerial prerogative, the employer can take it unilaterally and impose it on the employee, without violating the contract. The difficult legal question then becomes: what are the boundaries of the prerogative? What changes can an employer implement unilaterally and what decisions can he take without seeking the agreement of its employees? Obviously business decisions that do not affect the employees do not require their approval. It is similarly clear, on the other hand, that terms such as those setting the amount of wages are *not* part of the prerogative and cannot be changed unilaterally by the employer. However, there is also a wide range of decisions in between which are not so easy to classify—particularly decisions that are based on a legitimate (good-faith) business reason but have an *indirect* negative impact on the conditions of employment. Who should bear the (indirect) cost of these changes?

The *Milfelder* Court did not answer these questions. In the following years, two separate and somewhat contradictory lines of thought have developed side by side. On the one hand, there were cases in which some change in the workplace has been examined through a contractual lens, and following *Milfelder* no change has been allowed unilaterally. On the other hand, there were cases in which decisions of the employer have been examined through the managerial prerogative lens, with the background (default) understanding being that changes are allowed even if they affect the employee. Strangely, when the Court resorts to one of these

doctrines, there is usually no mention of the other. And so they live side by side, as if they were unrelated—while in fact these two doctrines represent two sides of the same coin. The question is always whether the change amounts to a violation of the contract, and in order to answer this question, the Court has to decide whether the work conditions that were changed fall within the conditions that are part of the contract, or whether they fall within the conditions that an employer can change as part of the prerogative. Otherwise put, the question is: What are the boundaries of the managerial prerogative?

Because of the unique, long-term, and complex nature of the contract of employment, these legal questions usually arise with regard to changes that have not been foreseen in advance. Although the Court could have framed its decision as an attempt to gauge the intent of the parties, the judges usually refrain from this somewhat fictitious move. Instead, they seem to draw the boundaries of the managerial prerogative based on what reasonable employment relationships ought to look like—i.e., based on public policy considerations.

3. The Internalization Approach

During the 1990s, the two doctrines continued to live side by side. In some cases labor courts continued to apply the (older) approach that can be termed the "wide latitude" approach. In other cases they preferred to follow the *Milfelder* precedent and apply the (somewhat newer) approach that can be termed the "contractual" approach. As a result, when employees challenged some change in work conditions before the courts, the end-result was always "all or nothing"—the change was either allowed (if it falls within the prerogative) or prohibited (if the contract prohibits it).

This binary divide surprisingly changed in the National Labor Court case of *Nahari*, handed down in 2000.[21] Mr. Nahari worked in an institution caring for the mentally retarded. At first he was required by the employer to work only night shifts, and although he objected at first, over time he got used to this arrangement. After nine years the employer decided to change the arrangement and wanted everyone (including Nahari) to work day shifts as well. This meant some disruption for the work-life balance that Nahari developed for himself, and, perhaps more significantly, the loss of the night shift allowance that constituted an important part of his salary.

21. The State of Israel v. Moshe Nahari, 35 PDA 318 (2000).

As a result he objected to the change. The question before the Court was whether this change in the shifts schedule was allowed.

Based on the contractual approach, an employer cannot unilaterally reduce an employee's salary. On the other hand, based on the wide latitude approach, the shifts' arrangements fall within the boundaries of the managerial prerogative—it is up to the employer to make decisions and changes on such matters. In the past, such a case would probably have been decided based on the latter approach. Night shift allowance is paid only to those who actually work at night. It is not considered part of the regular salary. Assuming the employer acted in good faith, i.e., did not change the shifts arrangement just to harm Mr. Nahari, but rather had some business reason for this decision, it is safe to assume that in the past the courts would have considered the change to be within the prerogative. The reduction in the employee's total income would have been considered, in the past, an indirect and unavoidable result of a legitimate change. The "cost" of the change falls, according to this approach, on the employee alone.

The judgment of the National Labor Court in Nahari, written by President Steve Adler, surprisingly separated between the change itself and its consequences. The Court reiterated its previous precedents and noted that an employer has the prerogative to change the shifts arrangements without the consent of its employees. Nevertheless, the Court added, after nine years in which Nahari received the night shift allowance, it became part of his salary, indeed part of his contract. Thus, as the employer is not allowed to change the contract unilaterally, he may change the shifts arrangement as he wishes but must continue to pay the night shift allowance to Nahari. Otherwise put, the Court required the employer to *internalize* the costs of the change.

In a later judgment dealing with similar facts,[22] the Court acknowledged that it would be unreasonable to require the employer to pay the night shift allowance for an unlimited time. Accordingly, the new approach—which can be termed the internalization approach—was refined to require only *limited* compensation for the "damages" incurred as a result of the change introduced by the employer. In the context of workers who have lost their night shift allowance after years of getting it regularly (and growing to rely on it), the Court required the employer to pay a sum equivalent to the monthly night shift allowance for a period of twelve months. Otherwise put, the Court in effect required the employer to give a

22. The State of Israel v. Avraham Grinshpan, judgment of Apr. 24, 2006.

significant notice period before making the change—a period in which the affected employee can (hopefully) make the necessary arrangements to adjust himself to the new setting (and salary).

The new approach is, at least potentially, revolutionary. While in principle employers (or managers) are still considered the sole decision-makers on "managerial" issues, they are now required to internalize the costs of their decisions—to bear at least part of the costs inflicted by their decision on their employees. This will obviously also impact their decision-making process itself—some workplace changes will not be beneficial for the employer anymore once these costs are taken into account. This is hardly revolutionary from an economic analysis point of view—indeed, by making employers internalize some of the costs of their actions, the new rule can be seen as correcting a market failure and enhancing efficiency. However, it is certainly a major transformation compared with the previous state of the law.

It is perhaps the breadth of this transformation that has so far muted the impact of the *Nahari* precedent. The Israeli labor courts have been slow to acknowledge and understand this change and have so far only rarely applied it. But it seems fair to assume that the new rule is here to stay and will gain impact over time. This can have dramatic consequences for a variety of situations in which employers decide to introduce changes that affect their employees, including, for example, transferring an employee from one department to another, moving offices to a new location (which requires an employee to spend more time commuting), or reducing the overtime hours that an employee is used to working. All of these situations have so far been considered within the employer's prerogative. Today this is still formally the case, but at the same time the employer could be required to pay the employee some compensation for this change.

4. Some Reflections on the Current State of the Law—and its Origins

I have sketched the development of the Israeli law concerning the managerial prerogative in individual employment relations by reference to three different approaches. While there was certainly development over time, each new approach has not replaced the former, but was rather added on top of it. Thus, the wide latitude approach still has a lot of influence, and one often finds in the case law reference to its main precedents and the use of rhetoric emphasizing the sole decision-making power of the employer. At the same time,

however, in other cases the contractual approach is invoked, and changes that affect employment conditions are considered to be in violation of the contract of employment. Yet other times—rarely so far, but we can expect to see more of that in the future—we find an interesting combination (the internalization approach) in which employers are free to make unilateral decisions introducing changes in the workplace, but they must bear some of the consequences and compensate the employee for at least part of the loss she incurred as a result of this decision.

The origins of each approach are not easily apparent. Israel's unique legal system—a combination of a common law system (stemming from the British mandate period) with Ottoman origins and modern civil-law-style legislation—makes it very easy for judges to "pick and choose" their preferred source of influence in any given context. Preference is not necessarily based on the end result, but often on the personal background of each particular judge. In the earlier days of the country, there were a number of influential judges who were brought up in Europe and often looked to French or German law for inspiration. Today this is much rarer. Most of the judges have studied law in Israel, and it is fair to assume that while all of them read English, only a few can read German or French. Judges are thus much more likely to turn to the more accessible American or British materials for inspiration and comparison, even though Israeli legislation is often closer in style to the civil law tradition. The result is a complex mixture of influences and origins that is often difficult to detect.

When the National Labor Court first referred to the concept of managerial prerogative in the 1970s, it included references to German and French texts, as well as to U.S. case law and literature.[23] However, as noted, although the concept may have been new, it only served to name and perhaps reinforce pre-existing law, which was based on British law and probably also on the principles of the *Mejelle* (the Ottoman civil code). In the *Milfelder* decision setting forth the contractual approach, Justice Barak of the Supreme Court cited

23. In Mekorot Water Co. Ltd. v. Tsvi Markovits, 6 PDA 125 (1974), the Court cited ALFRED HUECK & HANS CARL NIPPERDEY, LEHRBUCH DES ARBEITSRECHTS (1957); ALFRED SOLLNER, ARBEITSRECHT (1978); and JAUSSAUD DURAND, TRAITE DE DROIT DU TRAVAIL (1947). In Zim v. Ze'ev Ne'eman, 10 PDA 225 (1979), the Court cited United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959). Justice Zvi Bar-Niv, who was President of the Court at the time, was especially familiar with foreign legal systems. He was, among other things, the founding editor of the International Labor Law Reports.

contemporary British authorities[24]—although it is not clear to what extent he actually borrowed from British law in this case, rather than just including references to support his own conclusions. Indeed, Israeli judges have never been shy of developing new law based on normative considerations as they see fit. This has become more overt since the 1980s, under the leadership of Justice Barak, and even more so in his years as Chief Justice of the Supreme Court from 1995 through 2006. Influenced by Barak, the National Labor Court has been very open about making new law (for example, where the legislature has been silent) and basing this law on policy considerations. Thus, for example, in the cases of *Nahari* and *Grinshpan*, which developed the internalization approach, President Adler who wrote the judgment for the Court made no reference to foreign legal systems, but rather focused on policy considerations that could justify his new approach.

B. Collective Labor Relations

In the context of collective labor relations, reference to the managerial prerogative became popular only since the 1990s.[25] In this context as well, the concept has not introduced new law, but rather provided a name for established principles. In individual employment law we have seen that the prerogative was first introduced to name and reinforce the employer's right to make unilateral decisions—and over time the courts have narrowed this right. In collective labor law it appears that the Court went directly to the narrowing stage. From the beginning, the concept is usually mentioned by way of a background to the introduction of new limitations on the managerial prerogative.

Israeli legislation in the area of collective labor law is extremely minimal. Drafted in the 1950s, when the *Histadrut* (the Israeli main labor union) was almighty, and hardly amended ever since, the Collective Agreement Law of 1957 and the Labor Disputes Settlement Law of 1957 generally followed the British approach of the time and respected the autonomy of the labor parties. The basic idea was that in the collective labor relations context the power of employers is met by the power of unions, and this power struggle is best handled through the "free" market without legislative

24. The references were to MARK FREEDLAND, THE CONTRACT OF EMPLOYMENT 41 (1976); and ROGER RIDEOUT, PRINCIPLES OF LABOUR LAW (1983).

25. *See*, *e.g.*, Tirkovot Brom Ltd. v. The Histadrut, 23 PDA 456 (1991); The State of Israel v. The Histadrut, 26 PDA 87 (1993).

intervention. Nonetheless, as the law in effect conferred significant powers on the parties to regulate the workplace through collective agreements, it was appropriate and necessary to include a list of issues that are suitable for such agreements. Section 1 of the Collective Agreement Law lists for this purpose issues of hiring, firing, work conditions, industrial relations, and rights and duties of the collective partners. In a somewhat similar manner, section 2 of the Labor Disputes Settlement Law defines the issues that can be the subject of labor disputes by reference to the signing or changing of a collective agreement; setting employment conditions; hiring, refusing to hire, or firing an employee; and setting rights and duties that derive from the employment relationship. These appear to be the only references in legislation that could be used by courts to define the boundaries of the managerial prerogative. In this context as well, then, there is plenty of room for judicial law-making, whether by comparative borrowing or by original development. The goal of this section is to briefly review and comment upon the development of the law in this area.

1. The Wide Latitude Approach

As long as the *Histadrut* was very powerful, it did not need the Court to impose negotiations on employers. The scope of issues subject to negotiations was determined by power struggle. The scope of duties to cooperate with the union was similarly determined by power struggle. This was convenient for the *Histadrut*, which accordingly preferred to leave the Court out of the picture. Legally speaking, unions had very few rights. There is no duty to bargain under Israeli law, nor were there, until the 1990s, any other duties to cooperate. Such rights were not needed and so were not developed. There was wide latitude (or autonomy) for the parties to manage their conflicts and reach agreements as they see fit.

The situation has gradually but dramatically changed during the 1980s and 1990s.[26] Over those two decades union membership rates dropped from 80–85% to 40–45%.[27] The ability of the *Histadrut* to impress upon employers—and improve working conditions for employees—has significantly declined. The legislature was not quick to respond to this change, whether because neo-liberal views favoring

26. This has been described as transformation from a corporatist to a pluralist industrial relations system. *See* GUY MUNDLAK, FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION (2007).

27. Yinon Cohen et al., *Unpacking Union Density: Union Membership and Coverage in the Transformation of the Israeli Industrial Relations System*, 42 IND. REL. 692, 708 (2003).

free markets have achieved dominance in Israeli politics, or because the traditional preference for avoiding interference in labor relations remained in force. The National Labor Court has stepped into this vacuum, gradually imposing a number of duties on employers and in effect limiting the managerial prerogative in collective labor relations. The changes can be divided into two: those broadening the list of issues suitable for collective agreements, and those imposing new duties on employers to include employees' representatives in the decision-making process. They are discussed below in turn.

2. Increasingly More Issues Open for Discussion

Decisions that do not directly affect the employees are considered under the labor courts' jurisprudence to be within the "managerial prerogative," the implication being that employers can make such decisions unilaterally. Examples that are often mentioned in the case law are decisions on what products to manufacture, what should be the identity of the managers, what marketing strategies to choose, what research and development plans to make, sources of financing, and so on.[28] There is still the question of whether the union can demand a say on such issues—not as a "right" but as part of the ongoing "power struggle"—and strike if the employer refuses. This is likely to arise on matters that indirectly but clearly have an impact on the employees, if not immediately than in the not-so-distant-future. An example is a decision to outsource some aspect of the work to subcontractors. This obviously has a direct relevance to employees if the decision also includes a component of dismissing some of them. However, in this case the struggle, and strike, are actually against the intention to dismiss those employees. A more difficult scenario is when the employer promises not to dismiss any employees as a result of the decision to outsource. In such a case, the (implicit) understanding until the mid-1990s had been that the union's objection to the managerial decision could not justify a strike. This position changed in a judgment of the National Labor Court refusing to issue an injunction against a strike of the Tel-Aviv municipality employees, who objected to a decision to use subcontractors to clean some parts of the city.[29] Although the employer promised not to dismiss any employees, the Court recognized that the worries of the union that this is the next logical step were not unfounded. Understanding that

28. *See*, *e.g.*, The Histadrut v. The State of Israel, 35 PDA 103 (2000).

29. Tel-Aviv-Yaffo Employees Union v. Tel-Aviv-Yaffo Municipality, judgment of Dec. 4, 1997.

the union should not be forced into a position of facing *fait accompli* changes, the Court therefore considered the employees' interest direct enough to permit the strike.

A similar dispute arose with regard to the maximum number of employment positions allocated by the State for a given public institution. The maintenance workers and nurses in public hospitals argued that they were overworked and demanded to include this issue in negotiations. The government maintained that the issue falls under its managerial prerogative and the union can have no say on such matters. In the past the *Histadrut* managed to use its powers and impose reference to the number of employees in some collective agreements, but this has never received legal backing. The question before the National Labor Court was whether a strike directed against the government's refusal to discuss the issue with the union was legitimate.[30] President Adler classified such issues as "mixed issues"—matters than fall within the managerial prerogative, but have a significant impact on employees. He concluded that on such issues only the impact on employees is open for negotiations. Thus, employees cannot demand the employment of more staff, but they can demand (and strike over) compensation for being overworked. Obviously the issues are tied together, so it is not clear to what extent this division is practically applicable. However, for our current purposes it serves to show the general trend—albeit a cautious and limited one—toward judicial recognition of more issues as open for collective bargaining.

A parallel broadening occurred in the mid-1990s with regard to the so-called "political" strikes. Previous precedents maintained that only "economic" issues are open for negotiations, while "political" issues should be resolved by democratic institutions and not through the pressure of strikes. Thus, for example, when Druze teachers from the Golan Heights objected to the enactment of a law that annexed the occupied area to Israel (in 1981), and announced a general strike, the Supreme Court refused to accept it.[31] Their actions were political and could not be considered a "strike" in the labor law sense. As a result, the Court upheld the dismissal of those teachers on disciplinary grounds, because they had not showen up for work for a long period of time. The issue is more difficult, however, when a strike is directed against legislation, or the intention to legislate, on issues that impact

30. The Histadrut v. The State of Israel, 35 PDA 103 (2000).
31. Nabil Hatib v. The Nat'l Labor Court, 40(1) PD 673 (1986) (Supreme Court of Israel).

the employees. Thus, for example, in the *Bezeq* case,[32] dealing with the national telephone company, the union vehemently objected to the intent to open the market for competition. The employees feared mass dismissals once their employer lost its monopoly stance. At the National Labor Court, the majority opinion, written by President Menachem Goldberg, decided to narrow the definition of political strikes and allow the Bezeq workers' strike. Among other things the Court relied on developments in a number of European countries in the same direction—although it added a cautionary note about the difficulty of learning from other countries with very different legal traditions and different legislation. Justice (as he then was) Adler concurred in the result but offered a new test, according to which the definition of a legitimate strike will be based on the "predominant purpose of the dispute" being labor-related rather than political. This test is explicitly adopted from the United Kingdom.[33]

The *Bezeq* case continued to the Supreme Court where the judgment of the National Labor Court was overturned. In its 1995 judgment[34] the Supreme Court introduced the concept of a "quasi-political" strike, referring to strikes directed against the legislature (or the government acting in its sovereign power rather than as an employer), when the law or governmental decision has *direct impact* on employees' rights. In such cases, the Court reasoned, the strike is not strictly political, but there is justification only for a very limited strike—a "protest" strike of no more than a few hours. While the judgment of the Supreme Court also refers to case law from a number of European countries, the end result (allowing only a very short strike) appears to be an original development.

This broadening of the right to strike was more theoretical than real. Obviously there is little value in such short strikes (when the end is known in advance) in terms of bargaining power. However, a few years later this was further and more significantly broadened by the National Labor Court. Faced with increasing legislative intervention in public sector employment conditions, the Court realized that despite the democratic difficulty workers must be allowed to use their muscles (i.e., the right to strike) against such threats. Gradually but surely, over the last few years the Court has changed its previous

32. The Histadrut v. Bezeq, 25 PDA 367 (1992).

33. Judge Adler relied on Mercury Commc'n Ltd. v. Scott-Garner, [1984] 1 All ER 179 for this test. He also referred to the writings of Otto Kahn-Freund and Lord Wedderburn in this context.

34. The General Attorney and Bezeq v. The Nat'l Labor Court, 49(2) PD 485 (1995) (Supreme Court of Israel).

position and began to allow strikes that would have been considered "political" in the past: a general strike initiated by the *Histadrut* against a governmental plan (anchored in legislation) to deal with an economic recession, including by way of lowering benefits anchored in collective agreements;[35] strikes by employees of governmental companies (the ports authority and a bank) against laws that privatized these companies, in an effort to improve compensation related to this move;[36] and a strike initiated by the banks' employees' union against a governmental commission that considered plans to increase competition in this sector, including by way of taking some businesses out of the banks' hands.[37] Recently there is also willingness on the part of the Court to allow more substantial (not necessarily limited in time in advance) "quasi-political" strikes as well.[38] Strictly speaking these developments do not add new limits on the managerial prerogative, because they address the relationship between the unions and the political (democratic) institutions. Indirectly, however, they obviously have an impact on the relationship between the unions and the employer as well. The list of issues open for discussion in collective bargaining has certainly been broadened.

3. Increasingly More Duties to Cooperate With Employees

In parallel with the *Histadrut* decline, starting from the early 1990s the National Labour Court introduced a number of duties on employers to cooperate with unions or other employees' representatives. These duties have gradually intensified over the years.

First was a duty to consult. In the case of *Tirkovot Brom* the employer introduced some changes in its previous policy concerning the payment of bonuses.[39] The question before the Court was whether (and to what extent) the union should have been included in making such decisions. The Court ruled that an employer must *consult* with the union with regard to any change that affects all the employees or otherwise has significant implications in the workplace. This duty has been developed by the Court by way of deduction from the legislated duty to perform contracts in "good faith," and by reference to the

35. Tel-Aviv Chamber of Commerce v. The Histadrut, judgment of Dec. 14, 2003.

36. The Port Auth. v. The Histadrut, judgment of July 14, 2004; Discount Bank Ltd. v. The Histadrut, 40 PDA 337 (2004).

37. The Israeli Banks Ass'n v. The Histadrut, 40 PDA 537 (2005).

38. Israel Elec. Co. Ltd. v. The Histadrut, judgment of Oct. 10, 2007; Union of Local Auth. in Israel v. High Sch.Teachers Union, judgment of Dec. 4, 2007.

39. Tirkovot Brom Ltd. v.The Histadrut, 23 PDA 456 (1991).

"basic principles of labor law." A few years later, the Court added that even in non-unionized settings, an employer must consult with the employees' representatives prior to making redundancy dismissals.[40]

The next step has been the imposition of a (judicially developed) *duty to bargain* in some contexts. This duty has so far been introduced only with regard to unionized workplaces, i.e., when there are pre-existing collective relations. In such settings there is now a duty to bargain on the extension of a collective agreement and on the introduction of any change that has significant implications for the employees,[41] including the impact of decisions that fall within the managerial prerogative.[42] The duty to bargain includes also a duty to provide information—for example, an employer cannot just tell the union that its economic situation necessitates redundancy dismissals, but must provide evidence for this situation.[43] Although the main precedents developing these duties, written by President Adler, include references to American, British, and European sources, the real basis for these new developments appears to be, once again, the principle of "good faith" that is central to Israeli contract law, and the "basic principles of labor law."

III. WRONGFUL DISMISSALS

Surprisingly perhaps, even though the employment relationship is heavily regulated in Israel and in most contexts one can find European-style detailed protections, there is no legislation generally preventing wrongful dismissals in Israel. There are a number of legislative provisions prohibiting dismissals for specific "bad" reasons, such as pregnancy or joining a union,[44] and there is also legislation giving employees a right to reasonable notice (usually one month) before termination, as well as the right to severance payments equal to a month's salary per each year of work.[45] However, there is no legislation generally regulating dismissals in Israel—probably because for many years the vast majority of employees enjoyed job security through collective agreements.

The exceptional strength of the *Histadrut* and the broad coverage of collective agreements until the 1980s are strikingly evidenced by

40. Leah Levin v. The Israeli Broad. Auth., 36 PDA 400 (2001).
41. Menashe Mo'adim v. The Defense Ministry, 33 PDA 441 (1999).
42. The Histadrut v. The State of Israel, 35 PDA 103 (2000).
43. Delek v. The Histadrut, 33 PDA 337 (1999).
44. Employment of Women Law 1954, § 9; Collective Agreements Law 1957, § 33j.
45. Prior Notice to Dismissal and Resignation Law 2001; Severance Pay Law 1963.

the rarity of cases on the right to terminate employment during that period. Indeed, it was only in 1973 that the National Labor Court had an opportunity to explicitly discuss the default rule regarding termination.[46] At issue was actually the dismissal of an employee in a unionized workplace, two years before the age of retirement. The Court took the opportunity to consider the laws of termination, and clarified that the default rule is the common law "employment at will" rule that allows the employer to end the relationship at any time and for any reason, subject only to limitations and prohibitions as set out by legislation, by collective agreement or by an individual contract of employment.

In the specific case, the employee was apparently dismissed in violation of the collective agreement, so the Court went on to discuss the appropriate remedy. On this point there were previous precedents of the Supreme Court maintaining that courts will not impose a personal relationship such as the employment relationship on the employer, so damages were the only possible remedy in cases of wrongful dismissals.[47] The National Labor Court, noting various critiques of this approach as well as recent (at the time) British legislation on the matter, attempted to deviate from this approach, but its judgment was overturned by the Supreme Court shortly thereafter.[48] Both courts rely in their judgment on a wealth of comparative sources, especially from the United Kingdom and from continental Europe.

The *Tsori* cases (of the National Labor Court and of the Supreme Court) serve as a good starting point for a discussion of developments in Israel's wrongful dismissals law over the last couple of decades. First because they established the basic rules: employment at will and no enforcement by way of specific performance. Second because they are representative of a period in which, at least on the explicit level, judgments included (for the most part) a doctrinal rather than a normative analysis. On both fronts there have been significant changes in recent years. Sections A and B below discuss these changes with regard to limitations on dismissals and with regard to remedies, respectively.

46. Tsori Pharm. & Chem. Indus. v. Tsvi Ricks, 4 PDA 477 (1973). Although the labor courts system was set up only four years earlier, replacing the general (civil) system on such matters, there are no earlier Supreme Court precedents on this issue either.

47. Mordechai Regbi v. The General Manager of the Train, 7 PD 333 (1953) (Supreme Court of Israel).

48. Tsori Pharm. & Chem. Indus. v. The National Labor Court, 28(1) PD 372 (1973) (Supreme Court of Israel).

A. Limitations on Dismissals

While the basic default rule that allows termination of employment for any reason is still in place, over the years exceptions have been added and broadened to create a wealth of limitations on the "right" to dismiss an employee. Limitations are generally of two kinds: substantive and procedural. Some are anchored in legislation: for example the (substantive) prohibition to dismiss a pregnant employee or a "whistle blower" or to dismiss workers because they choose to unionize; or the (procedural) requirement according to which municipality workers can only be dismissed by a decision of the municipal Council.[49] Other limitations are based on collective agreements: although their scope has narrowed significantly over the last two decades, job security is still the hallmark of most collective agreements, and includes both substantive limitations (no dismissals without "just cause") and procedural ones (joint union-management bodies to consider what amount to "just cause" etc.).

Another set of limitations, which is most interesting for our purposes, is limitations developed by the judiciary. Until recent years these referred only to public-sector employees. From its inception the Supreme Court developed a set of administrative law rules, which are used to judicially review decisions and actions of public authorities. Originally these rules created mainly procedural requirements (such as the right of a citizen to be heard prior to any decision having negative implications for him), but as of the 1980s the focus has shifted to substantive requirements (such as the requirement that every decision be "reasonable" and "proportional"). A decision of the State or some other public agency to dismiss an employee is reviewed as any other decision, according to the same standards. More recently, however, the National Labor Court introduced some additional limitations, which apply to the private sector as well. Procedurally, in the early 2000s the right to a hearing before dismissals, and the right of employees' representatives (even in a non-unionized workplace) to be consulted with prior to redundancy dismissals, was extended to all employees.[50] Substantively, during the 1990s the National Labor Court developed strong protections against

49. Employment of Women Law 1954, § 9; Collective Agreements Law 1957, § 33j; Protection of Employees (Exposure of Offences, Unethical Conduct or Improper Administration) Law 1997; Municipalities Ordinance, § 171.

50. Yoseph Herman v. Sonol Israel Ltd., judgment of Dec. 29, 2002; Leah Levin v. The Israeli Broad. Auth. , 36 PDA 400 (2001).

dismissals intended (even indirectly) to prevent unionization.[51] These were later codified as legislated prohibitions.[52] More recently, the Court introduced a prohibition on "retribution dismissals," resulting from a decision by an employee to sue her employer.[53]

This last addition to the law appears to be based doctrinally on the duty to perform contracts in good faith. The same duty has been the basis of an attempt by Justice Elisheva Barak-Ososkin, the Vice-President of the National Labor Court until her recent retirement, to replace the default rule with a "just cause" requirement. Although she remained a minority opinion on this point,[54] it is interesting to notice her thought process and the kind of justifications she invokes, because these are not very different from those of other judges in other cases. On top of her suggestion to interpret the duty to perform an employment contract in good faith as requiring "just cause" for terminating this contract, Justice Barak-Ososkin relies on a few other sources. First is the "right to work," which she develops and gives significant weight. She argues that courts must balance the employer's property rights and the managerial prerogative with the employee's right to work. Second is the fact that a "just cause" rule appears in many collective agreements. She does not explain why this should justify the extension of the same rule to other workplaces. Finally, Justice Barak-Ososkin relies on the law in other countries, describing legislation in Europe as well developments in the United States where exceptions to the "employment at will" doctrine have broadened over the years. This description is somewhat misleading: in Europe the limitations on dismissals were set by legislation and not developed by courts, and in the United States the default rule is still very much "employment at will." So doctrinally speaking, the justifications put forward for the new suggestion are not very strong. They exemplify the way the Court is developing the law in a way which it believes to be normatively desirable.

The objection of the other judges to changing the default rule has probably nothing to do with being faithful to legal origin or uncomfortable about introducing dramatic changes. Rather, it probably reflects misgivings about the ability of a "just cause" rule to

51. Mif'aley Tachanot Ltd. v. Israel Yaniv, 33 PDA 389 (1996); Horn-Leibovitz v. The Histadrut, 35 PDA 145 (2000).

52. Collective Agreements Law 1957, § 33j.

53. Such dismissals are explicitly prohibited in some employment regulations. *See*, *e.g.*, the Wage Protection Law 1958, § 28a. But the Court broadened this prohibition to other contexts as well. *See* Ofer Yechieli v. Hashmira Ltd., judgment of May 6, 2004.

54. *See*, *e.g.*, Fin. Co. for the Dev. of Kafr Manda v. Abed Alhamid Jabar, 35 PDA 245 (2000); David Bivas v. Supersal Ltd., 36 PDA 481 (2001).

allow the efficient management of the workplace. Job security arrangements the *Histadrut* achieved in its heyday are notoriously rigid, to the extent of almost entirely preventing dismissals. It is not the "just cause" rule in itself that is so rigid but the procedural safeguards included in most collective agreements that require approval of a joint union-management committee for every dismissal. In the public sector in particular, this has meant in practice an inability to dismiss incompetent employees.[55] Very much aware of this reality, judges are not enthusiastic about extending the "just cause" rule, even though there is nothing in the rule itself that necessitates this rigid and inefficient application.[56]

B. Remedies

Although the default rule concerning termination is still "employment at will," we have seen that exceptions are increasing, and there also appears to be more willingness on the part of the Court to apply them. It is not uncommon today, therefore, for the Court to conclude that dismissals have been performed in violation of the law. What is the remedy for such violations?

The basic rule preventing specific performance of employment contracts, adopted by the Supreme Court soon after the establishment of the State of Israel and restated in the *Tsori* case, has undergone dramatic changes over the past three decades. Originally there were two major exceptions: dismissals prohibited by legislation and unlawful dismissals by a government agency. In these two contexts the traditional view of the courts has been that dismissals are *void* and have no legal effect. Accordingly, reinstatement is possible. More recently the National Labor Court introduced some additional exceptions. When legal proceedings against the dismissals take the form of a collective dispute, reflecting the union's objection to the violation of a collective agreement with regard to the specific employee, reinstatement is considered to be only a "side effect" of enforcing the union-management agreement and is therefore allowed.[57] Also, dismissals that infringe upon a constitutional right, particularly the freedom of association, are now considered to be an

55. The process of dismissing employees for disciplinary reasons is not less grueling. In the public sector this is possible only on the basis of a formal disciplinary committee judgment, a limitation set out in legislation and not in collective agreements. *See* Civil Service (Discipline) Law 1963, § 68.

56. *See* Guy Davidov, *In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws*, 23 INT. J. COMP. LAB. LAW AND IND. REL. 117 (2007).

57. The Histadrut v. Tel-Aviv Univ. , 15 PDA 260 (1984).

exception justifying specific performance (reinstatement).[58] In a 1996 judgment reinstating employees who have been dismissed because of their union activities, President Goldberg was very explicit about his intention to change the default rule.[59] For some reason, in more recent cases the current President (Adler) preferred a narrow reading of this judgment and considered it to be the addition of another exception rather than a change of the rule itself.[60] At the very least, however, it is fair to say that exceptions in this context have already swallowed the rule. The accepted understanding today is that enforcement of employment contracts may not be the first and most "natural" option, but it is certainly an option that courts consider.

The turning point in the cases of *Mif'aley Tahanot* and *Horn-Leibovitz*[61] provides a nice opportunity to observe the dynamics of change in the Court's jurisprudence. Both cases include a wealth of comparative references, to American, European, and international sources. They also include references to academic critiques of the previous ("no specific performance") rule. While all of these sources probably provided some insight and ideas, it seems that the most important factor in the judgment is the normative justifications. If the Court is really serious about protecting the freedom of association, and as a consequence prohibiting dismissals of employees because of their union activities, it is quite obvious that financial (damages) awards cannot achieve the desired prohibitive impact. If the union activists stay out of the workplace, the message to other employees remains one of threat. The Court apparently realized that, and accordingly found it necessary to open the possibility of reinstatement in such cases. The fact that it found support for this view in other legal systems was surely helpful. This in itself does not seem to be the driving force toward change. It rather appears that judges feel less bound by legal precedents or by solutions dictated by legal origin, and more liberated to pursue solutions that seem to them the most justified on the merits.

The change has not been limited to the addition of the specific performance option. The most recent development appears to be an increased willingness on the part of labor courts to require employers to pay damages in significant amounts for all kinds of violations

58. *See*, *e.g.*, Mif'aley Tachanot Ltd. v. Israel Yaniv, 33 PDA 389 (1996); Horn-Leibovitz v. The Histadrut, 35 PDA 145 (2000).

59. Mif'aley Tachanot Ltd. v. Israel Yaniv, 33 PDA 389 (1996).

60. David Bivas v. Supersal Ltd., 36 PDA 481 (2001).

61. Mif'aley Tachanot Ltd. v. Israel Yaniv, 33 PDA 389 (1996); Horn-Leibovitz v. The Histadrut, 35 PDA 145 (2000).

concerning dismissals. Thus, for example, when the relationship is terminated without proper hearing, in the past courts often just noted that the violation was not serious enough to justify reinstatement. Today employers are likely to find themselves in such cases liable to pay damages equivalent to a few months' salary—and even as much as twenty-four months when the court considers their actions to be in "bad faith."[62]

IV. CONCLUSION: THE DEVELOPMENT OF (ISRAELI) LABOR LAW

An influential contemporary argument maintains that legal origin, the historic association with a certain legal "family" or "tradition," matters, and matters a lot. A reading of the Israeli labor court's jurisprudence concerning the managerial prerogative and wrongful dismissals suggests otherwise. Admittedly, the starting point in both of these contexts derives a lot from Israel's common law roots. However, the development of the law over the last few decades hardly seems to be influenced by those roots. Faced with changing realities in the labor market, judges developed the law in a way they considered most suitable. They sometimes looked for inspiration from other legal systems—common law as well as civil law ones—but mostly just based their new developments on normative considerations.

One could argue that this is simply a characteristic of the common law tradition: judges adapting the law and developing it on a case-by-case basis. However, the "legal origin" line of research explicitly connects the common law tradition with free markets and freedom of contract.[63] Israeli courts have not adapted the law in that direction. On the contrary, the development of the (judge-made) law has clearly been in the direction of additional limitations on employers—less "freedom" to make unilateral changes in the workplace, and less "freedom" to dismiss employees as they see fit.

One could further argue that Israel is an exception because of the uniqueness of its legal system, which is based on common law but includes plenty of civil-law-style legislation. This may be true, but there are probably many other "exceptions" as well. In any case, as explained at the outset, I do not purport to directly refute the empirical findings of Botero et al., but simply to point out that they paint a very partial and incomplete picture. Looking much more

62. Tel-Aviv Univ. v. Rivka Elisha, judgment of Feb. 27, 2008.

63. *See* Botero et al., *supra* note 1, at 1345; La Porta et al., *The Economic Consequences of Legal Origins*, *supra* note 2, at part II.

closely at one country (Israel) teaches us that there are complexities that the crude index does not catch. In particular, there are areas of employment regulation that are entirely judge-made, and the courts develop the law in these areas independently. In Israel, at least, in recent years this development has been in the direction of *more* limitations on employers. Courts with a common law heritage are thus not necessarily a guarantee for more "freedom of contract." Overall, then, the case study suggests that any empirical analysis of labor laws that is not based on a close reading of the case law is bound to be incomplete, at best, and sometimes misleading and incorrect. One cannot ascertain to what extent the Botero et al. study is correct without knowing the "real story" of labor law in each of the countries examined.

As for Israel itself, what can explain the willingness of the courts to delve into normative considerations? This is a question that merits another study. It is tempting to attach much weight to the leadership of Aharon Barak, who was an influential judge (and later Chief Justice) of the Supreme Court for nearly three decades. Barak came from the academic world, and under his leadership Israeli courts exhibited increased openness to influences from academia, which in turn became increasingly prone to normative analysis over the last couple of decades. This is surely part of the story, but there are probably many other reasons, perhaps ones that are more important, for the way Israeli judges have engaged themselves with normative considerations.

To be clear, the reference to normative decision-making by judges is not intended to disregard the importance of various pressures on the decision-making process. This is not a view that is naïve about the importance of external pressures, as well as legal conventions, in influencing, often sub-consciously, the thinking of judges. I do not argue that Israeli labor judges are now free from these influences and constraints, but rather that those pressures (among others) have shifted the judicial focus toward normative thinking that is to a large extent detached from legal origin. In recent years Israeli labor and employment law has gone through a dramatic transformation.[64] The changes in the law concerning the managerial prerogative and wrongful dismissals are only a small fraction of this transformation. Arguably, this dramatic and rather swift

64. For a recent comprehensive and intriguing account of this transformation see Mundlak, *supra* note 26.

transformation was possible and relatively painless thanks to the detachment of Israeli judges from legal origin constraints.