

## THE PRINCIPLE OF PROPORTIONALITY IN LABOR LAW AND ITS IMPACT ON PRECARIOUS WORKERS

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### I. INTRODUCTION

The principle precluding the use of power excessively (or gratuitously) is a basic principle of law. It forms an important part of public law in many countries; we expect our representatives to use their powers proportionately, and avoid any unnecessary infringement of our rights. It is accepted as a principle of international law; we expect each country to avoid, for example, overreactions against threats from other countries. It is used in criminal law; we expect our judges to apply a punishment that is proportional to the crime. And so on. Proportionality appears to be an age-old ethical principle,<sup>1</sup> but as a binding *legal* principle it has its origins in nineteenth-century Germany.<sup>2</sup> It was first used there as a legal tool to limit the use of police powers.<sup>3</sup> It later became a prominent principle of administrative and constitutional law in many European countries. It is also found in a number of constitutions and international treaties.<sup>4</sup> In Israel, which this Article will focus upon, the principle was adopted in the early 1990s, and has quickly achieved a leading role in administrative as well as constitutional law.

The principle of proportionality is usually understood to include three separate requirements, all concerning the means chosen to achieve the State's goals.<sup>5</sup> First, there must be a *rational relation* between the means

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1. See generally JEFFREY WATTLES, *THE GOLDEN RULE* (1996).

2. NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 23 (1996); JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 685 (1992).

3. EMILIOU, *supra* at Ch. 2; see also DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 309 (1994).

4. See, e.g., BASIC LAW: HUMAN DIGNITY AND LIBERTY Art. 8 (Isr.); CANADIAN CHARTER OF RIGHTS AND FREEDOM, Art. 1 (1982) (Can.); S. AFR. CONST. Art. 36; EUROPEAN CONVENTION OF HUMAN RIGHTS arts. 8–11; TREATY ESTABLISHING THE EUROPEAN COMMUNITY Art. 5; CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION Art. 52.

5. See, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.); H CJ 3477/95 *Ben-Atyia v. Minister of Education and Culture* [1995] 49(5) PD 1 (Isr.). See also, DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

and the goals, in the sense that the means applied can indeed advance the ends they are supposed to advance. Second, the State must choose the least drastic means necessary to achieve its goals, *i.e.*, any infringement of rights is justified only to the extent necessary (“*minimal impairment*”). The third requirement, which is more controversial, goes beyond a mere review of the means chosen. It demands the harm caused by the use of force (in terms of the infringement of rights) to be proportional to the benefit that stems from that action (“*proportionality in the strict/narrow sense*”). This obviously requires judges to make value judgments about the importance of certain goals, which makes the last test prone to indeterminacy. But it is still considered necessary in public law, in many legal systems, to prevent extreme violations of rights for trivial goals.<sup>6</sup>

Can we apply the same standards to put limits on the use of power by employers, including employers in the private sector? And *should* we impose such a standard in the context of labor and employment law? This Article answers both questions positively, although with some qualifications. Part II shows that in practice, even if sometimes not explicitly, Israeli courts are already using the three proportionality tests to place limits on employers’ actions. Part III further argues that this development is justified; that in some circumstances—and the unique employment relationship in particular—it is justified to impose stricter standards on parties to “private” contracts. I will examine the workability of this proposal in a number of specific contexts, and show how it can assist courts in deciding labor and employment law cases, and at the same time, in what contexts using the proportionality tests would *not* be appropriate.<sup>7</sup> Part IV then considers possible objections to using this standard, stemming from writings that are skeptical about the introduction of constitutional rights and human rights’ discourse into the labor relations sphere. I will try to show that although proportionality is indeed a key legal tool used in applying constitutional rights and human rights, the concerns of the skeptics are not strong in the current context. And specifically, there is no reason to suspect that introducing the proportionality tests into labor law will be detrimental to precarious workers. On the contrary, there is reason to believe that these tests will be especially beneficial to those with less bargaining power.

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6. In the United Kingdom, originally the formulation of the proportionality test did not include the last test. See *De Freitas v. Permanent Sec’y of Ministry of Agric., Fisheries, Lands & Hous.*, [1999] 1 A.C. 69, 80 (Eng.). However it was later added, see *Huang v. Sec’y of State for Home Dep’t* [2007] 2 A.C. 167, 4 All ER 15 (Eng.).

7. Parts II and III are based on my article in Hebrew on this topic, with some updates. See Guy Davidov, *The Principle of Proportionality in Labor Law*, 31 IYUNEY MISHPAT [TEL-AVIV UNIV. L. REV.] 5 (2008).

While examples in this Article are based on experience in Israel alone, the discussion and the conclusions will hopefully be relevant to other legal systems as well. As a matter of practice, it appears that the principle of proportionality has been applied to limit the use of power by private employers in other countries as well (a few examples are included in the next part). At the normative level, the considerations put forward below to justify the use of the proportionality tests are not limited to the Israeli context. Admittedly, in some countries the judiciary is perceived as hostile to workers' causes and strictly devoted to "free market" ideas of contract and property, which give an advantage to employers, so it might be risky to give judges more power to apply such an open-ended concept. I will refer to this concern in Part IV.

## II. FROM "PUBLIC" TO "PRIVATE": PROPORTIONALITY IN ISRAELI LABOR AND EMPLOYMENT LAW

According to Israeli jurisprudence, public sector employers must conform to the standards of Israeli public law when dealing with employees—even though in theory they are acting in the sphere of "private" contracts.<sup>8</sup> In the last two decades this has meant that decisions of public authorities taken with regard to employees must conform to the principle of proportionality. But the principle's impact has in fact been much deeper. A review of the case law reveals that labor courts apply the same limitations—the proportionality tests—on "private" employers, and labor unions, as well. Indeed, to some extent they have done so even before the proportionality tests have been adopted in Israeli public law.

This Part describes this development. I will briefly review the relevant case law to make two descriptive arguments. The first concerns the scope of the principle. Although in recent years labor courts have started to mention the principle of proportionality *explicitly* in some contexts, I will argue that in practice the proportionality tests are used—and have been used in the past—in many other cases and contexts, in which they were *not* mentioned explicitly. My second descriptive argument concerns the way in which the principle has been applied in those (recent) cases in which it was explicitly mentioned. Paradoxically, when the labor courts have relied on this principle in their rulings, they generally required employers to act with proportionality, but refrained from applying the three separate tests mentioned above. As a result, the requirement is seen by employers as much more vague and indeterminate than it actually could (and should) be.

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8. See, e.g., LA 360/99 Aharon Cohen v. The State of Israel [2002] 38 PDA 1 (Nat'l Lab. Ct.) (Isr.).

Proportionality first appeared in Israeli labor law in the context of placing limits on strikes. The fact that a strike has been initiated suggests a power struggle that peaked. While the law obviously allows such struggles—indeed the right to strike is considered a basic civil right in Israel<sup>9</sup>—limits must be set to ensure that this forceful mean is used responsibly, and the harm to employers and the public at large is minimized. In Israel there are hardly any limitations in legislation, so this task was left to the courts. In two judgments of the Supreme Court from the mid-1980s, such limits were placed by using—in practice although not explicitly—two of the proportionality tests. In one of those cases, a group of exporters sued a union representing sea-dockers for damages caused by their strike.<sup>10</sup> The Court decided that the union could be held responsible for such damages, if the strike exceeded its legitimate scope. Among the factors mentioned to decide whether this has happened, the Court included an assessment of the harm expected to be inflicted on third parties due to the strike, balanced against the benefit expected to the strikers as a result of their actions. This cost-benefit analysis in fact closely resembles the third proportionality test, as mentioned above. In a second case from the same period, the Supreme Court considered an appeal on a disciplinary ruling against the head of the Israeli Broadcasting Authority workers' union.<sup>11</sup> This union official shut down a television broadcast—at a time when this was the only television channel available in Israel—because he suspected that management violated a collective agreement. While affirming his disciplinary conviction, the Court emphasized the fact that the union head's actions were overly aggressive, and that he failed to exhaust all other (less aggressive) options. This, indeed, is exactly the second proportionality test (minimal impairment).

In other labor courts' judgments one can similarly identify the use of the proportionality tests to place limits on industrial action, at least from the 1980s onward (perhaps even before that). More recently, the principle of proportionality has been evoked *explicitly* in this context.<sup>12</sup> However, this has not been consistent; there are cases in which, for some reason, the Court refrains from any mention of this principle. Moreover, even when it is mentioned, the National Labor Court did not go far enough to clearly embrace and apply the three different proportionality tests used in Israeli

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9. HCJ 1074/93 Att'y Gen. v. Nat'l. Lab. Ct., [1995] 49(2) PD 485 (Isr. Sup. Ct.). *See also*, Guy Davidov, *Judicial Development of Collective Labour Rights—Contextually*, 15 CAN. LAB. & EMP. L.J. 235 (2010).

10. CA 593/81 Ashdod Car Works Ltd. v. Tsizik [1987] 41(3) PD 169 (Isr. Sup. Ct.).

11. CCA 1/86 Koka v. IBA Chairman [1986] SC 40(2) PD 406 (Isr. Sup. Ct.).

12. *See, e.g.*, CDA 19/99 Mekorot Water Co. Ltd. v. The Histadrut [2001] 36 PDA 560 (Isr.); CD 13/03 Lishkat Hamischar Tel-Aviv v. The Histadrut, Judgment of Dec. 14, 2003 (Isr.); CDA 1017/04 Sherutey Briut Clalit v. The Histadrut, Judgment of May 16, 2005 (Isr.).

public law. Often when the Court is asked to put limits on strikes, the requirement that unions' actions must be "proportional" is mentioned, and separately, the Court sometimes examines whether there were less drastic means available, and what is the magnitude of the damage cause by the strike vis-à-vis its importance to the workers' legitimate interests. Thus, for example, when considering an application for an injunction against a strike by Israel's Water Authority workers, the Court explained that "because the parties were close to an agreement, the strike went on for a long time, disruptions of water supply could risk lives and public safety, and it was possible to limit the strike partially without totally negating the union's bargaining power, we have reached a conclusion that an injunction is warranted . . . to prohibit any disruptions in water supply."<sup>13</sup> In another case, at issue was a strike by the workers of a major bank, which involved a refusal to submit reports to the Israeli Securities Authority, at a time when such reports were necessary to allow the bank's sale. The Court issued an injunction, and reasoned that allowing such a move would amount to giving the workers a right to veto the bank's sale.<sup>14</sup> The Court went on to explain that a strike necessarily involves some (legitimate) harm to the employer, but in the specific case the harm is extreme, and the workers have other ways available to advance their legitimate aims vis-à-vis the employer. So the principle itself is sometimes mentioned, and one or more of the three proportionality tests can be found between the lines.

This limit on labor unions' use of force is balanced by a similar limit on the right of employers to initiate lockouts. The National Labor Court jurisprudence is clear in allowing lockouts only as a "last resort."<sup>15</sup> The Court further maintained that there must be proportionality between the "counter-means" invoked by the employer and the means (the industrial action) initiated by the workers.<sup>16</sup>

While in the context of collective labor law the requirement of proportionality has been applied (to one extent or another) on both parties, in the context of individual employment law—where a presumption of unequal bargaining power is paramount—the limits on the use of power are directed toward the employer alone. A review of Israeli case law reveals a number of contexts in which employers are legally bound (whether explicitly or as a matter of fact) to act in accordance with the principle of proportionality.

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13. CDA 19/99 Mekorot Water Co. Ltd. v. The Histadrut [2001] 36 PDA 560 (Isr.)

14. CDA 1013/04 Israel Discount Bank v. The Histadrut [2004] 40 PDA 337 (Isr.).

15. LA 2-35/80 Kozlovitz v. Ordan Ltd. [1981] 12 PDA 200 (Isr.).

16. LA 4-13/77 Ramat-Gan – Givatayim Workers' Council v. Elko [1977] 9 PDA 113 (Isr.).

### A. *Restraint of Trade*

In analyzing restrictive covenants—in which employees agree not to compete with their employer after the end of the relationship—Israeli courts examine whether the restriction is “reasonable.” Otherwise it is considered against public policy and therefore void. A restriction is “reasonable,” according to the Supreme Court, only to the extent that it is necessary to protect the employer’s legitimate interests.<sup>17</sup> This, in effect, means that courts apply the first two proportionality tests. The judges are looking for a legitimate business purpose (other than the mere interest in preventing competition), which the restrictive covenant can advance—the rational relation test. Then they aim to ensure that the restriction is limited to the extent necessary to achieve this goal—the minimal impairment test.

### B. *Privacy at Work*

When employees of Tel-Aviv University complained that they are required to go through psychological tests—that impinge on their privacy—before applying for any new position within the University, the National Labor Court allowed this practice with two important conditions.<sup>18</sup> First, that the specific tests are relevant to the position sought (in effect the rational relation test). Second, that the tests have been proven to conform to scientific standards of validity and reliability and the results are kept confidential (in effect the minimal impairment test). More recently, in a case setting limits on the right of employers to look into e-mail correspondence of their employees, the Court explicitly referred to proportionality, and specifically to the minimal impairment test, as well as the need to balance the gains with the infringement of privacy rights.<sup>19</sup>

### C. *Antidiscrimination*

In a case involving airline stewardesses who were required by El-Al Israel Airlines to retire at the age of sixty, the Supreme Court decided that this practice is discriminatory and they should be allowed to retire at sixty-five like other El-Al employees.<sup>20</sup> The main question was whether the differences between different employees could justify the disparate treatment. Chief Justice Barak referred in this context to the principle of proportionality. He did not explicitly apply the three separate tests, but it can be seen that in fact the first two tests are applied. El-Al had two

17. CA 6601/96 AES Sys. Inc. v. Sa'ar [2000] 54(3) PD 850 (Isr. Sup. Ct.); see also LA 164/99 Frumer v. Redguard Ltd. [1999] 34 PDA 294 (Isr.).

18. LA 4-70/97 Tel-Aviv Univ. v. The Histadrut [1998] 30 PDA 385 (Isr.).

19. LA 90/08 Issakov v. The State of Israel, Judgment of Feb. 8, 2011 (Isr.).

20. SHCJ 4191/97 Rekanat v. Nat'l Lab. Ct. [2000] 54(5) PD 330 (Isr. Sup. Ct.).

excuses for the different treatment: that they want the stewardesses to have a young appearance, because this is what the customers want; and that the job requires physical fitness. Barak maintained that a young appearance is irrelevant for the job (thus, in effect, it does not pass the rational relation test); and that the company can ensure physical fitness by individual tests (*i.e.*, the current policy impairs the right to equality more than the minimum necessary).

#### *D. Disciplinary Actions*

When public sector employees are dismissed or suspended in Israel for disciplinary reasons, the courts insist (albeit usually without referring explicitly to the principle of proportionality) that punishment should be the minimal necessary to achieve the goals of punishment in the specific context, and that these goals will also be balanced with the harm to the specific employee (*i.e.*, taking into account personal circumstances).<sup>21</sup> In the private unorganized sector, the default rule, as interpreted by the Israeli courts, is “employment at will,” meaning that employees can be dismissed without any disciplinary proceedings. However, similar considerations could arise when employers refuse to pay severance payments, which they are generally required to pay by law in any case of dismissals, but can be exempted if the employee committed a serious disciplinary offence.<sup>22</sup> The court then has to decide if the punishment (withholding severance payments) is justified in the circumstances. There are first signs that the principle of proportionality is used in such cases as well.<sup>23</sup>

#### *E. Unjust Dismissals*

Justice Elisheva Barak-Ossoskin, who until her retirement from the National Labor Court in 2006 was leading the way with explicit references to proportionality in the private sector, was the only member of the Court to favor the application of this principle in the context of dismissals as well. She argued that the “employment at will” rule should be changed to require “just cause” in any dismissal. As part of this view, Barak-Ossoskin has argued that decisions to dismiss should be reviewed through the prism of the proportionality principle.<sup>24</sup>

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21. LAA 6494/00 Chezi v. Tel-Aviv Municipal Auth. [2000] 54(5) PD 101 (Isr. Sup. Ct.); CAA 309/01 Zarzur v. Pub. Serv. Comm’r [2001] SC 55(2) PD 830 (Isr. Sup. Ct.).

22. SEVERANCE PAY LAW §§ 16–17 (1963).

23. Lab 2811/98 Dadon v. Ziv Kitchens Indus. [1990] Ltd., Judgment of Feb. 26, 2004 (Isr.).

24. LA 375/99 Econ. Dev. Corp. Kfar Manda v. Jabber [1997] 35 PDA 245 (Isr.); LA 300/78/98 Bivas v. Supersol Ltd. [2001] 36 PDA 481 (Isr.).

*F. Managerial Prerogative*

Israeli employers, like their peers in many other countries, have been granted a so-called “managerial prerogative” to make unilateral decisions concerning the workplace. They are thus free to make managerial decisions as they see fit, whatever the consequences for the employees may be—as long as the contract with the employees does not prohibit a given decision. Legal battles are often fought on whether a specific decision is prohibited by the (usually implicit) contract with employees, or whether it falls within the unilateral “prerogative” zone. The limits on managerial powers are thus set by the court’s interpretation of the (implicit) employment contract. National Labor Court judges have generally been reluctant to place any significant limits on managements’ prerogative. Yet in recent years there are statements in the case law that the prerogative is limited by the principle of proportionality.<sup>25</sup> Although such statements appear to apply to the private sector as well, they have not been explained or justified by the judges, so it is not clear yet whether this will have any practical implications. The only judge that has clearly meant to introduce new limits on employers’ decision making in the private sector is Elisheva Barak-Ossoskin. Thus, for example, in a case concerning a decision to move an employee from one position to another despite his objection, she opined (in dissent) that in the specific circumstances the employer’s decision was not proportional—and therefore prohibited.<sup>26</sup>

Proportionality is used in similar ways in many other legal systems. Most notably, it appears explicitly as a general limitation on employer decision making in the French labor code.<sup>27</sup> It is also used explicitly by judges in different countries (especially in Europe) in deciding workplace discrimination cases,<sup>28</sup> workplace privacy cases,<sup>29</sup> and more.

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25. LA 90/08 Issakov v. State of Israel, Judgment of Feb. 8, 2011 (Isr.).

26. LA 701008/98 Binyamin v. Minister of Fin., [2003] 38 PDA 318 (Isr.).

27. CODE DU TRAVAIL Art. L120-2, which states that “no one can limit the rights of the individual, or individual and collective freedoms, unless the limitations are justified by the task to be performed or are in proportion to the goal toward which they are aimed.” *Id.*; see Jean-Emmanuel Ray & Jacques Rojot, *Worker Privacy in France*, 17 COMP. LAB. L.J. 61, 64–65 (1995); see also Pascal Lokiec, *Discrimination Law in France*, in NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW 77 (2008).

28. See, e.g., Aaron Baker, *Proportionality and Employment Discrimination in the UK*, 37 INDUS. L.J. 305 (2008) (describing the use of proportionality in European Law—and urging adoption of similar standards in the United Kingdom).

29. See, e.g., Hazel Oliver, *Email and Internet Monitoring in the Workplace: Information Privacy and Contracting-Out*, 31 INDUS. L.J. 321 (2002); Christophe Vigneau, *Information Technology and Workers’ Privacy: The French Law*, 23 COMP. LAB. L. & POL’Y J. 351, 354 (2002).



## III. JUSTIFYING THE PRACTICE AND ITS EXPANSION

Can we justify the practice of placing the burden of proportionality on private sector employers? And if so, what are the appropriate limits on the expansion of this practice? To answer these questions, we should begin by inquiring into the basis for demanding that *public* authorities act in accordance with the principle of proportionality. A narrow explanation would be that those who hold public offices do so as the People's "agents" or "trustees." If the Government is nothing but our "long arm," acting on our behalf, it is only logical that we demand that it conform to high standards of behavior. But a broader understanding is also possible. The principle of proportionality can be seen as derived from the view that power must be accompanied with responsibility. According to this line of thought, it does not really matter what the *source* of the power is—whether it was granted to a public official by the people, or secured by a corporation in the market—*any* power should be used responsibly.<sup>30</sup> Indeed, once we understand that "private" power is always based on "public" support—whether it is the system of property, the police and the courts enforcing it, limited liability of corporations and so on—it becomes quite obvious that power is always granted by society (to one extent or another), and society can put limits on it.

It is hardly surprising, therefore, that in a number of contexts, private law doctrine (at least in Israel) demands from people who are not completely strangers to each others to conform to high standards of behavior. Thus, for example, parties to contracts must act in "good faith" toward each other; owners of land cannot use it in a way that is harmful to others; people involved in road accidents must provide help to others involved in the same accident; people who own businesses that are open to the public cannot discriminately prevent someone from entering; and so on.<sup>31</sup>

If this is the case in private law generally, the justification for a high standard of behavior is even stronger in the context of employment relations—a paradigmatic example of "relational" contracts.<sup>32</sup> Notwithstanding the shift toward "nonstandard" employment relationships in recent years, employment contracts are still personal, for relatively lengthy periods (and often indefinite), complex, require significant

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30. For an application of this idea in the current context, see John Laws, *Public Law and Employment Law: Abuse of Power*, 1997 PUB. L. 455 (1997).

31. CONTRACTS LAW (GENERAL PART) § 39 (1973); LAND LAW (§ 14) 1969; PROHIBITION OF DISCRIMINATION IN PRODUCTS, SERVICES AND ENTRY TO ENTERTAINMENT ESTABLISHMENTS AND PUBLIC FACILITIES LAW (2000).

32. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); see also Guy Mundlak, *Generic or Sui-generis Law of Employment Contracts?*, 16 INT'L J. COMP. LAB. L. & INDUS. REL. 309 (2000).

investments by the parties and a high level of trust, and important to the worker in a personal-psychological and social sense (on top of the economic one). They are based on an inherent conflict of interests, which employers usually “win” because of their superior bargaining power.<sup>33</sup> All this means that society has a special interest in regulating these relationships. They present a relatively high potential for abuse of power, and a high price—for employees and for society at large—when such abuse has occurred. And indeed, the legislature—in Israel as in many other countries—has already regulated many aspects of employers’ use of power. The question is whether an additional limitation in the form of a proportionality requirement is justified. Such a limitation has been adopted in France in legislation (at least in some contexts).<sup>34</sup> In Israel it has been developed—as we have seen—by the courts. One could ask whether this is an appropriate move for the judiciary. My own focus in this paper is on the substance of this legal rule. Is it justified, and useful, as a legal tool, to prevent abuse of power by employers?

One would expect employers to fiercely object such a limitation. However, to a large extent the application of the proportionality tests would actually be to their advantage, at least in the Israeli context. Employers in Israel are in any case bound to act in “good faith” toward their employees, for example when infringing their right to privacy. Similarly, covenants in restraint of trade must not, in any case, contradict “public policy”, which as noted is understood to mean that the restriction must be “reasonable”. And so on. All these open-ended concepts have been used for many years to place limits on employers’ use of power. In most of the specific contexts mentioned, the proportionality tests do not add any additional limitation. Rather, they should be seen as a concretization of previous limitations. An employer using means that are not rationally related to its legitimate business goals is not acting in good faith or reasonably. An employer using means that harm its employees more than necessary—*i.e.*, the employer can achieve the same business goals in a way that is less harmful to employees’ interests but refuses to do so—is not acting in good faith or reasonably. Perhaps more controversially, but arguably, an employer making decisions that are extremely harmful to its employees, but only negligibly beneficial to the employer, is similarly acting in bad faith or unreasonably. The point is that to a large extent these limitations already exist in Israeli law. The three proportionality tests only help to sort them out into clear questions; to make the vague open-ended requirements more concrete and determinate.

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33. Guy Davidov, *The Reports of My Death Are Greatly Exaggerated: “Employee” As a Viable (Though Over-Used) Legal Concept*, in BOUNDARIES AND FRONTIERS OF LABOR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 133 (Guy Davidov & Brian Langille eds., 2006).

34. See generally *supra* note 27 and accompanying text.

But what about extending the proportionality tests in a way that adds *additional* limitations on the use of employers' powers? In the Israeli context, this is most easily demonstrated by the suggestion of Justice Barak-Ossoskin to require, in effect, all managerial decisions to stand up to the proportionality requirement. Here I think it would be useful to separate the first two tests from the third one. The requirements of a rational relation between the goal and the means, and a choice of means that minimally impairs the rights (or interests) of employees, do not present any significant danger to the efficiency of the business or the autonomy of the employer. There is no limitation on the choice of goals—any legitimate business goal is acceptable. Employers are only asked to act rationally, and consider the interests of the employees as well, as long as they do not compromise their ability to fully achieve their goals. There is nothing inefficient or overly intrusive here. The difficulty for employers, in this regard, is caused only by the submission of their decisions to judicial review. While the first two proportionality tests should not be used to annul any managerial decision that is rational and necessary to achieve the goals that the employer itself has set, there are still costs associated with litigation and with the possibility of judicial mistakes. Assuming that we are willing to impose *some* costs on employers to ensure the protection of workers and prevent abuse of power, but at the same time, that we should be wary of imposing *excessive* costs on employers; the central question becomes an empirical one: how significant are these costs? While there is no empirical data on this question, it seems reasonable to believe, given the inherent difficulties workers face that prevent them from easily bringing cases to court, and given the deferential attitude of courts toward managerial decisions, that the costs of litigation and judicial mistakes would not be excessive. So a general requirement that employers act in accordance with the tests of rational relation and minimal impairment appears justified. Doctrinally, in Israel this could easily be instituted as interpretively flowing from the legislated "good faith" requirement.<sup>35</sup>

Admittedly, there are contexts in which the change would be so dramatic that it would seem illegitimate to *judicially* institute the requirement. Thus, for example, in the context of dismissals, demanding that employers stand up to those two proportionality tests would amount to nothing less than replacing the at-will rule with a "just cause" rule. In countries where the default rule is employment at will, including Israel, changing it (even assuming this is justified) arguably requires legislative intervention. Subject to this exception, and assuming (as I have) that the

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35. CONTRACTS LAW (GENERAL PART) §§ 12, 39 (1973).

costs to employers would not be too excessive, the application of the first two proportionality tests seems perfectly justified.

The third test—proportionality in the narrow sense—is more problematic. If applied, it would require the employer to balance its own interests against those of the employees before making a decision. This test could therefore prevent otherwise legitimate business decisions only because the benefit they create to the employer is outweighed by the harm they cause to the employees. Such a standard seems acceptable in public law, but is it too demanding when dealing with two “private” parties? Perhaps it would be useful to distinguish here between harm to employees that involves constitutional or otherwise fundamental rights (such as equality or privacy) and harm that involves other interests. When constitutional/fundamental rights are at stake, it seems justified to apply this strict standard. Employers are told, in effect, that society lets them set up a limited liability corporation, own private property that society protects, employ other people, and so on; in the condition that employees are treated fairly, which includes, when the right to privacy (for example) is infringed, a requirement from the employer to show that the gain is greater than the harm. On the other hand, when other interests (that are not considered constitutional or fundamental rights) are involved, it seems that such a burden would be too high. At most, in such cases a relaxed balancing test might be appropriate—in which the burden is on the employee to show *extreme* disproportion between the harm to her and the benefit to the employer.

Such a proposal is easier to understand where constitutional rights already have some application in the private sector (as in Israel),<sup>36</sup> but probably somewhat baffling for those accustomed to a sharp public-private distinction in this regard.<sup>37</sup> This is not the place to discuss the general justifications for protecting constitutional rights in “private” relations as well. It should however be noted, that the use of public law doctrines in labor law is not new.<sup>38</sup> And more recently the use of proportionality in the

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36. See Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW 13 (Daniel Friedmann & Daphne Barak-Erez eds., 2001); see also HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jörg Fedtke eds., 2007).

37. It has been argued that because in the private sphere the legislature can protect the weaker party, there is no justification for applying constitutional rights—which are designed as protection for the individual *against* the State. See 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA c. 21, at 3–4 (2009). But it is difficult to see the difference between the individual’s need of protection against *action* by the legislature and the need of protection against *nonaction* by the legislature. Especially if we remember that it is the legislature that gave private actors their powers in different ways—powers which they sometimes use against other individuals. On applying proportionality tests in private law, see also Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in HUMAN RIGHTS IN PRIVATE LAW 43, 54–61 (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

38. See Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J. 1 (1986); G. Ganz, *Public Law Principles Applicable to Dismissal from Employment*, 30

labor context has been specifically explored.<sup>39</sup> Moreover, it is not necessary to apply constitutional rights in the private sphere in order to bring proportionality into the analysis. Employees have fundamental rights vis-à-vis their employers (such as a right to privacy, for example) emanating also from specific legislation or from interpretation of the open-ended employment contract. In such cases as well, courts are often required to balance competing rights and interests, and the proportionality tests are a useful and principled aid in doing so.

So far I have attempted to justify the use of the proportionality tests to limit the use of power by employers. But as we have seen, the principle is used in Israel to limit the use of power by labor unions as well. Where collective bargaining is heavily regulated, as in the United States, there is probably no need to place additional limits on unions. But in Israel there are practically no limits in legislation on unions' uses of power. Like employers, unions would surely object to any judicial review of their decisions. And indeed, judicial review may frustrate, even mistakenly, some legitimate industrial actions. But the same basic ideas advanced with regard to employers—that power is given by society, and therefore must come with responsibility—equally apply.

#### IV. CONTEXTUAL, STRATEGIC, AND DISTRIBUTIVE OBJECTIONS

In Part II we have seen how the proportionality tests have been used in practice by Israeli labor courts, to limit the harm caused by strikes and also, most importantly, to prevent abuse of power by employers. In Part III, I attempted to justify this developing practice, to argue that there are advantages in referring to the principle of proportionality explicitly and applying the three tests separately, and to suggest some boundaries for this practice. But this normative discussion cannot be complete without considering some possible objections to using a legal tool which has traditionally been attached to constitutional jurisprudence and human rights. The normative discussion so far has refrained from considering the historical context, strategic considerations, and possible indirect distributive impacts. The aim of this part is to briefly consider whether such considerations should change our interim conclusions.

Such additional considerations are especially important given the state of labor law in recent years. Regrettably, labor laws remain too often

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MOD. L. REV. 288 (1967); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 720.

39. Baker, *supra* note 28; David Cabrelli, *The Hierarchy of Differing Behavioural Standards of Review in Labor Law*, 40 INDUS. L.J. 146 (2011); David Cabrelli, *Rules and Standards in the Workplace: A Perspective from the Field of Labor Law*, 31 LEGAL STUDIES 21 (2011); A.C.L. Davies, *Judicial Self-Restraint in Labor Law*, 38 INDUS. L.J. 278 (2009); Oliver, *supra* note 29.

merely on the books, failing to reach a large and growing number of workers.<sup>40</sup> Some fall outside the scope of labor law because of lacking enforcement by the State and inability to enforce their own rights. Others find themselves excluded, to one extent or another, because they are employed in nontraditional forms of employment that labor laws have so far failed to cover. Such precarious workers are often contrasted with unionized workers or the highly skilled workers, who are in a much stronger position vis-à-vis their employers. Any new laws that help the latter group of employees but not the former, would only deepen the divide between those two groups, thus having regressive distributive impacts.<sup>41</sup>

Two relevant strands of literature have considered such issues in recent years. One concerns the constitutionalization of labor rights: whether labor rights should be transcended to the constitutional level.<sup>42</sup> The other concerns labor rights as human rights: whether labor advocates should rely on the discourse and tools of human rights (or fundamental/basic rights) to protect labor rights and advance workers' causes.<sup>43</sup> Many scholars support both of these (related) strategies,<sup>44</sup> to one extent or another, and such views are compatible with the argument advanced in the previous part. Proportionality is one of the main legal tools used to apply constitutional rights and human rights. And as we have seen, requiring employers to stand up to this standard is especially justified (with all three tests) when basic rights are infringed.

But there are also objections.<sup>45</sup> First, it is argued that very little will come out of these strategies for workers, if at all; and, accordingly, it would be a mistake to devote limited resources in this direction. This is contested, but even if we accept the critique, it does not seem to apply in the current context. The current paper was not concerned with major cases mounting constitutional challenges against legislation. It rather concerns daily actions

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40. See generally GUY DAVIDOV & BRIAN LANGILLE, *BOUNDARIES AND FRONTIERS OF LABOR LAW* (2006).

41. On intra-worker distributive justice, see Guy Mundlak, *The Third Function of Labor Law: Distributing Labor Market Opportunities Among Workers*, in *THE IDEA OF LABOR LAW* (Guy Davidov & Brian Langille eds., 2011).

42. See, e.g., JAMES A. GROSS & LANCE A. COMPA, *HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES* (2009); Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19 *SOC. & LEGAL STUD.* 403 (2010); Hugh Collins, *Theories of Rights As Justifications for Labor Law*, in *THE IDEA OF LABOR LAW* 137, 140 (Guy Davidov & Brian Langille eds., 2011).

43. See, e.g., Guy Mundlak, *Human Rights and the Employment Relationship: A Look through the Prism of Juridification*, in *HUMAN RIGHTS IN PRIVATE LAW* 297 (Daniel Friedmann & Daphne Barak-Erez eds., 2001); *LABOR RIGHTS AS HUMAN RIGHTS* (Philip Alston ed., 2005); Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 *COMP. LAB. L. & POL'Y J.* 29 (2007); Kevin Kolben, *Labor Rights As Human Rights?*, 50 *V.A. J. INT'L L.* 449 (2010).

44. See, e.g., Mundlak, *supra* note 43; Gross & Compa, *supra* note 42 (editors' introduction); Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?*, in *LABOR RIGHTS AS HUMAN RIGHTS*, *supra* note 43, at 61.

45. See, e.g., Arthurs, *supra* note 42; Kolben, *supra* note 43.

by employers, which individual employees, and sometimes also unions, object to. If and when they decide to challenge such decisions in court, it would be useful for them to be able to rely on the proportionality tests. This is not likely to cause any shift in the focus of the labor movement, from organizing and collective action to individual legal battles, any more than the existence of the minimum wage or other individual employment standards in legislation.

The experience in Israel over the last fifteen years has been positive in this regard. During this period, the National Labor Court has not only applied the principle of proportionality in a growing number of contexts, it has also developed new protections for unions and in various ways attempted to encourage unionization and collective bargaining.<sup>46</sup> The unions themselves have not changed their strategies as a result of the rising importance of proportionality in Israeli labor law. Admittedly, we have witnessed a process of juridification years ago,<sup>47</sup> so unions already bring many disputes to Court. With this background, adding a new (or clearer) limitation on employers simply adds a legal weapon to their arsenal.

The situation might be different in legal systems where judges are generally hostile to workers' causes (which seems to be the case in systems without an independent labor courts' system). Courts in such countries are not likely to adopt the principle of proportionality as a broad limitation on employers. And if the proportionality tests are imposed on them in legislation, they are likely to limit the actual impact of these tests. Obviously if this turns out to be the case, workers and unions will not resort to this principle as much. Still, I do not see any serious danger of misdirected resources.

The situation might also be different in legal systems where labor relations are less juridified. The fear, in such cases, would be that by applying the legal tool of proportionality in the labor context, we might encourage unions to go to Court instead of using traditional methods of collective labor power. Again, this does not seem to present a serious risk. The proportionality tests could be, as I have argued, very useful in the labor context. But they do not offer such a dramatic shift to be likely to cause any significant shift in the strategy of labor unions.

A second argument against the use of constitutional/human rights claims in the labor context is more fundamental and raises distributive issues. It is argued that, because human rights and constitutional discourses are for the most part individualistic, legalistic and elitist, it is risky to introduce them. Employers will immediately reply with similar reciprocal arguments, relying on their constitutional/human rights to property,

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46. Davidov, *supra* note 9.

47. Mundlak, *supra* note 41.

freedom of contract, freedom of occupation and so on. Moreover, constitutional and/or human rights will arguably serve mostly the more powerful members of the workforce, those who have the resources to sue and the ability to present their arguments in rights form. The result could be deepening gaps between the “haves” and “have nots” among the workforce. Otherwise put, given that the main problem of labor law today is the exclusion or under-protection of precarious workers, introducing new legal tools that will only benefit the powerful (unionized, highly skilled etc.) workers is highly problematic.

Again, the argument itself is contested. It could be argued in response that we should focus first and foremost on distribution between workers and employers, and should not refrain from providing new protections to workers just because they will not *all* be able to enjoy them equally. But even if we accept the critique, it does not seem to apply in the current context. For the most part, the proportionality tests as described in the previous parts do not create new rights or encourage new litigation. They simply create a useful structure to analyze claims that already exist against an employer. At least in the Israeli context, the only new right that was proposed was in the context of limiting the managerial prerogative. If this proposal is adopted, many employers will change their decision-making process as a result, so precarious workers will enjoy this development as well, even if they are not the ones to bring cases to court. Indeed, the more (stronger) employees challenge managerial decisions for failing the proportionality tests, the clearer the rules that will be developed by the Court for various circumstances, for the benefit of precarious workers as well.

Moreover, it is actually reasonable to assume that a requirement of proportionality would be especially beneficial to workers with low bargaining power. When dealing with stronger employees—whether because they enjoy the protection of a labor union or because they have special skills or expertise and are difficult to replace—an employer is likely to be hesitant before making detrimental decisions. The employer will probably make sure not to infringe the rights of such workers more than necessary, and not to act in a way harmful to their interests if the benefit to the employer cannot justify the harm. In contrast, when dealing with precarious workers, an employer might be oblivious to any indirect harms. He is not likely to make a special effort to accommodate the needs of such workers and ensure that the requirements of the three proportionality tests are met. Imposing such a requirement in law could therefore be especially useful for precarious workers. They will still face, to be sure, the usual enforcement problems. But it is fair to assume that many employers will



take the new legal requirements into consideration before making decisions that affect their employees.

## V. CONCLUSION

The concept of proportionality, standing alone, is hardly a meaningful legal tool. It is vague and indeterminate. But the three tests developed in public law, in Israel as in a number of other countries, offer concrete substance to this amorphous concept. They create a useful structure for discretionary decision making, which aims to ensure that decisions are rational and considerate. As I have shown above, this structure also fits the intuitions of judges, who in practice have been applying these tests (to one extent or another) in a number of labor and employment law contexts. The result is that employers, and unions, are legally required to stand up to the (high) standard of proportionality, even in the private sector.

This may seem too radical for people brought up on the distinction between private and public law. But we have to ask ourselves directly: what is the standard of behavior that society can and should demand? Obviously we can demand a high standard from the people in Government working for us and on our behalf. And it seems equally obvious to me that we cannot demand the same standard from individuals toward other individuals who are strangers to them. But the law certainly prohibits individuals from harming other people (including strangers) in various contexts. And it already demands that individuals take the interests of others (who are *not* strangers to them) into account, in some contexts. There is no clear-cut dichotomy between public and private law.<sup>48</sup> The standard of behavior that we demand from individuals varies along a broad spectrum of possibilities. The employment relationship is already recognized as one that requires close attention. Even in the scarcely regulated U.S. market, employers cannot treat their employees as they treat strangers. So adding a requirement of proportionality would not be that radical. The divide between public and private law—if it ever existed—has already been crossed long ago.<sup>49</sup> It is rather a question of degree and specifics. I have argued that, at least in Israel, the rational relation and the minimal impairment tests—the first two proportionality tests—are unlikely to put any new significant burden on employers. It is therefore relatively painless to use them as a general guiding principle of labor and employment law. They may not fit every legal question, but in many cases, they could

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48. See generally DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE (1999).

49. It has been thoroughly demonstrated that this divide can serve the stronger parties by giving them in effect immunity for actions taken in the “private” sphere. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993).

be extremely helpful in setting the structure and explaining our expectations from the parties.

The third (balancing) test is more difficult to accept, as we have seen. It amounts to a rather significant interference in current market practices. The impact on employers' managerial flexibility cannot be over-looked or under-estimated. At the same time, the balancing test is an important aspect of the attempt to ensure "proportional" decisions. Without it, the demands from employers would hardly suffice to prevent abuse of power. My suggestion was to distinguish between violations of constitutional/fundamental rights, which employers should justify by showing that they conform to all three proportionality tests, and harm to other employee interests, which should trigger at most a relaxed balancing test (*i.e.*, less judicial intervention).

Together, the three proportionality tests are a convenient and useful legal tool. They can help in making decisions more structured and principled and less indeterminate. They also define a standard of behavior that is aimed at preventing abuse of power by employers (and unions). I have discussed some possible objections, asking whether developing this legal tool would be a strategic mistake, or would have a regressive indirect distributive impact. We have seen that this is not the case. On the contrary, the proportionality tests could be especially useful for precarious workers, who often lack the protection of unions or the bargaining power needed to defend themselves against inconsiderate decisions by their employers.