LEGAL EXPORTATION: THE CASE OF EUROPEAN LABOR LAW AND THIRD COUNTRIES

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ABSTRACT

The frequency of change in industry and human mobility has brought new legal issues before labor courts. These changes constantly create a need to rethink and renew national labor law principles. In this process countries search for and import labor law principles from foreign legal systems. This Article focuses on Israeli labor law as a test case. Israeli courts considering labor law matters often turn to foreign legal systems in a manner that arguably influences the courts' interpretation and development of local labor laws. In practice, labor courts in Israel, when faced with a lack of appropriate domestic legislation, model local principles with the guidance of foreign labor law practices.

Research on the influence of foreign jurisprudence on the development of Israeli law and case law have focused on the Anglo-American legal systems which have been and continue to be central sources for legal interpretation in Israeli courts. Academic research thus far has refrained from analyzing the influence of the European Union ("EU") on Israeli labor law. The EU is a key trade partner with Israel, geographically close, and can be characterized by political, legal and historical proximity, all of which is reflected by Israel's special status in the EU. Despite the legal and historical differences between its member states, the EU removed trade barriers and prevents harm to freedom of movement for people and workers, among other public interests. These objectives require the EU to strive for legal integration in labor law practices between member states and to improve legal systems so as to provide uniform mechanisms for resolving new challenges in the labor sector.

This Article aims to unveil the influence of EU labor law on foreign legal systems with which the EU has unique political and economic ties. As such, the case of Israel serves as an exemplar to the influence of EU labor law standards on non-member countries. The findings of this Article are based on a unique database that contains

all instances in which normative legal sources from EU law appeared in the legal opinions of the Israeli Appellate Labor Courts, the National Labor Court and the Supreme Court. It is our contention that the analysis of this database will reveal that European law, as an independent and harmonized legal system, influences the formation of norms in Israeli labor law. This Article forms a unique and integrated evaluation of the influence of the EU on Israeli labor law, despite the fact that Israel is not a member state, and ultimately presents the untested role of the EU as an exporter of legal standards to non-member countries. The Article is divided into three parts. Part One, contains the background for our analysis. We examine the unique factors that characterize the development of the labor laws in Israel and the EU followed by a discussion on the role of protective labor law alongside the formation of mandatory labor laws. Finally, we review the exceptionality of a separate court for instances of labor law. In Part Two, we review the notable appearances of European law in Israeli labor law cases and present a critical examination of eight central topics at the heart of judicial review in the labor sector and reflect upon the apparent influence of European doctrines and principles. Part Three details the methodology used and the quantitative data collected which support our claims.

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I. INTRODUCTION

The contribution of foreign law to the development of Israeli law is undeniable. Just as a variety of colorful stones form a mosaic artwork, a variety of foreign legal principles inform the Israeli legal system.[1] Among its advantages, the use of foreign law allows courts to reexamine traditional legal principles and adapt to changing social realities. Judges examine legal issues while taking into consideration a broader range of ideas, which allows for the Israeli legal system to develop in a way that maintains its relevance at the inter-state and international level.[2] The proceeding analysis will show how the labor law in Israel has been informed by European jurisprudence, as

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1 Yoram Shachar, *The Degree of Reliance of the Supreme Court 1950–2004*, 50 HAPRAKLIT 29 (2008) (Isr.); Yoram Shachar, Ron Harris & Miron Gross, *The Degree of Reliance of the Supreme Court: Quantitative Analyzes*, 27 MISHPATIM 119 (1996) (Isr.); Pablo Lerner, *Comparative Law in the Age of Harmonization*, *in* URI KITAY'S BOOK 131, 132–135 (Boaz Sangero ed., 2007) (Isr.); Konrad Zweigert, *Comparative Law and Law Resumption*, 2 IYUNEI MISHPAT 607, 608 (1972) (Isr.); Daphne Barak-Erez, *Comparative Law as a Practice: Institutional, Cultural and Executive Aspects*, 4 DIN UDVARIN 81 (2008) (Isr.) [hereinafter *Comparative Law as a Practice*]; Mordechai A. Rabillo & Pablo Lerner, *About the Role of Comparative Law in Israel*, 21 MECHKAREY MISHPAT 89, 91 (2004) (Isr.); Suzie Navot, *Israel: Creating a Constitution – The Use of Foreign Precedents by the Supreme Court (1994–2010)*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 5 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013); Iddo Porat, *The Use of Foreign Law in Israeli Constitutional Adjudication*, *in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING 151 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013). For specific information about Labor Law research methodologies, *see* Guy Davidov, *Special Issue: Labour Law Research Methodologies Editors' Introduction*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 1, 1–5 (2017).

2 Aharon Barak, *The Israeli Jurisprudence: Its Tradition and Culture*, 40 HAPRAKLIT 197 (1992) (Isr.) [hereinafter *The Israeli Jurisprudence*]. *See also* Nir Kedar, *A Scholar, Teacher, Judge, and Jurist in a Mixed Jurisdiction: The Case of Aharon Barak*, 62 LOY. L. REV. 659, 667 (2016); Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760, 818-826 (2001).

indicated by the import of legislation and the judicial application of foreign legal norms.[3] Legislatures and courts, specifically labor courts, face the challenging task of developing and adapting labor law in response to changing social and economic realities.[4] When faced with factual circumstances that legislation has failed to account for or provide an interpretative standard for such circumstances' resolution, the judicial system is obligated to consider and regulate labor practices based on customary law.[5] In carrying out this obligation, the courts turn to foreign law, which can influence the formation of new doctrines and can even change basic principles.[6] Examples of this in the Israeli labor law include the definition of who an "employee" is, collective labor law, work and rest hours, the principle of equality in the workplace, equal opportunity, as well as retirement age.[7]

The workplace environment has changed and continues to change dramatically; the emergence and development of new work patterns is a universal phenomenon, which is affected, *inter alia*, by increased migration and mobility between different countries for workers.[8] The

3 Barak-Erez, *Comparative Law as a Practice*, *supra* note 1, at 85. Barak-Erez mentions, in the Israeli context, other factors that have led to a relatively high degree of openness and use of comparative law.

4 Regarding the complexity of transposing EU law into EU countries as an example of the complexity of using foreign law, *see* Ralf Rogowski, *The European Social Model and the Law and Policy of Transitional Labour Markets in the European Union*, *in* THE SOCIAL MODEL AND TRANSITIONAL LABOUR MARKETS: LAW AND POLICY 9 (Ralf Rogowski ed., 2008); Brian Bercusson, *General Principles of Enforcement of European Labour Law*, *in* EUROPEAN LABOUR LAW 403 (Brian Bercussom ed., 2009); Aristea Koukiadaki, *The Legacy of the Economic Crisis for Labour Law in Europe*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 64 (Alan Bogg, Cathryn Costello, and A. C.L. Davies eds., 2016).

5 Yoram Margaliot & Sharon Rabin Margaliot, *Tips*, 38 MISHPATIM 107, 124 (2008) (Isr.). The authors discuss how the courts, in the absence of a legal definition for the term "tips," acted to create the needed definition.

6 Regarding employee rights and fundamental definitions in labor law, *see generally* Judy Fudge & Guy Mundlak, *Justice in a Globalizing World: Resolving Conflicts between Workers' Rights beyond the Nation State*, *in* GLOBAL JUSTICE AND INTERNATIONAL LABOUR RIGHTS 121 (Yossi Dahan, Hanna Lerner, & Faina Milman-Sivan eds., 2016). For a specific example of a new doctrine regarding work time and employment flexibility, *see* Tobias Nowak, *The Turbulent Life of the Working Time Directive*, 25 MAASTRICHT J. EUR. COMP. L. 118, 118–29 (2018).

7 *See infra* Part III(G).

8 Bercusson, *supra* note 4; Dagmar Schiek, *Comparing Labour Laws in the EU Internal Market: A Social Actor Perspective*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 171, 190-92 (2017). *See also* Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union 2017/0355, EUR. PARL. DOC. (COM 797) (2017). The proposed directive updates EU labor laws in line with the new world of labor. Among other things, the directive regulates the flexible employment of employees

necessity to meet the intense competition in labor markets both domestically and abroad, the increased use of outsourcing and exportation of production to other countries, the increased number of migrant workers—all these factors and more give rise to new challenges when examining existing legal arrangements and application of labor laws.[9] In the era of globalization labor market flexibility allows for the exclusion of collective wage agreements once achieved by strong unions in traditional labor markets. This development, together with the establishment of international bodies and transnational organizations such as the European Economic Community and the EU, necessitated efforts to integrate different legal and cultural approaches. Harmonization efforts are more pronounced in the EU, as would be expected for a transnational organization in which workers, capital, goods, services and information move freely.[10] These factors require a sophisticated and consistent policy approach

in contracts without working hours (zero-hour contracts) and work from home. *Id*. at art. 9.

9 Madeleine Sumption, *Labour Immigration After Brexit: Questions and Trade-Offs in Designing A Work Permit System for EU Citizens*, 33 OXF. REV. ECON. POL'Y 45, 45-53 (2017); MARTIN KAHANEC & KLAUS F. ZIMMEREMANN, EU POST-ENLARGEMENT MIGRATION AND THE GREAT RECESSION: LESSONS AND POLICY IMPLICATIONS 419-445 (Martin Kahanec & Klaus F. Zimmeremann eds., 2016). For further studies on the impact of the UK's departure from the Union *see Brexit*, PUBLICATION OFF. EUR. UNION, https://op.europa.eu/en/web/general-publications/brexit.

10 Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2008 O.J (C115) 47. About the unique characteristics of the organization and structure of the EU, *see* NELLY MONIN, EU LAW AFTER LISBON TREATY 16 (2012) (Isr.); Lior Zemer & Sharon Pardo, *Thoughts on Judicial Activism: The Case of The European Court of Justice*, 7 MISHPAT VEASAKIM 203, 212–15, 227–28 (2007) (Isr.). *See also* Arieh Reich, *The European Union Law: Foundations and Institutions*, *in* INTERNATIONAL LAW 129, 163 (Roby Sivel & Yael Ronen eds., 3d ed. 2016) (Reich elaborates on the EU's supremacy while examining the principle and manner in which it was based on court rulings). Arieh Reich, *Globalization and Law: The Impact of International Law on Commercial Law in Israel in the Next 50 Years*, 17 MECHKAREY MISHPAT 17 (2001); Guy Harpaz, *Enhanced Relations between the European Union and the State of Israel under the European Neighborhood Policy: Some Legal and Economic Implications*, 31 LEGAL ISSUES ECON. INTEGRATION 257, 257–74 (2004). *See also* Guy Harpaz, *The European Union's Neighborhood Policy*, 4 MISHPAT VEASAKIM 431, 439–42, 448–55 (2006) (Harpaz claims that creating a similarity between the laws of Israel and those of the EU may greatly benefit the State of Israel and its economy). For more on the EU's governance structure and its place in the global arena, including comparative analyses, *see generally* Daniel Thym, *Towards International Migration Governance? The European Contribution*, *in* THE EU'S ROLE IN GLOBAL GOVERNANCE: THE LEGAL DIMENSION 289 (Bart Van Vooren, Steven Blockmans & Jan Wouters eds., 2013); G.F. MANCINI, DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION: COLLECTED ESSAYS (2000).

that takes into consideration the effects of economic globalization on the nature of the labor market and the status of workers in developing welfare countries.[11]

There are vast differences between different legal systems when it comes to the principles of labor law. However, in the modern world labor law is often seen as borderless, and as enabling human mobility on a global scale, which increases the need for national labor laws to function in harmony with commercial and business trends of international scale.[12] If the courts find legislative arrangements to be outdated when faced with circumstances unforeseen by the legislator, judges make use of foreign law, particularly EU law. Furthermore, close examination of the history of labor law in Israel reveals the critical impact of EU law upon the development of Israeli law, and an in-depth analysis of European influence on Israeli law on this matter has yet to be explored. The EU's legal system—which began around the same time as the establishment of the State of Israel—enjoys legal supremacy in all 28 jurisdictions that constitute the Union. Each state joining the Union already had sophisticated labor law structures that made supranational labor law seem unnecessary.[13] As the European project continued to develop beyond economic interests, and as labor movements expanded, cross-border legal conflicts arose which created an interest in uniform standards for resolution. Interpreting national laws in a manner that meets EU standards strengthened the superior status of European law, and such supremacy characterizes modern labor law in the EU.[14]

11 Stefano Giubboni, *The Rise and Fall of EU Labour Law*, 24 EUR. L. J. 7, 11-12, 16-18 (2018); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 53-54, 56 (2017).

12 *See generally* Guy Mundlak, *De-territorializing Labour Law*, 3 L. & ETHICS HUM. RTS. 188 (2009); Fudge & Mundlak, *supra* note 6.

13 Alan Bogg*, Viking and Laval: The International Labour Law Perspective*, *in* EU LAW IN THE MEMBER STATES: VIKING, LAVAL AND BEYOND 113–26 (Mark R. Freedland & Jeremias Prassl eds., 2016); Catherine Barnard, *EU Employment Law and the European Social Model: The Past, the Present and the Future*, 67 CURRENT LEGAL PROBS. 199, 201-12, 227-28 (2014).

14 Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585. For example, the European Court has introduced the direct effect principle, by which EU law would be binding and will have supreme status within the states, in order to make it possible for the citizens to rely on it before local courts, *see* Case 26/62 Van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1. *See also* Instrument Relating to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, EUR. COMM'N, TASK FORCE FOR THE PREP. & CONDUCT OF THE NEGOTIATIONS WITH THE U.K. UNDER ART. 50 TEU, TF50 (2019) 61.

The EU and the State of Israel have relatively young legal systems that have faced many challenges since their establishment, one of which is very similar.[15] Established as a new state in 1948, Israel had to respond to complicated societal needs, establish its economy amidst the waves of immigration of due to survivors of Holocaust and immigrants from many other countries. The EU, which celebrated 60 years since formation on May 9th, 2020, also had to form a regulatory response to mass migration due to millions of workers and citizens enjoying their rightful freedom of movement between member states.

Studies examining foreign influences on the development of law in Israel have focused primarily on the legal systems upon which Israeli law was built, and which form basic interpretative sources.[16] Such studies, however, refrained from examining EU law as a unified legal system. The research presented herein assesses the EU as one unified jurisdiction, despite its being a transnational union—herein lies the differentiation of the EU from other legal systems. Today, the EU is the world's largest bloc of democracies, governing over the third largest population, constituting the second largest economic bloc and the largest trade framework in the world. Since the accession of Cyprus to the EU in 2004, the EU has been one of Israel's closest neighbors. The EU is also Israel's largest economic partner, Israel's leading research and development partner, and in many ways the EU contributes to the cultural and even political backbone of Israel.[17] Despite the legal and historical differences between its member states, the EU strives to harmonize completely different legal systems in order to remove trade barriers and prevent harm to, among other

15 *See* as specified at Draft Bill for the Labor Court and Social Security Law, 5728–1967, HH (Gov.) 748 15 (Isr.), https://www.nevo.co.il/law_word/law17/prop-0748.pdf: "Labor is, as we know, one of the most important and vital arteries of state. Labor relations and employers are among the major factors determining the fate of the country's economy and the human and social atmosphere of its residents. They also raise difficult. Israeli law has a considerable number of labor laws, most of which are from the Israeli legislature. They grant rights and impose obligations . . . but they also drag on them new problems, which now involve various institutions, including the courts."

16 *See* Navot, *supra* note 1; *see also* Shachar, *supra* note 1; Barak-Erez, *Comparative Law as a Practice*, *supra* note 1.

17 SHARON PARDO & JOEL PETERS, UNEASY NEIGHBORS: ISRAEL AND THE EUROPEAN UNION (2010) (Pardo and Peters stance on Israel's desire to strengthen ties with the EU and to be part of the European integration project.). For more about the EU as the main trading partner of Israel, *see Israel's Foreign Trade in Goods, by Country – May 2020*, CENTRAL BUREAU OF STATISTICS (June 18, 2020), https://www.cbs.gov.il/he/mediarelease/DocLib/2020/174/16_20_174e.pdf.

things, the freedom of movement for people and workers. These goals require the EU to emphasize legal integration in the field of labor law between member states. The absence of the EU legal system in the studies examining the effect of foreign law on Israeli jurisprudence has perpetuated the superiority of major legal systems,[18] and specifically, as will be shown below, limiting the sources from which adapting legal principles to changing situations can be imported.

As noted, the absorption and influence of legal principles from external legal systems is neither new[19] nor foreign to the realm of labor law.[20] This study challenges the superiority of the central legal systems that have appeared in Israeli research and case law, and offers an examination of the extent to which labor law in Israel has been affected by the EU as a single foreign jurisdiction, in addition to the examination of the general development of Israeli labor law as well as

18 MENACHEM MAUTNER, LAW AND CULTURE IN ISRAEL AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY 149–60 (2008); Yoram Shachar, *Residence as a Courthouse*, 19 MECHKAREY MISHPAT 397 (2003); Barak-Erez, *Comparative Law as a Practice*, *supra* note 1; Assaf Likhovski, *Between Two Worlds: The Legacy of Mandate Law in the First Years of Israel*, *in* JERUSALEM DURING THE MANDATE: ACTION AND HERITAGE 253–66 (Yehoshua Ben-Arieh ed., 2003); *see also* Barak, *The Israeli Jurisprudence*, *supra* note 2, at 201–15; Aharon Barak, *The Lacuna in Law and in the Foundations of Law Act*, 20 MISHPATIM 233 (1991); Aharon Barak, *The American Constitution and The Israeli Law*, 26 ZEMANIM 12, 14–19 (1978); Assaf Likhovski, *Between a Mandate and a Country: About Periods of Law in the History of Israel*, 29 MISHPATIM 689, 689-96, 712–21 (1998); Eli Salzberger & Fania Oz-Salzberger, *The German Tradition of the Supreme Court in Israel*, 21 IYUNEI MISHPAT 259, 259–61, 276–94 (1998).

19 Aharon Barak, *Comparison in Public Law, in* JUDICIAL RECOURSE TO FOREIGN LAW 287, 292 (Basil Markesinis & Jörg Fedtke eds., 2006); *see also* RESEARCH METHODS FOR LAW (Mike McConville & Wing Hong Chui eds., 2d ed. 2017); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1229, 1245 (2011); Esin Örucu, *Methodological Aspects of Comparative Law*, 8 EUR. J. L. REFORM 29, 29-42 (2006); Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 185–87 (2004); Jan M. Smits, *Comparative Law and its Influence on National Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 512–13 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

20 Silvia Bonfanti, Cynthia Estlund & Nuno Garoupa, *Comparative Labor and Employment Law, in Developed Market Economies: Fostering Market Efficiencies or Repairing Market Failures?*, *in* COMPARATIVE LABOR LAW 62 (Matthew W. Finkin & Guy Mundlak eds., 2015); Benjamin Aaron & Katherine V.W. Stone, *Comparative Labor Law – Bridging the Past and the Future*, 28 COMP. LAB. L. & POL'Y J. 377, 387 (2007); Harry Arthurs, *Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law*, 28 COMP. LAB. L. & POL'Y J. 591, 594-95 (2007); *see* specifically about labor law in Davidov, *supra* note 1.

significant domestic and international changes along the way. We will refrain from discussing the influence of the ordinarily discussed legal systems on the development of Israeli law and do not deal with comparative distinctions between legal systems. We have collected all occurrences of EU law in the judgments of the higher courts of labor law, which ultimately indicate the reach of influence EU law has in the development of labor law in Israel. Unlike the Court of Justice of the EU ("CJEU"), which operates in a bi-directional manner as both an importer and exporter of legal doctrines, Israeli courts operate unidirectionally importing legal doctrines into but not exporting out of Israel.[21] This study seeks to assess the quality and extent of the impact of EU law on the interpretation and formation of principles in Israeli labor law.[22] The assessment is based upon a specialized database specifically designed for this study by analyzing the entire body of Israeli case law in the field of labor for references, in various ways, to normative legal obligations rooted in EU law.

This research forms part of a broader project that began over a decade ago, with the goal of evaluating the influence of European law on the case law administered by the Israeli High Courts, finding that by 2016 the High Court of Israel, in both public and private law, made 153 references to European Law in its judgments.[23] From within these

21 David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 302 (2006) (Zering examines the amount of references to foreign law within federal courts in the United States, including sources from Israeli law, and indicates the status of Israeli law as a comparative source); *see also* Porat, *supra* note 1, at 151–52, 160–61 (according to Porat, there are four main reasons that explain why Israeli law and the judicial system are built for use in foreign law and are compatible with its effect).

22 Eli Salzberger, *50 Years to the Israeli Supreme Court*, 16 MECHKAREY MISHPAT 141 (2000) (Isr.) (one of the explanations for the expectation that the Supreme Court will address European sources is the origin of the judges. Studies that examined the Supreme Court judges in Israel indicate that there is almost an absolute majority of European judges, who also speak other languages such as English, German, and French. This is of course alongside the use of American law. Salzberger refers, among others, to Shachar, Harris & Gross, *supra* note 1). About the origin of Judges in Israel as part of the cultural impact of the Judicial System, *see* Elyakim Rubinstein, JUDGES OF THE LAND 141 (1980). Similar arguments can be seen at Salzberger & Oz-Salzberger, *supra* note 18; *see also* Mordechay Ben Ari, Who is The Judge? Judges and Judicial Discretion: Effects and Variables, (2008) (doctoral dissertation, The Hebrew University—Dep't of Philosophy), shemer.mslib.huji.ac.il/dissertations/W/JLW/001498928_1.pdf (Isr.) (this source references another study by Ben Ari, who researched seventy-five retired judges who from all courts—not just the Supreme Court—and found that over half of them were born in Israel and about a third were born in Europe).

23 This study is part of a wide-ranging project that began over a decade ago and examines the impact of EU law on the Supreme Court ruling in general. The

references, we reviewed specifically decisions from Israeli Appellate Labor Courts, the High Courts of Labor Law—including the National Labor Court, an appellate court for proceedings initiated by the Regional Labor Court, which was established by virtue of the Labor Court Law of 1969[24]—and the Supreme Court, as an appellate court for the National Labor Court. In the field of labor law, 94 references were made to EU law. The findings of the research presented herein will serve as a basis for future studies on the impact of EU law, as a single foreign legal system, on the various fields of law in Israel.

II. THE DEVELOPMENT OF LABOR LAW IN THE EU AND ISRAEL

The six founding nations of the EU were tasked with unifying their interests and redefining economic and policy borders as the continent recovered from the atrocities of World War II. This task called for the removal of trade barriers, the restoration of the right to freedom of movement of people, workers and goods, the prevention of discriminatory tariffs and the transfer of authorities to European institutions.[25] European labor law began as a bundle of laws originating in member states, creating a need for legal harmonization.[26] Today, EU labor law is largely regulated by regional laws that maintain almost complete freedom of movement for people and workers between member states.[27] The Treaty of Rome, signed in

extensive study seeks to cover, through a dedicated database, all the rulings and decisions made to a normative source of EU law since 1978 (National Labor Court 3-71/37 "Elit" Israeli Chocolate Making Company v. Lederman 9 PD 255 (1987) (Isr.)) and until 2016.

24 Labor Courts Law, 5729–1969, SH No. 553 p. 70 (Isr.).

25 Cecilia Bruzelius, *Freedom of Movement, Social Rights and Residence-Based Conditionality in the European Union*, 29 J. EUR. SOC. POL'Y 70 (2018); R. Daniel Kelemen, *Is Differentiation Possible in Rule of Law?*, 17 COMP. EUR. POL. 246, 247 (2019); George Argiros & Athina Zerovoyianni, *The European Union: Evolution, Institutional and Legislative Structure and Enlargement*, *in* EUROPEAN INTEGRATION 12 (Athina Zervoyianni, George Argiros & George Agiomirgianakis eds., 2006); Athina Zerovoyianni & George Argiros, *Factor and Product-Market Integration and Europe's Single Market*, *in* EUROPEAN INTEGRATION 93 (2006). For historical overview of EU treaties since after World War II period, *see* ALAN DASHWOOD ET AL., EUROPEAN UNION LAW 3 (6th ed. 2011). For different rationales underlying the EU community integration, *see* Paul Craig, *Development of the EU*, *in* EUROPEAN UNION LAW 9, 31 (Catherine Barnard & Steve Peers eds., 2d ed. 2017).

26 On the development of EU law and its institutions, *see* ORIGINS AND EVOLUTION OF THE EUROPEAN UNION 233 (Desmond Dinan ed., 2d ed. 2014).

27 Susanne K. Schmidt, Michael Blauberger & Dorte Sindbjerg Martinsen, *Free Movement and Equal Treatment in an Unequal Union*, 25 J. EUR. PUB. POL'Y 1391, 1391–93 (2018) (the authors face the challenge posed by the EU's principle of free

1957, is a concrete example of primary legislation containing references to basic principles of labor law and formed the legal basis for broad economic integration among European countries. The Treaty of Rome is the central historical legal benchmark that paved the way for the EU to attain the status it has today. The Treaty laid the foundations for optimal economic integration within the framework of the European Economic Community ("EEC") so as to ensure the freedom of movement of economic resources such as goods, services and workers, and thereby maintain the proper functioning of the common market.[28] Changes made since the Treaty of Rome have expanded the reach of European integration to different sectors. In the field of labor law, there are currently 30 guidelines ("Directives")[29] that primarily address: health and safety, ensuring equal treatment for men and women, prohibition of discrimination, protection of workers in the event of insolvency and the definition of labor relations.[30]

labor movement within Member States). For more about the principle of free movement of workers, *see* Floris De Witte, *EU Citizenship, Free Movement and Emancipation: A Rejoinder*, *in* DEBATING EUROPEAN CITIZENSHIP 169 (Rainer Bauböck ed., 2019). *See generally* Nicolas Bueno, *From the Right to Work to Freedom from Work: Introduction to the Human Economy*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 463, (2017); Catherine Barnard, *Free Movement of Natural Persons and Citizenship of the Union, in* EUROPEAN UNION LAW, *in* EUROPEAN UNION LAW 369 (Catherine Barnard & Steve Peers eds., 2d ed. 2017).

28 Reich, *supra* note 10, at 133, 134-38 (Reich emphasizes the EU's ultimate goal of creating integration and free movement of all economic resources. The author also details the new amendments and mechanisms introduced by the EU over the years to establish integration); *see also* Dorte Sindbjerg Martinsen, Gabriel Pons Rotger & Jessica Sampson Thierry, *Free Movement of People and Cross-border Welfare in the European Union: Dynamic Rules, Limited Outcomes*, 29 J. EUR. SOC. POL'Y 84, 85-89 (2019) (for the argument that integration strengthens individual well-being within member States); WILLEM MOLLE, THE ECONOMICS OF EUROPEAN INTEGRATION 101 (2006) (highlighting the integration of work).

29 Regarding the distinction between directives and regulations, *see* Reich, *supra* note 10, at 158–59 (EU institutions can issue mandatory directives to EU countries, also called directives. Article 288 of the Maastricht Treaty establishes the status of these directives as a normative source of the European Union, directly applicable to the Member States. According to the article, the directives require the Member States to achieve a certain outcome and set the general goal and guidance for achieving it, but leave the states to determine how to achieve those goals in accordance with the domestic law and institutional structure of each state and in accordance with its national preferences).

30 Kofi Addo*, The Global Debate: The Linkage Between Labour Standards and International Trade*, *in* CORE LABOUR STANDARDS AND INTERNATIONAL TRADE 19, 29 (2015). For the normative arrangements regarding the prohibition of discrimination and equal treatment of employees, *see* the detailed in Chapter Four of RESEARCH HANDBOOK ON EU LABOUR LAW, *supra* note 4, at 391–547. For information on defining employment relations onglobal scale, including the EU, *see*

EU's labor law challenged the basic economic profile of work,[31] from the reference to "rights of workers" in the Rome Convention to the determination that work is not a commodity.[32] The Treaty of Rome focused on economic rather than social objectives under the assumption that laws on social matters would be developed by the member states themselves at a national level.[33] Said economic orientation did not impede the development of social rights in the EU, including workers' rights which would prove fundamental for the

Zoe Adams, et al., *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 158 INTERNATIONAL LABOUR REVIEW 1 (2019); Chris Brewster et al., *Employee Voice and Participation: The European Perspective*, *in* EMPLOYEE VOICE AT WORK: WORK, ORGANIZATION, AND EMPLOYMENT 51 (Holland P., Teicher J., Donaghey J. eds., 2019). *See generally* Breen Creighton & Shae McCrystal, *Who is a Worker in International Law?*, 37 COMP. LAB. L. & POL'Y J. 691 (2016); Jeremias Prassl, *Who is a Worker?*, 133 L.Q. REV. 366 (2017); JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER (2015); NICOLA COUNTOURIS, THE CHANGING LAW OF THE EMPLOYMENT RELATIONSHIP 58 (2007) (protecting these issues is similar to the protective legislation in labor law in Israel, which, like the EU law and directives, seeks to create a uniform and minimum level of rights. Preserving these rights requires uniformity in the application and interpretation of the directives throughout the Union. One way of ensuring this is the use of Article 267 of the Treaty of the European Court of Justice, which states that the European Court is empowered to hear, inter alia, referral from state courts for a preliminary ruling). This notion is also expressed in Ross Cranston, *Helping the Court to Function Effectively*, *in* THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION 5 (Alan Dashwood & Angus C. Johnston eds., 2001). *See generally* ANDREEA MARIA ROȘU, THE EUROPEAN CONNECTION ON HUMAN RIGHTS IN TIMES OF ECONOMIC CRISIS AND AUSTERITY MEASURES (2015); A.C.L. Davis, Alan Bogg & Cathryn Costello, *The Role of the Court of Justice in Labour Law*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 134 (Alan Bogg, Cathryn Costello, & A.C.L. Davies eds., 2016); Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 1997 O.J. (L 18) 1.

31 *See generally* DIAMOND ASHIAGBOR, THE EUROPEAN EMPLOYMENT STRATEGY: LABOR MARKET REGULATION AND NEW GOVERNANCE (2005).

32 Julia Lopez, Consuelo Chacartegui & Cesar G. Canton, *From Conflict to Regulation: Transformative Function of Labour Law*, *in* THE IDEA OF LABOUR LAW 344 (Guy Davidov & Brian Langille eds., 2013); Treaty Establishing the European Economic Community (Rome Treaty) Title 3, Mar. 25 1957, 298 U.N.T.S. 3 [hereinafter Rome Treaty].

33 Rome Treaty, *supra* note 32, at art. 117 (defining the social goals of the communities); *id.* at art. 118 (providing for close cooperation of Member States in the social sphere); *id.* at art. 119 (only art. 119 allowed the Council to take steps to promote the principle of non-discrimination on the basis of gender). *See generally* Claire Kilpatrick, *The Displacement of Social Europe: A Productive Lens of Inquiry*, 14 EUR. CONST. L. REV. 62 (2018); Phil Syrpis, *The EU and National Systems of Labour Law*, *in* OXFORD HANDBOOK OF EUROPEAN UNION LAW 15 (Damian Chalmers & Anthony Amull eds., 2015); Barnard, *supra* note 13.

future of European integration.[34] The resulting school of thought views workers' rights as a broad term among social rights in general, which posed a challenge for the courts prior to the ratification of the EU's Basic Human Rights Charter, which provided a strong legislative framework for labor rights and declared them to be basic human rights.[35]

We must note two other sources that influenced the evolution of European labor law. The first is the European Convention on Human Rights of 1950 (the "ECHR"),[36] which protects civil and political rights. This document, which was signed by all EU member states and

34 *See generally* Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Re-Appraisal*, 1 EUR. LAB. L. J. 161 (2010); Sjoerd Feenstra, *How Can the Viking/Laval Connundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?*, *in* A EUROPEAN SOCIAL UNION AFTER THE CRISIS 314 (Frank Vandenbroucke, Catherine Barnard & Geert De Baere eds., 2017).

35 European Community Charter of Fundamental Social Rights of Workers, EUR. PARL. DOC. (COM 471) 3 (Dec. 9, 1989) (referred to social rights of employees in its preamble); Stefan Clauwaert, *The Charter's Supervisory Procedures*, *in* THE EUROPEAN SOCIAL CHARTER AND THE EMPLOYMENT RELATION 97 (Niklas Bruun, Klaus Lörcher, Isabelle Schömann & Stefan Clauwaert eds., 2017) (two other sources that influence the development of labor law). *See also* The European Convention on Human Rights, art. 4-11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (signed by all EU member states and subsequently referred to by the Lisbon Treaty, the ECHR provides protection for civil and political rights and, as a normative source of human rights in the EU, reinforces the status of fundamental principles and rights in labor law: freedom of association, prohibition of slavery, privacy, religious freedom, and expression in the workplace). *See also* Philip Alston, *Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 490-95 (2004); Lisa Rodgers, *The Interpretation of Article 6 ECHR and Access to Justice for Public Employees*, 40 EUR. L. REV. 563, 563–80 (2015); Lisa Rodgers, *Labour Law and Employment Policy in the EU: Conflict or Consensus?*, 27 INT'L J. COMP. LAB. L. & INDUS. REL. 387, 387–406 (2011). *See also* European Social Charter, Feb. 26, 1965, 35 E.T.S 1 [hereinafter ESC] (provides protection of basic rights in labor law, including the right to work, organize and collective action); Commission Working Paper on Social Dimension of the Internal Market, SEC (1988) 1148 final (Sept. 14, 1988) (from the mid-1970s, the separation between the economic goal, which led the EU, and the social purpose, which was largely reserved for state legislation, was gradually abandoned. The latter began to be seen as a complementary goal to the economic goal and even as a supportive source of economic growth. "It will provide the Community with the means to achieve greater economic growth and the instruments to master its future. Through greater efficiency of the machinery of production and a strengthening of the Community . . . .The social dimension of the internal market is a fundamental component of this project."); Single European Act, 1986 O.J. (L 169) 7 [hereinafter: SEA] (adopted in 1986 and amending parts of the Rome Treaty in order to create a more stable internal market).

36 Convention for the Protection of Human Rights and Fundamental Freedom, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

later referred to by the Lisbon Treaty as a normative source of EU human rights, reinforces the status of fundamental principles and rights in labor law: freedom of association, prohibition of slavery, privacy, freedom of religion and expression in the workplace.[37] The second source is the European Social Charter,[38] which provides protection for basic rights in labor law, including the right to work and the right to collective action. Since the 1970s, the separation of the initial economic goals of the EU from social objectives, which were reserved for state legislation, gradually subsided. Social matters began to be seen as complementary to the economic goal at large, and even as contributions to economic growth.[39]

This legislative perspective on the development of EU labor law presents an ideal combination of the agreed upon legal instruments through which the EU may directly and indirectly exercise influence on the various normative frameworks within the Member States.[40] The European Court of Justice, as the judicial branch of the EU, acts as the gatekeeper for the development of the social aspect of European integration.[41] For example, in a matter brought before the CJEU in 1996[42] that received considerable local and global attention, the court adopted a substantially pro-worker approach regarding the interpretation of the EU directive on working hours.[43] This judgment

[37] *Id.* at art. 4, 8–11. *See also* Alston, *supra* note 35; Rodgers, *The Interpretation of Article 6 ECHR and Access to Justice for Public Employees*, *supra* note 35; Rodgers, *Labour Law and Employment Policy in the EU: Conflict or Consensus?*, *supra* note 35.

[38] SEC (1988) 1148 final, *supra* note 35, at 61.

[39] SEA, *supra* note 35 (which was adopted in 1986, continued to enhance social rights status by amending parts of the Rome Charter to create a more stable internal market); European Community Charter of Fundamental Social Rights of Workers, *supra* note 35 (continued to enhance social rights status).

[40] Barnard, *supra* note 13, at 216-17; Giubboni, *supra* note 11.

[41] Case C-284/83, Dansk v. Nielsen, 1985 E.C.R. 553; GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOR LAW 43-45 (2016) (Davidov presents new, social-psychological perspectives).

[42] Case C-84/94, U.K. v. Council of the European Union, 1996 E.C.R. I-5755.

[43] Council Directive 93/104, 1993 O.J. (L 307) 18; Nowak, *supra* note 6, at 4; Harald Hannerz & Helle Soll-Johanning, *Working Hours and All-Cause Mortality in Relation to the EU Working Time Directive: A Danish Cohort Study*, 28 EUR. J. PUB. HEALTH 810 (2018); INT'L LAB. OFF., GENERAL SURVEY CONCERNING WORKING-TIME INSTRUMENTS—ENSURING DECENT WORKING TIME FOR THE FUTURE, 1, 4 (2018), https://www.ilo.org/ilc/ILCSessions/previous-sessions/107/reports/reports-to-the-conference/WCMS_618485/lang--en/index.htm. *See also* Barnard, *supra* note 13 (this move made it easier to mix economic aspects with social aspects and examine every legal aspect of the

indicates further integration of economic factors with social factors, allowing for an additional legal tool for the examination of commercial employment arrangements.[44] An additional indicator of the increasing protection of social rights in EU labor law is the Maastricht Treaty[45] which, though lacking specific clauses on labor law, allows for the uniform legislation and standardization of labor law between countries. The Maastricht Treaty went into effect in November 1993 and finalized the shift towards a more holistic legal system by enshrining human rights already recognized by a plethora of historical agreements between the people of Europe.[46]

The EU's role in labor and social policy was further expanded in 1997 with the adoption of the Amsterdam Convention.[47] This convention provided a system for the coordination and supervision of national employment policies[48] so as to promote certain policies on

occupational regulation with additional tools); ALEXANDER SCHELLINGER, EU LABOR MARKET POLICY: IDEAS, THOUGHT COMMUNIITIES AND POLICY CHANGE 58 (2016) (Schellinger examines the development of a pro-liberal approach and the impact of economic efficiency on labor law issues); Simon Deakin & Frank Wilkinson, *Rights vs Efficiency? The Economic Case for Transnational Labour Standards*, 23 INDUS. L.J. 289, 293–94 (1994).

44 The Treaty on European Union, 2012 O.J. (C 326) 13 [hereinafter Maastricht Treaty]. *See also* Manfred E. Striet & Werner Mussler, *The Economic Constitution of the European Community: From "Rome" to "Maastricht"*, 1 EUR. L.J. 5 (1995); JAMES A. CAPORASO, THE EUROPEAN UNION: DILEMMAS OF REGIONAL INTEGRATION 74 (George Lopez ed., 2018).

45 Maastricht Treaty, *supra* note 44, at art. B ("The Union shall set itself the following objectives: - to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.").

46 *See id.* at art. F ("Union shall respect fundamental rights, as guaranteed by the traditions common to the Member States, as general principles of EU law.").

47 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) [hereinafter Treaty of Amsterdam].

48 *Id.* at art. 119 ("Member States and the Community shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets.").

the national level,[49] with a particular emphasis on social rights.[50] The Lisbon Treaty,[51] adopted in 2009, reflected the significant progress on social rights and workers' rights and made the European Social Charter a binding mandate.[52] As part of the EU's increasing attention to broader societal issues and the social aspect of European integration, the Union published a position paper in April 2017

49 *Id.* at art. 117 ("The Community and the Member States, having in mind fundamental social rights . . . , shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.").

50 *Id.* at art. 118c ("The Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to: employment; labour law and working conditions . . . social security . . . the right of association and collective bargaining between employers and workers.").

51 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306).

52 Veronica Papa, *The Dark Side of Fundamental Rights Adjudication? The Court, the Charter and the Asymmetric Interpretation of Fundamental Rights in the AMS Case and Beyond*, 6 EUR. LAB. L. J. 190, 210–11 (2015). Papa summarizes the discussion in this article about the Court's intervention in strengthening the social dimension of the ECHR. Papa also points to a number of reasons for this position being taken by the Court, including recognizing its role in protecting social rights and traditionally regulating relations between the Union and its member states. *See also* Treaty of Amsterdam art. 5a ("In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."). This trend is being channeled into the launch of a new strategy for 2020, based on economic policy coordination by Member States, aimed at increasing the potential for growth, employment, and competitiveness. *See* EUROPEAN COMMISSION, EUROPE 2020 INTEGRATED GUIDELINES FOR THE ECONOMIC AND EMPLOYMENT POLICIES OF THE MEMBER STATES (2010), http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf [hereinafter EUR. COMM'N, EUROPE 2020 INTEGRATED GUIDELINES] (Guideline no. 7: "Member States should integrate the flexicurity principles endorsed by the European Council into their labour market policies and apply them, making full use of European Social Fund support with a view to increasing labour market participation and combating segmentation and inactivity, gender inequality, whilst reducing structural unemployment."). This European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection, and welfare. The Charter lays specific emphasis on the protection of vulnerable persons such as elderly people, children, people with disabilities, and migrants. It requires that enjoyment of the abovementioned rights be guaranteed without discrimination.

summarizing the foundational issues regarding social rights, which was then adopted by Parliament in November 2017.[53]

Alongside the adoption of an explicitly neo-liberal perspective, the integration of labor law and society in the EU reflects strategic coordination on the state level aimed at increasing the potential for growth, business and competition, with an emphasis on social issues such as gender equality, equal opportunity and eradication of poverty,[54] beyond the adoption of obligatory legislation.[55] The labor law in the EU developed beyond the written words of its existing treaties in lieu of the need to practically coordinate legal procedures regarding inter-European transactions, freedom of movement for workers, and the need to protect workers' rights and their families across different countries.[56] Allowing for the complete regulatory autonomy for member states in labor law was justified in the early days of the Union for economic reasons. As time progressed, and economic and social interests began to converge, minimal standards

53 Proposal for an Interinstitutional Proclamation Endorsing the European Pillar of Social Rights, COM (2017) 251 final (Oct. 20, 2017), https://ec.europa.eu/commission/sites/beta-political/files/proclamation-pillar_en.pdf.

54 *See* EUR. COMM'N, EUROPE 2020 INTEGRATED GUIDELINES, *supra* note 52, at 22 (Guideline no. 10: "Member States' efforts to reduce poverty should be aimed at promoting full participation in society and economy and extending employment opportunities, ... Efforts should also concentrate on ensuring equal opportunities, including through access to affordable, sustainable and high quality services and public services . . . and in particular health care."). Regarding the challenge of preserving these rights for achieving consequential improvement, *see* Gerard George et al., *Understanding and Tackling Societal Grand Challenges Through Management Research*, 59 ACAD. MANAG. J. 1880 (2016).

55 *Commission Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century*, COM (2006) 708 final (Mar. 12, 2007), http://ec.europa.eu/employment_social/labour_law/answers/documents/4_93_en.pdf. On the challenges of Labor Law and the labor market in the EU and the emphasis on shaping modern policies in the future, *see id.* at 7–9. *See also* Jeremias Prassl, *Future Directions in EU Labour Law*, 7 EUR. LAB. L. J. 323, 325-30 (2016) (discussing the design, permutations and directions of Labor Law).

56 Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 104, 108-09 (2006). For various rationale underlying integration in the EU community, *see* Paul Craig, *Development of the EU*, *in* EUROPEAN UNION LAW 9, 31 (Catherine Bernard & Steve Peers eds., 2014). Regarding the movement of workers in the EU, *see* Susanne K. Schmidt, Michael Blauberger & Dorte Sindbjerg Martinsen, *Free Movement and Equal Treatment in an Unequal Union*, 25 J. EUR. PUB. POL'Y 1391, 1391–93 (2018).

of protection were put in place, and the member states were free to extend the scope of rights beyond the minimal standard required.[57]

Thus, the constitutional elements of labor law in the EU were enshrined at a national level and protected from the opposing influences of other member states. European labor laws promised growth, improvement and efficiency, while expanding the list of protections on the national level. Over the years, the economy has become increasingly global and international, and the interdependence between member states has heightened the importance of labor law. To cope with the challenges of the market, the EU developed a system of labor laws and employment standards which, together with rulings of the European courts, has significantly impacted labor practices across member states. Local law became subject to the European Court's review of domestic labor laws in relation to the protection of fundamental freedoms, as opposed to earlier complete legislative autonomy.[58]

European labor law is a legal field that requires, and indeed offers, a coherent and consistent examination of economic and social needs, while preserving the nature of the member states' distinct laws. A large part of this legal field is regulated by guidelines whose normative bounds enable a degree of flexibility in domestic legislation, with the purpose, *inter alia*, to establish a minimal set of labor rights,[59] as can be found for example in the protective labor law

57 Catherine Barnard, *Fifty Years of Avoiding Social Dumping? The EU's Economic and Not so Economic Constitution*, *in* 50 YEARS OF THE EUROPEAN TREATIES: LOOKING BACK AND THINKING FORWARD 314 (Michael Dougan & Samantha Currie eds., 2009); Kilpatrick, *supra* note 33, at 69. Freedom is expressed not only in the scope of rights but also in the way they are anchored. For example, basic rights can be anchored in protective labor law or collective agreements.

58 *See* Barnard, *EU Employment Law and the European Social Model*, *supra* note 13. Barnard points to a deep connection between labor law and politics (and especially its industrial aspect). She believes that the political factor is an important part in shaping labor law policy. For more on the protection of social rights from political interference, *see* Syrpis, *The EU's Role in Labour Law*, *supra* note 33, at 21, 29.

59 Maastricht Treaty art. 288, states that a directive binds States in general with direct applicability to Member States in the EU community and it aims to determine a minimum set of rights. For more on the adoption of social doctrine, *see* CATHERINE BARNARD, EU EMPLOYMENT LAW 61 (4th ed. 2012). Protecting these issues is similar to the protective labor law legislation in Israeli Labor Law, in the same way that EU law and its directives seek to create the same law and minimum standard of rights. Maintaining them requires uniformity in the application and interpretation of the directives throughout the community. One way is the use of Article 267 of the EEC Treaty which states that the European Court has jurisdiction to hear, inter alia, a referral from state courts for a preliminary ruling. *See, e.g.*, THE FUTURE OF THE

in Israel.[60] As opposed to European law, which forms a consistently updated body of legislation,[61] Israeli labor law seems to be frozen in time.[62] Judicial review appears to be the only tool for adapting the law in the face of developing social realities, specifically around employment. It should be noted that this study does not seek to evaluate whether EU law is the best influence on labor laws in Israel, as compared to other foreign jurisprudence, such as that of the United States, England, Germany or Canada. Rather, our focus is on the manner in which the National Labor Court and the Supreme Court make use of European legislation as they shape Israeli labor law and adapt it to a modern challenge.

Before our main analysis, we would like to establish that the use of comparative law in Israel, as we will apply to the field of labor law, is a common practice.[63] Foreign legal systems have always served as a basis for legal opinions, especially in times of contentious political or economic circumstances.[64] Historically, comparative law has been a major component in the development of Israeli jurisprudence since

JUDICIAL SYSTEM OF THE EUROPEAN UNION 5 (Alan Dashwood & Angus C. Johnston, eds., 1st ed. 2001). *See generally* ROŞU, *supra* note 30; Davis, Bogg & Costello, *The Role of the Court of Justice in Labour Law*, *supra* note 30.

60 For the normative status of the protective labor law in Israeli Labor Law, *see* Sharon Rabin Margaliot, *Behavioral Explanations to Labor and Employment Law*, 3 MISHPAT VEASAKIM 123, 131 (2005) (Isr.).

61 Ingeborg Tömmel, *Policy-Making and Governance in the European Union's Multilevel System*, *in* EUROPEAN UNION GOVERNANCE AND POLICY MAKING: A CANADIAN PERSPECTIVE 83, 87 (Emmanuel Brunet-Jailly, Achim Hurrelmann & Amy Verdun eds., 2018).

62 Israeli labor law lacks an important element: the relevance of the legal system to the existing social, economic, and legal realities, as part of Legal Realism approach. For further discussion on the need and responsibility of the law to promote "social engineering," *see* Ofer Sitbon, *First Act*, 1 MA'ASEI MISHPAT 11 (2008).

63 Barak-Erez, *Comparative Law as a Practice*, *supra* note 1.

64 Robert Leckey, *Review of Comparative Law*, 26 SOC. & LEGAL STUD. 3, 9–12 (2017).

the days of Ottoman and British rule.[65] We will now elaborate on the influence of foreign law upon the development of labor law in Israel.[66]

Similar to the minimal rights set by EU law, the protective legislation in Israeli labor law was enacted in the 1950s to create a safety net for the worker community.[67] International treaties concerning labor practices as well as various political arrangements served as a basis for the Israeli safety net. By approving and directly assimilating relevant international treaties, the State of Israel officially became part of a wider legal community. For example, the Hours of Work and Rest Law was formulated with full consideration of international treaties[68] a proposed Annual Vacation Bill included provisions from an international treaty as adopted by the International Labor Organization,[69] a proposed Wage Protection Bill offered a variety of new provisions based on the International Labor

65 *See* Law and Administration Ordinance, Law No.1 of 5708–1948, § 11, (English translation available at http://www.knesset.gov.il/review/data/eng/law/kns0_govt-justice_eng.pdf). In addition, the "Founding Fathers" of Israeli jurists who acquired their legal education outside of Israel contributed to the design of Israeli legal system, which is a mixed jurisdiction and is exposed to multicultural influences. *See* Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 ISR. L. REV. 192, 192-95 (1975). For example, the long-term impact of English law can be seen on Israeli law. The turning to English law derived first from a statutory order, by adherence to Palestine Order-in-Council, 1922-1947, art. 46. Later, Israeli law turned to many states and used foreign law rulings and legislation that assisted the legislature and especially the courts in interpreting national law as part of its interpretation or completion of existing laws and regulations, and creation ex nihilo of legal norms. *See* Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 COLUM. J. EUR. L. 477 (2009).

66 Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 214, 247-49, 269 (2008).

67 Protecting these issues is similar to the protective labor law legislation in Israeli labor law, in the same way that EU law and its directives are seek to create the same law and minimum standard of rights. *See supra* note 59.

68 Hours of Work and Rest Law, 5711–47, LSI No. 47 (Isr.). The international treaties mentioned in § 10 of the Explanation of the Bill and are: Hours of Work (Industry) Convention, I.L.O (Washington) 1919, limiting the hours of work in Industrial to eight hours in a day and forty-eight in a week; Hours of Work (Commerce and Offices) Convention, I.L.O. (Geneva) 1930; Weekly Rest (Industry) Convention, I.L.O. (Geneva) 1930.

69 Annual Leave Law, 5711-1951, SH No. 36148 (1951) (Isr.). The bill is based on the Holidays with Pay Convention, ILO (Geneva) 1936.

Convention,[70] and also the proposed Collective Agreements Law.[71] The Israeli legislature has stagnated when it comes to labor law, which has been "frozen" from the early days of Israel, when a great deal of pride was felt in providing such strong protections for workers' rights—even before the public discourse on human rights and other social issues. This chapter examines the development of labor law in Israel, specifically the role played by the courts in adapting outdated legislation to modern societal needs. We will show how the courts have attempted to meet the standards of the international community by adopting rules of law from various countries as a legitimate result of legal interpretation.

The State of Israel has not yet succeeded in formulating an orderly system of laws, especially in the field of labor law. Today, legal norms have different normative levels of priority, which at times contradict each other, and in some cases even fail to adequately provide a way to resolve questions presented before the courts. At the institutional level, labor law in Israel is primarily regulated by court rulings and judge-made law, thereby making it difficult to formulate a uniform policy.[72] The role of the judiciary as a central actor among various market forces is evident. In effect, the courts shape and influence the nature of employment relationships, drawing from a variety of arrangements making up Israeli labor law.[73] The courts then find themselves involved in extensive judicial legislation and bear the burden of developing and shaping the normative system of labor law in Israel. The question, "who is a worker?," which is at the heart of the

70 Wage Protection Law, 5718-1958, LSI 112 (Isr.). The law is enacted to allow the ratification of an international labor convention, Protection of Wages Convention, ILO (Geneva) 1949.

71 Collective Agreements Law, 5715-1955, SH 221 63 (Isr.), https://www.nevo.co.il/Law_word/law14/LAW-0221.pdf (directly influenced by the Freedom of Association and Protection of the Right to Organise Convention, ILO (San Francisco) 1948).

72 The Israeli labor law is known to consist of three pillars, which are added to the contractual relationship between the employee and the employer. The three pillars are: (1) legislation and regulations as part of direct intervention of the legislature, including protective labor law that forms the basis of the system of rights and obligations in labor relations as a cogent basis; (2) collective agreements as a result of collective negotiating between employees and employers or employers' organizations; (3) and extension orders of the working world that constitute secondary legislation and most often apply rights from the collective agreement to workers who do not have such an agreement at their place of work. *See* Guy Mundlak, *The Israeli System of Labor Law: Sources and Form*, 37 COMP. LAB. L. & POL'Y J. 159, 165-70 (2009).

73 *See* Guy Mundlak, *supra* note 72, at 177.

labor law, is an example of an issue the legislator left for the courts to develop, without any definition in the law. The courts authored the employee's standard "Bill of Rights" and dictate that the rules of the labor law game are part of a greater trend of judicial activism stemming from the vacuum created by the legislature.[74]

The main criticism of Israeli labor law, especially legislation, is its lack of relevance to the reality faced by the modern workforce, as affected by globalized economic, political and cultural processes. Alongside globalization, the labor market is increasingly flexible, changing and rendering obsolete old patterns we have become accustomed to in labor relations and collective arrangements.[75]

One of the components of the neoliberal ideology in Israel was the need to reduce the power labor unions. Following this approach allowed workers to be transferred to personal contract, which would ensure greater social protections, and would also benefit the promotion of growth, as a primary socio-economic goal.[76] This ideology, among other factors, led to the evolution of the labor market into one characterized by workers with limited rights, temporary and partial jobs, and new employment patterns.[77] The courts were forced to actively regulate disputes arising from market trends which existing legislative frameworks inadequately address. Importing new norms and rules of conduct from various legal sources in the absence of

74 Ruth Ben-Israel, *Resolving Labor Disputes in the Court System – An Israeli Situation Report – Preliminary Reflections*, 1 SHNATON MISHPAT AVODA [ISR. SOC'Y LAB. L. & SOC. SECURITY Y.B.] 7 (1990) (Isr.).

75 Stone, *supra* note 56. *See* Kerry Rittich & Guy Mundlak, *The Challenge to Comparative Labor Law in a Globalized Era*, *in* COMPARATIVE LABOR LAW HANDBOOK 80 (Matthew W. Finkin & Guy Mundlak eds., 2015).

76 Gregor Gall, Richard Hurd & Adrian Wilkinson, *Labour Unionism and Neo-liberalism*, *in* THE INTERNATIONAL HANDBOOK OF LABOUR UNIONS: RESPONSES TO NEO-LIBERALISM 1, 2–8 (2011); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 UNIV. TORONTO L.J. 357, 376–379 (2002) [hereinafter Davidov, *The Three Axes*]; Guy Mundlak, *The Power of Purpose: Comments on A Purposive Approach to Labour Law*, 16 JERUSALEM REV. LEGAL STUD. 40, 45 (2017). Davidov and Mundlak describe the balance needed in judging between the new foundations of labor law—on the one hand the economic aspect, and on the other hand the social aspect.

77 For the transformation of working relationships into flexible relationships, *see* LILACH LURIE, EMPLOYMENT AND SOCIAL SECURITY LAWS IN THE TWENTY-FIRST CENTURY 51–67 (2013). For flextime in the context of outsourcing, *see* Ruth Ben-Israel, *Employment of Workers by Employment Agencies: Bargaining Unit and Representativeness Questions First Thoughts Following the Amendment to the Law*, 2 MAZNEI MISHPAT 9, 10–11 (2002). *See also* Thomas Bailey & Roger Waldinger, *Primary, Secondary, and Enclave Labor Markets: A Training Systems Approach*, 56 AM. SOC. REV. 432, 435-36 (1991).

adequate legislative solutions is a predominant characteristic of the Israeli judicial system and judge-made law, which precedes the legislature and faces the need for innovative solutions.[78] Given these circumstances, the labor courts in Israel play a central role in direct regulation of the Israeli labor market.[79]

The judicial bench of an Israeli labor court incorporates public representatives, in addition to judges, throughout all stages of the judicial decision. This endows the labor courts with a unique status and authority to allow for the development of regulatory case law.[80] As decision makers on the application of labor law to modern challenges, Israeli labor courts are forced to deal with unprecedented legal questions, and judges may turn to remedies and norms from international and comparative law as a means to adjudication. In the post-globalization era, legal opinions referring to foreign arrangements can be seen as an expression of an ongoing international judicial dialogue between the various judicial systems courts.[81]

The following chapters examine labor court judgments in which judges were required to import foreign law in order to solve unprecedented legal labor conflicts. Following an analysis of the case law, it appears that in the area of labor law, the starting point for the use of foreign law, and in our case EU law, derives from the following

78 National Labor Court 3–9654/ Machleket Habnya Shel Hakibbutz Ha'artzi Ba'am v. Abedel Rachman [Construction Department of Kibbutz Artzi Ltd. – Abdel Rahman], PD 29 151, 161 (1995).

79 The basic model of labor relations was proposed by economist John Dunlop, who described the labor relations as an interactive system between the relevant actors, on the basis of certain conditions, among which he emphasized technological development, market structure, and power relations in society. The product of this system is more or less formal norms that regulate the relationship between the parties and the system. Despite criticism of Dunlop's model over the years and even the systemic approach at large, this model remains the main model in the analysis of labor relations and is at least effective in presenting the system and its changes. This Dunlop model can be seen as the basis for the growth of labor law through the judgments, where social or other legal norms are no longer able to stabilize the social system and the parties turn to the courts as legal agents. Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. L. 117, 124-26, 130 (1996); Bruce E. Kaufman, *Reflections on Six Decades in Industrial Relations: An Interview with John Dunlop*, 55 INDUS. & LAB. REL. REV. 324, 345-47 (2002).

80 Labor Court Law, 5729–1969, §§ 32–33, 553 LSI 70 (1969) (as amended) (Isr.).

81 *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 4-6 (2004) (introducing the Global Government Networks Theory ("GGNT")). *See also* Pascal Lamy, *Global Governance: From Theory to Practice*, 15 J. INT'L ECON. LAW 721, 721–28 (2012).

two objectives: first, to strengthen the local law[82] and second, to promote the interests which the local law seeks to protect.[83] Applying Israeli law with the direction of foreign models and rules provides courts with the flexibility required to answer unprecedented legal questions. The judge, by nature of the law, does not usually investigate the history or circumstances of foreign law, and as such, reliance on comparative law is only partial. Due to these issues, the influence of foreign law on legal systems has recently become one of the most examined subjects in legal scholarship. Although the judge must decide according to local law, the Israeli judicial system has always allowed for and even promoted the consideration of foreign laws, thus shaping the Israeli legal system as a mixed system.[84] To our approach, the justification for the use of foreign sources has been and continues to be the scarcity of domestic case law and legislation on various matters. The legislature and the courts are both responsible to reexamining traditional legal tests and adapting them to modern reality. However, applying foreign sources when domestic legislative arrangements cannot solve the conflict at hand allows the courts to develop rules that both increase their institutional power and provide grounds for the importance of establishing labor law.

The developing needs surrounding occupational decentralization, technology, and equality, together with trends of free movement of workers without geographical limitations, create a basis for the redefinition of labor law such that it may suit modern times. It follows that the adoption of a foreign legal rule may provide an adequate legal

82 This correspondence with EU law, which is done to strengthen local law, shows in our opinion a dialogue and cross-fertilization between legal systems, while keeping abreast of the case law and normative provisions on issues that arise in Israeli law. Calabresi has developed a typology of citations and references from a foreign law by the court. He refers to the "strengthening" of local law by appealing to a foreign law as follows: "in which the Court looks to foreign law and practice to demonstrate that its opinions are logical and are supported by reason." *See* Stephen A. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 864 (2005).

83 Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 499 (2005); PHIL SYRPIS, EU INTERVENTION IN DOMESTIC LABOUR LAW 3–10 (2007). Syrpis discusses in detail the intention of using EU Labor Law into domestic state law in EU countries, and the rationalizations for allowing it.

84 Rabillo & Lerner, *supra* note 1, at 90–97. The authors first refer to the place of the legal system in Israel as a mixed jurisdiction in the shadow of comparative law effects, and also indicate the ground that allowed the application for comparative law, including legal education in European countries.

solution in disputes for which domestic law fails to answer. These situations allow the courts to respond to the effects of global processes on local law and to contribute to the establishment of an international legal language.[85] One of the arguments supporting the use of foreign sources in case law is the natural convergence between similar legal systems, in light of harmonization attempts and international global characteristics.[86] The similarity of challenges brought before the courts, the development of labor law in Israel and the EU law on a similar timeline, and the fact that the EU is working on the regulation of norms between diverse cultural groups strengthen the status of EU law as a proper comparative source of labor law in Israel and relevant to the local social mix. A stagnant legal system that is disconnected from reality and ceases to be a tool in the hands of society and the state, requires reconsideration of the prevailing law.[87]

This Chapter addressed the distinguishing characteristics of labor law's development in both the EU and Israel, followed by the inclination of Israeli labor courts to use foreign legal systems as interpretive sources. The following Chapter reviews the use of foreign sources in cases adjudicated by the Israeli labor courts, specifically the application of legal rules which are rooted in foreign legal systems. Later Chapters will show how EU law has been found by Israeli courts to be an up-to-date legal source with respect to labor law and the protection of social rights, as a robust and well-developed legal source which would serve us well to learn from.

III. NOTABLE ELEMENTS OF EUROPEAN LABOR LAW IN ISRAEL

In the context of labor law, the EU's progress addresses the challenges of the modern labor market to the extent that, as this article

85 For a discussion of whether Labor Law is in place of international legal discourse, comparing it to the American model, *see* Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 281-91 (2001). One of the immediate questions that arises in this context is whether national courts have the freedom to apply foreign legal sources and thus contribute to the establishment of a global legal outlook. *See* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132–39 (2005) (responding to this question in the context of United States courts). *See also* Benvenisti, *supra* note 66.

86 PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD (1st ed. 1995). For similar legal systems that allow export and import between them, *see* at 3; for harmonization of law, *see* at 379.

87 TRADE UNIONS AND MIGRANT WORKERS: NEW CONTEXTS AND CHALLENGES IN EUROPE (Stefania Marino, Judith Roosblad & Rinus Penninx eds., 2017).

will show, in some key cases, the Israeli labor law courts see EU law as complementary to domestic legislation. Many "new" areas of labor law in Israel contain normative questions addressed by European law, by court ruling or even by legislation, and as such Israeli judges make regular use of the EU law in their rulings on labor disputes.[88] Exploring European law enables us to study and even adopt solutions to these challenging legal issues, all while allowing for adaptation to the unique nature of Israel's legal system. Israeli society, as a heterogeneous mosaic, routinely challenges the courts to find creative solutions to questions stemming from social diversity in Israel. Similarly, the EU may also be compared to a mosaic, one of established and new democracies, representing cultural identities and needs in conflict with each other, and which history has struggled to reconcile. The European Court has a central role in crafting unified standards for the Member States, a role which the EU courts carry out by settling cross-border disputes and providing a way to bring unifying guidelines into practice within each diverse legal system.[89] These guidelines have advantages beyond the borders of the EU, and should provide guidance to countries that may not be part of the EU but nevertheless share a common set of values. As Justice Rabinowitz said in the **Elbit** case:[90] "Even in the position of European law we can find clear support for our interpretation of this case ... [European law] may be seen as guidelines… and the interpretation of these guidelines by the Court of the European Community should serve as a guide for the proper interpretation of the question in dispute, in harmony with the European Labor Law."[91] In this judgment, Justice Rabinowitz made

88 *See* Tali Isakov Inbar v. The State of Israel – The Supervisor of the Women's Employment Law (Feb. 8, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter the Isakov case]. This case, for the first time, required the labor law courts in Israel to adjudicate the issue of privacy in technology repositories in the workplace. The need for deliberation in a new field and the fact that EU law was already asked to give a determination on this topic, led the court to be based on EU law, and specifically on a directive published two years before the date of the court's decision. For more information, *see* extensively Chapter III(H).

89 Jukka Snell, *The Internal Market and the Philosophies of Market Integration*, *in* EUROPEAN UNION LAW 310 (Catherine Barnard & Steve Peers eds., 2d ed. 2017);Davidov, *Special Issue*, *supra* note 1.

90 National Labor Court 68–09 The New General Employee Histadrut Trade Union of Electrical, Metal and Electronics Workers v. Elbit Optoelectronics Systems Ltd. (Nov. 29, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter the Elbit case].

91 *Id.* at ¶ 45 (Rabinowitz, J.). The quote is in accordance with the original source. The use of the term "European Community" is in accordance with the original source, although it is not suitable for 2012 in which the ruling was given.

extensive use of EU law to support domestic legislation and, in fact, found it appropriate to discuss the relevance of foreign law to the judicial process in Israel.[92] The Judge's words were not only intended to strengthen the appeal of EU law as such, but to strengthen its perceived suitability for assimilation into Israeli local law. Justice Rabinowitz continues: "Such an interpretation is consistent with the provisions of the collective agreement, with the rulings of the regional courts, with the customary law in the EU and with international conventions, even if not explicitly adopted by Israel."[93]

The first time the National Labor Court of Israel cited European law was in 1978, in the **Lederman** case.[94] In this case, the legal question was whether a female "Elite" factory employee's salary should be equal to the male employees who do the same work at the same ranking. The court turned to foreign legal sources, including European law, as a means of interpreting Israeli legislation. The court ruled that the purpose behind Israeli law is not unique to Israel, and the European legislation presents a way to achieve the same purpose.[95] Following this judgment, labor law courts continued to incorporate sources from the EU's cases into their rulings. Some legal opinions even devoted complete sections to discussions on European law. An example of this is the more than 6-page long review of the European Court by Deputy President Or of the Supreme Court in the **Israel Aerospace Industry** case.[96] According to him, in the absence of a "direct and explicit answer to the disputed question" in the Israeli Law, the European law proposes a legislative regulation addressing the matter, which the Supreme Court can address to.[97]

Before further discussion on the database at the heart of this study through the examination of eight core issues, we would like to present some of the key judgments given in the higher Courts of Labor Law. The issues adjudicated indicate the suitability of EU labor law as a source of comparative interpretation which can promote and strengthen labor law in Israel. The judgments, collectively, address a number of key areas of labor law in Israel: the definition of the term *employee*, collective labor law and the right to strike, change in

92 *Id.* at ¶ 52 (Rabinowitz, J.).

93 *Id.* at ¶ 13 (Rabinowitz, J.).

94 Lederman case, *supra* note 23.

95 *Id.* at 264.

96 HCJ 8111/96 New Federation of Workers v. Israel Aerospace Industries Ltd. 58(6) IsrSC 481 (2004) [hereinafter The Israel Aerospace Industry case].

97 *Id.* at 511.

employer practices, work hours and vacation, the principle of equality regarding the LGBTQ community, minority representation and diversity, retirement age and workplace privacy. The comprehensive analysis of the legal opinions we reviewed cite a variety of references to EU law. Moreover, due to the progress of legislation and case law in the EU, among other reasons, judges sometimes devote entire sections of their rulings to the review of European law and its comparison to Israeli law.[98] In other cases, Supreme Court justices, when faced with significant and novel legal issues, look to other legal practices, including within the EU, while taking note that in certain cases, even European law has failed to provide a solution. This appeal to EU law sources is a "window into what happens across the sea."[99]

A. The Definition of "Employee"

The definition of labor relations, and the determination of a worker's status, developed over the years primarily in case law, as legislation assumed that judges and professional representatives were better equipped than the legislature to handle the cases argued before the courts.[100] Consequently, courts extended the use of the interpretive bounds of "employee" status to adapt the applicable labor law to the changing labor market, and to include groups of people who had not previously been considered employees. As ruled in **Sarusi**,[101] "Jurisprudence develops legal concepts. Each tradition has its own

98 *See, e.g.*, the comprehensive review of EU Law in National Labor Court 4–1/54 General Organization of Workers in Israel v. Ramth Ltd. [1996] PD 29(1) 601 (Isr.), And the discussion of this review later in Chapter III(C); s*ee also* the Israel Aerospace Industry case, *supra* note 96, and the discussion of this review *infra*.

99 *See, e.g.*, HCJ 721/94 El-Al Israel Airlines Ltd. v. Danilowitz, 48(5) IsrSC 749 (1994) (Isr.); The Isakov case, *supra* note 88. These two judgments are discussed at length in Chapter III(E) and chapter III(H), respectively.

100 Isabel Shutes, *Work-related Conditionality and the Access to Social Benefits of National Citizens, EU and Non-EU Citizens*, 45 J. SOC. POL'Y 691, 696-97 (2016); This definition is of main importance for the purpose of examining the application of protective labor law that applies only when employment relations exist, and for examining the application of additional laws. In the field of social security, taxation and even intellectual property, *see, e.g.*, Menachem Goldberg, *"Employee" – "Employer": Current Position*, 17 IYUNEI MISHPAT 19, 21-2 (1992) (Isr.). For a global perspective, including the EU, addressing the question of who is an "Employee" and for the definition of "labor relations," *see* Creighton & McCrystal, *supra* note 30; Jeremias Prassl, *Who is a Worker?*, *supra* note 30; JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER, *supra* note 30, at 195-220. For the European aspect specifically, *see* COUNTOURIS, *supra* note 30.

101 HCJ AD 4601/95 Sarusi v National Labor Court, 52(4) IsrSC 817 (1998) (Isr.) [hereinafter the Sarusi case].

legal concepts and jurisprudence. These [concepts have] great importance. They sum up cumulative legal experience. The jurist need not commence his analysis as though he is the first. He may, and should, continue where his predecessors have finished."[102] The determination that a person has the legal status of an "employee" is a matter of substance, independent of the parties' subjective consent, even if such consent was expressly provided for in a contract.[103] In this state of affairs, obtaining employee status and the recognition of employment relations are prerequisites for the applicability of the labor law. Most protective legislation and various legal arrangements in Israel exclusively apply to those legally considered "employees," without providing any clear definition for who an "employee" is.[104] Therefore, the first hurdle a plaintiff must deal with in court is the requirement to prove the existence of employment relations with the defendant.[105]

The definition of "employee" status has been determined by the labor courts over the years, since the establishment of the Israeli judicial system, by importing principles and interpretations from

102 *Id.* at 827.

103 National Labor Court 3–27/31, Municipality of Netanya v. Berger, PD 3 177 (1971) (Isr.) [hereinafter the Municipality of Netanya case]. For more on the meaning of contractual labor relations, *see* Jeremias Prassl & Einat Albin, *Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment*, *in* THE CONTRACT OF EMPLOYMENT 341 (Mark Freedland et al., eds., 2016).

104 In comparison to Israel, the United States' definition for who is a worker is statutory in federal law ("FLSA"). However, it should be noted to the Labor Courts' credit that the tests that have become widely accepted in Israel for determining who is a "worker" are far more in line with the Purposive approach than many other legal systems. In the 1940s, the United States stopped the Purposive revolution by adopting the "Economic Realities" test to identify if the worker was in circumstances that warrant protection. S*ee* 29 U.S.C. § 152(3) (2017) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.").

105 Goldberg, *supra* note 100, at 20–21. The preliminary question is for recognition of employee status, as opposed to independent contractor status, freelance worker, and others.

foreign law in light of lacking legislation and domestic precedent on the matter.[106] Over the years, Israeli courts have developed a series of tests to delineate the bunds of "employee" status. Initially, the courts assumed the term had a uniform universal meaning so as to ensure legal certainty,[107] and only later was this assumption replaced by a purposive test common to other jurisdictions, according to which the specific circumstances of each case must be examined against the objectives of the applicable law.[108] Using this test, Israeli labor courts adopted an intermediate labor relations category, as accepted in various countries, and granted partial labor and social rights even without first confirming the existence of working relations, and without granting employee status to the plaintiff.[109] As in many other areas of law, the courts gradually developed legal tests to assist in the judicial process of determining the existence or absence of employment status.[110]

In the **Agushevitz** case,[111] one of the first judgments between the establishment of the State of Israel and the legislation of the Labor Court Law 1969, Justice Silberg was asked to discuss the question, "Who is an employee?" Justice Silberg considered this "an interesting, new and complicated question," and found it imperative to convey "the correct meaning of the term 'employee' and the attribute, or attributes to determine whether the term applies."[112] To do so, the judge reviewed over a century of English case law, which itself

106 *Id.* at 25–30.

107 HCJ 5168/93 Mor v. The National Labor Court, 50(4) PD 628 (1996) (Isr.). *See also* the universal approach in the Sarusi case, *supra* note 101, at 825.

108 The Sarusi case, *supra* note 101, at 827, 843–44. *See also* Guy Davidov, *Who is a Worker?*, 34 INDUS. L.J. 57, 62-63, 70 (2005).

109 *See* Judge Adler's opinion in National Labor Court 300274/96 Tzadka v. The State of Israel - Army Radio (Oct. 16, 2001), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter the Tzadka case) (a dissenting opinion that became a majority opinion in later rulings) that a freelance worker is also entitled to certain rights reserved for the worker.

110 For a comparative review of the tests used in various legal systems, *see* Davidov, *The Three Axes*, *supra* note 76; LUISA CORAZZA & ORSOLA RAZZOLINI, COMPARATIVE LABOR LAW: WHO IS AN EMPLOYER? 132 (Matthew W. Finkin & Guy Mundlak eds., 2015). For the development of the concept of "worker" in EU law, *see* Nicola Kountouris, *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, 47 INDUS. L.J. 192 (2018). In previous writing, Kountouris, along with other writers, examined three different theoretical approaches for defining employment relations and established an answer to the question "who is a worker."

111 C.A. 47/48 Agushevitz v. Futerman 5 PD 4 (1951) (Isr.) (hereinafter the Agushevitz case).

112 *Id.* at 6.

defined the term "employee" due to the absence of a statutory definition.[113] Justice Cheshin, agreed with Judge Silberg, while pointing out that since the time of the British Mandate, the definition was based on English law. Already then, court decisions were based on English law.[114] Following the **Agushevitz** case, labor courts found certain circumstances appropriate for reliance upon foreign judgments, particularly from the English courts, for the purpose of distinguishing between an employee and a non-employee. Various tests were presented and adopted in Israeli case law, most critically the Integration Test,[115] examining the integration of employees in the workplace, which joins the Purposive Test.[116] Faced with legally challenging, new forms of employment, courts have re-interpreted and added to the definition of employee status for workers that fall somewhere between "employee" and "self-employed." The court continued to rely on foreign law as needed, for example the bench adopted the term "freelancer" from German law in 1973.[117] Unlike an "ordinary" employee, a freelancer takes part in the business without

113 *Id.* at 8. For examples from the English case law *see*, Underwood v. Perry & Son Ltd. [1922] 15 B.W.C.C. 131, 133 (Eng.).

114 *Id.* at 18.

115 The Municipality of Netanya case, *supra* note 103, at 190.

116 Guy Davidov & Brian Langille, *Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?*, *in* THE IDEA OF LABOUR LAW 1-10 (Guy Davidov, Brian Langille, eds., 2011).

117 National Labor Court 3–9/33 Israel Broadcasting Authority v. Sivan, PD 4 520 (1973) (Isr.).

forming an integral part of it.[118] In the 1973 **Tzadka** case,[119] the court adopted this "freelancer" status to deal with the uncommon employment patterns in the communications industry, for which traditional labor relations tests do not provide an applicable answer.[120]

A worker's status in a given workplace is variable, making it difficult to depict a "standard" worker. In recent years, as part of the general use of foreign law, Israeli labor courts have increasingly turned to EU law to answer the basic question regarding "employee status." The appellants in the **Ortal** case,[121] who were independent contractors, asked the National Labor Court to grant them the same rights granted to the employees of the respondent. The case considers the identification of the employer, by recognizing the appellants as employees of the respondent. Judge Davidov-Motola addressed whether the appellants could be granted employee rights independent of employment status. That is to say whether a worker may be granted labor rights in the absence of employment relations, or without any determination regarding the employment relationship. The judge sought to interpret the law in Israel using EU law, presenting the difficulties of exploitation of temporary workers employed by

118 For German case law, *see* MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY 116 (3d Rev'd ed. 2000). Regarding recognition of an employee status, the Israeli Labor Court has also assisted Australian law in two interesting rulings: first, a precedent ruling regarding a woman who engages in prostitution, by claiming recognition of an employee status for the purpose of receiving minimum wages and annual leave by authorization of protective labor law. Adopting a purposive approach in order to accept an employee status for escort girls led the court to use Australian case law that granted insurance rights to an escort girl who was harmed in her work. Second, in a ruling regarding recognition of a soldier in the IDF as a "worker" for the dismissal process, the ruling which was based of the purposive test stated that the soldier is not to be defined as an employee at the dismissal stage, but only as a "status holder," and that there is no employer–employee relationship. Here, too, the judges based their ruling on an old Australian precedent that serving in the Australian Defense Force does not render one a Civil Servant, whereby similarly serving in the Crown Armed Forces does not render one as a Civil Servant. *See* National Labor Court 3–180/56 Eli Ben Ami – Classa Institute v. Galitzenski, PD 31 389 (1998) (Isr.); C.A. 153/54 Vider v. The Attorney General, 10 PD 1246 (1956) (Isr.) and it's referral to the Australian court ruling *The Commonwealth v. Quince* (1943) 68 CLR 227 (Austl.).

119 *See* Tzadka case, *supra* note 109.

120 *Id.* at 644. There, the court creates the term semi-independent based on German law and refers to Professor Weiss (citing Manfred Weiss, *Employment Versus Self-Employment: The Search for a Demarcation Line in Germany*, 20 INDUS. L.J. 741 (1999)). Moreover, the court went so far as to adopt another status of a "fake self-employed freelancer," which is based on German Law as well.

121 National Labor Court 10-10-14274 Goldberg v. Ortal Human Resources Service (Nov. 14, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

outsourcing and other indirect transactions. She based her ruling upon EU directives for interpretation: "This trend is consistent with the 'equality approach' which has become a rising principle around the world. For example, under the EU directives, there must be equality of terms for those directly and indirectly employed, who perform the same job, regardless of the definition of labor relations."[122] We expect the courts to continue addressing EU law as a relevant foreign system in labor relations, both because of the tendency of the labor world to move towards flexible employment models requiring new paradigms and tests, and because of the special circumstances of the EU allowing labor movement and therefore dealing with layers of innovative employment configurations.[123]

B. Collective Labor Law and the Right to Strike

One of the unique features of labor law the fact that it concerns two levels of relationships: individual (between employee and employer) and collective (between labor unions and employers). Within collective labor relations, freedom of association and the fulfillment of common labor law goals motivate binding collective agreements.[124] The purpose of this freedom is to ensure a balance in power between employer and employee, who form a relationship inherently characterized by inequalities to the employee's disadvantage.[125] The right of association in labor law in Israel has been recognized as a fundamental right that formed the basis for the Collective Agreements Law 1957, which also recognizes derivative rights, such as the right of association, the right to negotiate

122 In paragraph 22 the judge mentions the following: Ronit Nadiv & Yuval Feldman, *Positive and Normative Aspects of Equality (or Inequality) in Triple Labor Relations in Israel*, 12 AVODA CHEVRA VEMISHPAT 153 (2010) (Isr.); Council Directive 99/70, 1999 O.J. (L 175) 43; Council Directive 97/81, 1998 O.J. (L 14) 9.

123 Susanne K. Schmidt, Michael Blauberger & Dorte Sindbjerg Martinsen, *Free Movement and Equal Treatment in an Unequal Union*, 25 J. EUR. PUB. POL'Y 1391, 1396 (2018); Martin Ruhs, *Free Movement in the European Union: National Institutions vs Common Policies?*, 55 INT'L MIGRATION 22 (2017).

124 THE ECONOMIC AND FINANCIAL CRISIS AND COLLECTIVE LABOUR LAW IN EUROPE (Niklas Bruun, Klaus Lörcher & Isabelle Schömann eds., 2014) part I; Alan Bogg & Keith D. Ewing, *Freedom of Association*, *in* COMPARATIVE LABOR LAW 296 (2015).

125 *See* HCJ 7029/95 New General Labor Union v. National Labor Court 51(2) PD 63 (1997) [hereinafter General Labor Union case] (for a discussion on the status of the freedom of association as a constitutional right).

employment terms and the freedom to strike.[126] Essentially, due to the natural power imbalance between employees and employers, the right of association reflects the employee's autonomy, freedom of speech and the protection of dignity. Work disputes form an integral part of labor relations and a great deal of effort is invested by the courts in finding effective solutions to resolve them.

Mironi found in his research that in a number of cases the labor courts turn to foreign countries' legal systems in order to rule on questions relating to collective employment agreements and the freedom of association.[127] Case law from the early 2000s indicate that European law influenced judicial review in Israel regarding these issues. An example is the **H&L** case, in which the employer refusing to negotiate terms for a collective employment agreement. The employees proceeded to declare a strike, in response to which H&L fired over thirty workers, both those on the negotiating committee and other workers who took part in the strike.[128] In his ruling, President Adler addresses several foreign legal sources, including European law. In addition to European Law, President Adler turned to Article 11 of the European Convention on Human Rights, which offers guidelines regarding employment termination for union members. These sources protect workers' rights to organize and strike, and even prohibit termination as a sanction against the exercise of these rights.[129]

This reference reinforced the court's decision to rejecting H&L' appeal, requiring the company to reinstate the employees who were fired from their jobs. Regarding to the right to unionize, which includes the right of a workers' union to negotiate on behalf of the employees for a collective agreement with the employer, President Adler turned to the European ruling in the **Gustafsson** case,[130] in

126 National Labor Court 57/05 New General Labor Federation v. Department of Transportation (Mar. 3, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

127 Mordehai Mironi, *Developments and Trends in Collective and Individual Labor Law 2010–2011*, 8 DIN UDVARIN 153, 155–56 (2004) (Isr.). ("The data indicate that the outline of labor relations in Israel is increasingly reminiscent of the picture of labor relations in most Western countries, where the collective model and collective labor law are in the process of diminishing and shrinking.") (translation by authors). For the characteristics of association and collective relations as distinct from those in EU law, *see* Mark Freedland & Nicola Kountouris, *Some Reflections on the 'Personal Scope' of Collective Labour Law*, 46 INDUS. L. J. 52 (2017).

128 CDA 1008/00 Horn & Lebobivtz Inc. v. New General Labor Federation (Jul. 23, 2000), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

129 *Id.* at section 10 of President Adler's ruling.

130 Gustafsson v. Sweden, 1996-II Eur. Ct. H.R. 637 (1996).

which the employer's claim that the right to associate did not include the right to negotiate with the workers' union representing the employees was rejected. Justice Adler referenced this precedent in the **Jerusalem Cinemateque** case,[131] in which an application for injunction was submitted, as part of a collective dispute, requesting that employees be prevented from taking steps to unionize or causing work disruptions. The court ruled that the right to organize includes the right of a union to negotiate with their employer, and further discussed the employer's obligation to conduct collective negotiations.[132] Another case concerns a collective dispute in which Discount Bank requested the issuance of injunctions against the workers' sanctions.[133] Deputy President Barak-Ussoskin, in a minority opinion, made use of EU law and referred to the main elements of the European Directive (which replaced minor amendments to European Directive 77/187)[134] and mentioned EU case law, particularly the EU ruling in the **Katsikas** case.[135]

Subsequently, the Israeli labor courts were required to interpret the nature of employer and employee unions. The Labor Dispute Resolution Law refers to an employer organization as someone who is authorized to represent an employer who is a party to a labor dispute.[136] However, the question remains as to how to define an employer organization? In the same way that the legislature is vague regarding employee status, here too the legislature refrained from providing a statutory definition, and the courts were left with the task of defining employer status as well. In the absence of a law regarding

131 National Labor Court 64\09 Power for Employees – Democratic Labor Organization v. Jerusalem Cinemateque Association – Israeli Film Archive (Jul. 2, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Subsequent to this ruling, the legislature adopted the law which strengthens the employee's power and introduced into the law a duty to negotiate with the workers' organization. *See* Collective Agreements Law, 5757–1957, § 33H1(a), SH No. 221 p. 63 (Isr.).

132 *Id.* Jerusalem Cinemateque case, *supra* note 131, at 18.

133 National Labor Court 1013/14 Israel Discount Bank v. New General Labor Federation (Sep. 26, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

134 *Id.* at 22 ("On the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of undertakings of Businesses.").

135 Case C-132/91 Katsikas v. Konstantinidis 1992 E.C.R. I-6577. This case was mentioned in CDA 1013/14, *id.* at 23, as well as in the Israel Aerospace Industry case, *supra* note 96, at 524-530.

136 Labor Disputes Law, 5757–1957, § 4, SH No. 221 p. 58 (Isr.).

workers associations and employers,[137] the Labor Law Courts in Israel turn to European law, as seen in the **Amit** case.[138] Here, the National Labor Court discussed the criteria that an organization must meet in order to be recognized as a union. In this case, President Goldberg used the Charter of Social Rights of Workers, signed in 1989, in order to compare legal systems and interpretation of Israeli law regarding the definition of a union.[139]

Vice President Barak-Ossoskin, in various cases referencing European Law, recognizes the organization as characterized by operative — as opposed to merely declarative — emphasizing the duty to consult. The **Telecom** case[140] was a dispute regarding the dismissal of 142 workers from the workers' association. The Vice President turned to European directive for cases of dismissal,[141] and imposes a adopts the rules to apply in Israeli labor law, which include the obligation to consult with employee organizations prior to such a dismissal as was carried out in the case.[142] In the case of **Nitay**,[143] the

137 The Collective Agreements Law has a very narrow reference to the term "employers' organization." See *id.* at § 2(1) ("Employers Organization representing the Employer.") (translation by authors).

138 National Labor Court 55/4-30 "Amit" Maccabi Workers Federation v. The Local Government Center PD 29 61 (1995) (Isr.) [hereinafter Amit case].

139 *Id.* at 79. The court also determined the status of such organization and the required characteristics in order for it to be recognized. NCLA 35/4-7 Tel Aviv University v. The Organization of the Academic Staff of Tel Aviv University PD 5 85 (1973) (Isr.). The Israeli court chose to adopt the common model in European countries, according to which the organization is granted a special status in general. For an example of a country implementing the model is Germany. *See* Annelie Marquardt, Collective Agreements – Germany, XIV MEETING OF EUROPEAN LABOUR COURT JUDGES (2006), http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/meetingdocument/wcms_159943.pdf. This is in contrast to Anglo-American countries, in which such organization will not be granted a special status. For more see: Gilad Neve, REGULATING EMPLOYERS' ORGANIZATIONS LEGAL STATUS – A COMPARATIVE REVIEW (The Knesset, Legal Bureau, Legislation and Legal Research, 2014). It can be said that labor law courts do not directly state the importance of employee organizations, but do so indirectly by imposing an obligation on the employer to consult with the employees' organization prior to reduction dismissal.

140 National Labor Court 1003/01 New General Labor Federation v. I.C.A Telecom Inc. PD 36 289 (2001) (Isr.) [hereinafter Telecom case].

141 Council Directive 75/129 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, 1975 O.J. (L 48) 29. This European directive was later amended by another directive aimed at clarifying and adding to the employer's duty to consult with employee representatives. *See* Council Directive 92/56, 1992 O.J. (L 245) 3.

142 Telecom case, *supra* note 140, at 307.

143 National Labor Court 300053/96 Nitay v. Nahum Goldman's Diaspora House (Apr. 24, 2002), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

Vice President emphasized that we must look at the situation in Europe, especially in light of the fact that "in the European community there is a special committee aimed at establishing rules regarding the obligation to consult with a workers' union at the time of dismissal."[144] Deputy President Barak-Ussoskin presented EU law as a right-wing marker in the context of unlawful dismissals and the duty to consult the workers' union, if there is one. According to her, the courts had previously insisted on the need for good faith in the dismissal, but the fact that a European Commission was working on this very issue to regulate the area reinforced the purposeful interpretation conducted by the Deputy President. This reinforces the status of EU law not as a one-off occurrence in Israeli court rulings, but rather, as an emerging and relevant comparative law system whose innovations should be closely examined. Further in his judgment and in order to rule upon the issue of tenure in the workplace, the Deputy President cited several legislative examples from European countries, however he chooses to reinforce this use of foreign law by stating that "it is the law in the European Community."[145] The issue of consulting also came up in the **Clalit Health Services** case,[146] in which the Deputy President again emphasized that the duty to consult has a number of normative sources, including EU law: "There are countries that have legislation and the European Community has directives which require consultation."[147]

In another case, the **Levin** case, the appellant was employed by the respondent in two forms, first as a service provider and subsequently under a special contract, until she was fired.[148] The dispute considered the preliminary question regarding the existence of labor relations. If it is determined that labor relations existed between the parties during the entire period of employment, the employer had the obligation to consult the representative employee organization prior to the appellant's dismissal. To influence the social and legal order on the subject, Deputy President Barak-Ososkin referenced both European Directives and case law in order to review the manner in which European arrangements address the issue, using European law

144 *Id.* at § 6 to the judgment of Vice President Barak-Usoskin.

145 *Id.* at § 9 to the judgment of Vice President Barak-Usoskin.

146 National Labor Court 1017/04 Clalit Health Services v. New General Labor Federation (May 16, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

147 *Id.* at 18.

148 National Labor Court 359/99 Levin v. Israel Broadcasting Authority PD 36 400 (2001) (Isr.) [hereinafter Levin case].

as an interpretive tool. The Vice President emphasized European law, citing in her judgment the European Directive regarding the commitment of Member States in the event of dismissal, as well as the amendment of the Directive by Directive 92/56,[149] which clarifies the employer's duty to consult with employee representatives: "The obligation is imposed in laws, agreements and collective arrangements and the custom of the duty of consultation with the employee representatives as a step to make dismissals for economic reasons and regarding the list of dismissed employees."[150]After referring to the directives that discuss the Member States commitment in the event of layoffs and consultation with workers' representatives, the judge also refers to European case law and cites the **Rockfon** ruling, in which the Luxembourg court ruled that the procedures required for dismissal due to economic reduction do not violate the employer's right to act as required in his discretion.[151]

The lack of organized legislation in this area of Israeli law is significantly felt and the courts continue to use EU law to interpret and effectively change domestic law. Thus, in four judgments, Israeli labor courts relied on directives of EU law. Regarding the determination of worker union representation, the National Labor Court stated, in the **New General Labor Federation** case, in dealing with the question of whether the New General Labor Union is an organization.[152] Like the Vice President, Justice Davidov-Motola also recognized a legislative lacuna, and came to a ruling by making use of the European Community Charter to determine whether or not the New General Labor Union falls under the term "organization" or not.[153] In the **Levinson** case,[154] the labor court expressed support for the directive on the duty of consulting with workers' committees and

149 Council Directive 75/129, *supra* note 141.

150 Levin case, *supra* note 148, at 413.

151 *Id.* at § 3 to the judgment of Vice President Barak-Usoskin; Case C-449/93 Rockfon A/S v. Specialarbejderforbundet i Danmark, 1995 E.C.R I-4291.

152 National Labor Court 50718-07-10 New General Labor Federation v. National Workers Union in Israel (Nov. 17, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

153 *Id.* at §§ 20, 38 to the judgment of Judge Davidov-Motola.

154 National Labor Court 1005/00 Etim Israeli News Agency v. Levinson (Jan. 8, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

organizations.[155] In addition, in the **Aschack** case[156] regarding the employer's obligation to consult in case of dismissal, the court stated:

"This duty is enshrined in many collective agreements in Israel. In many countries, it is enshrined in law… The European Community has a directive discussing the matter … The directive was amended in 1992 mainly to clarify and add to the employer's duty to consult with employee representatives. The European Court of Justice in Luxembourg discussed the importance of institutionalizing procedures between an employer and the workers' union when it comes to dismissals."

One of the rights protected under the freedom of association is the freedom to strike, recognized by virtue of the fundamental right to association during the 20th century in three different international frameworks, and as a result was even adopted into local law in Israel.[157] Initially, the right was recognized in the international treaties addressing social and economic rights, later it was legislated in treaties originating in the EU,[158] and Article 8 of the International Labor Organization Convention,[159] stating that rights would be in accordance and not in contradiction with local laws. The Supreme Court of Israel recognized the right to strike, and interpreted the collective agreement using the Collective Agreements Law.[160] The court was prepared and ready to acknowledge this right as consistent with the principle of symmetry and reciprocity in labor relations.[161] Due to the Israeli legislature's refusal to expressly define the term "strike," the

155 *Id.* at section 7 to the judgment of Vice President Barak-Usoskin.

156 National Labor Court 1349/01 Aschack v. State of Israel – The Ministry of Education and Culture (Feb. 16, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

157 International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1966, 993 U.N.T.S. 3.

158 European Social Charter, *supra* note 35; Charter of Fundamental Rights of the European Union, 2010 O.J. (C 326) 391.

159 Freedom of Association and Protection of the Right to Organize Convention (ILO No. 87), July 9, 1948.

160 DACS 1/86 Coca v. Chairman of the Broadcasting Authority 40(2) PD 406 (1986) (Isr.). See also: Menachem Goldberg, *The Right to Strike in the State of Israel*, 3 IYUNEI MISHPAT 606 (1973) (Isr.).

161 National Labor Court 36/4-5 Ginstler v. The State of Israel PD 8 3 (1976). *See also* National Labor Court 48/41-20 Federation of Academies in Social Sciences and Humanities v. The Airport Authority PD 19 449, 458 (1988) (Isr.). The court stated that the right to strike is "[a]mong other fundamental rights such as freedom of speech, the right to protest and freedom of occupation, though not written on book, are not vested rights, but have a superior legal status.") (translation by authors).

legitimacy of a given strike is usually shaped by the courts' judgments.[162] Professor Ruth Ben-Israel, a leading researcher in the field of labor law, argues that the courts serve an important role in defining the right to strike and determining its characteristics and criteria.

Within the wide range of using foreign jurisprudence by Labor courts in Israel, there is a reference regarding the right to strike, in light of partial and insufficient legislation. Several important cases stand out in which courts in Israel establish the decision on foreign law. For example, in the **Chativ** case,[163] the Supreme Court ruled that political strikes are not legally recognized and based this ruling upon English law. In most developed countries, there is a consensus that the right to strike excludes political strikes directed against the government (not the employer), However, in Norway and Italy, for example, such a strike may be legitimized under certain restrictions.[164] The use of foreign law on the right to strike as part of collective rights, can be found in Justice Levin's ruling in the case of **Ashdod Auto Factories**, in which the court presented an historical review of the right to strike in England and the United States.[165]

It is clear from the above that the promotion of rights in the field of collective labor law, and ensuring their protection, have appeared in many judgements in the last twenty years and have contributed to shaping Israeli labor law. This legal field was built and shaped by considering other legal systems, including that of the EU, which

162 RUTH BEN-ISRAEL, LABOUR LAW IN ISRAEL (2002) (Isr.). According to Ben-Israel, courts play an important role in defining the right to strike and its characteristics and conditions. In fact, the establishment of the Labor Court was mainly due to the desire to establish a forum which aims to promote the treatment of strikes as an Industrial Mediator.

163 HCJ 525/84 Chativ v. The National Labor Court Jerusalem 40(1) PD 673 (1986) (Isr.).

164 *See* Frances Raday, *Political Strikes and a Fundamental Shift in the Economic Structure of the Workplace*, 2 HAMISHPAT 159 (1994) (Isr.); Ruth Ben-Israel, STRIKE AND DOWNTURN IN THE MIRROR OF DEMOCRACY 142, 144-46 (2003) (Isr.); Michal Shaked, *The Theory of Banning the Political Strike*, 7 MISHPAT AVODA 185 (1999) (Isr.). *See also* Erika Kovacs, *The Right to Strike in the European Social Charter*, 26 COMP. LAB. L. & POL'Y. J. 445, 449 (2004).

165 CA 593/81 Ashdod Automotive Enterprises Ltd. v. Tzizik 41(3) PD 169 (1987) (the judge noting that "I wrote these in detail, since it may demonstrate what may be considered. . . . It can be inferred from the aforementioned review that English law protects the right to strike by granting immunity to strikers, balances the various interests through interpretation of the legislative provisions, and that there is a strong tendency in both the legislation and the English case law to reduce the said immunities, especially in those cases where the legislative or commentator's moral reference to a given act of strike is that the purpose should not sanctify the means.").

developed parallel to Israel's legal system and enabled the adoption of relevant arrangements for the modern labor market. Referring to European legislation allows the labor courts to apply legal norms that shape collective labor law in Israel. The courts ensure the recognition and protection of labor rights, such as the right of association, the obligation to consult and protections from layoffs, and the right to strike. Another area of Israeli labor law developed by the labor courts with European Influence regards change of employers, which will be discussed in the following section.

C. Change in Employer

A real possibility facing each employee in the modern labor market is that they can find themselves working for a new employer because the business or enterprise had a change in ownership. A close relationship exists between an employee and their workplace; the protection of that relationship brings a sense of stability to the workplace and employment conditions. The issue of change in employers raises many questions, including layoffs and the desire for continued employment. European law deals with this question, and European Directive 77/187 recommends that states adopt and implement local legislation to require that existing obligations towards employees remain in force in the case of a change of employer.[166] The purpose of the Directive is to protect employees' rights, which are often affected by change in employers, including the situation in which the company is sold to new owners. Therefore, the National Labor Court sought to adopt in Israel a rule from the Directive 77/187 of the European Economic Community which states, "In the case of transferring employees from one employer to another employer, the existing obligations of the transferring employer remain in effect, and cited relevant instances, basing their ruling on case law."[167]

The following year, in the **Ramtah** case,[168] Justice Elyassof used European law as an interpretative source and conducted an extensive review of EU law and practice. In particular, in a section he titled "The Law in Other Countries on Change in Employer," Justice Elyassof reviewed EU law, reinforcing his review by domestic legislation of EU Member States. The Judge found it appropriate to quote from the Directive which imposed an obligation upon the new employer to

166 Council Directive 77/187, 1977 O.J. (L 61) 26.

167 National Labor Court 3–9654, *supra* note 78, at 163.

168 Ramtah case, *supra* note 98, at 618.

adopt the previous agreement, and an obligation upon workers to continue to be a party to the previous agreement, so as to facilitate the free movement between factories or control.[169] The purpose of the Directive is to protect workers, and this has encouraged EU Member States to enact laws expanding workers' protections while maintaining each Member State's freedom of action. Justice Elyossef directs to the **Berg** case, from the German courts, where the court ruled based on the European Directive that a transfer or dismissal done in absence of an employee's consent to transfer is void if t it is claimed to be for the reason of transferring the plant to a new employer, and the refusal of the employee to work.[170] The court cited another German ruling, **Katsikas**,[171] to strengthen the influence of EU law and its adaptation to domestic law. Further along in his ruling the Honorable Judge Elyossef refers to a directive concerned with change in employers with the goal of ensuring the employees' security during a period of structural economic changes,[172] and emphasizes that the arrangements in the EU are more robust than those in Israel because European law also accounts for the transfer of contractual rights in the event of a change in employer."[173]

The extensive review of EU law in the **Ramtah** case emphasized the need for this foreign law to complement local law in Israel. Justice Barak-Ussoskin, in a minority opinion to Elyossef's judgment, emphasized that while the purpose of the Directive is to protect employees in such situations, including the obligation to inform and consult with the workers' representatives, the Directive allows Member States legislative freedom.[174] This freedom has been narrowed by the European Court of Justice, which ruled in a series of cases that the obligation to obtain workers' consent to transfer to a new

169 Council Directive 77/187, *supra* note 166 (stating that in the event of transfer of ownership of the factory, the individual and collective parties' obligations are transferred to the new employer. Nevertheless, in the case of a transfer of factory ownership, especially when it concerns the transfer of ownership of only part of the factory, the employee may declare his objection and choose to remain an employee of the previous employer).

170 Case C-144/87 Berg v. Besselsen 1988 E.C.R. 2559; Ramtah case, *supra* note 98, at 618.

171 Case C-132/91 Katsikas v. Konstantinidis 1992 E.C.R. I-6577; HCJ 8111/96 New Federation of Workers v. Israel Aerospace Industries Ltd. 58(6) IsrSC 481 (2004); National Labor Court 1013/14 Israel Discount Bank v. New General Labor Federation (Sep. 26, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.)

172 *See* Council Directive 77/187, *supra* note 166.

173 Ramtah case, *supra* note 98, at 618.

174 *Id.* at 641.

employer cannot be withdrawn once given. In that matter, Justice Barak-Ussoskin notes that the **Berg** case[175] and the **Katsikas** ruling,[176] provide that employees cannot waive the rights in the said Directive and should no longer be seen as employees within the context of the old agreement once they are employed by the new owner of the company: "The workers cannot waive the rights in the said Directive. Following the German ruling, the European Court held that employees are not bound to their old employment agreement with the new employer."[177] The majority opinion in the National Court held that a factory worker who chooses to continue his work after the employer has been replaced is not entitled to sue and continue to be an employee of the former employer, contrary to the minority opinion, which states that when separating or privatizing an enterprise, employment cannot be transferred to the new employer without the employees' consent.[178] The fact that the majority opinion found it appropriate to provide a wide review of EU law, demonstrates the need for foreign law, and reinforces the status of the EU law as a source of interpretation and as part of the set of considerations made by the courts.

A notable ruling, which relied heavily upon EU law was the Supreme Court case of the **Israel Aerospace Industry** in 2004,[179] in which the court relied on a variety of European normative sources, both directives and case law,[180] as a means of interpreting the domestic law and for comparative law. The importance of EU law can be reflected by the judgment of Deputy President **Or**, describing EU law over three pages within a comparative law section. Due to the progress of legislation and case law in the EU, the judge devoted an entire chapter to conducting a review of European case law and its comparison to Israeli law. Reference to EU law as a foreign law was made from the beginning of the judgment as a basis for comparison and introduced Articles 3, 4 and 7 of Directive 2001/73/EC, the latter imposing a duty on the former and new employer to inform the

175 Case C-144/87 Berg v. Besselsen 1988 E.C.R. 2559.

176 Case C-132/91 Katsikas v. Konstantinidis 1992 E.C.R. I-6577.

177 *Id.*

178 Chativ, *supra* note 163. The Union appealed to the Supreme Court, as a third instance, on the ground that the National Court's ruling violates the fundamental rights of the workers and the freedom of contracts. The intervention in the decision of the National Court was appropriate according to the Chativ case.

179 The Israel Aerospace Industry case, *supra* note 96.

180 Council Directive 2001/23, 2001 O.J. (L 82) 16 (EC) (the directive title is: "On the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees Rights in the Event of Transfers of Undertakings Businesses or Parts of Undertaking or Business."); *see also* Katsikas, *supra* note 135.

workers' representatives who may be affected by the transfer and to consult with them directly. The Deputy President found it appropriate to extend the decision beyond EU law and turned to cases from the Luxembourg Court of Justice,[181] which raised the question of whether according to Article 3 (1) an employee may object to his transfer to a new employer and continue his employment with his former employer. The Vice president discusses at length the remarks of the European Court of Justice. [182]

This issues of change in employer and its consequences are relevant not only when the transfer of ownership of the company occurs between private entities, but also when it comes to the privatization of public and government services.[183] In the case of privatization, the government employee continues to do the same work, but is employed by a private business instead of by the government. The first judgment asked to settle the implications of this issue in Israel was the **Moadim** case,[184] which indicated a clear preference for the adoption of foreign normative sources that grant rights to workers, such as those in the EU, over methods in which these rights are not guaranteed, such as the right to continue employment as is customary in American law.[185] Moadim concerned the Israeli government's decision to privatize military food services. These employees sought to prevent the publication of the tender for privatization and to compel the state to negotiate with them regarding the terms of the tender relating to them, and in particular regarding their continued employment by the company that wins the tender. During the case many questions arose pertaining to workers' rights during the privatization process, questions left unresolved by the existing Israeli legislation.

181 Katsikas, *supra* note 135.

182 *Id.* at 865–66.

183 *See* Amit Ben-Tzur, *Manual to Decision Making Prior to Privatization and Outsourcing – Should It Be Privatized, and If So – How?*, VAN LEER JERUSALEM INSTITUTION (2014).

184 National Labor Court 3-7/98 Moadim v. Ministry of Defense (Dec. 02, 1998), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Moadim case].

185 *See* Daniele Checchi & Marco Leonardi, *An Economic Perspective on Employment Protection Legislation and Labour Market Prospects*, 32 EUR. SOCIOL. REV. 532 (2016) (in both federal and state law there is no reference to the right of workers to oppose the exchange of employers); *see also* Ivanhoe Inc. v. UFCW, [2001] 2 S.C.R. 565 (Can.) (Contrary to US law, Canada's law protects employment stability and workers' rights in a structural change); Pascal McDougall, *Leaving Labour Law's Pragmatic and Purposive Fortress Behind: Canadian Union Successor Rights Law as a Case Study*, 54 OSGOODE HALL L.J. 253, 263, 285-88 (2016).

President Adler examined the European directive regarding the continuity of employees' labor rights when a company is transferred to a new owner.[186] The European system, which supports the worker and providesan extensive safety net for employees in cases of privatization, in effect guarantees the continuation of the workers' employment contract and prevents their dismissal due to the transition. He also cited section 3.1 of the Directive, which "transfers the obligations and rights of business employees from the business transferor to the recipient,"[187] and continued to expand upon Article 4.1 of the directive, whereby the transfer of the business itself cannot be a cause for dismissal, as well as Article 6.1, which requires the transferor of the business to provide employee representatives with information on the transfer.[188] President Adler further referred to another directive that deals with workers' rights during layoffs, and which requires the employer to provide employee representatives with information, to consult with them and even negotiate with them.[189] President Adler cited the **Danmark** judgment to show how the European Court makes an expansive interpretation of these arrangements.[190] In this case, the European Court of Justice ruled that the Directive also applies not only in cases where a business is sold but also when a change in the conduct occurs. President Adler directly quoted from the words of the European Court,[191] and determined that the Directive also applies to cases involving outsourcing, when another company assumes responsibility for a specific action previously executed by the company: "The Directive . . . applies as soon as there is a change . . . . The person responsible for operating the undertaking, which, consequently, a conventional sale or from a merger of the natural or... working in the undertaking… legal Enters into obligations as an employer towards the employees."[192]

186 *See* Council Directive 77/187, *supra* note 166.

187 *Id.* ("The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.").

188 *Id.*

189 *See* Council Directive 75/129, *supra* note 141.

190 C-324/86, Danmark v. Daddy's Dance Hall, 1988 E.C.R. 739.

191 Case C-209/91, Watson Rask v. ISS Kantineservice A/S, 1992 E.C.R. I-5755.

192 Moadim case, *supra* note 168, § 8 to Judge Adler's decision.

The use of EU law to interpret and rule on this issue appeared in the **Koor** case.[193] In response to the sale of the company's shares and the replacement of the employer, discussions were conducted regarding a request to obtain injunctions prohibiting a strike or work disruption. Honorable Justice Barak-Ussoskin found it appropriate to use EU law and relied on a European directive[194] and a European judgment[195] regarding similar changes in employers, emphasizing European jurisprudence as long-standing sources ask the question whether the sale of shares did, in fact, change the nature of the employer, regardless of whether a legal change in ownership of the enterprise occurred.[196]

Another example is the **Eleav** case,[197] where the National Labor Court ruled that retirees' rights could not be derogated from by a collective agreement reached after their retirement.[198] Deputy President Barak-Ussoskin looked to a European directive[199] in making her decision that the rights and obligations of the transferring employer, which derive from a contract of employment, a collective agreement or existing labor relations, will be transferred to the new employer when the company is transferred. The Deputy President went on to say that the Directive protects employees who are no longer employed, but who are entitled to pensions, and in this way extended the applicability of the agreement to pensionable employees in the spirit of the EU directive. This issue is another example of how EU law finds its way into Israeli case law and offers the local court methods for settling unresolved issues. These examples also illustrate the fact that labor courts, unlike other courts, appeal to EU law extensively and favor these laws, on certain issues, over other foreign legal practices.

193 National Labor Court 17/99 New General Labor Federation v. Koor Industries Ltd. PD 34 510 (1999) (Isr.) [hereinafter Koor Industries].

194 Council Directive 77/187, *supra* note 166.

195 Berg case, *supra* note 170.

196 Koor Industries, *supra* note 193, at 527.

197 National Labor Court 629/97 Eleav v. Macafet Pension Fund and Compensation Cooperative Fund Ltd. PD 36 721 (2001) (Isr.).

198 In similar to the U.S. Supreme Court ruling in Chemical Workers v. Pittsburgh Glass, 404 U.S. 157 (1971).

199 On the unity of the laws of the Member States regarding the protection of workers' rights in the event of a transfer to a new employer, *see* Council Directive 77/187, *supra* note 166.

D. Working Hours and Vacation Days

The legal regulation of working hours and rest began in the first half of the 20th century, as a result of the increasing awareness of workers' rights in most developed countries.[200] The Rome Convention of 1957 states that Member States agree that there exists a need to promote improved working conditions and living standards for workers,[201] yet a 40-hour work week and paid vacation days were not adopted by the EU until 1975.[202] Finally, 20 years later in 1993, a directive on working hours was enacted which determined, *inter alia*, rest periods and standardization of work patterns by shift or at night,[203] and the working time was defined as the period during which an employee performs work, is available to the employer and fulfills their duties, without the need for a specific geographical place for this to occur.[204]

The legal issue of working hours is likely to continue to develop in the digital age, mainly due to the increase in the use of technology that affects employment flexibility in time and place to the extent that the location of the employee may be inconsequential. The

200 SANGHEON LEE, DEIRDRE MCCANN & JON. C. MESSENGER, WORKING TIME AROUND THE WORLD – TRENDS IN WORKING HOURS, LAWS AND POLICIES IN A GLOBAL COMPARATIVE PERSPECTIVE (2007), 24-27, https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_104895.pdf. For example, § 117 to the Rome Treaty, *supra* note 32, stated that Member States agree on the need to promote improved working conditions and standards of living for workers. *See* Recommendation of the Council of 22 July 1975 No. 75/457/EEC, 1975 O.J. (L 199). This recommendation adopted a 40-hour work week and paid annual leave. *See also* Council Directive 93/104/EC of 23 November 1993, 1993 O.J. (L 307), § 2(1) (regarding the determination of rest times and the regulation of work shifts in shifts and nights and also the definition of working time without geographical dependence).

201 Rome Treaty, *supra* note 32 ("Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.").

202 1975 O.J. (L 199) 32 (on the principle of the 40-hour week and the principle of four weeks' annual paid holiday).

203 Council Directive 93/104, *supra* note 43.

204 *Id.* at §§ 1-2 ("working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice."). The directive was updated in June 2000, Council Directive 2000/34, 2000 O.J. (L 195) 41. The terms "adequate rest" and "mobile worker" were added.

technological means and increased employee availability from anywhere and at any time, not only obscure the concepts of place and time, but also challenge the legislature in the field of labor law.[205] The challenge is not only in defining the term "'working hours" for the purpose of compensation, but more so, the social aspect of maintaining a separation between work and private time spent at leisure and with family.[206]

The French law passed in January 2017 which stipulates employees' rights to demand contractual arrangements with their employers, including paid compensation for any activity beyond regular working hours completed outside of the office.[207] Furthermore, one of the controversial issues in labor law regarding work and rest hours is on-call labor and the work of doctors. This issue has come up in a ruling in Spain in which the court considered the definition of working hours, ultimately basing their definition on the Directive as opposed to local law,[208] stating that being on-call is actual work that

205 Louis Leung & Renwen Zhang, *Mapping ICT Use at Home and Telecommuting Practices: A Perspective from Work/Family Border Theory*, 34 TELEMATICS & INFORMATICS 385, 385-87 (2017); Armi Mustosmäki, *The Intensification of Work*, *in* FAMILY, WORK AND WELL-BEING 77 (Mia Tammelin ed., 2018); *see also* Jeremias Prassl & Martin Risak, *Working in the Gig Economy – Flexibility Without Security?*, *in* EUROPEAN EMPLOYMENT POLICIES: CURRENT CHALLENGES 68 (Reinhard Singer & Tania Bazzani eds., 2018).

206 The fact that work arrangements have a contribution and impact on work-life balance is not new. Flexible boundaries between work and individual life can help the employee and be very effective for the employer in the matter of employee's motivation and contribution to the business. But at the same time there is a concern. Often, flexible boundaries result in the involuntary penetration of work time into the individual's life in the direction of a work field into the home field. *See generally* Louis Leung, *Effects of ICT Connectedness, Permeability, Flexibility, and Negative Spillovers on Burnout and Job and Family Satisfaction*, 7 HUM. TECH. 250 (2011); *Work-life Balance for All: Best Practice Examples from EU Member States,* EUROPEAN COMMISSION (May 2, 2019), *available at* https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8212&furtherPubs=yes.

207 Loi 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels (1) [Law 2016-776 of August 8, 2016 of Relating to Employment, Modernization of Social Dialogue and Securing Professional Life], J. OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 9, 2016. For a discussion about the right to rest, *see* Matan Szatmary, *The Coverage's Right to Know*, MISHPAT VEASAKIM: ONLINE (Apr. 19, 2017).

208 Case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, 2000 E.C.R. I-7963; *see id.* at 19, where the Court refers to Directive 93/104, *supra* note 43, and the special protections provided in arts. 9–13 regarding night workers and shift workers.

requires consideration and readiness and should be rewarded as work hours.[209] This issue has come up also in Israel in several different instances. A prominent example is the **Lenzberg** case, in which the working hours of specialist doctors were discussed, and the Labor Court conducted a comparative review of foreign law.[210] The court first looked to US law, which was the pioneer in this matter, and used recommendations formulated in US legislation in 2011.[211] Judge Spivak goes on to present the legal situation in the EU in an ideological and systematic manner.[212]

While in Israel the subject of work hours and rest are covered by protective legislation that protects against exploitation, EU law emphasizes the element of leisure and the well-being of workers outside the workplace and a healthy work-life balance.[213] Structuring labor law norms with a broader view of employee life, accounting for the benefits of leisure and well-being is part of the manifestation of human rights norms and constitutional rights discourse into areas of private law.[214] This social aspect is part of the EU labor law, but in Israel it is inconsistently used in case law and is insufficiently reflected in outdated legislation.[215]

An accompanying part of an employee's working time is their time off from work. The Israeli court gives much room to foreign law when interpreting the local law on this issue as well. Thus, in the **Elbit** case, the National Labor Court had to determine whether vacation days could be accrued during a period in which an employee is on extended sick leave, as he would have been able to accrue had he not become ill. [216] Justice Rabinowitz made extensive use of the EU's legal position for the interpretation he sought and conducted a

209 *See, e.g.*, National Labor Court 35/59-5 Mitrani v. State of Israel, PD 7(1) 302 (1976) (Isr.) (where the court asked a similar question regarding remuneration for physician readiness and duty roster hours. The court stated that the readiness and duty roster time would not be considered work time. In this case, the court did not seek to use EU law, as its directive's provisions are more stringent than Israeli Law).

210 File no. 54860-01-12 Labor Court (TA), Lenzberg v. State of Israel (Jul. 23, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

211 *Id.* at 29.

212 *Id.* at 30, 41.

213 Giubboni, *The Rise and Fall of EU Labour Law*, *supra* note 11.

214 Pascale Peters, et al., *Exploring the 'Boundary Control Paradox' and How to Cope With It: A Social Theoretical Perspective on Managing Work-Life Boundaries and Work-Life Balance in the Late Modern Workplace*, *in* WORK-LIFE BALANCE IN THE MODERN WORKPLACE 261, 268–72 (Sarah De Groof ed., 2017).

215 On the social dimension, *see, e.g.*, Schiek, *supra* note 8.

216 The Elbit case, *supra* note 90.

comprehensive review throughout his judgment. From the outset, one can see the importance he gives to the EU law: "Indeed, this Convention has not been ratified by the State of Israel, and therefore does not have any valid application in Israeli law, but the provisions of the Convention and their interpretation by the Court of Justice of the European Community, may serve as guides, for the proper interpretation of the question in dispute."[217] During his review, Judge Rabinowitz mentioned and cited the purpose and scope of the Directive and the obligation of the Member States to ensure the acceptance of annual leave, as expressed in Articles 1 and 7 of the European Directive.[218] In addition to using the directive, the European Court of Justice has ruled that a prolonged illness does not detract from an employee's right to annual leave. For example, in the **Schultz-Hoff** case, the Court was asked to interpret Article 7 of the Directive:[219] "Accordingly, the Member States are required to interpret these rules and organise their national legal systems in such a way that absence from work due to illness does not prejudice the right to a minimum period of paid annual leave."[220]

As a counter argument in the **Schultz-Hoff** case,[221] the judge cited another ruling, as given in the **Dominguez** case,[222] concerning the interpretation of the right to annual leave. In the Dominguez case, an EU Court of Justice was asked to determine whether sections of French law providing that a period of absence of up to one year which was beyond the employee's control shall be considered as working days, in line with the Directive. The Court was faced with interpreting the Directive in light of the French provisions regarding the right to annual leave. Justice Rabinowitz made broad use of European law including extensive references to case law in order to support his interpretation of domestic law and its comparison to the EU. Because

217 *Id.* at 25 (the court fails to understand EU law, stating that the treaty has not been ratified in the State of Israel).

218 Council Directive 2003/88, 2003 O.J. (L 299) 1, 9 (EC).

219 Case C-350/06, Schultz-Hoff v. Deutsche Rentenversicherung Bund, 2009 E.C.R. I-179.

220 The Elbit case, *supra* note 90, at 26–27 (the court mentions the "Community Court" but it is the EU Court and not a Community).

221 Gerhard Schultz-Hoff case, *supra* note 219.

222 *See* C-282/10, Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, 2012 E.C.R I-559, at ¶ 28 ("In the dispute in the main proceedings, Article L. 223-4 of the Code du travail, which provides an exemption from the requirement of actual work during the reference period in respect of certain periods of absence from work, is an integral part of the domestic law to be taken into consideration by the French courts.").

the right to annual leave had been recognized by the EU as a fundamental social right of the highest degree, the court held that the right to accumulate vacation days can hardly be restricted. Therefore, Israeli case law supports an expansive interpretation of the right of an employee to accrue days off whether or not work was actually performed, accounting for days not worked due to illness.[223] The social and societal reasoning behind the right to annual leave extends to other basic issues, including the interpretation of labor law in a manner that is not "blind" to gender, origin and age. To expand on these basic rights, the following three sections discuss the right to equality among employees belonging to the LGBTQ community; the need to ensure diversity in the workplace; and, finally, retirement age.

E. Equality for the LGBTQ community

One notable example of using EU law guidelines for alignment is the **Danilowitz** case,[224] argued before the Supreme Court, which introduced legal innovation in Israel adopted from anti-discrimination EU law, even though the EU at the time abstained from supportive case law or legislation on the subject. In other words, unlike the above mentioned issues, the EU's law acts as direction for reasonable behavior, whereas the Israeli courts effectively adopt the conceptual spirit that appears therein as a "window to is the development of European law," taking it a step further by ruling precedents on the matter. The historic **Danilowitz** ruling given by the Israeli Supreme Court constituted the original foundation upon which subsequent actions were based, as the President of the Supreme Court Naor noted: "The principle of equality does not operate in a social vacuum. In a given case, he question of whether there is discrimination between equals or legitimate distinction between different people, is determined based upon accepted social norms."[225] The importance of

223 *Id.* at 31. For a recent emphasis on that, *see* Case C-437/17 Gemeinsamer Betriebsrat Eurothermen Resort Bad Schallerbach GmbH v. EurothermenResort Bad Schallerbach GmbH, 2019 EUR-Lex CELEX LEXIS 2019 (Mar. 13, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62017CJ0437&from=NL.

224 The Danilowitz case, *supra* note 99.

225 HCJ 12/9134 Gavish v. The Knesset (Apr. 21, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter the Gavish case). *See also* HCJ 09/1268 Zozel v. Commissioner of the Israel Prison Service (Aug. 27, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); National Labor Court -08-43426 14 Katz v. El Al Israel Airlines Ltd. (Jan. 1, 2018)), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

this ruling is clear from judgments outside the field of labor law, and the Danilovich case formed a guiding precedent when discussing the right to equality as a constitutional right.[226] The issue of equality held a significant place in Israeli law even before the constitutional revolution in the 1990s. First, the principle of equality was developed by the courts as a judge-made legal principle and is recognized as a fundamental value. Only later was it enshrined in labor law legislation, culminating in the Equal Employment Opportunity Law and the Basic Laws, which, from the courts' point of view, elevated the right to equality to constitutional status. This process led to the expansion of protection afforded to minority groups, including the LGBTQ community, in Israeli labor law.[227]

The Supreme Court ruling on the **Danilowitz** case was issued when Israeli law already explicitly prohibited discrimination in the workplace on the basis of sexual orientation , and yet Vice President Barak chose not to rely on the Equal Employment Opportunity Law in his majority opinion, relying instead on the principle of equality as a fundamental principle and the process of liberalization and awareness regarding the LGBTQ community around the world. Justice Dorner reviewed the changes in social norms across Western legal systems, referring to various European states, the United States and Canada, citing Article 8 of the European Convention on Human Rights and rulings from the European Court of Human Rights.[228] The Supreme Court did not look for domestic legislation to reinforce its reasoning, but rather opted to use foreign law for guidance towards an appropriate decision, to strengthen the basis for the ruling and reach the same result independent of the amendment to the Equal

226 For example, on equal pay for alimony between men and women *see*, CivA 919/15 Anonymous v. Anonymous (Jul. 19, 2017) Nevo Legal Database (by subscription, in Hebrew) (Isr.).. For primary literature on constitutional rights, *see* AHARON BARAK, A SELECTION OF WRITTEN WORKS – CONSTITUTIONAL STUDIES 547 (2017); AHARON BARAK, HUMAN DIGNITY – THE CONSTITUTIONAL RIGHT AND IT'S OUTCOMES 685 (2014).

227 HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 (1969); The Women's Equal Rights Law, 5711-1951; Employment Service Law, 5719–1959, to the Employment (Equal Opportunities) Law, 5748–1988; the Danilowitz case, *supra* note 99. In 1992, the Employment (Equal Opportunities) Law was amended, by including for the first time an explicit prohibition for work discrimination on grounds of sexual orientation. *See* Employment (Equal Opportunities) Law, 5752–1992 (Amendment No. 1) SH No. 1377 p. 37, § 2 (Isr.).

228 The Danilowitz case, *supra* note 99, at 782 (the Court mentions the verdict in Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993)).

Employment Opportunity Law.[229] Further reinforcement can be found in Justice Dorner's remarks in the same matter: "This amended law did not change the existing law on equal rights for the LGBTQ community, it merely gave expression to those rights."[230]

The Supreme Court case regarding **Danilowitz** reveals changes in social norms in relation to human rights in international labor law and, more broadly, the EU's human rights protections. While the founding treaties of the EU did not include reference to human rights, the ECJ, the European Court of Justice, appropriately filled the void,[231] as the primary court EU whose rulings form binding precedent for EU institutions and its member states, and which led to human rights issues being addressed in European treaties later on.[232] The principle of gender equality was further addressed in the 1957 Rome Convention, which enshrined the right to equal pay for men and women,[233] a principle adopted by Israeli legislation and later adopted

229 Strengthening the claim that the Court's lack of need to meet the Employment (Equal Opportunities) Law and the status of the right can be seen in Barak's assertion that denial of the benefit to an employee and his or her spouse due to his sexual orientation, constitutes an infringement of his privacy protected by Basic Law: Human Dignity and Liberty, § 7 (5752-1992). *See*, the Danilowitz case, *supra* note 99, at 765–66.

230 *Id.* at 780.

231 Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104, 1104–05 (2007) ("Through the decisions of the European Court of Justice ('ECJ'), human rights have been placed at the forefront of the agenda of the European Union ('EU')."). *See also id.* at 1108 ("It is the ECJ that has been instrumental in integrating human rights into the fabric of the Union."); *id.* at 1104-05 ("[W]hen the Treaty of Paris, which created the Coal and Steel Community, and the Treaty of Rome ('EEC Treaty'), which created the European Economic Community ('EEC'), were adopted, little attention was paid to the protection of human rights."). *See also* Frank Emmert & Chandler Piche Carney, *The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights on Fundamental Freedoms – A Comparison*, 40 FORDHAM INT'L L.J. 1047 (2017) (these led to addressing the human rights issue in later EU treaties).

232 *See* Lenaerts Koen, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, 6 COLUM. J. EUR. L. 1, 9–18 (2000). For an interesting article about using ECJ sources by former Supreme Court President Aaron Barak, *see also* Niels Baeten, *Judging the European Court of Justice: The Jurisprudence of Aharon Barak through a European Lens*, 18 COLUM. J. EUR. L. 135, 138 (2011).

233 Treaty of Rome, *supra* note 32, at art. 119 ("Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, 'pay' means the ordinary basic it minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without

by several other directives. Although the principle of gender equality was established in domestic Israeli legislation, the court in the **Lederman** case was required to interpret domestic law and for the first time turned to EU law.[234] The court cited Article 119 of the Treaty establishing the European Community and used it to support an expansive interpretation of the Equal Pay Law for Male and Female Employees, 1964: [235]"The same is true for the Rome Convention, which in Article 119 requires equal pay for female and male workers doing the 'same job'…and the treaty is applied by demanding equal salaries for 'similar work' which means work 'that is essentially identical' or 'substantially similar.'"

Unlike the issue of gender equality, the proper attention to LGBTQ rights was a later development.[236] In the **Grant** case,[237] the European Court was asked to address equality on grounds of sexual orientation for the first time and examined whether the scope of protection against discrimination based on gender as provided for in Article 119 of the Rome Treaty Rome and the directives extended to discrimination based on sexual orientation. The Court, contrary to the opinion of the Attorney General, adopted a narrow interpretative approach with regard to the scope of the provisions of the law and held that, according to EU law, different treatment towards same-sex

discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.").

234 The Lederman case, *supra* note 23.

235 *Id.* at 265. It should be emphasized that the provisions of the Male and Female Workers Equal Pay Law 5756–1996, SH no. 1581, conform to the guidelines on equal pay in Council Directive 75/117 1975 O.J. (L 45) 19. Although the court in the Lederman case, *supra* note 23, does not refer to the EU ruling, Professor Shachor-Landau, in her article, points to a consistent approach to EU case law and refers to Case 96/80 Jenkins v. Kirgsgate, 1981 E.C.R. 592. *See* Chava Shachor-Landau, *The Equality of the Working Woman in European Community Law and the Lesson to Israel*, 13 MISHPATIM 457, 472 (1984). For discussion on the topic of discrimination between male flight attendants and female flight attendants when the work they did was the same, *see* Case 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, 1976 E.C.R. 455.

236 *See* Mark Bell, *Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law*, 60 AM. J. COMP. L. 127, 129-30 (2012) (for gender equality). *See also* Mark Bell, *EU Equality Law and Precarious Work*, *in* EU Anti-Discrimination Law Beyond Gender 75 (Uladzislau Belavusau & Kristin Henrard eds., 2018); Muriel Robison, *The Influence of European Law on Sex Equality Laws*, *in* GENDER PERCEPTIONS AND THE LAW 89, 89-102 (Christine Barker, Elizabeth A. Kirk & Monica Sah, eds., 2018)

237 Case C-249/96 Grant v. South West Trains Ltd, 1998 E.C.R. I-621 (hereinafter the Grant case).

couples does not constitute discrimination. The Court said its reasoning was based on the interpretation that should be given to Article 119 of the Rome Treaty and the Equal Treatment Directive. [238] The Court found that the European Community, Member States and the European Commission on Human Rights do not grant equal status to same-sex couples and despite the existence of a statement condemning gender-based discrimination, the EU has yet to adopt laws enshrining this equality of rights for same-sex couples.[239] The Protection of LGBTQ rights in the EU, as deriving from the principle of equality, was only granted in 1999, in the Amsterdam Treaty, which grants EU institutions the authority to take necessary measures to combat discrimination, including discrimination based on sexual orientation.[240] The following year, Directive 2000/78 came into effect, which explicitly prohibits direct or indirect discrimination on the basis of sexual orientation, stating that such discrimination undermines the EU's objectives.[241] Further reference and significant progress prohibiting discrimination is found in the European Charter of Human

238 Council Directive 76/207/EEC of 9 February 1976, on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40. *See e.g.*, Council Directive 86/378/EEC of 24 July 1986, on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 1986 O.J. (L 225) 40; Council Directive 75/117, *supra* note 235; Council Directive 97/80 of 15 December 1997 on the Burden of Proof in Cases of Discrimination Based on Sex, 1998 O.J. (L 14) 6 (EC); Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC) (referring extensively to the burden of gender equality in employment). *See also* Nicholas Bamforth, *Discrimination on the Ground of Sexual Orientation and Gender Identity*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 495, 527 (Alan Bogg, Cathryn Costello & A.C.L. Davies eds., 2016).

239 The Grant case, *supra* note 237, at 31.

240 Treaty of Amsterdam, *supra* note 47, at 7 ("The following Article shall be inserted: 'Article 6a' – Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."). S*ee* MANCINI, *supra* note 10, at 137–62 (discussing the new boundaries of the EU's Gender Equality Law).

241 Council Directive 2000/78, *supra* note 238, at arts. 11–12 ("Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons. . . . To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.").

Rights, which became binding in 2009 as part of the adoption of the Lisbon Treaty.[242] This interpretive doctrine for the term "spouses" discussed in the **Danilowitz** case led to the recognition of equal rights and the recognition of same-sex couples for social rights in the wider field of labor,[243] in contrast to the conventional definition accepted by the EU.[244] Legal scholarship emphasizes that the new attitude adopted by the Court in Danilowitz is distinct from the applicable norms in European case law.[245] One of the future challenges in the world in

242 Charter of Fundamental Rights, *supra* note 35, at art 21(1) ("1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.").

243 *See* Amir Paz-Fuchs & Revital Turner, *Employment Equality and Discrimination for LGBT in Israel*, *in* LGBTQ RIGHTS IN ISRAEL: GENDER IDENTITY, SEXUAL ORIENTATION AND THE LAW 569 (Einav H. Morgenstern, Yaniv Lushinsky & Alon Harel eds., 2016).

244 Council Directive 2001/38, art. 3, ¶ 2(a), 2001 O.J. (L 187) 43. *See* ALISON DIDUCK & FELICITY KAGANAS, FAMILY LAW, GENDER AND THE STATE: TEXT, CASES AND MATERIALS 20, 28 (3d ed. 2012) (for a comprehensive review of the Danilowitz case and its new interpretation). *See also* Helen Stalford, *Concepts of Family Under the EU law: Lessons from the ECHR*, 16 INT'L J. L., POL'Y & FAM. 410, 411 (2002).

245 ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY 75 (2017); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 99 (2004). A number of revolutionary judgments can be discerned following the Danilowitz case, which over the years has become a reference point not only as regards the LGBTQ community's equality and discrimination in employment relations, but as a central pillar of equality and discrimination law in general. *See e.g.*, A.A.A. 343/09 Jerusalem Open House v. Jerusalem Municipality 64(2) PD 1 (2010) (Isr.) (where the Supreme Court canceled the decision Minister of Education not to broadcast a program for teenagers dealing with gay and lesbian youth in Israel); C.A. (Nazareth District) 3245/03 Estate of the Late S.R. v. the Attorney General (Nov. 11, 2014)), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (where the court ordered the state to allow a homosexual to inherit the apartment of one who was his spouse for forty years); C.A. 10280/01 Yaros-Hakak v. Attorney General, 59(5) PD 64 (2005) (Isr.) (where the supreme court ordered the state to allow a lesbian spouse to apply for the adoption of her spouse's sperm donation). *See also* HCJ 566/11 Mamat-Magad v. Minister of the Interior (Jan. 28, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 5771/12 Moshe v. The Board for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements Law (Sep. 18, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 1779/99 Berner-Kadish v. Minister of the Interior 54(2) PD 368 (2000) (Isr.). All of these verdicts dealt with a legal process relating to registration rights after surrogacy abroad of same-sex couples. As Justice Ickovitz's appropriately determined in L.D. (Tel Aviv) 791-06-13 Mashal v. Educational Technology Center (Aug. 28, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), regarding discrimination on grounds of gender identity under the Employment (Equal Opportunities) Law. In Israel, verdicts on this issue have not

regards to the labor market in the context of gender identity and the application of the equality principle to the LGBTQ community appears to be the question of right mechanisms to attain equality and, *inter alia*, equal opportunities and employment diversity, which we shall address in the following section.[246]

F. Equal Opportunity and Diversity in the Workplace

The principle of equality, recognized as a fundamental principle, forms part of the DNA of our legal system in general and particularly in tender laws for employees.[247] Any appointment that infringes upon an individual's right to compete for a given position and results in an appointment from the majority group violates the right to equality. Therefore, an equal opportunity hiring practice for public service jobs was adopted, with the goal of providing fairness and to achieve an equitable outcome. In this way, it is possible to form legal guidelines, according to which the principle of equality can be fulfilled as a consequential social norm—justice as fairness.[248] The underlying concept is the British meritocracy model, according to which the nomination system must be free of non-material considerations and the replacement of people should be based solely on professional

yet been given, and those given were in other contexts as part of a community discussion in general.

246 For Mark Bell's latest article on the Prohibition of Discrimination, including the EU Gender Aspect, *see* Mark Bell, *supra* note 236, at 75. *See also* Mark Bell, *Adapting Work to the Worker: the Evolving EU Legal Framework on Accommodating Worker Diversity*, 18 INT'L J. DISCRIMINATION & L., 124, 124–43 (2018) (concerning diverse transaction). For more on this topic, *see* EUROPEAN COMMISSION—EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION, HOW THE EU HELPS FIGHT DISCRIMINATION AT WORK (2019), https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8210&furtherPubs=yes.

247 HCJ 2671/98 Israel Women's Network v. Minister of Labor & Social Affairs, 52(3) PD 630, 650–651 (1998).

248 Frances Raday, *On Equality*, 24 MISHPATIM 241, 257–60 (1994) (Raday outlines the concept of affirmative action, either formal or consequential, and analyzes the issue of women's preference from a broad discourse of affirmative action). For the latest research on affirmative action in the civil service, *see* WALTER BROADNAX, DIVERSITY AND AFFIRMATIVE ACTION IN PUBLIC SERVICE (Walter D. Broadnax ed., 2018). For justification of the supremacy of the principle of equality over inequality regarding the division of positions and jobs, *see* David A. Harrison et al., *Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research*, 91 J. APPLIED PSYCHOL. 1013, 1017–19 (2006).

data.[249] The British model is based on examination of virtues and qualifications, and the replacement of employees must be based on professional data only. The whole method of recruitment, evaluation, promotion, and various tests are conducted uniformly without any distinction aimed at advancing target populations.[250]

The principle of equality appears twice, in this context of the nomination system. First, the fulfillment of the principle of non-discriminatory tenders which promotes target populations. Secondly, and in order to fulfill the same principle, action should be taken to

249 This model is more strict than other countries' models of Politics-administration dichotomy, as part of the aim of protecting and isolating civil service. All jobs belong to the Professional Civil Service and are staffed by professional officials who are sorted by professional skills. However, the British model did not always advocate this approach. The professionalism of service and the reliance on virtues and qualifications, which is an integral part of the meritocratic model, were the result of a historical process. Until 1850, the British model was characterized by staffing Civil Service positions on the basis of personal affiliation, and so the wealthy Lords established control over members of parliament and other officials. The change came as a result of the "Northcote Trevelyan Report of 1854," which banned non-appropriate nominations on political grounds and determined that appointments and promotions will be according to qualifications and achievements. The implementation of reform was tarried, and only by 1870 the Crown Order stipulated that appointments on political grounds were the exception to the rule of manning jobs in civil service. From 1870 until World War II, the scope of subordinate appointments was expanded consistently to a test of competence and achievement. Thus, a testing system for appointments was created for appropriate judgment, as opposed to external considerations that are considered irrelevant. For supervising the implementation of the system, the United Kingdom has set up two independent bodies responsible for the meritocratic system which are also operating a system of appeal on tender procedures. For more on the meritocratic system, *see* Anirudh V.S. Ruhil & Pedro J. Camoes, *What Lies Beneath: The Political Roots of State Merit Systems* 13 J. OF PUB. ADMIN. RES. AND THEORY 27, 28, 31 (2003). For the relationship between the meritocratic system and employment diversity, *see* Christopher L. Aberson, *Diversity, Merit, Fairness, and Discrimination Beliefs as Predictors of Support for Affirmative-Action Policy Actions*, 37 J. APPLIED SOC. PSYCHOL. 2451, 2453-54 (2007).

250 ALBERT G. MOSLEY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE? 32 (Rowman & Littlefield 1996). However, other voices from the courts have also been heard against the claim that the evaluation of the employee's virtues and skills can remain neutral. The argument is that prejudice and gender stereotypes may cause biased appointments. *See e.g.*, C-490/95 Marschall v. Land Nordhein-Westfalen 2001 E.C.R. I-45; Case C-407/98 Abrahamsson and Anderson v. Fogelqvist, 2000 E.C.R. I-05539, 2000 IRLR 732 CJEU. *See also* C- 450/93 Kalanke v. Freie Hansestadt Bremen 1995 E.C.R. I-3051 and what was stated in C-490/95 Marschall v. Land Nordhein-Westfalen ("[T]hat it consider[ed] that the priority which the provision in question accords in principle to women seems to constitute discrimination within the meaning of Article 2(1) of the Directive and that such discrimination is not eliminated by the possibility of giving preference, exceptionally, to male candidates.").

promote a target population, meaning social groups that for long periods have suffered from inequality (e.g. women, ethnic minorities, etc.), by way of affirmative action aimed at creating employment diversity, by promoting the representation of groups who, until recent decades, have been absent from the labor market or had only partial representation. Affirmative action has become one of the most effective tools in the legal battle against discrimination and has even received support in international law through various treaties: a treaty to ban discrimination on the basis of race from 1965 was ratified by Israel the following year, after which the UN Convention on the Elimination of Discrimination against Women in 1979 was enacted, ratified by Israel in 1991.[251]

In Europe, the European Community adopted a directive to ensure equal treatment for men and women at work, from 1976, and the European Council issued a recommendation on the promotion of women in 1984.[252] The British Equality Act evolved from the idea of equality enshrined in the EU first under the Amsterdam Convention of 1997, which calls for full equality and allows for the adoption of measures to prevent or compensate for any deficit experienced by a particular group, [253] and the directives also discuss gender equality.[254] However, the British Equality Act does not provide specific targets,

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251 International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (1969); The Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (hereinafter CEDAW).

252 CEDAW, *id.* at ¶ 4; Council Directive 76/207, *supra* note 238. *See also* Council Recommendation 84/635, on the Promotion of Positive Action for Women 1984 O.J. (L 331) 34.

253 Treaty of Amsterdam, *supra* note 47, at art. 141(4). Similar elements, especially in the context of race equality, can also be seen in the Directive of Race Equality in 2000. *See* Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality*, 23 B.C. INT'L & COMP. L. REV. 1, 30–33 (1999). Prof. Shachor-Landau examined the limits of affirmative action in the European community: "The wording of this section indicates that in the European community it is impossible to establish a rigid arrangement for quotas. The community encourages equality in practice but is simultaneously sensitive to the issue of discrimination against workers due to affirmative action." *See* Chava Shachor-Landau, *Equality between Male and Female Workers in the European Union*, 11 MISHPAT AVODA 357, 372 (2006).

254 Directive 2002/73, of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 2002 O.J. (L269) 15; Council Directive 2004/113, 2004 O.J. (L 373) 37; Council Directive 2006/54, 2006 O.J. (L 204) 23.

quotas or operational obligations to ensure the result of affirmative action for underrepresented groups. Similarly, Israeli law also does not set out such goals, and most actions taken do not result from regulatory obligations.[255]

All of these normative sources determine, in one way or another, that special measures or temporary means for accelerating equality, notwithstanding their violation of meritocracy values, would not in fact be considered discrimination. An example of this is reflected in the British Equality Act of 2010, which states that any job candidate assessment must be objective and ignore group affiliations such as race or gender, except in cases of a tie.[256] This assertion is similar to the practice in Israel for the proper representation of women in tender law which allows them to win a tender when they are against a man of "similar" skills, thus preferring equality in outcome rather than procedure.[257] British law was not enacted in a vacuum, but adopted the tiebreaker rule, allowing for the appointment of a female candidate when her evaluation is similar to that of the male candidate, according to an EU 1976 directive.[258] In the **Plotkin** case, the National Labor

255 Thus, under art. 158 of the 2010 Law, the employer may take certain proportionate actions to increase representation, but again it is not required. The intention is towards the private sector mainly. *Cf.* § 15a, Civil Service Law (Appointments), 5719–1959, LSI 279 86(Isr.),which stipulates that every governmental ministry should ensure adequate representation in the absence of clear quotas and targets. On the other hand, there are mandatory appointment duties and affirmative action in certain places in Israeli law. Thus, for example, § 239(d), Companies Law, 5759–1999, LSI 1711 189 (Isr.), provides a practical obligation for at least one female director appointment. In addition, § 18a, Government Companies Law, 5735–1975, LSI 770 132 (Isr.), provides the duty of adequate representation for both sexes and requires ministers to nominate women to some extent until adequate representation is obtained.

256 Equality Act 2010, c. 15, § 158 (Eng.).

257 MINISTRY OF INDUSTRY, TRADE AND LABOR—EQUAL OPPORTUNITIES COMMISSION, EXERCISING THE RULE OF CORRECTIONAL PREFERENCE AT THE TASK FORCE EXAMINING COMMITTEES OF THE CIVIL SERVICE (Sept. 19, 2010). The Commission refers in the report to the affirmative action rule when there are candidates with similar qualifications; that is, the distinctions in the report are only for ordinary tenders that are not aimed at a specific population. The Commission has published its proposals to establish guidelines that "similar qualifications" mean a gap of up to 15% in the candidate's overall score. *See also* the test norming method that was suggested in the US in order to overcome different start points of university applicants at Steven Flaut, *Spoiling Action*, 3 MISHPAT VEMIMSHAL 235, 240 (1995) (Isr.). The EU has also adopted the equality breaking rule, which allows for the appointment of a woman candidate when her acceptance score is similar to that of a male candidate. This is in accordance with the Council Directive 76/207, *supra* note 238.

258 *Id.* Council Directive 76/207, *supra* note 238, § 2(4). *See* Kalanke case, *supra* note 250. For more about anti-discrimination in the EU, *see* Sandra Fredman, *Pasts*

Court used this Directive to increase deterrence by imposing upon the employer the demand to ensure punitive damages for violating the fundamental constitutional right of equality and using stereotypes against women in the workplace.[259] The Court referred to case law from the European Court of Justice, which emphasized the importance of punitive sanctions and held that the courts must ensure real protection.[260] The National Court elaborated upon the right of equality, stating that the no statute of limitations does not apply in the case of violation of the right to equal treatment. To highlight this, Vice President Adler reviewed the famous **Marshall** case,[261] as cited by the European Community Court in **Colson**: "It is impossible to establish real equality of opportunity without an appropriate system of sanctions" (*Sabine von Colson and Elisibeth Kamman v. Land Nordrheim Westfalen*).[262]

To summarize, applying affirmative action methods to further the cause of equality in the workplace and the pursuit of employment diversity is an issue that has gained momentum in recent years, not only from the general perspective of justice and equality but from a genuine concern for the exclusion of certain groups in the labor market and the need for integration. This exclusion, for many reasons, impacts the issues of poverty and welfare for these groups as well. The gaps are due to job differentiation, geographical segregation, discrimination and inequality. This state of group stratification in the employment market, especially under new immigration policies in the EU, has amplified the issue of employment diversification and affirmative action.[263] Older employees form one of the most challenging

and futures: EU Equality Law, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 391 (2016); Lyiola Solanke, *A Method for Intersectional Discrimination in EU Labour Law*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 445 (2016); Mark Freedland & Lucy Vickers, *Age Discrimination and EU Labour Rights Law*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 527 (2016).

259 National Labor Court 56/3-129 Plutkin v. Aizenberg Brothers Ltd. PD 33 481 (1999) (Isr.) [hereinafter Plutkin case].

260 Case C-127/92, Enderby v. Frenchay Health Authority, 1993 E.C.R. I-5535; Case C-109/88, Danmark v. Dansk Arbejdsgluertorening, 1989 E.C.R. 3199; Josephine Shaw, *European Community Judicial Method: Its Application to Sex Discrimination Law*, 19 INDUS. L.J. 229, 235-36 (1990). Shaw discusses § 6 to The Equal Treatment Directive from 1976 and its effect on the member states; Case 14/83 von Colson v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891; Plutkin case, *supra* note 259, at 500.

261 Case 152/84 Marshall v. Southampton Health Authority, 1986 E.C.R. 723.

262 Plutkin case, *supra* note 259, at 503.

263 Roxana Barbulescu, *From International Migration to Freedom of Movement and Back? Southern Europeans Moving North in the Era of Retrenchment of*

occupational groups, including those who no longer work by definition because they have passed the compulsory retirement age. The cost of living, an increase in life expectancy, the erosion of pension savings funds, and so on, have led to older employees' increased dependence on the younger generation and the national finance ministries. In the next section we will discuss the issue of work retirement age, as it relates to employment diversity under the broad principle of equality and discussion of the right to employment continuity and freedom of occupation in general.

G. Retirement Age

Since the amendment of the Israeli law regarding equal work opportunities[264] and influences from the adoption of a ban prohibiting age discrimination in the United States,[265] there has been significant development in prohibiting age discrimination. The legal regulation stemmed from a number of precedent rulings that dealt with two questions, the first regarding the different retirement age for different groups and the second regarding the mandatory retirement age. Regarding different retirement ages, the **Rekanat** case[266] stated that different retirement ages constitute discrimination on the basis of age. Later, the **Rosenbaum** ruling[267] invalidated a different retirement age policy for particular employee groups. The EU has had extensive legal discourse on whether women's right to early retirement from work is consistent with the principle of gender equality, supported by different conceptions of equality within European welfare states.[268]

Freedom of Movement Rights, *in* SOUTH-NORTH MIGRATION OF EU CITIZENS IN TIMES OF CRISIS 15, 19–24 (Jean-Michel Lafleur & Mikolaj Stanek eds., 2016); Perna Roberta, *Re-bounding EU citizenship from below: Practices of healthcare for '(il) legitimate EU migrants' in Italy*, 44 J. ETHNIC MIGRATION STUD. 829, 834-35 (2018).

264 Employment Equality Act, 5748–1988, SH No. 1528 p. 334 (Isr.).

265 ADEA Act, 29 U.S.C. §§ 621–34 (1967) (federal law of 1967 which states that age discrimination is illegal).

266 HCJ 4191/97 Rekanat v. National Labour Court 53(2) PD 481 (2000) (Isr.).

267 HCJ 100/76 Rosenbaum v. Commissioner of Prisons 61(3) PD 857 (2006) (Isr.).

268 Banks Kevin, Nunin Roberta & Topo Adriana, *The Lasting Influence of Legal Origins: Workplace Discrimination, Social Inclusion and the Law in Canada, the United States and the European Union*, *in* COMPARATIVE LABOR LAW, 220, 230–35 (2015). *See also* Mia Rönnmar, *Does Age Matter? Sweden, Younger and Older Workers and the Intergenerational Dimension of Contingent Work*, *in* CORE AND CONTINGENT WORK IN THE EUROPEAN UNION – A COMPARATIVE ANALYSIS ch. 12 (Edoardo Ales, Olaf Deinert & Jeff Kenner eds., 2017).

A relevant issue is the examination of discrimination of women within the retirement age debate. In recent years, despite the mandatory retirement age enacted in domestic law, Israeli courts have dealt with the matter of retirement age in its interpretative and constitutional aspects, and on these occasions have approached EU law. The beginning of the legal battle to abolish mandatory and different retirement age for women was in the **Nevo** case,[269] in which Chief Justice Goldberg relied on EU law, including the famous European **Marshall** case,[270] distinguishing between the state's right to set a different age for women and men and social rights, including forcing an early retirement. The violation of the latter is prohibited by EU law and gives rise to a claim for a lawsuit against the state.[271] The Court also referred to a proposal submitted to the European Council to emphasize the case law and EU legislation in this area of law.[272] The mention and use of EU law sources in the **Nevo** case, was made for the purposes of interpreting local law and comparing legal practices in the Israel to those practiced in the EU. In order to reinforce his opinion that "according to Israeli law, retirement with a pension arrangement should not be regarded as dismissal (as it is in our case),"[273] based on the EU cases of **Burton**[274] and **Roberts**,[275] **Nevo** then continues with a petition to the Supreme Court[276] that reversed the National Court's determination that women and men having different retirement ages is inappropriate discrimination. This ruling is compatible with the Marshall case, which concerned an English woman who served as a senior official in a public institution who was dismissed against her

269 National Labor Court 46/3-73 Nevo v. The Jewish agency of Israel PD 18 197 (1986) (Isr.); HCJ 104/87 Nevo v. National Labour Court 44(4) PD 749, 758 (1990) (Isr.) [hereinafter Nevo case].

270 Marshall case, *supra* note 261.

271 Nevo case, *supra* note 269, at 208.

272 *Id*. at ¶ 18 of president Goldberg's judgment. Four years after, in 1995, the court discussed The General Labor Federation case, *supra* note 125. The court discussed the question when an organization will be recognized as employee's organization. The court referred to the ECtHR case originating out of Sweden, Swedish Engine Drivers' Union v. Sweden, 20 Eur. Ct. H.R. (ser. A) in order to demonstrate how EU courts, in similar to the Israeli court, limits the number of employee's organizations.

273 *Id.* at 218.

274 Case 19/81, Burton v. British Railways Board, 1982 E.C.R. 554.

275 Case 151/84, Roberts v. Tate & Lyle Industries Limited, 1986 E.C.R. 703.

276 *Id.* at 758 (emphasis added). The court also makes reference to an English judgment that was rendered close to the Nevo case, and relied on the same principle that was discussed in the Nevo case. *See* James v Eastleigh [1990] 2 AC 751, 759-76 (appeal taken from B.C.).

wishes upon reaching the age of 60, for the sole reason that she is a woman and that the statutory retirement age for women is 60, compared to the age of 65 in relation to men. She turned to the Court of the Common European Market and claimed that her termination of employment constituted discrimination on the basis of sex, which constituted a violation of Council Directive 76/207.[277]

The labor courts in the **Nevo's** case dealt broadly with European law and although the case was ruled in contrast to EU law, various European legal sources were brought before the national court to conduct a comparative review. Afterwards, the same normative sources contributed to the Supreme Court's finding that the appellant's treatment was discriminatory and acceptance of her request to return to work, in a manner consistent with European law. The **Nevo** case was the first instance to deal with this issue, relying on EU law, marking the beginning of legal adherence to EU law as a leading foreign law system regarding retirement age. Indeed, shortly after the **Nevo** ruling, the National Labor Court in the **Havkin** case[278] ruled that there is no reason to impose a forced retirement age on an employee. Also, in the **Fidelman**[279] case it was held that there was no longer a need to continue affirmative action practices for women regarding pension arrangements. These last two judgments mark a change in the judiciary's position towards early retirement, contrary to the position of the National Labor Court and similar to the Supreme Court's ruling in the Nevo case.

In the 2002 **Niv** case, the Supreme Court discussed the question of discrimination between men and women regarding a voluntary retirement agreement between Clalit, a healthcare provider and its workers. Under the agreement, men who agree to early retirement will receive pension benefits until the age of 65. However, women were eligible for the same benefits only until the age of 60. Judge Cheshin, in the majority opinion, based his ruling on a European case, **Birds Eye Walls**,[280] on pensions. Justice Cheshin's remarks were made in passing and without contributing to the verdict. His remarks go beyond the subject matter before the court, thus suggesting, perhaps, the need to compare the Israeli case to the European case and learn

277 Council Directive 76/207, *supra* note 238.

278 National Labor Court 48/3-40 Chavkin v. Gachelet Education Savings Reward Ltd. PD 20 169 (1988) (Isr.).

279 National Labor Court 1407/01 Fidelman v. Mivtachim Employees Social Security Institute Ltd. Law (Oct. 17, 2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

280 Case C-132/92 Birds Eye Walls Ltd. v. Roberts 1993 E.C.R. I-5579, 682.

from the latter. Furthermore, In the **Haifa Chemicals** case,[281] the issue of discrimination on the basis of age was examined in light of the Equal Employment Opportunity Law, and Vice President Barak-Ussoskin again mentioned the **Marshall** ruling,[282] stating that there is no need to establish intent when the conduct is discriminatory because meeting the language of law is sufficient to show that discrimination exists.[283] Courts make widespread use of European law, as well as different rulings from England, to interpret local law and compare the law to the guidance of the European Court of Justice, which instructs all Member States to enact laws relating to the burden of proof of discrimination.[284]

Regarding the mandatory retirement age, the question arises whether determining a uniform or biological retirement age constitutes improper discrimination. A basic question about age discrimination was discussed in the **Bossi** case,[285] where Judge Rosenfeld based her ruling on the Directive on Discrimination in Work on the Background of Religion and Belief, Disability, Age or Sexual Orientation[286] whose implementation has led to comprehensive regulations on the subject.[287] The judgment cited Article 2 of the Directive, which expressly prohibits direct and indirect discrimination.[288] These references reinforce the Court's stance that both dismissal and wage discrimination in this case are illegal under Israeli and European law.[289] However, when the employee reaches retirement age, it is necessary to re-examine whether this is discrimination.

281 National Labor Court 404/05 Benoz v. Haifa Chemicals Ltd. (Dec. 21, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Haifa Chemicals case].

282 Marshall case, *supra* note 261.

283 Haifa Chemicals case, *supra* note 281, at 29.

284 *Id.* at 23 ("The European Court of Justice has ordered all Member States to enact laws in this spirit."); *id.* at 29 ("Many states follow this path in their rulings.").

285 National Labor Court 209/09 Garden Authority of Israel v. Bossi (Oct. 2, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Bossi case].

286 Council Directive 2000/78, *supra* note 238.

287 *See e.g.*, The Employment Equality (Age) Regulations 2006, SI 2006/1031 (Eng.), *superseded by* Equality Act 2010, c. 15.

288 Bossi case, *supra* note 285, at 21.

289 The right to equality sprawls in Israeli Labor Law, whether in explicit legislation or as a constitutional principle derived from Basic Law: Human Dignity and Liberty (5752-1992). Moreover, it has been held that even in situations where the Employment (Equal Opportunities) Law does not apply in any case, the prohibition on discrimination applies under the employer's obligation to perform an employment contract in good faith. *See* National Labor Court 1224-10-11 Saturated

In the **Weinberger** case,[290] the National Labor Court discussed a claim of age-based discrimination, with the appellants arguing that the obligation to retire at age 67 is unconstitutional, and that the employer must consider an employee's request for continued employment beyond the mandatory retirement age, on an individual basis. Judge Davidov-Motola, turned to EU Directive EC / 2000 / 78 that prohibits discrimination at work due to age, among other things,[291] but noted that it does not prevent the determination of compulsory retirement age to the extent that such determination is objectively justified and reasonable for the achievement of a proper purpose, provided that the means for achieving the purpose are proportionate and necessary.[292] The court accepted the appeal, and the judge relied on comparative laws from different countries, including the United States. The court referred to "An increasing trend of recognizing the serious consequences of forced retirement at a uniform biological age, and the need to soften in order not to contradict the prohibition of age discrimination."[293] Judge Davidov-Motola applied interpretations from a number of European legal sources. Apart from mentioning the Directive, she found support for her decision in the 2011 European Court of Justice *Rosenbladt* case,[294] which approved a collective employment agreement, according to which retirement is mandatory,

Water Ltd. v. Temyat (Oct. 8, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Dismissals close to retirement age have already been discussed quite extensively in Israeli case law. In their case, the question arose as to whether it was discrimination under the Employment (Equal Opportunities) Law. In the author's opinion, the issue of employing a post-retirement worker must be related to the issue of age discrimination, which is measured by the economic model: any distinction based on non-relevant considerations, whether a group affiliation in the traditional sense or an irrelevant criterion, was considered to violate the principle of equality. *See* Yitzhak Zamir & Moshe Sobel, *Equality before the Law*, 5 MISHPAT UMIMSHAL 165, 186–95 (1999); Sharon Rabin-Margaliot, *Diagnosis*, *Discrimination and Age: A Game of Balance of Power in the Labor Market*, 32 MISHPATIM 131, 135 (2001).

290 L.A. 209-10 Weinberger v Bar-Ilan University (Dec. 6, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter the Weinberger case].

291 *Id.* at 27. For a discussion on the pension in the EU, *see* Kendra Strauss, *Pension System and Labour Law in the EU*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 547 (Alan Bogg, Cathryn Costello & A.C.L. Davies eds., 2016).

292 The judge's verdict is also supported by comparative law of other states, including the United States, with reference to "a growing trend in recognizing the serious consequences of coercive retirement at the same biological age, and the need to soften the coercive retirement in order not to contradict the prohibition of age discrimination." *See* The Weinberger case, *supra* note 290, at 26–27.

293 *Id.* at 28.

294 Case C-45/09, Rosenbladt v. Oellerking Gebäudereinigungsges, 2010 E.C.R. I-9391.

with the formation of entitlement to a pension, and the latest at the age of sixty-five.

The most recent judgment in our study's database was given in the 2016 Gavish case.[295] In which, The Supreme Court was asked to consider the constitutionality of the statutory retirement age in Israel. Court was asked to cancel Section 4 of the Retirement Age Law, the petition was unanimously rejected. In reviewing the theory of retirement ages and adhering to arguments for and against it, the Supreme Court turned to foreign jurisprudence.[296] As for the question of whether a mandatory retirement age constitutes age-based discrimination, the Court turned to a directive adopted by the EU in 2000. The directive sets a standard for employment equality and prohibits, among other offenses, discrimination based on an employee's age.[297] President Naor examined the retirement age issue using a comparative perspective, finding that in various countries (EU, US, Canada, etc.) there are diverse options for regulating retirement, including retirement age.[298] She went on to state the purpose of the protection provided to these workers which is reflected by the rulings of the European Court of Justice.[299] The premise underlying the Retirement Age Law in Israel is to allow for the retiree to maintain basic living standards. To this end, she turned to the European Court of Justice ruling in *Rosenbladt*,[300] noting that, a "mandatory retirement on the basis of age is a common model in European countries and balances political, economic, social, demographic and budgetary considerations." [301]

This reference to *Rosenbladt case* was made to strengthen the interpretation of domestic law and to review the premise underlying the Retirement Age Law. Naor noted that the objectives mentioned have been recognized as commendable goals in both comparative law and by the European Court of Justice, citing five judgments given in this regard.[302] She interpreted the Directive's rules to have wide-

295 The Gavish case, *supra* note 225. For further information *see*, Chapter III(G).

296 *Id.* at ¶ 39.

297 *Id.* at ¶ 53. The Court refers to Council Directive 2000/78, *supra* note 238, that was adopted by the EU. The directive establishes procedures for employment equality.

298 *Id.* at ¶ 39.

299 *Id.* at ¶ 39.

300 *Id.* at ¶¶ 50, 53.

301 The Gavish case, *supra* note 225, at ¶¶ 50, 53.

302 *Id.* The cases that the President refers to are: Case C-411/05 Palacios de la Villa v. Cortefiel Servicios SA 2007 E.C.R. I-8531; Case C-250/09, Georgiev v.

reaching scope while fully examining them and their application in the European Court of Justice. President Naor goes on to state that this issue is not unique to EU law and that various member states have made specific legal arrangements. Justice Barak-Erez joined President Naor's opinion, noting that "the aspect of collective arrangements for retirement age was also emphasized in the European Court of Justice's ruling."[303] Justice Barak-Erez's referral was made for the purpose of interpreting domestic law and comparing Israeli law to EU law.

Even though the judge ultimately decided that there was no reason to interfere with the retirement mechanisms set out in the Retirement Age Law in Israel, she stressed that "[t]he fact that the retirement age issue has not disappeared from the public agenda reinforces the conclusion that the appropriate place to consider further changes is in the legislature. Even though I found the law to be constitutional, it seems that the respondents were right in deciding to bring this issue before the Government."[304] And before these words, she notes that: "Weighing the retirement age issue from a comparative perspective reveals that the legislature's retirement model is not exceptional… There are various considerations for and against the retirement age frequently discussed in these states and the legal, social and economic debate on this issue is not over yet."[305]

These examples show how EU law continues to influence labor law in Israel even without explicit citation within a given ruling. It is sufficient to see that the highest instance of the judicial system has conducted a thorough legal analysis which lead to the interpretation of domestic law based on elements of EU law. This study only examined judgments that directly cite EU law. However, in our opinion, the effect of foreign law as a legal tool used by the Israeli judiciary is broader than can be demonstrated by number of citations. The Supreme Court's call for the legislature to re-examine the issue has not yet been answered despite changes and rulings in the EU as well as various European countries that have adopted lenient arrangements that essentially abolish any mandatory retirement age. The fact that in the *Gavish* case and in other judgements the Court broadly looked to EU law in the context of comparative law, emphasizes the extent to

Tehnicheski universitet - Sofia, filial Plovdiv 2010 E.C.R. I-11869; Case C-141/11, Hörnfeldt v. Posten Meddelande AB 2012 E.C.R. I-00000; Case C-159/10, Fuchs v. Hessen, 2011 E.C.R. I-6919; Case C-341/08, Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, 2010 E.C.R. I-47.

303 The Gavish Case, *supra* note 295, at ¶ 12.

304 *Id.* at ¶ 61.

305 *Id.* at ¶ 56.

which the courts depend upon foreign law to make practical changes to the field.

The last three sections in this paper, discussed the issues of equality in Labor Law for the LGBTQ community, affirmative action and employment diversity as well as the issue of different retirement ages for men and women on the basis of gender. In all these issues, the reliance of labor law courts in Israel upon foreign law arrangements is clear, and this reliance contributes to the development of Israeli case law. The final issue we seek to address is privacy in the workplace as it is clear that the Court specifically addresses EU law as a source foreign jurisprudence.

H. Privacy in the Workplace

This issue is an example of how the Israeli court used European law in the absence of applicable domestic rulings or laws. This is expressed in the National Court's judgment in *Isakov*[306] regarding privacy in the workplace. With emphasis on EU law as a foreign source, the Court notes:

> In broadening the interpretive horizon and field ... we consider the EU directives in which normative arrangements were established regarding the rights and obligations using information technology in the workplace ... these principles can be a normative source from which to draw when interpreting the laws relevant to the subject at hand.[307]

There it was decided that the employer is prohibited from reading the personal correspondence conducted in the employee's personal e-mail, except in exceptional circumstances that justify it.[308] This was the first case that Israeli courts were required to address privacy in the workplace. Judge Arad reviewed the right to privacy in comparative law and turned to a European directive[309] that established an advisory body that aims to harmonize, among the various EU legal systems, privacy protection in general and particularly privacy protection in the workplace. This ruling is based primarily on the right to privacy in

306 The Isakov case, *supra* note 88.

307 *Id.* at ¶ 17.

308 *Id.*

309 Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

comparative law that was recognized as a fundamental right in labor relations, and the Directive on Privacy in Electronic Communications.[310]

Judge Arad found support in EU law for her decision prohibiting monitoring and following private employee activity in Israel, finding such monitoring to be a serious violation of the employee's right to privacy, as opposed to automated and passive monitoring. This issue is complex in the technological age and outdated regulation can undermine labor relations. It can even be said, with caution, that legal challenges posed by technological advances in law[311] have just begun, and are intensified in the area of labor relations.[312] This is an immediate and expected result of the increasingly blurred boundary between work and private life, on the one hand, and the multiplicity of digital media and technologies including computers and mobile phones that which allow employers to monitor employees even when they are away from the work premises, on the other.[313] The examples cited in the eight issues we examined focus on the essence of EU law in labor courts in Israel. These references show how Israeli courts use EU law as a source to aid in interpretation of domestic labor law, shaping the field in Israel with foreign influence. In the next section of the article we will present quantitative data on references in the labor law courts in Israel to sources of EU law.

310 Directive 2002/22 of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services (Universal Service Directive), 2002 O.J. (L 108) 51; Directive 2002/58 of the European Parliament and of the Council of 12 July 2002 Concerning Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on privacy and electronic communication), 2002 O.J. (L 201) 37.

311 MATTHEY W. FINKIN, ET AL., EMPLOYEE AUTONOMY, PRIVACY, AND DIGNITY UNDER TECHNOLOGICAL OVERSIGHT, COMPARATIVE LABOR LAW 153–55 (Matthew W. Finkin & Guy Mundlak eds., 2015).

312 IRENE MANDAL & MAURIZIO CURTARELLI, CROWD EMPLOYMENT AND ICT-BASED MOBILE WORK – NEW EMPLOYMENT FORMS IN EUROPE, POLICY IMPLICATIONS OF VIRTUAL WORK 51, 72 (Pamela Meil & Vassil Kirov eds., 2017).

313 Nataly Nachman Kimchi, *Monitoring@Work.com, Employer's Supervision of Employee's Online Activity in the Workplace* Monitoring@Work.com, 12 AVODA CHEVRA UMISHPAT 71, 74–82 (2010).

IV. QUANTITATIVE DATA: THE INFLUENCE OF EU LAW ON ISRAELI LABOR LAW

A. Methodology

This study is the first to offer an examination using integrated quantitative-descriptive research to reflect on the role of EU law in Israeli labor court rulings. Unlike previous studies that have discussed the effects of foreign law, focusing on main legal sources such as Anglo-American common law or continental law,[314] our research presents a novel approach at how a supra-national entity serves as a source of reliance for Israeli legal interpretation and judicial review in the field of labor law. With our unique database, we, sought to collect data regarding every labor law ruling in which the courts referred to some normative source from EU law.

The database compiled references to normative sources of EU law, including treaties, regulations, directives and the case law of the European Court of Justice. These references were reviewed with the Citation Analysis methodology,[315] which allows for the examination of the information judges found valuable, the adopted legal reasoning, and the types of EU law cases found to be more worthy of the applied reasoning, as noted by Zaring.[316] The study does not examine the integration of individual EU Member States' legislation into Israeli law but seeks to treat EU law, as one legal system, to be our research objective in this area of labor law.[317] The collection of data allows us to present an empirical analysis of the evolution of the references to these normative sources over the years. The methodology of analysis

314 *See* Shachar, *supra* note 1; *see also* Navot *supra* note 1; *see also* Barak-Erez, *supra* note 1.

315 Richard A. Posner, *The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics* 2 (John M. Olin Program L. & Econ. Working Paper No. 83, 1999); Zaring, *supra* note 21, at 306–07. In our study, a very similar research methodology to Zaring's research methodology was performed, with the required changes.

316 Zaring, *supra* note 21, at 302.

317 For studies that were done on specific countries in the EU and not on the EU as one piece, *see* Shachar, *supra* note 1; *see also* Navot, *supra* note 1. Shachar's research indicates that between 1995 and 2004, 11% of the referrals were made to foreign referrals. Most of the referrals were referred to Anglo-American jurisdictions and a small part of them were referred to European Civil Law. *See* Shachar, *supra* note 1, at 46, 63, 65–67. Navot's research examines foreign references to other common law jurisdictions such as Canada and England. The results show that 23% of the foreign referrals examined in the study were referred to these two countries while 5% of the referrals were referred to Germany, a civil law jurisdiction. *See* Navot, *supra* note 1, at 148–51.

has a limitation, which should be presented. The mere mention of a normative source does not lead to a definite conclusion that the cited source ultimately influenced the decision of the judge or the court. Indeed, it may well be that, at the end of the day, a given decision in the database was not based primarily or exclusively on EU law. Our findings indicate how judges view the importance of European law as a normative source of legal inspiration that can influence labor law in Israel. The analysis of all the judgments examined constitute a combination of empirical data collection alongside descriptive analyses of references to sources of EU law from the high Labor Law Courts. Despite the potential drawback of this methodology, it allows one to reliably see the frequency of labor law judges' references to European sources.[318]

The database compiled for this study is based on the judgments in labor law in Israel which contained references to EU law, in the High Courts of Labor Law, from the date of the Labor Court's establishment in 1969 up to the end of 2016. The High Labor Law Courts include the National Court, as a first instance and an appellate court for proceedings initiated by the Regional Labor Court, and the Supreme Court, as an appellate court for the National Labor Court. Unlike previous research[319] based on a small sample of cases,[320] this database includes all the judgments given in labor law cases, in which references were made to a binding normative source of EU law. This study allows for the understanding of the presence and quality of the use of EU law sources in Israeli case law. The purpose of this study is not to compare the manner and scope of EU law references with other sources of foreign law, but rather, to examine the role of EU law as a

318 The analysis methodology has several limitations and this research seeks to neutralize it as much as possible. The difficulty in this methodology is that there are various reasons for the use of reference by judges in verdicts. For more on this topic *see*, Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 27 J. LEGAL STUD. 495, 513 (2000); Matthias Van Der Haegen, *Building a Legal Citation Network: The Influence of the Court of Cassation on the Lower Judiciary*, 13 UTRECHT L. REV. 65, 67 (2017). For the place of quantitative methodology in labor law, *see* Simon Deakin, *The Use of Quantitative Methods in Labour Law Research: An Assessment and Reformulation*, 27 SOC. & LEGAL STUD. 456, 461-64 (2018).

319 *See* Shachar, *supra* note 1; Navot *supra* note 1.

320 Shachar et al., *supra* note 1, referred to 7,147 Supreme Court rulings published in the PDI study years that were a random sample of the judgments published during those years. From the period in the PDI volumes and the computerized database. Zaring's research, *supra* note 21, also did not include all federal rulings in the United States.

unified system in the field of labor law and as an actor in the international arena.

The first phase of our research consisted of creating a database based on a search of official case law in the legal database, Nevo legal data base.[321] We located references made by labor law courts to EU law, its institutions, and its normative sources: primary legislation (treaties), regulations, directives and rulings.[322] The second stage consisted of reading and categorizing the collected judgments that referenced the sources of EU law. Reference to foreign legal sources is part of almost every legal case, and therefore it is of great importance to classify these references as accurately as possible.[323] This study classifies the findings of references in all judgments into three main categories, similar to Zaring's study[324]: (1) references made so as to interpret domestic laws and compare laws; (2) references made in order to reinforce domestic law and (3) references made in passing without any significant effect on the verdict.

The first category, "Interpretation of Local Law and Comparison of Laws," includes judgments with reference to EU law for the dual purpose of interpreting domestic law and comparing domestic law to that of the EU, ultimately coming to a decision based on EU law that modifies existing normative provisions of labor law in Israel or allows for existing norms to be interpreted differently.[325] The second category, "Reinforcement of Domestic Law," includes rulings which referenced EU law in order to reinforce a decision based on existing domestic norms. In these cases, EU law does not form a basis for the ruling, but rather serves as a reinforcement and affirmation of domestic legal norms. The third category, "Reference in Passing," includes judgments with references to EU law without contributing to the verdict, but rather as a way to observe other methods from

321 NEVO LAGAL DATA BASE, www.nevo.co.il.

322 The following search terms were used, in both Hebrew and English, including variations thereof, in order to compile an exhaustive list of any potential keywords: Europe; Regulations; Directive, EU, European Community; European Convention; The European Council.

323 Filippo Galgani et al., *LEXA: Building Knowledge Bases for Automatic Legal Citation Classification*, 42 EXPERT SYS. APPLICATIONS 6391, 6405 (2015).

324 Zaring, *supra* note 21, at 315–20.

325 *See* the Elbit case, *supra* note 90 (exhibiting an example of the use of reference for interpretation and comparison, where Justice Rabinowitz widely used EU law to support the interpretation of domestic law while emphasizing the relevance of foreign law to the judicial process in Israel).

abroad.[326] Regarding the need for foreign law as a part of domestic judicial review, Slaughter notes: "Stop imagining the international system as a system of states unitary entities like billiard balls or black boxes-subject to rules created by international institutions that are apart from… They relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels."[327] Each reference was classified according to four additional criteria. First, the type of normative source to which the reference was made: legislation (treaty, regulation, directive), charter or recommendation, case law and literature; second, the year of the judgment; third, the subject of the labor law ruling; and fourth, the identity of the judge who made the reference. To this end, our findings were reviewed by authors and a team of ten research assistants for approximately a decade, with the aim of counteracting the personal subjective effect of reading the judgments.[328]

These uses of foreign law to reinforce particular interpretations of domestic law and solutions to new legal challenges, correspond to

326 Careful reading of these references indicates that sometimes, despite being casually mentioned, it is used underneath the surface in order to strengthen local law. *See, e.g.*, HCJ 6845/00 Niv v. National Labour Court 56(6) PD 663 (2002) (Isr.) [hereinafter Niv Case].

327 Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 205 (2002) (according to Slaughter the references to foreign law are gradual, first as a reinforcement of existing law and only then as a new interpretation of domestic law).

328 Supreme Court judges over the years used normative sources such as legislation on various levels and EU court rulings, judges and literature aides, White Papers, Green Papers, and Handbooks, as well as various reports which publish various official bodies in the EU. At a high normative level, the use of sources such as these also influences the development of legal debate and interpretation of principles and rules of local law and the strengthening of local law, as well as the making of passing references, as mentioned, such references were not included in the database generated in this study and are not considered as a source. The Labor Law Courts, as will be shown below, often refer to both EU and European law as a single entity and do not always clearly distinguish between them, and the European Court of Justice ("ECJ"). The ECJ also found in the Israeli case law references to the European Court of Human Rights ("ECtHR") and the European Convention on Human Rights ("ECHR"), both of which, by virtue of this Court, are not included or counted in our databases, as well as references to the Council of Europe, which is not a body of the European Union. Also, these references, which do not belong to the EU, were not counted in the database, making a clear distinction between them. Alongside this, there are cases where Israeli judges have cited secondary sources, such as European legal literature that cites legislation or rulings originating in EU law, but without specific reference within the judgment. These sources were also not counted in the database in this study. In doing so, we believe that a fuller and wider picture of the use of European law as a whole will be possible, with emphasis on the empirical findings pertaining to the sources of EU law only.

what Aharon Barak considers the proper use of comparative law.[329] Barak describes three types of possible uses of foreign law: an interpretative theory in which the foreign law helps the judges to better understand their role of interpretation and the judicial process while weighing other legal systems; examination of democratic values in foreign law and the manner in which they are used and safeguarded, based on the understanding that democracy has common basic values; Comparative Solutions for Specific Situations - Test to see how other legal systems respond to similar situations that are novel to our system.[330] The three types of assistance that can be derived from the use of foreign law, as noted by Barak, are also expressed in the findings of many researchers such as Yoram Shahar, Susie Navot, and Dafna Barak-Erez,[331] who pointed to the importance of using comparative law and the status of foreign law in domestic law.[332] Shahar's studies found an increase in the number of references to foreign sources within Israel's Supreme Court rulings[333] and Navot studied the influence of foreign law on Israeli constitutional law cases finding that countries with similar legal values tend to support similar legal conclusions, which further legitimizes domestic rulings based on foreign law.[334] In Barak-Erez's opinion, the use of foreign legal systems is influenced not only by legal considerations, but also by aspects of the cultural proximity between Israel and the countries that serve as the inspirational models.[335] Similarly, Amichai Magen examined the many ways in which domestic legal changes take place, *inter alia*, through the direct influence of EU law.[336] In his opinion, Israel operates selectively within the global arena, only absorbing rules into domestic law that it considers appropriate.[337] While many

329 AHARON BARAK, THE JUDGE IN A DEMOCRATIC REGIME (2004); Barak, *Comparison in Public Law*, *supra* note 19, at 289.

330 AHARON BARAK, THE JUDGE IN A DEMOCRATIC REGIME, *supra note* 329.

331 *See* Navot, *supra* note 1; *see also* Shachar, *supra* note 1; Barak-Erez, *Comparative Law as a Practice*, *supra* note 1.

332 *See* Barak-Erez, *Comparative Law as a Practice*, *supra* note 1, at 90–93.

333 Shachar, Harris & Gross, *supra* note 1, at 151–63.

334 Navot, *supra* note 1, at 150.

335 Barak-Erez, *Comparative Law as a Practice*, *supra* note 1, at 88.

336 Amichai Magen, *Israel and the Many Pathways of Diffusion*, 35 WEST EUR. POL. 98, 100, 104-05 (2012).

337 *Id.* ("While there is little evidence that direct EU influence mechanisms—manipulation of utility calculations, socialisation, or persuasion—have produced substantial impact, Israelis emerge as sophisticated emulators of EU institutions, adapting and implementing EU standards in carefully selected policy realms,

studies examine the impact of EU law on its member states, few studies examine the impact of EU law on foreign countries.[338]

Our empirical collection and descriptive analyses the rulings examined in this study, as presented in the following section, constitute an integration of methodological references from the High Labor Law Courts into the sources of EU law. In analyzing these cases, it is essential to understand existing influences in the decision-making process in a given legal system. This methodology allows one to see the frequency of referral of Supreme Court cases to the sources of EU law. Despite the potential shortcomings of this methodology, and the limited number of references, it is evident that EU law is present in precedent rulings in which labor law questions arise. This is partly because of the particular issues facing the Israeli legal system.

B. Findings

The database includes 94 citations in labor law courts of EU labor law cases, of which 21 are Supreme Court rulings and 73 are National Labor Court rulings. The majority of the references, about 63%, serve to aid the interpretation of local law and the comparison of laws, indicating the labor courts' need for additional normative sources for interpreting Israeli law, with only about 18% of referrals being made to directly reinforce domestic legislation. These findings reinforce the premise that Israeli labor law makes use EU law primarily in cases for which domestic provisions are deficient or in which new issues in the Israeli legal discourse are presented, and less for the purpose of reinforcing existing law.[339] In an attempt to characterize, in the aggregate, the uses of EU legal sources in the Israeli labor courts, we will present our collected data in a concentrated manner.[340] It is worth noting that the courts' use EU law even when it is not bring to a

typically as the result of two distinct mechanisms of emulation: competition and lesson-drawing."). *See also id*. at 109–11 (specifically about selective absorption).

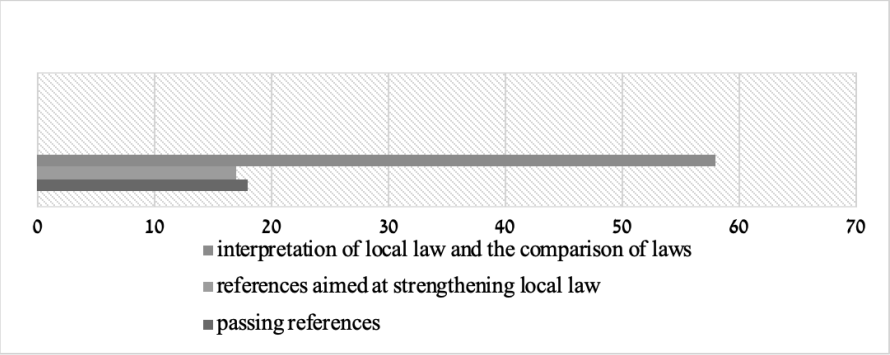
338 André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 EUR. J. INT'L L. 105, 109-11 (2014). *See also* Silvana Sciarra, *The Evolution of Collective Bargaining: Observations on a Comparison in the Countries of the European Union*, 29 COMP. LAB. L. & POL'Y J. 1, 25 (2007).

339 *See, e.g.*, the Elbit case, *supra* note 90; the Israel Aerospace Industry case, *supra* note 96; Gavish case, *supra* note 225; Niv Case, *supra* note 326; Nevo case, *supra* note 269; HCJ 5666/03 Kav LaOved v. National Labor Court Jerusalem 52(3) PD 267 (2007) (Isr.); Amit case, *supra* note 138; Haifa Chemicals case, *supra* note 281.

340 In the table titled "Classification of references—in all tribunals of labor law," the references are listed by number and the data presented in writing alongside the table indicate the percentage segmentation.

different ruling than Israeli domestic law would; such is the case of references made in passing or references used to reinforce local law, which together constitute about 37% of the references. This data point confirms the status of EU law as influential to Israeli law, in the eyes of judges, and its connection to Israeli law, as well as the extent to which it is suitable to be an influential source of developing legal norms. Even when there is no need or desire to use EU law for adjudication, Israeli judges perceive this foreign law to be a reliable, fundamental and appropriate source for reference and discussion.

Figure 1 - Number of References (by classification in all labor law courts)



References to EU case law made to aid in the interpretation of local law and to conduct a comparative law analysis, indicate that citing EU law is not an ordinary part of adjudication, but rather serves in situations of importance that contribute to and promote the development of new legal norms. In our opinion, the number of referrals and types of references, in conjunction with a substantive examination of each case and its subject matter, indicate and qualitatively reinforce our asserted special impact of EU law on legal precedents in Israel. It is important to consider separately the National Labor Court, which is the highest instance of labor courts and whose rulings contain the most references to EU law. About 70% of the references made by the National Labor Court served to assist in the interpretation of local law and conduct a comparative analysis between laws. This is the "classic" use of foreign law – cases in which domestic law is lacking, or its language is incompatible with the circumstances presented before the Court. This figure alone indicates the place of EU law, as part of the process of interpretation and judicial review conducted by the National Labor Court. Of the remaining

references, about 18% were references in passing and 12% served to reinforce local law. In contrast, the practices of the Supreme Court are slightly different: 40% of the references were made for the interpretation of local law and comparative analysis and a similar percentage of references served to reinforce local norms. This may be due to the fact that the reinforcement of local law, in the case of the Supreme Court, may entail the direct support of the National Labor Court's rulings.

We categorized the references made to EU law in our collected rulings according to the following: legislation, case law, and other sources (recommendations, charters and literature). Most references were made to case law and legislation, about 52% of the Supreme Court references and 41% of the National Labor Court references were made to rulings, and about 47% of the Supreme Court references and about 49% of the National Labor Court references were to legislation. In the high courts of labor collectively, meaning the Supreme Court and the National Labor Court, references to legislation and case law account for more than 95% of all references made. Regarding challenges between citizens and state agencies, Israeli judges find reinforcement and inspiration in matters that were brought before EU courts or expressed in legislative documents such as treaties, regulations and guidelines.

Table 2 - Classification into Normative Sources

	National Labor Court (N=73)	Supreme Court (N=21)
Legislative	49%	48%
Ruling	41%	52%
Other	10%	-

We continued and codified the legislative references according to these three: Treaties, Regulations and Directives. The division within the legislative category shows that about 40% of citations by the Supreme Court were references to treaties, but most of the citations,

both in the Supreme Court and the National Labor Court, were references to directives, 60% and 89% respectively.[341]

Figure 3 - Distribution within Legislative Reference Group (according to the various courts).

We examined the references and use of EU law throughout the existence of the labor law system in Israel and found a total of 94 references within 50 labor law cases. We observed a thematic development in the field of labor law, in Israel and around the world, that is mainly concerned with employment flexibility amidst unprecedented work patterns, openness to employment diversity and the right to equality.[342] These issues are consistent with the references to EU law by Israeli labor courts, divided into the various sub-branches of law within labor law. Due to the numerous fields within labor law, we grouped our data into five categories: social rights; termination of employment and retirement; employment relations; labor law unions; equality and anti-discrimination laws.

Table 4 - Distribution by Subject

Supreme Court (n=21) %	Subject	National Labor Court (n=73) %
5	social rights	8
10	termination of employment and retirement	19

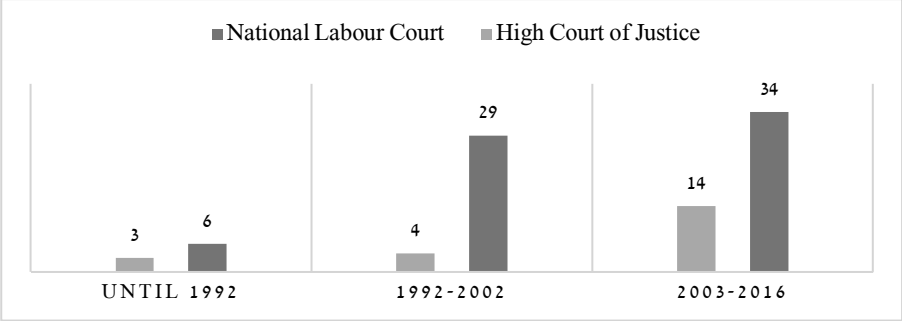
341 In the National Labor Court, there was a small amount of references of regulations—2.78% of all legislative references. No such references were found in the Supreme Court.

342 Giubboni, *The Rise and Fall of EU Labour Law*, *supra* note 11.

14	employment relations	36
14	labor law unions	11
57	the right to equality and anti-discrimination law	26

About one fifth of the references to EU sources by the National Labor Court were made in the field of dismissal. Two categories form the majority of National Labor Court references to EU law: employment relations (36%), and the right to equality and anti-discrimination law (26%). These two areas also constitute the majority of references made by the Supreme Court. Anti-discrimination law is particularly prominent with 57% of references, and together these two areas constitute more than 70% of the references made. The different thematic distribution between the courts can be explained, partly because of the difference in relevant authority and the appellate nature of the Supreme Court for the National Labor Court. It is also interesting to look at the distribution of the references over the years, in a way that allows for a comparative analysis between the court cases:

Figure 5 - Distribution of References Number Over the Years



Quantitatively, there is no doubt that the significant court in our research is the National Labor Court, it is both a high-instance court and has expertise in labor law. With the passage of time, the use of EU comparative law has increased significantly, both in frequency and in quantity referenced. In the National Labor Court, Judges Barak-Usoskin (38% of references made) and Adler (15% of references made) stand out. But it is interesting to mention the growth of the references over the periods during which different Presidents served the National Labor Court.

As can be seen from Figure 5 above, the number of references made by the National Labor Court has increased over the years, there was a growing need to define basic concepts of labor law. Labor law courts have needed foreign law, especially regarding modern labor challenges. To summarize, the field of labor law in Israel derives information and guidance from EU law, in most cases to assist in the interpretation of domestic law, and to carry out judicial activism to confront issues left unaddressed at local law. This is especially true in the presence of a need for aid in interpreting local law to suit modern conflicts, particularly regarding issues arising from dismissal and integrated aspects of defining employment relations, anti-discrimination measures and equal opportunity in the workplace.

V. CONCLUSIONS

This study aims to show the influence of EU labor law on Israeli labor law. According to the analysis in this Article, the quality of the references made to EU law indicates that Israeli judges, in the field of labor law find in European law a proper and natural interpretive source for the legal questions that require novel interpretations. Beginning with the first sources of EU law in 1978 in the **Lederman** case,[343] throughout the 47 years researched, Israeli labor courts began to make more comprehensive and in-depth comparisons of Israeli law to EU law, often dedicating entire chapters to EU law review before adjudicating the issue before them.[344] It seems that the use of EU sources in labor law will become important in the coming years, in light of the progress made by EU law when compared to other legal practices, and as a result of the EU seeking to enshrine unified standards in labor law.

Our research presents the application and use of EU law by labor courts in Israel. The study shows that the courts in Israel are turning to fundamental practices of European law when the tools provided by the domestic law are insufficient to meet the needs of frequently changing labor law. Although our sample size is not large, we find significant attempts to adapt the provisions of the law to a changing world; changes to work patterns and employment realities in Israel.[345]

343 The Lederman case, *supra* note 23.

344 The Israel Aerospace Industry case, *supra* note 96.

345 This was proposed by the Working Hours and Rest Law Commission on behalf of the Association for Labor Law. *See* Gideon Hollin, *The Israeli Labor Law Association – Law Working Hours and Rest Committee*, 6 MISHPAT AVODA 343

Israeli labor legislation is largely based on a European model, but the outdated nature of Israeli law is striking when comparing it to existing practices in other countries. Labor law in Israel suffers from a partial set of outdated legal provisions that do not offer solutions for the issues now facing the courts. Thus, while the purpose of labor law is to influence and shape social institutions, a rethinking of how labor law in Israel and the place of foreign law in general, and EU law in particular, is required.[346]

Ideally, every legal system solves the challenges brought before the courts in a local and independent manner, which is why the best solution would be for the legislature to provide adequate attention and rearrangement to the legal framework in labor law in such a manner that reference to foreign legal systems would no longer be required. But the reality on the ground is different, it is difficult for legislatures to keep up with the rapid pace of change and to swiftly prepare the appropriate legislation for future problems. Therefore, even with changes to local law, there will always be a need to turn to foreign law for reinforcement. While EU law influenced labor law legislation in the early 1960s, labor courts have remained largely loyal to other foreign legal sources. Additionally, one must note that the references to EU case law are not exclusive, and alongside the mention of EU law it is common to see references of other foreign legal systems.

That being said, early EU case law on Costa[347] and Marshall[348] prompted a change in the EU that had a ripple effect on the distant labor courts in Israel. The Marshall case has been mentioned four times in the 1990s in Israel, twice by the National Labor Court and twice by the Supreme Court, all of which were references in the context of labor law.[349]

(1996) (Isr.). The fact that the reference sample is not large may affect the significance of EU law alone on the decision taken.

346 Yehezkel Dror, *Law and Social Change*, 33 TUL. L. REV. 787 (1959); Rostam J. Neuwirth, *Global Law and Sustainable Development: Change and the "Developing–Developed Country" Terminology*, 29 EUR. J. DEV. RES. 911, 919–20 (2017) .

347 Costa case, *supra* note 14. This matter was mentioned in the Supreme Court's proceedings regarding constitutional rights, including property rights. *See, e.g.*, CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.).

348 Marshall case, *supra* note 261.

349 Nevo case, *supra* note 269; HCJ Nevo, *supra* note 269; Plutkin case, *supra* note 259; Haifa Chemicals case, *supra* note 281.

This study is the first to examine the impact of EU labor law on the development of case law in a non-EU country. The study refers to EU law as a goal and as a supra-national method that is the source of reliance for the interpretation and criticism of Israeli labor law. We did not examine the relationship between reliance on EU law and other legal systems often used for comparative analysis. The study also does not suggest that EU law is more appropriately suited for domestic application than any other foreign legal system. The use of foreign rulings may contribute to the development of domestic legal practice by both lawmakers and courts as they legislate and interpret national law.[350] The importance of using comparative law in the Supreme Court lies in the example it gives to the entire legal community. The fact that the higher labor courts in Israel find it appropriate to make use of foreign law, such as that of the EU, encourages legal arguments based on comparative study and reinforces the legitimacy of referring to successful legal solutions from other systems.[351] Labor court cases reveal EU law as a source of influence on local labor law in a way that effects fundamental conventions and outdated rules. EU law, by its presence as a legal guide for non-EU countries, serves as a set of rules from which legal principles can be adopted.

This study could form the basis for further research examining a possible solution to the existing legislative shortcomings in Israeli labor law and in many other legal systems. One can only expect that exposure to EU law will increase and, with it, the impact on laws of different countries around the world. This achievement is not in the hands of the various states but also, and perhaps most notably, in the hands of the EU itself to stabilize its status as a legal system of a unique and unified character beyond its recognized geographical boundaries – to become one of the great legal practices effecting the formation of law in many countries.

350 Smits, *supra* note 19.

351 Shachar, Harris & Gross, *supra* note 1, at 168–69. *See also* about the EU's affect MADS ADENAS AND FRANK WOOLRIDGE, EUROPEAN COMPARATIVE COMPANY LAW (2009).