

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 11 No. 02/2022



**ADAPT**  
www.adapt.it  
**UNIVERSITY PRESS**

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Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

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# The Right to Strike in a Neoliberal Context

Sergio Gamonal C. \*

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## Abstract

*Chile is known as a country that has applied the neoliberal recipes of the Chicago School to the extreme. Within this context, Chilean trade union law is extraordinarily restrictive and regulatory. Neoliberal legislation has limited the right to strike, disfiguring it when compared to the doctrine of the ILO's committee on freedom of association. In this work, we will refer to two observable trends within this context: one purely legal and the other factual. The legal trend refers to how academics and the courts have interpreted Pinochet's 1980 constitution broadly and evolutionarily to admit the strike as a constitutional right. On the other hand, unions and workers increasingly resort to strikes outside the legal framework, and with atypical modalities. Both trends intersect when the courts have upheld atypical strikes as a constitutional right for workers. However, both directions have not been sufficient to develop strengthened unionism in Chilean labour law.*

*Keywords:* Neoliberalism; Freedom of association; Strike.

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*You know as well do that when we are talking on the human plane question of justice only arise when there is equal power to compel: in terms of practicality the dominant exact what they can and the weak concede what they must<sup>1</sup>*

## 1. Introduction

The *Fable of the Bees* of Bernard Mandeville, the first version of which was published in 1705, is considered as one of the founding works of the economic theory of *laissez-faire*<sup>2</sup>. Mandeville tells us the story of a thriving beehive abundant with both occupations and bad habits, the latter being key to the prosperity of the beehive. In other words, because all of its inhabitants are somehow thieves, the entire beehive is prosperous. Notwithstanding this, the bees decide to become honest, and the many activities that depend on the misfortunes of others disappear, thus, it also becomes extinct. The name of the Fable ends with this famous quote: *Private Vices Public Benefits*, perhaps Mandeville's most famous quote. For many, The Fable of the Bees is the DNA of capitalism.<sup>3</sup>

The Chilean case might as well be similar to that of the Fable of the Bees, as the dictatorship of Pinochet led to a genuine neoliberal revolution, privatizing all spheres of Chilean society<sup>4</sup>, from education to prisons, from public works to health and pensions. Likewise, taxes were lowered, foreigners were allowed to exploit natural resources without being required to pay any taxes or royalties, and State-owned companies were privatized at shockingly low prices and given out to Pinochet's closest circle almost for free.<sup>5</sup>

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<sup>1</sup> Thucydides, *The Peloponnesian War*, Oxford University Press, 2009, p. 302.

<sup>2</sup> L.C. Rutledge, *The Fable of the Bees by Bernard Mandeville (1670-1733) and Its Influence in Literature and Economic Theory*, in *American Entomologist*, Vol. 52, No. 3, 2006, p. 134.

<sup>3</sup> D. Dufour, *Cuando el robo es virtud*, in *Le Monde Diplomatique*, Chilean edition, 2017, pp. 34-35.

<sup>4</sup> D. Barría Traverso, E. Araya Moreno, O. Drouillas, *Removed from the Bargaining Table. The CUT during the Bachelet Administration*, in *Latin American Perspectives*, Issue 185, Vol. 39 No. 4, 2012, p. 89.

<sup>5</sup> J.G. Palma, *¿Cuánto habrá que esperar para que los Chicago Boys & Asociados respondan por el botín que algunos se llevaron?*, in *CIPER Chile* (09/12/2013), available in: <https://www.ciperchile.cl/2013/09/12/%C2%BFcuanto-habra-que-esperar-para-que-los-chicago-boys-asociados-respondan-por-el-botin-que-algunos-se-llevaron/>

On the other hand, and although the country has experienced an economic growth, the huge inequality<sup>6</sup>, the persistent productive matrix of an exporter of commodities, which has not yet been overcome, and the consolidation of major monopolies consisting of less than 10 families - which practically own the country and dominate almost all the media (print media, TV, radios, etc.) and almost all the *think tanks*- raise doubts about Chile's capacity to become a developed country in the future<sup>7</sup>. Chile is what MIT professor Ben Ross Schneider calls *hierarchical capitalism*,<sup>8</sup> which tends to monopolies and low productivity. In this context, the social outcry of October 2019 is no surprise, nor is the fact that the governing elite was forced to begin a process for the drafting of a new constitution. Discontent is huge, and it may be illustrated with some of the most popular graffiti and banners of the protests since 2019:

Until dignity becomes a habit"<sup>9</sup>; "¡Chile Awoke!"<sup>10</sup>; "There is still a lot month left at the end of the wage"<sup>11</sup>; "If there is no bread for the poor, there shall be no peace for the rich"<sup>12</sup>; "I'm sorry that my protesting gets in the way of your traffic, but your INDIFERENCE gets in the way of my country"<sup>13</sup>; "One need not be a communist to wish for a better world"<sup>14</sup>; "I do not fear death. I fear retirement"<sup>15</sup>; "To the Congress: If pension payments do not rise, at least approve the euthanasia law"<sup>16</sup>; "PLUNDERING is for a university student to be forced to pay during 20 years what a congressman makes in 2 months"<sup>17</sup>; "They want to take

<sup>6</sup> Chile shows one of the biggest inequalities worldwide. See P. Posner, *Bachelet and the Chilean Model*, in *Georgetown Journal of International Affairs*, July 12, 2016.

<sup>7</sup> J.G. Palma, *Cómo fue que nos graduamos de "país de ingreso alto" sin salir del subdesarrollo*, in *CIPER Chile* (07/15/2013), available in: <https://www.ciperchile.cl/2013/07/15/como-fue-que-nos-graduamos-de-pais-de-%E2%80%9Cingreso-alto%E2%80%9D-sin-salir-del-subdesarrollo/>

<sup>8</sup> B.R. Schneider, *El capitalismo jerárquico de Chile difícilmente puede ser defendido por los partidarios del libre mercado*, in *CIPER Chile* (05/04/2016) available in: <http://ciperchile.cl/2016/05/04/el-capitalismo-jerarquico-de-chile-dificilmente-puede-ser-defendido-por-los-partidarios-del-libre-mercado/>

<sup>9</sup> R. Molina Otárola, *Hablan los Muros. Grafitis de la rebelión social de octubre de 2019*, Lom, 2020, p. 23.

<sup>10</sup> Id. p. 23.

<sup>11</sup> Id. p. 36.

<sup>12</sup> Id. p. 46.

<sup>13</sup> Id. p. 52.

<sup>14</sup> Id. p. 60.

<sup>15</sup> Id. p. 60.

<sup>16</sup> Id. p. 62.

<sup>17</sup> Id. p. 69.

out our eyes because they know we already opened them”<sup>18</sup>; “Fight until living is worth it”<sup>19</sup>; “I am a Dietician, and violence is that 50% of the senior adults who are admitted to hospitals are MALNOURISHED”<sup>20</sup>, and “Violence is to refer to years of abuse as <<NORMALITY>>”<sup>21</sup>.

This process has yet to end, and, for the time being, the costs of human rights violations are very high, and they brought back to life ghosts that seemed to have been overcome.<sup>22</sup> The weakness of unions has played a key role in the inequalities of the labour market<sup>23</sup>, which has led to a low collective bargaining coverage.<sup>24</sup> The limitations to the right to strike, among others, have been key to this result.<sup>25</sup>

<sup>18</sup> Id. p. 71.

<sup>19</sup> Id. p. 80.

<sup>20</sup> Id. p. 87.

<sup>21</sup> Id. p. 92.

<sup>22</sup> There are several reports on the serious human rights violations in Chile by the Government since October 2019: (1) Human Rights Watch in <https://www.hrw.org/es/world-report/2020/country-chapters/336397> (2) Office of the United Nations High Commissioner for Human Rights in [https://www.ohchr.org/Documents/Countries/CL/Report\\_Chile\\_2019\\_EN.pdf](https://www.ohchr.org/Documents/Countries/CL/Report_Chile_2019_EN.pdf) (3) Informe de Derechos Humanos en Chile (“Human Rights Crisis in Chile: A Digital Inquiry”) of the University of California in Berkeley and Santa Cruz in <https://storymaps.arcgis.com/stories/1ee6a10615944aeab3be4fce51c03989> (4) Amnesty International in <https://amnistia.cl/informe/capitulo-de-chile-informe-anual-2020-21/> (5) Informe Final Report of the International Human Rights Observation Mission of the World Organization Against Torture in <https://www.omct.org/es/recursos/reportes/final-report-of-the-international-human-rights-observation-mission>.

Likewise, the Inter-American Commission of Human Rights has expressed concern about the serious violation of human rights in Chile: [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/317.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/317.asp)

<sup>23</sup> On inequality in Chile, see PNUD, *DESIGUALES. Orígenes, cambios y desafíos de la brecha social en Chile*, Uqbar Editores, 2017.

According to the OECD, Chile is one of the three Latin American countries with the highest levels of income inequality, in: <https://www.elmostrador.cl/noticias/2020/03/09/segun-informe-de-la-ocde-chile-es-uno-de-los-tres-paises-latinoamericanos-mas-desiguales-en-cuanto-a-ingresos/>

<sup>24</sup> G. Durán, S. Gamonal C., *La opacidad de las cifras: La cobertura de la negociación colectiva en Chile*, in *Derecho y Crítica Social*, 5 (1-2), 2019, pp. 1-38.

A draft of this paper, in English (Collective Bargaining Coverage in Chile: Increase or illusion?), is available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3396890](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3396890)

Collective bargaining agreements are regulated in detail in Chile, i.e., the Labour Code includes the types of agreements, their content, bargaining rules, a mandatory renewal calendar (which ranges, depending on the agreement term agreed upon, from 2 to 4 years, its effects, etc. For example, for the agreement to be renewed, a proposal by the workers must be filed within 65 to 45 days before the expiration of the agreement in

As Numhauser-Henning explained many years ago, the role of anti-union legislation in Chile was quite relevant. Contrary to the deregulation usually associated with neoliberalism, the Labour Plan of the Dictatorship, in 1979, enshrined a significant degree of state intervention in collective bargaining labour law. These rules of the game favored the individual freedom of the worker over that of the union, and also the decentralization of collective bargaining at the enterprise level, which, along with rules that prohibited collective bargaining in certain cases (all matters related to the employer's direction and disciplinary powers), encouraged a free market economy<sup>26</sup>.

In this scenario, we must not forget all the limitations to the right to strike, which is only possible in the final state of collective bargaining at the company level and workers could be replaced from day 1. After the return to democracy, in 1990, although this legislation was reformed, it retained its essence, especially its detailed regulations, its applicability in only one case (the final stage of bargaining at the company level), and the rules of replacement<sup>27</sup>, which limited the effectiveness of strike and its nature as a countervailing power in bargaining.

In addition to this, governments since 1990 were incapable of substantially amending the Labour Plan of the dictatorship, and of providing answers to the observations of the ILO for Chile to respect freedom of association.<sup>28</sup>

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force. The response by the employers, the negotiations, the potential claims by the parties to such negotiation with the Labor Directorate, are regulated based on such presentation. If no agreement is reached within 45 days, they may vote for strike (this is the only hypothesis of legal strike). The process must end with an agreement agreed upon between the parties or presumed by law (if it is not possible to approve or execute the strike, for example, the workers are presumed to accept the last offer of the employer).

<sup>25</sup> Not only the case of Chile, but the entire Latin America region shows a weak protection of freedom of association. Probably the only exception is Uruguay. See S. Gamonal C., C.F. Rosado Marzán, *Principled Labor Law. U.S. Labor Law through a Latin American Method*, Oxford University Press, 2019, pp. 163-164.

<sup>26</sup> A. Numhauser-Henning, Ann, *Towards a Neo-Liberal Labour Law? The example of Chile*, in *Den Neoliberal Arbetsrätten. Exemplet Chile*, Juristförlaget i Lund, 1996, pp. 191-192.

<sup>27</sup> S. Gamonal C., *Chilean Labour Law 1990-2010: Twenty years of Both Flexibility and Protection*, in *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 27 No. 1, 2011, pp. 85-94.

<sup>28</sup> See S. Gamonal C., *The Labor Reform in Chile: New Wine in Old Wineskin*, in *Employee Rights and Employment Policy Journal*, 23 (2), 2019, pp. 219-247; and P. Pérez Ahumada, *Why Is It So Difficult to Reform Collective Labour Law? Associational Power and Policy Continuity in Chile in Comparative Perspective*, in *Journal of Latin American Studies*, 53 (1), 2021, pp. 81-105.

Strike is essential for the empowerment of the workers. As shown in the first quote at the beginning of this paper, regarding the Melos Dialogue, where the arrogant Athenian ambassadors told the rulers of the small island of Melos that justice is only present among those who have the same power<sup>29</sup>. Force operates where power is unequal.<sup>30</sup> The Melos Dialogue reminds us of the limitations of law in the case of power asymmetries.<sup>31</sup> And it also reminds us why the right to strike is so important in the face of corporate powers. Before 1990, union law in Chile was enacted in 1924 and in the Labor Code in 1931. The system was based on bargaining by company, with a single union that represented all the workers. Additionally, during the second half of the 20<sup>th</sup> century, two bargaining systems by branch of activity were developed: In the late 60s, in the industry of agriculture, and in other industries, through tripartite commissions (for example, in construction). With the 1973 military dictatorship, this system ended and was replaced in 1978 by the Labour Plan, which allows for exacerbated union parallelism at the company level (there are cases of companies with more than 100 small unions and many different collective bargaining agreements, even within the same establishment), collective bargaining only at the company level, just for wage issues, with the possibility of declaring a strike, but the employer has the right to replace workers from day one. As we have already mentioned, after the return to democracy in 1990, this scheme of the Labor Plan has been maintained.<sup>32</sup>

This work has focused on two phenomena that have tried to overcome the Labour Plan. In fact, given this restrictive scenario, legal scholars and Chilean courts reinterpreted the Constitution of 1980, which only prohibited strike, on the understanding that strike was a fundamental right too. Moreover, in practice, strikes have taken place beyond the legal framework in several strategic sectors, and workers have tried to impose measures of pressure beyond the limits of the prohibition legislation. Both trends have tried to push the limits of the Labour Plan. As will be analyzed at the end of this paper, both cases converge in the case law of

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<sup>29</sup> Thucydides, *supra* note 1, p. 302.

<sup>30</sup> Notwithstanding the questionable historical truthfulness of this encounter. See A. Gómez-Lobo, *El diálogo de Melos y la visión histórica de Tucídides*, in *Estudios Públicos*, No. 44, 1991, pp. 247-273.

<sup>31</sup> The Melians did not accept the surrender, they were proud of their freedom and autonomy after 700 years. After months of heroic fight, they were subjected by the Athenians, who killed all adult males and enslaved women and children. See Thucydides, *supra* note 1, p. 307.

<sup>32</sup> Gamonal, *supra* note 28, pp. 225-230.

our courts. However, results have been modest. In other words, we can conclude that constitutional changes are most pressing in Chile<sup>33</sup>, in order to empower unionism and to balance the labour market.

## 2. Beyond the Labour Plan: A Dynamic Interpretation

Today, in Chile, strike due to a non-compliance with the law or with the employer's collective bargaining agreement is not legal, nor are industry or solidarity strikes, or strikes due to anti-union practices of the employer. Strike is only applicable as the last stage of collective bargaining regulated in the law. As the law provides stringent deadlines for the renewal of collective bargaining agreements, the employers know what the date of a potential strike will be almost 2 years in advance. In this scenario, it is no surprise that workers have no bargaining power. The Constitution of 1980 prohibits strike in the public sector, in city halls, and in the essential services in a broad sense:

State or city hall officials cannot go on strike. Nor can people who work in corporations or companies -regardless of their nature, purposes or function- providing public utility services, or the stoppage of which leads to serious damages to health, the economy of the country, the supply of the population, or national security. The law will establish the procedures to determine the corporations or companies whose workers will be subject to the prohibition of this subparagraph (article 19 No. 16 final paragraph).

The text provides an express prohibition of strike in the public sector and in essential services, leaving the private sector in the dark (when it is not an essential service). In other words, the right to strike had the hierarchy of a law in Chile, and its protection was left to the legislator.<sup>34</sup> Constitutional scholars admitted that the purpose of the restrictive constitutional standard was to limit and compress as much as possible the right to strike.<sup>35</sup>

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<sup>33</sup> Notwithstanding the legal changes, also pressing in matters of freedom of association.

<sup>34</sup> M. Verdugo, E. Pfeffer, H. Nogueira, *Derecho Constitucional*, Volume I, 2<sup>nd</sup> updated edition, Editorial Jurídica de Chile, 1999, p. 292, and A. Vivanco M., *Curso de Derecho Constitucional. Aspectos Dogmáticos de la Carta Fundamental de 1980*, Volume II, Ediciones Universidad Católica de Chile, 2006, p. 427.

<sup>35</sup> J. Cea Egaña, *Derecho Constitucional Chileno*, Volume II, Ediciones Universidad Católica de Chile, 2004, p. 439.

Since the late 80s, labour scholars tried to interpret that strike in the private sector was a constitutional right, arguing that the Constitution implicitly included the right to strike in the private sector.<sup>36</sup>

In the 90s, scholars also suggested the right to strike based on another constitutional standard. It was the rule on the autonomy of unions (article 19 No. 19 final paragraph). Those who drafted the Constitution were thinking of the administrative and financing autonomy of unions. But its wording gave the idea that said autonomy was also related to the achievement of the union's purposes, including the right to strike as a means to achieve said goals.<sup>37</sup> This was reinforced by international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and ILO Convention N° 87, which, in light of the second subparagraph of article 5 of the same Constitution, was to be promoted and respected by the State.<sup>38</sup> This way, the argument was complete. Despite the current lack of unanimity, the thesis of the constitutionality of the right to strike is a majority among constitutional scholars.<sup>39</sup> As we will see at the end of this paper, this change in interpretation has been relevant to defend the constitutionality of extra-legal strike.

### 3. Beyond the Labour Plan: The Extra-legal Strike

The fact that strike is very much limited does not mean that there is no conflict. In fact, the number of strikes beyond this limited legal framework is greater than legal strikes.<sup>40</sup>

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<sup>36</sup> G. Macchiavello, *Derecho Colectivo del Trabajo*, Editorial Jurídica de Chile, 1989, p. 443 and P. Irueta *Constitución y Orden Público Laboral. Un análisis del art. 19 N° 16 de la Constitución chilena*, Colección Investigaciones Jurídicas No. 6, Universidad Alberto Hurtado, 2006, p. 187.

<sup>37</sup> S. Gamonal C., *Perspectivas futuras del derecho sindical chileno. Desafíos de nuestro derecho sindical*, in *Revista Derecho y Humanidades*, Universidad de Chile, No. 5, 1997, pp. 104-109.

<sup>38</sup> Id. p. 106.

<sup>39</sup> A. Bronfman, J.I. Martínez, M. Núñez, *La Constitución Comentada. Parte Dogmática. Doctrina y Jurisprudencia*, AbeledoPerrot, 2012, p. 356; A. Silva Bascuñán, *Tratado de Derecho Constitucional*, Volume XIII, Editorial Jurídica de Chile, 2010, p. 338, and H. Nogueira, *Derechos Fundamentales y Garantías Constitucionales*, Volume 3, Centro de Estudios Constitucionales de Chile, Universidad de Talca, Librotecnia, 2009, p. 548.

<sup>40</sup> 62% of strikes in the private sector in Chile, in year 2019, took place beyond the legal framework. See F. Gutiérrez, R. Medel, D. Pérez, P. Pérez, D. Velásquez, Diego, *Informe de Huelgas Laborales en Chile 2019*, OHL Observatorio de Huelgas Laborales, Universidad Alberto Hurtado, Centro de Estudios del Conflicto y la Cohesión Social, 2020. Available in: <https://coes.cl/observatorio-de-huelgas-laborales/>

On the one hand, extra-legal strikes happen much more often than legal strikes.<sup>41</sup> In fact, some economists have said that the excessive formality of our bargaining process encourages the recurrence of strikes and informal bargaining in the private sector, which are more efficient, without burdensome deadlines or excessive legal requirements and formalities, quorums or certifying officers. On the other hand, employers often do not dismiss workers involved in extra-legal strikes, due to the high costs involved in mass dismissals followed by mass recruitment, the selection of new staff, the need to train the recently recruited workers, etc.<sup>42</sup> However, as we will point out later, there are usually dismissals of the leaders of the extra-legal strikes.

For Armstrong, the lack of efficient and fast mechanisms to solve occasional problems or situations, which definitely cannot be resolved by formal collective bargaining, encourages informal strikes and bargaining in the private and public sector.<sup>43</sup>

In addition to this, workers resort to other types of protection, considered a non-standard strike, which, more than a collective absence from work, aims to alter the productive process.<sup>44</sup>

In Chile, there are strikes and conflictive actions which led workers of the Metro (Underground) system to post banners creating awareness of their poor working conditions, or workers of a Call Center who went to work in mourning clothes to denounce their poor working conditions, or workers of a cinema who, faced with the intransigence of their employers, decided to tell the clients the end of the movies at the entrance of the cinema. In less than a week, their demands were heard.<sup>45</sup>

Sociological literature also provides examples of complex and desperate conflictive actions, even of an individual nature, such as hunger strikes<sup>46</sup>, suicide<sup>47</sup>, and strikes during rest hours<sup>48</sup>, i.e., during the workers' free-time,

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<sup>41</sup> R. Águila, A. Armstrong, *Las Huelgas en Empresas del Sector Privado en Chile: 1979-1999*, in *Revista Abante*, Vol. 3, No. 2, 2000, pp. 165-201.

<sup>42</sup> A. Armstrong, *Tendencias, magnitud y causas de las huelgas de trabajadores dependientes de un empleador en Chile*, in *Estudios de Administración*, Vol. 4, No. 1, 1997, pp. 47.

<sup>43</sup> Id. p. 48.

<sup>44</sup> S. Gamonal C., *Derecho Colectivo del Trabajo*, third edition, ediciones DER, 2020, pp. 405-408.

<sup>45</sup> Gamonal, *supra* note 44, pp. 397-398.

<sup>46</sup> R. Medel, D. Pérez, D. Velásquez, G. Morales, *Huelgas con adjetivo: hacia una diferenciación conceptual de la nueva estructura de conflictividad laboral*, in Aguilar, Pérez and Henríquez (eds.) *Huelgas laborales en Chile. Conciencia y paralización*, Editorial Universitaria, 2017, p. 44.

<sup>47</sup> Id. p. 45.

<sup>48</sup> Id. pp. 46 et seq.

outside the working time and place, such as when, in a mining company, contractors cut the road by which the mine is accessed, affecting its productive process and protesting about their poor working conditions. Those workers who cut the road were not on call, but in their rest hours.<sup>49</sup> The problem is that, as such strikes and protests are not covered by the legal right to strike, the workers involved in them are exposed to the risk of a disciplinary dismissal, as will be analyzed in the following paragraph.

#### 4. A Modest Balance: Convergence in Courts

Strikes and self-government actions have been suppressed by employers, especially by resorting to the disciplinary dismissal of their leaders.

It is here where both trends meet, as the workers dismissed due to an extra-legal strike claim wrongful discharge and the courts have ruled that, as strike is a constitutional right, the dismissal is indeed wrongful. I.e., the workers were exercising a right.

For example, the Courts of Appeals have declared dismissals due to stoppages caused by the workers to be wrongful. This, as, in their opinion, strike is a constitutional right and, hence, the right to strike is not only subject to the restrictive legal hypothesis of regulated bargaining.<sup>50</sup>

Furthermore, the Supreme Court, in December 2014, expressly recognized the constitutional nature of the right to strike.<sup>51</sup> In this case, a majority of the Labour Chamber of the Supreme Court (3 out of 5 members) ruled against the internal replacement of workers.<sup>52</sup> Their main reasons can be grouped as follows:

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<sup>49</sup> Id. p. 48.

<sup>50</sup> See Case (Rol) No. 183-2014, Court of Appeals of San Miguel, of July 9, 2014, and Case No. 1266-2014, Court of Appeals of Antofagasta, of October 27, 2014, commented by S. Gamonal C., *La Huelga como Derecho Fundamental*, in *Revista de Derecho Laboral y Seguridad Social*, Thomson Reuters Chile, No. 4, 2014, pp. 390-393; J.L. Ugarte, *La Huelga en el Derecho Laboral Chileno: Superando el Espejismo*, in *Revista de Derecho Laboral y Seguridad Social*, Thomson Reuters Chile, No. 4, 2014, pp. 63-69, and S. Gamonal C., *Conflicto Colectivo y Huelga Preventiva, Huelga Constitucional y Huelga en base a la Excepción de Contrato no Cumplido*, *Revista de Derecho Laboral y Seguridad Social*, Thomson Reuters Chile, No. 2, 2015, pp. 274-277.

<sup>51</sup> Gamonal, *supra* note 44, pp. 84-85.

<sup>52</sup> Case No. 3.514-2014, of December 4, 2014. This case was about the former article 381 of the Labour Code, which authorized, in some cases, the recruitment of replacement workers during a strike. The problem was in case that the employer did not recruit workers, but rather reassigned tasks among the workers that did not go on strike. Subsequently, in 2016, an amendment prohibited the replacement, but imposed new

*Finalistic interpretation:* The Court tells us that the law is to be interpreted from different perspectives: historical, semantic, sociological, teleological, and axiological. And, for the purposes of this case, the Court states that strike is an inalienable right of workers, who lack other peaceful tools to claim their rights (whereas 9 to 12).

*Constitutional recognition:* The Chilean Constitution, a legacy of Pinochet, recognized freedom of association and collective bargaining and, for the Court, this recognition also includes the right to strike. On the one hand, the Constitution prohibits strike in the public sector, which leads to infer, *contrario sensu*, that it is indeed a right in the private sector. On the other hand, the Constitution provides that collective bargaining is a right of the workers, and the Court believes that if strike is limited or prohibited, the essence of collective bargaining would be affected (whereas 23, 29 and 30).

*International Labour Law:* The trend in international treaties and human rights declarations is that freedom of association, and thus strike, are fundamental rights. And Chile has ratified the said international instruments (whereas 17 to 21).

*Sociological interpretation:* From a sociological approach, the Court recognizes the existence of social conflict and the importance of strike in its resolution (whereas 31 to 33).

The majority of the Court emphatically concludes that: “The right to the declaration of legal strike is sort of an essential crowning of freedom of association, through a regulated exercise of collective bargaining” (whereas 35).

The minority vote (2 out of 5 judges) is based on a restrictive interpretation of the right to strike, stressing out that the right to strike must be limited, as it affects the economic development of the country.

Unlike the courts and the Supreme Court, the majority of the Constitutional Court (hereinafter the TC, by its Spanish acronym) sustains a restrictive literal approach in the constitutional interpretation of freedom

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limits to the right to strike, maintaining the essence of the Labour Plan in force since 1979. See Gamonal, *supra* note 28, pp. 230-236.

of association, which could be considered as originalist, in the sense that it is loyal to the neoliberal ideas.

In the ruling about the latest labour reform<sup>53</sup>, in 2016, the Constitutional Court interprets the Constitution in light of the ideas of the dictatorship and of the Labour Plan. In other words, freedom of union is interpreted in the sense of turning its back on the international law on human rights and the theory sustained by the Supreme Court in 2014. For the TC, freedom of association only included the right to organize in trade unions, excluding collective bargaining and the right to strike.

The majority of the TC believes that the interpretation of the constitution must not be neutral, but it must rather protect the neoliberal system (p. 49). Additionally, in the opinion of the TC, it must not take into account the international human rights treaties which protect freedom of association in force in Chile, which, according to subparagraph 2 of article 5 of the same Constitution, are to be respected and promoted by the State (pp. 73 and 86).

On the contrary, the minority vote of the TC is consistent with the theory of the Supreme Court, which we already commented.

The current composition of the Chilean TC is conservative, and one of the matters yet to be discussed in the constitutional debate is the need to suppress it or to reduce its powers. For the time being, legal scholars have criticized the TC, exposing its authoritarian approach and against labour rights.<sup>54</sup>

The valuation of these two trends should be modest for the following reasons.

First, there is no unanimity about the scopes of freedom of association in Chile. Beyond the efforts of scholars, the text of the Constitution of 1980 does not help, and currently, the Supreme Court and the Constitutional Court disagree.

Secondly, dismissal declared as wrongful under the theory of constitutional strike does not imply the reinstatement of the worker, but a further payment regarding severance pay for years of service. This payment depends on the seniority of the worker, thus, if he or she had

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<sup>53</sup> Case No. 3016 of May 9, 2016. Bachelet's reform was presented by her government as an overcoming of the Labor Plan although, in fact, it maintained and even reinforced it. The two amendments declared unconstitutional by the TC was very small progress. In other words, the reform of Bachelet government continued with extreme union parallelism, bargaining at the company level, a very limited right to strike, etc. See Gamonal, *supra* note 28, pp. 225-230.

<sup>54</sup> Gamonal, *supra* note 44, pp. 94-95.

been working for a short time, he or she will obtain little money. Hence, the cost of the collective conflict for the workers is high, they risk losing their job and even receiving a low compensation after a trial that may last even 1 years.

Therefore, in the current constitutional process, changes are pressing in Chile if the intention is to empower unionism and balance the labour market by recognizing the right to strike as a fundamental right. In 2013, several labor law professors had signed a Labor Manifesto, asking the government for a comprehensive union reform respecting the principle of freedom of association.<sup>55</sup> Currently, academics are once again calling for the new constitution to respect freedom of association and to enshrine the right to strike without limitations, except those recognized by the ILO's Committee on Freedom of Association.<sup>56</sup>

At the time this paper was written, the Constitutional Convention has been in session for three months and is in the process of approving its rules of procedure, so substantive issues, such as freedom of association and other fundamental rights, have not yet been discussed.

## 5. Conclusions

This paper focused on two phenomena that have attempted to overcome the Labour Plan, a legacy of the dictatorship of Pinochet, regarding the right to strike.

Scholars and the Chilean courts reinterpreted the Constitution of 1980, which only prohibited strike, on the understanding that strike was also a fundamental constitutional right.

Additionally, in practice, strikes have taken place beyond the legal framework in several strategic sectors, and workers have tried to impose measures of pressure beyond the limits of this prohibition legislation.

As we already analyzed, both trends have tried to push the limits of the Labour Plan and have converged in the courts, when workers are

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<sup>55</sup> S. Gamonal C., *Comentario al Manifiesto Laboral chileno*, in *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo (ADAPT)*, Vol. 1, N° 3, July-September 2013, pp. 53-62.

<sup>56</sup> See E. Caamaño, *Derecho de Sindicación y Nueva Constitución: La necesaria promoción de la libertad y la autonomía sindical*, in Caamaño y Varas (eds.) *Trabajo y Nueva Constitución*, ediciones DER, 2020, pp. 91-110; K. Varas, *La huelga. Un derecho de primer orden en la nueva Constitución*, in Caamaño y Varas (eds.) *Trabajo y Nueva Constitución*, ediciones DER, 2020, pp. 131-173, and S. Gamonal C., *La negociación colectiva en la nueva Constitución*, in Caamaño y Varas (eds.) *Trabajo y Nueva Constitución*, ediciones DER, 2020, pp. 111-129.

dismissed due to extra-legal strikes or to the measures of pressure that they have tried to impose beyond the legal limits.

But the results have been modest. In other words, there is still no unanimity as to the scopes of freedom of association in Chile, and the cost of the collective conflict is high for workers, as they risk of losing their job and even receiving a low compensation after a trial that may last for almost 2 years.

Hence, in the current constitutional process, the constitutional changes and the possibility of recognizing strike as a fundamental right are essential to the future of Chilean labour law.



**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

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