ANOTHER KIND OF SHAM: OUTSOURCING PUBLIC SERVICES AND THE LIMITS OF LAW

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Fiction of use to justice? Exactly as swindling of use to trade

Jeremy Bentham

Law and, consequently, the study and analysis of law, the judicial decision making, and even the reform of law, all have a static quality to them. Those engaged in such endeavours, seeking to conceptualize, identify and circumscribe particular socio-legal phenomena, wish to project an understanding on a given reality. This is true, of course, in contract law as it is in property, in torts as in criminal law. But few areas of law are as challenging in this respect as labour law, particularly over the past few decades. The challenges for labour law: globalisation, the 'need' to account for managerial adaptability through a flexible world of work, hostility to labour unions on the one hand and to the public sector on the other – make clear that the world of labour is changing, shifting below our feet.[1]

This does not mean that we must deny protection to workers in the name of "economic determinism".[2] And yet, it does demand asking if we can keep the concept of employer, employee or, indeed, work, as a constant against the background of a shifting reality. Moreover, within a given social and economic context, we note a different type of dynamism, in the sense that governments and employers *react* to legislative, judicial and scholarly conceptualization in manners that, at times, undermine the original intent, when such intent existed. The two are not unrelated: a global, privatised and flexible world of labour relations offer more opportunity for and employers to respond to judicial changes. Less legal hurdles, lower transaction costs, and more advanced technology, for example, allow corporations to move their provision of services to other countries following a decision to apply minimum wage legislation, or equality legislation, in a manner that they do not approve of, while maintaining their provision of services. This is quite familiar territory.

But employers do not always have that option. The provision of social services – health, education and welfare, cannot (yet) be implemented from thousands of miles away. And yet, this does not mean that governments and employers seeking to avoid unwelcome legal and economic results are left without recourse to other avenues. The aim of flexibility has not remained an objective pursued solely by private enterprises. Indeed, in some domestic contexts, governments have had much more to gain from flexible employment relations when compared to the (already quite

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[1] CATHERINE STONE, "The Three Challenges of Labor Rights in our Time" 44 *Osgoode Hall L. J.* 77-104 (2006)

[2] NICOLA COUNTOURIS, *The Changing Law of the Employment Relationship* (2007) p. 7.

flexible) private sector. The civil service is subject to collective agreements, to the supervision of regulatory agencies and to specific rules and regulations. Managers in the civil service are faced with greater obstacles if they wish to employ employees on a temporary basis to address particular needs; to employ part time workers; to move employees from one position to another; and to tailor the wage and compensation to productivity and ability to pay at given moments.[3] And so, we find that, through outsourcing of social services, certain governments have managed to "remove that workforce from the ambit of public sector bargaining".[4]

This paper is part of a larger project which focuses on the outsourcing of social services from a perspective that is somewhat distinct from previous analyses. First, while there is no shortage of excellent scholarship on the advantages or disadvantages of the outsourcing of social services, the emphasis is often on the end product: the quality of services – education, health, social services. Thus, and this is the second distinction, while political scientists, economists, sociologists and social workers have contributed much to the study of the field, the role of law has, to date, been minimal. Thirdly, when lawyers have begun to assess the legitimacy, and even legality, of outsourcing of public services, they have done so from a public law perspective. In a manner that relates to the first point, since the effect of outsourcing on the employees in the sector has not been a major focus of the inquiry, labour law has not been at the centre of attention in this respect.

The outsourcing of social services offers a fascinating background for the assessment of the way labour law operates in a changing environment, revealing the way enterprises and governments respond to judicial decision making against a given legal background, operating with the guidance of the "tests" set down by the courts and using them in a manner that operates not only against the original aims (protecting workers) but also in a manner that undermines other public goods.

And so, as the motivation for governments to engage in outsourcing becomes clearer, courts may become increasingly occupied with the need to look beyond the contractual framework, which governs, at times, 'authentic', good faith outsourcing designed, for example to make use of business expertise that does not exist inside the government; and, in other instances, fictitious, or 'sham' constructions, that are created with no true institutional objective but to deprive employees of rights that otherwise would have been granted to them. The distinction between the two types of outsourcing and the way they are developed by courts form the legal core of this paper.

But, in addition, this paper has a *socio-legal* aspect. As noted in the opening, law in general, and labour law in particular, does not operate in a vacuum. To the legal action there is a government and business reaction. At times, we shall find, the good

[3] PAUL DAVIES & MARK FREEDLAND, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (OUP, 2007)

[4] PAUL DAVIES & MARK FREEDLAND, *Labour Legislation and Public Policy: A Comparative History* (OUP, 1993) at 622; SANDRA FREDMAN & GILLIAN MORRIS, *The State as Employer* (1989), 145.

intentions of legislatures and courts have led to a response that left workers worse off than they were initially.

The focus on the outsourcing of social services by the public sector is not coincidental, of course. Apart from affecting the terms of conditions of employment, outsourcing in these areas may have significant ramifications on the status of civil service employees and on government's responsibility and accountability in the provision of services. While the project will expand to a wider comparative assessment, this paper focuses on two cases, namely – that of Britain and of Israel. The two have much in common: institutionally, both are characterised by Employment Tribunal (in Britain), or Labour Court (in Israel), systems, governed by civil courts. Juridically, the judicial "tests" developed by the courts for employment are very similar, a testament to the ongoing influence that British jurisprudence has over Israel. And with respect to economic reforms, both nations have undertaken swift measures to outsource major parts of their public sector, in a manner that has wide ranging implications – constitutional and labour related.[5] And alongside the commonalities, the Israeli system has incorporated the ideal of a flexible, outsourced public sector with impressive zeal. So much so, in fact, that it has led to a surprisingly aggressive defensive by the Israeli labour courts. This, and the ensuing reaction from government, has not been the case in Britain. Israel, therefore, may be seen as a manifestation of things to come.

The first chapter of this paper will provide an outline of the effect of outsourcing of social services from a labour law perspective. The second chapter will sketch the similar and different backgrounds and challenges of British and Israeli labour regulation in dealing with this phenomenon. This will lead to the third, and central chapter, which provides four possible approaches to viewing triangular employment relationships as fictitious, or sham, and the willingness of the British and Israeli system to incorporate either approach. The fourth chapter concludes with some thoughts for the future.

1. Labour law and the Outsourcing of Public Services

A. Background

The social and economic trends of the 1980s and 1990s have, perhaps, changed the background for labour law in a manner that has not been evident since the industrial revolution. Moreover, it is interesting to note that the direction of the change, at least with respect to our concern here, is precisely the opposite one. If mass production led to the decline of intermediate forms of labour sub-contracting,[6]

[5] MARK FREEDLAND, "Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994", *Public Law* (1995) 21; MARK FREEDLAND, "Contracting the Employment of Civil Services – A Transparent Exercise", Public Law (1995) 224. In Israel: BARAK MEDINA & YOAV DOTAN, "Legal Aspects of the Privatization of the Supply of Goods and Services", 37 *Mishpatim* (Hebrew University Law Review) 287

[6] SIMON DEAKIN, "The Many Futures of the Contract of Employment' (CBR Working Paper, No. 191, Dec 2001) p. 2; Countouris (note 2) at 26

the current trends seem to view the engagement of sub-contracting as a necessary strategy in a globalised, specialised world. And if labour law in the past complemented the trend, in some cases outlawing sub-contracting,[7] contemporary labour trends all but embrace and encourage such "commercialization" of employment.[8] This has been evident in private business, but its presence in the provision of public services has yet to be fully understood.

Over the past three decades, most industrialised nations have been increasingly providing public services through the use of private intermediaries. This trend is noticeable in the social services (health, education and welfare) but also in areas that were traditionally viewed as "inherently governmental" such as security, justice and immigration.[9] This structure has been referred to as "partial privatisation", "outsourcing" or "contracting-out", the latter designating the division of labour between the government that "steers" – initiates, directs, funds and regulates the policy, and the contractor which "rows", or implements the policy. Of course, such a policy assumes the ability to distinguish and indeed separate planning and decision making from the policy implementation.[10]

Where contracting out of public services is concerned, sectors such as cleaning, IT services or maintenance may be carried out by private companies. These examples are not completely arbitrary. The sectors most prone to contracting out are those that do not constitute part of the enterprise's core operations. This issue is important because those periphery sectors tend to be lower paid and constituted by more women and minorities than core sectors. Since contracting out is generally associated with the loss of certain employment rights and benefits, the social effects have to be acknowledged and dealt with.[11]

It is difficult to overstate the importance and ramifications of contracting out as a policy.[12] In the United States, for example, over 50 percent of publicly funded

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[7] MARK FREEDLAND, *The Personal Employment Contract* (OUP, 2003) pp 16-17.

[8] J. FUDGE, S. MCCRYSTAL AND K SANKARAN, ??? *Challenging the Boundaries of Work Regulation* (Hart, 2012) 10.

[9] JODY FREEMAN, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 595 (2000); PRIVATISATION AND MARKET DEVELOPMENT: GLOBAL MOVEMENTS IN PUBLIC POLICY IDEAS, (Graeme A Hodge ed., 2006); Jon D. Michaels, *Privatization's Pretensions*, 77 THE UNIVERSITY OF CHICAGO LAW REVIEW 717 (2010); Sharon Dolovich, *How Privatization Thinks*, in Minow & Freeman (note 12) 128; MARTHA MINOW, *Privatizing Military Efforts and the Risks to Accountability, Professionalism and Democracy*, in Minow & Freeman (note 12) 110.

[10] NICHOLAS DEAKIN & KIERON WALSH, *The Enabling State: The Role of Markets and Contracts*, 74 PUBLIC ADMINISTRATION 33 (1996); HILLEL SCHMID, *Rethinking the Policy of Contracting Out Social Services to Non-Governmental Organizations*, 5 PUBLIC MANAGEMENT REVIEW 307-323 (2003). But cf *YL v Birmingham City Council and Others* [2007] UKHL 27, at [66] per Baroness Hale, LJ: "it is artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them, when the state has assumed responsibility for seeing that both are done".

[11] CHRISTOPHER MCCRUDDEN, *Buying Social Justice*, (2007) at 11.

[12] MARTHA MINOW & JODY FREEMAN, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Harvard UP, 2009)

government services are provided by private intermediaries.[13] The rate of public roles operated by civil service personnel dropped from 40 percent in the mid-1970s to 29 percent today.[14] Mark Freedland expressed concern that, under the guise of a "little and mechanical" reform, the British government managed to change central features of constitutional law through the seemingly innocuous policy of contracting out.[15] So while the 'pure' privatisation of public companies has attracted attention and appraisal, the silent, partial privatisation of public (and especially – social) services has continued and expanded without the same level of scrutiny to areas that include the preparation of the procurement process, the drafting of contracts and the regulatory procedures themselves.[16] Another aspect of the expansion of contracting out concerns the character of the non-governmental entities that governments engage with when providing public services. While in the past, partial privatisation referred to government funding of charities and non-profits, contemporary contracting-out reveals a significant increase in the number and weight of for-profit corporations in the provision of public services.[17]

What is unique about this format of contracting out in general, and contracting out of public services in particular? Public authorities engage with non-governmental entities in various ways, of course. Moreover, public law scholars often group together contracting out with other types of public-private partnerships, such as licencing or franchising.[18] Though in all such cases the government regulates a certain area, and is able to advance its interests through the use of the contract, there is a distinction between them, which is important for present purposes. Crudely, this distinction is manifested in the direction that the money 'flows'. While the government may purchase education from a privately incorporated school (i.e. fully fund its activities), private companies operating in the public utilities arena (gas, electricity, telecommunication) *pay* for the right to do so. The citizen's perspective is the mirror image: while she is not expected to pay (or at least, not pay the true cost) of publicly funded services, even when provided by private entities, the government involvement in the operation of a private company, through the granting of a license or a franchise to a company, does not bar the latter from charging the citizen at full cost.[19]

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[13] MICHELE GILMAN, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 594 (2001); LESTER SALAMON, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L. J. 1611 (2001).

[14] JOHN DONAHUE & RICHARD ZECKHAUSER, COLLABORATIVE GOVERNANCE: PRIVATE ROLES FOR PUBLIC GOALS IN TURBULENT TIMES (Princeton, 2012) 9.

[15] MARK FREEDLAND, "Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994", *Public Law* (1995) 21, at 23

[16] Donahue & Zeckhauser (note 14) at 141; Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y. U. L. REV (2000), 1121, 1130; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1286, 1309 (2003).

[17] MARTHA MINOW AND JODY FREEMAN, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Harvard University Press, 2009)

[18] ANNE DAVIES, THE PUBLIC LAW OF GOVERNMENT CONTRACTS (OUP, 2008) 10-16.

[19] See similarly *YL v Birmingham City Council and Others* [2007] UKHL 27, at [68] per Baroness Hale, LJ (minority opinion) but *cf* at [106] per Lord Mance

It should be stressed that the distinction is not one based on the relevant field, but rather on the fundamental view of the state and its role in society. Take, for example, two states that use private intermediaries to provide health services, but do so in very different ways. State A sets out a public procurement regime, whereby private contractors that wish to provide health services will submit proposals, detailing the services they will provide for government funding, along with the various conditions, such as quality of care, maximum queues, maximum charges, equal treatment of patients, and so forth. In contrast, State B opens the market to contractors who may provide health services under predefined licensing terms. In this case, while it will presumably regulate basic terms and conditions (to avoid malpractice or pandemics, for example), State B prefers the market to decide which provider offers better health services, while the contractors will pay a lump sum or a percentage of their profits *to* the state.

The direction of the flow of funding is important because it indicates the underlying perception of the state as responsible for the provision of certain, good quality services. The use of private contractors for the provision of health, education, welfare, or even security is done, according to the ideal model, after policy makers have concluded that this form of provision will achieve the best price for value.[20] The government thus purports to *manage* the provision of the services, even when it does not provide them directly through its own employees. In contrast, when offering a licence or a franchise, the government aims to regulate a portion of the market in a way that would maximise citizen welfare. However, just as regulation of restaurants or chemical manufacturing does not imply the government's responsibility *for* the service or the production of certain goods, a licensing regime for social services would suggest the withdrawal of government's responsibility and accountability in the relevant sectors.

To summarise this point: contracting out of public services has presented a challenge for public lawyers that surpasses even the "profound difficulty"[21] that characterises contracting out in general, precisely because of a certain ambiguity in the nature of the government's responsibility and accountability. This is true not only for the quality and stability of the services themselves, and the legal powers that have been transferred. These issues have been studied extensively. Much less attention has been given to the way contracting out has had on the workers involved.

B. How Flexibility and Contracting Out Changed the Labour Market

Despite it being a global phenomenon, at least in industrialised nations, different legal backgrounds, social cultures and economic forces in each nation lead to important differences in the motivation for the turn to subcontracting and thus, to important nuances in the way the outsourcing is regulated. But across nations, it is important to distinguish between contracting out that takes place in the private sector and contracting out that is initiated by the public sector. The motivations, the legal

[20] Davies, (note 18) at 35-37.
[21] Freedland, at 36

framework, and the ramifications are significantly different. Since this paper focuses on public services, it is important to highlight these differences. Most obviously, civil service constraints, such as post limits, do not apply in the private sector. The role of unions is much more visible in the public sector, and therefore reducing their capacities and role is much more evident as a motivation there.[22] And related to both issues – the limitations placed on managerial adaptability are significantly more prevalent and, perhaps, onerous, in the public sector. In recent years, this aim of empowering managers to adapt to a rapidly changing economic environment has been routinely been referred through the concept of employment *flexibility* and, with respect to social policy (employment and social security) in general – flexicurity.[23]

How does outsourcing lead to flexibility? Outsourcing changes the employment relationship, from a bilateral relationship to a trilateral one. While, in the past, those employed in a wide range of public services were generally employed directly by the government, there has been a "qualitative change" in that regard, as the default position has become such that "public employers are required to submit services to competitive tendering ... unless the in-house employees can make a more acceptable offer".[24] Following outsourcing, the employees (if at all recognised as such, as we discuss below) will be considered to be employed by the contractor, who has a contractual-business relation with the end-user. The business contract between the end-user and the contractor may be renewed or terminated according to the terms set therein. In addition, the terms of the contract between the contractor and his employees routinely offer more convenient clauses for the termination of the employment relationship, when compared to the typical employment contracts in the government sector. The flexibility is achieved, therefore, on both sides of the triangle.

This is not the place to ascertain whether outsourcing indeed leads to the desired flexibility. Suffice to note that there is, in fact, evidence suggests that the end-user (in this case – the government) becomes increasingly dependent on the contractor, thus replacing one form of inflexibility (due to the constraints laid by collective agreements) with another.[25]

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[22] EMANUEL S. SAVAS, *Privatization and the New Public Management*, 28 FORDHAM URB. LJ 1731–1737 (2000); GRAEME HODGE, *Contracting Public Sector Services: a Meta-Analytic Perspective of the International Evidence*, 57 AUSTRALIAN JOURNAL OF PUBLIC ADMINISTRATION 98–110 (1998); Nicholas Deakin & Kieron Walsh, *The Enabling State: The Role of Markets and Contracts*, 74 PUBLIC ADMINISTRATION 33 (1996).

[23] ANNE DAVIES, *EU Labour Law* (Elgar, 2012), at 195; SIMON DEAKIN AND H. REED, 'The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart, Oxford, 2000); DIEDRE MCCANN, *Regulating Flexible Work* 11*ff* (2008)*;* J. ATKINSON, 'Flexibility or Fragmentation? The UK Labour Market in the Eighties', *Labour and Society* 87 (1987).

[24] Fredman & Morris (note 4) at 435; Davies & Freedland (note 3) at 37-38.

[25] The Israeli State Ombudsman, for example, notes in his 2009 report how the Ministry of Health became completely dependant on a non-governmental organisation because the latter "controls significant medical and para-medical personnel, and thus has increased its administrative and

For present purposes, it is important to note that new developments changed the structural foundations of the labour force. In the UK, for example, a "major aspect of the Beveridge Report was the abolition of distinctions between different categories of employees ... regardless of their annual income or of their professional status";[26] bilaterality was "instigated at least in part to make sure that a worker engaged in a dependent employment relationship could identify the subject against which she could exercise the legal rights deriving from labour protection legislation and collective bargaining";[27] and "decasualization" was achieved through "collective laissez-faire", and legally – through statute and collective bargaining.[28]

In contrast, the surge of contracting out in general, and in public, social services in particular, has led to the emergence of a two-tiered workforce, with an increasingly small core of protected employees, and a growing periphery of precarious workers,[29] predominantly made up of women.[30] For employment law, outsourcing has become "the most intractable, as well as the most basic" problem.[31]

2. Shifting Places in the Race to Outsourcing: British and Israeli Experimentation

The comparison of British and Israeli experience with outsourcing is potentially very fruitful, because of the strong commonalities between the two systems, and because of their differences. Institutionally, both systems adjudicate employment disputes initially through a professional fact-finding tier (Employment Tribunal (ET) in Britain; Labour Court in Israel) and then to an appellate tribunal (Employment Appeal Tribunal (EAT), National Labour Court(NLC)) before moving on to the general judicial system (Court of Appeal; High Court of Justice). Moreover, while credited by judges of the general system for expertise,[32] the existence of a separate judicial system for employment law and social security law is under constant threat in both countries.[33] This is notable because, as we shall see below, the British Employment Tribunals have often addressed the issue of outsourcing through a distinctly conservative, or neo-liberal lens, when compared to the Court of Appeal, which has

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operational power as a quasi-exclusive provider of these service" – GOVERNMENT OMBUDSMAN, *Report 59A for the Year 2008 and the Fiscal Year 2007* (2009) at 477 [my translation].

[26] SIMON DEAKIN, 'The Evolution of the Contract of Employment', p. 221

[27] Countouris (note 2) at 37.

[28] OTTO KAHN-FREUND, 'Status and Contract in Labour Law' MLR(1967): 642

[29] Countouris (note 2) at 41; Anne Davies, "Identifying 'Exploitative Compromises': The Role Of Labour Law In Resolving Disputes Between Workers' *Current Legal Problems* (2012); *James v Greenwich Council* CA [2008] at [60]

[30] SANDRA FREDMAN, "Women at Work: The Broken Promise of Flexicurity", 33 Industrial L. J. 299 (2004); SANDRA FREDMAN, "Labour Law in Flux: The Changing Composition of the Workforce" 26 ILJ 338, 340 (1997); ANNE DAVIES, *EU Labour Law* (Elgar, 2012), at 183-184.

[31] *Dacas v Brook Street Bureau* [2004] IRLR 358, at [7]

[32] See Sedley LJ in *Dacas*. The British system has recently undergone significant reform – see EDWARD JACOBS "Something Old, Something New: The New Tribunal System" 38 *ILJ* 417 (2009); SUSAN CORBY & PAUL LATREILLE, "Employment Tribunals and Civil Courts: Isomorphism Exemplified" 41 *ILJ* 387 (2012) -

[33] ANNA MACEY, "Struck Out: Why Employment Tribunals Fail Workers and What Can be Done" 41 *ILJ* 486.

expressed views that addressed the plight of workers in such situations in a spirited manner.[34] In Israel, in contrast, while the Labour Courts have not always shielded workers from the effects of outsourcing, they have undoubtedly presented a far more progressive position when compared to the civil courts in Israel or, for that matter, in Britain.

Judicially, the "tests" for deciding the existence of employment relations – subordinance and control; economic reality; personal obligation; and the catch-all 'integration test' have been imported from the British system directly to Israeli jurisprudence. The use of identical tests by tribunals and courts in both systems is a crucial factor, which offers a level playing field when comparing judicial decisions.

The final commonality is probably the most obvious: the surge of contracting out as a policy, essentially stating as a predisposition that, if possible, government services will be supplied by non-government (local or civil) workers.

Against the background of these commonalities, there are also important differences. First, we shall see a significantly more assertive approach taken by the Israeli courts in their defence of the rights of workers' subject to outsourcing. This is made manifest both in legal doctrine and in effective orders. Second, the two countries exhibit a different pace. While Israel embarked on contracting out as a policy almost a decade after Britain, it has moved much more rapidly in that direction. Perhaps as a consequence, courts have been adapting swiftly to different formats of contracting out and different efforts to conceal its true nature and motivations. And so we find that the tone and direction of judgments set by Israeli courts in the late 1980s have echoed in British jurisprudence almost 20 years later. The direction of jurisprudential import-export has thus been reversed, if only at a subconscious level. And so, the final distinction between the two systems is presented by a stage that is evident in Israeli public services, but may yet appear on the British horizon: the change in employer (in this case – government) behaviour, as a result of recent court decisions.

Bearing in mind the outline of contracting out as an important concern for employment relations, this section will continue by illustrating in some more detail the historical development, motivations and ramifications in Israel and Britain.

A. Historical Development

For more than two decades, Britain and Israel have been consistently replacing government employees with workers employed by intermediaries.

In Britain, the Conservative government enacted the Compulsory Competitive Tendering programme which *required* local authorities and other public bodies to

[34] David Renton and Anna Macey, *Justice Deferred: A Coalition's Guide to the Coalition's Employment Tribunal Reform* (IER, 2013).

move from in-house employment to outsourcing.[35] Mark Freedland noted, in 1995, that as a result of earnest implementation of contracting policy, the British Civil Service was reduced to its lowest level since the Second World War, and the expectation was that this fall would continue.[36] The statutory platform which enabled the reform was Part II of the Deregulation and Contracting Out Act of 1994, which provided that order making powers, traditionally yielded by civil servants on behalf of the Minister, may now be conferred to private sector contractors and "may be exercised by (or by employees of) such person as may be authorised in that behalf by the Minister or office holder whose function it is".[37] Freedland justifiably notes that, supported by additional legislation,[38] this Act enabled the government to contract out not only ancillary, but also indubitably core functions.

Privatisation and contracting out was viewed by British unions and their supporters as the most deadly attack on collective labour,[39] and probably – rightfully so. The British Prime Minister at the time, Margaret Thatcher, viewed privatisation as an important tool to weaken unions and thus "to reverse the corrosive and corruptive effects of socialism".[40] The process achieved its goal. As Fredman concludes, "forcible contracting out [has]... undermined centres of trade union strength, a process accelerated by the removal of rights to extend the results of collective bargaining".[41]

In Israel, the singular shift from a political economy more centralized than any other outside the Soviet bloc to a hyper-privatised, liberalized economy, within the breadth of 20 years, demands explanation. Accepted wisdom suggests that the (neo)liberal streak, which was latent and disparaged in the country's first 30 years, gained credence, ideologically and professionally, following the financial meltdown that occurred in the early 1980s. Professional economists who were schooled under neo-liberal guidance, who warned against reckless government policy in advance, and successfully saved the economy from the brink, in the aftermath, were rewarded with significant and long lasting public legitimacy as the only "responsible adults" around, granting them a carte blanche to lead Israeli economy in a manner they see

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[35] SANDRA FREDMAN, "Women at Work: The Broken Promise of Flexicurity", 33 Industrial L. J. 299, 308 (2004)

[36] MARK FREEDLAND, "Contracting the Employment of Civil Services – A Transparent Exercise", *Public Law* (1995) 224, at 224.

[37] Section 69(2) of the Act, and similarly (for local authorities) section 70(2) of the Act. And see also Section 72(2), which is headed "The Effects of Contracting Out" which provides that "anything done ... in relation to the authorized person (or an employee of his) in ... the exercise ... of the function shall be treated for all purposes as done" by the Minister or office holder or local authority.

[38] E.g. the Criminal Justice Act 1991, the Government Trading Act 1991 and the Civil Service (Management Functions) Act 1992

[39] R. BICKERSTAFF, "Forward: Keep Our Services Public" in S. Hastings & H. Levie (eds.) *Privatization?* (Oxford: Spokesman Books, 1983) at 7

[40] MARGARET THATCHER, *The Downing Street Years*, (1993) at 676

[41] SANDRA FREDMAN, "Labour Law in Flux: The Changing Composition of the Workforce" 26 ILJ 338, 340 (1997)

fit. And they did. They released Israeli market from the stronghold of the state, crushed labour unions and, most relevant for present purposes, led an unabashed policy of privatization of government industries, corporations and services.

Emergency powers were employed to order the government and local authorities to reduce the number of public employees immediately, and significantly.[42] The regulations also provided that collective agreements and Civil Service Commission's regulations will not apply. Challenges in the NLC and in the HCJ, were not successful.[43] And so, in the first instance, ancillary services such as construction and cleaning were transferred to private contractors. In the 1990s, pressures increased to expand the use of outsourcing.[44] And so, government departments and municipalities began outsourcing services that ranged from court secretarial services to nurses, dentists, social workers and teachers. Unlike their government-employed co-workers, these providers of services are commonly employed on a 'zero hour contract' basis, do not benefit from employment related social benefits, days of rest, educational funds, protection against unfair dismissal, and so forth.[45] The use of intermediaries expanded to such a degree that teachers were employed through non-governmental entities to teach all subjects, including core courses, in contravention of the Ministry of Education's directives.[46]

As in Britain, the Israeli government made clear its aim to avoid the applications of collective agreements on the employee, including post limits, civil service pensions and other occupational benefits. Outsourcing was motivated by the aim to reduce the cost of labour to employers by circumventing employer's duties as settled in collective agreements.[47] Related is the politically motivated agenda to sideline unions by reducing their hold on the provision of public services. The Head of the powerful Budget Division in the Treasury Department stated, in an interview given upon leaving his post and taking on the position of Prime Minister's Chief of Staff, that his major achievement in his previous role was "breaking collective labour in Israel" through privatisation.[48] Prime Minister Rabin delivered a disturbing parallel by saying "I am not worried about the resistance of labour unions to privatisation, just as I am not worried about the resistance of terror organisations to the peace process".[49] Finally, the restrictions on post limits, just noted, imposed severe challenges to provide for growing needs, for a growing population, with fewer people.

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[42] Articles 11, 12 of the *Emergency Regulations (Provisions for Economic Emergency)* (1985).

[43] Labour Case 46/4-13 *State of Israel v. the Histadrut* LC 14, 181; HCJ 90/86 *The Histadrut v. the National Labour Court* 40(3) 318.

[44] GALNOOR, pp 30-31

[45] ORIT ICHILOV, *Privatization of Public Education: Consequences for Citizenship and Citizenship Education* (2010)

[46] GUY DAVIDOV, "Contract Workers in Schools", *Labour, Law and Society* (2009); Yuval Vorgan, *Employing Teachers Through Intermediaries* (Knesset Research and Information Centre, 2011).

[47] McCrudden, *Buying Social Justice*, at 108

[48] MERAV ARLOZOROV, "Dismantle the [Land] Administration and Sell National Lands" *Haaretz* (2004)

[49] Cited in ITZHAK KATZ, *Privatization in Israel and Worldwide* (1997) at 175.

Outsourcing, therefore, enabled circumventing these post limits so as to enable the civil service to address *bone fide* needs through recruitment of employees.

Before continuing with the description of the ensuing developments in both systems, it is worth noting that the injurious (to many) motivations for the establishment of a triangular employment relationship were not always dominant. In fact, a striking similarity between the two countries is revealed in the facts and outcome of two early cases. In both cases, a triangular relationship was established by the government to *assist* workers who would not otherwise manage to find suitable employment in the free market, on their own. In the Israeli case of *Hershkovitz*, a 71-year old immigrant was found employment in a government hospital as a pharmacist, through the help of a government corporation, despite having minimal command of (Hebrew) language and a different professional background.[50] His wages were paid, in part, by a corporation set up by the government to assist the disabled which operates as a sheltered workshop. In the British case of *Bearman*, two disabled workers were found employment with the Employment Service through the Sheltered Protection Scheme operated by the Royal British Legion Industries.[51] In both cases, the workers demanded status as government employees, with all the rights that such a status entails. In both cases, their requests were denied, with very similar rationalizations. The NLC in *Hershkovitz* and ET in *Bearman* both began by examining the contractual structure, which keeps the government sponsor at arm's length.[52] But both judgments also make note of the general public benefit of such schemes, which includes the benefit to members of the same group to which the plaintiffs belong. They suggest that this form of triangular employment is not intended to disenfranchise workers, but rather to benefit them in a manner that would not have been possible under the traditional, market-based contract of employment. Therefore, there is "nothing in this structure that undermines the foundational elements of labour law".[53]

B. The Paths Part: British Passiveness, Israeli (Failed) Activeness in Addressing Burgeoning Legal Fiction

It stands to reason that temporary work arrangements and long-standing, tripartite work relationships are mutually exclusive. Though both are exceptions, or modifications, of the traditional, bilateral, continuous contract of employment, they are not the same type of exception, or modification. The paradigmatic temporary work relationship is, first and foremost, temporary, i.e. short termed and intended to address local needs, such as replacing an absent employee or a sudden influx in the workload. In contrast, a client (e.g. a hotel) may have a very long and fruitful relationship with the employees of a service provider (e.g. a law firm). In both cases, the paradigmatic, or authentic, work types would give no rise to a claim that the employee of the agency or service provider are, in effect, employees of the client.

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[50] LA SM/129-3 *Hershkovitz v. the State of Israel* PDA 12, 255 (1981).

[51] *Secretary of State for Education and Employment v Bearman* [1998] IRLR 431.

[52] *Bearman*, at 434.

[53] *Hershkovitz*, at [8].

Matters become more complicated when the two 'types' become intermeshed, i.e. when 'temporary' agency workers are employed by clients for years, subordinate to the client's managerial hierarchy, embedded in the operational system and subject to all disciplinary control by the client. At times, agencies are replaced, while the worker holds her position and responsibility throughout. And so, during the late 1990s, it became increasingly noticeable that contractual arrangements are being used to offer the appearance of a triangular relationship, solely for the purpose of undermining foundations of labour law. As noted by Antonio Ojeda Avilés: 'in quite a few cases the contracting out is essentially reduced to the labour force alone, [thus raising] the old problem of pseudo contracting and of labour only contracting'.[54]

And so, workers employed by agencies approached the courts in both countries with a legal challenge: to ascertain whether the triangular relationship is "authentic", in which case the worker will be deemed employed by the agency or service provider, with all the rights that such a decision does, or does not, entail; or "fictitious", thus requiring to unveil the 'implied contract' that the worker had. Despite this commonality, there is an important divergence between the legal systems in the two countries. In Israel, it is usually not questioned that the worker is, in British legal typology, an employee who is entitled to all statutory rights. The central question is who is her employer, and from the answer to that question the court derive the range of *additional* rights to which the worker is entitled.

An important aspect of the statutory regulation of triangular relations in Britain is the direct application of equality laws to contract workers, thus avoiding the need to identify the true employer for such purposes.[55] In contrast, temporary agency workers in Britain were routinely denied statutory labour rights, with courts asserting that the claimant could not be seen as employed by the agency *or* by the end-user.[56] The curious reason given for this result is that, while in the past bilaterality was a characteristic of the employment relationship, in the UK (but not in Continental Europe) bilaterality became a *precondition*, a requirement for workers to obtain "employee" status.[57] The judicial 'explanation' for this peculiar state of affairs was given by the Court of Appeals in *Dacas*.[58] Delivered in 2004, it is somewhat

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[54] In Freedland and Kontouris, at 115, and see at 116-117, where the authors explain how this grey area parallels the centuries-old effort to distinguish the hiring of a person's capacity to general services (operarum) and hiring her for specific work assignments (operis).

[55] Section 41(5)-(7) of the Employment Equality Act 2010. The idea, interestingly, is not new. See Section 4B(9) of the Disability Discrimination Act 1995; Section 7 of the Race Relations Act 1976; Section 9 of the Sex Discrimination Act 1975; Regulation 8 of the Employment Equality (Religion or Belief) Regulations (2003). The wording of the SDA 1975, for example, is as follows:

> "This section applies to any work for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself by another person, who supplies them under a contract made with the principal".

[56] HUGH COLLINS, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" 10 OJLS 353 (1990); ANNE DAVIES, *EU Labour Law* (Elgar, 2012), at 195.

[57] MARK FREEDLAND, *The Personal Contract of Employment* (OUP, 2003) at 55; Countouris (note 2) at 37.

[58] *Dacas v Brook Street Bureau* [2004] IRLR 358.

surprising that after more than two decades of intense contracting out, this was the first occasion that the Court confronted 'head on' the question whether a contract of service could be implied between an agency worker and the end user in a tripartite setting.[59]

Dacas involved the case of a cleaner who worked for the Wandsworth Borough Council through an agency for a period of over four years. Munby J reasoned that "the two critical elements – the obligation to remunerate and the right to control – are located in different parties".[60] This "differential distribution" of the employer between the agency and the end-user "has hitherto been relied on by the industry as necessarily producing the happy outcome – happy, that is, both for the agency and the end-user, though not, of course, for the worker – that the worker has no contract of service either with the agency or with the end-user".[61]

The consequences of this legal conclusion are straightforward. As Simon Deakin explains, employers "adopt arrangements whose sole or principal purpose is to avoid the application of protective legislation".[62] This was echoed by the Advocate General in the ECJ case of *Allonby*, who noted that "the legal arrangements instituted as a result of these developments may also be used to evade the consequences of employment protection legislation".[63]

Despite its long tradition, there are signs that British courts are seeking to distance themselves from such a harsh and, with respect, illogical result.[64] While reaching the conclusion that the worker has no employer on procedural grounds (Mrs Dacas did not raise the claim that she should be considered an employee of the Council), the majority in *Dacas* expressed their reservations with the result, with Sedley LJ noting that such a possibility "defies common sense".[65] The Court of Appeals in *Muscat* expressed unequivocal support for the majority's reasoning.[66]

However, if British jurisprudence is indeed developing in this direction (and there are also signs of retracing steps), it seems to push no further. Despite the powerful rhetoric in *Dacas*, British courts have yet to rule on one case of triangular employment relationships that the worker is employed by the client. In contrast, Israeli

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[59] As noted in *James v Greenwich Council* [2007] IRLR 168, at [47]

[60] *Dacas* (note 31) at [83].

[61] *Id.*

[62] SIMON DEAKIN "The Changing Concept of the 'Employer' in Labour Law" 30 *Ind. L. J.* 72 (2001)

[63] Opinion of A.G. Geelhoed in Case C-256/01, *Debra Allonby v Accrington & Rossendale College* [2004] ECR I-00873, [45]; and see also *Abbey Life Insurance Co Ltd v Tansell* [2000] IRLR 387, 388, regarding the possibility of evading the Disability Discrimination Act through outsourcing.

[64] But cf. *East Living Ltd v Sridhar* [2008] UKEAT/0476/07, where the EAT concluded that significant control on the part of the end user was evidence that a contract of employment was not established with the *agency*, and therefore the claimant (of a grievance based on grounds of racial and sexual orientation) was not an employee of either.

[65] *Id.,* at [77]

[66] *Cable & Wireless v Muscat* [2006] IRLR 354, at [35]. For a critique of the judgment see Michael Wynn & Patricia Leighton "Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of Temporary Work Agencies" 35 *Industrial L. J.* 301a (2006)

courts and the Israeli legislature have become increasingly assertive in their role to reverse the problematic, if not illegal, trend that does not deprive workers of their statutory rights, but consists of "contracting out of the collective agreement, in a manner which conflicts with the fundamental notions of labour law".[67]

The temporal aspect of the triangular employment relationship is a case in point. Should the passing of time change the legal assessment and categorization of the 'factual matrix'?[68] In Israel, in a number of cases, the fact that employees served the same end-user, occupying the same position, for over a decade, while the intermediaries were replaced time and time again, was found by the Labour Court to be strong evidence that the legal construction does not mirror reality. In Britain, in contrast, the courts routinely found that the length of service in a particular type of relationship is irrelevant for the legal categorisation.[69] Even when a homecare service employee worked for Camden Council for over 6 years, initially employed by the Council directly, then transferred at the Council's initiative to an agency called Reliance Care, then to Central Care, and finally to Supporta, the EAT found that no implied contract of employment existed between the Council and the worker.[70]

The Israeli Parliament also sought to address the plight of temporary agency workers in Israel in a series of legislative initiatives since the mid-1990s. Central among them was the amendment to the *Manpower Act* (1996) which came into force in 2008.[71] The newly incorporated section 12A states that agency employees who have been assigned to an end user will be considered the end user's employees after nine months. The Israeli government, by far the greatest employer of workers through the use of intermediaries, was anxious about the ramifications of this article, for its immediate implementation would mean a massive extension of the public sector, in a manner that is in strict conflict of the ideology held by all the major parties (at least – at the time). It therefore opposed the article, and deferred the date of its entry into force for 8 years. The reason for the state's objection is thus apparent. What could explain the sudden withdrawal from years of opposition?

The reason is legalistic, simple, and crucial for present purposes: the government re-categorised the workers as "service providers" which are not under the scope of the *Manpower Law* and cannot benefit from its provision. While 10,000 'outsourced personnel' were employed by the government in the year 2000, by early 2009, there were only 150 such workers in *all* government ministries, and they were

[67] Labour Appeal 57/3-54 *Michel Lankri v. A.N.S. Support for the Disabled*, PDA 36, 361, 364-365 [2001].

[68] *Frank v Reuters Ltd* [2003] IRLR 423, at [26].

[69] Unusually, in *Frank v. Reuters*, Mummery J. seemed to hint, in passing, that this logic should be revisited: "it is not irrelevant evidence in the context of an individual who sought a temporary placement through an employment agency, but was then allowed to stay working in the same place for the same client for over five years, during which period he was re-deployed" - at [29]; see A. Davies, 'Casual Workers and Continuity of Employment', ILJ (2006): 196

[70] *Beck v Camden LBC* [2008] UKEAT/0121/08

[71] The provision was incorporated in 2000, but its entry into force was postponed for 8 years due to the Ministry of Finance's opposition, for reasons that will be immediately apparent in the main text.

employed only as a last resort, for up to six months.[72] For the first time, the State Accountant began publishing detailing the number of 'outsourced personnel' in all ministries.[73] The State Accountant directed all government entities (ministries and corporations) that "in general, no employment of contract workers will be authorized".[74]

The situation regarding employees in the 'outsourced *services'* is dramatically different. Their numbers are not made public. In fact, the State Accountant's report, just noted, states explicitly that the government entities were not asked to report the number of employees employed through service providers (as opposed to those employed through 'personnel' contractors). In some cases this change of direction was effected by government agents discontinuing contracts with personnel contractors, and transferring the activities to service providers. However, in many cases, the 'reform' had a much more legalistic, and even cynical, character: personnel agencies of yesteryear began branding themselves as service providers. Thus, when the Israel's Ministry of Health (MoH) was asked by the State Comptroller how it plans to restructure its engagement with the Association for Health Services, a contractor which provides 4500 workers to the MoH, the latter's General Manager replied that the MoH plans to "move from a 'personnel contractor' to a 'service provider contractor' model". Needless to say, the change of models did not require changing the identity of the (personnel/service) provider.[75] A year later, the MoH's provision of student health, which was delivered through "personnel provision", was transferred to "service provision".[76]

If, in Britain, efforts to rescue workers from the plights of a precarious work environment which deprived them of employment rights has resulted to an "ignominious retreat to orthodoxy",[77] similar efforts in Israel have actually led to workers being further excluded from employment protection. Both trajectories offer a prime example to the claim that such attempts end up being a Sisyphean process, as "every time law manage(d) to regulate an employment relationship, another atypical employment relationship (would come) immediately into being, frustrating the restraints envisaged by the regulations".[78] In light of the fact that leading scholars in Britain and beyond are advancing precisely such approaches, it is worth remembering this lesson, for the worthy, bold rejection of sham employment transaction may also have unexpected consequences.

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[72] The numbers are an estimate because before the law came into force, the government did not collect data on the number or character of employment through intermediaries. Since 2008, the legal ramifications of 'outsourcing personnel' became so significant (the 'threat' of incorporation after 9 months), that this form of employment is heavily regulated. However, only sporadic data is collected on the employment of 'outsourced services'.

[73] THE STATE ACCOUNTANT (2010).

[74] The State Accountant, sec. 1.1 (2008)

[75] State Ombudsman, *Yearly Report 2008*, at 474 (2009)

[76] State Ombudsman, *Yearly Report 2009*, at 349 (2010)

[77] HUGH COLLINS, "Book Review of Diedre McCann, Regulating Flexible Work" 72 MLR 141, at 143 (2009)

[78] YOTA KRAVARITOU-MANITAKIS, *New Forms of Work* (1988) at 23

3. The Elusive Concept of Sham in Employment Relationship

The portrayal thus far has shown that, after a cautious start, it is possible now to detect an increased willingness on the part of courts to scrutinise employers' claims and to depart, to some extent, from the contractual language. As such, this pursuit has a long history in British labour law, where courts were asked, time and time again, to offer differentiate contracts *for* services from contracts *of* services. The former being perceived as contracts with self-employed individuals, while the latter understood as contracts of employment. As we note below, while the legal question put before the court in such cases was 'is the labourer an employee or a self-employed individual?' rather than 'who is her employer?', the tests that evolved in this context were transferred from the former to the latter, without much scrutiny. This overlap, or even convergence, between the two questions in British jurisprudence recurs quite often.

The study of sham in employment relationships (in British parlance), or of fictitious employment contracts (in Israeli legal discourse), includes at least a couple of assumptions. First, although the two terms (sham and fictitious contracts) will be used interchangeably, it may be that they carry different weights. To be precise, it is the denotation of sham that carries moral condemnation that, arguably, the ascription of fictitious contracts does not, or at least – not to same extent. Secondly, and more fundamentally, stating that a contract is 'sham' or 'fictitious' assumes the existence of some legal reality, 'transcendental' or not,[79] that has been thwarted. The idea of legal fiction, Lon Fuller explained, "forces upon our attention the relation between theory and fact, between concept and reality, and reminds of the complexity of that relation".[80] In other words, if the concept of the employer is fundamentally malleable and subject to private negotiation and construction, the ascription of sham/fiction will be extremely rare, if not logically impossible. We shall witness hints to such an approach in what follows. In contrast, if courts assume that the concept of an employer is identifiable by social, economic or other legal facts, then a contract that fails to identify the true employer cannot be seen as other than fictitious or, if disapprobation is appropriate – sham.

In unpacking the concept of sham with respect to triangular employment relationships, we encounter four relevant categories, which will be referred to as: the *Snook* Approach; the Discrepancy Interpretation; the Reality Interpretation; and the Inclusion Approach. It appears, at the outset, that only the first two have been considered by the British courts, while the latter two have been referred to by Israeli courts. While a better understanding of the preferable interpretation of sham contracts will be conducive to employment law doctrine, we should not be led to believe that the matter can be settled by pure analytical logic. If there are occasions where the preferred interpretation of legal concepts may be derived without recourse

[79] FELIX COHEN, "Transcendental Nonsense and the Functional Approach", 35 *Columbia L. Rev.* 809, 814 (1935)

[80] LON L. FULLER, *Legal Fiction*, at ix (1967).

to the general social and economic context, this is not one of those occasions. Moreover, it may well be the case that the concept of sham, with its moral undertones, cannot be argued for without setting forth the interpreter's strong philosophical positions. Indeed, it cannot be a coincidence that in a parallel scenario to the one discussed in this paper – the application of constitutional rights to clients who receive publicly funded care from a private care home – judges on both side of the aisle revealed very different predispositions.[81] Writing for the majority (and rejecting the claim), Lord Mance evoked Adam Smith, arguing that "the self interested endeavour usually works to the general benefit of society".[82] In response, Lady Hale's speech referred to the Beveridge plan's promise of universal services, available to all, irrespective of ability to pay.[83] As we see below, social context and social philosophy, although rarely mentioned explicitly, are central to arguments in favour of particular conceptualisations of sham in triangular employment relationships.

A. The Snook *Approach: Sham as Designed to Deceive the* Public

Perhaps unfortunately, the first development of sham as a legal concept in British legal doctrine was offered in *Snook*,[84] in a commercial context (the sale of a car), which perhaps led to Diplock LJ construing a narrow definition of "this popular and pejorative word".[85] According to Diplock, for the court to view a transaction as sham, two conditions must apply. First, the appearance of the legal parties rights and obligations must be different from the actual rights and obligations. And, second, "all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating".[86]

This construction may explain the path of sham interpretation into the employment context. In several early, formative cases, *both sides* were content with the construction they had devised, which categorised the labourer as self-employed. The party which saw itself deprived of 'rights', in those cases, was a third party, namely – the British public.[87] Taxes and national insurance contributions were demanded from the employer as if the workers were subject to a contract of employment, and not a contract for services. This social and economic context was certainly a driving force when MacNeil J wrote: "The parties to a contract of employment cannot, by private arrangement, exclude from the arrangement public or community obligations. Whilst what the parties intended to be their contractual relationship is a factor in determining what, in law, their relationship was, it is not conclusive".[88] Note the focus

[81] *YL v. Birmingham* (note 19)
[82] Id, at [105].
[83] Id, at [49].
[84] *Snook v London & West Riding Investments* [1967] 2 QB 786.
[85] ACL DAVIES "Sensible Thinking About Sham Transactions", 38 ILJ 318
[86] Id, at 803.
[87] See, e.g., *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 1 All E.R. 433; *Warner Holidays Ltd. v. Secretary of State for Social Services* [1983] ICR 440.
[88] *Warner,* at 454.

on "public obligations", on the one hand, and the *parties' intentions*, on the other hand, as focal points that would allow setting aside the "private arrangement", which is the contract of service.

The legacy of the narrow, textual interpretation of sham continued, however, even where tax and national insurance contributions were not at issue. Moreover, the doctrinal tests for sham were transferred from the inquiry as to whether the worker is an employee to a very different question, namely: who is the employer. As late as 2007, Elias P echoes Diplock LJ's approach and overturned the ET's decision, which was reached on a broader understanding of sham, explaining that "the Tribunal did err in finding that the relationship was a sham. It will only be in exceptional circumstances that such a conclusion can be reached".[89] As we see below, until very recently, the spectre of the *Snook* doctrine continued to hover even when the courts seek to render it inapplicable to the employment context.

B. The Discrepancy Approach to Sham

On occasion, British courts became more willing to associate not only with 'legal fiction' – the construction of a contract by both sides to deprive the public from taxes – with sham, but to embrace a broader notion of 'contractual sham', which includes the case where contractual text does not mirror the day to day employment reality. The employer is seen to adopt the relevant legal tests as set by the courts in a cynical way by inserting them verbatim into the contract so as to deprive employees of statutory rights.[90] And so, if the courts characterised employment as a personal relationship, the employer will simply insert a 'substitution clause' into the contract, formally empowering the worker to send a substitute to perform the work, even when it is clear to both parties that such a situation will never occur.[91] And since the employment relationship demands an irreducible minimum of obligation, the employer will seemingly absolve the worker of such requirement while in effect, nothing less is expected from the worker.[92]

As noted, courts, egged on by labour law scholars,[93] have been quite aware of the absolute ease of inserting "elaborate protestations" to a contract so as to deny workers their rights, even "when examined, [they] bore no practical relation to the reality of the relationship".[94] However, the dominance of the *Snook* doctrine has kept "radical mainstream"[95] approach at bay for several decades insofar as a triangular employment relationship is concerned.

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[89] *National Grid PLC v Wood* at [38]
[90] Deakin (note 62) at 75.
[91] Davies (note 85) at 323; *Express and Echo Publications v Tanton* [1999] ICR, CA.
[92] Davies (note 85) at 324.
[93] See e.g. BOB HEPPLE "Restructuring Employment Rights" 15 ILJ 69 (1986)
[94] Sedley LJ in *Autoclenz* (CA).
[95] ALAN BOGG, "Sham Self-Employment in the Court of Appeals" 126 LQR 166 at 171

Curiously, if a transformation has indeed taken place in this regard, Elias P played a role in bringing it about. In *Kalwak*,[96] Elias P cited, seemingly with agreement, the *Snook* definition of sham, but then continued noted that

> The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship ... if the reality of the situation is that no-one seriously expects a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the truth of the relationship".[97]

It should be noted that while *Kalwak* dealt with a situation of agency workers, the claim before tribunal concerned the worker's entitlement to statutory protection and, in particular, protection from dismissal for proposed trade union membership.

On appeal, the CA rejected this broader notion of sham, and chose to reinstate the narrow, *Snook*, approach. Finding that the contract is in part a sham, the CA noted, "required a finding that *both* parties intended it to paint in that respect a false picture as to the true nature of their respective obligations ... The Chairman recorded that he was referred to Snook, but provided no indication that he had had regard to the applicable principle".[98]

When the CA had the opportunity to address the matter again, in *Szilgalyi*,[99] it sought to simultaneously adopt the broader version of sham, while downplaying the differences between the EAT's approach and the CA's approach in *Kalwak.* It has been pointed out that, with respect, the CA was more successful in the former task than in the latter.[100]

The proper scope of sham in employment relations was finally, and decisively, addressed by the Supreme Court in *Autoclenz.*[101] Taking into account the different bargaining position of parties to an employment relationship, the SC unanimously accepted a "critical difference" between commercial contracts and personal employment contracts, thus setting aside the *Snook* interpretation for future reference in the employment context.[102] The importance of the SC's ruling in *Autoclenz* lies in its willingness to consider "*all the relevant evidence*, ... [which] will also include evidence of how the parties conducted themselves in practice and what their expectations were of each other".[103] It seems that the SC adopts a very clear

[96] *Consistent Group v Kalwakii* [2007] IRLR 560, EAT.
[97] At [58]
[98] [2008] IRLR 505, CA at [28].
[99] *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ. 98, CA; [2009] IRLR 365.
[100] ALAN BOGG "Sham Self-Employment in the Court of Appeal" LQR; Bogg's analysis was accepted by the Supreme Court in *Autoclenz.*
[101] *Autoclenz Limited v Belcher and Others* [2011] UKSC 41.
[102] At [34]-[35]
[103] *Autoclenz*, at [53].

interpretative approach, which fits nicely with Guy Davidov's suggestion that "when employers draft contracts that do not represent the real nature of the relationship, courts must ignore such sham appearances and ask whether the characteristics that justify protection appear in the real life arrangements".[104] However, the identification of the relevant 'real life arrangements' is not an easy one. This matter will be dealt with below.

In the meantime, it is noted that while Elias P raises the bar for proof of "sham" in *National Grid*, he was willing to accept that an implied contract existed even in the absence of sham, when the actual conduct of the parties did not reflect the express documents, and when such a conclusion is "necessary".[105] What underlies the analysis is relatively simple: the "express documents", or contractual arrangements between end-user, agency and worker, imply (even if they do not state so explicitly), direct contact between the agency and the worker, and only indirect relationship between the end-user and the worker. If, however, it is found that the worker had a direct relationship with the client-company, who was active in his recruitment, negotiated changes in pay, notice and holiday arrangements, and in general treated him not as a semi-detached member of staff, but rather "as though he were a wholly integrated member of staff",[106] then it would be *necessary* to find an implied contract between the end-user and the worker, even in the absence of sham. The focus of this approach, we find, is on the discrepancy between the contractual arrangement and the true employment relationship.

But is the converse is similarly true? If the tripartite employment relationship mirrors the contractual documents, one may argue, then not only is there no basis for an allegation of sham, but a claim for an implied contract will also fail.[107] Take, for example, the situation similar to the one described by the EAT in *James v Greenwich Council*:[108] *the contract* between the worker and the agency states that the worker will be assigned to a particular client only after the client interviewed the worker, assessed her capabilities and accepted her for the position; that the client (and not the agency) will assign the particular tasks for the worker, and authorise paid and unpaid leave; that the worker is subject to the authority and discipline of the client; that the client will decide when the employment relationship has ended, and so forth. A separate contract, between the agency and the client, states that the worker is subject to the supervision, direction and control of the client; the agency will not assign the worker any other work without the consent of the client; and that the client assumes responsibility for the worker's remuneration, while the agency takes its commission.

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[104] GUY DAVIDOV, "Re-Matching Labour Laws with their Purpose" in G. Davidov and B. Langille (eds) *The Idea of Labour Law* (Oxford: Oxford University Press, 2011).
[105] *National Grid*, at [40]
[106] *Id*, at 40
[107] *East Living v. Sridhar* [2008]
[108] [2007] IRLR 168, [5]-[9].

So much for the contracts. The interesting issue is that the reality corresponded with the contract. The agency had no day to day control over the worker; the worker did not carry out work for the direct benefit of the agency; and there was no mutuality of obligations between the two. And it is this precise execution of the contractual arrangements, rather than the substance that governs them, that was central to the EAT's decision. Elias P explains that

> where the obligations taken by the parties can be explained wholly by reference to the express contracts which make up the agency arrangement, then "it is neither necessary nor appropriate to infer that there must be some other separate independent contractual obligation between the [worker] and the [end user]".[109]

The CA in *Muschett* similarly accepted that there is "no need to consider whether to imply a contract of employment between [Mr Muschett and HMPS]'. This was because the contractual terms in the case were clear and Mr Muschett worked in accordance with them".[110]

Respectfully, this position is peculiar, if not plainly tautological. If the behaviour of the parties may depart from the contractual text (and still be highly relevant for legal analysis), it is patently true that such behaviour of the parties *may* stem from their contractual obligations. It is for the courts to assess how the whole array of facts presented, including but not limited to "the true construction or interpretation of a written agreement",[111] affects the *legal status* of the worker. Going back to first principles, "whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract".[112] The fact that the origin of these rights and obligations is contractual, in other words, should not bar them from affecting the status of the parties to the contract. In support of his position, Elias P refers to several sources which all have in common a commercial context, which is of course distinct from the employment context in several familiar respects, but for present purposes, the crucial difference is the fact that the contract of employment has the power to create or deny *status*. And status, of course, is a matter of law.

C. The Reality Interpretation of Sham

The previous interpretations to the sham doctrine (or to the prerequisites for an implied contract) lead up to the common sense approach, which has governed Israeli jurisprudence in this context for almost 30 years, and seems to be gaining

[109] *James v Greenwich Council* [2007] IRLR 168, [27], citing Munby J in *Dacas* (note 31) at [35]; see also *James* at [57]-[58] for an extended explanation of this position; also Wiley and Leighton, at 315.
[110] *Muschett v Her Majesty Prison Services* [2010], at [18]
[111] *Young & Woods Ltd v West* [1980]
[112] *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 1 All E.R. 433, at ???

adherents in Britain as well. Accepting as given Sedley LJ's assertion that the possibility that the worker has no employer at all "defies common sense", the only task of the court is to locate the relationship where the intensity is most evident. In doing so, the contract is but one element but, bearing in mind the interests of agencies and clients and their unmitigated ability to draft contracts as they see fit, not the most important one. Similarly, the discrepancy between the contract and the employment reality is indicative of the contract's fictitiousness, but this is not to say that such discrepancy is a necessary requirement.

The strength of this approach lies in its strong relation to a common thread that carries throughout the jurisprudence of employment relationship: the focus on the employer's control over the worker's activity, or even more broadly, "the daily contact … the nature and the extent of the dealings between them".[113] Even critics of the courts' more progressive statements agree that "Questions of mutuality and control intertwine in many of the cases concerning multilateral relationships. There can be no mutuality of obligations where there is no long-term control, as is also the case in relationships of a more intermittent nature".[114] This makes sense, in light of the historical importance 'control' test, which developed as 'the power of deciding the thing to be done, the means to be employed in doing it, the time when and the place where it shall be done'.[115]

Consciously or not, this test seems to be an extension of the traditional control test, which emerged in British labour law. Though significantly diluted and eventually merged into the integration test, its force is evident where triangular employment relationships are concerned. Thus, in 1983, the High Court found prior precedents, which suggested that "the real question is one of the degree of control ... cannot stand in the light of later authority".[116] And yet, in 2001, the EAT in *Motorola v. Davidson*[117] concluded that the labourer, though contractually an employee of a third party, should be viewed as an employee of Motorola, relying *solely* on the latter's control over the individual. The court referred to the "well known dictum of MacKenna J in *Ready Mixed Concrete*",[118] which put as central the question of the employer's control over the labourer when assessing his status as employee. Similarly, the CA in *Dacas* stressed the presence of day to day control as a central and necessary condition to establish a contract between the end user (or agency) and the worker.[119]

[113] *Dacas*, at [61], Mummery, J.
[114] Wynn & Leighton, at 313-314.
[115] *Ready Mixed Concrete (South East) LTDv Minister for Pensions and National Insurance* [1968] 2 QB 497, 515; Countouris (note 2) at 31
[116] Warner, at 454, citing *Gould v. Minister of National Insurance* [1951] 1 K.B. 731
[117] *Motorola Ltd v Davidson* [2001] IRLR 4
[118] Id, at [4].
[119] *Dacas* (note 31), at [49]

So while that analysis is considered insufficient, if not anachronistic,[120] when assessing the status of an employee *qua* employee, the EAT expressed little reservation exploring who controlled the worker's assignments,[121] who gave instructions, who prescribed the rules according to which he operated, who addressed his grievances, who disciplined him, and who authorised his vacations. All this was done, of course, to assess not *whether* Mr. Davidson was an employee (a matter that was not contested), but rather – who was his employer.[122]

While the application of British anti-discrimination legislation, such as the Race Relations Act or the Sex Discrimination Act, extends coverage also to workers who are not employed by the principal, the arguments that serve as the axis for the courts' reasoning in such cases are instructive. Thus, in *Leeds v. Woodhouse*, the claimant was employed by a Leeds ALMO (Arms Length Management Organisation), which was set up by Leeds council to manage their residential properties. Woodhouse lodged several grievance claims against an employee of Leeds Council, but the council asked to strike down the complaints on the grounds that Woodhouse is not a council employee, and thus cannot bring claim against another council employee. Central to the arguments of both sides was the closeness of relationship and the control over Mr Woodhouse activities.[123] The Court of Appeal found that ALMO employees

> are treated on the same basis as employees of Leeds City Council staff. For example, they receive … the information bulletin for Leeds City Council staff; Mr Woodhouse's personnel records are administered by Leeds City Council Personnel Department so that he receives his pay and his leave card from them; he can use the City Council's canteens as an employee; he is listed on the Leeds City Council website, which gives details of where to find him, giving his job title as Project Manager and his Department as Leeds ALMO, in the Division: Leeds North West Homes. Staff at WNWHLL have access to and use the Council's IT systems. WNWHLL has contracted with the City Council for the provision of IT and personnel services with the City Council.[124]

The importance of control even in anti-discrimination cases seems to receive even greater force following the recent case of *Jivraj*, which limited the scope of the

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[120] SIMON DEAKIN AND GILLIAN MORRIS, *Labour Law* (6th ed., 2012) at 161.

[121] See also *Wickens v Champion Employment* [1984] ICR 365. Despite the above assertion, one could plausibly argue that the analysis in *Warner* and in *Wickens* did not depart to such an extent from the control test. Rather, the emphasis on 'continuity' and 'care' is simply a different interpretation of the original test.

[122] The Advocate General also considered distance (and its opposite – continuity) as a factor when deciding if the transfer of undertaking directive applies. Opinion of Advocate General, Mr Van Gerven, *Stichting v. Bartol* Case C-29/91, I-3203

[123] *Leeds Council v Woodhouse* [2010] EWCA, at [21]; see similarly *London Borough of Camden v. Pegg* [2012].

[124] *Leeds Council v Woodhouse* [2010] EWCA, at [7] (citing paragraph 6.8 of the ET) and [22]

legislation to workers who passed the control test.[125] In an original contribution, explores the possibility of viewing Private Equity Funds as constituting part of the employing entity, based on the fact that in many cases, "two loci of control" may be detected.[126] The rationale that covers the closeness of the relationship, the day to day contact, and control, also governs the tests set in the leading Israeli judgment of *Kfar Ruth* (Ruth Village).[127] There, the court identified eight tests that help to distinguish between cases where a worker should be seen as an employee of the end-user or an employee of the service provider or, in other words, between "fictitious" and "authentic" outsourcing. Among the tests, the following deserve special mention: who has the power to dismiss the worker and who should receive notice of resignation; who hired the worker; who set the terms of employment, including payment and benefits; who supervises the worker's work; who authorises the worker's leave and vacations; who *truly* (and not as a channel) bears responsibility for the worker's pay; who owns the equipment, the material and tools that the worker uses in his work.

While this approach is only beginning to gain adherents in Britain, the Israeli Labour Courts has never seriously questioned the *Kfar Ruth* tests, and has applied them routinely when triangular relationships came before them. Three examples are indicative. In *Avni-Cohen*, typists employed by an agency to provide services for the Israeli court system claimed that they should be treated as court employee and entitled to all the related benefits.[128] The court noted that the typists were employed in the exact same fashion for years, serving the judge to whose court they were assigned, while the agencies were replaced every few years, following a renewed tender. The typists used court (and not agency) equipment; requests for paid vacation were approved by the state's human resources departments as well as the agency's; the government had the power to dismiss a typist; the agency that won any current tender was required to accept to its ranks the typists previously employed (formally – by the previous agency) and was denied the power to hire at will.

In *Aloni*, the NLC rejected an appeal on the Labour Court's decision that found that the employment of safety instructors in schools through a series of employment agencies was fictitious, and that they are, in effect, Ministry of Education employees.[129] It pointed out that the contrast between the close personal interaction between the Ministry of Education and the workers, on the one hand, and the lack of any such interaction between the various intermediaries and the workers throughout the years. The NLC continues, through Justice Davidov-Motola:

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[125] *Jivraj v Hashwani* [2011] IRLR 827; Christopher McCrudden "Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*" 41 *ILJ* 30 (2012); Mark Freedland and Nicola Kontouris "Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*" 41 *ILJ* 56 (2012)

[126] Jeremias Prassl, "Rethinking the Notion of the Employer" (Paper for the Inaugural LLRN Conference, Barcelona 2013) at 15.

[127] Labour Appeal 52/142-3 *Alharinat v. Kfar Ruth* 535 (1992).

[128] Labour Case (Tel-Aviv) 911583/99 *Hanni Avni-Cohen v. the State of Israel* (unpublished, 2001)

[129] Labour Appeal 602/09 *The Ministry of Education v. Hanna Aloni* (unpublished, 2012)

> Applying the *Kfar Ruth* tests reveal, therefore, that the selection of instructors was made, in effect, by the Department of Education; the power to dismiss was, substantively, in the hands of the Ministry of Education; and the wages and terms of employment were set, in effect, by the Ministry of Education. ... The government decided on the material that the instructors were to work with, conducted the training and supervised their work, even if, on some occasions, the supervision was transferred to the contractors.[130]

Finally, and similarly, in *Dayan*, the same Justice rejected an appeal on a decision that found as fictitious the contractual structure that governs employment of 70 IT workers employed by the National Insurance Institute.[131] The NLC relied on the fact that

> the National Insurance Institute set the acceptance exams for workers; it decided on their posting and transfer based on need; it set the wages and benefits; it directed the respondents [the workers] professionally on a daily basis ... the contact between the respondents and the Institute was continuous and uninhibited, even when the contractors were replaced.[132]

It is difficult, I believe, to argue against the intuitive appeal of the reality approach to sham employment relationships. Again, if the choice is between one of two potential employers, a common sense approach would be to assess which employer is "closer" to the worker, and find him to be the 'true' employer. Whether designated as 'sham' or only 'fictitious', in other words – whether a cause for moral critique or solely a legal assessment, if the end-user hired the worker, governed her activities, was in close contact on a day-to-day level, and eventually dismissed her, the formal, contractual arrangement should have little relevance.

In light of its importance to the discussion that follows, it is not superfluous to stress: the guiding rationale that governs the tests distinguishing authentic from fictitious, legal or sham, outsourcing per the reality interpretation**: the stronger the association of the employee to the end-user, the stronger the tendency to see her as the employee of the end-user**. In contrast, **the greater the distance between the employee and the daily routine of the workplace, the more the court will be inclined to treat the worker as employed by the service provider.**

However, a central insight of this paper is that the behaviour of employers is not, as the Court seems to intimate, a constant. Rather, employers may, and indeed do, adapt or even manipulate their behaviour and thus – 'the factual matrix', to satisfy the legal tests.

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[130] *Aloni*, at [41]
[131] Labour Appeal 6818-10-10 *The National Insurance Institute v. Eliyahu Dayan* (unpublished, 2012).
[132] *Dayan*, at [28]

A possible reply to this worry is present in Alan Bogg's assessment of *Autoclenz*. Bogg notes that Clarke LJ's speech adopts not only an interpretative approach which simply incorporates additional evidence from real life, but also "purposive approach to the problem"[133] and, according to Bogg, a "radical" one at that.[134] The purposive approach adopted in *Autoclenz* may, in effect, change dramatically the traditional presumption, which relied on the contractual text, and "suggest that there should be a *presumption* of employee/worker status that can be rebutted only by clear evidence to the contrary".[135] It also resembles, in important respects, similar propositions, like those advancing a "functional" or "responsive" approach to legal concepts, such as the worker or employer.[136]

This is not the place to address the strengths and weaknesses of the purposive approach. Its potential may be realised precisely in cases like *Autoclenz*. However, it should be noted, that as an exceptionally potent tool (in its ability to interpret contracts against their explicit wording), it may serve different masters at different times. For example, there is no shortage of scholars and judges who firmly believe that employment protection should come into being only on those rare occasions of market failure and that the role of the courts should be to clear regulatory obstacles from the free market reign. Others hold good faith behaviour in such high regard as to overcome statutory protections. Both are examples (of which more can be added) to instances that can be justified by resort to a purposive approach.

In contrast, the following, final interpretation of sham, which has been suggested by the Israeli court in several recent cases, presents an interpretation that is more contextual than a general purposive approach and, in particular, is more closely connected to labour law fundamentals. But before doing so, the next section opens with several descriptions of problematic dynamics that have resulted following the fruitful implementation of the reality approach in Israel. These dynamics have arguably motivated the court to suggest an alternative interpretation.

D. *The Inclusion Approach to Sham – Addressing the Control of "Control"*

The aforementioned appeal of the Reality Interpretation is also its weakness. It provides straightforward tools to analyse the picture of a given employment relationship. However, the dynamics of employment relationships suggest that they are better perceived as film, rather than a picture. An analysis of one frame within the film may be illuminating and revealing, but it has the clear flaw of missing the past and, more importantly, future development of employment relationships. The difference between the two perspectives may even be more foundational, and related to a different concept of law. Robert Summer, for example, contrasted the positivist preoccupation of providing an "anatomy of law" that seeks to explain the

[133] *Autoclenz*, at [35].
[134] Alan Bogg, "Sham Self Employment in the Supreme Court" 41 ILJ 328, at 342 (2012)
[135] Id, at 343
[136] See, e.g. Prassl (note **Error! No s'ha definit l'adreça d'interès.**) at 23-24.

"momentary legal system – all the norms valid in one system at one point in time", with the non-positivist concern with the "living 'psychology of law' - the institutional processes through which human conduct is subject to legal governance.[137] To conclude this somewhat metaphorical portrayal, one may even say that the court's analysis has an "observer effect" quality, in that the observation and analysis changes the nature of the phenomenon being observed.

Back to our field of inquiry, it has clearly transpired that the courts' good faith efforts to conceptualise and organise the boundaries of bilateral and trilateral employment relationships and, consequently, authentic and fictitious contracting out, may be subject to manipulation. In Israeli industrial relations, for example, the *Kfar Ruth* judgment should not be seen solely as a static assessment of a given employment reality; rather, it has become an **employers' directive to plan their employment relationship in a manner that will knowingly distance themselves from the agency workers**. If proximity and control lead courts to legal conclusions that are anathema to employers (in this case – the government), then the government will simply distance itself from the workers. Thus, employers avoid all professional or personal contact with agency workers so as not to create the appearance of a worker's association to the workplace. An example of this conscious decision is documented in the 2010 Israeli Ombudsman Report. Examining the contractual relation that the National Insurance Institute has with "independent assessors" who are charged with determining the dependency of elderly and disabled persons, the Ombudsman warns that "for several years, the NII has been aware that the current employment relationship *may be construed as a contract of employment* and not as a service provision relationship, as it should be. Nevertheless, the NII has not established array of assessors and counsellors, such as contracting with an external, private company".[138]

An exceptional indication that a similar state of mind is evident in Britain is found in the *Leeds v. Woodhouse* judgment. The EAT cites the ET's portrayal:[139]

> As their name suggests, ALMOs should therefore manage at arms length from the local authority; it is important to the Government scheme that ALMOs should be independent of the local authority. Clause 30 of the Management Agreement reflects this aspiration:
>
> '30.1 Neither Leeds North West Homes nor its personnel shall in any circumstances hold itself or themselves out as being the servant or agent of the Council otherwise then in circumstances expressly permitted by the agreement.'

And, in fact, Leeds Council failed to do just that. The relationship between the council and the ALMO was too close – the council set out the Performance Management Framework and supervised it; and, as noted, ALMO employees were

[137] Robert Summers, *Lon L. Fuller*, at 31, referring to Joseph Raz, *The Concept of a Legal System* (1970)
[138] State Ombudsman, *Yearly Report 2010*, at 223 (2011)
[139] Section 6.4 of the ET's judgment.

treated on the same basis as Council employees.[140] The failure to 'keep their distance' led the court to a result that the council opposed. Similarly, the facts in *Camden v. Pegg* (which similarly deals with a claim of discrimination, and therefore posing no need to establish the precise employer) suggest a similar effort to significantly increase the distance between the end-user and the worker. Ms. Camden worked for Camden authority as a Senior School Travel Planning Officer, "fully integrated with other members of staff at Camden ... frequently represented Camden at meetings, conducted presentations and courses on Camden's behalf [and] made contracts on behalf of Camden".[141] And yet, she was supplied by an employment agency, which contracted with *another* employment agency, which contracted with the local authority. This layering of contracts was not sufficient to produce the result that Camden sought and to remove the worker from the ambit of anti-discrimination legislation.

However, this aim may be materialised, at least with respect to employment rights that are not equality-related, by further 'distancing', a practice that Atkinson refers to as representing 'the displacement of employment contracts by commercial contracts',[142] but may and presumably will, have other manifestations. Thus, there is a risk that the increasing of distance between the end-user and the worker will be not only legal (additional contracts) but also physical and managerial.[143] The risk, in fact, is materialising in Israel in recent years.

One such example for such a state of affairs became evident during the litigation brought by several secretaries who were employed, by a service provider, with the Israeli Revenue Service.[144] Justice Rosenfeld describes how, "prior to the motion brought by the plaintiffs, some of the secretaries who are plaintiffs in this case, sat in the same room as secretaries who are government employees. Immediately following the submission of the motion to the court, a "separation of powers" ensued, so that six secretaries who are government employees were placed in the 'small room', while the plaintiffs were moved to the 'big room'".[145]

Ten years later, the present author was approached by several workers who are employed by the Department of Social Services in Tel-Aviv, one of the largest municipalities in Israel, through an agency.[146] The municipality's legal counsel swiftly intervened, instructing the department not to allow the agency workers to enter the department building, to use the department computers or to participate in staff

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[140] See text next to note 123.
[141] *Camden v. Pegg*, at [7].
[142] Atkinson, "Flexibility or Fragmentation? The UK Labour Market in the Eighties", *Labour and Society* 87 (1987).
[143] The facts in *Camden v Pegg* may suggest such a trend, as the Ms Pegg worked for the Camden local authority
Cf Countouris (note 2) at 59 [explaining a similar trend, affecting the judicial tests used to attribute the status of employee to a labourer].
[144] Labour Case (Jerusalem) 2513/00 *Anat Zerifa v. The State of Israel, Ministry of Finance* (unpublished, 2005)
[145] *Zerifa*, at [6.4]
[146] Email from Sharon Luzon, Tel-Aviv Council Member, to Amir Paz-Fuchs (April 4, 20120, 15:33)

meetings. At no point was the motive for this directive hidden. Though several municipality workers stated that the directive clearly impaired on the functionality and productivity of the department, the primary aim was clear: at no point can the workers be perceived to obtain the relevant ties to support the claim that they are employed, in effect, by the municipality. This type of disparate treatment is not limited to professional decisions. Employers, inter alia for this reason, began denying agency workers the opportunity to access to conditions of employment enjoyed by government workers, such as eating in the dining room, transportation to and from the workplace, use of the staff showers, and so forth.[147]

Moreover, since stringent supervision increases the threat that, if the matter reaches the courts, the triangular relationship will be viewed as fictitious, we have a clear incentive, created by the law governing employment relationship, to limit government **training, guidance and supervision over the work**, and not only the rights, **of "agency" workers**. The force of the incentives set by the judicial tests was made manifest very recently. As part of the Israeli government's reforms following the 2011 social protests, free after school activities were established for pre-school and grades 1 to 3. This extensive, ambitious programme is set to cost over 2.35 billion NIS (over $700 million) annually. Since it did not wish to expand the number of teachers employed by the Ministry or by the municipalities, the government decided that they will be employed by a contractor. And so, the public procurement documents state the contractor is the employer of the teachers, that no employment relations will exist between them and the Ministry, and that they will not be entitled to rights as government employees.[148] However, aware of the legal state of affairs and, in particular, the *Kfar Ruth* tests, the tender documents also state that the contractor will operate from his office, and that he will be responsible for recruiting and placing personnel, at his expense.[149] Furthermore, it is made clear that the contractor's employees may not sit in the Ministry's offices, may not use government equipment, may not use official government letterhead, may not sign documents in the name of the ministry and may not use titles reserved for government employees.[150]

But the most extreme instance of the effort to distance the contractor and his workers in the name of preserving an "authentic" outsourcing concerns the supervision over the work of teachers. Here, the tender document clarifies that the body responsible for supervising the effective execution of the project is ... the contractor himself![151] Since close supervision by government workers at the school could lead to the conclusion that an employment relationship does, in fact, exist, a

[147] SHARON RABIN-MARGALIOT, "Service Providers, their Clients, and the Workers Performing the Services: How to Effectuate Enforcement of Employment Rights?" 25 *Bar Ilan L. Rev.* 525 (2009)
[148] ETTI WEISBLAI, *Implementing the Recommendations of the Committee for Social and Economic Change: Supplementary Afterschool Educational Frameworks* (The Knesset Research and Information Centre, 2012) at 3; Ministry of Education Tender No. 17/06.12 *Operating Additional Day Care (OADC)* (2012).
[149] OADC Tender, section 6.1
[150] *Id*.
[151] Id, section 5.21

radically new construct was established. For the first time (insofar as I have managed to find), the *contractor* will employ a part-time supervisor from within the ranks of the school teachers, who will be responsible for the implementation of the programme.[152]

In light of the above, it is interesting to note a new judgment, which may be understood as governed by an opposite rationale. In *Chasidim*, the National Labour Court offers a series of "supplementary tests" (in the words of the Court) to those set down in *Kfar Ruth* and governing the Reality Approach. However, far from being "supplementary", these tests pull towards a very different direction.[153] These tests, that compose what may be seen as the Inclusion Approach, include the following: is the worker excluded from union representation as a result of the outsourcing; is the worker excluded from collective agreements as a result of outsourcing; does the outsourcing lead to the worker's social exclusion and have a detrimental effect on his dignity in the workplace; does the outsourcing impinge on his potential for promotion and professional development; and does the outsourcing negatively affect the worker's ability to maintain a personal relationship with his employer, taking into account the relevant occupation.

We find that, despite being branded as "supplementary", the *raison d'etre* of the *Chasidim* tests is directly opposed to that of the Reality Interpretation. The court in *Chasidim* finds the *distancing and exclusion* of the worker as supporting the conclusion that the outsourcing is *il*legitimate, while under the Reality Approach such distancing (e.g. moving the worker to a different venue, imposing a different manager) would have increased the likelihood that the outsourcing would be viewed as authentic. Take, for example, workers employed by a local authority through charities, as is common in the area of social services. Such workers are supervised by the charity's executives, who decide whether to appoint them, set their wages, authorise their vacations and are empowered to dismiss them. The local authority leaves the hiring process completely to the charity, does not dictate the training of the workers or provide guidance for the execution of their duties; and does not involve them in the principled discussions that take place in the council in areas that are central to their role. Based on *Kfar Ruth*'s traditional tests, this 'factual matrix' would constitute authentic outsourcing of services. And yet, the *Chasidim* rationale would focus on different tests - lack of union representation; the denial of government employees rights that derive from collective agreements; their detachment from the general welfare system; the denial of any potential for promotion with the social service system – and would find fault in the outsourcing. Adopting the *Chasidim* tests over those offered in *Kfar Ruth* could have led to a very different set of incentives: while under *Kfar Ruth* the extent of distancing and lack of supervision would reduce the chance that the court will conclude that the outsourcing is fictitious, under *Chasidim*, distancing and lack of contact with the workers will increase the chance that the court will conclude that the workers are state employees.

[152] Id., section 4.6.14
[153] Labour Appeal 478/09 *Itzhak Chasidim v. The Jerusalem Municipality* (unpublished, 2011), at [29]

To refer to Nicola Countouris's useful typology, the Reality Interpretation and similar judgments that followed enabled a framework of *normalization* [of outsourcing] *without parity*, the Inclusion Approach rationale offers the seeds of a *conversion* strategy. To briefly explain, normalization without parity refers to a regulatory framework whereby the employment of atypical workers at conditions that differ from those of standard employees is regulated, but not forbidden or forced to change and atypical workers are not granted the same rights as standard employees. In contrast, within the conversion strategy, legislatures and courts increasingly convert atypical work into contracts of regular, subordinate employment.[154]

Perhaps even more ambitiously, the *Chasidim* rationale demonstrates a different *raison d'etre* of labour law as a whole, thus 're-institutionalizing' labour law,[155] and not only in the context of outsourcing of services. The traditional aim of labour law - protecting the weaker party within a labour context – demands identifying a circumscribed, economic relationship. Here, managerial control was key, and the identity of the employer follows the identification of authority. The legal conceptualisation follows the economic conceptualisation.[156] Simon Deakin explains the rationale underlying the overlap between the economic and the legal: since employees are subject to decisions made by employers (in aspects of health and safety, or employee representation, for example) it is reasonable that employee protection is coterminous with the exercise of centralized managerial coordination.[157] The Inclusion Approach potentially continues the interest that has begun to emerge in considering not only the power dynamics between workers and employers, but also amongst workers.[158] It also has the benefit of integrating social aspects of work alongside material foundations.

4. Concluding Thoughts

Sham Outsourcing in the Public Services – A Special Case?

This paper has been focusing on the outsourcing of public services, and the special ramifications of labour law judgments in this arena were outlined above. Before concluding, it is necessary to address the special character of the public services from an additional perspective – that of the remedy. Needless to say, this matter has not occupied the British courts, since they have yet to accept such a claim. Indeed, one may surmise that if the categorisation of an instance of public service outsourcing as a sham would require viewing the agency workers as civil servants – that, in itself,

[154] Countouris (note 2) pp 6-7.
[155] A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP, Oxford, 2001), p. 52
[156] R.M. Coase, "The Nature of the Firm"
[157] Simon Deakin, 'The Changing Concept of "Employer" in Labour Law', ILJ (2001) at 80.
[158] Mundlak

is sufficient motivation for the courts to make a special effort not to reach such a conclusion, even regardless of the prevailing facts and legal doctrine.[159]

In *Dovrat Schwab*, the worker was employed in the market analysis unit of Israel's Agriculture Ministry.[160] Following cuts to the public service, a significant part of the unit was outsourced to a government corporation, and from there – the workers were transferred to a private employment agency. The claimant was eventually given notice of dismissal, signed by the Ministry of Agriculture's Director of Market Analysis. Two judges of the minority pointed out that the claimant was hired by the government, negotiated her terms and conditions with the government, was subordinate to government directives, and was eventually dismissed by the government. Therefore, following the Kfar Ruth tests, the minority position was that the claimant should be considered a government employee. In a relatively rare occurrence, the NLC's president, Steve Adler, formed a majority with the side-judges (the worker and employer representatives) in opposing the conclusion that a worker who had not passed civil service procedures will be granted civil service standing through judicial injunction. President Adler did not contest the minority's finding in fact or in law, and it seems relatively clear that it was the ramifications, not the logic of their decision, which troubled him. One may even find a similar concern in the British CA's comment in *Muschett*, which mentioned the fact that the claimant's aspiration to become a permanent employee is not enough, since "the application had to go through the normal process".[161]

It is possible that as social services are being devolved to local authority, and outsourced by them, the matter will be somewhat less contentious. However, even in such cases, the main contention surfaces with regards to the right to job security, or tenure. On several occasions, the NLC ruled that after years of indirect employment, the State cannot raise any objections in that regard, otherwise it will benefit from its own wrong.[162] However, it seems that the majority in the NLC is leaning towards a sui generis resolution, according to which the worker's terms and conditions of employment will be equal to those of a civil servant, apart from particular rights – tenure and privileged pension, since the worker did not pass the necessary requirements for a civil service post.[163]

The Shape of Things to Come?

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[159] One may say that such a worry is at the crux of President Adler's majority judgment in Labour Appeal 273/03 *Dovrat Schwabb v. the State of Israel* (2006).

[160] Labour Appeal 273/03 *Dovrat Schwab v. State of Israel* (unpublished, 2003)

[161] See similarly in *Muschett* (note 110) at [28].

[162] Labour Appeal 1189/00 *Ilana Levinger v. the State of Israel* (unpublished); Labour Appeal 168/05 Shlomo *Nakash v. The State of Israel* (unpublished); Labour Appeal 326/03 *The State of Israel v. Yelana Chepkov* (unpublished); Guy Davidov "Indirect Employment", 12 *Labour, Society and Law* (2009);

[163] Labour Appeal 273/03 *Dovrat Schwabb v. the State of Israel* (2006); Labour Appeal 410/06 *Ra'id Fahum v. the State of Israel* (unpublished); Labour Case 1596/05 *Haim Moyal v. the Ministry of Welfare* (unpublished) (2008)

If Britain paved the path for outsourcing of public services in the late 1980s, Israel blazed by with vigour in the 1990s. Since then the Israeli Labour Courts have positioned themselves as counter force to contain the tide. As noted, the courts' efforts may have led to a counter effective result, as the government has been increasingly distancing itself from the workers, to the detriment of the latters' rights and to the quality of services and the supervision over their provision. In contrast, while the British courts came close to declaring particular cases of public service outsourcing as 'sham', they have yet to do so in one single case.

One explanation for this disparity is different judicial temperament, especially insofar as the Israeli Labour Courts are concerned. Another explanation may, perhaps, focus on the unique position of the British civil service, and the danger that may be posed by the ability to circumvent its entry requirements through judicial intervention. A third possibility may be that while some members of the Israeli judiciary have yet to come to terms with the dramatic from a centralised to a privatised shift social structure, the provision of public services through private intermediaries is less of an anathema in British eyes.

Be that as it may, the Israeli experience may be, for a change, a view of things to come for British policy makers and scholars of social services. The acceptance of the Reality Approach to sham may well have the effect that it is having in Israel over the past decade, leading governments to distance themselves from service providers and their workers, to the detriment of the latter and the clients.

While Countouris wrote, in 2007, that the British legal system is struggling to make sense of trilateral employment relationships, at least in the area of labour law,[164] a year later the EAT viewed it as one of those "hot topics" in the development of employment law that has eventually arrived at a settled outcome.[165] I would suggest, with respect, that Countouris's assessment is more accurate. Trilateral employment relationships will continue to occupy the courts and tribunals in Britain, and the jurisprudence will continue to affect the incentives and, consequently, the behaviour of employers.

[164] Countouris, at 103, including the caveat that the situation is less ambiguous 'when fiscal considerations arise'; see S. Deakin, 'The Changing Concept of 'Employer' in Labour Law', ILJ(2001): 75–76

[165] *Beck v Camden LBC* at [8]