SPECIAL PROTECTION FOR CLEANERS: A CASE OF JUSTIFIED SELECTIVITY?

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I. INTRODUCTION

Should the same labor laws apply equally to all workers?[1] Not necessarily. In a recent article, I have argued that a balance must be struck between universalism and selectivity.[2] Universal labor laws have some important advantages: they enjoy broader support and stability, compared with laws that protect only a small specific group; they are more likely to reach a larger segment of the population that needs them (it is easier for workers to know their rights and enforce them, and more difficult for employers to evade); they are better in fostering solidarity and social cohesion, avoiding the need to name certain groups as being in need of special protection; and they are designed to ensure, paternalistically, that we get some benefits (e.g., vacations, maximum hours, pension savings) even when we can get them without regulatory intervention, because we sometimes fail to realize their importance. At the same time, selective labor laws have their own advantages. They are more efficient and arguably more just in targeting benefits to those who really need them, allowing the legislature to set the level of rights according to the needs of the specific group, rather than the lowest common denominator; they allow the provision of special (tailored) protection for those with special needs/vulnerabilities; and they can be used to provide partial protection for those who need only the protection of *some* laws (and not the entire bundle of rights)—such as dependent contractors—who are usually excluded altogether from universal labor laws.

During much of the twentieth century, there was a move toward universalism that was (righty) seen as progressive, because basic protections were gradually broadened and extended to more workers who

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1. I use the term "labor law" in this Article to include employment law and workplace discrimination law as well.

2. Guy Davidov, *Setting Labour Law's Coverage: Between Universalism and Selectivity*, 34 OXFORD J. LEGAL STUD. 543 (2014).

needed them. The basic protections provided in a relatively universal way, however, were supplemented by additional sector-specific or workplace-specific rules and benefits adopted in collective agreements. The dramatic decline in union density in recent years, together with the proliferation of precarious work arrangements, necessitate a rethinking of the balance between universalism and selectivity. This is not to suggest that the balance was optimal in the past; only that it is becoming ever more crucial to look for new ways to advance labor law's goals. And that includes a new combination of universal and selective regulations.

Universalism is probably seen as progressive because it appears as the opposite of labor market segmentation. The reality, which exists in many countries, of a deep divide between "good" and "bad" jobs, with the allocation of some people into "bad" positions often for entirely arbitrary reasons, cannot be justified. Optimally, the solution could be to use labor laws to turn "bad" jobs into "good" ones. Alternatively, if it is not possible for all workers to enjoy secure, stable jobs with good pay and benefits, perhaps the way to prevent the exclusion of some workers into temporary, insecure, and low pay jobs is by creating a universal middle ground.[3] Either way, it may seem that the solution to segmentation is universal measures. This may be true in many cases, but not always; sometimes it might be necessary to use selective (targeted) measures to improve the conditions of a specific group and thus minimize its exclusion.

There are several ways in which we can improve the universalism-selectivity balance.[4] One is to untie the connection between employment status and benefits that have nothing to do with employment (such as health care); i.e., extend such benefits not only to employees but more universally. Another is to correct the unjustified exclusion of specific groups, i.e., to extend the protections of labor law to workers who have been excluded for unjustified reasons. A third way is to break the binary divide between employees and independent contractors and add an intermediate group of "dependent contractors," i.e., extend some protections (not all) to workers that have so far been excluded, but have some (not all) of the vulnerabilities of employees. A fourth method is to use purposive interpretation of the term "employee" for additional "corrections," i.e., include some workers within the scope of specific labor laws—or exclude some others—if this is justified by the purpose of the specific regulation. Finally, we can add special protections to groups that are especially vulnerable; that is, instead of treating them like all other employees (subjecting them to universal labor laws) special regulations are sometimes needed to address their unique

3. *See* GIUSEPPE CASALE & ADALBERTO PERULLI, TOWARDS THE SINGLE EMPLOYMENT CONTRACT: COMPARATIVE REFLECTIONS (2014).

4. *See* Davidov, *supra* note 2.

vulnerabilities.[5] The goal of this Article is to examine this last method in more detail; to check how it can (and should) work in practice.

A recent example of a selective scheme designed to address the shortcomings of universal labor laws is the Decent Work for Domestic Workers Convention.[6] The ILO report that led to the new Convention has pointedly maintained that domestic work should be treated as "work like any other, work like no other."[7] The Convention attempts to ensure that domestic workers are not excluded from regular labor law protections, and at the same time to offer them special (selective) protections to address their special vulnerabilities. This Article examines another such attempt: the specific regulations recently adopted in Israel with regard to cleaners. I show that these regulations have improved the work conditions of cleaners in Israel, but at the same time helped to legitimize and perpetuate their precarious and inferior position. I then address the more general question posed by this case study: when is it justified to use selective measures? And if it is justified, what is the appropriate method for such regulations?

Part II offers a brief overview of the cleaning sector in Israel, focusing in particular on the unique vulnerabilities of workers in this sector. I then move to describe and analyze three separate selective regulations introduced in this sector in recent years. Part III considers judicial judgments concerning the right to severance payment, creating different rules for cleaners. Part IV focuses on the Act to Improve the Enforcement of Labor Laws, which created incentives for users, or "clients," to ensure compliance by cleaning contractors. Part V then considers new legislation that gives cleaners in the public sector a right to a minimum wage and other benefits somewhat above the minimum required by universal laws. Finally, Part VI attempts to offer some conclusions and recommendations about the optimal use of selectivity in labor law. The above-mentioned developments are quite exceptional and provide an interesting and fertile ground for this study.

II. THE CLEANING SECTOR IN ISRAELI: AN OVERVIEW

There are three main forms of employment in the Israeli cleaning sector. First, there are people who work as cleaners in private households or small businesses, usually working in several different places (once or

5. This has recently been advocated in detail by Einat Albin, using the context of the British hospitality sector as an example. Einat Albin, *Sectoral Disadvantage: The case of Workers in the British Hospitality Sector* (Unpublished PhD dissertation, University of Oxford, 2010).

6. ILO, Decent Work for Domestic Workers Convention, No. 189 (2011).

7. ILO Report IV(1), *Decent Work for Domestic Workers* (ILO, 99th Session, 2010). For analyses of the convention see Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUS. L.J. 425 (2012); Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation, 2011*, 106 AM. J. INT'L L. 778 (2012).

twice per week in each place). Such workers are usually employed directly, as employees of each of the families or businesses enjoying their work. Second, there are instances of cleaning services provided to private households or small businesses by cleaning firms – usually the smaller cleaning firms. In such cases, the cleaning firms are considered the employers, and the workers are placed by them in different places. Third, there are workers who work full-time as cleaners in a public establishment or a relatively large private establishment that requires cleaning on a daily basis. They could be cleaning a government office building, university, school, hospital, department store, high-tech office building, streets of a municipality, and so on. Until the 1980s, most cleaners working full-time at the same establishment were employed directly by the entity using their work, but during the 1980s and 1990s, cleaning services have been outsourced. [8] Currently, direct employment by public or private establishments using full-time cleaners is virtually nonexistent. Unfortunately, there is no data on the number of workers in each of the three formats, but the latter (indirect employment) is certainly substantial, and it has attracted most of the legal and public attention. This Article focuses on this form of employment.

There are several kinds of indirect employment in the cleaning sector. First, there is "real" outsourcing to cleaning contractors. Assume, for example, that a University is no longer involved in the way the campus is cleaned—how many people clean it, in what way, at what times, who are the cleaners etc.—but leaves everything to the contractor. It requires the contractor to deliver a clean campus for a lump sum. In such cases, we can certainly say that the cleaning service has been outsourced. Second, there are cases of "sham" outsourcing. Assume, for example, that a contractor is engaged by a university and is required to deliver cleaning services, but the university controls everything: the number of workers, who they are, how and when they work, including supervision by university staff. In such a case, the only thing that is outsourced is the legal title of an "employer." Third, there was some use of Temporary Employment Agencies (TEAs) to employ cleaning staff. During the 1990s, in particular, this was a very popular form of employment in the general Israeli labor market. It was an easy way for employers to evade employer responsibilities – in particular, to avoid obligations from collective agreements. In 2000, as much as 5.8% of Israeli employees were employed in this manner; many of them for long-

8. Orly Benjamin, Deborah Bernstein & Pnina Motzafi-Haller, *Emotional Politics in Cleaning Work: The Case of Israel*, 64 HUM. RELATIONSHIPS 338, 341–42 (2011) list four forms of employment in the cleaning sector: domestic-direct, domestic-indirect, commercial-indirect, and commercial-direct. However, the latter appears to be only theoretical today. On the massive shift to outsourcing in the 1980s, see Deborah Bernstein, *The Servant, the Maid and the Cleaning Worker: Developments in Cleaning Work in Israeli Society*, 30 MEGAMOT 7 (1987) (Isr.).

term employment with a single "user."[9] Because of judicial and legislative efforts to curb this practice, the numbers have gradually declined after 2000 and have fallen dramatically in 2008, with the coming into force of a law deeming users to be employers automatically after nine months of employment through TEAs.[10] In practice, employers responded by increasing their resort to subcontractors instead of TEAs. In the cleaning sector, where the service provided is mostly unskilled labor power, before 2008, some establishments (public and private) have used TEAs to indirectly employ cleaners, while others have always preferred to engage with contractors (i.e., companies providing cleaning services). At present, the judicial and legislative fight against long-term employment through TEAs has simply led to an exclusive reliance on subcontractors – i.e., the first or second forms of indirect employment mentioned above.

With TEAs essentially out of the picture, we are left with two forms of indirect employment of cleaners: "real" and "sham" outsourcing. In both cases, they are formally employed by contractors. In the extreme "sham" cases, the contractor is little more than a funnel for the transfer of wages to the worker; its involvement is merely on paper. In the "real" cases of outsourcing, the contractor is closely involved in the working lives of the workers. In practice, there is a spectrum of possibilities in-between the "real" and "sham" poles, and most cases appear to be somewhere in the middle, i.e., there is some real outsourcing of cleaning tasks (including, to some degree, in terms of supervision and control over the employees), but at the same time, the "user" retains some degree of control, for example on the identity of the workers, the hours of work, and the level of wages.[11]

This system of outsourcing—that became the norm in the Israeli cleaning sector—obviously gives a lot of power to the "clients" enjoying the services. Clients are using tenders to elicit a competitive process for choosing contractors. Given the low level of skills required from workers, and the low level of financial investment required to set up a business in this sector, the tenders have triggered a strong "race to the bottom" between contractors, which was immediately translated into deterioration of workers' rights. During the 1990s and early 2000s, the situation of cleaners continuously worsened as a result of this process, with noncompliance with basic employment standards becoming widespread.[12] Eventually this has

9. Ronit Nadiv, *Employment Through Employment Agencies* (Ministry of Labor, 2003) (Isr.).

10. Employment of Workers Through Employment Agencies Act, § 12A (1996) (Isr.); Ori Tal-Safiro, *Data on Employees of Employment Agencies, Employees of Service Contractors and "Side-by-Side" Employees at the Israeli Public Sector* (The Knesset Research and Information Center, 2014) (Isr.).

11. Unfortunately, there is no data to corroborate this assessment. It is based on anecdotal evidence from case law, media reports, and personal communications of the author.

12. Again, there is, unfortunately, no empirical data, only plenty of anecdotal evidence; but also statements of the National Labor Court to that effect. *See* Avishai Benish & Roei Tsarfati, *When Labor*

led to guidelines of the Accountant General, issued in 2007, prohibiting State agencies from buying cleaning services at rates lower than the minimum required for the contractor to obey employment standards – i.e., preventing "money-losing contracts" with cleaning contractors.[13] Although these guidelines formally applied only to State agencies, they have been extended to local municipalities by the Minister of the Interior, and voluntarily adopted by some other public entities (such as universities). Furthermore, judgments delivered by labor courts around the same period created the possibility of placing direct employer responsibility on the clients in cases of "money-losing contracts" because of their ultimate responsibility for noncompliance by the contractor.[14] This has led many clients (the using entities) to change their practices, including clients in the private sector.

The result of these developments has been a shift among the clients. Before 2007 (or around that year), they were constantly looking for the cheapest offer, pressuring contractors to lower their offers – and have usually set a *maximum* per-hour cost in the tender. Currently, the tender usually includes a *minimum* per-hour cost. This is significant and should certainly be seen as a positive development for cleaners. The difference, however, was less dramatic than it might appear. Noncompliance with employment standards became less widespread, but still far from uncommon. And the prospect of cleaners earning more than the very minimum required by law was still very distant. Not to mention the possibility of being employed directly by the user, which remained entirely inconceivable.

With this background, I turn to three (separate) attempts to address the situation of cleaners employed by contractors – three cases of selective regulations specifically targeted at this group of workers. The first is a judicial decision; the other two are pieces of legislation.

Becomes a Commodity Again: A Critical Examination of Abnormally Low Bids in the Procurement of Employment Services, 1 MAASEI MISHPAT 93 (2008) (Isr.); Noam Abhasera, Neta Beker & Ziv Cohen, *Invisible Workers in the Public Service* (2008) (Isr.); *see also* LC 1101/04 *A. Dinamica Services (1990) Ltd v. Tatiana Veronin* (Judgment of Aug. 21, 2005, National Labor Court) (Isr.). The precarious and vulnerable position of cleaners is obviously not unique to Israel. *See, e.g.*, Luis L.M. Aguiar, *Janitors and Sweatshop Citizenship in Canada*, 38 ANTIPODE 440 (2006); Nicole Mayer-Ahuja, *Three Worlds of Cleaning: Women's Experiences of Precarious Labor in the Public Sector, Cleaning Companies and Private Households of West Germany 1973-1998*, 16 J. WOMEN'S HIST. 116 (2004).

13. The same rules applied to security services as well.

14. LC 3054/04 *Shmuelov v. Moshe Pones Cleaning and Maintenance Services Ltd.* (Judgment of Dec. 10, 2006, Regional Labor Court Tel-Aviv) (Isr.).

III. SEVERANCE PAYMENTS FOR CLEANERS: CASE LAW DEVELOPMENTS

According to the Israeli Severance Pay Act of 1963, employees dismissed from their job are entitled to severance payments in an amount equal to one monthly salary per each year of work. As in many other employment regulations, the Israeli legislature recognized the connection between employees and their place of work, alongside the connection with the specific employer. Accordingly, severance payments are calculated based on the entire period of tenure at the same workplace – even if the identity of the employer has changed during this period. The law explicitly stipulates that the employer dismissing the employee has the duty to pay the severance payment *for the entire period of work at the same workplace* (Article 1). If company A is selling its business to company B, the latter must take into account a future obligation to pay severance payments for dismissed workers, calculated based on their work at the same workplace for company A as well. This part of the legislation was designed to ensure that employees retain their tenure-related rights in case of ownership transfer. In practice, this was also understood by the labor courts to mean that severance payments should not be paid during the transfer of ownership, if the employee continues to work in the same workplace. The rights are retained until the time of actual dismissal.

The rule placing the duty with the last employer (at the same workplace) can be seen as preferable for the employee for two reasons: getting the payment at the time when it is most needed (given the goals of the Severance Pay Act); and getting a larger payment overall because it is calculated based on the last salary, which is usually higher. Admittedly, some employees might prefer to get the payment earlier, at the time ownership is transferred, because if they eventually leave at their own choice (without being dismissed), they would get no severance pay at all. However, in this respect, they are not different from any other employee – i.e., they are not "losing" anything by not getting severance payment from company A because workers only get this payment as compensation for losing a job, which in the current situation did not happen.[15]

Deferring the payment until actual dismissal is also more just from the point of view of the employers. The law is based on the assumption that in transfer of ownership situations, the tenure rights of employees are factored into the price of the deal; but the future obligation to pay severance

15. I am assuming that the employee wants to stay in the job under company B; otherwise, if he or she wants to leave because of the transfer, the employee will likely be entitled to severance payment according to Israeli case law. *See* HCJ 8111/96 *The Histadrut v. Israel Aerospace Industries* 58(6) PD 481 [2004]; LC 1271/00 *Emi Matom v. Avraham* (Judgment of Feb. 10, 2004, National Labor Court) (Isr.).

payment can be estimated based on the average number of people being dismissed. The fact that company B will not have to pay severance payments to all the employees—but rather only to employees it chooses to dismiss—reduces the obligation and makes the transfer of ownership more feasible.

The understanding that the first employer does not have to pay severance payments for employees continuing to work in the same workplace has been uncontroversial for a number of decades, since the adoption of the Act. However, in recent years, it became clear that the same rule—originally adopted to protect employees from losing tenure-related rights—could become detrimental for them. This is especially the case in the cleaning sector, where a large majority of workers is now employed through contractors, which tend to change frequently. Assume a person working as a cleaner at a university (or any other establishment) for twenty years. It is quite possible that during this time the identity of his or her employer has changed many times. Every few years (and in some cases even every year), the university is likely to issue a new tender and choose a new cleaning contractor. When contractor B is replacing contractor A, it is not "buying" the business of the previous contractor, but rather replacing it due to the university's decision. But Article 1 of the Severance Pay Act seems to apply in such situations.

Three problematic results follow once the regular rules are applied. First, contractor B will be reluctant to hire the same workers employed by contractor A because they come with tenure-related obligations. In most cases, they are likely to lose their job at the university. Second, assuming the workers are not offered to continue with the new contractor, contractor A is likely to try to avoid paying them severance payments by offering them alternative placements (cleaning at another establishment under contractor A). According to Article 11 of the Act, employees are entitled to severance payment if they are resigning due to changes that significantly worsen their working conditions (a form of constructive dismissal). Thus, if the offer is not comparable to the previous placement, workers can be entitled to severance payments. However, an assessment of the new offer requires judicial discretion based on the concrete facts, so the right is difficult and costly to enforce. Moreover, because cleaners are not likely to have alternative options, they can be forced to accept the inferior offer to avoid unemployment, thus waiving their right to severance payments. Third, if contractor B has decided to hire the same employees after all—whether because of demands from the client or because of the advantages of continuing with experienced workers who are familiar with the workplace and the demands of the client—there is a risk that, at the end of the day,

severance payments for previous periods of employment will not be paid.[16] While noncompliance with labor and employment laws is always a possibility, especially in low-wage sectors such as the cleaning sector, the risk seems higher when contractor B is required to assume tenure-related duties accumulated during the period of employment with contractor A, without being compensated for this cost (compensation that can be expected in regular transfers of ownership). Alternatively, if contractor B is planning to comply with this duty and assume the workers' tenure-related rights, as required by law, at the very least it can be expected to demand concessions from them in return.[17]

By refraining from employing the cleaning staff directly, the "client" is surely responsible for these problems. But let us assume that such indirect employment is legitimate and legally acceptable (I will discuss this question briefly later on). Is there a way to avoid these problematic results and ensure that the general right to severance payment does not cause the workers to lose their jobs, or move to another workplace against their preference? Also, is there a way to ensure a realistic prospect for them to receive severance payment for the entire period of work at the same workplace, as required by the Act?

The National Labor Court responded to these challenges in 2005 by deciding that when cleaning contractors change, employees are entitled to severance payment from contractor A, even if they stay at the same workplace under contractor B (thus relieving contractor B from its future obligation for this period).[18] Moreover, another judgment adds that cleaners are entitled to this payment, even if they are offered a comparable placement by contractor A.[19] In other words, even if they are not actually

16. *See, e.g.*, LC 1363/00 *Hezin v. Tenufa HR Service and Maintenance 1991 Ltd.* (Judgment of Nov. 25, 2006, National Labor Court) (Isr.); LC 2409/08 *Mniyesko v. The State of Israel – Ministry of Defense* (Judgment of Aug. 29, 2011, Regional Labour Court Tel Aviv) (Isr.); LC 405/03 *Liubov v. Sheleg Lavan Cleaning Security and Guard Service Ltd.* (Judgment of Dec. 29, 2005, Regional Labor Court Haifa) (Isr.); LC 15138-05-09 *Kozentzov v. Maof Human Resources Ltd.* (Judgment of Feb. 20, 2013, Regional Labor Court Haifa) (Isr.).

17. The magnitude of the problem has somewhat diminished since 2008, when a general extension order created a universal right to a pension plan for Israeli workers. Employers' mandatory payments to the pension fund include two components; one of them is a payment toward severance payment (a sum equal to 6% of the salary), which became part of the pension savings. Save for exceptional circumstances, the employer will not get this money back if the employee leaves without being dismissed. As a result, much of the sum that used to be paid as severance payment—until 2008 only in case of dismissal and only at the time of dismissal—is now transferred by the employer each month to the pension fund. Still, an additional 2.33% of the salary is paid according to the previous rules. And in the cleaning sector, which is based on low profit margins, this is significant enough to lead to the same incentives and same problematic results.

18. LC 1101/04 *A. Dinamica Services (1990) Ltd v. Veronin* (Judgment of Aug. 21, 2005, National Labor Court) (Isr.).

19. LC 324/05 *Achildave v. Amishav Services Ltd.* (Judgment of Mar. 27, 2006, National Labour Court) (Isr.); LC 32805-11-11 *Ofek M.B. Management and Maintenance Ltd v. Bliuzer* (Judgment of July 8, 2013, National Labor Court) (Isr.).

dismissed by contractor A but simply ordered to move to a new workplace, according to this ruling, workers have the right to refuse and stay at the same workplace under contractor B, without losing their right for severance payment from contractor A. These rules provide solutions (at least partial solutions) to all the problems mentioned above. Contractor B will not have to assume the costs of severance payment for periods of work under contractor A, and thus will be less reluctant to hire the same workers and allow them to continue to work at the workplace. The workers are also more likely to receive their severance pay – first from contractor A and later (if dismissed) from contractor B, for the later period.

The same two rights where later also included (codified) in a collective agreement for the cleaning sector, signed in 2013 and extended in February 2014 by the Minister of Economy to all cleaning contractors. However, the interesting point is the regulation of the cleaning sector by the National Labor Court, before the adoption of the same solutions by the collective parties. Sector-specific rules are common in collective agreements; indeed one of the justifications for collective agreements is their ability to create rules tailored for specific workplaces or sectors. But this is much less common when initiated by courts. The Severance Pay Act is universal; it appears to apply equally to all sectors. Until recently, for many years unions were not able to achieve specific solutions for cleaners (a sector especially difficult to unionize). Faced with this reality, and realizing the difficult implications for the workers, the Court created a sector-specific solution – in effect, a selective regulation applicable only for cleaners.

When reaching the decision to create separate severance pay rules for cleaners, the Court relied on the characteristics of the sector. Harsh competition, together with the special vulnerabilities of employees, created a high risk that the full severance payment (for the entire period of work) will not be paid in practice by the last contractor. Even more importantly, the frequent replacement of contractors meant that contractors were at the same workplace for relatively short terms, but workers naturally wanted to stay for longer periods. The universal rules created by the Act were not designed for such situations, and created an incentive to replace the workers, which was highly detrimental for them. The (selective) new rules created by the Court can correct the shortcomings and problematic incentives created by the (universal) general rules, when applied to the cleaning sector.

IV. AN ACT TO IMPROVE THE ENFORCEMENT OF LABOR LAWS

Over the years, it has become apparent to social activists, judges, and legislators that indirect employment is leading to poor work conditions—

whether the intermediary is a TEA or a subcontractor. The phenomenon is widespread in Israel. Some teachers and support staff at schools are employed through nonprofit educational organizations instead of the government; some social workers are employed by nonprofit welfare organizations; and so on. These professional workers are unable to enjoy collective agreements that apply to their peers, and they generally suffer from lack of job security and work benefits much below the standard among comparable workers employed directly. But the situation is even worse for nonprofessional workers, especially in the cleaning and security sectors, who also often suffer from noncompliance with employment laws. So it is not only that they do not enjoy the benefits of collective agreements at the workplace, which they clean and protect, they are further exposed to frequent violations of the law, resulting in payment of a salary below the minimum wage, no payment for overtime, no vacations, and so on.[20] As noted in Part II, the situation has somewhat improved in the last few years as a result of the Accountant General guidelines as well as some (limited) judicial efforts. But this was far from sufficient.

Under significant public pressure to protect cleaning and security workers—considered especially vulnerable—in 2011 the legislature finally responded with the oddly named but important Act to Improve the Enforcement of Labor Laws.[21] Alongside some general measures, such as a new power given to governmental inspectors to impose fines (without the regular and cumbersome criminal proceedings), a large part of the Act is dedicated specifically to cleaning and security workers employed indirectly.[22] The idea is to create incentives for the users (clients) to make sure that cleaning and security contractors working with them are complying with employment laws. This is achieved by placing direct responsibility on the clients—not as employers but as guarantors—in cases of noncompliance by the contractor itself. So, if the worker is not getting overtime payments required by law (for example), and a demand issued to the contractor did not yield results, the worker has an option to sue the client directly for the same amount.[23]

The Act further lists a number of conditions leading to liability or exemption from liability of the client. First, the client must take reasonable steps to prevent any infringement of workers' rights by the contractor,

20. *See supra* note 12.

21. Act to Improve the Enforcement of Labor Laws 5772-2011, 2326 SH 62 (2011) (Isr.).

22. The list of sectors relevant to many of the Act's new measures is included in an Appendix to the Act: cleaning, security, and catering (food) services offered to workers of the client (i.e., workers of a cafeteria inside a workplace). The last group is less significant and has not attracted much attention or discussion thus far. The Minister of Economy was given the power the change the sectors in the Appendix, subject to some conditions.

23. Act to Improve the Enforcement of Labor Laws, art. 25.

including by setting a procedure for the workers to complain (complaints submitted to the client against the contractor). If such a procedure is not established, or is not made known to the workers, the client will be liable for any infringement of rights, even if the worker did not issue a demand to the contractor. Second, the client will be exempted from liability if it hires a "certified wage-checker" to perform periodical checks and acts swiftly if violations are found. Third, the client will be automatically liable if it does not pay the contractor per-hour compensation that exceeds the minimum required by the Act – a calculation based on the minimum wage plus the cost of all other mandatory employment standards plus some minimal profit (i.e., no "money-losing" contracts).[24]

The duty to take "reasonable steps" to ensure that the workers' rights are respected might not seem so important. Unlike the other two duties (to hire a wage-checker and to pay more than the minimum required) it does not entail direct costs. Nonetheless, it has crucial implications. In the past, clients have been very hesitant about showing interest in cleaners' rights, out of fear that any direct contact will be used as an indicator of direct employment relations. The Act not only gives clients positive incentives to care about the cleaners, it also eliminates the negative incentives. If you have direct contact with the workers in order to make sure that their rights are not infringed—because this is required by the Act—there is no reason to suspect that courts would view this as a relevant indicator of employment.

Overall, the Act creates a significant bundle of unique regulations, specific for cleaning (and security) workers employed by contractors. The goal of these selective regulations is not to create a separate legal regime for cleaners in terms of the substantive rights they enjoy, but rather to ensure that they are able to enjoy the universal employment rights in practice. Given a reality of poor compliance, bolstered by a problematic incentive structure, there were good reasons to create regulations designed specifically to overcome the cleaning sector problems. At the same time, however, there is a cost to the solution chosen. While it has good potential to improve compliance with employment standards for cleaners, it is also likely to perpetuate their inferior position. Although it is stipulated in the Act that it does not create direct employment relations nor refutes the existence of such relations,[25] it is obviously based on the premise that indirect employment through contractors is legitimate and offers solutions within this structure. Moreover, by placing a duty on clients to care about

24. The Act goes on to place criminal liability on the client for such "money-losing" contracts. *Id.* art. 31. Furthermore, there is criminal liability on the client's managers for the same offence (*Id.* art. 32); criminal liability on the client for not taking every reasonable step to prevent violations by the contractor (*Id.* art. 33); and criminal liability on government officials responsible for relations with contractors for the same offence (*Id.* art. 37).

25. *Id.* art. 46.

cleaners, the Act has blurred the lines between direct and indirect employment, making it more difficult to place direct employer duties on clients. Overall, the Act is likely to lower the chances of labor courts concluding that a cleaner is in fact legally employed by the user enterprise.[26]

V. LEGISLATION MANDATING WAGES AND OTHER BENEFITS

The Act to Improve the Enforcement of Labor Laws is not yet operative, but even under the most optimistic assumption regarding its successful operation, cleaners employed through subcontractors might still face very limited prospects. The unique measures created for this sector as outlined in the previous Part are designed to ensure—through pressure on the "clients" using the work—that cleaning contractors will comply with their employment law obligations. So cleaners might get a minimum wage and vacation days as required by law, but no more than the bare minimum. As unskilled labor, they lack bargaining power, and because of various barriers (notably being widely dispersed), they are not likely to unionize. As a result, even after years of work at the same workplace, cleaners often remain very close to the minimum wage level.[27]

One might argue that this is not a problem. Employment laws set the level of wages and benefits necessary for "decent work" – and beyond this minimum, workers only get what their market position allows. In this respect, cleaners are not different from other low-wage, unskilled, nonunionized workers – and there is no shortage of such workers in recent years. Nonetheless, over the last fifteen years or so we have seen growing discontent in the Israeli public over the situation of "contract workers" – a popular term used to refer to TEA workers as well as workers through subcontractors. With the TEA problem curbed in 2008, the focus shifted entirely to subcontracting, with most attention (in the public and legal discourse) given to cleaning and security workers.[28] These two sectors are seen as more problematic than other low-wage contexts. Part of it is surely the unique enforcement problems, which the legislature attempted to

26. I discuss this at more length in Guy Davidov, *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, 26 INT'L J. COMP. LAB. LAW & INDUS. REL. 61 (2010). For a recent example see LC 10632-09 *Klodet Tsagir v. Bank Leumi* (judgment of Apr. 7, 2014, Tel-Aviv Regional Labor Court) (Isr.) (a person who cleaned a branch of the Bank for seventeen years, formally employed through a number of contractors that changed from time to time, was rules *not* to be an employee of the Bank).

27. *See* Nadiv, *supra* note 9, at 44–45; *see also* Haim Bior, *84% of Contract Workers in the Public Sector Earn Less Than the Average Salary*, MARKER, Oct. 10, 2011, *available at* www.themarker.com/career/2.590/1.1520055 (Isr.).

28. Tal-Safiro, *supra* note 10; Michal Tabibian-Mizrahi, *Employment of Contract Workers and External Service Workers in Governmental Ministries* (The Knesset Research and Information Center, 2007) (Isr.).

address in the 2011 Act discussed in the previous Part. But there was also perhaps a feeling that cleaners are especially vulnerable and that their level of wages and benefits is unfair. This can explain the insistence of the Histadrut—Israel's major labor union—on additional measures.

Following massive country-wide protests in the summer of 2011 in support of various social justice causes—including, among many other things, the problem of indirect employment—the Histadrut called a general strike in February 2012 against the government's frequent resort to "contract work."[29] After a five-day strike backed by broad public support, the government and the Histadrut reached an agreement that included several measures, most important among them higher wages and new benefits for cleaning and security workers.[30] This was a significant development: for the first time the government agreed, under pressure, to sign a collective agreement with the Histadrut that does not concern government employees, but rather the employees of contractors engaged by the government. Given that the Histadrut has no formal status as the legal representative of the various contractors' employees, this was unusual and even legally questionable. However, this perhaps parallels the questionable employment of all cleaning and security workers through subcontractors, rather than directly.

The 2012 agreement sets the wages of cleaners at 4.5% higher than the national minimum wage for the first seven months, growing gradually to 8% above the minimum wage after a year.[31] Moreover, it was agreed that some of the workers will be entitled to merit bonuses, based on selection criteria decided by the government (and not by the contractor); those who have a supervisory role will receive a higher wage, set in the agreement; the employers' contributions to the employees' pension fund will be higher than the minimum required by law; cleaners will have a right to a new saving fund (commonly available in Israel for unionized employees), which requires the employer to pay an extra 7.5% of their salary; as well as some additional benefits. It was further agreed that in the future, any wage

29. Haim Bior, *Israeli Workers Open General Strike, Disrupting Airport and Economy*, HAARETZ, Feb. 8, 2012, *available at* www.haaretz.com/news/national/israeli-workers-open-general-strike-disrupting-airport-and-economy-1.411688 (Isr.); Shai Niv, *The General Strike Is Over*, GLOBES, Feb. 12, 2012, *available at* www.globes.co.il/news/article.aspx?did=1000723734 (Isr.). On the nation-wide protests, see Eitan Y. Alimi, *"Occupy Israel": A Tale of Startling Success and Hopeful Failure*, 11 SOC. MOVEMENT STUD.: J. SOC., CULTURAL & POL. PROTEST 402 (2012); Joseph Zeira, *The Protest and the Economy*, 5 MAASEI MISHPAT 231 (2013) (Isr.).

30. The other main parts of the agreement were a significant rise in the number of labor inspectors and a process designed to address extreme cases of bogus indirect employment, in which workers through subcontractors are working long-term next to government employees doing in practice the same job. *See* Memorandum of Understanding (Feb. 12, 2012) (Isr.) (on file with author); A Collective Agreement Between the Government of Israel and the Histadrut (Dec. 4, 2012), *available at* http://apps.moital.gov.il/Agreements/Search.aspx (Isr.).

31. The same rights apply to security workers as well. I focus, however, on the cleaning sector.

increase agreed between the parties for government employees should apply to the cleaning contract workers as well.

The Histadrut also demanded, and the government agreed, to use legislation to extend these obligations to the entire public sector (including local authorities, universities, hospitals, government-owned companied, and numerous other organizations wholly or partially funded by the government). On August 2013, the Knesset accordingly adopted the Act concerning Workers Employed by Cleaning and Security Service Contractors in Public Entities. According to this Act, all public entities (as broadly defined in the Act) must include in their agreements with cleaning contractors a stipulation that the wages and benefits as agreed in the 2012 collective agreement shall apply. This agreement with the government and the ensuing legislation have eventually led to another collective agreement, between the Histadrut and an employers' organization in the cleaning sector, applying similar terms on cleaners employed in private sector organizations (an agreement that was extended by the Minister of Economy and came into force on February 2014).

The result of these developments is that cleaners are now able to enjoy wages and benefits somewhat above the minimum set by employment laws.[32] The interesting story is about the way this has unfolded. The cleaning firms (contractors) are not against better terms and conditions for their workers, as long as they are paid on a "cost plus" basis, which is indeed the norm in this sector. If the clients agree to pay more so that the workers will get more, there is no reason for the contractors to object. However, they were not in a position to impose higher payments on their clients – especially the major public sector clients, who (indirectly) employ a large part of the sector, and are constantly under pressure to cut costs. Moreover, the Histadrut had little bargaining power to impose an agreement on the contractors, given that the cleaners are highly dispersed and mostly nonunionized.[33]

32. This is true as long as they are employed through cleaning contractors – which, as noted, is the case for a large majority of workers in the sector, not including those employed in private households.

33. The Israeli Collective Agreements Act 5717-1957, 221 SH 63 (1957) (Isr.) gives a union the power to sign a "general" collective agreement (sector-wide or state-wide) if it has more members than any other union, without any minimal number of members. For "specific" collective agreements pertaining to a *specific* employer, a union must also have at least third of the employees in the bargaining unit as members. In theory, then, the Histadrut, which presumably had more members than any other union in the cleaning sector, could ask an employers' organization representing the cleaning contractors to sign a collective agreement. However, this was not a realistic prospect for several reasons: the small number of union members (making a strike virtually impossible); the fact that employers are under no obligation to form an employers' organization in the sector (the entity necessary to sign a "general" collective agreement); and the lack of any duty to bargain on the employers (such a duty exists in Israeli law only for "specific" collective agreements – when a union manages to sign up a third of the workers).

The only way to change this difficult situation was through pressure on the clients, and specifically the biggest and most powerful client – the government. A general strike called when public opinion was favorable forced the government to agree to pay more to its contractors for the benefit of the cleaners. This was then extended by way of legislation (which the government was obligated to draft and support, according to its agreement with the Histadrut) to cleaners in the broader public sector. This was crucial: there was no other practical way to reach the numerous workers cleaning hospitals, universities, municipalities, schools, and so on all over the country. Once it was made clear that the legislation will make the higher wages and benefits a new standard in the sector, it became possible to reach a collective agreement with the contractors themselves, thus extending similar terms to the private sector as well.

A sectorial collective agreement setting a wage increase and other benefits for cleaners is nothing extraordinary in itself. Collective agreements have been the common method for creating sector-specific rights for the past century. The interesting point in the current case, however, is the use of employment legislation that applies only to very specific groups: cleaning and security workers employed by contractors. As we have seen, this legislation was necessary for the workers to be able to achieve any gains over the minimum standards universally set by the law.

VI. SELECTIVE EMPLOYMENT LAWS: WHO, WHEN, AND HOW

As briefly explained in the introduction, there are several reasons that might justify selective labor regulations. One of them is the need to provide special protection for especially vulnerable groups. For the most part, labor laws are universal; however, there are exceptions, and there are good reasons to think that regulations that are more selective are required. The traditional system of labor law, still in force today, is based on two main elements: first, a basic level of employment standards set in legislation; second, a right to all workers to organize and achieve through collective bargaining better wages and work conditions, as well as rules and/or benefits tailored to the specific needs of the workplace or sector. In practice, both of these elements are increasingly incapable of delivering results for many workers (the more vulnerable ones). Legislated employment standards are going through an enforcement crisis; numerous workers are not getting in practice what they should be getting by law. As for the right to organize, it is often illusory due to employer resistance and

other barriers. Union density in Israel has plunged dramatically, from roughly 80-85% in the 1980s to 40-45% in 2000 to 25% today.[34]

One could make a plausible argument that the entire system of labor law must change given such a crisis in both of its basic elements. But until a better system is found, an attempt should be made to correct as much as possible the failings of the current system; that is, to use concrete solutions that address enforcement problems and the difficulties of unionization. Many such solutions have been offered in the literature, and some have been adopted by legislatures in different countries. But the focus has usually been on universal, generally applicable solutions. Without detracting from the importance and usefulness of such efforts, more attention should be given to selective solutions as well – specific to certain sectors or certain forms of employment. Einat Albin has suggested that there is sometimes a "sectoral disadvantage" that needs to be addressed in sector-specific regulations.[35] Indeed, if a group of workers is especially vulnerable, it is highly probable that universal solutions are not sufficient to address its special vulnerability. Nonetheless, the addition of selective regulations also has some clear drawbacks and risks, so it should be done very carefully. The appropriate balance between universalism and selectivity—or more correctly, in this context, the appropriate room for selective regulations that deviate from the universal norm—cannot be ascertained in an abstract formula. Rather, it depends on the details of a particular context.

Cleaners employed indirectly (through contractors) in Israel are a good case study to examine the details of selective regulations. For a couple of decades this sector was known for poor (and deteriorating) compliance with employment laws. Prospects of unionization were especially bleak. This is a clear example of a situation that could justify special (selective) treatment. Universal measures could not yield satisfactory results. If one or both routes for delivering rights to workers is effectively blocked, this must be addressed, and if general solutions are unlikely to help a group of workers that is more vulnerable, a selective solution is justified and required.

What can we learn from the example described in this Article about the way selective regulations should be executed? The first lesson is about *timeliness*. Eventually, all the branches of government (the National Labor Court, the government, and the legislature) have acted. But their reaction was slow, and, at least in the case of the government and the Knesset, only

34. Yinon Cohen, Yitshak Haberfeld, Guy Mundlak & Ishak Saporta, *Unpacking Union Density: Union Membership and Coverage in the Transformation of the Israeli Industrial Relations System*, 42 INDUS. REL. 692 (2003); Israeli Central Bureau of Statistics, Selected Data from the 2012 Social Survey on the Organization of Workers (Press Release of June 9, 2013), *available at* http://147.237.248.50/reader/newhodaot/hodaa_template_eng.html?hodaa=201319151.

35. Albin, *supra* note 5, ch. 1.

came after exceptional outside pressure (from public opinion and later from the Histadrut). Obviously one of the reasons for the slow reaction was lack of political will by right-wing governments. But perhaps another reason was the lack of empirical data to show the unique vulnerabilities of the sector. A response based on anecdotal impressions could be inaccurate and is likely to come only after such anecdotal evidence accrues to an overwhelming degree. Once the idea that selective regulations are sometimes warranted is accepted in principle, the government should perform on-going studies with the aim of exposing in real-time unique vulnerabilities of specific groups of workers.

A second issue raised by the case-study concerns the *appropriate institution* to produce selective regulations. In principle, the relevant government agency (in the Israeli case, the Ministry of Economy) is most suitable to address timely and specific problems in a relatively swift way. Employment laws should generally give the Minister an authority to add special protections for selected groups. At the same time, if a problem is structural—as in the case of cleaners employed through contractors—it requires a long-term, comprehensive solution, which the legislature is most suitable to produce. Perhaps the most interesting aspect of the example discussed here is the role of the judiciary. We have seen that the National Labor Court introduced new rules—by way of creative interpretation—to address the difficulties encountered by cleaners in receiving severance payments. This is not an ideal solution. Judges do not have access to the entire factual picture of the sector and its differences from other sectors. They are also very limited in their arsenal of possible measures. The other two branches of government are much better situated to produce selective solutions. Nonetheless, if they fail to act in a timely manner, an intervention by the Court is both justified and warranted. Purposive interpretation should lead to a context-sensitive reading of the law, one that advances the goals of the legislation – and sometimes this requires a different reading for specific sectors or groups of workers. If the general (universal) interpretation leaves some workers unprotected—against the goals of the legislation—then the Court must distinguish between different groups to create selective solutions.[36] The legislature can always intervene and amend the new legal rule, if the judicial intervention is deemed unacceptable.

Finally, and most importantly, there is the question of the *content* of selective regulations. Our starting point in the current context is the

36. On purposive interpretation by the Israeli National Labor Court to advance labor law's goals see Guy Davidov, *Judicial Development of Collective Labour Rights – Contextually*, 15 CAN. LAB. & EMP. L.J. 235 (2010). On the method of purposive interpretation in labor law more generally see Guy Davidov, *Articulating Labour Law's Goals: Why and How*, 3 EUR. LAB. L.J. 130 (2012).

existence of unique (or heightened) vulnerabilities that require additional protections. This is not the case of selective laws that *exclude* some workers – something that could be justified in other contexts and for other reasons. Indeed, in all three cases described in the previous Parts, selective regulations have been used ostensibly to *improve* the situation of cleaners – to add protection and not detract. A difficulty arises, however, with setting the baseline for comparison. Given a reality of poor enforcement, and no clear judgment from the National Labor Court against sham arrangements, one could certainly view the two pieces of legislation discussed above as an improvement. Clients were given strong incentives to prevent noncompliance by contractors and thus to protect the basic rights of cleaners. Later, clients were also instructed to ensure that cleaning contractors would pay their workers somewhat more than the minimum universally required by law. Viewed against the background of "law in action"—as opposed to "law on the books"—the situation of cleaners has improved. However, in terms of the potential to be seen as directly employed by the "client," they are now worse off. This potential existed before, and it still exists today; but it is now significantly lower. Arguably, the potential was not high before as well. Still, it was an important possibility that has diminished.

Was there a better alternative? Certainly, the trade-off just described is not necessary. For example, the legislature or the courts could also have determined that the "client" is the legal employer when workers are employed for a long term (more than a few months) exclusively on its premises. This raises the question of whether such a regulation could (or should) be selective. Is there any reason to make such a rule limited for cleaners only (and perhaps other groups), rather than universal? On the face of it, a universal solution seems preferable in such cases. However, it is very difficult to set the lines between the parties to triangular relations and define the "employer" in a general way. Some degree of indeterminacy is inherent in the process of interpreting the concepts of "employer" and "employee," which leads to difficulties of enforcement. These difficulties are much more pronounced in some specific contexts of low-wage, vulnerable workers. Given this reality of practical enforcement difficulties, a selective rule that makes a clear-cut determination for a specific group (such as cleaners) could be justified.

To be sure, a solution of deeming cleaners to be employees of the user after a certain period is not without its difficulties. It collapses the distinction between "real" and "sham" outsourcing, in practice preventing both of them and limiting managerial flexibility. Whether this is a problem or not depends on one's views about the importance of the "free market" – and more specifically, whether "real" outsourcing is good or bad in this

context.[37] In any case, more intricate solutions can also be developed to leave some room for "real" outsourcing while preventing the wholesale exclusion of cleaners to the realm of indirect (and much inferior) employment. It is impossible to justify the current situation in which people that clean university premises full time, side by side with university employees and under their supervision, are not university employees and cannot enjoy the many benefits of collective agreements signed by the university. Sure, they are better off thanks to the new laws described in this Article, but still excluded—the entity using their work is considered a "client" rather than an employer—even in situations that lack any justification for this separation.

To put this in more general terms, selective regulations designed to add special protection for an especially vulnerable group could take several forms. Notably, they can confront the root cause of the problem, or just some of the symptoms. The developments described in this Article, while important and useful, are unfortunately all of the latter kind. It will be naïve to expect the legislature (or government, or court) to go "all the way" and try to solve the ultimate problem each time. It is still worth pointing out that a more fundamental solution is possible and available.[38] Moreover, when a regulation is only concerned with the symptoms, it can have the effect of indirectly legitimizing—and helping to perpetuate—the more fundamental problem. It improves the situation of the targeted group, but comes with a price. Is it justified in such circumstances? That depends on one's views about second-best solutions, whether we should pursue them when the optimal solution is not feasible or wait for the optimum. It also requires us to speculate about the feasibility of more optimal solutions in the near future.

VII. CONCLUSION

Selectivity is usually treated with suspicion in labor law. This is understandable, given that historically it was often used to exclude

37. For a discussion see, e.g., Robert Dryden & Jim Stanford, *The Unintended Consequences of Outsourcing Cleaning Work* (Canadian Centre for Policy Alternatives, 2012).

38. Those who are critical of labor law—or at least critical of the level of protection offered in Israel—would probably argue that the root cause of the problem is not employers' resort to indirect employment, but rather the high burden of labor regulations leading them to look for "ways out." In particular, strong job security has been cited as one of the main reasons for the preference for using indirect employment. However, even if one accepts the critique of job security, the solution cannot be to exclude the weakest, most vulnerable workers. Rather, laws (or collective agreements) that are too strict should be reformed directly. The delegation of cleaners to an inferior status while leaving the critiqued arrangements untouched for other workers cannot be justified.

vulnerable groups (such as domestic workers or agriculture workers).[39] Universalism, in contrast, was considered progressive: leading to the equal treatment of all workers, without questionable exclusions. Moreover, the movement toward universalism has led to the inclusion of more workers under the scope of protection: from a regime protecting only small groups that are especially vulnerable to one that covers many other vulnerable workers who are not part of those groups.[40] Nonetheless, there is nothing inherently regressive about selectivity. On the contrary: with the current crisis of labor law—exemplified in particular by the proliferation of precarious arrangements and by the decline in union density and power—this technique, if used carefully, can become an important element of the solution. This is not to suggest that selectivity should replace universalism as the preferred method of labor regulation. Rather, it should be added *alongside* universal laws, when appropriate and justified.

In this Article, I described selective regulations (through legislation as well as judicial judgments) that have been introduced in recent years in the Israeli cleaning sector. The analysis of these regulations was used—as a case-study—to offer some suggestions about the potential usefulness, and appropriate uses, of selectivity in labor law. When universal routes of protection are effectively blocked for a specific group of workers, special treatment by way of selective regulations could be justified. In terms of timeliness, I suggested that governments should perform ongoing studies to identify unique vulnerabilities of specific sectors to allow them to respond without undue delay. In terms of the allocation of responsibility, I have argued that while the government, and in some cases the legislature, are the appropriate bodies to produce selective solutions, the judiciary is also justified to act when the other branches fail to do so. Finally, in terms of the content of selective regulations, it was shown that selective regulations, while improving the immediate short-term situation of workers, could serve to legitimize and perpetuate an inferior position. This could be avoided if the root cause of the inferiority/vulnerability is attacked, rather than a specific symptom.

These proposals will surely not be applicable to every context. However, the analysis and the conclusions can hopefully shed some light on similar problems in other sectors and other countries as well.

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39. *See, e.g.*, Einat Albin, *From Domestic Servant to Domestic Worker*, *in* CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION 231 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds., 2012).

40. See, e.g., the way that minimum wage laws have developed. At the beginning, they only applied to specific groups considered especially vulnerable, like women and children. Over the years, they were gradually extended to more workers. *See* GERALD F. STARR, MINIMUM WAGE FIXING: AN INTERNATIONAL REVIEW OF PRACTICES AND PROBLEMS, ch. 1 (1981).