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OUTSOURCING, DISCRETION, AND ADMINISTRATIVE JUSTICE: EXPLORING THE ACCEPTABILITY OF PRIVATIZED DECISION MAKING

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Outsourcing, Discretion, and Administrative Justice: Exploring the Acceptability of Privatized Decision Making

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Abstract: This study explores what happens to administrative justice and to the acceptability of frontline decisions in privatized and marketized models of service. Through the case study of privatized welfare-to-work in Israel, it shows the fundamental tension between outsourced discretion and traditional conceptions of administrative justice, in which the trustworthiness of decisions relies on the idea that decision makers have no personal interest in the outcome of their decisions. It finds that in the Israeli case, contractors' financial interests were widely perceived as putting their professionals into a conflict of interest, thereby undermining trust in their decisions. At the same time, the study finds the program's managerial performance mechanisms did not provide an alternative legitimacy argument for the acceptability of decisions. The study also analyzes the ways policy makers reconstructed the decision-making systems to regain public acceptance of frontline decisions, while discussing both the potential and the limits of legitimizing outsourced discretion in such complex public services.

Keywords: Administrative justice, Bureaucratic justice, Discretion, Contracting-out, Conflict of Interest, Welfare-to-Work, Israel, New Public Management, Regulation.

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I. Introduction

In recent years we have witnessed major transformations in the governance of public services (see, e.g., Gamble and Thomas 2010; Le Grand 1991). Governments, as part of what is sometimes captured by the notion of "New Public Management" (NPM), adopt market ideas and mechanisms, replacing bureaucratic forms of administration with business-like management. In this vein, governments are increasingly moving the provision of services to private actors while using contracts and performance-based mechanisms to steer them. As a result, administrative decision making, which was formerly exercised almost exclusively by public workers, is now often devolved to private organizations, located in the business and the voluntary sectors, making them the new agents of the state.

This study explores the implications of these drastic changes in public administration, particularly the diffusion of administrative powers to private actors, on administrative justice. Building on Mashaw's (1983) and Adler's (2003, 2006) conceptual frameworks, it asks what happens to the acceptability of administrative decisions when decision making is contracted-out and marketized. To date, research on such matters has focused almost entirely on decision making in public agencies (Sainsbury 2008), but as Halliday and Scott point out, with the rapid change in the organization of public management, the administrative decisions of private agencies are becoming intriguing new territories for research, presenting a new challenge to sociolegal scholars (Halliday and Scott 2010a, 2010b).

The study uses the context of welfare-to-work policy, a policy domain which is radically experimenting with the new forms of public management (van Berkel, Graaf, and Sirovátka 2011). Administrative justice scholars, especially in the United Kingdom (Adler 2008; Sainsbury 2008) have already started to explore the administrative justice implications of publicly-operated welfare-to-work programs.

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The current study expands the scope of this inquiry to include the implication of privatization on social security administration through a case study of the Israeli welfare-to-work program's extreme model of privatization and incentive-based steering.

The article proceeds as follows. The next section presents the concept of administrative justice and theoretically analyzes the implications of contracting-out on this concept. The third section presents the context of welfare-to-work from an administrative justice perspective, and the fourth section provides the background to the Israeli case study. Section five presents the tensions and the dynamics created by the outsourcing of discretion by focusing on two professional decision makers who played a central role in the Israeli program: employment case managers and medical doctors. Based on the empirical findings, section six analyzes the tensions between outsourced discretion and the traditional models of administrative justice and discusses the capacity of traditional and new models of administrative justice to mitigate these tensions. The final section summarizes the study's key contributions.

II. Administrative Justice in Changing Times

Traditionally, administrative decision making has been based on delegation of powers to public officials, including powers to make decisions about the distribution of public resources and services, benefits, and burdens of people, and more generally, what people can (or cannot) or what they must (or must not) do (Sainsbury 2008, 324). Entrusting such powers to public officials, who are not elected, challenges democratic theory. Moreover, the attachment of discretion to such powers is often perceived as a source of potential arbitrariness, injustice, and other forms of abuse of discretion for illegitimate purposes. Yet it is obvious that discretion is an inevitable, and sometimes even desirable, feature of administrative systems (Kagan 2010), especially in complex human services (Hasenfeld 2009). In addition, often policy makers intentionally build-in discretionary decision systems in order to circumvent politically contested issues and to pass responsibility to street-level officials (Brodkin 2011, 256).

Mashaw, in his influential book *Bureaucratic Justice* (1983), provides a useful framework for understanding this puzzle of discretion and legitimacy in

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administrative decision making. Mashaw defines administrative justice as "the qualities of a decision process that provide arguments for the acceptability of its decisions" (1983, 24).[1] In the context of US disability benefits, he identifies three models of administrative justice with different legitimacy arguments for the acceptability of decisions.[2] In the *bureaucratic rationality* model, the legitimacy of bureaucrats' decisions rests on the assumption that value judgments are made by the legislators (representing the "public will") and that bureaucrats merely implement the policy accurately, consistently, and efficiently. Under this model, discretion should be as small as possible, carefully structured through primary and secondary legislative rules. In the *professional treatment* model, decisions by professional decision makers (such as doctors, teachers, and social workers) are legitimized based on the expertise and ethical commitments of those professionals. In this model, discretion is an integral part of the decision-making process, but the assumption is that discretion is exercised according to the best clinical knowledge available and in the interest of the clients. Finally, in the *moral judgment model*, the decision maker decides between competing claims. Here, discretion is also inherent to the decision-making process, since decisions are often based on judgments of reasonableness and deservedness. The acceptability of decisions according to this model relies on the court-like process, which affords the claimants procedural protections that enable them full and equal opportunity to assert their rights.

Thus, each of Mashaw's administrative justice models provides distinctive justice arguments for the acceptability of front line decision making. He argues that these models are competitive rather than mutually exclusive; if a conscious effort is made to promote one model in an administrative system, the others will be diminished in importance.

These conceptions of administrative justice were developed in the context of public administration as we have known it in the postwar era. In the mid-1980s, however, this structure of public administration began to change. Harsh criticism of public sector agencies as inefficient, wasteful, monopolistic, paternalistic, and unresponsive led to radical alternations in public governance, sometimes captured by the notion of New Public Management (NPM) (see, e.g., Hood 1991). Often these reforms reflected

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a broader neoliberal agenda of economizing social and political realms, and encouraging service providers and receivers to act as self-interested economic actors (Newman and Clarke 2009, 18). A central element of these reforms was the attempt to shift the public sector from a bureaucratic to a market culture by incorporating business values and practices into the delivery of public services. Market type mechanisms quickly spread into the provision of public services, to varying extents and in a variety of mixes, in the belief that they would boost efficiency, decrease public spending, and increase the responsiveness of public services.

In an effort to adapt the administrative justice concept to these new realities, Adler (2003, 2006) suggests adding three new models (or "ideal types") to Mashaw's typology. Adler's *managerial* model corresponds to the idea of managerialism (i.e., giving public managers autonomy in how they manage their departments as long as they meet performance standards). In this model, like in Mashaw's bureaucratic rationality model, legitimacy of decisions relies on the notion that value judgments are made by policy makers, and that managers and street-level workers are only implementing the policy. However, unlike the bureaucratic structure, goal alignment is achieved through articulating policy goals as performance targets while granting managers and frontline workers wide discretion in how to meet those targets efficiently. In Adler's second model, the *consumerist* model, the acceptability of decision making is based on seeing citizens as consumers and meeting their preferences. Generally, this model seems to require wide discretion among street-level decision makers as to how to meet the service recipients' preferences. In Adler's *market* model, like the consumerist model, legitimacy relies on meeting consumers' expectations, but in this model, the focus is on meeting these expectations efficiently through the creation of competitive quasi markets and by granting the citizen-consumers (Newman and Clarke 2009) the option to choose among service suppliers.

Adler's extended model of administrative justice has not been immune to criticism. For example, Halliday (2004, 211) embraces Adler's consumerist model as a new and distinctive model of administrative justice, but he questions whether the market model offers any real difference in terms of decision-making processes. Halliday (2004, 213)

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further argues that Adler's managerial model is a "contemporary gloss on Mashaw's bureaucratic model" rather than a distinctive decision-making process (see also Halliday and Scott 2010b, 198; Sainsbury 2008, 326; for Adler's response to the critique, see Adler 2003, 334; 2010, 149).[3]

Adler's analysis draws our attention to three important implications of NPM on discretion and acceptability, which are at the core of this study. First, due to its focus on results and responsiveness to customer preferences, NPM encourages entrusting significant discretion to frontline service providers, at least in *how* to conduct their tasks. Second, NPM marks a fundamental shift in the logic of public decision making, putting efficiency and other market values much higher in the decision-makers' priorities (Cowan and McDermont 2006). And third, as economic incentives rather than legal rules are increasingly used to steer frontline decision making, understanding the incentive structure in which decisions are made is an important part of figuring out the acceptability of decisions in the new structure.

Here we turn to contracting-out. This element in NPM, which has not yet received sufficient attention in administrative justice theory, brings new actors into the delivery of public services. In the privatized setting, service delivery is devolved to the workers of private (for-profit and nonprofit) contractors, who replace public sector workers and become the new frontline service providers. The important point here is that, in contracting-out, the government is not only purchasing services but also "purchasing" private sector logic and ethos in service delivery. In that respect, contracting-out signifies a more radical shift away from bureaucratic structure towards market ideas and policies than when NPM is implemented in public sector agencies, the foundations of these organizations remain, to a large extent, bureaucratic, professional, and legalistic. In the privatized setting, however, the services are delivered by actors who operate according to market culture and values in the first place.

Therefore, outsourcing intensifies the NPM implications for administrative justice. Most notably, it marks a further elevation of economic values in the frontline decision-making environment, especially when profit-maximizing organizations are involved. At the same time, administrative and legal values are weakened as private

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contractors are usually not subject to administrative law norms or to other public sector requirements (see generally Rosenbloom and Piotrowski 2005; Vincent-Jones 2005; Taggart 1997). This delegalized and debureaucratized structure gives the contractors and their workers, at least as a starting point, much more discretion and flexibility in their day-to-day operation.

Furthermore, privatization significantly alters the organizational structure within which frontline decision makers operate. While traditionally decision making in the public domain has involved the state and the citizen, it now has a new intermediary – the private contractor, with its own organizational interests. These interests may sometimes converge with public interest; at other times, they pull in different directions. This structure puts street-level decision makers in a complicated situation: they must pursue the public policy goals laid out in the contract, and sometimes even in law while, at the same time, satisfying the interests of their owners. In these circumstances, as some scholars point out, decision makers may be more committed to the private interests of the contractors and their employers, at the expense of public interests (Aman 2002, 1710).

III. Administrative Justice in the Welfare-to-Work Context

Over the last fifteen years, welfare-to-work (or "activation") programs have proliferated all over the western world (van Berkel, Graaf, and Sirovátka 2011; Considine 2001). Underpinning these programs is a shift in the way governments perceive the relationship between the state and the claimants of social security benefits. These programs are intended to transform "passive" social security systems, which rely mostly on benefits, to "active" systems that put much greater emphasis on engaging unemployed people in the labor market. This new philosophy informing welfare policy has radically transformed the role of the street-level workers who treat welfare recipients. They are now expected not merely to process applications correctly and efficiently, but to motivate people into work while taking into account labor market circumstances and the abilities, needs, and wants of each participant. Naturally, this role, when compared to benefit administration, requires much more discretion.

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The increased amount of discretion in social security governance is, of course, very relevant to the administrative justice perspective at the heart of this study. In their studies of the role of caseworkers in the UK's Pathways to Work program, Adler (2008) and Sainsbury (2008) conclude that the professional treatment model dominates their decisions making. Sainsbury adds that their role includes elements of the bureaucratic rationality model as they must apply the program's rules of conditionality and possibly invoke sanctions on claimants; he points out that they can experience tensions between these two aspects of their role (Sainsbury 2008, 333).

Another important aspect of many welfare-to-work reforms is the introduction of privatization and market-based management to social security governance; in fact, some of the most radical experiments with these new modes of governance have been conducted in this field. To date, the administrative justice implications of the marketization of welfare-to-work have not yet received sufficient scholarly attention. As Sainsbury (2008, 336) points out in his study of UK's (then public) program mentioned above, the trend towards contracting-out of welfare-to-work to the private and voluntary sectors makes administrative justice a prime concern. The following section seeks to fill this gap through an in-depth analysis of the organization of frontline decision making in the context of the Israeli welfare-to-work program.

IV. Welfare-to-Work in Israel

The Israeli welfare-to-work program, which started in August 2005 as a two-year policy experiment in four regions, represents a combination of far-reaching reform on both the policy and the administration sides of social security (see generally Benish forthcoming; Maron 2014; Gal 2005). On the policy side, the program adopted a strong "ending welfare dependency" and "work first" stance. The eligibility conditions for income support benefits were toughened; benefit claimants were required to attend newly established "job centers" and carry out a personal activity plan of thirty to forty hours per week. The program offered wider options for vocational training and work support services, but the general policy focused on "soft skills" workshops and quick labor market integration.

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On the governance side, the Israeli program adopted a strong market-based approach to the administration of social security. The operation of the job centers was contracted-out to four private for-profit firms through competitive tendering, and a special department at the Ministry of Industry, Trade and Labor (hereafter "the department"), was put in charge of regulating the program. The market-oriented approach also drove the department to delegate most of the daily program operation to the contractors' managers and professional workers.

The Israeli program also adopted a strong business-like payment model. The contract created three types of performance-based payments. First, the contractors were paid based on reductions in income support expenditures. If contractors met an overall savings target of 35 percent in income support payments in their region (compared to income support payments in previous years), 50 percent of the additional savings were rewarded in payment to the contractors. If the contractors did not meet the savings target, they faced a penalty equal to the difference. Second, the contractors were paid an additional bonus for claimants who stopped receiving income support (not based on a sanction decision) for at least six months. Third, the contractors were entitled to a bonus payment of 5 percent of the savings in their work support services budget.

The program was extended until April 2010 when it was ended due to public criticism. Recently, the government declared that the program would be re-enacted and introduced a new welfare-to-work bill. As a radical example of privatization and marketization of discretion which generated a good deal of controversy, the Israeli welfare-to-work program can serve as an interesting case study for probing the implications of privatization on the acceptability of decision making.

V. Exploring Privatized Decision making

To provide a rich factual base for the analysis, the study focuses on two frontline decision makers who played a central role in the Israeli program: the employment case managers and the medical doctors. Despite the professional design of their roles, as will be shown below, their decisions attracted considerable public concern and criticism which, in turn, led to substantial transformations in the organization of their

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decision-making system. This section presents the dynamics of these criticisms and reforms. We set the stage by presenting the case managers and medical doctors' roles and decision-making powers.

A. The Initial Decision-Making System[4]

Employment Case Managers. The key decision maker in the job centers was the Employment Case Manager. The case managers' role included a significant professional component. In their professional capacity, they were expected to diagnose claimants' employability and identify work barriers; discuss the claimants' work aspirations and prepare an appropriate activity plan; decide on the need for vocational training and work support services; help claimants gain work experience through unpaid community services; and ultimately, place claimants into jobs. Case managers were also expected to provide emotional support, motivate, and work closely with claimants as they re-entered the labor market. Although, as I elaborate below, the case managers' professional status was relatively weak, they had considerable discretion in carrying out those tasks consistent with the professional treatment model of decision making. However, the case managers had also the power to impose sanctions on claimants. For instance, the case manager had the power to disentitle claimants (and their family) from income support payments if they did not submit required information, if they failed to cooperate with the case manager's activity plan or if they turned down a job that suited their medical condition (or did not make a "reasonable effort" to obtain it). Hence, the role of the case managers was designed primarily as professional, but it also had a significant bureaucratic element in its enforcing of the program's rules of conditionality. Every participant who considered him or herself adversely affected by any decision of the case manager had the right to make an appeal to an administrative tribunal. The law also provided that decisions of the administrative tribunals could be reviewed by the Israeli labor court system.

Medical Doctors. The role of the program's medical doctors, who were hired by the job centers, included two important professional decisions. The first, and most important, was to diagnose claimants' permanent physical and mental health condition and to determine medical restrictions on their ability to work and to

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participate in the center's activities. The doctors' second professional task was to determine whether claimants were temporally unable to participate in the program due to illness of up to thirty days. As part of this task, they were to evaluate the acceptability of medical documents, obtained by the claimants from other doctors (mainly sick leaves). The program regulations provided that the doctors could determine, according to their professional judgment, whether to check the claimants themselves, to talk personally with the doctor who issued the document, or to rely on evaluation of the paper documentations. The medical decisions were of central importance in the program's day-to-day operation since a significant portion of participants had a known history of medical problems. Although the administrative tribunals, described above, were designed mainly to review the case managers' decisions, in practice, they also indirectly reviewed the decisions of the job centers' medical doctors. In such appeals, the tribunal called on an external medical doctor.

B. The Tensions Caused by Outsourced Discretion

From its inauguration, the program attracted considerable public attention, largely driven by a group of advocacy NGOs who targeted the program and launched a campaign against it (see the discussion in Katz et al. 2007). Although the campaign was aimed at the program at large, a significant portion of it was directed at the privatized model of its operation. The main argument was that delegating state powers to the private job centers put the rights of welfare recipients at risk due to the contractors' conflicting economic interests. The argument stressed that the competitive contract award process, which worked to garner lower bids, together with the profit maximizing nature of the contractors, would lead to quick and harsh processing of cases and limit work support and vocational services. Other criticism was aimed at the payment model of the program. The clear links between the contractors' profits and the decrease in benefits and services gave rise to the argument that, as the CEO of one of the advocacy groups put it in an op-ed article, "the money taken from welfare recipients is transferred into the pockets of the corporations running the program" (Rapaport 2006).

The advocacy NGOs collected numerous complaints from program participants alleging abusive and unfair practices of the contractors (Katz et al. 2007). Many of

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these stories reached the media and led to extensive and mostly critical media coverage of the program. For example, a long and comprehensive magazine story published about nine months after the program started described complaints about disentitlement of benefits based on ill-defined (and allegedly illegal) causes, assignments to jobs paying unlawful wages, "ridiculous, useless and humiliating" training, and false reports on job placements (Rapaport 2006). The article talked about people with serious medical conditions who were determined by job center doctors to have only minor work restrictions. In addition, the article brought to light the story of three case managers in one of the centers (a story denied by the center's manager) who argued they were encouraged not only to increase the number of job placements but also to increase the rate of benefit disentitlements.

It is, of course, difficult to evaluate the truth of these stories; more importantly, it is hard to determine to what extent they are the result of the privatized and marketized model of the program, and not simply the result of the work-first philosophy and the inherent problems of implementing such a complex and harsh policy. The point is that in the public discourse, the privatized model of the program quickly became a central explanation for its various problems. This is reflected, for example, in how Rapaport (2006) summarizes his impression:

> The hundreds of stories I've heard in the last couple of months are not the result of chance, error, or the wickedness of one center manager or another. They are the result of a method. The government signed contracts with four private companies that won tenders ... which were constructed so that companies will start earning just after they "erase" more than 35% of welfare recipients under their care.

Problems related to case managers' discretionary powers also reached sessions of parliamentary committees. Advocacy groups pointed to the high rate of sanctions applied to program participants based on broad and vague causes, such as "noncooperation" with program requirements. At the request of a parliamentary committee, the state comptroller launched a comprehensive audit of the program, including both the department and the job centers. His report, published about two years after the program started, emphasizes the need for clearer definition of the

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causes for sanction due to the severe implications of such decisions on participants and the fact that private contractors might benefit from such decisions (The State Comptroller 2007, 13). The last point – which is unique to outsourced and marketized forms of discretion – is explained in the report as follows:

> The compensation to the firms is based on the savings in income support payments to the participants in their region. These savings can derive also from sanctions. The firms, therefore, might be incentivized to apply sanctions to participants that they did not place in jobs. Seemingly, this creates a *structural conflict of interest* between the economic considerations of the firm and its obligation to work in the interest of the participant. (Emphasis added; The State Comptroller 2007, 40)

The potentially adverse effect of such conflicts of interest on participants' rights appeared also in discussions of the Ye'ari Committee, a special committee of the Israel Academy of Science and Humanities, which was asked by the government to evaluate the program. In its report, the Committee emphasizes perverse incentives that could emerge when applying market logic in the realm of unemployment and welfare:

> [W]e are dealing not with privatization of a purely economic activity, but the outsourcing of a basic social service ... The way risk is allocated may affect the behavior of the contractors: when most of the financial risk is imposed on them we should expect more vigorous activities of the contractors to score high compared to the performance indicators, and that might come at the expense of safeguarding the rights of the participants. (Ye'ari Committee 2007, 92)

Another aspect of the program that received public attention, though to a lesser extent, was the case managers' weak professional status. Advocacy groups argued that "[a]lthough the contractors' case manager holds almost unlimited power in his relationship with the participant, the minimal requirements for this significant role are only 12 years of study or completion of a professional school, one year experience at any job and no criminal record of violence" (Association for Civil Rights in Israel et al. 2009, 11). Even though the Ye'ari Committee (2007, 128) found that, in practice, 69 percent of the case managers were academics and about 25 percent had academic

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degrees in care-related professions, the relatively low threshold criteria seriously threatened their professional status. As a result, the Ye'ari report (2007, 129) recommended elevating the minimal criteria for this role and limiting the scope of their professional decisions (as will be elaborated below).

As for the job centers' medical doctors, perhaps surprisingly, despite their much more well-established professional status, a similar dynamic of public criticism developed. As mentioned above, stories appeared in the media about participants with a long history of medical conditions required to work in demanding jobs because they were found by the centers' doctors to be almost fully employable (often based on document assessments) (Lavi 2007, Rapaport 2006). Advocacy groups accused the doctors of acting unethically. They argued that medical doctors were not serving the interest of the program participants, their patients, but those of the contractors – their employers. The head of the ethics committee of the Israeli Medical Association took a strong public stance, arguing that since the job centers' doctors were receiving salaries from the contractors, who had an interest in the outcomes of their decisions, they were, in fact, in a situation of a conflict of interest (Rapaport 2006). These criticisms of the job centers' doctors' position are noted in the Ye'ari report, which stresses that:

> The fact that the job center's doctor can decide whether to accept medical documents or to reject them, fraught with danger of *severe conflict of interest*, since the job center may benefit from an increase in revenues due to the actions of the doctor. In this situation there is a tension between the commitment of the center's doctor to protect the rights of the patient and his commitment to the job center that employs him ... [T]hus the government should directly employ the doctors ... (Emphasis added; Ye'ari Committee 2007, 152–153)

Another public committee (the Tamir Committee), criticized the job centers' doctors and case managers for not carrying out the employability assessments properly. The Committee recommended transferring the assessment of certain profiles of participants to an external professional committee (composed of an occupational doctor, social worker, and a rehabilitation expert); it emphasized the independence of these professionals from the job centers (Tamir 2007).

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C. Restructuring the Decision-Making Systems

The department's initial response to the public criticism was to reject most of it as untrue, biased, or exaggerated. In a parliamentary session about six months after the program started, the department head rebutted the allegations of harsh and unfair treatment saying that she "did not see any governmental service that provides so respectful, so caring and so sensitive service as the treatment given to all the participants that arrived to the job centers" (State Control Committee 2006). However, as criticism mounted and began to trickle into the state comptroller and Ye'ari Committee reports, the department initiated some significant changes, including changes in the decision-making and redress systems.

Restructuring case managers' decision making. The case managers' decision-making processes and decision-making environment were significantly altered in several ways. First, the case managers' discretion was structured and narrowed through a series of rules-based regulations (Maron 2014). Remarkably, in January 2009, the department published a comprehensive manual containing about 170 pages of detailed regulations of case managers' decision making in areas such as benefit termination, allocation of services, and many other day-to-day aspects of their operation. While at first there was no definition of what constituted an "unjust absence" from the program, eventually the program manual devoted seven pages to regulations elaborating various circumstances in which the participant's absence was justified and should not lead to sanctions (MITL 2009a).

Second, the procedural protections of the participants were extended. The most significant development occurred four months after the program started. The head of the department met with judges from the Labor Courts (who review case managers' decisions); based on their advice, the department issued a regulation that in case of a sanction decision, or any other decision that might have significant consequences to the participant, case managers must conduct a hearing and give participants an opportunity to present their case prior to the decision. Following instructions of the state comptroller (The State Comptroller 2007, 41–42), the department extended its due process regulations to more clearly define the circumstances in which the case

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managers must conduct a hearing, detailing the components of the hearing process and its documentation (MITL 2009a, 117–119).

Third, the department altered the case managers' decision-making environment by revising the contractors’ performance targets. At first, the payment model was revised so contractors could not directly profit from actively imposing sanctions on participants; later, following the recommendation of the Ye'ari Committee (2007, 93), the payment model was revised to focus on job placement and retention rather than on decreasing the welfare rolls. Following another recommendation of the Ye'ari Committee (2007, 100), the bonus to contractors for saving on work support services was omitted in the second contract. A central motivation of these revisions was to mitigate the conflict of interest concerns created by the initial economic model.

Fourth, there was a clear trend towards strengthening the legal review of case managers’ decisions. The most significant step in that direction was amending the law to grant every participant publicly-funded legal representation already at the administrative tribunal stage. This was a result of a campaign launched by advocacy groups and eventually supported by the state comptroller and the Ye'ari Committee. The amending bill stated that legal representation is essential for making the tribunals effective in protecting the rights of program participants and balancing the power gap between participants and job centers at tribunal sessions (Government of Israel 2007).

Fifth, some of the case managers' professional and bureaucratic functions were transferred to other actors. For example, the employability assessment and the preparation of participants' activity plans of participants with known medical and social problems, were transferred to an external professional committee. This change, triggered by the Ye'ari Committee’s criticism of the weak professional threshold criteria for case managers as well as the Tamir Committee’s criticism of the job centers’ inappropriate assessment process, seems to indicate mistrust of both the competence and the ethics of case managers as professionals. Moreover, in an effort to regain public trust and support, just before the program ended, the government presented an amendment bill, whereby all case managers’ sanction decisions would be subject to approval by a public sector worker positioned in the job centers "to supervise the case manager's discretion" (Government of Israel 2010).

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Restructuring doctors' decision making. The department fundamentally reformed the doctors' decision-making environment by reorganizing their employment structure. Subsequent to public skepticism of the ability of doctors to act ethically when employed by the contractors, and following the Tamir Committee's criticism of the job centers' assessment process, starting in February 2008, all functions of the job centers' doctors were transferred to doctors employed by an external third party firm hired in a separate contract solely for this purpose. The department emphasized that this was intended to create "a total separation of medical decisions from any consideration of the job centers" (MITL 2009b).

VI. Outsourcing and Its Implications on the Acceptability of Decision Making

What can we learn from the case study about the implications of outsourcing on acceptability of frontline decision making? The most striking observation is the widespread expression of mistrust in the contractors' professional frontline decision makers. The outsourcing of discretion was commonly perceived – by legislators, courts, the state comptroller, public committees, advocacy groups, program participants, and the media – as endangering welfare recipients' rights. Many cited the organizational commitment of case managers and medical doctors to the profit-maximizing interest of their employers (the job centers) arguing this may impinge on their professional judgment. As shown above, this situation was often framed, including in official public reports, as creating a structural conflict of interest for the program's frontline decision makers.

This perceived conflict of interest of the program's frontline decision makers highlights a fundamental tension between the traditional models of administrative justice and privatized models of service delivery. According to NPM ideas, the fact that street-level service providers (organizations or individuals) have an economic interest in how the service is delivered, is not only legitimate but even a desirable feature of public services and is essential for boosting service quality and efficiency. However, as the case indicates, this model of *self-interested decision makers* may

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undermine the acceptability of decisions. The absence of self-interest on the part of the decision maker is usually associated with the notion of impartiality, part of Mashaw's moral judgment model, but the case demonstrates that the existence of self-interest may also undermine the acceptability of professionals' decision making (see Sainsbury 2008, 335). Interestingly, in the case studied, the privatized setting eroded trust not only in the professional judgment of case managers (whose professional status is still relatively weak, as will be discussed below), but also in the professional judgment of medical doctors, who are considered the prime example of the professional treatment model of administrative justice. The doctors' organizational commitment to the contractors' financial interests severely undermined what Mashaw describes as the "trusteeship implicit in professional-client relationships" (Mashaw 1983, 29).[5]

In fact, if we think about it, the absence of personal interest actually underlies *all* Mashaw's normative models of administrative justice. We accept the decisions of bureaucrats, professionals, or judges because we believe that they have no personal interest in the outcome of their decisions. This reflects a long established norm in public service, according to which decision makers are not to use their powers for personal gain (de Ridder 2010, 305), and decisions involving personal interest should be treated as expressions of corruption. It seems that this principle is so obvious in the "old" logic of the public administrations that it is usually taken for granted. But the case highlights that this can no longer be taken for granted.

One of the intriguing questions that the case raises is why the financial interest of the contractors attracted so much public attention. This is intriguing since, as we know, financial consideration can also constrain discretion in public service organizations (Lipsky 1980). What, then, explains the different public reaction to contractors' financial interest? One possible explanation is that the use of financial criteria by public agencies is generally perceived as serving broader public interests, as the same budget may be used to provide more services or to decrease the burden on taxpayers. The use of financial criteria by for-profit providers, who were the providers in the case study, is associated with their private financial interests and it does not seem to enjoy the same legitimacy of serving the broader public interest. Another reason

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might be that the public perceives the financial constraints of for-profit providers as stronger than those of public agencies. While the latter use financial criteria to cope with limited resources, private agencies must also maximize the owners' profit. The greater importance of economic considerations in the private agencies' decision-making priorities increases concerns that they come at the expense of legality and fairness. Finally, conflicts between the interests of the agency and the interests of the individual – which exist also in public welfare agencies (Halliday 2004) – are much more *visible* in the privatized model.

The case also sheds light on managerialism's limited ability to provide a justice argument for the acceptability of decisions when the performance targets are not perceived as creating a satisfactory alignment with policy goals (see Ye'ari Committee 2007, 93). In such circumstances, much of the legitimating goal of meeting the "standards of services" (in Adler's managerial model), or alternately the policy implementation rationale (in Mashaw's bureaucratic rationality model) – is lost. Moreover, the case suggests that performance targets (such as the initial payment model in the Israeli program) might even increase suspicion of perverse incentives and further undermine trust in frontline decision making.

We now turn to the considerable restructuring of the decision-making systems of case managers and doctors. What can these revisions tell us about the characteristics of administrative justice in the new structure? For case managers, we can see a constant shift to more formal legal controls on their decision making, both substantive and procedural. This turn to legalism was done by limiting and structuring their discretion though more detailed and specific legal rules and by enhancing participants' procedural rights prior to decision making. The participants' rights to redress were strengthened, most notably by providing publicly funded legal representation at the administrative tribunal stage, leading the sessions of the tribunals to become more court-like. These developments strengthened the bureaucratic and legal elements in the case managers' role and made them much more accountable for legality and fairness (for similar trends in Wisconsin's welfare-to-work program see Benish and Levi-Faur 2012; Benish 2010).

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From an administrative justice perspective, this turn to legalism made it easier to justify case managers' discretion under Mashaw's bureaucratic model of administrative justice, in the sense that they were implementing detailed rule-based policies; although, from a management perspective, control was achieved through regulatory, rather than bureaucratic means (see Levi-Faur 2013; Le Grand 1991). This, in turn, increased the tension between the bureaucratic and the professional elements in their role. It is questionable whether such high levels of legalism can stably coexist with such an inherently professional role, which requires high levels of discretion. As Mashaw's theory about the competitive nature of these models predicts, such a decision-making system is prone to instabilities and legitimacy problems.

In addition, the economic model of the program was revised to decrease conflicts of interest and to reduce their visibility. At first this might seem like a different course of action, but it is actually closely connected to the shift to legalism. To use Halliday's (2004) insightful illustration, the decision-making environment is an arena in which there is a competition between law and other normative systems. Hence, strengthening legalism and weakening the economic values by revising the program's economic model represents an attempt to strengthen the relative importance of law in the case managers' decision making.

The third course of action was limiting case managers' decision-making powers. This was done, for example, by transferring case managers' decisions to other external professionals, as in the case of employability assessments discussed above. More interestingly, the new bill proposes that case managers' substantial decisions be subject to review by public servants. This marks an alternative, and maybe more stable, solution; if the more sensitive bureaucratic decisions were entirely relocated in the hands of public officials, the need for strong legal controls on case managers' discretion and some of the tensions might be removed.

For the medical doctors, the decision-making system was reconstructed as well but took a different direction. To break any potential linkage between the doctors' decisions and the interests of the job centers, the doctors were simply separated from the centers by moving all the medical functions to the responsibility of another contractor. The fact that the new contractor had no apparent direct interest in the

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outcomes of the doctors' assessments mitigated the "conflict of interest" concerns raised when the doctors were employed by the job centers. Thus, although the doctors were still not public employees, the new organizational structure, which was based on *separation of interests* between the job centers and the doctors, reinstated the appearance of impartiality in the doctors' decision making and heightened trust in their professional judgment, as in the traditional professional treatment model of administrative justice.

A comparison of the different ways in which the case managers and medical doctors' decision-making systems were revised may be of some theoretical value. Interestingly, despite the similar framing of the problem, the solutions were markedly different. While the restructuring of the decision-making system for doctors focused on finding a way to uphold the professional model of legitimacy, for case managers, the general trend was towards increasing the bureaucratic and legal elements in their decision making, even considering moving the more sensitive decisions back to "in-house" public bureaucrats. How can these different rationales be explained? Arguably, because in Israel (as elsewhere; see, e.g., Adler 2008), the employment case manager's role does not have all the characteristics of a profession, case managers do not enjoy a strong professional status. Therefore, legitimacy and accountability demands were translated into bureaucratic and legalistic, rather than professional, solutions. Moreover, from a pragmatic perspective, the case managers' role was integral to the operation of the job centers, and unlike the medical doctors' role, it could not be practically separated from the contractors.

It remains an open question, however, whether it was better from an administrative justice perspective to make a sustained effort to strengthen the professional status of case managers through special training and distinctive professional accountability mechanisms (see van Berkel, van der Aa, and van Gestel 2010). Such an effort might have created a more stable and sustainable model of legitimacy for decision making. But the fact that even medical doctors were not trusted to retain their professional ethics, when employed by the contractors, raises doubts about whether such a move would be sufficient without other significant means of minimizing potential conflicts of interest.

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Another open question is whether giving claimants the right to choose their welfare-to-work provider would have served as an effective model for legitimizing contractors' frontline decision makers by creating structural incentives to meet customer's preferences to their satisfaction (in line with Adler's consumerist and market models). Nevertheless, the point to be made here is that the absence of choice in the case studied does not seem to be coincidental. In the context of welfare-to-work, as in other welfare services for the poor, it seems to reflect a general assumption of policy makers that benefit recipients will "use 'choice' to work against their responsibilities" (Elliott, Morrell, and Branosky 2005, 51).[6] Not surprisingly, in the Israeli case, program participants often perceived the treasury, not themselves, as the real "customer" of the program.

VII. Conclusions

The exploration of the Israeli welfare-to-work program provides an empirical glimpse into the realities of administrative justice in the age of privatization. The study suggests that although discretion in administrative decision making always raises legitimacy concerns, the outsourcing of discretion creates new challenges to acceptability of decisions. It demonstrates the fundamental tension between the new economic and self-interested logic endorsed by NPM and the traditional conceptions of administrative justice, in which the trustworthiness of decisions relies on the idea that decision makers have no personal interest in the outcome of their decisions. In the case studied, the commitment of the job centers' professionals, case managers, and medical doctors to their employers' profit motives was widely seen as putting them in a structural conflict of interest, severely eroding trust in their professional judgment.[7] At the same time, the managerial performance standards did not offer an alternative legitimacy argument for the acceptability of decisions due to the limited ability of performance indicators to create goal alignment when policy goals are hard to define as outcomes. In fact, the initial performance-based payment scheme even intensified concerns over conflict of interest.

Eventually, the decision-making systems of case managers and medical doctors were considerably reconstructed to make them consist with the traditional models of administrative justice, albeit differently. Doctors' decisions were demonstrably

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separated from the job centers' interests so that trust in their professionalism could be regained. This represents one way of upholding the professional model of administrative justice in a privatized setting. The case managers' decisions, on the other hand, were limited and proceduralized through regulation, and their incentives were revised to minimize conflicts, with no attempt to uphold their professional status. This turn towards legalism corresponded with Mashaw's bureaucratic model of administrative justice; it promoted the appearance of neutrality in case managers' decision making (see Kagan 2010), but it undermined the case managers' ability to fulfill their professional role. This points to a fundamental problem of legitimizing professionals' discretion in a marketized setting when the professionals cannot be practically separated from the private contractors' interests. In such circumstances, the case suggests, the more sustainable solution might be to limit the scope of outsourced discretion and to weaken economic incentives, contrary to NPM recipes. The particularities of the case, however, cannot help us determine whether choice-based solutions could have legitimized privatized decision making despite the contractors' private financial interests.

These complexities of the interaction between outsourcing, discretion, and the acceptability of decision making indicate a need to continue to probe the new realities of administrative justice, especially with the growing trend towards outsourcing discretionary tasks in the administration of social security and in other policy domains. Articulating the challenges of privatized and marketized decision making, and assessing the potential of traditional and new models of administrative justice to cope with them, is essential if we are to respond to these challenges.

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Notes

1. Administrative justice is a contested concept in sociolegal studies (Sainsbury 2008; Halliday 2004). While at first this term referred mainly to legal redress mechanisms afforded to individuals to challenge pubic officials' decisions, over time – and especially due to Mashaw's work – the focus shifted towards the justice in routine front-line decision making (Sainsbury 2008, 336). This study follows Mashaw's definition and focuses on routine front-line decision making. Redress mechanisms are presented and analyzed as they contribute to the understanding of initial frontline decisions (for further theoretical and empirical analysis of redress mechanisms see, e.g., Lens 2013; Halliday and Scott 2010a; Gilad 2008).

2. For a detailed analysis of these models see Adler 2003, 2006, 2008, 2010; Halliday and Scott 2010a, 2010b; Kagan 2010; Sainsbury 1992, 2008; Halliday 2004.

3. Although I agree with Halliday and Scott on the need to separate administrative justice models and public management models, I question whether managerialism is merely a gloss on Mashaw's bureaucratic model. In the managerialist model, legitimacy of decisions relies on the notion that managers are implementing pre-established policy efficiently, as in Mashaw's bureaucratic rationality model. However, according to the managerialist approach, managers are also granted wide discretion in how to meet these policy goals, and consistency in treatment is much less emphasized. This digresses from the bureaucratic rationality model, in which, as Halliday and Scott (2010b, 185) note, "the administrative system must operate on the basis of clear rules and guidance which tell low-level officers how to process claims and which promote consistency of decision-making." These differences in the organization of decision making become even more apparent in privatized and marketized models of governance. The legitimacy of granting such wide discretion to managers, it seems, stems from a conception of managers as experts in designing efficient and personalized service systems. Therefore, managerialism has similarities with but also differences from Mashaw's bureaucratic model in terms of decision-making processes and their acceptability. Deciding whether these differences are enough to constitute a distinctive model of administrative justice is a matter of judgment, but my point is that these differences should be acknowledged and taken into account.

4. The materials in this section were derived from Benish 2014; Maron 2014; the report of the Ye'ari Committee 2007; the State Comptroller's report 2007; and Gal 2005.

5. I should clarify that I refer here to the "self-interested decision maker" as a feature of the NPM recipe for public management and not as a feature of administrative justice model of marketized decision making (see Halliday and Scott, 193-4). The argument made is simply that in the case studied this feature of NPM was perceived as potentially creating a structural conflict of interest, which distorts decision-making practices and that it led to crisis of public confidence in the justice of the decision-making processes.

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6. There are exceptions; for example, welfare-to-work programs in Australia and the Netherlands provide claimants choice among contractors for welfare-to-work services (see van Berkel, Graaf, and Sirovátka 2011; Considine 2001).
7. It should be stressed that although the focus of this study is on privatized decision making, the increased use of performance-based evaluations, especially when attached to personal financial payments (i.e., bonuses), might create similar tensions and legitimacy deficits within the public sector.

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