Applying International Labour Standards to the Informal Economy

Introduction

The ILO has estimated that over 60 percent of the global workforce, or 2 billion people, laboured in the informal economy before the COVID-19 pandemic, with 64 percent of that being self-employed[1]. Globally, informal work has been growing and significantly outstrips formal employment. Even in countries with robust economic growth, informal employment has been growing more rapidly than formal employment. Workers from marginalised groups tend to be disproportionately represented in the informal economy, whether women, racial, ethnic or caste minorities, LGBTQ+ workers, migrants, persons with disabilities and others. This is very often the result of deliberate public policy choices that serve to exclude these workers from formal jobs with legal recognition and protection of their labour rights (at least on paper).

In 2002, the International Labour Conference (ILC) commenced a two-year General Discussion on Decent Work, which resulted in the 2003 *Resolution Concerning Decent Work and the Informal Economy.*[2] The Resolution attributed decent work deficits to a lack of enabling legal and institutional frameworks and identified several ways in which member states needed to reform their laws and policies. Firstly, it stated that obstacles to the exercise of freedom of association should be removed, and that legislation should 'guarantee and defend the freedom of all workers and employees, irrespective of where and how they work to form and join organizations of their own choosing'. Secondly, it provided that social protection should be extended to all workers. Thirdly, the resolution focused on enforcement mechanisms and access to justice, including improving labour inspection, dispute resolution, and addressing corruption.

Despite this, ILO Conventions and Recommendations have for the most part ignored this vast workforce. It was only with the adoption of Recommendation 204[3] in 2015 (hereafter R204) that the ILO attempted to provide comprehensive guidance in this area.[4] Chapter III on 'Legal and Policy Frameworks' states that member states should "adopt, review and enforce national laws and regulations or other measures to ensure appropriate coverage and protection of all categories of workers" (Article 9) and introduce 'an appropriate legislative and regulatory framework' (paragraph 11 (b)) that realise the rights contained in ILO Conventions and other UN instruments.[5] Chapter V of R204 on 'Rights and Social Protection', provides that states should "respect, promote and realize the fundamental principles and rights at work for those in the informal economy" (paragraph 16). Yet, few member states have amended their labour laws to realise the fundamental conventions, or other conventions, for workers in the informal economy.

[1] ILO 'Women and men in the informal economy: A statistical update' (2023), available at https://www.ilo.org/global/topics/employment-promotion/informal-economy/publications/WCMS_869188/lang--en/index.htm

[2] ILC (90th Session, 2002) Resolution Concerning Decent Work and the Informal Economy https://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf

[3] Recommendation 204 (Transition from the Informal to the Formal Economy Recommendation, 2015), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204

[4] Other instruments which regulate specific categories of workers whose jobs are often informal include, for example, the Right of Association (Agriculture) Convention, 1921 (No. 11), Migration for Employment Convention, 1949 (No. 97), the Domestic Workers Convention, 2011 (No. 189) and the Violence and Harassment Convention, 2019 (No. 190).

[5] See Annex of R204.

R204 defines the informal economy as "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements" (article 2). The use of the term "activity" here is important as it serves to de-centre the employment relationship, through which a worker is subordinated to an employer, as the [sole] basis for the recognition and regulation of work. If informal employment is defined as work that is not recognised or protected by legal and regulatory frameworks, from a legal perspective then, the informal economy is inclusive of self-employed workers such as street vendors, and self-employed fisherfolk and waste reclaimers. Others, such as (overwhelmingly) women performing unpaid care work also fall within the scope of this legal definition.[6] In this series, our focus is on (a) non-standard workers[7] who may be employed by formal or informal enterprises, and (b) informal, own account workers (such as street vendors and waste pickers) who do the work themselves and do not employ others.

The supervisory system has been slow to develop observations, conclusions or recommendations which would provide guidance to states, employers, and workers as to how to apply these rights and principles in practice to address practical needs. This must change if the body of existing labour standards is to be relevant to *all workers*, including those in the informal economy.

In order to provide workers and workers' organizations, including unions, the tools to use existing ILO conventions and recommendations creatively to elicit new interpretations from the ILO supervisory system which broaden their scope to the obstacles confronting workers in the informal economy, the *International Lawyers Assisting Workers (ILAW) Network* and *Women in Informal Employment: Globalizing and Organizing (WIEGO)* are producing a series of guidelines on a convention-by-convention basis. These guidelines identify the specific issues that workers in the informal economy face that are relevant to that convention and provide; existing ILO jurisprudence on point; and provide recommendations as to how workers and the organizations should frame their comments or complaints to obtain a favourable outcome from the supervisory system. It is our hope that workers and organizations, through consistent use of these guides, will help to develop a robust set of jurisprudence, which can be used to advocate for legal and institutional reforms at the national and regional levels.

The series will begin with guides on the ILO fundamental conventions and will be published on the ILAW (www.ilawnetwork.com) and WIEGO (www.wiego.org) websites as each one becomes available. Subsequent guides will focus on the governance and technical conventions and recommendations. We do not intend to cover every convention and recommendation; rather, we will focus on those with the greatest relevance for workers in the informal economy.

The following three ILO supervisory mechanisms are available for you to use:

Committee of Experts

Every country must report on its compliance with the conventions it has ratified. They must report every three years in the case of fundamental conventions and every six in the case of technical conventions. Trade unions can also submit reports, which must be considered together with reports from the government and employer representatives. These reports are normally due every September 1, and are submitted to normes@ilo.org. You can find the reporting cycle of your country here.

Committee on Freedom of Association

For violations of the right to freedom of association and the right to collectively bargain, a "complaint" can be filed with the Committee on Freedom of Association. This is true regardless as to whether your government has ratified the relevant conventions (including conventions 11, 87, 98, 141, 151 and 154).

[6] For a full discussion of definitions see Marlese von Broembsen & Jeffrey Vogt (2022) 4 'Why the Struggle of the 2 Billion Workers in the Informal Economy Matters to Us All' The Global Rights Reporter: Protection of Rights in the Informal Economy. See also, Florence Bonnet, Joann Vanek and Martha Chen ' Women and Men in the Informal Economy: A Statistical Brief' (2019), available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_711798.pdf

[7] The ILO defined non-standard work as 'temporary, part-time/on-call, a multi-party employment relationship, or disguised employment/dependent self-employment'. See, International Labour Organization *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (2016) at 8, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf

Once received, the tripartite Committee on Freedom of Association will review the complaint and the government's response and will issue conclusions and recommendations as to how the government can comply with its obligations. You can find more information on filing a complaint here.

Representations

For violations in law or in practice concerning a convention (or conventions) that a government has ratified (other than those concerning freedom of association and collective bargaining), a trade union can file a "representation" at any time. If accepted by the ILO Governing Body, a tripartite committee will be established to review the representation and the government response and will issue conclusions and recommendations as to how the government can comply with its obligations under the convention(s). You can find more information on filing a representation here.

We of course invite your feedback on these guides,[8] which we will update to address new and emerging issues, and to account for any observations, conclusions and recommendations from the ILO supervisory system which comes as a result of the use of these guides.

[8] Feedback on these guides can be sent to admin@ilawnetwork.com

Applying International Labour Standards to the Informal Economy

Chapter 1
Convention 87: Freedom of Association

Introduction

The right to freedom of association is a fundamental principle and right at work. Article 2 of Convention 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948) states that this right applies to *"all workers without distinction whatsoever."*[1] The Convention makes clear that regardless of the existence of an employment relationship, the manner in which work might be arranged, or the nature of the workplace, all workers (those who receive wages and those who are self-employed) have the right to form and join an organisation without previous authorisation".[2,3] Further, ILO Recommendation 204 (Transition from the Informal to the Formal Economy Recommendation, 2015) specifically provides, at Article 16(a), that, "Members should take measures to achieve decent work and to respect, promote and realise the fundamental principles and rights at work for those in the informal economy, namely: freedom of association and the effective recognition of the right to collective bargaining."[4]

Despite the provisions of Convention 87 and Recommendation 204, the ILO supervisory system (primarily the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA)) has not yet developed a robust body of observations, direct requests, conclusions, or recommendations to guide governments, workers', and employers` organisations to address the many specific problems which arise for workers in the informal economy. This chapter seeks to provide guidance to workers and trade unions on the issues they may want to raise with the ILO supervisory system so that it can develop targeted observations and recommendations which workers can then use to advocate with their respective governments for necessary legal and institutional reforms.[5] Of course, any such reforms should be made in full consultation with worker organisations, especially those in the informal economy.[6]

[1] Convention 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232

[2] See, e.g., ILO Committee of Experts, General Observation on Convention 87 (2009) ("In many countries around the world, the informal economy represents between half and three-quarters of the overall workforce. The Committee, in reaffirming that Convention No. 87 is applicable to all workers and employers without distinction whatsoever, is heartened by innovative approaches taken by governments, workers' and employers' organizations over recent years to organize those in the informal economy but observes that these are few and far between and that the full benefits of the Convention rarely reach the informal economy."), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3066686,,,2008 . See also, Report of the CEACR, Observation on Convention 87, Turkey (2010), Report of the CEACR, Observation on Convention 87, Senegal (2011). CFA Report No. 326, Case no. 2103 (Mexico, 2001), CFA Report No. 363, Case no 2602 (Republic of Korea, 2012).

[3] Indeed, the only exception is found in Article 9 of Convention 87, which gives states the flexibility at the national level to regulate the extent to which the convention applies to members of the police or the armed forces.

[4] Recommendation 204 (Transition from the Informal to the Formal Economy Recommendation, 2015), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204

[5] If your country has ratified Convention 87, comments may be sent either to the CEACR (depending on the reporting cycle), or a complaint may be filed to the CFA. If your country has not ratified Convention 87, you can still file a complaint to the CFA.

[6] ILO Committee on Freedom of Association, Compilation of Decisions (2018) ¶ 1526 ("The Committee recalled that, according to the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), in designing, implementing and evaluating policies

Below we have identified some common legal issues which could frustrate the exercise of the right to freedom of association for workers in the informal economy. The text notes where there are existing relevant observations by the ILO supervisory system, if any, and suggests how to best raise these issues. In all cases, it would be important that your submissions to the ILO supervisory system start with the statement that "all workers in the informal economy have the right to right to freedom of association" before raising specific concerns.

It is important to consult with organisations of workers in the informal economy in your country on the submissions in relation to each issue. If you are unable to identify national organisations, you can contact the International Domestic Workers Federation,[7] StreetNet,[8] HomeNet,[9] and the International and the International Alliance of Waste Pickers[10], among others, for assistance.

1. Scope Of Labour Law

A. Total or Partial Exclusion

The constitutions of many countries extend the right to freedom of association to all workers or all citizens. Further, many constitutions also enshrine a right to equality and freedom from discrimination, meaning the state cannot discriminate between workers due to different statuses of employment. Yet the labour and/or trade union laws of most countries, even those with the constitutional rights described above, exclude workers in the informal economy. They do so by defining the scope of application of those laws to those who are in an employment relationship. Depending on the law, the description of the employment relationship may be broad and include non-standard work and some categories of informal employment, such as domestic work, but in many cases the definition makes clear that the law only applies to workers who are in permanent full-time employment in the formal economy.

Some labour laws explicitly exclude some or all workers in the informal economy, such as:

Armenia: Section 6 of the 2018 Law on Trade Unions applies only to those with employment contracts.[11]

Uganda: Sections 2 and 3 of the Labour Unions Act of 2006 and Sections 2 and 25 of the Labour Disputes Arbitration and Settlement Act of 2006 applies only apply to employees employed by an employer under a contract of service.[12]

Croatia: Section 4(1) of the Labour Act does not cover self-employed workers.[13]

United States: Section 2(3) of the National Labor Relations Act specifically excludes domestic workers and agricultural workers from the term "employee".[14]

Recommendation:

If workers in the informal economy in your country are excluded from the labour and/or trade union law because it only applies to those with an employment relationship or with an

and programs of relevance to the informal economy, including its formalization, the Government should consult with and promote active participation of the most representative employers' and workers' organizations, which should include in their ranks, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy.).

[7] https://idwfed.org/

[8] https://streetnet.org.za/

[9] https://www.homenetinternational.org/

[10] https://globalrec.org/

[11] ILO, Committee of Experts, Observation on Convention 87, Armenia (2021), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4050014,102540,Armenia,2020

[12] ILO, Committee of Experts, Direct Request on Convention 11 – Uganda (2011) ("while the 1995 Constitution provides that every person shall have the right to freedom of association, the existing legislation only covers employees in the formal sector, whereas agriculture forms a large part of the informal sector." It also noted that "the National Union of Plantation and Agricultural Workers only covers workers in commercial agriculture and does not include medium-sized and smallholder farms where the majority of the workforce are.") online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2331510,103324

[13] ILO, Committee of Experts, Observation on Convention 87, Croatia (2021), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4054246,102700,Croatia,2020

[14] National Labor Relations Act, 29 U.S.C. §§ 151-169, §152(3), online at https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act

employment contract, this should be raised with the ILO supervisory system as it is a clear violation of Convention 87. In your submission, you should urge that the labour law be amended to apply to all workers - including those in the informal economy. Alternatively, you could urge the government to create a separate legal regime for self-employed workers in the informal economy that nevertheless extends an equal right to freedom of association, but which may also take into consideration the unique issues which may arise for workers in the informal economy. In any case, it will be important that the trade unions are able to represent workers (not only employees) and to negotiate with the entit(ies) that determine the worker's terms and conditions of work – whether or not an employer.

If the problem in your country relates to the exclusions of specific occupations that are often associated with the informal economy from the protection of labour law (e.g., domestic workers, agricultural workers), you should also urge that these exclusions be repealed. To the extent relevant, you could also cite the constitutional provisions in your country that guarantee rights to freedom of association or trade union rights to "workers" (rather than employees) or to "everyone" or "all citizens" or which provide that all citizens be treated equally and without discrimination.

B. Non-Union Associations

In some countries, workers in the informal economy are not entitled to form or join a union but are permitted to form an association under laws used to establish NGOs or other civic associations. However, these laws do not afford the same rights and protections as laws protecting trade unions and their activities, including the right to bargain collectively or strike.

For example:

Bosnia Herzegovina & Republica Sprska: While workers in the informal economy may form associations (under the FBiH Act on Associations and Foundations and RS Act on Associations and Foundations), these associations do not provide the same guarantees to workers in terms of the right to organise and associated rights.[15]

Cambodia: Workers who are not permitted to form unions under the Trade Union Act, including most workers in the informal economy, may form associations under the Law on Associations and NGOs (LANGO). However, the law limits the ability of associations to draw up constitutions and rules, to elect representatives, to organise activities and formulate programs without interference of the public authorities.[16]

Pakistan: The Industrial Relations Act (IRA) 2012, the Balochistan Industrial Relations Act (BIRA) 2022, the Khyber-Pakhtunkhwa Industrial Relations Act (KPIRA) 2010, the Punjab Industrial Relations Act (PIRA) 2010 apply only to formal sector workers. Workers in the informal economy can only establish or join associations established under Societies Registration Act, 1860.[17]

Recommendation:

If workers in the informal economy in your country are only able to form an organisation under a law regulating associations, this should be raised with the ILO supervisory system. In your submission, you should explain that these workers have the right to form or join a union of their choosing under Article 2 of Convention 87. You should identify those portions of the labour law which defines a trade union to exclude workers who are not in an employment relationship. Further, it would be important to indicate the restrictions that the associations'

[15] ILO, Committee of Experts, Observation on Convention 87, Bosnia and Herzegovina (2021), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4058106,102704,Bosnia%20and%20Herzegovina,2020

[16] ILO, Committee of Experts, Observation on Convention 87, Cambodia (2022), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4122256,103055

[17] ILO, Committee of Experts, Observation on Convention 87, Pakistan (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4320814,103166,Pakistan,2022

law imposes on the structure and governance of the association, the activities it may or may not undertake (for example limits on collective action or advocacy), the restrictions on sources of its funding, and the association's ability to associate or affiliate with other organizations, including unions. Also, if relevant, be sure to explain that collective agreements entered into by an association usually cannot be enforced in the same way as a collective agreement concluded between and employer and a registered trade union.

2. Minimum Membership Number

The labour laws of most countries require a minimum number of members to apply for and to maintain legal registration. The existence of a minimum membership requirement is not itself a violation of freedom of association; however, "the number should be fixed in a reasonable manner so that the establishment of organisations is not hindered. What constitutes a reasonable number may vary according to the particular conditions in which a restriction is imposed."[18]

Bangladesh: The ILO noted that the law sets a minimum membership number of 20 percent of the total number of workers employed in the establishment in which a union is formed, and requested the government to "reduc[e] the minimum membership requirements to a reasonable level, at least for large enterprises, and ending the possible cancellation of trade unions that fall below minimum membership requirements."[19]

India: The ILO noted that section 4(1) of the Trade Union Act, 1926, as amended in 2001, [which imposes a minimum of at least 10 per cent or 100 workmen, whichever is less], imposes an excessively high minimum number of members for the formation of unions, at both enterprise level and industry level.[20]

Myanmar: The ILO noted and "request[ed] the Government to take steps to review the 10 per cent membership requirement with the social partners concerned, with a view to amending section 4 of the Labour Organisations Law so that workers may form and join organisations of their own choosing without hindrance."[21]

The ILO has previously found a minimum of 20 members may be reasonable.[22] In the context of the informal economy, or indeed in any country with a high number of micro or small enterprises, it is important to allow a relatively low number of workers to establish a union, as a high number such as in the examples above could create difficulties in forming a union.

Recommendation:

If the law in your country establishes a minimum membership requirement which creates obstacles to forming a union in the informal economy, this should be raised in your comments to the ILO. Explain how such requirements have or could frustrate the ability of workers in the informal economy to form a union and ask the Committee to urge the government to lower the minimum number necessary to form a union. As explained in the next section, this is particularly important if there is a high minimum number for the establishment of sectoral or occupation-based unions – which is a more common form of organisation in the informal economy given the lack of a direct employer in most cases.

3. Union Structure

For many workers in the informal economy, their "workplace" is not in an enterprise but in the public

[18] ILO Compilation of Decisions, ¶ 441.

[19] ILO, Committee of Experts, Observation on Convention 87, Bangladesh (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4322754,103500

[20] CFA Case No. 2991, Report 368 (June 2013), ¶ 564, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128211

[21] ILO, Committee of Experts, Observation on Convention 87, Myanmar (2018), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3344050,103159

[22] ILO Compilation of Decisions, ¶ 446.

space (such as street vendors, waste pickers, informal transport operators) or in a private home, including their own home (such as domestic workers, care workers, and industrial outworkers/homeworkers). However, many labour laws require unions to form pyramidal structures, with the establishment of lower-level, enterprise-based unions, which then in turn affiliate to create sectoral or occupational unions. For workers with no fixed workplace, or multiple workplaces, this traditional workplace-based structure creates obvious problems. The more appropriate structure for workers in the informal economy may be a union organised on a sectoral, occupational, or geographical basis, which unifies workers by a common purpose rather than a common employer. However, many labour laws also require a high minimum number to form such sectoral or occupational unions, which creates yet another obstacle (even where such unions can be formed without first organizing enterprise-based unions).

Cambodia: The Law on Trade Unions provides for an enterprise union model whose requirements are often very difficult to meet by workers in the informal economy, and the law in practice does not allow for the creation of unions by sector or profession.[23]

Armenia: Section 2 of the Law on Trade Unions requires over half of workers' organisations operating at the territorial level to form a sectoral union.[24]

Guatemala: Section 215(c) of the Labour Code requires a membership of "50 percent plus one" of the workers in the sector to establish a sectoral trade union.[25]

Recommendation:

If these requirements (pyramid structure and/or high minimum membership for sectoral unions) are an issue in your country, you should raise them in your comments to the ILO supervisory system. You should ask the Committee to urge the government to amend its laws so that workers, including those in the informal economy, can form unions most suitable to their needs (by workplace, sector, occupation, geography, etc.) without the requirement to establish lower level, enterprise-level unions. Further, the minimum number to form a sectoral, occupational, or other union must be reasonable.[26]

4. Other Requirements for Union Registration

The labour laws of most countries require a union to register with the government in order to have legal rights to operate and carry out its activities. Normally, workers seeking to form a union will have to complete and file an application. However, most applications were developed with the formal economy in mind and may contain requirements that would be difficult or impossible for workers in the informal economy to provide. Similarly, some laws require this information to also appear in the union's bylaws or constitution, which raises similar problems. As such, these provisions likely violate Article 3(2) of Convention 87, which states that "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." The section below sets out instances in which the labour laws of a country likely infringe on the rights of workers in the informal economy and which amount to "previous authorisation" and an interference that "restricts this right or impedes the lawful exercise thereof".[27]

[23] ILO, Committee of Experts, Observation on Convention 87, Cambodia (2022), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4122256,103055,Cambodia,2021

[24] ILO, Committee of Experts, Observation on Convention 87, Armenia (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4050014,102540,Armenia,2020

[25] ILO, Committee of Experts, Observation on Convention 87 – Guatemala (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4320579,102667

[26] See, e.g., CFA Compilation, ¶ 439 (finding a minimum number of 30 workers would be acceptable in the case of sectoral trade unions).

[27] The Labour Court in South Africa held that where the labour laws prevent non-standard workers from exercising their right to freedom of association, the state is guilty of "previous authorisation", which is in violation of its international law obligations. See, Simunye Workers' Forum v Registrar of Labour Relations Case No. J 1375/ 2022 (South Africa)

- Many labour laws or regulations require an applicant to provide the name and address of the employer, the workers of which the union is seeking to represent.[28]

Recommendation:

Such a requirement assumes an employment relationship. If this is an issue in your country, this should be raised in your comments to the ILO supervisory system. You should explain how such a requirement has or could frustrate the ability of workers in the informal economy to form a union and urge that the law be amended to waive such a requirement for unions of workers with no formal employer. Instead, a union of workers in the informal economy should be able to use another address, including the address of a supportive trade union or an NGO.

- Many labour laws require applicants to provide the address of the union's office and/or include this information in its bylaws/constitution.[29]

Recommendation:

Unions of workers in the informal economy may not have the resources for office rent – especially at the time of registration.[30] Such a requirement assumes assets which can be difficult even for some workers in the formal economy to raise. If this is the case in your country, this should be raised in your comments to the ILO. You should explain how such a requirement has or could frustrate the ability of workers in the informal economy to form a union and urge that the law be amended to provide for alternatives where the union may be able to receive official correspondence, such as the offices of trade union or NGO.

- Some labour laws require the payment of fees for processing a union application.

Recommendation:

As with the previous point, such a requirement assumes assets which can be difficult even for some workers in the formal economy to raise. If this is the case in your country, this should be raised in your comments to the ILO supervisory system - especially where the fees are more than nominal. You should explain how such a requirement has or could block the ability of workers in the informal economy to form a union and urge that the law be amended to either waive such fees, or to reduce the fees to a truly nominal amount.

- Some labour laws require the founders of the proposed union to provide ID cards, including in some cases ID cards issued by the employer.[31]

Recommendation:

Many workers in the informal economy may not have a national ID card, and certainly not one provided by an employer. If this is an issue in your country, you should raise this in your comments to the ILO supervisory system and urge that the law be amended to waive workplace ID cards where there is no formal employer. If the law requires a national ID card, this too should be addressed, either by accepting alternate forms of identification, or require the state to provide ID on the spot and free of charge.

[28] See, e.g., Uganda, Labour Unions (Registration) Regulations, Regulation 5(e)(iv) ("An application for registration shall be accompanied by a statement of the following particulars — iv the name and address of each officer's employer.)

[29] See, e.g., Argentina, Trade Union Associations Law, Article 16; Bangladesh, Labour Act, Section 179(1); Botswana, Forms A1, A2 and A3 under the Trade Unions and Employers' Organization Act, 2004; Colombia, Substantive Labour Code Art 362; Guatemala, Labour Code, Article 221; Uganda, Labour Unions Act, Act 7 of 2006, Sec. 15; United States, LMRDA, Section 431(a).

[30] In a similar situation, the CFA found that "it is contrary to Convention No. 87 to demand information from the founders of an organization such as their telephone number, marital status or home address (this indirectly excludes from membership workers with no fixed abode or those who cannot afford to pay for a telephone)." See, CFA Compilation of Decisions, ¶ 433.

[31] See, e.g., Bangladesh, EPZ Labour Act Section 94 (requiring submission of national ID cards with application to form a Worker Welfare Association). See also Honduras, Labour Code Section 510 (requiring a having a citizenship or identity card to be a union officer).

- Some labour laws require union officers to be literate or have other formal educational requirements.[32]

Recommendation:

The ILO has already found literacy requirements to be an obstacle to freedom of association , especially for migrant workers.[33] This can be an even greater obstacle for some in the informal economy. If this is the case in your country, this should be raised in your comments to the ILO and urge that such a requirement be repealed.

- Some labour laws prohibit workers with a criminal record from running for union office[34]. However, informal work is often criminalized, and a criminal record based on vagrancy or illegal hawking (a charge commonly made against street vendors), would create obvious issues regarding registration.

Recommendation:

The ILO has already found requirements around criminal convictions can be an obstacle to freedom of association, especially when the activity condemned is not prejudicial to the aptitude and integrity required to exercise trade union office.[35] If this is an issue, you should raise this in your comments to the ILO – especially if vagrancy, hawking or similar laws are on the books and have led to criminal sanctions against workers. Not only should the labour law be amended to remove overbroad prohibitions on criminal records, but of course the criminal laws themselves should be repealed or at the very least not applied to those who are otherwise lawfully carrying out their work.

5. Union Assets

A. Management of Assets

Many labour laws require union assets to be deposited in banks,[36] and for audits to be undertaken on a regular basis.[37] Some labour laws also require a union to provide the name of the bank where union assets are held at the time of registration or designate a specific bank where union assets must be deposited.

Recommendation:

While it is appropriate for the law to require a union to safeguard their members' assets, including by depositing those funds in a bank, minimum deposit requirements at many banks can frustrate the ability of unions in the informal economy to open or maintain an account. If this is an issue in your country, you should raise this in comments to the ILO, and urge that the government ensure that banks create accounts for unions in the informal economy with small asset requirements.

Similarly, while there is nothing wrong with requirements to audit accounts, some unions in the informal economy will have few assets and the costs of a professional audit may be prohibitively expensive. If this is an issue in your country, you should raise this in your comments to the ILO supervisory system and urge that the law be amended so that the audit requirement

[32] See, e.g., Honduras, Labour Code Section 510; Cambodia, Trade Union Law Section 20.

[33] ILO, Committee of Experts, Observation on Convention 87, Honduras (2012), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698650,102675,Honduras,2011

[34] See, e.g., Jordan, Labour Law Section 114 ("No person shall be elected to the membership of the administrative board of a trade union if he is not a registered worker or full-time employee therein, or if he has been convicted of a felony or of an offense involving dishonourable or immoral conduct.")

[35] See, CFA Compilation ¶ 625.

[36] See, e.g., Eswatini, Industrial Relations Act, Section 29 ((1) The constitution of an organisation shall include the following: (m) provision for the banking and investment of the organizations funds); Zambia, Industrial and Labour Relations Act, Application Form ("10. The provision for the vesting and safe custody of the funds and property of the representative body, and the banking and investment of the funds, maintenance, inspection and periodical auditing of its accounts and other financial records are set out in rule No. ..... of the constitution of the representative body.")

[37] See, e.g., Bangladesh, Bangladesh Labour Act Section 179; India, Trade Unions Act, Section 6, Myanmar, Labour Organizations Act, Section 10.

applies to unions with assets exceeding a certain amount, so it does not create problems for small unions with minimal income. In the alternative, the law could provide for low-cost or subsidized audits for unions in the informal economy.

B. Sources of Income

Dues: Although the matter of payment of member dues should be left to unions to decide in their constitutions and bylaws, as well as the consequences of non-payment, some labour laws require a union to collect dues from their members. Of course, in the informal economy, members cannot always afford the payment of dues. In some cases, the failure to collect dues would disqualify counting the non-paying member for the purpose of obtaining or maintaining union registration, or in determining which union is most representative for purposes of bargaining.

Nicaragua: Section 32 of the Regulation on Trade Union Associations (1998) lays down certain grounds on which a worker may lose his or her trade union membership, including non-payment of dues, without explaining the reasons, for a period of three months. The ILO held that this is a matter which should be determined by the workers themselves in their statutes and not by the public authority.[38]

Recommendation:

Dues collection is important to the sustainability of a trade union and helps avoid the pitfalls of over-reliance on long-term foundation support. However, the setting of dues, collection of dues and the consequences of non-payment should be a matter for the union to decide. If the law in your country legislates the payment of dues or the consequences of non-payment, this should be raised with the ILO supervisory system. The ILO should be asked to remind the government that such matters should be left to union constitutions and bylaws.

Of note, some of the more established unions of workers in the informal economy have been able to register themselves as a trade union in countries that allow their registration and have also registered an association that accepts donations and supports the trade union. This is the case for the Self-Employed Women's Association (SEWA) in India and the La Unión de Trabajadores y Trabajadoras de la Economía Popular (UTEP) in Argentina.

Grants and Donations: Some unions in the informal economy may depend to some extent on external sources of funding, including from national or foreign donors. Unfortunately, some labour laws impose limitations or prohibitions on receiving grants or donations, or more specifically foreign grants or donations. This has an obvious impact on the ability of such unions to support their members' activities.

Algeria: The ILO requested the Government to amend section 534 to remove the requirement to obtain prior authorization from the public authorities concerning donations and bequests from trade unions or foreign organizations.[39]

Russia: The Law on Control of Activities of Persons Under Foreign Influence defines foreign influence as a support provided by, among others, international and foreign organizations, and non-compliance with the requirements of the law entails a dissolution of the organization in question. Trade unions are not exempted from the legislation.[40]

Recommendation:

The ILO Committee on Freedom of Association

[38] ILO, Committee of Experts, Observation on Convention 87, Nicaragua (1999), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2173289,102780,Nicaragua,1998

[39] ILO, Committee of Experts, Observation on Convention 87, Algeria (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4320640,102908,Algeria,2022

[40] ILO, Committee of Experts, Observation on Convention 87, Russian Federation (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4322521,102884,Russian%20Federation,2022

has made clear that, "Provisions which restrict the freedom of trade unions to administer and utilize their funds as they wish for normal and lawful trade union purposes are incompatible with principles of freedom of association."[41] If the law in your country restricts the sources of union income, including donations from foreign organizations, this should be raised with the ILO supervisory system. The ILO should be asked to urge the government to repeal restrictions of foreign funding for legitimate trade union activity.

6. Concerted Activity

The ILO legal framework recognizes a universal human right to engage in collective bargaining and collective action, emanating from the right to freedom of association. This right should be exercised without regard as to the status of the workers under national law as a worker, employee, or other category.[42] However, workers in the informal economy can face particular obstacles to exercise these rights.

- In some legal systems, the right to strike is an individual right. The right can be exercised at the initiative of the individual, though almost always collectively. See, e.g., France. In other countries, the right requires no authorization and may be exercised by any group of workers, unionized or not. See, e.g., Italy, Uruguay, South Africa, and Hungary. In others, the right is a collective right which may only be exercised by a trade union. See, e.g., Germany. In those countries where the right to strike belongs only to the union, this presents an obvious problem in those countries where workers in the informal economy are unable to form or join a union, in law or in practice.[43]

Recommendation:

The CFA has determined that it is not a violation of the right to freedom of association "making the right to call a strike the sole preserve of trade union organizations."[44] However, it would be useful to raise this issue with the ILO if the law or practice makes it difficult or impossible for workers in the informal economy to form or join a trade union. It cannot be consistent with principles of freedom of association to vest the right to strike only in a union while at the same time denying the right to form a union to any group of workers.

- Some laws limit the use of the right to strike to the exhaustion of a collective bargaining process under formal procedures set forth in the labour code. However, if workers in the informal economy have no right to bargain collectively, because they are unable to form a union or are only able to form non-union associations, they would not be able to strike legally. The ILO has for many years emphasized that the right to strike is broader and should be exercised outside of the collective bargaining context.[45]

Recommendation:

If the law in your country limits legal strikes to the exhaustion of the collective bargaining process, it would be useful to raise this issue with the ILO - especially if the law or practice make it difficult or impossible for workers in the informal economy to strike. Of course, the ILO should urge governments to ensure that workers in the informal economy have the right to form a union and bargain collectively, whether in the labour code or similar law, and ensure that the right to strike is also protected.

[41] ILO, CFA Compilation, ¶ 683.

[42] CFA Report 376, Case no 2786, Dominican Republic (2015) ("The Committee requested the government to take the necessary measures to ensure that workers who are self-employed could fully enjoy trade union rights for the purposes of furthering and defending their interest, including by the means of collective bargaining...")

[43] For a comparative view of the regulation of the right to strike, see, e.g., Bernard Waas, THE RIGHT TO STRIKE, A COMPARATIVE VIEW (Alphen aan den Rijn, Woulters Kluwer 2014).

[44] See CFA Compilation ¶ 756.

[45] See CFA Compilation ¶ 766.

7. Specific Groups of Workers

A. Migrant Workers

In many countries, either regular or irregular migrant workers are unable to form or join unions or are unable to run for office in said unions. As such, it may be difficult to form a union in occupations dominated by migrant workers. The ILO has found that such limitations violate the right to freedom of association of migrant workers.[46] Of course, migrant workers often form a large portion of the workforce of the informal economy, often because of barriers to entering the formal workplace, including for reasons of immigration status.

Kuwait: The ILO noted that Section 99 of Labour Law of 2010 requires Kuwaiti nationality to establish a trade union organization and Ministerial Order No. 1 of 1964 requires migrant workers to have a work permit and to have resided in the country for five years in order to join a trade union organization.[47]

Mauritius: The ILO noted that Section 13 of the ERA 2008 requires non-citizens to hold a work permit in order to be members of a trade union.[48]

Recommendation:

If the law in your country limits the right of either regular or irregular migrant workers to form or join a union, or to hold union office, you should raise this as a violation of the right to freedom of association generally. Be sure to note that such limitation has a particular impact on work in the informal economy – especially those occupations where migrant workers predominate. You should also note if the law in your country requires a work permit. While countries generally have the right to determine who enters the country for the purpose of work, once a worker is employed in a country, the worker's migratory status should not create an obstacle to exercise their freedom of association.

B. Women

As the Committee on Economic Social and Cultural Rights explained in its General Comment, "women are overrepresented in the informal economy, for example as casual workers, home workers or own account workers, which in turn exacerbates inequalities in areas such as remuneration, health and safety, rest, leisure and paid leave."[49] The UN Special Rapporteur on Freedom of Peaceful Assembly and Association further noted that, "The discriminatory impact of excluding workers in the informal economy from the right to organize is hence multiply felt, as it both restricts such workers' ability to access their right to freedom of association as such, and prevents them from using that right from advocating for and hence improving their access to other social and economic rights."[50] Moreover, this discrimination must be understood in intersectional terms. As the CERD Committee recently explained regarding the situation of domestic workers in Zimbabwe, the informal sector and domestic work are "both sectors in which Black women predominate and face low wages, poor working conditions and racist dehumanizing treatment from employers and customers of different racial or ethno-linguistic identities which is reminiscent of the pre-independence era."[51]

Recommendation:

If women in your country are concentrated in the informal economy, or in specific occupations in the informal economy, and that the law denies such workers the right to freedom

[46] See CFA Compilation ¶¶ 320-24.

[47] ILO, Committee of Experts, Observation on Convention 87, Kuwait (2022), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4116630,103423,Kuwait,2021

[48] ILO, Committee of Experts, Observation on Convention 87, Mauritius (2022), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4115647,103106,Mauritius,2021

[49] CESCR, General Comment No. 23 on the right to just and favourable conditions of work (2016), para. 47(d), available at: https://www.refworld.org/docid/5550a0b14.html.

[50] Advancing the rights of freedom of peaceful assembly and of association of workers in the informal economy, A/HRC/53/38/Add.3, para 81, online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/127/91/PDF/G2312791.pdf?OpenElement

[51] CERD Committee, Concluding observations on the combined 5th to 11th periodic reports of Zimbabwe, UN Doc. CERD/C/ZWE/CO/5-11 (16 Sept. 2021), para. 31.

of association, in whole or in part, the gendered dimension should be raised in your comments to the ILO supervisory system. Moreover, if the impacts affect specific women workers as a result of race, ethnicity, caste, sexual orientation or gender identity, or other bases of discrimination, it would be important to highlight this while reporting to the ILO.

8. Specific Occupations or Arrangements of Work

A. "Gig" Work

The ILO's supervisory bodies have considered the application of ILS, both in law and practice, in the context of the platform economy.[52] In its 2020 General Survey,[53] the Committee of Experts on the Application of Conventions and Recommendations (CEACR) emphasized that "the full range of fundamental principles and rights at work are applicable to platform workers in the same way as to all other workers, irrespective of their employment status".[54] The CEACR has referred explicitly to the Employment Relationship Recommendation, 2006 (No. 198) and the number of possible indicators that can be considered to determine the existence of an employment relationship.[55] It has also indicated that "the principle of the primacy of facts is helpful, particularly in situations where the employment relationship is deliberately disguised".[56]

Recommendation:

Some work on digital platforms is clearly a misclassified employment relationship, while other work is less clearly so. In any case, whether an employee, self-employed, or some intermediate status, workers have a right to freedom of association. Thus, if the law in your country does not recognize the right of workers hired through digital platforms to exercise their freedom of association, this should be raised with the ILO supervisory system and urge the law to be amended accordingly.

B. Agricultural Work

While not all agricultural work is in the informal economy, much agricultural work tends to be. This often includes seasonal workers and day labourers. The ILO has promoted the right of agricultural workers to freely associate since 1921, via Convention 11, in recognition of the fact that they were often specifically excluded. Indeed, Article 1 provides, "Each Member... which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture." However, over 100 years later, agricultural workers, and especially those in the informal economy, face significant obstacles to the exercise of the right to freedom of association.[57]

Pakistan: While the Industrial Relations Act 2012; Punjab Industrial Relations Act, 2010 and Khyber Pakhtunkhwa Industrial Relations Act, 2010 provide in their section 1(3) that they apply to "all persons employed in any establishment or industry" in the covered territory, and even though agriculture does not figure among the activities explicitly excluded from the scope of these Acts, they do not appear to cover agricultural establishments.[58]

Cook Islands: While Section 8 of the Employment

[52] See, for example, CEACR observations on C98 (Syria 2012, Ireland 2017, Haiti 2012); CFA Case No. 2602 (Korea), No. 2786 (Dominican Republic).

[53] ILO, Promoting employment and decent work in a changing landscape (Geneva 2020), online at https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS_736873/lang--en/index.htm

[54] Id., ¶ 327.

[55] Ibid.

[56] Id., ¶ 230.

[57] Countries which have ratified Convention 141 have an obligation to promote the development of rural workers' organizations.

[58] ILO, Committee of Experts, Observation on Convention 11 – Pakistan (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4323139,103166,Pakistan,2022 ("*the Committee urges the Government to take adequate measures to ensure that federal and provincial Industrial Relations Acts are amended so as to expressly cover all agricultural workers, including those in the informal sector, and to enable them to enjoy the rights conferred by the Convention in law and in practice.*")

Relations Act applies to all industries, including agriculture, Section 3(b) excludes independent contractors under a contract of services. The ILO therefore questioned whether farmers working on their own account would be covered by the law.[59]

Recommendation:

As much work in agriculture is informal, whether in law or in practice, if the law in your country does not recognize the right of "all those engaged in agriculture" to exercise their freedom of association, this should be raised with the ILO supervisory system. You should urge that the law be amended to extend the right to freedom of association to such workers.

C. Domestic Workers

Domestic workers have frequently been excluded from labour law, including the right to freedom of association. The impact on domestic workers as a result is unsurprising. As the ILO explained:

At present, domestic workers often face very low wages, excessively long hours, have no guaranteed weekly day of rest and at times are vulnerable to physical, mental, and sexual abuse or restrictions on freedom of movement. Exploitation of domestic workers can partly be attributed to gaps in national labour and employment legislation, and often reflects discrimination along the lines of sex, race, and caste.[60]

At its 100th Session in June 2011, the ILO took the landmark step of adopting the Domestic Workers Convention No. 189 (C 189), and the corresponding supplementary Recommendation No. 201 (R 201). Article 1(b) of the Convention covers "any person engaged in domestic work within an employment relationship". The Convention "includes domestic workers engaged on a part-time basis and those working for multiple employers, nationals and non-nationals, as well as both live-in and live-out domestic workers".[61] The Convention's definition of "domestic worker" excludes solely those workers who perform domestic work "only occasionally or sporadically and not on an occupational basis" (Article 1(c)). The expression "and not on an occupational basis" was intended to ensure the inclusion in the definition of "domestic worker" of day labourers and similar precarious workers, including care workers.[62] Article 3(2) of Convention 189 explicitly recognizes that the right to freedom of association applies to domestic workers and requires states to guarantee its promotion and realization. However, the right to freedom of association remains elusive for many, including as a result of frequent isolation in the home.

Italy: While Italy extends the right to freedom of association to domestic workers, it questioned the extent to which domestic workers' freedom of association and collective bargaining rights are effectively promoted and ensured in practice.[63]

Ecuador: The minimum membership requirement of 30 workers and the requirement that workers must be from the same undertaking prevents most domestic workers from forming unions. Factors including a high degree of dependence on the employer and the frequent isolation of domestic workers make it particularly difficult for domestic workers to establish and join unions.[64]

[59] ILO, Committee of Experts, Direct Request on Convention 11 – Cook Islands (2019), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3959546,103291,Cook%20Islands,2018 (*"The Committee requests the Government to indicate whether self-employed workers (farmers working on their own or within their family) enjoy the rights of association and combination under the Convention and, if so, to indicate the relevant legislative provisions. If no legislation provision provides for this right, the Committee requests the Government to consider, in consultation with the social partners, the amendment of the law with a view to allowing "all those engaged in agriculture" the full exercise of freedom of association."*)

[60] International Labour Organization (ILO), Who are Domestic Workers, online at https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm.

[61] ILO General Survey (2022), ¶ 569.

[62] Id ¶¶ 562-63.

[63] ILO, Committee of Experts, Direct Request on Convention 189 – Italy (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4309817,102709,Italy,2022

[64] ILO, Committee of Experts, Direct Request on Convention 189 – Ecuador (2021), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4059654,102616,Ecuador,2020

Recommendation:

If the law in your country does not fully extend the right to freedom of association to domestic workers, this should be raised in your comments to the ILO supervisory system. Even if the right is protected in law, you should identify practical obstacles to the exercise of these rights, including dependence on employers, isolation, threats, or coercion, among other factors.

D. Home Workers

The Home Work Convention, No. 177 (1996) defines home work as "work carried out by a person (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used".[65] Eleven countries have so far ratified the Convention.[66] The CEACR's 2020 General Survey, Promotion Employment and Decent Work in a Changing Landscape,[67] identified three categories of homeworkers:

- Teleworkers
- Home-based Digital Platform work
- Homeworkers in (domestic and global) supply chains (also known as industrial outwork or subcontracted outworkers)

Article 4 of Convention 177 provides that states must promote "equality of treatment between homeworkers and other wage earners" ... and "in particular, in relation to: (a) the homeworkers' right to establish or join organisations of their own choosing and to participate in the activities of such organisations". According to a recent ILO publication, countries have taken various approaches to regulating freedom of association for home workers.

For example, homeworkers' right to organize is expressly recognized in the Philippines. In Argentina, home work legislation regulates the registration of professional associations of employers and workers, respectively, which may, inter alia, request the competent authority to convene wage committees. In Chile, the employer must inform remote workers and teleworkers in writing about the existence of trade unions that are legally constituted in the enterprise. In Spain, remote workers may exercise their collective representative rights in accordance with the provisions of the law. For this purpose, these workers must be assigned to a specific work centre of the company. In Germany, legislation provides for the establishment of sectoral home work committees, composed of workers' and employers' representatives, with a chair appointed by public authorities. The right of homeworkers to organize is also recognized in Bulgaria.[68]

However, many home-based workers are excluded from labour laws because they are considered to be independent contractors under the labour law. In other cases, such workers are included for only limited purposes, such as for taxation and social security. In others, they are included only if they have a formal contract of employment. Countries have taken various approaches to bring home workers into the scope of labour law.

Expanding the definition of '**employer**' to include intermediaries, contractors, and sub-contractors.

- Section 274 of Ecuador's Labour Code (as amended in 2018) defines employers in homework as 'manufacturers, traders, intermediaries, contractors, subcontractors, pieceworkers, etc., who give or commission work in this manner. It is immaterial whether or not they supply the materials and tools, or whether they fix the wage by the piece, by work or in any other way".[69]

- Article 155 of Philippines Labour Code defines the employer of a homeworker as "any person,

[65] ILO Home Work Convention, No. 177 (1996), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322

[66] See also, Home Work Recommendation, No. 184 (1996), online at (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R184

[67] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_736873.pdf

[68] ILO, Working from home: From invisibility to decent work (Geneva, 2021), p. 193-94, online at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_765806.pdf

[69] Ibid at 207.

natural or artificial, who for his account or benefit or, on behalf of any person residing outside the country, directly or indirectly, or through an employee, agent contractor, sub-contractor, or any other person:

I. Delivers, or causes to be delivered, any goods, articles, or materials to be processed or fabricated in or near a home and thereafter to be returned or distributed in accordance with his directions; or

II. Sells any goods, articles, or materials to be processed or fabricated in or about a home and then rebuys them after such processing or fabrication, either by himself or through some other person.

Often homeworkers do not know who they work for and if they and their organisations try to find out, they are threatened with losing their employment. This has implications for exercising their right to freedom of association and collective bargaining. Paragraph 5 of Recommendation No. 184 states that the law should provide for the employer to furnish homeworkers with the name and address of the employer and intermediary. Paragraph 18 of R 184 states that "Where an intermediary is used, the intermediary and the employer should be made jointly and severally liable for payment of the remuneration due to homeworkers, in accordance with national laws".[70]

Expanding the definition of "**employee**": Paragraph 12 of Recommendation No. 198 calls on Members to define the conditions (such as criteria and indicators) applied to determine the existence of an employment relationship, and refers to two such conditions, namely subordination and dependence. Paragraph 13 of Recommendation No. 198 provides a list of indicators that could also serve to determine the employment status of homeworkers (see chapter II)." [71]

- Section 200A of the Labour Relations Act No 65 of 1995 (South Africa) includes seven rebuttable presumptions that the worker is an employee. For example, where the worker is provided with the tools of the trade, the onus is on the employer to prove that they did not provide the tools.[72]

- Section 6 of Consolidation of Labour Laws (Brazil) states that 'no distinction shall be made between work performed in the employer's establishment, domestic work and remote work where the criteria for pre- sumption of an employment relationship have been met)'[73]

- Section 1 of Act No. 3846/2010 (Greece) provides that "the agreement between the employer and the employee for the provision of services or work, for a fixed or indefinite period of time, especially where work is paid by the piece, telework, homework, shall be presumed to disguise a dependent employment contract if such work is provided in person, exclusively or primarily to the same employer for nine consecutive months.[74] [the addition of a time period is regressive because it incentivises an employer to end employment before the nine month period and take a break before employing the person again.

- Section 1 of Act No. 877 (Italy) on rules protecting homeworkers 'provides that subordination, for purposes of the Act, occurs when the homeworker is required to comply with the guidelines of the entrepreneur concerning the execution and the characteristics and requirements of the work.'

Recommendation:

If the law in your country does not fully extend the right to freedom of association to home-based workers, this should be raised in your comments to the ILO supervisory system. Identify how the law excludes home-based workers, whether it is an explicit exclusion, a too narrow definition of employer or employee, or another reason. Where home-based work is a form of disguised employment or non-standard work,

[70] A good example is Australia's Fair Work Act. See WIEGO Law Brief 14, *Innovative Legislation in Australia Protects Homeworkers in the Garment and Footwear Sector*, August 2023, online at https://www.wiego.org/sites/default/files/publications/file/wiego-organizing-brief-no.14.pdf.

[71] ILO General Employment Survey (2020) at 210 - 212.

[72] https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf

[73] https://www2.senado.leg.br/bdsf/bitstream/handle/id/535468/clt_e_normas_correlatas_1ed.pdf

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that should also be explained. You may want to point the ILO to some of the examples above as to how best to address these issues.

9. Other Types of Laws Affecting Work in the Informal Economy

While labour laws present some of the greatest challenges to workers in the informal economy, other laws of general applicability can also impact workers in the informal economy.

For example, many countries have laws prohibiting unpermitted public gatherings or gatherings over a certain size. This could block the ability of unions in the informal economy to hold a union meeting in the public places where they work. For example, the law of Bangladesh gives the government broad discretion to ban assemblies of more than four persons.

Recommendation:

If the law in your country limits public gatherings, including by requiring prior authorization or by capping the number of people who may lawfully gather in public, it would be useful to raise this issue with the ILO supervisory system - especially if such limits have resulted in unions being unable to obtain a permit or if a gathering was halted for lacking a permit or exceeding the maximum size of a gathering.

Further, some countries have laws which prohibit the otherwise lawful activity of the worker, which of course also impacts their ability to associate and form a union. These often take the form of vagrancy or hawking laws which are used to criminalize the work of street vendors[75] and waste pickers. Indeed, vagrancy laws remain widespread across former British colonies in Africa, Asia, and the Caribbean.[76] These include:

- Nigerian Criminal Code Act, §§ 249–50
- Vagrants and Shelterless Persons (Rehabilitation) Act, ch. III–IV (Act. No. 15/2011) (Bangladesh).
- Destitute Persons Act §§ 11–13 (Act No. 183/1977) (Malaysia).
- Criminal Procedure Act § 6 (Act No. 3/1873) (Antigua & Barbuda)

Importantly, the African Court on Human and Peoples' Rights issued an advisory opinion in 2020 that found that vagrancy laws violated the rights to liberty, equality, dignity, a fair trial, freedom of movement, and to be free from discrimination.[77]

Recommendation:

If the law in your country prohibits or criminalizes street vending, waste picking/recycling or other work undertaken in public places, directly or through regulatory requirements which are unreasonable or impossible to meet, it would be useful to raise this issue with the ILO supervisory system. If one's work is unreasonably prohibited, it is therefore impossible to form or join a trade union. Further, many labour laws contain provisions which prohibit the union from promoting illegal activity. Such a provision applied to street vending, recycling and other work would obviously undermine the right to freedom of association of workers carrying out legitimate work.

[75] See, Christopher Roberts, Discretion and the Rule of Law: The Significance and Endurance of Vagrancy and Vagrancy-Type Laws in England, the British Empire and the British Colonial World, 33 Duke Journal of Comparative and International Law 181, 246 (2023)(finding such laws "have been used to force populations to work, both by penalizing non-work and by forcing potential workers into the labor force through detention and fines. Over and above their use to coerce work directly, they have served to limit populations' bargaining power, both by limiting their ability to freely negotiate their terms of work and by limiting their mobility.")

[76] Id.

[77] Request for Advisory Opinion by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, Advisory Opinion No. 1 of 2018, African Court on Human and Peoples' Rights (Dec. 4, 2020). See Krithika Dinesh, Pamhidzai Bamu, Roopa Madhav, Teresa Marchiori and Marlese von Broembsen. 'Re-examining Legal Narratives on Vagrancy, Public Spaces and Colonial Constructs: A Commentary on the ACHPR's Advisory Opinion on Vagrancy Laws in Africa' (August 2021) *WIEGO Informality Insights* No 3. available at https://www.wiego.org/sites/default/files/publications/file/WIEGO_LawNewsletter_August%202021.pdf for a discussion on how vagrancy laws affect workers in informal employment whose workplace is in the public space.

Applying International Labour Standards to the Informal Economy

Chapter 2
Convention 98: Collective Bargaining

Introduction

The right to organise and collectively bargain is a fundamental labour right.[1] The ILO supervisory system has explained that Convention 98 (Right to Organise and Collective Bargain Convention, 1949) protects the right of all workers, organised in a workers' organisation, to bargain collectively with employers and employers' organisations.[2] This is true regardless whether workers are in an employment relationship or the manner in which work might be arranged.[3] The only group of workers which are not directly addressed by the convention are "public servants engaged in the administration of the State," per Article 6, though it clarifies that Convention 98 "shall not be construed as prejudicing their rights or status in any way."[4] Further, Article 5(2)(a) of Convention 154 (Collective Bargaining Convention, 1981) obliges states which have ratified it to adopt measures so that "collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention."[5] Recommendation 204 (Transition from the Informal to the Formal Economy Recommendation, 2015) also provides, at Article 16(a), that, "Members should take measures to achieve decent work and to respect, promote and realize the fundamental principles and rights at work for those in the informal economy, namely the effective recognition of the right to collective bargaining."[6]

Despite that organised workers in the informal economy have clearly a right to collectively bargain, the ILO supervisory system has not yet developed a robust body of observations, conclusions, or recommendations to guide governments, workers' organisations, and employers' organisations to address the specific challenges which arise for workers in the informal economy. This chapter seeks to provide guidance to workers' organizations on issues they may want to

[1] We note from the outset the critical distinction between collective bargaining and various forms of workplace cooperation, often promoted by employers as a substitute to collective bargaining, especially in the absence of trade unions. There is simply no effective substitute to collective bargaining between a trade union and an employer or employers' organization.

[2] Convention 98 (Right to Organise and Collective Bargain Convention, 1949), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098

[3] ILO, Social Dialogue Report (Geneva, 2022), p. 51(box) ("In recent years, the ILO has increasingly focused on the access of workers in diverse forms of work arrangements in general, and of self-employed workers in particular, to collective bargaining. The ILO supervisory bodies have reiterated the universal character of the principles and rights enshrined in the fundamental Conventions. In 2019, the ILO Centenary Declaration for the Future of Work called upon all Members to strengthen the institutions of work to ensure adequate protection for all workers. It reaffirmed the continued relevance of the employment relationship as a means of providing legal protection to workers, emphasizing that all workers should enjoy adequate protection in accordance with the Decent Work Agenda, taking into account respect for their fundamental rights. More specifically, the ILO supervisory bodies have systematically noted that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), cover all employers and workers without establishing distinctions based on their contractual status)", online at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf

[4] The convention also allows flexibility for the ratifying Member State to determine through national law the extent to which the guarantees of the convention shall apply to the police and the armed forces.

[5] Convention 154 (Collective Bargaining Convention, 1981), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312299 (The convention states at Article 1 that it applies to "all branches of economic activity", while recognizing the potential limitations for police and the military, and the possibility for special modalities for public servants).

[6] Recommendation 204 (Transition from the Informal to the Formal Economy Recommendation, 2015), online at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204

raise with the ILO supervisory system so that it can develop targeted observations and recommendations on collective bargaining which workers organisations can then use to advocate with their respective governments for legal and institutional reforms.[7] Of course, any such reforms should be made in full consultation with worker organizations, especially those in , or having representatives from, the informal economy.[8]

Below are some common legal issues which frustrate and limit the exercise of the right to organise and collectively bargain in the informal economy. The text identifies where there are current observations by the ILO supervisory system, if any, and suggests how best to raise them with the various supervisory bodies. *As explained in the introduction to this series[9], if your country has ratified Convention 98, then written comments may be filed with the Committee of Experts in accordance with the reporting cycle for the convention though written comments may also be filed out of cycle in the case of, e.g., a major change in law. You can also file a complaint to the Committee on Freedom of Association at any time, without regard as to whether your country has ratified the convention or not.*

1. Scope of Labor Law

The labour and/or trade union laws of many countries exclude workers in the informal economy from coverage by defining its scope of application to those who are in a formal employment relationship. Depending on the law, the description of the employment relationship may be broad and therefore more inclusive, but in many cases the definition makes clear that the law applies in practice to workers in the formal economy only.[10] Some labour laws are in fact explicit in excluding some or all workers in the informal economy. As explained in Chapter 1 of this series, this exclusion denies workers the right to freedom of association. As a result, workers' organisations in the informal economy are not recognized and are denied the right to collectively bargain. This concern has been raised recently by the Committee of Experts, including in the following cases.

The Gambia: The definition of employee in the Trade Union Bill did not clearly protect self-employed workers and workers without employment contracts. The Committee called on the government to "take the necessary measures, in full consultation with the social partners, to ensure that the Trade Union Bill is revised and adopted shortly, with a view to guaranteeing that all workers, including prison officers, domestic workers, civil servants not engaged in the administration of the State, as well as self-employed workers and workers without employment contracts, enjoy the rights and guarantees set out in the Convention.")[11]

Syria: Section 5(b) of the Labour Act excludes several categories of workers from its scope of application, including independent workers, domestic workers, workers in charity associations, casual workers, etc., and exclusively refers to the content of their individual contracts of employment.[12]

[7] If your country has ratified Convention 98, written comments may be sent to the Committee of Experts on the Application of Conventions and Recommendations. The regular reporting cycle for Convention 98 can be found here: https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:14001:0::NO:14001:P14001_INSTRUMENT_ID:312243:NO. A complaint can be also filed with the Committee on Freedom of Association, even if your country has not ratified Convention 98.

[8] ILO Committee on Freedom of Association, Compilation of Decisions ¶ 1526 ("The Committee recalled that, according to the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), in designing, implementing and evaluating policies and programs of relevance to the informal economy, including its formalization, the Government should consult with and promote active participation of the most representative employers' and workers' organizations, which should include in their ranks, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy.).

[9] Online at https://www.ilawnetwork.com/wp-content/uploads/2024/03/ILAW-Applying-International-Labour-Standards-to-the-Informal-Economy-Intro.pdf

[10] However, some countries have expanded the scope of who is an employee by including provisions that deem certain categories of workers or occupational groups as employees. For example, in Australia amended the definition of 'employee' in the *Fair Work Act* to include subcontracted homeworkers in the clothing and footwear sector. In South Africa, the *Basic Conditions of Employment Act* identifies domestic workers as employees.

[11] ILO, Committee of Experts, Observation on Convention 98 – The Gambia (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4312497,103226,Gambia,2022

[12] ILO, Committee of Experts, Observation on Convention 98 – Syrian Arab Republic (2024), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4369008,102923

> **Haiti:** Despite the fact that the majority of the workforce is in the informal economy, the government had failed to indicate to what extent, if at all, workers in the informal economy are within the scope of the labour law. "Noting that most employment in Haiti is in the informal sector, the Committee requests the Government to indicate the manner in which the application of the Convention to workers in the informal economy is ensured and to clarify, in particular, whether specific measures have been adopted to address the particular difficulties encountered by these workers."[13]

This is not to say that workers in the informal economy are not engaging in collective negotiations. However, the bargaining counterparty for many occupational groups (such as street vendors and waste pickers) is the local authority. Without a statutory recognition of the right to form a union and collectively bargain, it is difficult to bring local authorities and others to the bargaining table. Also, negotiating against the backdrop of contract law places workers in informal employment in a much weaker position as such agreements are not protected by labour law, with its specific rules for dispute settlement and enforcement. Even in cases where workers in the informal economy form an association, often because they are prohibited from forming a trade union, they are still unable to conclude collective bargaining agreements. As explained in Chapter 1, workers should demand recognition of their organisations as trade unions.

For example,

> **The Philippines:** Department Order No. 40, 2003 distinguishes between trade unions, which can collectively bargain, and labour organizations, including in the informal economy, which can be organized for the mutual aid and protection but not for collective bargaining.[14]

Importantly, Article 4 of Convention 98 and Article 5 of Convention 154 require states to ***promote*** collective bargaining for all workers – including those in the informal economy. As such, the exclusion of workers organised in trade union in the informal economy from the right to bargain collectively is a clear violation of the state obligation to promote collective bargaining.

For example,

> **Argentina:** CTA Autonomous reported to the ILO that in the first quarter of 2023 the level of informality in the private wage sector reached 42 per cent and that over half of wage workers are not covered by any collective agreement. In response, the Committee of Experts "request[ed] the Government to provide information on the measures taken to promote collective bargaining for workers in the informal economy."[15]

> **Timor Leste:** In the absence of information about the promotion of collective bargaining, the Committee "reiterate[d] its request to the Government to provide information on any collective agreement in force in the country and encourages the Government to take measures to actively promote collective bargaining in all sectors of the economy, including in the informal economy."[16]

[13] ILO, Committee of Experts, Observation on Convention 98 – Haiti (2017), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3296780,102671. Note, the term "informal sector" is not the preferred term, but rather "informal economy". See, ILO, Resolution concerning decent work and the informal economy (2002), para 3, online at https://webapps.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf

[14] ILO, Committee of Experts, Observation on Convention 98 – The Philippines (2023), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4320867,102970,Philippines,2022 (The Committee urged the government to "to take the necessary measures to ensure that all workers covered by this Convention... can effectively benefit from the rights enshrined in the Convention, including the right to collective bargaining. The Committee further invites the Government to initiate a dialogue with the social partners concerned to identify the appropriate adjustments to be made to the collective bargaining mechanisms in order to facilitate their application to the various categories of self-employed and non-standard workers mentioned above.")

[15] ILO, Committee of Experts, Observation on Convention 98 – Argentina (2024), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4366194,102536,Argentina,2023

[16] ILO, Committee of Experts, Observation on Convention 98 – Timor Leste (2024), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4369514,103251,Timor-Leste,2023

Recommendation:

If workers in the informal economy in your country are excluded from labour law because it only applies to those with a formal employment relationship or employment contract, this should be raised with the ILO supervisory system. It is a clear violation of Convention 87 and, consequently, Convention 98, as well as the ILO Constitution. Even those associations created to organise informal economy workers should request that the ILO urge the government to recognise them as trade unions. In your submission, you should urge that the labour law be amended to ensure that workers in the informal economy have a right to bargain collectively, through a trade union.

See section 3 below on specific occupations for further recommendations.

2. Anti-Union Discrimination

The ILO Committee on Freedom of Association has held that, "Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions."[17] Article 1 of Convention 98 states that "workers shall enjoy adequate protection against acts of anti-union discrimination." This includes acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; or (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."[18]

In the formal workforce, anti-union discrimination usually takes the form of a direct employer firing someone for union activity, refusing to hire someone for union activity, or retaliating against a worker short of dismissal. In the informal economy, anti-union discrimination could take on a number of forms which, while not necessarily by a direct employer, could nevertheless lead to constructive dismissal or otherwise prejudice a worker for their union activity.

For example, these and other acts could constitute anti-union discrimination if undertaken because of a worker's trade union activity:

- a self-employed worker, such as a street vendor, could lose a license to operate, lose access to public space to vend wares, including marketplaces or other designated areas, have wares confiscated or be otherwise harassed or intimidated by public authorities;
- a worker in the informal economy could be arrested and prosecuted for protesting over conditions in their workplace;
- a home-based worker could be denied the materials to produce goods for a formal sector manufacturer, be given lower quality materials, paid less per piece, or have goods arbitrarily rejected;
- a domestic worker could be dismissed by an employer, face less favourable working hours or conditions, or suffer violence or harassment; and
- in all cases, workers could be blacklisted and unable to find work in the same area or occupation.

Unfortunately, the ILO supervisory system has had few opportunities to date to address cases of anti-union discrimination in the informal economy. The Committee on Freedom of Association did recently address a claim of anti-union discrimination in Peru filed by workers performing informal work at a fish market.[19] In that case, workers were hired by trucking companies as day labour to unload fish at the Villa María del Triunfo fish market. The workers unionized and sought to bargain collectively with the owners of the fish market because the market had failed to respect occupational health and safety regulations. The owners of the market refused and then sought to have the trucking companies retaliate by refusing to hire the workers. The owners then prohibited the trucks from unloading at the market. Following a short protest over these tactics, the owners then had the union leaders arrested and prosecuted, after

[17] ILO, Committee on Freedom of Association, Compilation of Decision, 1072.

[18] Ibid, Chapter 13, generally.

[19] ILO Committee on Freedom of Association, Case No. 3306, Report No 400 (Peru) October 2022, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4313417

which they were sentenced to several years' imprisonment.

Upon review of the facts, the Committee concluded that,

> [N]o person should be prejudiced in employment by reason of legitimate trade union activities and cases of anti-union discrimination should be dealt with promptly and effectively by the competent institutions. In light of the above, the Committee trusts that the Government has ensured that none of the union members have been affected in their access to employment because of their legitimate trade union activities[.][20]

Notably, the sentences were also overturned, and the Committee also informed the government that it expected that it would provide adequate compensation for their imprisonment.

Recommendation:

Anti-union discrimination can result from a broad range of actors, including persons other than the employer, when they are able to cause (or seek to cause) prejudice to a worker by reason of their participation in union activities. If you are a worker in the informal economy and are the subject of any form of retaliation for your union activities, your trade union can file a complaint with the Committee on Freedom of Association. You should try to have the matter resolved at the national level, though you need not use or exhaust domestic remedies before filing the complaint with the ILO. Your union can also report to the Committee of Experts if your country has ratified Convention 98.

3. Collective Bargaining by Occupation or Arrangement of Work

A. Self Employed Workers

Convention 98 protects the rights of all workers to collectively bargain, including worker organizations of the self-employed. The ILO has underscored this point on several occasions. In it 2012 General Survey, *Giving Globalization a Human Face*, the Committee of Experts explained that the right to collective bargaining should also cover organizations representing self-employed workers.[21] In its 2020 General Survey, which followed the adoption of Recommendation 204 in 2015, the Committee of Experts elaborated this point further.

> Recommendation No. 204 indicates in Paragraph 7 that the coherent and integrated strategies designed to facilitate the transition to formality should take into account the effective promotion and protection of the human rights of all those operating in the informal economy and the fulfilment of decent work for all through respect for fundamental principles and rights at work in law and practice (Paragraph 7(e) and (f)). Workers in the informal economy should enjoy freedom of association and the right to collective bargaining, including the right to establish and, subject to the rules of the organization concerned, to join organizations, federations, and confederations of their own choosing. This requires the existence of an enabling environment.[22]

The Committee of Experts and the Committee on Freedom of Association have also had opportunities to make observations concerning the failure of governments to extend the right of collective bargaining to self-employed workers.

For example,

> **Netherlands:** The Netherlands Authority for Consumers and Markets (ACM) refused to more broadly acknowledge the collective bargaining rights of self-employed workers that work side by side with regular employees, denying both those workers and the employees a fair income and allowing or even promoting underbidding, and that the Ministry of Social Affairs follows the

[20] Id. at 621.

[21] ILO, General Survey - Giving Globalisation a Human Face, (Geneva 2012), para. 209, online at https://webapps.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

[22] ILO, General Survey - Promoting employment and decent work in a changing landscape (Geneva 2020), para 826, online at https://www.ilo.org/resource/conference-paper/ilc/109/promoting-employment-and-decent-work-changing-landscape

ACM without giving consideration to the effects of the ruling on collective bargaining rights. The Committee "invite[d] the Government to hold consultations with all the parties concerned with the aim of ensuring that all workers including self-employed workers may engage in free and voluntary collective bargaining. Considering that such consultations will allow the Government and the social partners concerned to identify the appropriate adjustments to be introduced to the collective bargaining mechanisms so as to facilitate their application to self-employed workers, the Committee request[ed] the Government to provide information on the progress achieved in this respect."[23]

Republic of Korea: The Trade Union Law does not recognize individual truck-owner drivers, especially cement/concrete bulk transport truckers, as workers, denying them the right to associate and to bargain collectively. The Committee on Freedom of Association requested the Government "to take the necessary measures to ensure that all workers, including 'self-employed' workers, such as heavy goods vehicle drivers, can fully enjoy freedom of association rights with the organizations of their own choosing for the furtherance and defence of their interest, including the right to join federations and confederations of their own choosing subject to the rules of the organization concerned and without any previous authorization," and "to hold consultations with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that, on the one hand, workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining".[24]

In some cases, the difficulty can be in determining who is the notional employer for purposes of bargaining. In the case of a union of street vendors, it could be the municipal authorities who have control over the streets and decide therefore how that public space may be used. Municipal authorities may also manage registration to state or national level social services. As such, the municipal authorities may be the relevant entity. As in the Peru case mentioned above, the owners of the fish market had the responsibility to maintain safety and health in the market, and as such were the relevant entity for the trade union of informal dockworkers to bargain with on that issue. In all cases, the ILO has expressed the need for flexibility to adapt collective bargaining law to serve workers in the informal economy, and such adaptations be done in consultation with the relevant workers. In its recommendations in the Peru case, the Committee on Freedom of Association "*request[ed] the Government [to] create an enabling environment for workers in the informal economy, including dockworkers in the Villa María del Triunfo market, to exercise their rights to organize and bargain collectively, as well as to participate in social dialogue in the context of the transition to the formal economy.*"[25]

Recommendation:

Trade unions of self-employed workers have a right to bargain collectively. If the law in your country excludes self-employed workers from the right to bargain collectively as workers, then the relevant trade union should raise this with the ILO supervisory system. Importantly, they should be sure to identify the specific entities which have control over some or all aspects of the ability to work, and the conditions under which that work is undertaken. The government should be urged to facilitate bargaining between a union of self-employed workers and such entity or entities, following consultations.

B. Domestic Workers

Domestic workers, and migrant domestic workers in particular, face serious obstacles to the right to bargain collectively. In many labour laws, domestic workers are explicitly excluded from their scope, and thus have no right to form or join a union and bargain collectively. See Chapter 1, Freedom of Associ-

[23] ILO, Committee of Experts, Observation on Convention 98 – The Netherlands (2018), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3342047,102768,Netherlands,2017

[24] CFA Case No. 3439, Report 405 (March 2024) para 553, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4396599

[25] Para 623.

ation. In light of the high risk of exploitation that domestic workers face, the ILO adopted the Domestic Workers Convention (No. 189) in 2011.[26] Article 3(a) of the Convention requires each member to "take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely freedom of association and the effective recognition of the right to collective bargaining." Further, Article 2 of the Domestic Workers Recommendation (R201) calls on members to "give consideration to taking or supporting measures to strengthen the capacity of workers' and employers' organizations, organizations representing domestic workers and those of employers of domestic workers, to promote effectively the interests of their members, provided that at all times the independence and autonomy, within the law, of such organizations are protected."[27]

Collective bargaining can be difficult for domestic workers, as the industry comprises many individual workers providing services to many individual employers. A union of domestic workers can of course negotiate employer by employer, but setting wages and working conditions at on a sectoral basis can be difficult in the absence of an employers' association. However, in some countries, the state has established a tripartite board through which worker and employer representatives can negotiate basic terms and conditions through social dialogue.

For example:

United States of America: In 2018, the Seattle City Council passed a Domestic Workers' Ordinance[28] which establishes a tripartite Domestic Workers' Standards Board. The board includes six domestic worker representatives, six hiring entities and employers and one community representative. It makes recommendations on working conditions, protections, and benefits, to the city, which regulates the industry standards.

Uruguay: In 2006, domestic workers were recognised as workers by Law No. 18.065[29] and, in 2009, Law No 18.566 guaranteed their right to collective bargaining.[30] A tripartite collective bargaining structure was established with representatives from Sindicato Unico de Trabajadores (domestic worker trade union); Liga de Amas de Casa (an employer body founded by a group of employers) and the Ministry of Labour and Social Security. The first collective agreement was reached in 2008, which was extended to the sector and enforced by the Ministry.

Brazil: Amendment 72 of the Brazilian Constitution in 2013 recognised domestic workers as having the right to collectively bargain. The first of several collective bargaining agreements was concluded in 2013 between the Sindicato das Empregadas e Trabalhadores Domésticos da Grande São Paulo (SINDOMÉSTICA) and the Sindicato dos Empregadores Domésticos do Estado de São Paulo (SEDESP).[31]

Zimbabwe: The Domestic Employers Association of Zimbabwe (DEAZ) is in the final stages of registering, making it possible for the Zimbabwe Domestic & Allied Workers Union (ZDAWU) and DEAZ to establish a National Employment Council that could lead to collective bargaining agreement for domestic workers.

Recommendation:

Domestic workers have a right to bargain collectively, most recently acknowledged in Convention 189. If the law in your country excludes domestic workers from the right to bargain collectively through a trade union, then the relevant trade union should raise this with the ILO supervisory system (under Conventions 98 and 189). The government should be urged to facilitate collective bargaining between a trade union of domestic workers and employers (or associations of such employers), following

[26] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189

[27] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R201

[28] Ordinance 125627 available at https://seattle.legistar.com/View.ashx?M=F&ID=6451347&GUID=107050D2-BEFC-4B43-BC0D-B7AD73ADABF1

[29] https://www.impo.com.uy/bases/leyes/18065-2006

[30] https://www.impo.com.uy/bases/leyes/18566-2009

[31] Ana Virginia Moreira Gomes and Rupa Banerjee, *The guarantee of freedom of association and collective bargaining rights to domestic workers: two opposite models, Brazil and Canada*, Pensar, University of Fortaleza 2017, at 6-7, online at https://ojs.unifor.br/rpen/article/view/6363

consultations with organizations of domestic workers.

C. Cooperatives

As an initial matter, it is important to distinguish between several different situations involving cooperatives. In some cases (1), workers are hired by a cooperative and, as such, the cooperative is an employer just like any other. In other cases (2), employers have demanded that workers form a cooperative to avoid classifying them as workers, and then hire them through a commercial contract rather than a labour contract. As such cases are meant to disguise an actual employment relationship, workers in this situation should simply be considered employees of the employer.[32] In still other cases (3), workers are owners in a legitimate, self-managed cooperative.

In 2002, the ILO adopted the Promotion of Cooperatives Recommendation (R193) in recognition of the role they play to promote economic and social participation and development, including job creation.[33] Article 8(1)(a) of the Recommendation makes clear that states should adopt national policies with respect to cooperatives that "promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work, for all workers in cooperatives without distinction whatsoever," which includes the right to collective bargaining.[34] Further, in its 2022 report, Decent work and the social and solidarity economy, prepared for a General Discussion at the International Labour Conference, the ILO found that social and solidarity economy (SSE) units "promote compliance with the fundamental principles and rights at work among their members" and "can help tackle workers' rights deficits relating to freedom of association and collective bargaining."[35] In the tripartite resolution adopted as a result of the general discussion, the Committee agreed that members should "respect, promote and realize the fundamental principles and rights at work, other human rights, and relevant international labour standards, including in all types of SSE entities."[36] It went on to state that, in light of challenges, members should also consider "ensuring that entities and workers in the SSE benefit from freedom of association and the effective recognition of the right to collective bargaining to enable social dialogue through the most representative organizations of employers and workers for shaping measures which directly affect entities and workers of the SSE and, where appropriate, with relevant and representative organizations of the SSE entities concerned."[37]

There are few observations by the ILO supervisory system concerning labour cooperatives. The Committee on Freedom of Association recently had the opportunity to address a complaint filed by the Civil, Social, Cultural and Sporting Association of Túpac Amaru, in 2016 against Argentina.[38] Túpac Amaru described itself as a grassroots and indigenous political group that aims at revitalizing the most underprivileged sectors of the province through the management of housing, health, employment and education programmes by local cooperatives run by the residents. In reviewing the specific allegations by the cooperative, the Committee recalled that "such workers should enjoy the right to join or form trade unions in order to defend those interests." However, in light of the facts of the case, it was not apparent that the protest action taken by the members of the cooperative arose from a labour dispute or that the measures taken by government impacted the exercise of trade union rights. Thus, the Committee declined to pursue the case further.[39]

In a previous case concerning a cooperative of young workers working outside of a drugstore in Colombia, the Committee explained:

[32] ILO, Committee of Experts, Observation on Convention 87 – Colombia (2006)(concerning intermediation through so-called "associated labour cooperatives"), online at https://normlex.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2260741,102595

[33] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_code:R193

[34] Importantly, the recommendation also makes clear that cooperatives "are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships."

[35] Para 82, online at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_841023.pdf

[36] Para 6(c), online at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_848633.pdf

[37] Id. at 7(e).

[38] CFA Case 3225, Report No 401, March 2023, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4341016

[39] Id. at para 117.

> The Committee requests the Government to take the necessary measures to ensure that those minors who provide services outside Supertiendas y Droguerías Olímpica S.A. are able freely to exercise their trade union rights in order to defend their rights and interests, irrespective of whether they work directly for Supertiendas y Droguerías Olímpica S.A. or are self-employed workers or work for a cooperative.[40]

In sum, workers in any of the three scenarios outlined in this section have the right to form a union and bargain collectively. When a cooperative is the employer and has hired workers in the informal economy, those workers must have a right to bargain collectively through a trade union. In the case of a legitimate, self-managed membership cooperative, those workers should also have a right to affiliate to a trade union. Alternatively, the members can register as a trade union assuming they meet the legal requirements consistent with Convention 87.

Recommendation:

If the law in your country does not allow workers in the informal economy to form or join a union, and workers have instead formed a cooperative, they should file a complaint with the Committee on Freedom of Association to demand effective recognition as a trade union assuming that it is compatible with the nature and representativeness of a trade union. Comments could also be filed with the Committee of Experts.

D. Digital Platforms

In 2021, the ILO published its much-anticipated flagship report on the role of digital labour platforms in the world of work in 2021.[41] It explained that "all workers, including platform workers, enjoy the rights to organize and engage in collective bargaining under Conventions Nos 87 and 98.[42] The ILO's most recent 2022 Social Dialogue Report concludes that "given the rise in diverse forms of work arrangements, there may be a need at the national level to review existing regulatory frameworks to ensure that those in work relations who require the protections provided by labour laws and other laws and regulations are indeed afforded them, including the effective recognition of the right to collective bargaining"[43].

Parallel to this, the ILO's supervisory bodies have also considered the application of international labour standards, both in law and practice, in the context of digital platforms. In its 2020 General Survey[44], the Committee of Experts emphasized that "the full range of fundamental principles and rights at work are applicable to platform workers in the same way as to all other workers, irrespective of their employment status".[45] Additionally, the Committee of Experts has referred explicitly to the Employment Relationship Recommendation, 2006 (No. 198) as a tool to determine the existence of an employment relationship.[46] It also indicated that "the principle of the primacy of facts is helpful, particularly in situations where the employment relationship is deliberately disguised".[47] The Committee of Experts also held that while employment status is not an expressly protected ground of discrimination under international labour standards "further attention should be paid to addressing the potential of employment discrimination on this basis".[48]

In a direct request to the Government of Belgium regarding the way in which workers in the platform economy were able to organize and conduct collective bargaining in the context of Convention 98, the CEACR invited it "to hold consultations with the parties concerned with a view to ensuring that *all* platform workers covered by the Convention, irrespective of their contractual status, are authorized to participate in a free and voluntary collective bar-

[40] CFA Case No. 2448, Report 3442 (Colombia) June 2006, Para 405, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2909725

[41] https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm

[42] Id. p. 211.

[43] *Social Dialogue Report 2022: Collective bargaining for an inclusive, sustainable and resilient recovery. Geneva: ILO, 2022*

[44] ILO, Promoting employment and decent work in a changing landscape (Geneva 2020), online at https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS_736873/lang--en/index.htm

[45] Id., para. 327.

[46] Ibid.

[47] Id., para. 230.

[48] Id., para. 1067.

gaining".[49] The Committee of Experts also noted *with interest* new legislation in Greece that provides collective bargaining rights to digital platform workers in Greece who are classified as independent contractors.[50]

In practice, there are several obstacles to collective bargaining. Workers can be geographically dispersed, especially those who are performing web-based tasks. In some cases, however, workers have been able to communicate and organize through digital communications. Those who work on location-based platforms, like ride-hail and delivery, have also been able to associate physically and take collective action. Another problem, competition law is often used to prohibit collective bargaining for those who are self-employed or not considered to be in an employment relationship on the presumption that such an engagement is construed to be a cartel. However, this runs contrary to the rights enshrined in Convention No. 98, which should be available to all workers.

Some governments have begun to regulate to afford the right to bargain collectively to some digital platform workers. The Spanish *Ley Rider*[51] applies to food delivery platforms and creates a rebuttable presumption of an employment relationship for food delivery riders.[52] The law also requires that such businesses inform food delivery riders about how algorithms and artificial intelligence affect their working conditions, hirings, and firings. This law exclusively applies to food delivery riders working for digital platform companies and does not apply to other workers in the digital platform economy. As employees, they are able to form a trade union and bargain collectively with their employer. Notably, digital apps have circumvented the law by entering into a commercial relationship with a subcontractor, who is then the direct employer of the riders.

At the European level, Article 25 of the new EU Platform Work Directive calls for the promotion of collective bargaining in platform work. Specifically, it provides, "Member States shall, without prejudice to the autonomy of the social partners and taking into account the diversity of national practices, take adequate measures to promote the role of the social partners and encourage the exercise of the right to collective bargaining in platform work, including measures to ascertain the correct employment status of platform workers and to facilitate the exercise of their rights related to algorithmic management set out in Chapter III of this Directive."[53]

Finally, a draft law in Brazil would extend the right to form or join a trade union and to collectively bargain, though it would not recognize workers on digital platforms as employees but as self-employed (see, Article 3).[54]

Recommendation:

If the law in your country does not recognize the right of platform workers to form or join a trade union and bargain collectively, this should be raised with the ILO. All workers, whether employees or dependent self-employed have the right to bargain collectively. If the problem is created by the operation of competition law in your country, the union should raise this and urge the ILO to recommend that the law be amended so as to create an exception for negotiations over wages and conditions of work, which should not be subject to competition law (see following section).

[49] CEACR, Direct Request, Right to Organise and Collective Bargaining Convention (No. 98)(Belgium) 2021, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4058565,102560,Belgium,2020

[50] CEACR, Observation, Right to Organise and Collective Bargaining Convention (No. 98)(Greece) 2022, online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4120774,102658,Greece,2021

[51] Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales, online at

[52] The rebuttable presumption exists when the following four conditions are met: (1) the provision of services by one person; (2) the delivery of goods to a final consumer; (3) the direct or implicit exercise of the employer's management via a digital platform; and (4) the use of an algorithm to manage the service and determine working conditions.

[53] EU Press Release, Platform workers: Council confirms agreement on new rules to improve their working conditions, 11 March 2024, online at https://www.consilium.europa.eu/en/press/press-releases/2024/03/11/platform-workers-council-confirms-agreement-on-new-rules-to-improve-their-working-conditions/

[54] Projeto de Lei Complementar, PLP 12/2024, online at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2391423&filename=Tramitacao-PLP%2012/2024

E. Sectoral Collective Bargaining

For many workers in the informal economy, their "workplace" is not in an enterprise but in the public space (such as street vendors, waste pickers, informal transport operators) or in a private home, including their own home (such domestic workers, care workers, and industrial outworkers/homeworkers). As discussed in Chapter 1, some labour laws require unions to form a pyramid-shaped structure, with the establishment of lower-level, enterprise-based unions, which then in turn affiliate to create sectoral or occupational unions. This structure creates obvious problems. The more appropriate structure for workers in the informal economy may be a trade union organised on a sectoral, occupational, or geographical basis. However, many labour laws also require a high minimum number to form such sectoral or occupational trade unions. Other laws may technically allow for the formation of sectoral trade unions, but then have no effective mechanisms for collective bargaining at the sectoral level.

> **Guatemala:** Section 215(c) of the Labour Code requires a membership of "50 percent plus one" of the workers in the sector to establish a sectoral trade union.[55] Moreover, the law has no regulation for the modalities of collective bargaining at the sectoral level.

> **United States:** The National Labor Relations Act sets as the default single worksite bargaining.[56] While it is technically possible to establish a multi-facility bargaining unit of a single employer, the union would have to obtain the support of the NLRB for the larger unit. The law also allows employers to participate in bargaining unit determinations, which can lead to the defeat of units through various tactics to manipulate the unit's scope.

Of note, some governments have introduced or amended legislation in order that trade unions of self-employed workers may bargain collectively at an occupational level. For example,

> **Canada:** *The Status of the Artist Act* deems self-employed artists to be employees for purposes of qualifying for exemption from competition law. The labour tribunal issues a bargaining certificate when it is satisfied that the association is 'most representative' in the sector.[57] Further, the *Quebec Home Childcare Providers Act* establishes a 'sector-based collective bargaining scheme' for self-employed childcares.[58]

> **Ireland:** The Competition Amendment Act of 2017 states that trade unions of certain categories of dependent self-employed workers may conclude collective agreements without running afoul of competition law.[59]

Recommendation:

If these requirements are an issue in your country, the relevant trade union should raise them in its comments to the ILO supervisory system. The union should ask the ILO to urge the government to amend its laws so that trade unions of workers in the informal economy can form and collectively bargain at the level most suitable to their needs (by workplace, sector, occupation, geography, etc.).

[55] ILO, Committee of Experts, Observation on Convention 98 – Guatemala (2024), online at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4366690,102667,Guatemala,2023

[56] See, 29 USC 159(b).

[57] Shae McCrystal 'Collective bargaining by self-employed workers in Australia and the concept of "public benefit"' (2021) 42(2) *Comparative Labour Law and Policy Journal* at 686.

[58] Ibid at 397.

[59] Online at https://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/print.html