

# Labour Law and the Informal Economy

## Working Group Meeting

Geneva, Switzerland  
15<sup>th</sup> and 16<sup>th</sup> June 2002

Meeting Report

Final draft

The global network Women in Informal Employment: Globalizing and Organizing (WIEGO), organized a one and a half day meeting in Geneva to discuss key legal issues regarding how to protect the rights of informal workers. Nineteen lawyers and activists from around the world attended the meeting. Muneer Ahmad and Lora Jo Foo co-chaired the meeting. This report provides a brief background on the meeting, a summary of the presentations and discussions, and an articulation of recommendations arising from the meeting.

### **Background**

Labour law distributes economic rights between employers, employees and the state. As a mediating force, labour law can both enable and combat exploitative conditions of the informal economy. It is thus an important aspect of any effort to improve conditions for informal workers, whether through the reversal of informalization in industrialized nations, the formalization of economic relations in developing countries, the preservation of aspects of informality that benefit workers, or through other means. Recognizing the disparate negative impact of informality on women, strategies for the reform of labour law must be designed to achieve economic equality for both men and women.

The discussion in Geneva grew out of a session at the WIEGO annual meeting in Ahmedabad, India, as well as several previous meetings organized by WIEGO to incorporate a legal analysis into the study of women in informal employment. Participants in the Ahmedabad meeting discussed the impact of both international and domestic laws on the informal economy and examined non-legal and non-traditional strategies to improve conditions of informal economy workers. Participants contributed information on domestic labour law; gaps in protection and the reforms needed; the ways in which international law can be used domestically; and non-legal strategies for workers protection, such as organizing or codes of conduct. The meeting in Geneva was designed to carry this discussion forward and to identify with greater specificity the directions that WIEGO's work on labour law might take.

### **Aims and Objectives**

The objective of the meeting was to identify the key legal questions concerning protection of informal workers, with two outcomes in mind: first, to begin to formulate a concrete program of action and research for WIEGO on the relation of labour law and labour law reform to conditions of informal employment; and second, to identify ways that WIEGO might use the 2003 International Labour Committee general discussion on "employment relations" to advance this agenda.

The meeting included a series of presentations by participants on their firsthand experiences working with informal workers, as well as presentations on conceptual and theoretical challenges confronted in a consideration of labour law and the informal economy. In this manner, the meeting sought to provide a discussion of labour law issues that was grounded in and informed by the lived experiences of informal workers with whom the participants were familiar.

*15<sup>th</sup> June 2002*

***Introductory Remarks: Enrique Marin & Ike van den Burg***

*Enrique Marin* from the ILO began the meeting with a discussion of background events leading up to the anticipated ILO 2003 discussion on "employment relations." He reviewed the ILO's 1997-98 consideration of "contract labor," and discussed the ILO's failure to produce a convention regarding the term due to strong opposition from the employer and government representatives regarding a proposed definition of the term. At the end it was decided that more research was needed and the issue would again be taken up for discussion in four years' time. In the meantime studies would be conducted to investigate and identify situations where workers require protection.

The ILO subsequently formulated the question as one of workers' protection. In so doing, they focused on the ambiguity of employer relations. Through a series of country reports (29 of which have been completed, with 10 more pending), they identified four categories of workers and corresponding employment relations that reflect this ambiguity:

- 1) dependent workers;
- 2) non dependent workers, including own account workers;
- 3) triangular workers (i.e., workers working through one or more intermediaries);  
and
- 4) dependent-independent workers (i.e., workers who have different employment statuses and who may move back and forth between being a dependent worker and being self-employed).

The country reports studied bilateral and trilateral employment relations, and revealed several characteristics common in nearly all the countries studied. With regard to bilateral relations, the reports demonstrated: (1) an inability of legislation to capture the complexity of existing employment relations; (2) a multiplication of ambiguous working relationships all over the world; (3) certain sectoral similarities across different countries (e.g., lorry drivers); and (4) a trend toward judges' inquiry into the economic realities of employment relations in order to determine legal liability. Similar issues arose in the context of triangular relations, in particular the difficulty of identifying the roles played by different actors and the problem of disguised worker relationships.

Enrique spoke more specifically about the legal features of Latin American countries for which reports were produced (10-12 studies). He noted four salient features: (1) labor law in these countries date from the 1920s, and has a high degree of non-applicability today; (2) worker protections are, in theory at least, articulated in both statutes and

constitutions; (3) because Latin American countries primarily follow civil law (i.e., written law) systems (as opposed to the common law system of the U.S. or Great Britain, which allows for law to be more freely developed by judges through individual cases) there is less of a problem of shifting definitions of employer relations; and (4) the lack of precedential value of cases in civil law countries may be a barrier to reform of such definitions.

Apart from the ambiguities plaguing employment relations, Enrique also noted the problem of access to justice, and the limited utility of improved laws if low-income workers lack the means to enforce them. He also suggested the potential value of litigation, including class actions, to go after the real employers in informal worker cases.

Enrique reported that subsequent to the presentation of the country reports, the governing body of the ILO decided to table the question of employment relations until the ILO conference in June 2003. The topic for discussion is listed as “Employment Relationship (scope)” and is scheduled for general discussion and not for standard setting.

He noted that the ILO is not intending to craft a uniform definition of employment relations because it is too impractical to do so. Rather, the ILO would like to develop a common understanding of the problem among the stakeholders, encourage employer responsibility, and demonstrate good practices. He suggested that governments be asked for clearer definitions and basic protections for all workers. His specific suggestions are listed in the section on Recommendations and Next Steps of this report.

*Ike van den Burg* from European Union made a brief presentation highlighting the recent discussions in the EU on employment relationships. She said that relevant discussions on the European level are taking place with regard to “undeclared work,” telework and domestic work and undocumented immigrants.

Ike also mentioned the Commission on Equal Treatment of Temporary Agency Workers. The commission is looking at equal treatment at the level of enterprise as well as that of labour.

***Panel 1: Lora Jo Foo, Dhimant Vasvada, Jan Theron & Kamala Sankaran***

*Lora Jo Foo* from Sweatshop Watch California, USA, made a brief presentation on the Sweatshop Accountability Law, Assembly Bill 633 (AB 633), recently adopted by the California legislature.

The garment industry in California is the largest in the United States, accounting for 160,000 workers, mostly immigrant women. There are 15,000-20,000 garment workers in San Francisco and about 140,000 in Los Angeles. Sixty-one percent of the L.A. garment factories violate minimum wage and overtime laws and it was estimated in 1998 that that employers owed workers as much as \$73 million in back wages to garment workers. The reasons for the emergence of sweatshops in the garment industry are multiple: subcontracting; consolidating power of retailers; forces of globalization and poor enforcement of labour laws.

Lora chronicled the struggle for law reform in the California garment industry, noting that there have been four key phases: the passage of a registration requirement for all garment manufacturers and contractors in the state, enacted in 1980; litigation and judicial expansion of the law on joint employment, from 1980-1999; passage of AB 633 in 1999; and the challenges of implementation of AB 633, particularly with regard to the definitions in the law, which are ongoing.

AB 633 is the first garment manufacturer liability law in the country with teeth. It is also an explicit recognition of the manufacturers' responsibility for ensuring that the workers who sew their clothes get paid.

AB 633 imposes a wage guarantee on garment manufacturers so that the manufactures and retailers who engage in the manufacturing of private label clothing ensure with their contractors that workers are paid minimum wages and overtime. If contractors fail to pay minimum wage and overtime, the manufacturers bear legal responsibility to do so. It also provides an expedited administrative process before the California Labor Commissioner to recover unpaid wages under the guarantee. The bill also establishes successor employment liability so that garment factories cannot shut down and reopen under a different name to avoid paying the wages of its former employees.

The bill creates full joint liability for manufacturers using unregistered contractors, allows garment workers employed by unregistered contractors to bring legal action to recover wages, damages and penalties from the manufacturer who contacted with the unregistered contractor, and includes a provision that stipulates that absence of records should be presumed as falsified records and prescribes damages as twice as much as minimum wages.

*Dhimant Vasvada*, a lawyer with Self Employed Women's Association in Ahmedabad, India, cited the case of beedi workers to illustrate how the workers in informal sector are deprived of welfare benefits to which they are entitled due to non-compliance and non-implementation of the labour laws in India. He argued that the main problem in India is not the labour laws themselves, but rather the poor enforcement of these laws.

Discussing the case of Patel Jivrajbhai beedi workers, Mr. Vasvada noted that India's Employees Provident Fund commissioner has held that homeworkers rolling the beedies of a business establishment are the workers of that establishment, thereby requiring the employer to make contributions to the provident fund on the workers' behalf. Employers have challenged this and other decisions in the High Court, and unions have been wary of seeking compliance with the orders for fear that the employers will terminate services of the homeworkers. This has occurred despite favorable outcomes from the Indian Supreme Court on related matters. The result is that, despite appropriate legislation and administrative rulings, the provident fund is unavailable to workers in the informal sector, whether working at home or in a factory.

Mr. Vasvada cited a number of cases from the Indian Supreme Court, dating back to the early 1970s, to demonstrate the broad scope that the court has attributed to the employer-employee relationship. In the case of *Saruspur Mills Co. Limited And Ramanlal Chimanlal And Others*, in 1973, the Supreme Court held that even the employees employed by the Co-Operative Society which managed the canteen of a factory were the employees of the factory and were entitled to all benefits.

In the same year, in the case of *Silver Jubilee Tailoring House And Others And Chief Inspector Of Shop And Establishment And Others*, the Supreme Court of India held that if an employer has the right to reject the end product, the element of control and supervision is also present. In 1978 the Supreme Court held that if the livelihood of the workmen substantially depends on labour rendered to produce the goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship cannot snap the real life bond.

Mr Vasavada made the following recommendations:

- The definition of the workman/employee should be so amended in all laws so as to include part timers, casuals, temporary employees engaged through the contractor or home based worker.
- Workers' unions should be involved in ensuring compliance of the labour laws. For example, for minimum wages, the unions should be given statutory authority to secure the compliance of the provision of the act rather than leaving it to the government authority.
- For the Provident Fund, the power to implement the program should be simultaneously conferred on the office bearer of the union or the concerned employee with the aid of the office bearer of the union. Employer contributions to the fund be derived from a direct tax on employer revenue rather than being based on contributions per worker.

*Jan Theron* from the University of Capetown, South Africa, presented a small case study to highlight the vulnerable position of a bakery contractor. In South Africa there are many labour laws like the Basic Conditions of Work Act, the Equity Act, Skills Development Act, and the Unemployment Insurance Act. Despite the existence of this body of law, these laws are frustrated by the lack of enforcement with regard to informal sector workers. As Jan noted, "On the surface all is well. On the ground, things could hardly be worse."

Jan described the following scenario: A supervisor in a bakery is forced into an arrangement where he is a contractor for the bakery, employing about 15 workers. He pays reasonable wages and tries to comply with the labour legislation. However, his own position is very precarious. If he loses his contract, all the workers under him lose their employment and the obligation for compensation is all his. He works under a contract that signs away many of his rights as well as those of the workers. The labour laws of

South Africa fail to reach this situation both because of problems of enforceability and because of problems with the courts.

*Kamala Sankaran*, from the Faculty of Law at the University of Delhi, India focused her presentation on theoretical models of employment relations embodied in Indian labour legislation that could prove useful for the development of additional legal tools to protect informal workers.

For instance, under the Trade Unions Act of 1926 a workman is defined as one who is employed or engaged in an industry. This form of definition enables a self-employed person to be treated as a workman. Other laws have defined an industrial establishment as covering homes of beedi workers, and those working off-site at a premise other than that of the employer.

Another important aspect of Indian law is the creation of tripartite boards that regulate employment relations and social security payments for workers in certain sectors. This shifts the liability of providing social security from the employer to the tripartite boards. In other instances, the law stipulates that those working in triangular relationships, that is those employed via a contractor or intermediary, would have wages and other benefits provided by the user enterprise in the event of a default by the contractor. Tripartite boards offer a way to convert commercial contracts into employment contracts that directly benefit workers, including informal workers.

During the discussion following the first panel, Jennifer Gordon noted that the presentations were all industry-specific, but that there is a growing trend among immigrant workers to move between industries. She suggested that moving from an employer-employee relationship to an industry-based model does not work for these workers insofar as they have mobility among industries or occupy multiple industries simultaneously.

Jan noted that labour legislation in South Africa took a sectoral approach, and that it also distinguished between production and services. He also noted that although there was a move toward general unions in the 1970s, in recent years there has been a shift back toward a sectoral approach.

***Panel 2: Arbind Singh, Leah Vosko, Jennifer Gordon & Karin Ullrich***

*Arbind Singh* from National Alliance of Street Vendors (NASVI) presented the case of street vendors in India. There are 10 million street vendors in India and their number is on the rise. The reasons for their growth include increasing unemployment, migration from rural to urban areas, globalization and retrenchment of workers.

Cities are excluding the poor from urban planning. Street vendors have encountered massive evictions over the past ten years. In general, there is no local, state, or national policy regarding street vendors. According to the Police Act, street vending is a

cognizable and punishable act. Street vendors also confront a multiplicity of authority and burdensome licensing laws. They have no access to credit (vendors pay the equivalent of 482% in interest) and lack social security. Recently, the government has started drafting the national policy on street vendors.

Proposed solutions included: networking of vendor organizers and organizations; recourse to the courts to obtain orders regarding the issuing of licenses and declarations of hawking zones (this was recently done in Bangalore); amending the Police Act; and forming street vendor cooperatives so as to get rid of middlemen.

*Leah Vosko* from the Alliance for Contingency Work, York University, Canada made a brief presentation on the Status of the Artists Act. In Canada, 18% of the total workforce is self-employed (11% are own account, 7% self-employed and employing others), a high rate for an industrialized country. The social security coverage for this sector of workers is quite uneven, as coverage under each program depends on different definitions of employee.

The Status of the Artist Act allows professional, independent artists to organize and bargain collectively. Instead of a labor relations board, there is a tribunal. The tribunal also sets scale agreements that become minimum terms – for hours, and prices as well as establishes a fixed term license for organizations. To come under the purview of the Act, an artist must be a professional artist and must be engaged in production. The Act is limited in two major regards: producers are not compelled to bargain, and it is unclear who counts as a “professional artist.” Nonetheless, the Act represents one example of a labor relations approach to independent contractor relations.

*Jennifer Gordon*, a lawyer and organizer from the United States, made a presentation on Latino immigrant workers, who work as day labourer and domestic workers, particularly in the context of the Workplace Project in the Long Island, New York.

Long Island is home to more than 165,000 Latino residents, 6.3% of its total population. The vast majority of Latino immigrants in Long Island work as day labourers for landscape and small construction contracting. In addition, many immigrant women work as domestic workers. As with much work done by immigrants around the country, these jobs belong, in varying degrees, to the underground economy. Employers are rarely registered with the appropriate authorities; many of them neither comply with labor laws nor pay taxes to the government; and often, they fail to participate in mandatory insurance programs such as workers’ compensation or disability benefits. Few workers are unionized, and those who are frequently complain that their unions do nothing for them. Non-unionized workers have neither job security nor health benefits; their wages—when they are paid—are extremely low and their hours are long and irregular. Health and safety laws are violated with impunity, leading to high rates of injury and occupational disease.

Day labourers are usually employed for landscaping and small-scale construction. They wait at a designated street corner to be picked up by landscaping employers. The street corner provides a good venue for networking and for organizing efforts. In contrast, the domestic worker workers in isolation, in the suburbs. Their isolation also makes outreach difficult. There are no networking opportunities and the job itself is a dead end.

The Workplace Project, based in Long Island, provides legal services for workers with labor problems, in the form of a weekly legal clinic, in order to draw workers into organizing efforts. It is an effective means for bringing workers into the organization. It attracts new immigrants to the Project each week by demonstrating to them that the organization is willing to fight with them and on their behalf and that challenges to employers can succeed. The new cases that workers bring to the Project occasionally serve as a starting point for organizing. The flow of workers through the clinic helps the Project to monitor what is happening in the community and in workplaces around Long Island. Finally, the legal clinic provides financial sustenance to the organization. Beyond serving financial needs, the legal program helps to recruit and incorporate volunteers.

Jennifer's comparative analysis of day laborers and domestic workers revealed significant differences in workplace conditions and opportunities for organizing among men (day labourers) and women (domestic workers). She noted, for example, that for men day labour is often an entry point into better work, street corners are public networking and bargaining spaces, and the job offers the possibility of short-term work. In contrast, women domestic workers are typically in isolated, suburban, live-in situations from which it is hard to attain to a better job, their social contact is typically limited to that with their employer, and they are frequently dependent upon their employer for shelter. As a result, one might conclude that organizing makes more sense for domestic workers, who are long-term, than it does for day labourers, who are short-term.

*Karin Ullrich* from Southwest Centre for Economic Integrity, USA presented a case study of adult homeless brokered day labourers in the U.S. There are three million homeless in US, of which 25% are day labourers. Eighty percent of the homeless are men, 20% are women. African Americans and Native Americans are overrepresented in the homeless population. Poor Latinos tend to live in overcrowded, substandard housing. Homeless day labourers often live in deep poverty and precarious living conditions. They are viewed as criminals, with the common perception being that one cannot be homeless without having broken the law. Sometimes, social security creates more problems than providing any protection. For instance, the child support debt for a prisoner is based on minimum wage even though prison labor is compensated at significantly less than minimum wage. Many men therefore leave prison with huge debts.

Homeless workers are brokered by employment agencies that becomes the employer. Men report to a labour hiring hall where they are issued a labour ticket and are given dispatches and assignments, and are frequently paid substandard wages.



The strategies to combat the problems encountered by homeless day labourers could include establishment a non-profit day labour centre and assurance of minimum wages and legal protection.

Remarking on the cases presented, Muneer highlighted four conceptual issues.

- Overbreath – both of the workers in the informal economy and of the laws affecting the workers in the informal economy. While the former ranges from freelance editors in Canada to street vendors in India, the latter includes debt/credit laws in India, parental support/ prison laws and immigration laws in the U.S.;
- Problem of enforceability of good laws, access to justice and the role of the courts/ political will of the judges;
- Multiple uses of the labour law and the need to develop deeply contextualized, local strategic processes; and
- Impact of globalization – on policy decisions, legislature and on governance and the global-local paradox.

### **Key Questions**

The plenary also identified the following key questions.

1. How should one deal with multiple definitions of employee within a single nation's laws?
2. Can conditions for informal workers be improved through expanded definitions of employer and employee?
3. How can labour laws be made more inclusive, to cover those who work and not just employees?
4. How do we increase worker protection?
  - Employer relations
  - Social protection
  - Other laws
  - Commercial contracts
  - Non-legal
5. Can labour law be based on something other than employer-employee relations?

16<sup>th</sup> June 2002

***Guy Standing***

The half-day session opened with a presentation by Guy Standing. Dr. Standing discussed modes of control as a framework for rethinking work and labour. He has argued that the ILO must shift away from labor and employment toward a broader focus on work, a shift that has been achieved. Despite this advancement, he noted that much of the debate is still about statuses that derive from industrialized economies, using traditional terms of control of the workplace. He suggested that a discussion about control opens up different way of looking at work, beyond merely status.

He suggested that the argument about flexibility that animates informalization is really about re-exerting control over workers and the workplace. He argued that control is a multiple notion. Control means setting of limits – to an object of knowledge or range of behaviour – and an exertion of pressure to induce a reaction. Controls can compel somebody to do something, can raise the cost of doing something or not doing something and prevent someone from doing something. They may also prohibit someone for doing something. Therefore controls determines the range of feasible choices, preventing some that might be desired or imposing costs on certain options that influence the choice or give incentives to take a particular choice.

Dr. Standing identified seven entities over which control is exercised:

- 1) the self
- 2) labour (uses of time)
- 3) means of production
- 4) raw materials
- 5) development and refinement of skills
- 6) output
- 7) proceeds/income

Dr. Standing further distinguished between the controls that are internal and those that are external to the enterprise. External controls include economic claim enforcement mechanisms, such as wage setting or extra-economic like coercion. Internal controls have evolved out of simple controls to technical, bureaucratic and occupational control and may be linked to the character of labour, notions of skill, job and occupation.

He concluded that various forms of resistance to modes of control must be examined when thinking of work. Control (of a worker) must be accompanied by responsibility (to the worker) and rights (of the worker). Social protection should be seen as a system which enables people to make rational decisions about their work by agreeing to certain controls in exchange for guarantees of responsibility and rights.

## **Concluding Remarks and Recommendations**

A summary of the discussion after Dr. Standing's presentation follows:

Labour laws based on the employer-employee relationship cannot protect all categories of workers in the informal economy. By its very definition, the term employee excludes certain kinds of employment relations where a clear employer-employee relationship is not present or not visible. The home-based worker, the worker working through intermediaries on a triangular or multilateral relationship, or those employed in other kinds of disguised employment are left outside the ambit of such laws. Underlying the definition is also the assumption that the employee has a single job and works for only one employer at a time. This is far from the truth for many workers in the informal economy. Workers often move across sector and may hold more than one kind of job in a year or, sometimes even in a day. There are workers who may be self-employed at one time who are employees at another. Most labour laws are not incapable of capturing these transitory and multiple statuses. Then there is the question of liability. Who is responsible for the worker's protection – particularly when it is a self-employed worker or a home-based one?

It is crucial to widen the coverage of the labour law to include all categories of workers, particularly disguised workers and own-account workers in the informal economy. In addition, there is a need for joint- or multiple- liability laws that push legal responsibilities for the wage and working conditions of home workers and others in the informal economy up the production chain to the subcontractor, contractor, manufacturing firm and multinational corporation. However, this may not be possible simply by expanding the definition of the term employee. There are limits to how much we can rely on the extending the definition of the term. Besides, definitions can exclude, too, and too much focus on definitions may distract from the main objective. It may be necessary to move away from the definition question and view worker protection in the context of controls and resistance and the workers rights and responsibilities. Labour laws must be supplemented with social security policies and schemes and other extra legal procedures. There has to be harmony between labour law, and other laws of the land like the constitutional law and contractual law, etc.

The meeting concluded that while it is necessary to extend the coverage of the labour laws beyond the traditional employment relationship in order to provide adequate coverage to a diversity of new forms of work, basic protection can also be provided by family law, social protection legislation or other laws and social security schemes.

### *Recommendations*

Many recommendations and suggestions for action emerged from the workshop. They can broadly be categorized in two categories: first, recommendations which identified areas of documentation and action-based research that would deepen this debate, and second, recommendations that identified ILC 2003-related-activities to which WIEGO could contribute.

## **I. Identifying Areas for Documentation and Research**

One of the suggestions was to document good practices already in place from around the world. Case studies should describe the judicial procedures and legal institutions as well as the law.

1. Examine, at the national level, instances where labour laws have been extended to protect the informal sector workers. For example:
  - Reforms in law like in Ghana
  - A discrete project on own account workers
  - Cases where special legislation has been prepared or is under consideration as in India
2. Even when laws have not been changed, examine how, in certain cases, legal procedures and legal institutions have been successful, within the framework of the existing laws to extend protection to the worker in the informal economy.
3. Document new and innovative cases where labour laws that protect the right to organize have been changed or legal procedures have been added to include/recognize new forms of organizations of the workers in the informal economy.
4. Do a comparative study of how labour law is enforced. Study gaps and problems of enforcement, with special emphasis on dispute settlement.
5. Study areas of law other than labour law that affect workers in the informal economy (e.g., commercial law, immigration law, etc.).
6. Examine situations where the employee becomes a self-employed and is equally vulnerable, with the objective of granting these workers the same protection as traditional employees would get.
7. Formulate a concise list of all categories of work that are vulnerable at the national level, and their relationship with employers and markets
8. Study migrant workers, particularly with regard to gender.

## **II. Activities specific to or feeding into ILO-Conference, June 2003**

Several suggestions were made about the various ways in which WIEGO could contribute to the ILO 2003 discussion on employment relations, particularly in the context of labour law. It was recommended that WIEGO could facilitate informal consultations on the subject, in partnership with ILO, and prepare background papers, case studies or provide any other technical support. The objective of such a consultation would be to build awareness, amongst all stakeholders, on the legal notion of the problem at the national level. The specific suggestions were as follows:

1. Find grounds for common understanding between the employer, workers and government to facilitate better dialogue at the ILC 2003.
2. Prepare materials for worker delegates on how to link stories and good practices with actual conference proceedings, in order to assist worker delegates with the ILO process.
3. Work with the ILO and national experts already identified by the ILO.
4. Work closely with ICFTU.
5. Emphasize the gender dimensions of the debate.

**Miscellaneous**

1. Establish linkages with WIEGO statistical department – identify how to use statistics to add to our efforts.