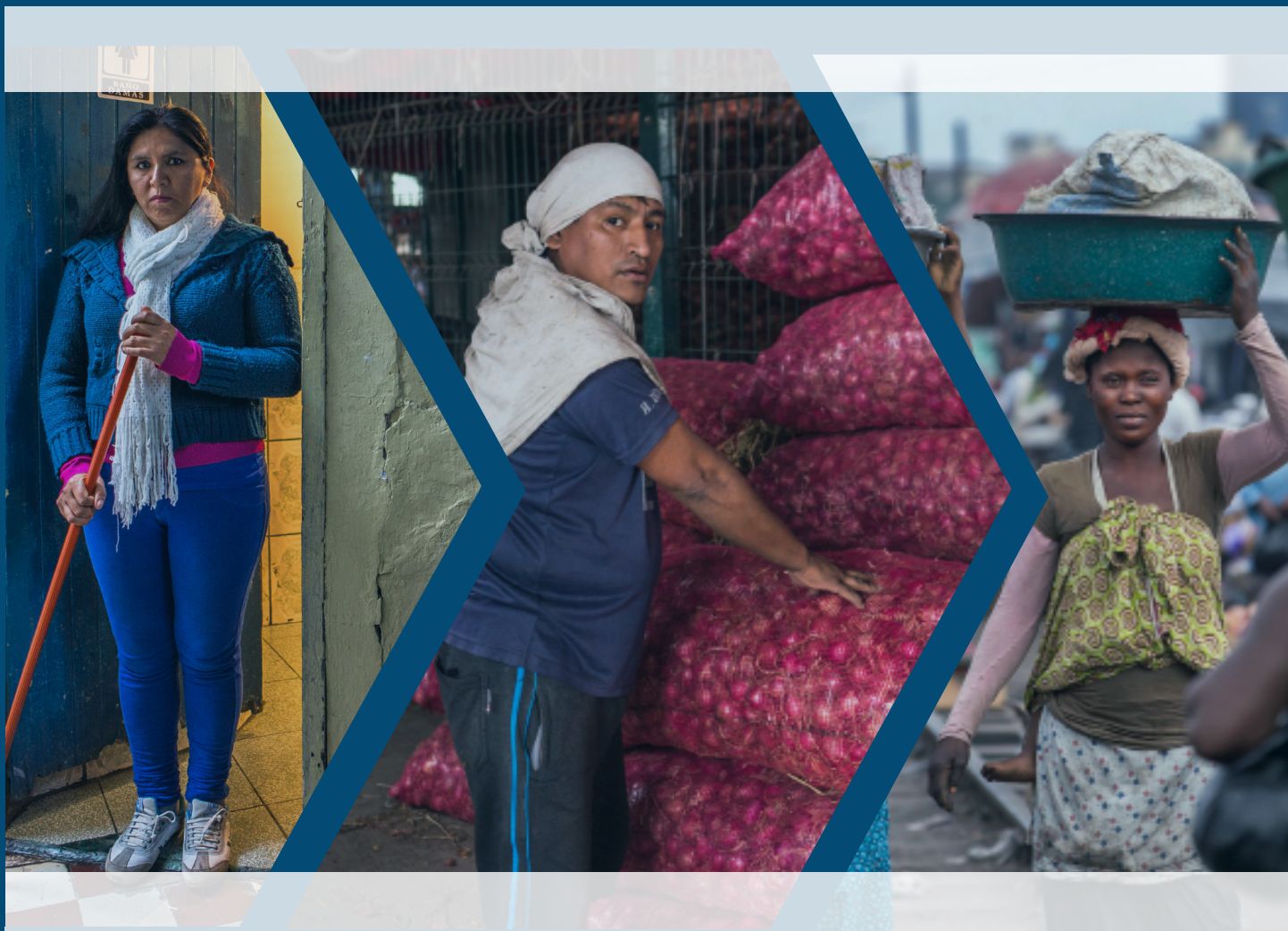


# The Global Labour Rights Reporter

Protection of the Rights of Workers in the Informal Economy



February 2022 | Volume 2 Issue 1

Global Labour Rights Reporter  
Volume 2, Issue 1

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Published by the ILAW Network  
1130 Connecticut Avenue, NW  
8th Floor  
Washington, DC 20036  
USA

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This publication is available online permanently at:

<https://www.ilawnetwork.com/ilaw-network-journal-the-global-labour-rights-reporter/>

ISSN 2693-9657 (print)

ISSN 2693-9665 (online)

It is printed in the United States by union labour.

Font: Open Sans

Layout by Haley Gray

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## EDITORS' NOTE

# WHY THE STRUGGLE OF THE 2 BILLION WORKERS IN THE INFORMAL ECONOMY MATTERS TO US ALL

MARLESE VON BROEMBSSEN, WIEGO LAW PROGRAMME DIRECTOR

& JEFFREY VOGT, ILAW NETWORK CHAIR

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In most regions of the developing world, modern industrial jobs have never been the norm; rather, informal employment, most of which is self-employment (i.e. characterised by the absence of an employment relationship), always has, and likely will be the norm.<sup>1</sup> The ILO has estimated that over 60 per cent of the global workforce, or 2 billion people, laboured in the informal economy pre-pandemic.<sup>2</sup> The sizable majority, 64 per cent, is self-employed. Globally, informal work has been growing and significantly outstrips formal employment.<sup>3</sup> Even in countries with robust economic growth, informal employment has been growing more rapidly than formal employment.<sup>4</sup>

Workers from marginalised groups tend to be disproportionately represented in the informal

economy, whether women, racial or ethnic minorities, migrants, persons with disabilities and others.<sup>5</sup> This is very often the result of deliberate public policies choices that serve to exclude these workers from formal jobs with legal recognition and protection of their labour rights (at least on paper). The number of workers in the informal economy increased as a result of the COVID-19 pandemic, particularly with the temporary or permanent closure of micro, small and medium enterprises around the world.<sup>6</sup> However, the full extent of the impact of the pandemic on workers will not be likely known for some years. Indeed, the size of the informal economy globally will very likely continue to grow (unevenly) as the pandemic begins to recede in the absence of sustained measures taken by governments at all levels to boost employment in the formal economy, to transition workers from the informal to the formal economy and to prevent the further informalisation of formal employment. Workers, trade unions and other representative organisations must of course be central to shaping these laws and policies.

### What is the Informal Economy?

The term 'informal sector' was used for the first time in 1971 by British anthropologist Keith Hart to describe self-employed Ghanaians' economic

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<sup>1</sup> Joann Vanek et al., *Statistics on the Informal Economy: Definitions, Regional Estimates & Challenges*, WIEGO WORKING PAPER 2, (2014), available at <http://wiego.org/informal-economy/statistical-picture>; See also Diamond Ashiagbor, *Introduction: Narratives of Informality and Development* in REIMAGING LABOUR LAW FOR DEVELOPMENT: INFORMAL WORK IN THE GLOBAL NORTH AND SOUTH at 2 (Diamond Ashiagbor ed., 2019).

<sup>2</sup> International Labour Office, *Women and men in the informal economy: a statistical picture (third edition)*, p.v, (2018). Further, 73 per cent of the non-agricultural workforce in developing countries is informally employed, followed by 59 per cent in emerging economies and 17 per cent in developed countries. See Florence Bonnet, Joann Vanek and Martha Chen, *Women and Men in the Informal Economy – A Statistical Brief*, WIEGO, at 3 (2019), available at <https://www.wiego.org/sites/default/files/publications/files/Women%20and%20Men%20in%20the%20Informal%20Economy%20-%20A%20Statistical%20Brief%20-%20for%20web.pdf>.

<sup>3</sup> James Heinz, *Globalization, Economic Policy and Employment: Poverty and Gender implications*, ILO EMPLOYMENT STRATEGY PAPERS No 3], at 21 (2006).

<sup>4</sup> *Id.* at 22.

<sup>5</sup> With regard to women and the informal economy See, International Labour Office, *supra* note 3 ("Women are indeed more exposed to informal employment in more than 90 per cent of sub-Saharan African countries, 89 per cent of countries from Southern Asia and almost 75 per cent of Latin American countries.").

<sup>6</sup> ILO Brief, *COVID-19 crisis and the informal economy Immediate responses and policy challenges* (May 2020).

activities. Hart's seminal paper<sup>7</sup> challenged the prevailing theory that people who were under- or unemployed constituted a passive 'reserve army of labour' waiting to be employed by capitalist enterprises. He saw the informal sector as an intrinsic part of the 'urban economy'<sup>8</sup> that comprised both formal and informal enterprises. And, he noted multiple linkages between the formal and the informal: informal retailers bought their goods from formal businesses (known in the economics literature as 'backward linkages'); consumers used their wages earned working for formal enterprises to purchase goods from informal enterprises and some informal enterprises sold their goods and services to the formal sector.<sup>9</sup> Individuals often engaged in more than one activity, and often engaged in both formal and informal employment.<sup>10</sup> For example, a watchman for a formal enterprise (which even if he earned less than the informal activities, provided reliable, stable income)<sup>11</sup> would at the same time operate an informal restaurant, hairdressing business or repair radios. Other times, informal activities acted as temporary a 'buffer' between formal jobs.<sup>12</sup> Most people in the informal sector were self-employed, but others were employed informally, for example to carry goods to informal markets for an informal sector enterprise.<sup>13</sup> These insights still ring true today.

### The Statistical Approach

Until the 1990s, informal employment, both in the development and statistics community, was synonymous with employment in informal, own-account operations and micro-enterprises. In 1993 the International Conference of Labour Statisticians (ICLS), which is the standard-setting body for labour statistics, defined the informal sector as 'employment and production that takes place in unincorporated small and/or unregistered enterprises'. In 1997, the UN Statistics Division established the Expert Group on Informal

Sector Statistics (known as the 'Delhi-group')<sup>14</sup> to 'document data collection practices, exchange experience in the measurement of the informal sector, and recommend improvements in the quality and comparability of informality statistics.' This Delhi-group, the ILO, and the research-advocacy network, Women in Informal Employment: Globalising and Organising (WIEGO),<sup>15</sup> collaborated to broaden the definition of informal employment in two respects: from an enterprise-based definition to a definition that would include both enterprises *and* all forms of waged-informal work; as well as a definition that would apply to all countries—industrialised, transitional and developing—rather than only to developing countries.<sup>16</sup> The 2002 International Labour Conference validated this expanded definition and in 2003, it was adopted by the ICLS. In the latest development, the 20<sup>th</sup> ICLS adopted in 2018 a resolution to create a new category of informal employment, called a 'dependent contractor,' which it defined as 'workers who have contractual arrangements of a commercial nature (but not a contract of employment) to provide goods or services for or through another economic unit.'<sup>17</sup>

### The Legal Approach

While the statistical approach may be clear, there is some confusion as to which kinds of activities and/or work relations comprise the informal economy *as a legal matter* -- particularly due to the proliferation of different kinds of work relations and the fact of substantial overlap between them in any typology. As discussed below, the statisticians and the lawyers are not entirely aligned.

<sup>7</sup> Keith Hart, *Informal Income Opportunities and Urban Employment in Ghana*, 11(1) J. OF MODERN AFRICAN STUDIES (1973). See also Martha Alter Chen, *The Informal Economy: Definitions, Theories and Challenges*, WIEGO WORKING PAPER No. 1 at 1, (2012) available at [http://www.wiego.org/sites/wiego.org/files/publications/files/Chen\\_WIEGO\\_WP1.pdf](http://www.wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf)

<sup>8</sup> Hart, *supra* note 7 at 86.

<sup>9</sup> *Id.* at 85

<sup>10</sup> *Id.* at 69 and 78.

<sup>11</sup> *Id.* at 73.

<sup>12</sup> *Id.* at 81.

<sup>13</sup> *Id.* at 70.

<sup>14</sup> Colin Williams and Mark Lansky, *Informal employment in developed and developing economies: Perspectives and policy responses*, 152(3-4) INT'L LABOUR REVIEW 355, 359 (2013).

<sup>15</sup> See Florence Palpacuer, *Bringing the Social Context Back in: Governance and Wealth Distribution in Global Commodity Chains*, 37(3) ECONOMY AND SOCIETY, 393, 404 (2008) (on WIEGO's contribution).

<sup>16</sup> Martha Alter Chen, *Re-thinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* WORLD INSTITUTE FOR DEVELOPMENT ECONOMICS RESEARCH Paper No. 2005/10, at 8 (2005), available at <https://www.econstor.eu/bitstream/10419/63329/1/488006546.pdf>

<sup>17</sup> Such workers are not employees of that economic unit but are dependent on that unit for organisation and execution of the work, income, or for access to the market. They are workers employed for profit, who are dependent on another entity that exercises control over their productive activities and directly benefits from the work performed by them. See 20th International Conference of Labour Statisticians, *Resolution Concerning Statistics on Work Relationships*, at para 35 (2018), available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms\\_647343.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_647343.pdf).

Article 2 of ILO Recommendation 204 'Concerning the Transition from the Informal to the Formal Economy' 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."<sup>18</sup> 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 with no notional employer, such as street vendors and self-employed fisherfolk,<sup>19</sup> as well as informal employment where there may be a notional employer, but that is clearly not recognised or protected by legal and regulatory frameworks, such as waste reclaimers and persons employed by micro-enterprises that are not covered by law. Others, such as (overwhelmingly) women performing unpaid care work also fall within the scope of this legal definition.

However, there are many workers situated in between the relatively small population of workers in a formal, standard employment relationship (in which an employer directly employs a worker in full-time, regular and continuous employment under their supervision (and, pre-pandemic, typically on the employer's premises) on the one hand and the workers referred to in the preceding paragraph on the other. The ILO refers to these workers as being in 'non-standard' forms of employment (NSFEs), though many lawyers in the Global South refer to them as 'atypical' since the 'standard' forms of employment have never been the norm in those countries.

Landau et. al.'s<sup>20</sup> typology of non-standard work usefully explains the different mechanisms employers use to restructure their employment relations to escape the standard employment

relationship. First, they adjust the *time period* so that the *work is not permanent*. Second, they adjust the *time* so that the *work is not full-time*. Third, they change the *place of work* so that the work does not take place on the employers' premises. Fourth, the mode of engagement is not directly with the employee, but through an intermediary. In general, however, these employment relationships will be recognised and protected by labour law. There is no doubt that such arrangements can be highly exploitative,<sup>21</sup> especially when such arrangements are not entered into by free choice, but that alone does not make them informal. They may be what Guy Standing refers to as the 'informalisation'<sup>22</sup> of the employment contract.<sup>23</sup>

This is not to say that NSFEs do not overlap with the informal economy, especially where domestic law would deprive the worker of recognition as an employee and thus of some or all of their rights. For example, homeworkers (industrial outworkers) and domestic workers may be recognised and protected as employees in some countries and be informal workers in other countries. Likewise, some employees of micro-enterprises may be formal, and others may be informal, depending on the law. In India, for example, the Contract Labour Act<sup>24</sup> that covers subcontracted workers only applies to employees working for firms or contractors that employ 20 workers or more workers. In other countries, it is not an all or nothing proposition. In many South-East Asian countries, fixed term contract workers are recognised by labour laws in respect of some rights (such as minimum wage legislation) but not in re-

<sup>21</sup> *Id.* at 45. ("Unsurprisingly these studies demonstrate that workers engaged in non-standard forms of employment are more likely to receive lower wages, fewer entitlements and to experience poorer working conditions and higher levels of job insecurity than those in standard employment.")

<sup>22</sup> Guy Standing, *Global Labour Flexibility: Seeking Redistributive Justice* (1999).

<sup>23</sup> It is here where the statisticians and lawyers might part ways. For example, while dependent self-employed have been deemed "informal" by the ICLS, the lawyers may note that in some countries (e.g., Sweden, Canada) this intermediate category of workers has been brought into the remit of labour law. In particular, it extends to them the right to bargain collectively. Should one classify dependent contractors as informal if they are recognised by labour law (either through statute or through an expanded interpretation of "employee")? See Guy Davidov, Mark Freedland and Nicola Kountouris, *The Subjects of Labor Law: 'Employees' and Other Workers*, in RESEARCH HANDBOOK IN COMPARATIVE LABOR LAW (Matthew Finkin and Guy Mundlak eds., 2015); See also, Harry Arthurs, *The Dependent Contractor: The Study of the Legal Problems of Countervailing Power*, 16 (1) Univ. of Toronto L. J., 89-117 (1965).

<sup>24</sup> Contract Labour (Regulation & Abolition) Act, at Chapter 1(4)(a) (1970) (Ind.).

<sup>18</sup> ILO, *R204 - Transition from the Informal to the Formal Economy Recommendation No. 204*, (2015), available at [https://www.ilo.org/dyn/normlex/en/?p=NORMLEX-PUB:12100:0::NO::P12100\\_ILO\\_CODE:R204](https://www.ilo.org/dyn/normlex/en/?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:R204)

<sup>19</sup> Though there may not be an employer, entities such as municipal governments may exercise significant power over these workers' ability to carry out their economic activities and to access the rights that come with formal recognition.

<sup>20</sup> Ingrid Landau, Petra Mahy, and Richard Mitchell, *The Regulation of non-standard forms of employment in India, Indonesia, and Viet Nam*, INTERNATIONAL LABOUR OFFICE: CONDITIONS OF WORK AND EMPLOYMENT SERIES No. 63 (2015) available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_414583.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_414583.pdf).

spect of others (such as severance pay or social security).

### Is Labour Law the (only) Answer?

As we understand the informal economy to be those workers excluded from legal recognition from labour laws, the obvious question is then is the solution simply to cover such workers by these laws. In short, is labour law the only solution to informality? The answer is no, though this does not mean that labour law concepts cannot be helpful in shaping solutions. In some instances, of course, workers in the informal economy are clearly rendering a personal service for another (whether or not under the latter's subordination), and in these instances insisting upon formal recognition as an employee under labour law might be an effective strategy.<sup>25</sup>

However, for workers without an employer, traditional labour law solutions would be less effective. In such cases, workers have made gains by organising and by resorting to a range of strategies including social dialogue with municipal authorities which have led to formal recognition arrangements, which in turn have led to, e.g., access to a dedicated space to perform their economic activity and enrolment in social protection schemes such as social security and access to health care. Others have turned to constitutional and/or human rights-based litigation to win material gains.

The articles and interviews in this issue of the Global Labour Rights Reporter attempt to highlight the ways in which workers in the informal economy, and their legal advocates, have been fighting to ensure the protection of and respect for their rights for workers through a variety of strategies and arrangements, both inside and outside of labour law, and the complications that arise in these efforts.

- Krithika Dinesh writes about successful litigation brought by homeworkers in India to gain recognition as an employees in order to access payments owed to them under the provident fund.
- Maximilano Garcez and Paulo de Carvalho Yamamoto review the various legal efforts that drivers have pursued to obtain recog-

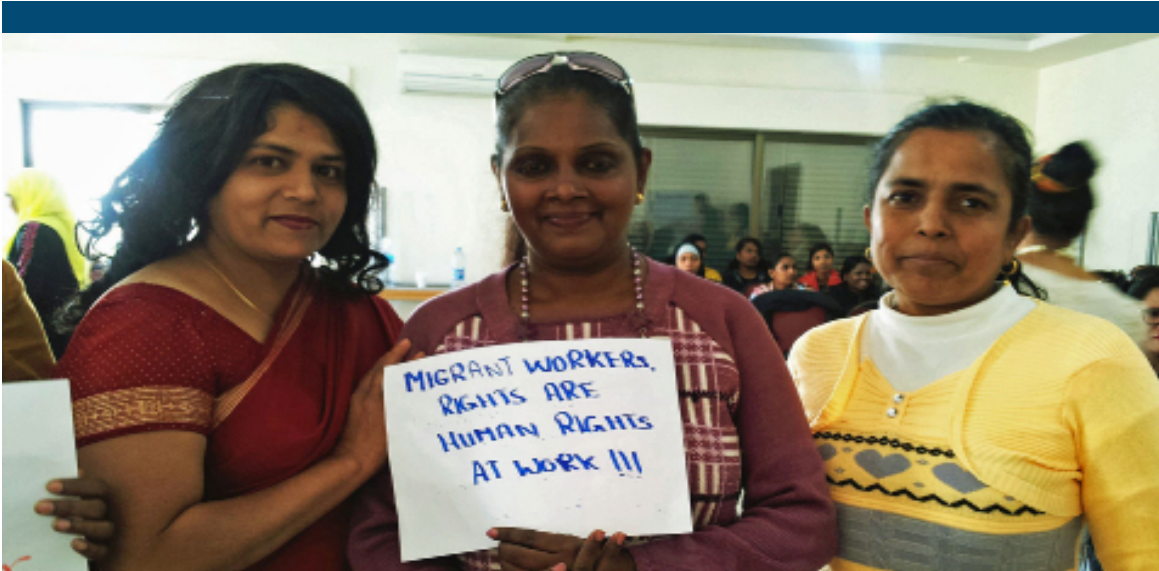
nition as the employees of ride hail apps in Brazil.

- Ziona Tanzer describes ground-breaking constitutional litigation brought by domestic workers in South Africa to claim compensation under the national workers' compensations programme (COIDA).
- Amita Ossom relates how waste pickers in Colombia relied on constitutional rights to demand the right to work, and the complications that arise around the question of formalisation.
- Marlese von Broembsen discusses efforts by street vendors in several countries to obtain improvements in working conditions through collective bargain with municipal governments.

Additionally, in-depth interviews with Elizabeth Tang, General Secretary of the International Domestic Workers Federation (IDWF) and Alana Dave, Director for Urban Transport at the International Transport Workers Federation (ITF) examine the issues that informal workers in these respective sectors face and how they are working collectively to overcome them.

We hope that this issue helps to contribute to the understanding of the issues that workers in the informal economy face, and how some have been able to successfully assert their rights through social dialogue, regulation and/or litigation.

<sup>25</sup> Of course, in many countries labour law remains quite limited, so merely extending these limited rights to more workers is not necessarily an improvement for these workers – especially if they fail to address the actual, lived experiences and concerns of workers in the informal economy.



Sri Lankan Domestic Workers in Jordan © Sara Khatib/Solidarity Center

## TO WHAT EXTENT HAVE RECENT LEGAL REFORMS IN THE GCC LED TO BETTER CONDITIONS FOR MIGRANT DOMESTIC WORKERS?

### A conversation with Elizabeth Tang<sup>1</sup>



**Elizabeth Tang**, *General Secretary, International Domestic Workers Federation (IDWF)*

*Elizabeth Tang is the General Secretary for the International Domestic Workers Federation (IDWF). With over eight years in this position, Elizabeth has played key role in connecting domestic workers' organisations into a global federation, by strengthening those workers organisations through supporting capacity building and exchanging of best practice, through advocacy and awareness campaigns, and by leveraging the support of strategic partners.*

*Prior to this, Elizabeth worked for over 2 years as the International Coordinator at the then International Domestic Workers Network, where she led the process of transforming it into the IDWF - a members-based organisation of domestic workers, inaugurated at the founding congress in Uruguay in 2013. Elizabeth also worked as Chief Executive at the Hong Kong Confederation of Trade Unions for 16 years. Her skills and interests are around policy analysis, human rights, and supporting domestic workers. Elizabeth received her Master of Arts in Sociology of Labor from the University of Warwick in the United Kingdom.*

<sup>1</sup> The following is an edited transcript of an interview between Jeffrey Vogt and Elizabeth Tang on December 20, 2021.



**Jeffrey Vogt:** *In response to international campaigns led by migrant workers and their organisations, regional and global trade unions and human rights organisations, countries comprising the Gulf Cooperation Council (GCC) have in recent years amended their labour laws to establish basic workplace standards for domestic workers (see, e.g., Qatar<sup>2</sup> and the United Arab Emirates<sup>3</sup>) and amended immigration laws to soften some aspects of the kafala system (see, e.g., Qatar<sup>4</sup> and Saudi Arabia<sup>5</sup>), including making it easier for workers to change employers or to leave the country. How have migrant domestic workers fared in light of these recent reforms?*

**Elizabeth Tang:** We were starting from a baseline that labour rights and social protection for migrant domestic workers in the Gulf was very low. In the last couple of years, as you noted, we have seen positive changes in the labour laws of some GCC countries, and Qatar did take the lead. We have also seen a shift in the public rhetoric of some governments with regard to the kafala system. They have increasingly acknowledged the fact of migrant worker exploitation, and the role that the kafala system has had in perpetuating that exploitation. That is why we hear now governments claiming that they are going to “abolish” the kafala system.

We have also seen some tolerance for domestic worker organisations. In Kuwait, for example, the IDWF now has an affiliate, the Sandigan Kuwait Domestic Workers Association (SKDWA), with about 300 members.<sup>6</sup> It was formed about two years ago. Though there is as yet no formal legal recognition, it is tolerated by the government. The situation is similar in Qatar. The government knows that domestic workers are coming together in their community groups and will occasionally meet with them, but they do not formally recognise them as an organisation.

In both cases, the government will receive complaints from these organisations on behalf of their members. As a result, some cases have been successfully addressed. For example, we have cases in Qatar and Kuwait where domestic workers have left abusive employers and are no longer being criminally charged with absconding as they would have been before. To be clear, this is not yet systemic change, and it is not a regular pattern, but it is an improvement from where we were just a few years ago.

Also, in Qatar, there is a formal labour reform committee, and the International Trade Union Confederation, the International Domestic Workers Federation, the Building and Woodworkers International Union, UNI Global Union, the International Transport Workers Federation and the ILO are members of it. Twice a year, we come together to discuss the implementation of the laws. In 2019-2020, we mostly talked about how to implement the labour laws, including the domestic workers' law. In 2021, there was an important change that came into force, namely that domestic workers no longer needed their employer's permission to change jobs. If they wanted to, they could just do it by informing their employers. The existing employer cannot refuse. Also, the exit visa is no longer required. A domestic worker can go home without the employer's permission.

However, while workers have these rights on paper, the implementation has been very piecemeal. For example, if a domestic worker wants to leave her employer, they ask the domestic worker for

<sup>2</sup> Qatar Law No. 15 of 22 August 2017 which relates to domestic workers, online at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/105099/128416/F-1438071320/QAT105099%20Eng.pdf>

<sup>3</sup> Federal Law No. 10 of 2017 on Domestic Workers (UAE), online at [https://elaws.moj.gov.ae/UAE-MOJ\\_LC-En/00\\_HUMAN%20RESOURCES/UAE-LC-En\\_2017-06-11\\_00010\\_Kait.html?val=EL1&Words=domestic#Anchor7](https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_HUMAN%20RESOURCES/UAE-LC-En_2017-06-11_00010_Kait.html?val=EL1&Words=domestic#Anchor7)

<sup>4</sup> Decree Law No. 18 of 2020 amending certain provisions of Labour Law No. 14 of 2004 (Qatar), online at [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms\\_754882.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms_754882.pdf); Decree Law No. 19 of 2020 (Qatar), online at [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms\\_754881.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/legaldocument/wcms_754881.pdf)

<sup>5</sup> Human Rights Watch, *Saudi Arabia: Labor Reforms Insufficient, Abusive Elements Remain; Changes Exclude Domestic Workers* (25 March 2021), online at <https://www.hrw.org/news/2021/03/25/saudi-arabia-labor-reforms-insufficient>

<sup>6</sup> See, e.g., International Labour Organization (ILO), *How domestic workers got organised in Kuwait* (4 August 2021), online at <https://voices.ilo.org/stories/how-domestic-workers-got-organized-in-kuwait>

compensation. So, they are forced to pay in order to realise their legal right to change jobs. Employers argue that they have to pay a lot to employ migrant domestic workers and thus should get their money back. They have asked for upwards of US \$1,000 or more, which domestic workers do not have. This is preventing some domestic workers from leaving an abusive situation. We have seen many complaints of this kind. Employers also argue ignorance of the kafala reforms in refusing to allow domestic workers to change jobs.

*JV: Can you explain what are the most significant obstacles to the realisation of labour rights?*

**ET:** In Qatar, the problem has been that the government did not really plan anything to facilitate the implementation of the laws once passed. They did a lot of work to draft and adopt the laws, but then there was little follow through. There has been little done by the government to raise public awareness about the rights of workers or the duties and expectations of employers. When complaints are filed by domestic workers, the Ministry doesn't really have procedures in place to deal with them. There are also an insufficient number of inspectors to respond to these complaints efficiently and effectively.

*JV: So, the burden is really on the workers and their organisations to press these issues, rather than the government being proactive (or the employer abiding by the law)?*

**ET:** Occasionally, IDWF will be able to engage directly with an employer who is willing to resolve the situation per the law, and in these cases we are lucky. However, most employers are not like this. To facilitate the labour reform implementation, the government of Qatar did allow IDWF to install a community liaison officer in Doha who is able to raise awareness among domestic workers about the laws and to help prepare and file cases. But after that, there is little more that we are able to do.

IDWF was in Qatar recently to meet with the ILO and the Ministry, and it was pretty clear from that meeting that the government was not going to do much more than they already had. For them, they saw it was necessary to pass the laws. But, these workers need to be able to enjoy these rights in practice and workers are becoming rightly frustrated by the lack of tangible progress. The cases just keep piling up.

*JV: Do you think that what we have seen from the government so far was done largely to deflect enough criticism to keep the World Cup in 2022, and then we will see migrant workers' rights dropped from the agenda, or do you think there is something sustainable being created here that will last beyond the games?*

**ET:** I don't know. In the beginning, as I mentioned, they went from having no laws to new laws. But then, there was very little on implementation and that is where we are stuck. And, as you know, freedom of association is still entirely out of the question, which is of course important if we are going to see sustained progress.

*JV: In the construction industry, we have seen the government permit the establishment of workplace committees on World Cup infrastructure projects as a step toward freedom of association for migrant workers. Do you think we may see something similar emerge for migrant domestic workers?*

**ET:** We have formed a group of domestic workers from the Philippines which now has about 200 members and are forming another group of Kenyan domestic workers which has over 500 members. Workers of other nationalities are also very interested, as they see the value of organising in the current context. We are able to hold workshops and arrange direct dialogue between migrant domestic workers and the Ministry of Labour to discuss their concerns. This is a breakthrough for them, as they have their voices heard. This wouldn't have happened before. But then, the government doesn't follow up on these complaints effectively. They seem willing to explain the law, but not willing to do anything about enforcing it. In other countries, workers could take collective action and escalate their demands if they were being ignored. But it is not really possible to do this in Qatar, or other GCC countries for that matter. In Kuwait, there is more of a civil society, and we get more support from other groups. But in Qatar, we are quite isolated.

We are also concerned about what happens after the World Cup. The World Cup was our way into Qatar. After the games, the labour law committee ends and then what? I would note that BWI has worked with Fédération Internationale des Associations de Footballeurs Professionnels (FIFPRO), which is the union of football players, to establish a workers' centre that can keep up the implementation on workers' rights reform after the games and the winding down of the committee.

*JV: There has been a lot of reporting about the impact of COVID-19 on migrant workers, most often about workers losing their jobs when their employers shut down their enterprises and who are then forcibly repatriated without the pay and benefits owed. I imagine the situation with migrant domestic workers might be different, as there is still demand for their labour. But no doubt migrant domestic workers have faced other consequences as a result of COVID-19. Can you elaborate?*

**ET:** Most domestic workers are in formal employment arrangements, so the main challenge for them is that they have been in lockdown and unable to leave the home. Of course, their families are also not going out, so the demands on the workers are even higher. They are working every day, very long hours, with no days off, and subject to abuse. This has been going on for a long time, causing a lot of stress for workers. They cannot go home or even send money back.

The situation is worse for migrant domestic workers in the informal economy. These are workers who may have been recruited to do another job but on arrival were told that they were going to perform domestic work. They may normally be contracted out to work for a few hours to several different employers. With the pandemic, they did not want the virus to spread so these workers were locked into dormitories with no work, no pay and no freedom. They could not go home, and some came from countries with no embassies in Qatar. They are treated as undocumented immigrants and no embassy, even their own, wants to help. We have tried to connect them with trade unions in their home countries and we have eventually been able to get them out of the country, but they were in a bad situation, with no money and with serious mental distress.

*JV: It has been 10 years since the adoption of ILO Convention 189 on domestic workers, and about 35 countries have ratified the convention. What would you say has been the most significant outcome as a result of the adoption of this convention, which domestic workers fought for and won?*

**ET:** I would say unfortunately the impact has been limited for migrant domestic workers. Most of the countries which have ratified the convention are not the destination countries but the origin countries. Few destination countries in Asia and MENA have ratified the convention, and so these countries need to ratify it and transpose it into domestic law.

*JV: Finally, how do you see lawyers internationally being able to support IDWF and its affiliates?*

**ET:** Where we already have law in place, we need to work toward effective implementation and build effective models which might be able to replicate this. Where we don't have laws, we need to identify their specific needs, understand the local institutions, and design laws and systems that will guarantee their rights and facilitate their respect and protection.

#### **Additional Related Resources:**

ILO Project Office for the State of Qatar, <https://www.ilo.org/beirut/projects/qatar-office/lang--en/index.htm>

ILO, Committee of Experts on the Application of Conventions and Recommendations, Qatar, Observation on Convention 29 (adopted 2020), online at [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:4062895](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4062895)

ITUC, *A new dawn for migrant workers in Qatar*, 20 August 2020, online at <https://www.ituc-csi.org/migrant-workers-qatar>

ITUC, *New era of transparency for the ILO and Qatar in support of workers' rights*, 22 November 2021, online at <https://www.ituc-csi.org/new-era-of-transparency-for-the>

Human Rights Watch, *Qatar: Significant Labor and Kafala Reforms Enforcement Needed, Other Provisions in Effect Still Carry Risk of Abuse*, 24 September 2020, online at <https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms>

Human Rights Watch, *FIFA and Qatar Need to Do More for Migrant Workers: Reforms Fail to Fundamentally Improve Working Condition*, 18 December 2021, online at <https://www.hrw.org/news/2021/12/18/fifa-and-qatar-need-do-more-migrant-workers>

Amnesty International, *Qatar: One year to make good on promises to migrant workers as progress stagnates*, 16 November 2021, online at <https://www.amnesty.org/en/latest/news/2021/11/qatar-one-year-to-make-good-on-promises-to-migrant-workers-as-progress-stagnates/>

# RECOGNITION FOR SOUTH AFRICAN DOMESTIC WORKERS: REFLECTIONS ON THE FIRST ANNIVERSARY OF MAHLANGU V MINISTER OF LABOUR AND OTHERS

## ZIONA TANZER

South Africa | Originally written in English

In November 2020, the South African Constitutional Court passed a historic judgment recognising that injury and illness arising from work as a domestic worker in a private home is no different to that occurring in other workplaces, and equally deserving of compensation. Yet, the significance of the judgment goes further than recognising the occupational hazards in the home; it gives recognition to the broader harm wrought by the invisibility of gendered, racialised work in the privacy of homes within the context of post-colonial and post-Apartheid South Africa.

In the case of *Mahlangu and Another v Minister of Labour and Others*, the South African Domestic Workers Union (SADSAWU) challenged the constitutionality of provisions of the Compensation for Occupational Injury and Illness Act (COIDA), which precludes domestic workers employed in private homes from claiming compensation from the Compensation Fund in cases of illness, injury, disablement or death at work.<sup>1</sup> The Constitutional Court agreed that this exclusion violates rights to social security, equality and dignity, and it made this finding retroactively applicable from 1994, the date the Constitution was enacted. In so doing, the Court took the opportunity to articulate a theory of intersectional discrimination and move forward its own jurisprudence on indirect discrimination, as well as infusing

its conception of socio-economic rights, dignity and retrospective application with an intersectional analysis. It also reframes the narrative on domestic workers: no longer invisible but “unsung heroines in this country and globally.”<sup>2</sup>

This article describes 1) the background events leading up to the Mahlangu litigation; 2) global and local advocacy to support the case; 3) the Constitutional Court judgment and 4) its aftermath a year later.

### Background to Litigation

The facts of the case centred on Ms Maria Mahlangu, who was employed as a domestic worker in a private house in Pretoria for 22 years. It was alleged in the case that she was partially blind and could not swim.<sup>3</sup> In March 2012, she fell from a ladder she was using to clean windows into her employer’s swimming pool and drowned in the course of her duties as a domestic worker. Although the employer was home at the time, she maintained that she heard no sounds of struggle. Her dependent daughter approached the Department of Labour to get compensation and was advised that she was precluded from doing so under COIDA. Then SADSAWU organiser Pinky Mashiane read about the drowning in a newspaper and approached the family to see how she could assist.<sup>4</sup>

<sup>1</sup> *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) (19 November 2020) (S. Afr.). [hereinafter *Mahlangu CC*], available at <http://www.saflii.org/za/cases/ZACC/2020/24.html>

<sup>2</sup> *Id.* at para 1 (“Domestic workers are the unsung heroines in this country and globally.”)

<sup>3</sup> *Id.* at para 7.

<sup>4</sup> Head Topics South Africa, *Pinky’s Promise: Domestic Workers will Rise Up*, <https://headtopics.com/za/pinky-s-promise->



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In 2013, the Solidarity Center embarked on a research project on Domestic Workers and Socio-Economic Rights, in which it explored different paradigms for conceptualising domestic worker rights under the International Covenant on Social, Economic and Cultural Rights (ICESCR) and the International Labour Organization (ILO).<sup>5</sup> The research explored the tension between an ILO approach focused on worker agency and institutional voice and an ICESCR approach establishing state obligation for basic minimum socio-economic guarantees.<sup>6</sup> It culminated in a list of domestic worker issues requiring urgent law reform. At the top of this list was inclusion of domestic workers in COIDA.

The Solidarity Center was looking for a litigant to challenge COIDA's constitutionality at the same time Pinky Mashiane – after having been turned down by multiple lawyers and law centres – was looking for a remedy for the family of the late Maria Mahlangu. Beginning in 2015, the case wound its way through the South African court system having been ably litigated before the High Court and the Constitutional Court by lawyers from the Social and Economic Rights Institute (SERI).<sup>7</sup>

Initially, the government respondents opposed the application, arguing that the legislature and not the court was the appropriate institution to address the issue, and further that efforts were underway to legislatively amend COIDA to include domestic workers. *Indeed, the issue had been on the agenda since 2001 without legislative reform ever being passed.*<sup>8</sup> After the respondents conceded the unconstitutionality of the exclusion, the question of retrospective operation remained opposed, with the government as-

[domestic-workers-will-rise-up-8294104](#) (last visited December 9, 2021). Pinky Mashiane is currently the founder and president of the United Domestic Workers of South Africa (UDWOSA).

<sup>5</sup> Ziona Tanzer, *Domestic Workers and Socio-Economic Rights: A South African Case Study*, (2013), available at <https://www.solidaritycenter.org/wp-content/uploads/2014/11/South-Africa.Domestic-Worker-and-Socio-Econ-Rights.WIEGO-2014.pdf>

<sup>6</sup> *Id.*

<sup>7</sup> Socio-Economic Rights Institute (SERI), *Mahlangu v Minister of Labour*, <https://www.seri-sa.org/index.php/19-litigation/case-entries/846-mahlangu-coida-constitutional-challenge-sylvia-bongi-mahlangu-v-the-minister-of-labour> (last visited December 9, 2021).

<sup>8</sup> *Id.*

serting that there would be a floodgate of claims if retrospective claims were permitted. On May 2019, the respondent conceded both points in the High Court and the court made the agreement a court order.<sup>9</sup>

### Sustained Global and Local Advocacy

The case benefited from sustained advocacy at global and local levels. The matter was brought before the United Nations Committee on Economic, Social and Cultural Rights, which was considering South Africa's compliance with treaty obligations, for the first time in 2019.<sup>10</sup> In its concluding observations, the Committee recommended that SA include domestic workers in COIDA. After a similar intervention, in 2021, the CEDAW Committee recommended that South Africa pass the COIDA Amendment Bill.<sup>11</sup>

In the early stages of litigation, the amicus, the Gender Commission, expressed frustration at the almost complete absence of information on the types of injuries and illness arising in the context of domestic work in private homes. To this end, Solidarity Center commissioned qualitative research consisting of in-depth interviews with domestic workers around the country, describing the types of injury and illness occurring in the context of the home.<sup>12</sup> The paper identified injuries ranging from dog bites, falls from staircases or ladders, skin damage from exposure to harmful chemicals, arthritis from repetitive intensive cleaning, and rape from home invasions and burglaries. In many cases, these workers not only could not claim compensation, but also faced dismissal, par-

<sup>9</sup> The court failed to provide reasons for its decision, which was criticised by the Constitutional Court.

<sup>10</sup> Ziona Tanzer and Tinovimbansashe Gwenyaya, *ICESCR Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights*, August 2018, available at [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT\\_CESCR\\_CSS\\_ZAF\\_32291\\_E.doc](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_CSS_ZAF_32291_E.doc)

<sup>11</sup> Shadow Report on South Africa's Compliance with its Labour-related CEDAW Obligations, 2021, [hereinafter CEDAW Shadow Report] available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fZAF-%2f46768&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fZAF-%2f46768&Lang=en)

<sup>12</sup> Janet Munakwame and Tinovimbanashe Gwenyaya, *When the Job Hurts: Workplace Injuries and Disease Among South Africa's Domestic Workers*, <https://www.solidaritycenter.org/publication/when-the-job-hurts-workplace-injury-and-disease-among-south-africas-domestic-workers/> (last visited December 9 2021).

ticularly in cases of permanent injury.<sup>13</sup> The paper was widely reported on in South African media.

Also crucial to the ultimate outcome in the Constitutional Court case was the amicus submission of the Women's Legal Centre which urged the court to craft an order in this case that "highlights the multiple intersecting forms of disadvantage and discrimination" and that will "set a much-needed precedent in feminist jurisprudence, utilising and expanding on rights-based language to give effect to substantive equality".<sup>14</sup>

Most significantly, at each of the numerous court hearings, the domestic worker unions and associations maintained a constant and united presence at the courts, holding placards with enlarged photos of the late Maria Mahlangu. They insisted that her life be foregrounded in the court room, and her death not be in vain.<sup>15</sup>

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### **The Constitutional Court Decision: Mahlangu v Minister of Labour and Others**

The Constitutional Court judgment gave a central role to international law, and quickly established that "in assessing discrimination against a group or class of women of this magnitude *that a broad national and international approach be adopted* in the discourse affecting domestic workers." <sup>16</sup> It continued that, under international law conventions, the exclusion of domestic workers from COIDA is inexplicable. The court referred

to the finding of the Committee on Economic, Social and Cultural Rights that domestic workers often labour under exploitative conditions and the Committee recommendation that South Africa strengthen the legislative framework applicable to domestic workers by extending the benefits of COIDA to this class of workers.<sup>17</sup>

#### *The Right to Social Security*

The majority judgment found that COIDA is a form of social security which must be understood within the framework of section 27 of the Constitution, which protects access to "social security, including, if they are unable to support themselves, and their dependents, appropriate social assistance" and its objective to achieve substantive equality. This is because the inability to work and or the loss of support after the death of a breadwinner as a result of the exclusion from COIDA traps domestic workers and their dependents in cycles of poverty.

In determining whether this exclusion was reasonable, the court asked whether this policy took into account the needs of the most vulnerable members of society; and if it did not, it would fail the test of reasonableness.<sup>18</sup> The court construed the reasonableness enquiry as necessarily contextual since "the social security legislation serves a remedial purpose: namely *undoing the gendered and racialised system of poverty inherited from South Africa's colonial and apartheid past*."<sup>19</sup> The court advised that in considering those who are most vulnerable, cognizance must be taken of "compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds."<sup>20</sup> Accordingly, the court found that there was no legitimate objective to the exclusion, and if anything, the exclusion had a significant stigmatizing effect which entrenches patterns of disadvantage.

#### *Non-Discrimination and Equality*

<sup>13</sup> *Id.*

<sup>14</sup> Second Amicus Curiae's Written Submissions, Mahlangu case.

<sup>15</sup> E.g. The Christian Science Monitor, *The backbone of this economy: Fighting for housekeepers' rights in South Africa*, (December 18, 2019) <https://www.csmonitor.com/World/Africa/2019/1218/The-backbone-of-this-economy-Fighting-for-housekeepers-rights-in-South-Africa>; New Frame, *Pinky Mashiane's fight for all domestic workers* (November 2, 2020), <https://www.newframe.com/pinky-mashianes-fight-for-all-domestic-workers/>.

<sup>16</sup> Mahlangu CC, *supra* note 1 at Para 42. (Since under Section 39(1)(b) the Constitution requires the Court to have regard to international law when interpreting the Bill of Rights).

<sup>17</sup> Mahlangu CC, *supra* note 1 at Para 44 (Referring to concluding observations on the initial report of South Africa, UN Doc E/C12/ZAF/CO/1).

<sup>18</sup> The Court quotes the Grootboom decision, which sets out that a law or policy that fails to take into account the most vulnerable members of society and those in most desperate need, would not be considered reasonable.

<sup>19</sup> Mahlangu CC, *supra* note 1 at Para 63.

<sup>20</sup> See Mahlangu CC, *supra* at para 65 ("...to allow this form of state-sanctioned inequity goes against the values of our newly constituted society namely human dignity, the achievement of equality and ubuntu. To exclude this category of individuals from the social security scheme established by COIDA is manifestly unreasonable.").

This case could have been easily disposed of on grounds of direct discrimination, since the majority found the exclusion of domestic workers from COIDA served no rational purpose and was arbitrary and constitutionally invalid. However, it decided that “in light of the unique circumstances of domestic workers, this case provides an unprecedented opportunity to expressly consider the application of 9(3) through the framework of intersectionality.” Consequently, it proceeded to explain that the particular differentiation also constituted *indirect discrimination*, because “domestic workers are predominantly black women ...and discrimination against them constitutes indirect discrimination on the basis of race, sex and gender.” The Court went on to find that discrimination on the grounds of race, gender and sex are not only presumptively unfair “but the level of discrimination is aggravated.”<sup>21</sup>

The court took the opportunity to articulate and apply a theory of intersectionality, which allowed it to consider the social structures that shape the experience of marginalization, including the convergence of sexism, racism and class stratification.<sup>22</sup> This required an examination of the “nature and context of the individual or group at issue, their history, as well as the social and legal history of society’s treatment of that group”.<sup>23</sup> The court viewed the unravelling the multiple layers of discrimination as a tool which will enable “a decisive break from the past towards the establishment of a democratic, compassionate and truly egalitarian society.”<sup>24</sup>

Viewed historically, the racial hierarchy established by apartheid placed Black women at the bottom of the social hierarchy which often required them to do the “least skilled, lowest paid and most insecure jobs.”<sup>25</sup> Domestic workers, the majority of whom are Black women, were denied both a family life and social life; lived in poor conditions devoting more time to caring for the children of their employers, than their own. The court explained that domestic work is still the third largest employer of women in the country and the marginalization has continued, since

“much like their apartheid counterparts... domestic workers remain shackled by poverty, because the salaries they earn are low and not nearly enough to take care of all their daily needs and those of their families...”<sup>26</sup>

As a result of the analyses the court found that domestic workers are a category of worker that have been “lamentably been left out and rendered invisible. Their lived experiences have gone unrecognised.”<sup>27</sup> It concluded that they are a “critically vulnerable group of workers,” and declaring the section of COIDA invalid will fulfil the transformative mandate set out by our Constitution, at both an individual and group-based level”.<sup>28</sup>

### *Dignity*

The majority judgement found that the exclusion violated their right to dignity because domestic work is undervalued precisely because it is poor Black women who perform the work, and the exclusion from COIDA reflects gendered and patriarchal values which determine what counts as real work. Further, the “often exploitative relationship between domestic workers and their employers is also relevant to the dignity enquiry in that it demonstrates how the labour of domestic workers has been commodified and how they have been objectified to that end.”<sup>29</sup> This the judge found to be contrary to the constitutional commitment to human dignity which “prohibits the idea that people can be reduced to objects and treated as a means to achieve an end.”

### *Justification and Remedy*

Although the state no longer sought to justify these constitutional violations, the court found that the respondents put up little evidence of financial and administrative burdens and “the fact that case concerns intersectional discrimination is a relevant factor in determining whether a retrospective order should be granted.”<sup>30</sup> With this the court dismissed any argument that the state was unable to include domestic workers based on a lack of available resources, and backdated the order to 27 April 1994 when the interim constitution

<sup>21</sup> Mahlangu CC, *supra* note 1 at para 73.

<sup>22</sup> *Id.* at para 102.

<sup>23</sup> *Id.* at para 95.

<sup>24</sup> *Id.* at para 97.

<sup>25</sup> *Id.* at para 99; para 102.

<sup>26</sup> *Id.* at para 104.

<sup>27</sup> *Id.* at para 103.

<sup>28</sup> *Id.* at para 106

<sup>29</sup> *Id.* at para 113.

<sup>30</sup> *Id.* at para 128.





Constitutional Court of South Africa during the hearing of the Mahlangu case  
© Amy Tekie/IZWI Domestic Worker Alliance

was enacted.<sup>31</sup> The majority judgment concluded that the invalidation of the relevant sections of COIDA “will contribute significantly towards repairing the pain and indignity suffered by domestic workers...and will hopefully have a transformative effect in other areas of their lives...”<sup>32</sup>

### Reflections One Year After Mahlangu

When constitutional impact litigation on COIDA was first conceived, it was with the hope that a successful outcome in this case would serve three purposes; (a) obtain much needed relief for domestic workers who were outside of COIDA’s purview and therefore had to individually bear the cost of illness, injury or death at work; (b) strengthen the domestic worker unions and (c) create an important precedent that would lay the foundation for a jurisprudence on domestic workers that could serve as a global marker. One year after the issuing of the Mahlangu judgment, we are only beginning to see its potential impact.

#### *Beyond Recognition:*

#### *The Quest for an Adequate Remedy*

Achieving a remedy on behalf of the family of Maria Mahlangu has proved frustratingly elusive. The *Mahlangu* judgment went to great lengths to explain that the order would operate retrospectively partly as a response to the broader finding of intersectional discrimination. However, the Constitutional Court did not strike down the restrictive timelines for bringing a claim which under COIDA is 12 months from injury or

illness. SERI lodged a claim for compensation under COIDA on behalf of the Mahlangu family, despite the absence of specific legislative provisions on retrospective claims. After a series of lacklustre responses from the Compensation Fund, they were informed that the fund was simply not able to process domestic worker claims.

The fund later informed SERI that the claim could not proceed without the employer of the late Maria Mahlangu first registering her employment. Given that employment had ended with her death in 2013, almost ten years previously, the likelihood of successfully locating the employer, and persuading them to retrospectively register the employment of Maria Mahlangu, seemed highly unlikely. However, the De Klerk family, who had employed Maria Mahlangu, were in fact still found to be living in the same home and did agree to retrospectively register her employment (after being threatened with a state subpoena) and the claim proceeded. In November 2021, one year after the Mahlangu judgment, Sylvia Mahlangu received the sum of R48 875,62 (approximately \$3000) from the Compensation fund, without explanation or breakdown on how the amount had been arrived at.<sup>33</sup>

The broader issue of the commitment to providing retroactive relief and the mechanics of retroactivity has proved similarly thorny. Resolving the issues will ultimately still require amending the COIDA Amendment Bill. Yet, the draft of COIDA put before parliament in January 2021 merely added the words domestic worker in private homes to the extant law and failed to address the issue of retroactivity at all. Accordingly, there remains a myriad of questions on how retroactive relief would operate in practice: what proof would be required from an injury or even death that had taken place since 1994, and how would a domestic worker prove loss of income, in a sector where the absence of contracts of employment is normative? It seemed clear that blithely including domestic workers into COIDA, without adapting its prerequisites to the domestic sector, would likely constitute success in law but not in life.

Then, in March 2021, the Compensation Fund published a notice in the Government Gazette setting out that domestic workers are now included in COIDA and that employers are obliged to register domestic workers in their employ and begin contributing to the Compensation

<sup>31</sup> *Id.* at para 128.

<sup>32</sup> *Id.* at para 120.

<sup>33</sup> Private Correspondence with Pinky Mashiane, December 2021.

Fund. This notice set a cut-off date for submitting retrospective claims as 20 November 2021. In other words, it was allowing domestic workers who had claims for injury, illness or death since 1994, a mere 8 months to bring such claims, before they would expire. This was obviously untenable, and inconsistent with the generous order set out by the Constitutional Court. In June 2021, the Department of Labour announced that this period would be extended in the COIDA Amendment Bill. The Bill has yet to pass. According to the Compensation Commissioner, they are not receiving COIDA claims from domestic workers.<sup>34</sup>

*Strengthening the Domestic Worker Unions: Visibility, Unity and Recognition as Key Stakeholders*

The fact that after 26 years of democracy, Mahlangu is the first case brought by the domestic worker union to the apex Court of the South African judiciary and guardian of constitutional values, is itself a significant milestone. The long road to Mahlangu has strengthened a growing coalition of unions and NGOs who have articulated their claims effectively in all forms of media and become recognized as key stakeholders in policy making by the department of Labour.

Domestic Worker unions such as SADSAWU and UDWOSA and worker associations such as IZWI Domestic Worker Alliance achieved visibility in the newspapers, television and social media. They have become core partners, who are consulted by the Department of Labour and Minister of Compensation. They have made submissions to parliament on the COIDA bill and continue to be the conscience of the nation, deriding a judgment that has not yet impacted on the workers it was designed to protect. Significantly, the two unions and IZWI Domestic Worker association achieved unity in their joint protests and advocacy around the Mahlangu case. The leaders of the two unions have also achieved personal recognition for their efforts. For instance, the founder of UDWOSA, Pinky Mashiane was recognized as an Atlantic fellow for racial justice.

They have also gone on to successfully champion further issues of discrimination in the sector, such as the absence of pay

parity for domestic workers under the National Minimum Wage Act, the absence of COVID-19 relief for unregistered domestic workers, and their inability to claim maternity benefits in fact, even though they were eligible under law. A forthcoming IZWI-Solidarity Center paper drawn attention to the loopholes in the Sectoral Determination 7 regulation of domestic work, with respect to live-in domestic workers, who face dramatic curtailment of their freedom of movement, the absence of explicit protection of their privacy or rights to family, and the absence of minimal guarantees for housing conditions.

*A Regional Discourse on Domestic Workers*

*“The NGO Forum of the African Commission passed a Special Resolution recognising that domestic workers in Africa experience intersectional discrimination based on race, class, nationalities and the gendered historical legacies of colonialism, and calling on member states to remove all references to domestic workers as “servants” in regulation, to recognise domestic work as decent and dignified work; to ensure adequate education and enforcement; and calling on the ECOSOC Committee to conduct a study on domestic workers regionally that would culminate in the adoption of a regional model law, to serve as a baseline standard for member countries.”*

Using international human rights norms as a reference point, the Constitutional Court stated in Mahlangu that “in assessing discrimination against a group or class of women of this magnitude that a broad national and international approach be adopted in the discourse affecting domestic workers.”<sup>35</sup> It is this notion of a broad approach to domestic work which has inspired a further Solidarity Center project on the regulation of Domestic Work regionally in Africa.

The research component of the project outlines the jurisprudence of global treaty bodies and their increasing willingness to address domestic work as a human rights issue globally. It considers regionally at the

<sup>34</sup> Public Dialogue, SERI, November 2021.

<sup>35</sup> Mahlangu CC, *supra* note 1 at para 42.

African Human Rights level that despite great possible scope, domestic workers have occupied strikingly little and or no space, within the regional system. The project proceeds to conduct nine different case studies of countries in Africa - South Africa, Mauritius, Kenya, Nigeria, Ghana, Ethiopia, Uganda, Lesotho and Malawi - with the aim of engaging national legal frameworks with the vision articulated in the *Mahlangu* case, that is cognizant of the ways in which this sector has been shaped by colonialism and its associated cultural and economic structures.

The preliminary research shows a range of approaches to the regulation of domestic work in Africa, with some countries adopting specific regulation tailored to the particularities of the sector (South Africa, Mauritius, Ghana), and others implicitly or explicitly including domestic workers within the purview of general labour laws (Kenya, Nigeria), and yet other countries, where domestic workers are largely excluded from labour protections (Ethiopia). It is telling that in a significant number of countries domestic workers are still termed “servants” in law. The study raises broader issues implicated in domestic work, such as child labour, migration and trafficking.

In November 2021, at the 60th anniversary of the adoption of the African Charter, the issue of domestic work was on the table for the very first time. The NGO Forum of the African Commission passed a Special Resolution recognizing that domestic workers in Africa experience intersectional discrimination based on race, class, nationalities and the gendered historical legacies of colonialism, and calling on member states to remove all references to domestic workers as “servants” in regulation, to recognize domestic work as decent and dignified work; to ensure adequate education and enforcement; and calling on the ECOSOC Committee to conduct a study on domestic workers regionally that would culminate in the adoption of a regional model law, to serve as a baseline standard for member countries.

### Looking Forward; Looking Backwards: Beyond Recognition - Redistribution Through Enforcement

Nancy Fraser famously noted that in a capitalist society, gender structures divisions between paid and unpaid work, and between higher paid male dominated jobs, and lower paid female dominated domestic jobs.<sup>36</sup> This results

<sup>36</sup> Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (2003).

in gender-specific exploitation.<sup>37</sup> Accordingly, gender injustice combines a status dimension (a cultural misrecognition), which necessitates recognition and at the same time, a class-like dimension, which requires redistribution. In her words, “gender injustice can only be remedied by an approach that encompasses a politics of redistribution and a politics of recognition.”<sup>38</sup>

The Constitutional Court has done the work of recognition admirably in *Mahlangu*: It has listened and heard the voice of domestic workers, it has “seen” their historic invisibility and powerlessness and recognized that their vindicated rights are “central to our transformative constitutional project.” But in a constitutional democracy, the court cannot do everything, and now it is up to the executive and legislative branches to listen to these voices and ensure access to effective and adequate remedies.

In fact, the recognition of domestic workers in *Mahlangu*, has an early antecedent in prior law reform. In 2000 the South African parliament amended the Unemployment Insurance Act to include domestic workers, thereby allowing them to claim from the unemployment insurance fund during periods of income cessation, including during maternity leave. The amendment was an important signal that domestic work was work like all other and entitled to the same benefits. However, registration for the unemployment insurance fund, and the payment of monthly contributions, rested on the employer. Consequently, the Achilles heel of that recognition has been the absence of compulsion on an employer to register and make contributions to the fund, a prerequisite without which a worker cannot make a claim. In fact, by all accounts in the past 20 years, registration has been negligible.<sup>39</sup>

The centrality of registration to vindication of rights became more pressing during the first wave of the COVID-19 pandemic, where unreg-

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 20

<sup>39</sup> CEDAW Shadow report, *supra* note 11 (cite a survey of IZWI Domestic Worker Alliance members revealed that 79% of respondents were not registered for unemployment insurance, while 11% did not know if they were registered or not); See also D Wesso and F Brandt, “Enforcement of Worker Rights: Negative experiences of low-wage precarious workers with the CCMA, Department of Employment and Labour and the Sheriff of the Court” (note that the failure of the DOL to enforce regulatory compliance “has perpetuated the widespread notion of domestic work as informal and unregulated, reinforcing historical servitude and enabling a range of exploitative practices around the sector.”) (unpublished, Solidarity Center) (2021).

istered domestic workers (the vast majority) could not make claims under the UIF COVID-19 Temporary Employer-employee relief scheme (TERS) benefit designed to alleviate the economic impact of the pandemic.<sup>40</sup> This left many domestic workers destitute and without a safety net. Civil Society organizations successfully challenged the exclusion, arguing that domestic workers whose employers had failed to register their contract of employment, should still benefit from TERS and be able to claim relief directly for the government.<sup>41</sup> As a result of the challenge, unregistered domestic workers were able for the first time to *register themselves* and make direct claims under TERS.<sup>42</sup>

In a 2015 global study on labour enforcement, Lucas Ronconi finds that countries that have the most protective labour codes, tend to enforce less.<sup>43</sup> He argues that this apparent paradox has its origin in colonization projects, where European colonizers created economies characterized by exploitation, and only introduced stringent labour laws to attempt to placate social unrest. He argues that in countries where Europeans pursued an extractive strategy, “we see more protective labour laws, lower overall enforcement and different levels of enforcement between large and small firms.” Accordingly, the chronic absence of enforcement in the domestic sector, likely the smallest of “firms,” can similarly be seen as a vestige of colonial labour law systems.<sup>44</sup>

Clearly, recognition of domestic workers intersectional and historic discrimination, without the provision of any or an adequate remedy – in Maria Malangu’s case a mere \$3000 after 28 years of service - rings hollow and will neither vindicate rights nor eradicate the remaining vestiges of apartheid. Yet, the Mahlangu case, and the outstanding COIDA amendment do still present a historic opportunity to finally correct the system of redistribution that hinges on unenforced employer registration. If successful, this reworking could trigger a wider professionalisation of the sector, beyond the narrow issue of com-

pensation for illness and injury; and would eradicate another equally distorting, vestige of colonialism and apartheid: the chronic under-enforcement of labour laws in the sector.

<sup>40</sup> CEDAW Shadow report, *supra* note 11.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Lucas Ronconi, *Enforcement and the Effective Regulation of Labor*, SSRN ELECTRONIC J., (2015), available at [https://www.researchgate.net/publication/314625979\\_Enforcement\\_and\\_the\\_Effective\\_Regulation\\_of\\_Labor](https://www.researchgate.net/publication/314625979_Enforcement_and_the_Effective_Regulation_of_Labor)

<sup>44</sup> *Id.*

# SETTING THE STANDARD FOR WASTE PICKERS' RIGHTS: THE IMPACT OF CONSTITUTIONAL COURT CASES IN COLOMBIA

## AMINTA OSSOM<sup>1</sup>

Colombia | Originally written in English

By 2009, dozens of informal workers whose livelihoods involved collecting and selling recyclable materials from a dumpsite in Cali, Colombia filed actions against the city alleging violations of their rights.<sup>2</sup> The workers were waste pickers, or individuals who 'pick' through municipal solid waste to recover recyclable materials to sell.<sup>3</sup> The city's decision to close Navarro, a dumpsite where the petitioners had worked, posed serious threats to their economic well-being. After promising alternative work opportunities for many of those who earned income off recycling materials from the dump, the city did not deliver on its proposals, so waste pickers initiated legal actions to defend their right to work.<sup>4</sup> They did so by filing *tutelas*, which are writs requesting relief

from government-perpetuated rights violations, and by employing the support of public interest lawyers and non-governmental organisations (NGOs) in advocacy both before and outside of court. Ultimately, the Constitutional Court of Colombia issued an opinion in their favor, *Sentencia T-291 of 2009*. The decision - in this and other related cases - can be taken as an example of both the potential and limitations of strategic litigation in defense of informal workers' rights.

*"Here, the Court specifically recognised a distinct right to livelihood, itself a helpful precedent. As both a constitutional and international human right, an individual's right to a freely chosen livelihood is linked to the concept of a right to life with dignity."*

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<sup>2</sup> Melanie Samson, *Chapter 5: Using the Law, in REFUSING TO BE CAST ASIDE: WASTE PICKERS ORGANISING AROUND THE WORLD* 60, 70 (2009).

<sup>3</sup> Waste picker organisations adopted the term 'waste picker' to counteract what were considered derogatory terms used to describe their function and work. INT'L LAB. ORG. & WOMEN IN INFORMAL EMPLOYMENT: GLOBALIZING AND ORGANIZING, COOPERATION AMONG WORKERS IN THE INFORMAL ECONOMY: A FOCUS ON HOME-BASED WORKERS AND WASTE PICKERS 21-22 (2017). However, these workers are known by different terms in different countries. See Martin Medina, *Living off Trash in Latin America*, 14 REVISTA 20, 21 (2015).

<sup>4</sup> Samson, *supra* note 2, at 70; Manuel Rosaldo, *Revolution in the Garbage Dump: The Political and Economic Foundations of the Colombian Recycler Movement, 1986-2011*, 63 SOCIAL PROBLEMS 351, 366 (2016).

### Legal Advancements

Often analyses of the Court's decision in *Sentencia T-291* focus on the right to work, which was the core argument in the waste pickers' individual petitions. It is true that the Court's decision was noteworthy in this regard. Contentious cases on worker rights often address rights within the workplace, such as rights to adequate compensation, free association, and equitable working conditions. Here, the Court specifically recognised a distinct right to livelihood, itself a helpful precedent. As both a constitutional and international human right, an individual's right to a freely chosen livelihood is linked to the concept of a right



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to life with dignity.<sup>5</sup> However, whether the normative standard includes a guarantee of continuity of that livelihood is seldom elaborated in contentious cases.<sup>6</sup> Confirmation of this right is especially relevant to the situation of informal economy workers who face precarity not only connected to treatment in their places of work but also connected to the insecurity of their livelihood as such.

Another significant aspect of the Court's opinion was its acceptance of arguments submitted by human rights NGO CIVISOL, which, as *amicus curiae*, argued that the city's closure of Navarro was part of a larger system of exclusion disadvantaging waste pickers. As evidence of this claim, CIVISOL pointed to legislation affecting anyone who aimed to collect waste on their own, including waste pickers working outside of the dumpsite. In particular, it referenced national law that had made collection of waste in the streets untenable because the law imposed fines on those accessing waste in public bins, which was often necessary to retrieve recyclables.<sup>7</sup> Petitioning the Court to guarantee economic inclusion in line with Colombia's *estado social de derecho*,<sup>8</sup>

CIVISOL suggested that the Court counter the systemic discrimination experienced by waste pickers through its judgments on the individual petitions.

Further, CIVISOL asserted, waste pickers as a class were a historically marginalised group deserving not only redress in response to the closure of the Navarro dumpsite but also affirmative actions to account for inequality that they had experienced over the course of Cali's history.<sup>9</sup> To support this argument, CIVISOL recounted the history of waste picking as a means of subsistence over the previous half-century. It described the factors driving families into waste picking, such as poverty and displacement, as unifying features of the group.<sup>10</sup> Moreover, it highlighted the stigma and poor conditions of work that waste pickers had tolerated in order to pursue a livelihood.<sup>11</sup> That the intervention succeeded in demonstrating group marginalisation on the basis of waste pickers' socio-economic status - and not primarily on immutable characteristics such as gender and ethnicity - was an innovation. Although it did not echo CIVISOL's rationale in its entirety, the Court nevertheless agreed that the government must take positive actions to even out obstacles to equality faced by groups disadvantaged in the economic and social sphere.<sup>12</sup> Requiring this substantive equality for waste pickers would have implications not only for redressing the petitioners' immediate harms but also for reforming Cali's waste management system itself, a potentially wider-reaching impact.

## Evolution of Arguments

The decision of the Court in *Sentencia T-291* was not without precedent. In 2003, the Constitutional Court of Colombia had also ruled positively on a legal action brought by waste pickers, this time from Bogotá. In that case, a network of waste picker cooperatives challenged Bogotá's regulatory scheme, which had worked to preclude the network from officially bidding for a citywide waste

<sup>5</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment No. 18, E/C.12/GC/18 (Feb. 6, 2006), ¶¶ 1, 31.

<sup>6</sup> There are, of course, some notable exceptions. See, e.g., *South African Traders Forum and Others v. City of Johannesburg and Others* 2014 (6) BCLR 726 (CC) ¶ 11 (S. Afr.); *Olga Tellis & Ors v Bombay Municipal Council*, (1985) 2 Supp SCR 51 (India). The first case of the Inter-American Court of Human Rights to address a right to continuity of livelihood as such was *Lagos del Campo vs Perú* in 2017. Franz Christian Ebert & Charlotte Fabricius, *Strengthening Labor Rights in the Inter-American Human Rights System*, 4 INT'L LAB. RTS. CASE L. 179 (2018). Before that case, in the Inter-American human rights system, the right to maintain one's livelihood was analysed indirectly under the right to judicial protection. See Flávia Piovesan, *Ius Constitutionale Commune En América Latina: Context, Challenges and Perspectives*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 49, 63-64 (Armin von Bogdandy et al. eds, 2017) (citing, as examples *Baena Ricardo and others v. Panamá*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2011); *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

<sup>7</sup> Rosaldo, *supra* note 4, at 366; Samson, *supra* note 2, at 70.

<sup>8</sup> Drawn from German and Spanish Constitutions, this foundational concept underpins the 1991 Constitution of Colombia. Broadly speaking, it signifies commitment to the rule of law as a constraint on political power and a recognized role for the state in guar-

anteeing social equality. Luis Villar Borda, *Estado de derecho y Estado social de derecho*, 20 REVISTA DERECHO DEL ESTADO 73 (2007).

<sup>9</sup> Corte Constitucional [C.C.][Constitutional Court], 23 de abril de 2009, *Sentencia T-291/09*, ¶ 8 (Colom.).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 3.

collection contract.<sup>13</sup> There, waste pickers and their supporters argued that the city had plainly discriminated against waste pickers by instituting narrow tendering terms, which restricted bidding to stock-owned enterprises that had held similar contracts in large cities during the preceding five years.<sup>14</sup> The waste pickers also argued that, by preventing them from pursuing a contract in line with their customary form of labour, the regulatory scheme infringed on waste pickers' right to work.<sup>15</sup>

Similar to the case of the Cali recyclers, in *Sentencia T-724 of 2003*, the Constitutional Court held that waste pickers were a marginalised group requiring special protection. It therefore required the Capital District of Bogotá to take affirmative actions in its subsequent contracting processes that would benefit waste pickers.<sup>16</sup> However, unlike *T-291*, in *T-724*, the Court did not elaborate on the arguments that petitioners had put forward under the rationale of the right to work. The fact that the bidding process at issue had completed before the Court had deliberated made an analysis of that claim moot.<sup>17</sup>

Both cases have proven influential in human rights discourse. Nationally, the two cases were foundational points in a decade-long timeline of legal advocacy conducted by waste picker associations and their NGO supporters in Colombia.<sup>18</sup> That advocacy has helped improve the social and economic standing of waste picker cooperative members. For example, decisions subsequent to *T-724* ordered Bogotá to include waste pickers in its official waste collection scheme.<sup>19</sup> Participants in the scheme were given remuneration for their

labour, which, coupled with the usual pay received for recyclables, increased their income.<sup>20</sup> Since that time, Bogotá has also provided safety kits, uniforms and trucks to waste pickers in order to, respectively, provide protection from dangerous elements mixed in with waste, facilitate identification and replace previously banned horse-drawn carts.<sup>21</sup> These provisions helped confirm waste pickers' status as legitimate workers and improved their conditions of work.<sup>22</sup>



Waste picker in Bogotá © Juan Arredondo/Getty Images/Images of Empowerment

Internationally, the cases have served as reference points in complementary analysis on workers' rights in other contexts. One such example is a 2016 decision of the Human Rights Commission of Mexico City, which similarly recognised informal waste pickers in Mexico's capital as a marginalised group deserving of special protection.<sup>23</sup> In that decision, *Recomendación 7/2016*, the Commission responded to the petitions of dozens of waste pickers whose informal work benefited the city but which the city did not compensate. Citing *Sentencia T-724* as persuasive guidance about what constitutes a marginalised group, the Commission concluded that the city should take affirmative actions to reduce those waste pickers'

<sup>13</sup> C.C., 20 de agosto de 2003, Sentencia T-724/03 (Colom.).

<sup>14</sup> *Id.* ¶ 1; Rosaldo, *supra* note 4, at 365.

<sup>15</sup> *Sentencia T-724/03*, *supra* note 13, ¶ 1.

<sup>16</sup> *Id.* ¶¶ 11-12.

<sup>17</sup> *Id.* ¶ 10. Because the Court agreed that the right to work had been infringed the decision of the court of first instance was revoked. The lower court had concluded that the right to work had not been violated because exclusion from a bidding process for a public contract did not prevent waste pickers from carrying out their ordinary recycling work. *Id.* ¶ 1.

<sup>18</sup> See generally Federico Parra Hinojosa, *De La Dominación a La Inclusión: La Población Recicladora Organizada Como Sujeto Político* (2016) (Ph.D. dissertation, Universidad Nacional de Colombia) (on file with author).

<sup>19</sup> Olga Abizaid, *ARB: Fighting for an Inclusive Model for Recycling in Bogota* 11 (Women in Informal Employment: Globalizing and Organizing, 2015); Rosaldo *supra* note 4, at 352; Marta Marelló & Ann Helwege, *Solid Waste Management and Social Inclusion of Wastepickers: Opportunities and Challenges*, 45 *LATIN AMERICAN PERSP.* 108, 117 (2018).

<sup>20</sup> Abizaid, *supra* note 19, at 11.

<sup>21</sup> Manuel Rosaldo, *The Antinomies of Successful Mobilization: Colombian Recyclers Manoeuvre between Dispossession and Exploitation*, *DEV. & SOCIAL CHANGE* 1, 17-18 (2019).

<sup>22</sup> Abizaid, *supra* note 19, at 9, 11; Rosaldo, *supra* note 4, at 361.

<sup>23</sup> Comisión de Derechos Humanos de la Ciudad de México, *Recomendación 7/2016, Omisiones en el Sistema de Recolección, Separación y Destino Final de Residuos Sólidos Urbanos en la Ciudad de México, así como en la Generación de Condiciones para el Trabajo Digno de las Personas que Realizan Esas Actividades* (July 14, 2016).

marginalisation.<sup>24</sup>

### Practical Limitations and Normative Impact

While *Sentencia T-291* and *Sentencia T-724* symbolised clear victories for Colombia's waste picker rights movement, the judgments also reflect the limitations of strategic litigation, including for the fulfilment of informal worker rights. First, implementation was not inevitable. Several of the actions initiated by waste pickers in the wake of the decisions pushed for enforcement of the earlier rulings given municipalities did not sufficiently comply with the Constitutional Court's orders automatically.<sup>25</sup> Second, efforts to vindicate waste pickers' rights in the courts required constant reinforcement through civic engagement and grassroots organising.<sup>26</sup> In fact, observers have suggested that pairing the formal, legal advocacy with strategic community activism was key to the campaign's successes.<sup>27</sup>

*“Second, efforts to vindicate waste pickers' rights in the courts required constant reinforcement through civic engagement and grassroots organising. In fact, observers have suggested that pairing the formal, legal advocacy with strategic community activism was key to the campaign's successes.”*

Finally, there was disagreement among relevant stakeholders about the best ways to fulfil the rights recognised. For instance, waste picker associations that sought inclusion diverged on whether the best method to realise this inclusion was through complete or partial formalisation of their labour.<sup>28</sup> In Bogotá, for

example, a sympathetic administration that came into leadership a decade after *T-724* proposed full-scale socialisation of the waste management system.<sup>29</sup> Under its proposal, the municipality would oversee waste collection entirely, taking it over from competing corporations and assigning waste pickers to collection routes or recycling centres through government-supervised cooperatives.<sup>30</sup> The benefits of this system were thought to be good coordination between all parts of the sector, increased efficiency, reduced exploitation by private intermediaries and an ability to transition the system into one that prioritised 'zero waste'.<sup>31</sup> As such, the framework was supported by one of the city's smaller waste picker associations.<sup>32</sup>

However, leaders of Bogotá's largest association were wary of the plan. Although incomes were projected to increase, less than half of the current waste-picking workforce could be absorbed under the proposal.<sup>33</sup> Waste pickers had, in the past, battled evictions, criminalisation and vigilante violence either perpetuated by the state or with its complicity.

*ity Do Workers Value? Evidence from a Choice Experiment in Bangladesh* (Rand Labor & Population Working Paper WR-1197, 2017). However, formalisation may also entail drawbacks that continue to subjugate marginalised workers, such as lack of ownership over labor, more hierarchical decision-making, inflexible work schedules, and loss of control over productive inputs. For more discussion of this topic as applied to waste pickers, see Sandra Aparcana, *Approaches to Formalization of the Informal Waste Sector into Municipal Solid Waste Management Systems in Low-and Middle-Income Countries: Review of Barriers and Success Factors*, 61 WASTE MGMT. 593 (2017); DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ), RECOVERING RESOURCES, CREATING OPPORTUNITIES: INTEGRATING THE INFORMAL SECTOR INTO SOLID WASTE MANAGEMENT (2011); César Rodríguez Garavito, *En Busca de Alternativas Económicas en Tiempos de Globalización: El Caso de las Cooperativas de Recicladores de Basura en Colombia, in EMANCIPACIÓN SOCIAL Y VIOLENCIA EN COLOMBIA 411* (BOAVENTURA DE SOUSA SANTOS & MAURICIO GARCÍA VILLEGAS eds., 2004).

<sup>24</sup> *Id.*, at 68.

<sup>25</sup> See, e.g., C.C., 30 de julio de 2010, Auto 268/10 (Colom.); C.C., 19 de diciembre de 2011, Auto 275/11; C.C., 28 de noviembre de 2014, Auto 366/14 (Colom.); C.C., 15 de diciembre de 2015, Auto 587/15 (Colom.).

<sup>26</sup> See Samson, *supra* note 2, at 44-47; Abizaid, *supra* note 19, at 111; Rosaldo, *supra* note 4, at 364; Marelló & Helwege, *supra* note 19, at 112.

<sup>27</sup> See, e.g., Rosaldo, *supra* note 4, 364.

<sup>28</sup> General debates over formalisation point to benefits and drawbacks of formality. Formalisation can offer workers higher pay, job stability, access to social and health benefits and regulation of conditions of work to reduce exploitation, harassment and occupational hazards. See Minhaj Mahmud et al., *What Aspects of Formal-*

<sup>29</sup> Rosaldo, *supra* note 21, at 2, 13-14. In comparison, the mayor of Cali proposed to establish a new municipal corporation with waste pickers as shareholders to implement *T-291*. His efforts were frustrated by the intervention of national government representatives and private sector interests that pushed for privatisation of waste collection. Natalia Angel-Cabo, *The Constitution and the City: Reflections on Judicial Experimentalism through an Urban Lens, in EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 157, 178-79* (Hirsch Ballin et al. eds., 2021).

<sup>30</sup> Rosaldo *supra* note 21, at 13-14.

<sup>31</sup> *Id.* at 2, 13-14. 'Zero waste' policies vary by country but generally aim for recovery of all recyclables before disposal.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 14-15.



Hence, association leaders were hesitant to lose their day-to-day autonomy and be dependent on the whims of the government.<sup>34</sup> Instead, they proposed, partial formalisation should be facilitated through remuneration and limited intervention of the state.<sup>35</sup> The competing perspectives of the associations—and of factions within Bogotá leadership—led to conflict and implementation delays.<sup>36</sup> Some of that contestation continues to this day.

These challenges notwithstanding, the normative power of the cases is without dispute. *T-291* and *T-724* definitively categorised waste pickers as a group of workers deserving of special protection on account of their marginalised social and economic standing. By doing so, the cases pushed municipalities to make proactive efforts to include waste pickers in local waste management systems. More broadly, however, the cases model to advocates the types of legal arguments that could be deployed elsewhere, arguments that help turn strategic litigation on account of individual informal workers into a tool of wider systemic reform.

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<sup>34</sup> *Id.* at 15-17.

<sup>35</sup> *Id.* at 17-18.

<sup>36</sup> See generally *id.*; Angel-Cabo, *supra* note 29.

## THE STRUGGLE OF AGRICULTURAL WORKERS TO GAIN THE RECOGNITION AND RIGHT TO ORGANISE IN JORDAN

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Since Jordan's founding over 100 years ago, agricultural workers have suffered systemic marginalisation by the state, including through their exclusion from the country's labour laws. Their situation has only worsened with the ongoing crises in neighbouring countries, especially Iraq and Syria, which are the two largest markets for Jordanian crops and produce. Further, access to European markets has been disrupted since the only land route to the EU is through Syria. These disruptions have led to a drop in the prices of these goods causing farmers to incur huge losses. At the same time, the cost of agricultural production has increased. Farm owners have sought cut their losses through reducing the cost of labour, and specifically by expanding the use of day labour or labour paid at piece rate. Owners have also increasingly employed migrant workers and refugees, who are paid lower wages and under conditions which are clearly illegal. They depend on the fact that such workers do not know their rights and who are in any case unable to exercise them if they did. Jordanian labourers have refrained from joining the agricultural sector due to the lack of legal protections and job security.

While a small group of agricultural workers is employed by agricultural companies under formal contracts that are subject to the Labour Law,<sup>1</sup> the overwhelming majority work informally and in an unorganised manner in seasonal, daily, tem-

porary, and intermittent agricultural work without written contracts and without enjoying the most basic worker rights. This includes exclusion from legal protections relating to the minimum wage, maximum hours, leave (weekly, annual and maternity), occupational safety and health, safe transportation, decent dorms, social protection and of course the right to freely associate and to bargain collectively.

Migrants and refugees in this sector are subject to the sponsorship system (known as the Kefala System), which restricts the worker to one employer. The worker is not allowed to change employers or their work sector except by following complicated procedures. This is made impossible in most cases given the fact that the employer holds the passport of the worker. The sponsorship system denies the freedom of the worker to movement, mobility, and self-determination; it is one form of modern slavery. Syrian refugees go to work as families, including children - most of whom are under the legal age to work. Each family is linked to a broker, who provides work for them in each agricultural season in return for a significant percentage of their modest wages. Women in this sector are vulnerable to and often subjected to gender-based violence and harassment. There is no protection from sexual harassment in the workplace nor during transport to and from work.

### **Legal Background of the Right to Organise in Jordan**

Jordan has ratified the International Covenant on

<sup>1</sup> Agricultural companies that are officially registered have workers under formal contracts. However, the majority of workers work for small farmers who are not officially registered and thus these workers are not employed under formal contracts.



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Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all of which enshrine the right to freedom of association (including the right to form and join unions) for all individuals. Jordan has also ratified some of the fundamental conventions of the International Labor Organization (ILO), including the Right to Organise and Collective Bargaining Convention No. 98.<sup>2</sup>

The Constitution of Jordan in Article 16 stipulates the right of Jordanians to form unions provided that they must have a lawful purpose, peaceful means, and by-laws that do not violate the provisions of the Constitution.<sup>3</sup> Also, Article 23 stipulates the right of Jordanians to form free unions within the limits of the law.<sup>4</sup> Article 128(1) of the Constitution stipulates that the laws issued under this Constitution to regulate rights and freedoms may not influence the essence of such rights or affect their fundamentals.<sup>5</sup> The Jordanian Constitution does not explain the relationship between international treaties and local laws. However, the Jordanian judiciary, in several rulings issued by the Court of Cassation, established those international treaties have supremacy over national law in the case of a conflict.<sup>6</sup>

<sup>2</sup> Jordan has not ratified ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention; however it is still binding on ILO member states, regardless of ratification, since it is one of the fundamental conventions. ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, (1998 annex revised June 2010) available at <https://www.ilo.org/declaration/textdeclaration/lang-en/index.htm>

<sup>3</sup> The Constitution of the Hashemite Kingdom of Jordan 1952 (rev. 2011), art. 16, available at <http://www.pm.gov.jo/content/1405787980/%D8%A7%D9%84%D9%81%D8%B5%D9%84%D8%A7%D9%84%D8%B9%D8%A7%D8%B4%D8%B1.html>

(English version here: [https://www.iec.jo/sites/default/files/202009/Jordan%20amended%20constitution%20%202016%20EN\\_0\\_0.pdf](https://www.iec.jo/sites/default/files/202009/Jordan%20amended%20constitution%20%202016%20EN_0_0.pdf)).

<sup>4</sup> *Id.* at art. 23 (f).

<sup>5</sup> *Id.* at art 128(1)

<sup>6</sup> Judgment number 2426 for 1999, Court of Cassation or (Supreme Court)/Civil, published in page number 1788 of Jordan Bar Association Journal for 2002; Judgment number 163 for 1977, Court of Cassation (or Supreme Court)/ Criminal, published on page 1315 of Jordan Bar Association journal for 1977. (It states that "the state implements treaties it enters into with other states on the ground that treaties are stronger than the ordinary domestic law." It also states that "Bilateral or international treaties are binding and must be enforced, and they are superior to the domestic law in the event of conflict."); Judgment number 818 for

The first Labour Law in Jordan was issued in 1960 (Law No. 21).<sup>7</sup> Its provisions excluded agricultural workers except for those who worked at government establishments in mechanical works and permanent irrigation. The 1960 law was repealed and replaced by Labour Law no. 8 in 1996. Law No. 8<sup>8</sup> has been amended multiple times, including in 2002, which allowed the Council of Ministers to include some groups of previously excluded workers. Regulation No. 4 of 2003<sup>9</sup> covered limited categories of agricultural workers, particularly: agricultural engineers, veterinarians, agriculture workers in government establishments, technical workers on agricultural machinery and at nurseries and animal husbandry farms. However, this regulation excluded the right to freedom of association, to collectively bargain, and provisions on vocational training. As for other categories of agricultural workers, who represent the vast majority of workers in agriculture, they remained outside the protection of the Labour Law. The government justified this on more than one occasion by saying that it aims at reducing the burdens on farm owners.

The right to organise and collective bargaining is regulated in the Labour Law. The ILO has found that the Jordanian Labour Law violates these rights as regulated by international law. For example, Article 98 of the Labour Law gives the Minister of Labour the right to identify the professions that are entitled to form a union.<sup>10</sup> Indeed, in 1999, the Ministry of Labour issued a decision to limit the professions able to form a union to 17. The law also prevents multiple unions in the same sector, meaning that those sectors where unions are allowed to form are often

2003, issued on June 9th, 2003.

<sup>7</sup> Temporary Labour Law of No. 21 of 1960, (Jord.), available at in Arabic <http://muqtafi2.birzeit.edu/muqtafi2/transform/fulltext/JTJGZGIIIMkZtdXF0Y-WZpJTJGYWN0JTJGeG1sJTJGMTk2MCUyRmxhd-19LaW5nXzE5NjAtMDU0tMjFfYXlIMkYyMV8xOTYwLn-htbA>

<sup>8</sup> Labour Code No. 8 of 1996 (Jord.).

<sup>9</sup> Regulation No. (4) of 2003, *The Regulation of Agricultural Workers Categories who are subject to the Provisions of the Labour Law* (Jord.), available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79111/84932/F1168099526/JOR79111%20Eng.pdf>

<sup>10</sup> Labour Code No. 11 of 2004 (as amended from No. 8) (Jord.), at art. 98(b), available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45676/84920/F-1672011876/JOR45676%20Eng.pdf>.

occupied by government-dominated unions. Further, migrant workers are deprived of the right to form unions, though they may join unions organised by Jordanian citizens. As such, the majority of workers in Jordan are unable to form or join a union.

*“The law also prevents multiple unions in the same sector, meaning that those sectors where unions are allowed to form are often dominated by government-dominated unions. Further, migrant workers are deprived of the right to form unions, though they may join unions organised by Jordanian citizens. As such, the majority of workers in Jordan are unable to form or join a union.”*

In 2008, the Labour Law was amended again, and agricultural workers were no longer explicitly excluded. The amendment required the promulgation of a regulation to be issued regarding all agricultural workers with respect to labour contracts, work time, breaks, labour inspection and other employment conditions. In May 2021, and after 13 years of delay, the government issued the Regulation on Agricultural Workers under immense pressure by civil society organisations, unionists, and worker activists.<sup>11</sup> These groups campaigned for over a year, focused on changing and bringing public opinion to recognise the essential and important role that workers in the agricultural sector play, in particular during the COVID-19 pandemic. Although it was issued late, the regulation constituted a qualitative and historic shift in the development of rights and protection of workers in Jordan and in the regulation of the relationship between employers and workers. It also ended a long epoch of exclusion of agricultural workers from the Labour Law.<sup>12</sup>

<sup>11</sup> Agricultural Workers Regulation No. 19 of 2021 (Jord.). With the amendment of the Labour Law in 2008 and the issuance of the Agricultural Workers Regulation of 2021, the regulation that defines categories of agricultural workers who are subject to the provisions of the Labour Law of 2003 will be effectively annulled. Article 5 of Civil Law stipulates that “no legislative stipulation may be repealed except by later legislation that explicitly stipulates this repeal or that includes a stipulation that conflicts with the stipulation of the old legislation or regulates anew the subject whose rules were previously established by that legislation.”

<sup>12</sup> In the intervening 13 years, the absence of the regulation strengthened the patterns of informal and unorganised contracting in the sector. In addition to violating domestic law, the continual refusal of the Government of Jordan to enact the special regulations was brought to the attention of the ILO, which reiterated the importance and urgency of such regulations. The lack of promulgation led to confusion and vagueness in interpretation of the Amended Labour law of 2008, particularly with regards to the question of whether

### *The Regulation of Agricultural Workers 2021*

The Regulation included all forms of agricultural work, all agricultural facilities and all workers regardless of their nationalities. It also included all forms of work contracts that do not have a specific duration, as well as those that have a specific duration, including temporary and seasonal work. Most importantly, it explicitly stipulated in Article 16<sup>13</sup> the application of the provisions of the Labour Law where there is no specific provision in the Regulation, which means that agricultural workers are included in all the provisions of the Labour Law. Agricultural workers are now entitled to the protections and recognition stipulated in the Labour Law with regards to wages, minimum wage, work contracts, occupational safety and health, work injuries, occupational diseases, employment and training services, organising, and collective bargaining. It allows agricultural workers to engage with and file complaints with the labour inspectorate. Further, this will allow them to access courts and submit complaints about their violations of their rights. However, the regulation excluded those who work for employers who employ three or less workers from the provisions concerning work hours, holidays, leaves, and social security. This exclusion was not justified and received strong criticism from rights organisations and those working in the sector in view of the confusion it will cause to worker relations.<sup>14</sup> Moreover, this exclusion will complicate

agricultural workers were now included in the amended law or would only be included when the regulations were promulgated. Some argued that because the amended law did not specifically exclude agricultural workers as it did civil servants and municipal employees, agricultural workers are included within the law. Others argued that for agricultural workers to be recognised under the new law, the government must issue special regulations to determine which provisions these workers would be subject to as required by the amended law.

<sup>13</sup> Agricultural Workers Regulation No. 19 of 2021 (Jordan), available at [http://www.mol.gov.jo/ebv4.0/root\\_storage/ar/eb\\_list\\_page/%D9%86%D8%B8%D8%A7%D9%85\\_%D8%B9%D9%85%D8%A7%D9%84\\_%D8%A7%D9%84%D8%B2%D8%B1%D8%A7%D8%B9%D8%A9\\_%D8%B1%D9%82%D9%85\\_19\\_%D9%84%D8%B3%D9%86%D8%A9\\_2021.pdf](http://www.mol.gov.jo/ebv4.0/root_storage/ar/eb_list_page/%D9%86%D8%B8%D8%A7%D9%85_%D8%B9%D9%85%D8%A7%D9%84_%D8%A7%D9%84%D8%B2%D8%B1%D8%A7%D8%B9%D8%A9_%D8%B1%D9%82%D9%85_19_%D9%84%D8%B3%D9%86%D8%A9_2021.pdf)

<sup>14</sup> Position Paper of the Coalition Against Violence and Harassment in the World of Work on Agricultural Workers Regulation No. 19 Of 2021, in Arabic, available at <https://ammannet.net/%D9%85%D8%B1%D8%B5%D8%AF-%D8%A7%D9%84%D9%81%D8%B9%D8%A7%D9%84%D9%8A%D8%A7%D8%AA/%D9%88%D8%B1%D9%82%D8%A9-%D9%85%D9%88%D9%82%D9%81-%D8%B5%D8%A-7%D8%AF%D8%B1%D8%A9-%D8%B9%D9%86-%D8%AA%D8%AD%D8%A7%D9%84%D9%81-%D9%85%D9%86%D8%A7%D9%87%D8%B6%D8%A9-%D8%A7%D9%84%D8%B9%D9%86%D9%81-%D9%88%D8%A7%D9%84-%D8%AA%D8%AD%D8%B1%D8%B4-%D9%81%D9%8A-%D8%B9%D8%A7%D9%84%D9%85->

oversight of rights and commitments, cause extreme hardship in court procedures, and deprive large segments of workers of fundamental rights.<sup>15</sup>

Importantly, the significant limitations on the right to freedom of association and to bargain collectively in the Labour Law still mean that, even with formal coverage under the law, these rights remain out of reach for agricultural workers.

### First Experience of Registering an Agricultural Workers Union

After years of waiting on the government to issue the necessary regulations, in September 2018, the Independent Union of Agricultural Workers in Jordan, which was unregistered and unrecognised by the Jordanian Government, filed an application with the Registrar of Unions at the Ministry of Labour to register the union. In October 2018, the Registrar of unions responded that the agricultural sector was not within the list of 17 classified sectors and thus, he had no power to approve the application. At the time, only the tripartite committee would be able to review the classified sectors and decide whether to add additional sectors.

In December 2018, a group of independent unions in Jordan filed a complaint with the ILO Committee on Freedom of Association (ILO CFA) concerning the violations of their right to freedom of association under the Jordanian Labour Law. The complaint included the refusal to register the agricultural workers' union. According to the ILO Report issued in March 2021, the reply of the Jordanian Government to the complaint stated that the tripartite committee would consider the application to register the union<sup>16</sup> and issue a

[https://www.ilo.org/wcmsp5/groups/public/-/ed\\_norm/---relconf/documents/meetingdocument/wcms\\_776041.pdf](https://www.ilo.org/wcmsp5/groups/public/-/ed_norm/---relconf/documents/meetingdocument/wcms_776041.pdf)

<sup>15</sup> As discussed above, most agricultural workers in Jordan work in informal and precarious relationships. Often, they are day labourers changing farms daily, making it nearly impossible to prove an employment relationship or they are migrant workers who work for smaller farmers that do not employ more than 3 workers.

<sup>16</sup> ILO, *Reports of the Committee on the Freedom of Association*, 393<sup>rd</sup> Report of the Committee on the Freedom of

decision on it, but this has not taken place so far. The ILO CFA recommended that the Jordanian Government hold consultations with the parties to social dialogue to introduce amendments to the Labour Law to ensure that the right to organise and collective bargaining, and to form multiple unions even by migrant workers is protected and realised.<sup>17</sup> As of the writing of this article, this has not happened.

In 2019, the Labour Law was amended so that the tripartite committee was no longer concerned with the classification of professions. That power now rested with the Minister of Labour and the Registrar of Unions.



Jordan agriculture workers © Nadia Naffaa/Solidarity Center

### Second Experience of a Registering Union

In light of the COVID-19 pandemic, agricultural workers became even more vulnerable. This highlighted the importance of providing them with social protection, including health care and social security, and the need to apply occupational safety and health conditions to the sector. Thus, workers tried again to submit an application to register their union. A new group of 50 members held a founding conference and elected members of the union council abiding by the pandemic-imposed safety restrictions issued by the government. As a result of the pandemic restrictions, all the members did not meet in one place but rather met in small groups and then signed

Association, at 167, (March 2021) [hereinafter ILO CFA] available at [https://www.ilo.org/wcmsp5/groups/public/-/ed\\_norm/---relconf/documents/meetingdocument/wcms\\_776041.pdf](https://www.ilo.org/wcmsp5/groups/public/-/ed_norm/---relconf/documents/meetingdocument/wcms_776041.pdf)

<sup>17</sup> *Id.*

a single document attesting to the formation of this union.

The application was submitted on 28 December 2020, and it was rejected by the Registrar of Unions on 11 January 2021. The Registrar justified the rejection on three grounds: (1) the agricultural sector is not within the classified sectors (2) the mechanism of holding the founding conference violates the norms that require that all members meet in one place and (3) the Labour Law does not apply to agricultural workers in light of the absence of a regulation for agricultural workers.

The union appealed the decision to the Administrative Court. This case was the first of its kind in Jordan. The union's lawyer refuted the reasons for rejecting the registration since agricultural workers are covered by the Labour Law as amended and the fact that the lack of a regulation for agricultural workers was issued does not mean that they do not enjoy these labour rights and protections. Further she argued that there is no existing law that defines the form of the founding conference of the union or a requirement that the founders all be present in one place. The bylaw of the union is the only required process to follow, and it specifically stated rules during a pandemic including the allowance of small committees, and the founding members did not violate it. The union lawyer also reminded the court of Jordan's international labour law commitments and the recent findings of the ILO Committee on Freedom of Association.

The Administrative Court rejected the workers' appeal by finding that the two plaintiffs did not prove that they were agricultural workers. The court also relied on the Regulation on Categories of Agricultural Workers Subject to the Provisions of the Labour Law of 2003 to emphasise that the two plaintiffs were not subject to the Labour Law, instead of the revised 2008 Labour Law which does recognise agricultural workers.

This decision was appealed to the Supreme Administrative Court. The union lawyer also filed an application to raise the defense of unconstitutionality of the Labour Law to the Constitutional Court arguing that the exclusion of agricultural workers from the list of professions and sectors allowed to form unions under Article 98 of the Labour Code violates the Constitution of Jordan (right to form a union and principles of equality).

The Supreme Administrative Court refused to refer the defense of unconstitutionality to the

Constitutional Court, justifying this by saying that there was no seriousness in submitting this request. Consequently, the court continued to consider the appeal of the decision of the Administrative Court.

In its final decision on 3 November 2021, the Supreme Administrative Court dismissed the appeal of the two plaintiffs and upheld the decision of the first court, based on the argument that the two plaintiffs were not from the categories of agricultural workers that are subject to the 2003 Regulation and that the agricultural sector was not within the sectors in which unions may be formed under the decision of classifying professions.<sup>18</sup>

*"Agricultural workers in Jordan are deprived of their right to organise and freedom of association through legislative, administrative, and judicial decisions. Often the laws relied upon to deny these workers their fundamental rights are repealed, or the decision is based on arbitrary factors."*

## Conclusion

Agricultural workers in Jordan are deprived of their right to organise and freedom of association through legislative, administrative, and judicial decisions. Often the laws relied upon to deny these workers their fundamental rights are repealed, or the decision is based on arbitrary factors. As the ILO Committee on the Freedom of Association rightly states, "the current system might leave out entire groups of workers unable to exercise their right to organise and to benefit from collective bargaining rights."<sup>19</sup> The exclusion of agricultural workers from the recognition, protection, and policies of the Labour law are a violation of fundamental labour rights. Besides, it is not a law that is difficult to amend; it can be reversed based on a decision by the minister of labour if there was political will to support free unions.

The Agricultural Workers Regulation No. 19 of 2021 was issued five months after filing the lawsuit and thirteen years after the law required its issuance, thanks to the struggle of the workers and human rights activists to confirm that agricultural workers are subject to the Labour Law.

<sup>18</sup> The judgment is not available online, but author has judgment on file.

<sup>19</sup> ILO CFA, *supra* note 15 at para 558.

The demand to cancel the decision to classify professions and industries by the Ministry of Labour is now very pressing. The Government of Jordan has to respond to worker demands, global union demands and the recommendations of the ILO Committee on Freedom of Association to amend the Labour Law in a manner that respects the rules of independent and free unions and not to interfere in the affairs of unions and not to discriminate between workers in the exercise of this right. This should be done through allowing multiplicity a plurality of unions, allowing migrant workers to form and join trade unions, stop the interference of the Ministry of Labour in the bylaws of unions, and cancel the condition of approval of registering unions to recognise their legal existence.

**Update:** In December 2021, the Jordanian Ministry of Labour finally issued instructions for labour inspections specifically directed at the agricultural sector to allow for inspectors to be aware of the unique risks and violations facing this sector.

# HOMEWORKERS AS EMPLOYEES: THE EMERGING JURISPRUDENCE IN INDIA

## KRITHIKA A. DINESH<sup>1</sup>

India | Originally written in English

During the COVID-19 crisis, ‘work from home’ became the norm for many, with countries asking companies to ensure that employees work from home. While this was a new experience for many workers across the globe, industrial outworkers carved an identity based on their place of work long before. Popularly known as ‘homeworkers’, these workers have a distinct identity derived from their place of work.<sup>2</sup>

Homeworkers work across sectors such as apparel, footwear, electronics, furniture, in making, assembling, packaging, labelling or finishing products.<sup>3</sup> The exact number of homeworkers is unknown since most countries’ labour force surveys count homeworkers as own-account workers. Additionally, some homeworkers do not identify themselves as workers.<sup>4</sup> A recent ILO report on homework estimates there are at least 49 million homeworkers.<sup>5</sup> Countrywide estimates suggest India has more than 6 million ‘probable homeworkers’, Mexico more than 4 million<sup>6</sup>

*“These homeworkers are usually part of larger domestic and global supply chains where production is systematically fragmented and outsourced, typically to developing countries. Consequently, production costs (such as cost of equipment, electricity, space), non-wage costs (such as occupational health and safety costs) and production risks of firms are passed onto homeworkers, at the bottom of the chains, who are not protected by labour laws.”*

and Pakistan nearly three hundred thousand.<sup>7</sup> Apart from not knowing the exact numbers, the legal implications of classifying homeworkers as own-account workers or as independent contractors are that they are by default excluded from labour laws applicable for employees. With the exception of a few countries,<sup>8</sup> homeworkers are implicitly excluded from labour laws. This is despite the ILO Home Work Convention No 177,<sup>9</sup> which states that homeworkers should be treated the same as other supply chain workers.<sup>10</sup>

<sup>1</sup> Krithika A Dinesh is an Indian lawyer working at Women in Informal Employment Globalizing and Organizing (WIEGO). The author is grateful for the keen insights and valuable suggestions given by Marlese von Broembsen to previous drafts of this paper.

<sup>2</sup> Throughout this paper the term homeworkers are used to refer to industrial homeworkers.

<sup>3</sup> See International Labour Organization (ILO), *Working from Home: From Invisibility to Decent Work* (2021), available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_765806.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_765806.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> The exact number of homeworkers are not known as they are often underestimated and undercounted in country level labour force surveys. This is demonstrated in a recent study where proxy measurements were used to arrive at a more accurate estimate of homeworkers, which is why they are

referred to as ‘probable homeworkers’. See *Working from Home*, supra note 3. See *Working from Home*, supra note 3.

<sup>7</sup> Sajjad Akhtar, *Home-Based Workers in Pakistan: A Statistical Profile*, WIEGO (2013) available at <https://www.wiego.org/sites/default/files/publications/files/Akhtar-HBW-Pakistan-WIEGO-SB9.pdf>

<sup>8</sup> Countries have adopted different approaches to include homeworkers within the labour law framework, either through specific legislation for homeworkers or expanding existing laws. See Marlese von Broembsen, Jenna Harvey and Marty Chen, *Realizing Rights for Homeworkers: An Analysis of Governance*, CCDP 2019-004 (2019)

<sup>9</sup> See ILO, *C177 Home Work Convention No, 177* (1996), available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312322](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_INSTRUMENT_ID:312322).

<sup>10</sup> Even though the Convention was adopted 25 years ago,





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The exclusion of homeworkers in labour laws allows factories to employ homeworkers, (often through intermediaries) without a written contract for a piece-rate wage that is much below statutory minimum wages.<sup>11</sup> These homeworkers are usually part of larger domestic and global supply chains where production is systematically fragmented and outsourced, typically to developing countries.<sup>12</sup> Consequently, production costs (such as cost of equipment, electricity, space), non-wage costs (such as occupational health and safety costs) and production risks<sup>13</sup> of firms are passed onto homeworkers, at the bottom of the chains, who are not protected by labour laws.

Though homeworkers are organised, in most countries, they cannot register their organisations as a trade union,<sup>14</sup> nor can they exercise collective bargaining rights or negotiate collectively for minimum wages, workplace safety, and social security entitlements. Even in countries where homeworkers are recognised as employees, such as in Thailand, the legislation is not enforced.<sup>15</sup> Non-recognition by firms and governments of homeworkers as employees also leads to other forms of exclusion. For instance, it is more difficult for homeworkers to access housing or bank loans without a formal employment contract. Likewise, during the

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it is presently only ratified by twelve countries and in force in ten countries.

<sup>11</sup> See Shalini Sinha and Firoza Mehrotra, *Working in the shadows: Women Homeworkers in the Global Supply Chains*, (2016) available at <https://hnsa.org.in/sites/default/files/Working%20in%20the%20Shadows%2C%20Nepal.pdf>; Anton Pieper and Prashasti Putri, *No excuses for Homework: Working conditions in the Indonesian leather and footwear sector*, SÜDWIND E.V., (2017), available at <https://labourbehindthelabel.net/wp-content/uploads/2017/03/2017-08-No-excuses-for-homework.-Working-conditions-in-the-Indonesian-leather-and-footwear-sector.pdf>

<sup>12</sup> See Marlese von Broembsen, *Constitutionalizing Labour Rights: Informal Homeworkers in Global value chains*, 1:34(3) INT'L J. OF COMP. LAB L. & INDUS REL. (2018); Annanya Bhattacharjee and Ashim Roy, *Bargaining in the global commodity chain: the Asia Floor Wage Alliance*, HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY. 33 (Edward Elgar ed., 2015).

<sup>13</sup> Id. von Broembsen *supra* note 12 at 268.

<sup>14</sup> India is an exception to this norm with unorganised worker organisations have successfully registered as trade unions. See Nalini Nayak, *Organizing the Unorganized Workers: Lessons from SEWA Experiences*, INDIAN J OF INDUS REL., 402-414 (2013).

<sup>15</sup> See von Broembsen, Harvey and Chen at *supra* note 8.

COVID-19 crisis, when global garment companies cited force majeure and withdrew from contracts, all workers were left without work.<sup>16</sup> Since homeworkers are not recognised as employees, the loss of work during the crisis was compounded by governments' responses that failed to include homeworkers in relief and recovery measures.<sup>17</sup>

Within this context, I discuss a recent judgment of the Supreme Court of India, which positively enhances the legal position of homeworkers. The court interpreted homeworkers as employees under the law concerning provident funds (a government-managed retirement scheme for employees). This decision extends the jurisprudence for recognising homeworkers as workers with the same rights as other employees.

### Godavari Garments Case<sup>18</sup>

M/s Godavari Garments Ltd is a readymade garments company based in Maharashtra, India. It engages women workers to make garments in their homes by providing them with the fabric and paying them at a piece rate. In 1991, the Provident Fund Officer ordered Godavari Garments to pay provident fund contributions to the women workers. This led to the question of whether these homeworkers are employees or independent contractors. Under the Employer Provident Fund Miscellaneous Provisions Act (EPF Act), 1952, employers are legally bound to contribute to the employees' provident fund in factories and other establishments. The Provident Fund Officer's order was challenged at the High Court of Bombay, which ruled in favour of the company in 1991. In 2019, the Supreme Court, which was hearing the appeal, issued the final decision.

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<sup>16</sup> See Asia Floor Wage Alliance, *Money Heist: COVID-19 Wage Theft in Global Garment Supply Chains*, 2021.

<sup>17</sup> See Anuradha Nagaraj, *India's 'hidden' home garment workers feared losing out on coronavirus aid*. REUTERS, 7 April 2020, available at <https://www.reuters.com/article/us-health-coronavirus-india-garment-trfn/indias-hidden-home-garment-workers-feared-losing-out-on-coronavirus-aid-idUSKBN21P1JO> and Marlese von Broembsen, *The world's most vulnerable garment workers aren't in factories – and global brands need to step up to protect them*, WIEGO, 21 April 2020, available at <https://www.wiego.org/blog/worlds-most-vulnerable-garment-workers-arent-factories-and-global-brands-need-step-protect>

<sup>18</sup> Officer In-Charge, Sub Regional Provident Fund Office v M/s Godavari Garment Ltd, (2019) 8 SCC 149

Employees were defined widely under this legislation, including any person in any kind of work, in connection with the work of the establishment and who gets their wages directly or indirectly.<sup>19</sup> While the definition is broad, workers such as homeworkers were usually excluded through practice. Godavari Garments argued that the women workers collected cloth from the production centre, worked at home with the help of family members with their own sewing machine, paid on a piece-rate basis and were not bound to report regularly to deliver products. Further, they have no formal contract with the company, all of which indicate they are not employees but independent contractors.



Bhavna Headod runs a beauty parlor from her home in Ahmedabad, India.  
© Paula Bronstein/Getty Images/Images of Empowerment

While examining the case, the court primarily relied on precedents. In these precedents, the control test was used to adopt a wide interpretation of employees under different legislation. Interestingly, the precedents relied on by the court are from the 1980s and 1970s, which looked at aspects such as reliance on family members and piece-rate payment for work, discussed below.

*(i) Reliance on family members:* In 1986, in a case concerning beedi workers (tobacco workers), who worked from home, the Supreme Court had held that the worker was eligible for provident fund.<sup>20</sup> The court rejected the narrow argument that the employee must be confined to work performed in the factory and left it open to the worker if they take the help of a family member.

<sup>19</sup> Employees Provident Fund and Miscellaneous Provisions Act No 19 of 1952, §2(f) (Ind.)

<sup>20</sup> M/s P.M. Patel & Sons v. Union of India, (1986) 1 SCC 32 (India).

The court said, “[t]he element of personal service, it seems to us, is of little significance when the test of control and supervision lies in the right of rejection.”<sup>21</sup>

*(ii) Method of payment:* Since previous judgments have held that payment on a piece-rate basis does not exclude workers from the employee status, the Court relied on these precedents. In one case, the workers of a shop who went daily to the shop sometimes took the work home with the owner’s permission and were paid on a piece-rate basis.<sup>22</sup> The challenge in court was whether these workers were employees or independent contractors.

In its decision, the court reasoned that “[a]s the employer has the right to reject the end product if it does not conform to the instruction of the employer and direct the worker to restitch it, the element of control and supervision as formulated in the decisions of this Court is also present.”<sup>23</sup> The right to reject a product was held sufficient to establish an employer-employee relationship.

Another precedent relied on was where workers were paid on a piece-rate basis by a garment company. In this case, the Industrial Tribunal held that since the workers were paid on a piece-rate basis, there was no master-servant relationship, and hence the workers cannot be considered employees.<sup>24</sup> When this decision was challenged, the Supreme Court reversed the decision in 1983, relying on the control test.

The court said, “[t]he right of rejection coupled with the right to refuse work would certainly establish master servant relationship and both these tests are amply satisfied in the facts of this case.”<sup>25</sup> Right to reject and right to refuse work was indicative of an employer-employee relationship.

Relying on these prior decisions that emphasised the test of control, the court reasoned that the homeworkers were employees of Godavari Garments within the definition under the Employers Provident Fund Miscellaneous Provisions Act.

<sup>21</sup> *Id.* at ¶9.

<sup>22</sup> Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, (1974) AIR 34.

<sup>23</sup> *Id.* at ¶31.

<sup>24</sup> Shining Tailors v. Industrial Tribunal II, U.P Lucknow, (1983) 4 SCC 464.

<sup>25</sup> *Id.* at ¶5.

Further, they found that the definition of employee is inclusive and “[w]idely worded to include any person engaged directly and indirectly”<sup>26</sup> in the work of the establishment. The court ordered the company to pay the provident fund contributions to the homeworkers.

### A Strengthened Position for Homeworkers?

The whole matter—from the order of the Provident Fund officer until the final judgment—took 28 years to be settled. The decision is significant for homeworkers as they can compel domestic companies that fall within the scope of the Employer Provident Fund Act to make provident fund contributions to homeworkers. More broadly, it strengthens homeworkers’ legal position to negotiate for social security and for recognition as employees.

However, the decision was limited in some ways. First, the judgment did not go in detail about the working conditions of the homeworkers. This was evident because even though the court asked the company to provide the latest state of affairs,<sup>27</sup> neither party gave details in the subsequent orders or final judgment. Second, this also indicates that there was limited involvement of the homeworkers in the case. Their involvement could have led to an elaboration of the working conditions and extent of homework in the company. Third, this could have led at least to broader observations by the judge, even though the scope of the case was limited to the EPF Act.

Despite its limitations, the judgment strengthens the legal position of homeworkers. The logic of employer-employee relationship adopted in this case can be extended to pursue the broader demands of homeworkers.<sup>28</sup> These include recognition as workers entitled to freedom of association, written contracts, employment benefits and maintaining a record of homeworkers.<sup>29</sup> Even

though there has been a lack of political will to deem homeworkers as employees across the globe, the organising efforts of homeworkers for better working conditions have only gained strength over time.<sup>30</sup> Despite being categorised as unorganised and informal, homeworkers are organised and fighting for decent work. Regional and networks such as Homenet Southeast Asia, Homenet South Asia and the recently established (in February 2021) international network- Homenet International speak to the strength of the fight for decent work for homeworkers.

Homeworkers have carved a distinct identity from their place of work-home,<sup>31</sup> but the distinction ends there. Homeworkers are employees just like other workers in domestic and global supply chains. The core of this argument is reflected in Convention 177, which was brought in through advocacy efforts.<sup>32</sup> National legislation must adopt laws to ensure “equality of treatment between homeworkers and other wage earners”.<sup>33</sup>

(2021) available at [https://www.wiego.org/sites/default/files/resources/file/HNSA\\_HNSEA\\_WIEGO\\_EUPlatform.pdf](https://www.wiego.org/sites/default/files/resources/file/HNSA_HNSEA_WIEGO_EUPlatform.pdf)

<sup>30</sup> See Rina Agarwal, *The State and Labor in Transnational Activism: The Case of India*, J OF INDUS REL., 54(4):443-58 (2012); Burchielli, Rosaria, Donna Buttigieg, and Annie Delaney. *Organizing homeworkers: The use of mapping as an organizing tool*, WORK, EMPLOYMENT AND SOCIETY 22(1), 167-180. (2008)

<sup>31</sup> Many homeworkers also prefer home to be their workplace, See von Broembsen *supra* note 11.

<sup>32</sup> It is the organising efforts of organisations such as the Self-Employed Workers Association and their allies, both in trade unions and outside that led to the adoption of Convention 177 See. *Out of the shadows: Homebased workers organize for International recognition international recognition*; Global Labour Institute, *Promoting ILO Home Work Convention and the Rights of Home workers, available at <https://hnsa.org.in/sites/default/files/Manual%20C-177-part%201.pdf>*

<sup>33</sup> See ILO C177 at §4, *supra* note 9.

<sup>26</sup> Officer In-Charge, Sub-Regional, Provident Fund Office v. Godavari Garments, CA 5821 of 2019, SC, at 6.1

<sup>27</sup> Officer In-Charge, Sub-Regional, Provident Fund Office v. Godavari Garments, Order 9 July 2019.

<sup>28</sup> The precedent set in the Godavari case is already used to enable other workers to pursue their provident fund entitlements. For instance, part time cleaners working in a regional rural bank was held to be employees by the Allahabad High Court in 2020. C/M Baroda U.P. Gramin Bank v The Presiding Officer Employees Provident Fund, (2020), 5974 of 2011.

<sup>29</sup> See Homeworkers in Global Supply Chains, WIEGO

# COLLECTIVE BARGAINING FOR SELF-EMPLOYED STREET VENDORS? MARLESE VON BROEMBSSEN<sup>1</sup>

Global | Originally written in English

ILO Recommendation 204 (R204)<sup>2</sup> of 2015 extends the right to collective bargaining to own account workers and economic units, which challenges the institution of collective bargaining in two ways: first, it extends collective bargaining to workers without a notional employer. Second, R204 imagines local government, which determines the terms and conditions of work for many self-employed workers, as the bargaining partner. With a focus on street vendors, this article examines two different approaches to institutionalising collective relations. The first case concerns the National Association of Street Vendors in India (NASVI), which fought for a statute that compels municipalities to establish representative street vending committees. The second discusses the Federation of Petty Traders and Informal Workers Union of Liberia (FEPTIWUL), which negotiated a ‘memorandum of association’—a collective bargaining agreement—with the Monrovia City Corporation (MCC), the statutory body that manages the Monrovia, the capital of Liberia.

The article proceeds as follows. Part one discusses street vendors: some statistics; their social and economic contribution; and how they are regulated. Parts two and three discuss the two cases and part four concludes with a brief analysis.

## Street Vendors: Statistics, Socio-economic Contribution and Regulatory Regime

Street vendors comprise hawkers, who move around, and street vendors who sell from stalls and tables on streets and pavements at public transportation hubs and from informal markets. Almost one in five (18 per cent) of informal urban workers is a street vendor. In low income countries, this increases to one in four.<sup>3</sup> In Sub-Saharan Africa, 43 per cent of informal workers are street vendors.<sup>4</sup> Women comprise a significant share of the sector, particularly in Sub-Saharan Africa: 51 per cent of women in Sub-Saharan Africa who are informally employed are vendors.<sup>5</sup>

Street vendors not only create employment for themselves, but also for others. In Mexico City, vendors employ others to set up and put away their stalls and to clean the streets after informal markets shut down. In Dakar, Senegal, young men carry bags of produce for women vendors shopping in wholesale markets. In Accra, Ghana, young women are ‘head-loaders,’ carrying goods on their heads to markets. In many countries, street vendors employ others as security guards.

Street vendors contribute to local authorities’

<sup>1</sup> Marlese Von Broembsen, *Social Inclusion and the New Urban Agenda: Street Vendors and Public Space in LAW AND THE NEW URBAN AGENDA* (Nestor Davidson and Geeta Tewari eds., 2020).

<sup>2</sup> International Labour Organization, *R204 – Transition from the Informal to the Formal Economy Recommendation No. 204* (2015), available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R204](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204).

<sup>3</sup> Sally Roever, *Informal Economy Monitoring Study Sector Report: Street Vendors* (2014), available at <http://www.wiego.org/sites/default/files/publications/files/IEMS-Sector-Full-Report-Street-Vendors.pdf>. (last visited October 25, 2021).

<sup>4</sup> Sally Roever and Caroline Skinner, *Street Vendors and Cities*, 28(2) ENVIRONMENT & URBANIZATION, 359, (2016) available at <https://www.wiego.org/publications/street-vendors-and-cities> (last visited October 26, 2021).

<sup>5</sup> *Id.*

revenue by paying a range of fees, including daily 'taxes' to operate, licensing and permit fees, and yearly/monthly sanitation taxes.<sup>6</sup> Located close to their customers' homes, they provide access to cheap commodities and services (including tailoring, hairdressing, repairs, and letter-writing for illiterate customers). They also provide cooked food, access to fresh produce, and services for the middle class. In Accra, Ghana, for example, middle class women frequent street vendors for weaves and other hair-dressing services.

Street vendors' livelihoods are in constant jeopardy. In many developing countries, elites' aspirations for 'world class' cities have led to large-scale evictions of street vendors from streets, where they have traded for decades.<sup>7</sup> They are subjected to evictions, fines, confiscation of their goods, and even imprisonment.<sup>8</sup> Often enforcement officers extract bribes in exchange for not prosecuting and street traders incur debt to pay these bribes.<sup>9</sup>

Sometimes the regulatory matrix is complex and contradictory. In Accra, Ghana, for example, public space is regulated through ten by-laws that emanate from different municipal departments, each with its own policy objective.<sup>10</sup> Other times the regulatory framework harks back to the colonial era: public spaces are regulated by nuisance laws and their contravention carries a criminal sanction.<sup>11</sup> The by-laws in Accra, Delhi, Dakar and in several municipalities in South Africa state that any contravention carries the sanction of a fine and/or imprisonment for up to one year.

Street vendors are organising and engaging

in collective action.<sup>12</sup> In Los Angeles, their collective action resulted in the Safe Sidewalk Vending Act, which provides street vendors with an enabling regulatory framework to access public space to trade.<sup>13</sup> In India, their collective action resulted in the Street Vendors' (Protection of Livelihood and Regulation of Street Vending) Act, 2014.

### India's Street Vendors' Act

In India, there has been migration to cities in search of work, and many have resorted to vending goods and services in the streets. In response to middle-class residents' objections, local authorities forcibly removed vendors, seized their goods, issued fines, and refused to renew their licenses to trade.<sup>14</sup>

There are approximately ten million street vendors in India.<sup>15</sup> Some of them have begun to organise. Aided by public interest lawyers, they have litigated against local authorities in Delhi and in Mumbai. In the first case, *Sodan Singh v. New Delhi Municipal Committee*,<sup>16</sup> the Supreme Court held that street vendors need access to pavements to exercise their constitutional right to trade and carry on a business and furthermore, and that pavements are not for the exclusive use of pedestrians. The court instructed local authorities to ensure that street vendors enjoy regulated access to pavements to trade.<sup>17</sup> In a landmark 1985 judgment, *Olga Tellis & Others v. Bombay Municipal Corporation & Others*,<sup>18</sup> the Supreme Court held

<sup>12</sup> Founded in 2000, StreetNet International has affiliates in 58 countries.

<sup>13</sup> Doug Smith & Katie McKeon, *Legislative Alert: SB 946 - Safe Sidewalk Vending Act*, Public Counsel (2018), online at <http://www.publiccounsel.org/pages/?id=0053> (last visited on October 25, 2021))

<sup>14</sup> Shalini Sinha & Sally Roever, *India's National Policy on Urban Street Vendors*, 2 WIEGO POLICY BRIEF (URBAN POLICIES) (2011) [https://www.wiego.org/sites/default/files/publications/files/Sinha\\_WIEGO\\_PB2.pdf](https://www.wiego.org/sites/default/files/publications/files/Sinha_WIEGO_PB2.pdf) (last visited October 24, 2021).

<sup>15</sup> Madhu Kishwar, *The Making and Unmaking of a Model Market for Street Vendors*, Manushi, available at <https://www.manushi.in/law-liberty-livelihood/part-i-the-making-and-unmaking-of-a-model-market-for-street-vendors> (last visited October 25, 2021).

<sup>16</sup> *Sodan Singh v. New Delhi Municipal Corporation*, 4 SCC 155 (1989).

<sup>17</sup> Sally Roever, *Informal Trade Meets Informal Governance: Street Vendors and Legal Reform in India, South Africa, and Peru*, 18(1) CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH (2016).

<sup>18</sup> *Olga Tellis & Others v. Bombay Municipal Corpora-*



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<sup>6</sup> *Id.*

<sup>7</sup> See Vanessa Watson *African urban fantasies: dreams or nightmares?*, 26(1): ENVIRONMENT & URBANIZATION 215 - 231 (2013).

<sup>8</sup> Alison Brown, *Claiming the Streets: Property Rights and Legal Empowerment in the Urban Informal Economy*, 76(C) WORLD DEVELOPMENT, 238 (2015); Roever, *supra* note 3; Roever and Skinner, *supra* note 4.

<sup>9</sup> Roever, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> For example, contravention of by-laws in Accra, Delhi, and Dakar and in several municipalities in South Africa carries the sanction of a fine and/or imprisonment for up to one year.

that the constitutional right to life should be interpreted to include a right to trade and to earn a living. The court recognised that if the state does not create employment, it cannot deny citizens the right to create a livelihood upon which their very existence depends.<sup>19</sup> Four years later, in *Sodan Singh v. New Delhi Municipal Committee*,<sup>20</sup> the court recognised street vendors' contribution to the economy in general and to consumers in particular, arguing that they 'add to the comfort and convenience of [the] general public, by making available ordinary articles of everyday use for a comparatively lesser price.'<sup>21</sup>

*"In a landmark 1985 judgment, Olga Tellis & Others v. Bombay Municipal Corporation & Others, the Supreme Court held that the constitutional right to life should be interpreted to include a right to trade and to earn a living. The court recognised that if the state does not create employment, it cannot deny citizens the right to create a livelihood upon which their very existence depends."*

In 1998, the National Association of Street Vendors of India (NASVI) — comprising street vendor organisations, trade unions and NGOs — was founded. Its objective was to advocate for national legislation to compel municipalities to protect street vendors' livelihoods and to secure street vendors' participation in institutions that regulate public spaces. NASVI commissioned research to understand regulatory and urban planning frameworks; to assess police and consumer attitudes; and street vendors' socio-economic conditions. The research showed that vendors work long hours, and their goods and services are in high demand. Armed with these findings, NASVI set about changing the narrative about street vending from one that characterizes vendors as a public nuisance and responsible for making the streets dangerous and unsanitary to one that recognises their cultural, social and economic contribution to the cities in which they work.<sup>22</sup>

The use of public space is a local authority competency, so it took more than a decade for NASVI to persuade the federal government (through

media campaigns, protests, and litigation) to legislate. Eventually, the government established a task team, which included representatives from NASVI, residents' associations, civil society, and the government, to draft a policy on street vending. The policy recognised that everyone has a right to work and is entitled to equal protection by the law. It also recognised the need to balance two competing policy considerations: preventing over-crowded, unsanitary streets on the one hand, and creating an enabling regulatory framework for street traders to generate a livelihood on the other.

In 2014, the Protection of Livelihood and Regulation of Street Vending Act (Street Vendors Act) was promulgated.<sup>23</sup> The Act mandates local governments to create a street vending committee (SVC) in each zone, which is responsible for all decisions related to street vending. The committee must comprise different stakeholders, including residents' associations and different departments within local authorities. Street vendors must comprise 40 per cent of the SVC and women must comprise at least a third.

The Act specifies that SVCs must undertake a survey every five years and issue certificates to sell to existing street vendors (who are over fourteen years of age, have no other form of livelihood, and who trade themselves or are assisted by a family member). Certificates are renewable every five years and may not be traded or transferred. If a vendor dies, the certificate goes to a spouse or child if they fulfil the same conditions. The certificate states the zone where the vendor may trade, the days and times, as well as the conditions and restrictions of trading. If street vendors trade in accordance with the certificate, the police cannot prevent them from exercising their right to trade (section 27).<sup>24</sup> If a vendor has no certificate, or contravenes the terms of their certificate, they may be fined.

The local authority may limit the number of licenses to 2.5 percent of the population in the zone. If the number of street vendors exceeds the limit, the vendor committee presumably decides on how to address the situation. Vendors' responsibilities include keeping their spaces clean and

tion & Others, 3 SCC 545 (1985).

<sup>19</sup> *Id.* at 548-50.

<sup>20</sup> *Sodan Singh v. New Delhi Municipal Corporation*, 4 SCC 155 (1989).

<sup>21</sup> *Id.* at 168.

<sup>22</sup> Sinha & Roeber, *supra* note 14.

<sup>23</sup> The Street Vendors (Protection of the Livelihood and Regulation of Street Vending) Act, No. 7, Acts of Parliament, India (2014), available at [https://mohua.gov.in/upload/uploadfiles/files/StreetVendorAct2014\\_English\(1\).pdf](https://mohua.gov.in/upload/uploadfiles/files/StreetVendorAct2014_English(1).pdf) (last visited on October 26, 2021).

<sup>24</sup> *Id.* at §27.

hygienic (section 15),<sup>25</sup> maintaining public property (section 16),<sup>26</sup> and paying a monthly maintenance fee (section 17)<sup>27</sup> in addition to the annual trading fee. If a vendor transgresses the terms of the certificate, the SVC can cancel the certificate. The street vendor has a right to take the decision on appeal to the local authority.

Markets older than fifty years must be declared “heritage markets.”<sup>28</sup> Any existing market cannot be declared a “non-vending zone.” Overcrowding cannot be a basis for declaring a non-vending zone and neither can unsanitary conditions unless the unsanitary nature of the area is the fault of the street vendors.<sup>29</sup> Vendors may only be relocated if there is an urgent need, and affected vendors must participate in the planning and implementation of the relocation and they cannot be worse off than before the relocation. Vendors must be given thirty days’ notice to move, and if they fail to move, they may be fined, and their goods seized.<sup>30</sup> Once they pay the fine, the local authority or police must return perishables the same day and non-perishables within two working days. If they lose assets because of the move, they must be compensated. Finally, if public land is sold or leased, the rights of street vendors trump new rights.

Implementation of the Street Vendors Act is uneven and NASVI reports that in many jurisdictions the local authority is acting in bad faith. Many local authorities have failed to establish town vending committees, and in many cities street vendors continue to be harassed and evicted.<sup>31</sup>

Street vendors in Monrovia, Liberia took a

<sup>25</sup> *Id.* at §15.

<sup>26</sup> *Id.* at §16.

<sup>27</sup> *Id.* at §17.

<sup>28</sup> *Id.* at Second Schedule (viii).

<sup>29</sup> *Id.* at First Schedule 1(c - d).

<sup>30</sup> *Id.* at 18(3-4).

<sup>31</sup> Shivkrit Rai & Deepamshu Mohan, *Gaps In Implementation Of Street Vendors Act Are Making Delhi’s Merchants Invisible*, The Wire November 2017 <https://thewire.in/economy/street-vendors-act-implementation-gaps> (last visited on 21 December 2021); Naman Sherstra, *A detailed study on the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014, Pleaders Intelligent Legal Solutions* (26 December 2020) at <https://blog.ipleaders.in/detailed-study-street-vendors-protection-livelihood-regulation-street-vending-act-2014/> (last visited 21 December 2021).

different approach. Their goal was to negotiate a collective agreement with the local authority.

### Monrovia, Liberia: A Memorandum of Understanding

Eighty-six percent of the workforce in Liberia (and 92 percent of women) is informally employed.<sup>32</sup> In 2009, in the capital city of Monrovia, there was a stand-off between the police (who blamed street traders for garbage in the streets) and street vendors (who blamed the city for the collapse of the city’s solid waste management). The police routinely carried out raids, confiscated street vendors’ goods, and physically assaulted them. The traders organised, registered their organisation the Federation of Petty Traders and Informal Workers Union of Liberia (FEPTIWUL), which grew to 3000 paid members. FEPTIWUL initiated negotiations with Monrovia City Corporation (MCC), the statutory body that manages the city.<sup>33</sup>

*“It took a decade of negotiations with two different administrations to conclude a Memorandum of Understanding (MOU) in September 2018. This MOU is one of the few comprehensive written collective agreements between a city authority and street vendor organization in the world.”*

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The agreement established institutions for co-decision-making, outlined the responsi-

<sup>32</sup> International Labour Organisation (ILO), *Social Dialogue for the Transition to the Formal Economy* (2020) available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_750495.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_750495.pdf).

<sup>33</sup> Milton A. Weeks, *Collective Bargaining Negotiations Between Street Vendors and the City Government in Monrovia, Liberia*, WIEGO (2012), available at <https://www.wiego.org/sites/default/files/resources/files/Weeks-Collective-Bargaining-Liberia.pdf>.

<sup>34</sup> See Sarah Orleans Reed and Mike Bird, *Liberia’s Street Vendors Pioneer New Approach with City Officials* (January 29, 2019), <https://www.wiego.org/blog/liberia%E2%80%99s-street-vendors-pioneer-new-approach-city-officials>.

bilities for both parties, and included breach of contract provisions. It established two institutions: a Federation Task Force and a sanitation team. The Task Force, which is the decision-making and implementation body, is composed of three FEPTIWUL members; nine members from different MCC departments and state institutions (including the departments of planning; the solid waste; environment; community service); the city police and the mayor's office. The transport union and the media also enjoyed representation. The Task Force's vision was to ensure that street trading is 'organised and regulated' so that streets are clean and there is a 'unity and a good working relationship' between the city police and the Task Force. Terms of reference are annexed to the agreement. The sanitation team (run by FEPTIWUL) is responsible for overseeing traders cleaning the streets where they trade. The MCC in turn committed to introducing a daily collection and disposal of garbage.



Informal workers in Accra, Ghana gather for the meeting of their association, the Makola Market Traders Union © Jonathan Torgovnik/Getty Images/Images of Empowerment

FEPTIWUL took responsibility for keeping a database of its members and sharing it with the MCC within three months, issuing members with identity cards and collecting annual permit fees from members. It assumed responsibility for ensuring that its members stay within designated zones (according to a map annexed to the agreement), comply with regulations that require them to give pedestrians space and always have their identity cards and permits on them. In exchange, the MCC undertook to 'protect FEPTIWUL members and their goods' on streets that are designated for trading. Moreover, the MCC had a contractual obligation to take disciplinary action against

any staff member that violated the agreement. Should an official breach the agreement three times, FEPTIWUL could take legal action.

Where vendors traded in sites that were not designated for trading, the parties would 'design a strategy' for their relocation within an agreed upon timeframe. The parties agreed to hold monthly and quarterly meetings and to monitor implementation of the agreement.

If street vendors failed to pay their 'municipal taxes' they would be fined between twenty-five and fifty dollars and issued a warning. FEPTIWUL members are given three warnings before the MCC institutes legal proceedings. Should street vendors contravene regulations their goods may be confiscated, but must be returned within a day of paying the fine (if perishable) and seven days (if non-perishable). Failure to pay the fine resulted in legal proceedings.

In case of a breach of agreement, either party could give thirty days' notice to terminate the agreement. 'Management' would meet within thirty days to resolve the difference, and if unresolved, either party could take the matter to arbitration or institute legal proceedings. Initially, both parties to the MOU adhered to the terms; unfortunately, FEPTIWUL later breached the MOU, which is unfortunate.

Despite its failure to transform local relations, it has inspired other informal worker organisations in Sierra Leone and Zimbabwe. The Zimbabwe Chamber of Informal Economy Associations (ZCIEA) is a trade union consisting of 265 chapters of street/market vendors, construction workers, waste pickers, and other informal economy workers in 30 territories. Street vendors members concluded MOUs with local authorities in 20 cities during the COVID-19 pandemic. Although none of these MOUs are as detailed as the Liberian example, they represent a transformative moment in the relations between street vendors and local authorities and are surely precursors to more substantive agreements.

### Concluding Analysis

In the contemporary global economy, 61 per cent of the workforce is informally employed, and mostly there is no notional employer.<sup>35</sup> Often the

<sup>35</sup> ILO, *Women and Men in the Informal Economy: A Statistical Picture* (2018) available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_626831.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf) (last visited October 28, 2021).



city municipality determines the working poor's terms and conditions of work, particularly if their livelihoods (such as street vending) rely on access to public space.

This paper has compared two cases where street vendors organised and engaged in collective bargaining with the state.

In Monrovia, FEPTIWUL concluded a collective bargaining agreement which, in the absence of labour laws that recognise self-employed workers right to collective bargaining, relies on the ordinary law of contract. Lack of a statutory framework means that when the agreement lapses, which it has, there is no statutory obligation for the MCC to bargain. This is particularly problematic when new officials take office. In the absence of sectoral determinations, the agreement applies only to members of the trade union and non-members are excluded.

In India, NASVI pushed for legislation at the national level that obliges municipalities to establish institutions that include street vendors in decision-making on the use of public space. Unlike the Monrovia MOU, which included both substantive provisions and procedural safeguards, including annexures that outline the composition and the procedures for the task force and sanitation team, and breach of contract provisions in the agreement, the legislation failed to include operational rules for the vendor committees, a dispute resolution mechanism, and administrative law due process requirements. In short, it failed to anticipate that officials may be obstructive.

# OBSERVATIONS ON THE REGULATION OF WORK ON DIGITAL PLATFORMS IN BRAZIL<sup>1</sup>

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## Two Characteristics of Our Times

As lawyers, one of the primary materials we work with are normative texts, such as statutes and regulations. Too often, however, we forget the social context in which the law is constructed, and in which we as lawyers work. By doing so, we run the risk of widening the existing and unfortunate gap between the law and the achievement of social justice. To avoid this, we must reflect on the concrete context in which we live - in Brazil and globally.

On the one hand, we live in an era of enormous technological progress and have achieved a level of development unimaginable only a short time ago. Today, we collectively produce enough food to feed the global population at 2,500 calories a day, and information, wherever it is produced, can reach the most isolated corners of the planet almost instantaneously. An effective vaccine to address a new, global pandemic was produced in under a year. We have even reached a point where human life on other planets may be feasible in the not too distant future. This is to say, that we have reached a level of technology in which we could all live with dignity, dedicating

ourselves to developing our human capacities. On the other, despite this enormous potential, our laws, our politics and our institutions are producing the opposite outcomes, namely growing economic and social inequality, hunger, violence, and the destruction of the planet itself. In August 2021, Brazil's Forbes Magazine reported that the country now has 315 billionaires (reais),<sup>4</sup> an increase of 77 during the global pandemic. Meanwhile, over 607,000 have died from COVID-19 in Brazil, and we watch in astonishment the growing misery. A short time ago, workers formed long lines to get a donated piece of bone for broth for their families' dinner. Immediately, several supermarkets began to sell the bones rather than donate them, seeing a new market. This is our reality today. In this article, we want to reflect briefly on the intersection of technology, law and inequality.

## Labour and Law

We are still in the most serious health emergency many of us have experienced. At the beginning, afraid of not knowing exactly what was happening, we did not dare leave our homes (it seems so distant today but that was less than two years ago). Thus, we turned to delivery apps to access the basic necessities of daily life. The pandemic proved to us the enormous importance that delivery workers have for our survival in today's world. Exactly for this reason, it is urgent we discuss the protection that these workers have in our countries: not only for their own welfare, but also, given that they perform essential jobs for the welfare of all of us.

<sup>1</sup> This article is based on the session organised by ILAW Network on "platform labor law initiatives in Latin American countries", where one of the authors had the honor of participating on October 13, 2021.

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<sup>4</sup> 1 billion reais equals about US\$ 181 million.



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The characteristic of law is to regulate social facts *a posteriori*. For example, first there is the social fact strike, then, later, the regulation of such fact. The content of the regulation, in turn, depends on the political strength of the parties in dispute. From a historical perspective, briefly, because of the workers' struggles of the first decades of the 20th century—struggles that stem from the struggle against slavery—Brazil achieved federal labour legislation in 1943, the so-called *Consolidação das Leis do Trabalho* (CLT) or “consolidated labour laws.”<sup>5</sup> Since then, almost all governments have promoted amendments to it. Two central points should be highlighted about the CLT.

First, based on the best Latin American doctrines, drawing on the studies of Mario de la Cueva, Brazil enshrined the Contract-Reality Principle. In other words, if the characteristics of the employment are present, attempts to deny the employment relationship through terms in the contract will not matter; the relationship will be protected by the rights established by Art. 9 of the CLT.<sup>6</sup> The second point is the law's characterization of the employment relationship, which defines the employer as: “the company, individual or collective, which, assuming the risks of the economic activity, admits, pays wages and directs the personal provision of the service,”<sup>7</sup> and the employee as “any natural person who provides services of a non-temporary nature to an employer, under their dependence and in exchange for a wage.”<sup>8</sup>

Thus, Brazilian legal doctrine established the following as the characteristics of the employment relationship: (a) being a natural person - that is, the employee cannot be a legal entity; (b) *intuitu personae* relationship - the employee cannot be replaced; (c) onerousness - the compensation for the labour activity is a wage; (d) subordination - the employer directs the labour activity; (e) habituality or non-eventuality - there is a periodicity in the work.

From a strictly legal point of view, we think that Brazilian Labour Law does not need

<sup>5</sup> *Consolidação das Leis do Trabalho* (CLT), Decreto-Lei No. 5452 (1943) (Braz.) available at [http://www.planalto.gov.br/ccivil\\_03/Decreto-Lei/De15452.htm](http://www.planalto.gov.br/ccivil_03/Decreto-Lei/De15452.htm)

<sup>6</sup> *Id.* at art. 9.

<sup>7</sup> *Id.* at art. 2.

<sup>8</sup> *Id.* at art. 3.

new legislation to recognise workers providing their labour through digital platforms as employees. They are safeguarded by all the existing legal protections for the employment relationship.<sup>9</sup> Someone who works on a ride hail platform, for example, is a natural person, who cannot send an acquaintance to replace them, who works and receives an amount of money for their labour, and who is subject to the power exercised through the platform. The doubt would remain about the so-called habituality. This last requirement would be subject to investigation carried out by the judiciary, which will be able to conclude whether the activity is habitual or not in the specific case.

### Judicial Hostility to Workers

Despite the clear application of the CLT to workers on digital platforms, the often conservative Brazilian judiciary has been mostly hostile to the various claims of workers to date. For example, in *Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda.*,<sup>10</sup> the Superior Labour Court dismissed an unfair dismissal claim by a driver who was deactivated from the app. The Court concluded unanimously that there was no employment relationship between Uber and the driver for lack of subordination. It concluded that “[I]t is common knowledge how the relationship between the drivers of the Uber app and the company works, which has a global reach and has proven to be an employment alternative and source of income in times of growing (formal) unemployment... It is important to emphasise that the intention to

<sup>9</sup> We agree entirely with Carelli, according to whom: “The worker is still a worker, no matter what name is given to them. If this company controls the provision of these services, and the worker has no autonomy in relation to its alleged business and form of work, it is an employer, and the worker is an employee, nothing changes the fact that the instrument of intermediation is digital, the company claims to be in the technology sector and label the worker as a partner or similar term.” Rodrigo de Lacerda Carelli, *O trabalho em plataformas e o vínculo de emprego: desfazendo mitos e mostrando a nudez do rei* in *FUTURO DO TRABALHO: OS EFEITOS DA REVOLUÇÃO DIGITAL NA SOCIEDADE* 65-85, (Rodrigo de Lacerda Carelli, Tiago Muniz Cavalcanti, and Vanessa Patriota da Fonseca, eds. 2020), available at <https://bit.ly/3Gk2IJS>.

<sup>10</sup> T.S.T.J. RR - 1000123-89.2017.5.02.0038, 05.02.2020, available at <http://aplicacao4.tst.jus.br/consultaProcessual/consultaTstNumUnica.do?consulta=Consultar&conscsjt=&numeroTst=1000123&digitoTst=89&anoTst=2017&orgaoTst=5&tribunalTst=02&varaTst=0038&submit=Consultar>

protect the worker should not extend to the point of making the emerging forms of work unviable, based on less rigid criteria and that allow greater autonomy in its achievement, through free disposition of the parties.” The previous year, in 2019, the Federal Supreme Court<sup>11</sup> struck down a municipal law passed in Fortaleza which prohibited the use of private cars for the paid individual transport of people. In its 125-page judgment, the court found that the law violated constitutional principles of free enterprise and competition.

### Bills in Brazil

At this moment, there are several bills in the Brazilian Legislature (Chamber of Deputies and Federal Senate) that propose different regulations on the subject, all of them awaiting some political or administrative action to move them forward. We will briefly comment on four of those bills.

The first, presented on May 7, 2019, by Senator Jaques Wagner (Workers’ Party - Bahia), is Bill n. 2.654/2019,<sup>12</sup> and is awaiting a decision in the Economic Affairs Committee. The project gives voice to a popular demand of platform workers, namely to impose a limit of up to 10% discounts on the value of the trip for remuneration from the digital platform. This would benefit these workers, but, even so, it is very limited and does not deal with the employment relationship.

A week later, Representative Celso Russomano (Brazilian Republican Party - São Paulo) proposed Bill n. 2.884/2019,<sup>13</sup> to recognise the jurisdiction of the Labour Courts to adjudicate cases concerning work on digital platforms. The bill awaits a vote by the Constitution, Justice and Citizenship Commission. The proposal is beneficial for workers, but it does not address the formalisation of the labour relationship. This central issue is addressed in two very different bills.

Representative Gervásio Maia (Brazilian Socialist Party - Paraíba) presented on September 17, 2019, Bill n. 5.069/2019,<sup>14</sup> which expressly recog-

nises the employment relationship of the worker of land transportation application platforms. The project awaits a decision from the Commission of Economic Development, Industry, Commerce and Services. In turn, Senator Alessandro Vieira (Citizenship - Sergipe), on July 13, 2020, presented Bill n. 3.754/2019,<sup>15</sup> which creates a new labour concept in which the platform worker is not considered an employee, but is assured some rights. The bill is awaiting referral by the President of the Senate to the competent committees for discussion.



Platform delivery worker in Warsaw, Poland © Kristina Blokhin - stock.adobe.com

Although it is not yet a bill being considered by the Brazilian parliament, the Bolsonaro government created, in September 2019, what it called “Grupo de Altos Estudos do Trabalho” (GAET), where economists and jurists from the business ideological spectrum<sup>16</sup> joined to propose profound changes to reduce the Brazilian social legislation. In November 2021, this group presented its report in which they make suggestions for draft legislation. What matters for the purpose of this article is the inclusion of a provision in the CLT that says: “The work done between a worker and computer applications of shared economy does not constitute an employment relationship”.<sup>17</sup>

<sup>11</sup> S.T.F.J. ADPF 449 / DF, Relator Min. Luiz Fux, 08.05.2019, available at <http://portal.stf.jus.br/processos/downloadPeca.asp?id=15340970707&ext=.pdf>

<sup>12</sup> Federal Senate, Bill No. 2654, of 2019 (Braz.). available at <https://www25.senado.leg.br/web/atividade/materias/-/materia/136598>.

<sup>13</sup> Chamber of Representatives, Bill No. 2884, of 2019 (Braz.). available at <https://www.camara.leg.br/propostas-legislativas/2203318>.

<sup>14</sup> Chamber of Representatives, Bill of Law No. 5.069, of 2019 (Braz.). available at <https://www.camara.leg.br/propostas-legislativas/2220389>.

<sup>15</sup> Federal Senate, Bill No. 3754, of 2020 (Braz.). available at <https://www25.senado.leg.br/web/atividade/materias/-/materia/143376>.

<sup>16</sup> This is what the Inter-Union Department of Parliamentary Assistance (Departamento Intersindical de Assessoria Parlamentária - DIAP) reports. DIAP Grupo de Altos Estudos do Trabalho, *Perfil e atribuições do novo grupo* (2021) available at <https://www.diap.org.br/images/stories/gaet-gat-perfis.pdf>.

<sup>17</sup> Grupo de Altos Estudos de Trabalho, *Relatório dos Grupos de Estudos Temáticos* (2021) available at <https://www.gov.br/trabalho-e-previdencia/pt-br/noticias-e-conteudo/traba->

Finally, on January 6, 2022, Law No. 14.297<sup>18</sup> was published, which guarantees access to water, hand sanitizer and masks for delivery drivers, in addition to providing insurance and financial assistance in case of absence from work due to a case of a coronavirus infection. In addition to not guaranteeing any labour or social security rights to the drivers, the Law will only be in force during the COVID-19 pandemic. Only in the case a driver is unable to work because they are sick with the COVID-19 virus will there be economic assistance, for a period of 15 days.

*“The history of social legislation around the world, including Brazil, tells us that the contents of the laws depend on the strength that workers and union demonstrate. During the pandemic, platform workers mobilised to ensure minimum protections, such as the distribution of hand sanitizer for delivery workers. Paulo Galo, one of the leaders of the mobilizations, practically overthrowing the mythology of jus-positivism, proclaimed that it is the “clenched fists of the workers that have always made the pen tremble”. In other words: the origin of rights is much more in the streets than in parliaments.”*

that it is the “clenched fists of the workers that have always made the pen tremble.” In other words: the origin of rights is much more in the streets than in parliaments.

Brazil, today, faces a crisis that began in 2016, with the coup that illegitimately removed President Dilma Rousseff from government. When her successor ascended to the Presidency of the Republic, one of the measures he adopted was to have the price of Brazilian oil added to the international market, based on the dollar. Then, as a continuation of the previous illegitimate government, the government of Jair Bolsonaro began. This, with disastrous policies in all sectors of society, produced a great devaluation of the Brazilian national currency and, consequently, an enormous increase in the price of hydrocarbons, which is substantially affecting the ability to survive of a large part of Brazilian workers.

In recent months, as economic and social conditions are rapidly deteriorating, strikes and mobilisations are breaking out all over Brazil. Labour regulation is, once again, dependent on the volume of the voices that can be heard coming from the streets.

## Final Thoughts

Faced with the bills that we briefly describe, the question remains as to how Brazil will choose to regulate work through digital platforms in the future. The history of social legislation around the world, including Brazil, tells us that the contents of the laws depend on the strength that workers and union demonstrate. During the pandemic, platform workers mobilised to ensure minimum protections, such as the distribution of hand sanitizer for delivery workers. Paulo Galo, one of the leaders of the mobilisations, practically overthrowing the mythology of jus-positivism, proclaimed

[lho/2021/arquivos/nota-de-apresentacao-dos-relatorios-final.pdf](https://www.in.gov.br/en/web/dou/-/lei-n-14.297-de-5-de-janeiro-de-2022-372163123).

<sup>18</sup> Lei No. 14.297 (January 2022) (Braz.). available at <https://www.in.gov.br/en/web/dou/-/lei-n-14.297-de-5-de-janeiro-de-2022-372163123>



Female truck driver © International Transport Workers' Federation

## THE WORK OF INFORMAL TRANSPORT WORKERS: ESSENTIAL YET EXPLOITED

### A conversation with Alana Dave<sup>1</sup>



**Alana Dave**, *Urban Transport Director, International Transport Workers*

*Alana Dave leads the ITF's global programme on public transport. The programme includes a number of strategic projects on labour impacts and issues in public transport. She is responsible for developing and promoting a trade union public transport policy to further decent work, social justice and gender equality. Alana represents the ITF in external relationships with transport stakeholders including UITP, C40 and Sustainable Mobility for All.*



**Ruwan Subasinghe**, *Legal Director, International Transport Workers and Advisory Board Member of the ILAW Network*

*Ruwan Subasinghe is Legal Director at the International Transport Workers' Federation (ITF), a global trade union body representing over 18.5 million workers in 147 countries. He specialises in labour, human rights, and international law. Ruwan represents the ITF at external bodies, including the International Labour Organization (ILO) and the Organization for Economic Co-operation and Development (OECD). He is frequently called up as an expert on international labour standards and, among other things, guest lectures at the International Training Centre of the ILO. Ruwan sits on the Advisory Boards of the International Lawyers Assisting Workers (ILAW) Network and Cornell University's New Conversations Project. He is also a Board member of the Ethical Trading Initiative (ETI). Prior to joining the ITF, Ruwan practised at an international law firm based in London. He holds a Bachelor of Laws Degree from the University of Durham and a Master's Degree in Industrial Relations from the London School of Economics and Political Science.*

<sup>1</sup> The following is an edited transcript of an interview between Ruwan Subasinghe and Alana Dave on January 17, 2022.

**Ruwan Subasinghe:** *Most of the world's transport workers are informal. They provide essential services for millions of people across the world, yet they are often denied fundamental rights and subject to poor working conditions. Can you briefly explain how informal urban transport systems are structured and how this results in decent work deficits for transport workers? Can you also please elaborate on the types of decent work deficits in the sector?*

**Alana Dave:** The informal transport economy is dominated in the Global South by the target system. In the target system, most informal drivers have to pay a vehicle owner a daily financial target, in effect it is a rental fee. This can be very substantial. Every day the driver has to collect sufficient fares to pay the target alongside covering other outgoing costs like fuel, paying conductors and mechanics, and police bribes. The leftover cash is the wage that drivers can take home for themselves. It is meagre! For example, in Dar es Salaam, Tanzania, more than 90% of drivers sell their labour to vehicle owners using this target system without a contract of employment.<sup>2</sup> They have no guaranteed daily income. They carry all the risk while the profits for the vehicle owners are guaranteed. The target system entrenches very low and insecure incomes for workers. It forces drivers and other workers in informal transport to work exceptionally long hours. For example, in Nairobi, Kenya, they work for more than 12 hours a day, 6 days a week. This leads to fatigue, accidents and generates fierce competition between drivers. It results in over-crowding and often violence. Health and safety conditions are absolutely appalling for these drivers. In addition to the problems which I have already mentioned, they can't access basic facilities like toilets, fresh water, or shelter from the sun. These workers have no rights or access to any social or labour protections, so are extremely vulnerable.

Although they perform incredibly valuable work, these workers exist outside of the legal framework. It is particularly the target system and the structure of the informal system which leads to these decent work deficits. Informal transport workers should not be blamed or stigmatised, they are finding ways of surviving in an extremely exploitative system. It is a systemic problem. And of course, some groups of workers, like women, young workers, migrant workers, are particularly vulnerable.

**RS:** *You mentioned that women, young people, migrants, older people and other vulnerable groups often disproportionately face the most serious decent work deficits in the informal economy. Can you elaborate?*

**AD:** Yes, I will pick up on the issue of women in particular. They face major discrimination in the informal transport sector. Some occupations are mostly dominated by men. Women are often found in the most precarious, low-paid jobs in informal transport, such as cleaning, vending at the transport hubs, and catering. They totally depend on servicing informal transport for their livelihoods. This is very interesting for the ITF and transport unions because it challenges us to think about what actually constitutes 'a transport worker.' So for example, in the main bus terminal in Bogota, Colombia,<sup>3</sup> women work as vendors, cleaners, toilet attendants, petrol pump attendants, security guards, couriers, and ticket sellers. But, there are many obstacles for women, to gain access to training, licensing, and the experience necessary to progress to other most stable jobs. They face major decent work deficits, for example, access to sanitation. There are very particular impacts for women workers which potentially can result in serious health problems by lack of access to sanitation. They also face many different forms of gender-based violence and harassment from both passengers and other workers in the system. The ratification and application of ILO Convention 190

<sup>2</sup> Matteo Rizzo, TAKEN FOR A RIDE: GROUNDING NEOLIBERALISM, PRECARIOUS LABOUR, AND PUBLIC TRANSPORT IN AN AFRICAN METROPOLIS (2017), available at <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794240.001.0001/oso-9780198794240>

<sup>3</sup> International Transport Workers' Federation (ITF), *The Power of Informal Transport Workers, An ITF Education Booklet* (2017) [hereinafter IFT Education Booklet], available at <https://www.itfglobal.org/media/1691170/informal-transport-workers.pdf>

is particularly important in this context.

We often find high numbers of migrant workers amongst informal transport workers. They face extreme vulnerability because often they are working in countries where they do not have the legal right to work. They are even more exposed and face the additional burden of police harassment and xenophobia.

**RS:** *COVID-19 has had a terrible impact on transport workers worldwide. I imagine that informal transport workers continue to face significant challenges. Is this true? Can you elaborate on this?*

**AD:** There has been catastrophic impacts on informal transport workers. COVID-19 has highlighted and further entrenched the extreme vulnerability of informal transport workers. The failure to protect informal transport workers by governments and employers means they were faced with the almost impossible choice of either working and risking infection and falling sick or falling even deeper into poverty because they were removed from their sources of livelihoods.

At work, informal transport workers mostly had to take their own health and safety precautions including providing their own personal protective equipment (PPE). And if they were infected, they had no access to sick pay or paid leave. But COVID-19 also highlighted the vital role of this industry in providing a mobility service for other critical workers and generally keeping cities moving during the pandemic. The very big challenge now is the financial sustainability of informal services. Many workers cannot pay back the loans that they have got on their vehicles. And of course, there is widespread unemployment. For example, at the moment, the South African government has set up COVID-19 taxi relief fund,<sup>4</sup> and minibus drivers (informal drivers) can apply to this fund for financial assistance. However, most countries have absolutely no emergency financial assistance for informal operators. Even when they do, it is not sufficient and will not benefit most informal workers, such as conductors, mechanics, and vendors.

We should also remember that informal public transport does not receive state subsidies. So, this sector is at a critical juncture with millions of workers relying on it for their livelihoods.

**RS:** *ILO Recommendation 204 of 2015 (R204) concerning the transition from the informal to the formal economy has been hailed as a landmark instrument giving guidance to States on the transition to the formal economy as means for realising decent work and for achieving inclusive development. Has the Recommendation been put to good use in the informal transport sector? Can you cite some examples?*

**AD:** In informal transport, it is disappointing that the majority of States have not moved towards an inclusive transition. R204 provides a very strong set of recommendations, but we have not yet seen the benefits of implementation in the transport sector. Even when new models of formal public transport are introduced, like Bus Rapid Transit (BRT), the impacts on and involvement of informal transport workers in the transition is mostly disregarded. ITF and its affiliates are campaigning for labour impact assessments and worker-led formalisation.

There is a huge opportunity to bring about this type of transition as part of the 'recovery from COVID-19.' There is an inspiring example led by one of the ITF affiliates in Cebu City in the Philippines. Jeepneys are the cheapest and most widely used form of public transport in the Philippines, but workers face serious decent work deficits.<sup>5</sup> In 2016, the Philippines government announced a modernisation program that would have risked thousands of jobs. ITF affiliates resisted this, and

<sup>4</sup> See Business Tech, *Government Launches R1.1 billion COVID fund for South Africa's taxis* (last visited January 25, 2022), available at <https://business-tech.co.za/news/motoring/550060/government-launches-r1-1-billion-covid-fund-for-south-africas-taxis/>.

<sup>5</sup> Ted x Talk, *A worker-led just transition in public transport in the Philippines*, YOUTUBE (Jan. 14, 2022), <https://www.youtube.com/watch?v=FJHD6C-g664Q>



partly as a result of this resistance and now COVID-19, our affiliate NCTU has negotiated with the government to form cooperatives, which could bid for the routes. The cooperatives are made up of NCTU members who are jeepney drivers. They have negotiated service contracts with the 'land transportation franchising board' which works in very close coordination with municipalities. This system is more collective, and workers do not have to compete with each other. They drive cleaner units, which is improving health and safety conditions for workers. For the first time, these workers have access to social security, agreed wages, overtime pay and established working hours. This is a really good example of a worker-led and inclusive transition to formalisation.

Another good example is in Dakar, Senegal. The national government recently launched a strategy to promote a gradual transition towards formalisation.<sup>6</sup> The ITF is working together with unions in Dakar, where they are introducing a new bus rapid transit system. This should be an opportunity to create new formal jobs for transport workers and also improve conditions for informal workers through integrating informal transport services with the formal public transport system. As a result of trade union campaigning, we have had a commitment from the transport authority to negotiate this transition with unions.

**RS:** Recommendation 204 calls on States to ensure that those in the informal economy enjoy freedom of association and the right to collective bargaining. However, in practice, informal workers' unions and associations sometimes struggle to identify a willing bargaining partner. Is this a problem in the informal transport sector? Can you provide examples of successful organising drives resulting in the adoption of collective bargaining or other agreements?

**AD:** These are very pertinent issues in informal transport. When there is no clear employment relationship, it is really hard to identify who the collective bargaining partner is and decide which level of authority to engage with to resolve specific issues. This can be confusing for informal workers as well as for their union representatives. On the whole, informal workers and unions see municipalities as their natural counterparts because so many municipal policies directly affect them. I also want to emphasise that many unions want to move away from engaging municipalities only when dealing with problems such as police harassment or access to parking spaces. They also want to fully participate in the design and implementation of the policies that define their workspace, including when new formal public transport services are introduced.

In Nepal, ITF affiliated unions organised the e-rickshaws, which are the electric powered tricycles.<sup>7</sup> In 2016, a new union was formed of the rickshaw drivers, and within a year 8,000 workers had joined the union, including a significant number of women. They formed committees which negotiate directly with government agencies at a district level over the issue of licenses. There has been a great increase in the collective bargaining power with other decision makers such as police officers, transport officers, municipal officers and other government organisations.

Another positive example from Nepal, as a result of union organising, is that the Kathmandu administration officer, recently agreed to 42 new toilet facilities including toilet facilities for women. The confidence of the union to negotiate on behalf of informal workers and identify counterparts is growing.

In Uganda, the ITF affiliate ATGWU has focused on electing and training the leaders of informal transport workers.<sup>8</sup> Firstly they ensured that leaders were democratically elected, and then focused on training and building their capacity to identify and negotiate with their counterparts. Government and local authorities now consult the workers directly, something that never used to happen

<sup>6</sup> Global Labour Institute and Laboratory of Human Geography, *Dakar Bus Rapid Transit: A Labour Impact Research Report* (2020).

<sup>7</sup> ITF Education Booklet, *supra* note 2.

<sup>8</sup> Dave Spooner and John Mark Mwanika, *Transforming Transport Unions Through Mass Organisation of Informal Workers* (2017), available at <https://library.fes.de/pdf-files/iez/13643.pdf>

because of the weak and fragmented organisation of workers. The authorities used to say that they did not know who to consult or engage with. The union has managed to turn this around. It is a powerful example of what is possible when you link strong organisation to building collective bargaining power and capacity.

**RS:** *What role can legislation play in ensuring a transition in the informal transport sector while also protecting and improving existing livelihoods during the transition?*

**AD:** Legislation has an absolutely vital role to play. ILO Convention 190 has to be widely ratified, so that it is transposed into national law. It will directly benefit informal transport workers. The policies, principles, and recommendations of R204 provide excellent guidance and we have to ensure that they guide national law. The ITF would like to collaborate with the social partners to develop ILO guidelines on implementing R204 in urban transport. Governments and employers would also benefit from opportunities to regulate large parts of the economy that are unregulated. For example, the target system can provide a new revenue base for tax collection. It also gives governments the framework to improve working conditions and widen the access to social security.

Informal workers themselves have a very clear idea of what their rights should be. ITF affiliated unions have developed an informal workers' charter,<sup>9</sup> that reflects the ideas and rights based struggles of workers. Thus, they need to play a direct role in shaping legislation so that it reflects their needs and interests.

Legislation should provide the framework in which different stakeholders such as governments, unions, and employers have a voice in the transition. There could be a statutory process for dialogue, that becomes institutionalised in cities and countries so that there is genuine inclusion in the transition to formalisation.

**RS:** *There is a clarion call for governments to take action. Do you think litigation [against public authorities] can be part of the broader strategy for protecting informal transport workers?*

**ET:** I have really mixed feelings about that question. I think litigation is really important but not in isolation of a wider strategy to strengthen the power of informal worker organisations. So I think that litigation can be really effective where legislation is not being implemented. We need to hold public authorities accountable.

But overall, if you look at legislation around the world, informal workers are not covered. They are completely excluded. They exist outside the legal framework. Our focus has to be on getting the rights and interests of informal workers recognised in the law. There are too many vested interests for us to be able to win this only through litigation. It is going to require building the representation and organisation of workers themselves, so they can campaign on their own behalf for improved rights.

**RS:** *Finally, how can the ILAW Network, made up worker-side lawyers from across the world, support ITF affiliates and contacts organise and represent workers in the informal transport sector? Do you see a role that this Network can play?*

**ET:** You have a really excellent network, and it has a really important role to play. Supporting the capacity building of unions to negotiate with their bargaining counterparts, on both very specific issues and also on the bigger transition to formalisation, is very important. This was a very impor-

<sup>9</sup> See International Transport Workers' Federation (ITF), *Informal Transport Workers' Charter* (August 2016), available at <https://www.itfglobal.org/en/reports-publications/informal-transport-workers-charter>

tant outcome of the ILO technical meeting on the future of work in urban transport last year. This must include capacity building for governments and employers to effectively engage in an inclusive transition.

We also need information sharing and education on ILO R204 and ideas on how the recommendation should be implemented in the context of urban transport. From a union perspective, that would really help us develop strong proposals when there is an opportunity to negotiate such guidelines with governments and employers.

Occupational safety and health (OSH) is likely to be recognised as a fundamental right this year by the ILO. What will that mean for informal transport workers? Will this improve their healthy and safety? So we need support to understand the specific issues related to OSH as a fundamental right for informal transport workers.

Lastly, as I mentioned before, we need to build the campaigning capacity of transport unions to lobby for laws that protect their rights and interests.

*RS: Thank you so much. It is a long list, but that is what we are here for, and we are more than happy to assist. Thank you for taking this time to be interviewed for the ILAW Network's Global Labour Rights Reporter Journal.*

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.