Applying International Labour Standards to the Informal Economy

Chapter 2
Convention 98: Collective Bargaining

Introduction

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

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

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

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

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

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

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

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

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

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

1. Scope of Labor Law

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

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

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

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

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

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

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

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

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

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

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

For example,

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

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

For example,

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

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

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

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

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

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

Recommendation:

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

See section 3 below on specific occupations for further recommendations.

2. Anti-Union Discrimination

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

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

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

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

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

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

[18] Ibid, Chapter 13, generally.

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

which they were sentenced to several years' imprisonment.

Upon review of the facts, the Committee concluded that,

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

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

Recommendation:

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

3. Collective Bargaining by Occupation or Arrangement of Work

A. Self Employed Workers

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

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

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

For example,

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

[20] Id. at 621.

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

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

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

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

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

Recommendation:

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

B. Domestic Workers

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

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

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

[25] Para 623.

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

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

For example:

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

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

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

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

Recommendation:

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

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

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

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

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

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

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

consultations with organizations of domestic workers.

C. Cooperatives

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

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

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

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

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

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

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

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

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

[37] Id. at 7(e).

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

[39] Id. at para 117.

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

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

Recommendation:

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

D. Digital Platforms

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

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

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

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

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

[42] Id. p. 211.

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

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

[45] Id., para. 327.

[46] Ibid.

[47] Id., para. 230.

[48] Id., para. 1067.

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

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

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

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

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

Recommendation:

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

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

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

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

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

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

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

E. Sectoral Collective Bargaining

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

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

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

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

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

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

Recommendation:

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

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

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

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

[58] Ibid at 397.

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