ENFORCEMENT PROBLEMS IN "INFORMAL" LABOR MARKETS: A VIEW FROM ISRAEL

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I. INTRODUCTION

A recent report by the International Labor Organization (ILO) boasts that the term "informal sector" was first popularized by the ILO itself in the early 1970s.[1] While the ILO now admits to some of the difficulties with this term,[2] it continues to use it, as well as other variations that point to purported "informality." But what exactly is meant by "informality" in the context of employment? The General Conference of the ILO adopted an extremely broad understanding:[3]

> The term "informal economy" refers to all economic activities by workers and economic units that are—in law or in practice—not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that—although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.

Such a definition seems too broad to be useful. Indeed, it is now common to distinguish between different aspects of the so-called "informal economy."[4] Thus, for example, we can distinguish between own-account workers—who form a significant part of the "informal economy," but absent an employer are not relevant for a study of

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1. Int'l. Labour Org. [ILO], *Decent Work and the Informal Economy: Report VI to the 90th Session of the International Labor Conference* 1, 121 (2002), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf.

2. *Id.* at 2.

3. *ILO Resolution Concerning Decent Work and the Informal Economy*, 90th Session of the General Conference ¶ 3 (2002), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25.pdf.

4. *See* Ralf Hussmanns, *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment* (ILO Bureau of Statistics, Working Paper No. 53, 2005).

labor and employment law—and "informal *jobs*," which were defined by the International Conference of Labour Statisticians (ICLS) as follows:[5]

> Employees are considered to have informal jobs if their employment relationship is, in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.). The reasons may be the following: non-declaration of the jobs or the employees; casual jobs or jobs of a limited short duration; jobs with hours of work or wages below a specified threshold (e.g. for social security contributions); employment by unincorporated enterprises or by persons in households; jobs where the employee's place of work is outside the premises of the employer's enterprise (e.g. outworkers without employment contract); or jobs for which labour regulations are not applied, not enforced, or not complied with for any other reason. . .

In my view this definition is still too broad, at least as far as labor law purposes are concerned. If certain protective regulations do not apply *as a matter of law*, there is nothing "informal" about it. If a legislature decides that a certain group of workers (say, casual workers) should not enjoy a certain entitlement (say, annual leave), it does not mean that these workers operate outside the reach of the law. Legislation is always based on line-drawing. There is nothing "informal" about a piece of legislation setting the scope of its application (and necessarily excluding some people). There are surely reasons for the exclusion of a given group in a given context. Whether such reasons are justified or not is of course a legitimate and important question, which should be discussed on its merits, in the context of the specific legislation. On the other hand, if casual workers are *not* exempted from annual leave regulations, but often in practice they do not enjoy it, this is a problem of enforcement. It does not seem useful—indeed, it seems misleading—to consider these different issues together. The ILO and ICLS definitions, which focus on the end-result in which workers do not enjoy certain protections, downplay the important difference between non-application *in law* and non-application *in practice*.

This article will limit itself to the latter phenomenon. I see no reason to tie problems of enforcement (which will be discussed below) with questions about the justifiability of specific exemptions. It is worth noting that in Israel—which will be the focus of my discussion—there are no exemptions of entire sectors from the scope of labor and

5. *17th International Conference of Labour Statisticians Final Report* (2003), at 14, *available at* http://www.ilo.org/public/english/bureau/stat/download/17thicls/final.pdf.

employment law (as, for example, in the case of farm workers or professionals in the United States[6]). In principle every employee enjoys the protection of labor laws. There are, of course, specific exemptions. Thus, for example, the Work and Rest Hours Law excludes police officers; those working aboard ships or airplanes; civil servants whose job requires them to work in exceptional hours; managers and other employees holding jobs that require a high degree of personal trust; and employees who, due to the circumstances of their work, are not under the control of the employer in terms of their working hours.[7] Some of these exemptions seem unwarranted to me. But a discussion of their merits requires one to go into the purposes of the specific law and the justifications for the exemptions in the specific context. This has nothing to do with problems of enforcement or with "informality."

If workers excluded from labor regulations *as a matter of law* should not be considered part of the "informal economy" (at least as far as the study of labor law is concerned), those excluded *in practice*—which are the subject of our attention here—also do not properly deserve the term "informal." When an employer fails to obey the requirements of labor or employment laws, she breaks the law. When an employer fails to declare the true number and names of his employees (assuming this is required), he breaks the law. In Israel, at least, this creates not only a civil liability, but a criminal one as well. It is not different from any other situation of legal disobedience; and it seems inappropriate to describe it as a situation of "informality." We do not describe theft as an "informal property arrangement." Rather, we take this violation of the laws of property seriously. Labor and employment laws deserve the same respect. Terms like "informal" create a false impression of a legal and harmless situation. We should not obscure the illegality, nor the significant harm to the workers involved.[8]

One possible explanation for this soft and ambiguous choice of words is the view among some people that violation of labor and employment laws has its advantages. It is often noted that people work in the "informal economy" because they have no job or business opportunities in the formal one. So the "informal sector" is

6. Fair Labor Standards Act, 29 U.S.C. § 213 (2004).

7. Hours of Work and Rest Law, 5711-1951, 5 LSI I 125, § 30 (Isr.).

8. *See generally* Dwight W. Justice, *Work, Law and the "Informality" Concept*, *in* UNPROTECTED LABOUR: WHAT ROLE FOR UNION IN THE INFORMAL ECONOMY? 5, 7 (Manuel Simon Velasco ed., 2002), *available at* http://www.ilo.org/dyn/dwresources/docs/530/F1303165723/127e.pdf.

sometimes seen as a solution for unemployment. This is unfortunate; the existence of unemployment in the background cannot serve as a justification for a lawless work environment. If the desire is to extend labor market opportunities, this can be achieved by various forms of regulation[9] and/or deregulation.[10] Excluding some groups of people from particular regulations is obviously also an option, but this must be performed deliberately, after a consideration of the consequences, and be part of the regulatory regime itself. There is no reason to accept a division into two separate worlds within the same legal system, one that regulates the employment relationship and provides protection to workers, and another where for similar workers labor law is non-existent. By leaving a group of people completely outside the scope of protection, and not on the basis of a deliberate and justifiable distinction, such a division is detrimental to the rule of law, to principles of distributive justice, and to all the purposes of the different labor laws themselves.

I will therefore proceed with the understanding that laws should be obeyed and enforced. Exemptions can be made, but only within the laws themselves. The violation of labor and employment regulations cannot be accepted. The poorly-termed "informal sector" should be seen simply as an enforcement problem. The next part of this article (Section II) distinguishes between three different types of enforcement problems, and provides details about the extent of each problem in Israel. Section III proceeds with describing and analyzing the main solutions introduced by the legislature and by the labor courts in Israel. Finally, Section IV summarizes the main arguments.

II. THREE TYPES OF ENFORCEMENT PROBLEMS IN LABOR MARKETS

It is useful to distinguish between three types of enforcement problems in labor markets, creating a spectrum of possibilities in terms of the degree of evasion. In discussing enforcement problems, my focus is limited to *systematic* violations of labor and employment laws. I will not consider situations of one-time or otherwise discrete violations. This is not to suggest that such violations are unimportant or negligent. Rather, they are expected in a well-functioning system and can be dealt with through the regular channels of civil and/or

9. *See*, *e.g.*, Lora Jo Foo, *The Vulnerable and Exploitative Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994).

10. *See*, *e.g.*, Richard A. Epstein, *The Moral and Practical Dilemmas of the Underground Economy*, 103 YALE L.J. 2157 (1994).

criminal enforcement. The three situations described below—all pointing to repeated and systematic violations of labor and employment laws—constitute *failures* of that system.

A. Violation of Specific Legal Requirements: Partial Exclusion

At one end of the spectrum there are specific violations of a given labor or employment law. At this end, both the business and its employees are properly declared to the relevant authorities, and protective regulations are partially obeyed. But the employer violates a specific legal obligation, or a number of obligations, toward an employee or several employees (or all of them). This is widespread in Israel, especially among contractors supplying security and cleaning services. Over the past two decades, most Israeli establishments—in the public as well as the private sector—have outsourced these services to contractors. Cleaning services are needed in every establishment, and most are now using outside contractors for these purposes. Security services are also needed because of the constant threat of terror attacks in every Israeli establishment except for very small businesses; and currently almost all are using outside contractors for these purposes as well. The result is that most medium- and large-size establishments—whether it is stores, plants, private-firm offices, hospitals, medical clinics, universities, government offices, or others—are using contractors for the supply of cleaning services and for the supply of security services. Violations of labor and employment law by such contractors appear to be widespread.[11]

What is unique about cleaning and security services that can explain this enforcement problem? While the contract is considered to be one for the performance of services—e.g., the contractor agrees to ensure that the establishment is clean—for the most part in practice the obligation of the contractors is to supply workers who do the job. There are very few costs in these sectors other than the cost of labor

11. *See How to Secure the Rights of Security Workers? A Position Paper on the Enforcement of Protective Laws, with an Emphasis on the Enforcement of Security Workers*, University of Haifa Clinic for Law and Social Change (Mar. 2005), *available at* http://isllss.haifa.ac.il/articles.htm (Hebrew); *Background Document on the Employment Characteristics of Security Workers in Israel*, Knesset Research and Information Center, at 10 (July 2005), *available at* http://www.knesset.gov.il/MMM/data/docs/m01173.doc (Hebrew); *Invisible Workers in the Public Service: A Report on Violation of Contractor's Workers Rights in Government Offices*, Hebrew University Employment Welfare Clinic (Feb. 2006), *available at* http://law.mscc.huji.ac.il/law1/clinics/sherut.pdf (Hebrew). It is interesting to note—as another testimony for the severity of the problem—that in March 2006 (the time of writing this article) the Association for Civil Rights in Israel launched a nationwide campaign dedicated to this exact issue.

itself. And while work in these sectors is physically demanding, it requires very little knowledge or expertise. So the pool of potential workers for such jobs is large, and in an economy with significant unemployment (approximately 10% in recent years), the market wage in these sectors is meager. Add the fact that there are hardly any regulatory constraints on starting a new business in these sectors, and the picture becomes clear. The business of providing security or cleaning services requires very small capital. Virtually anyone can set up such a business. Indeed, competition in these sectors is fierce. And since payments to workers are by far the biggest expenditure, competitive advantage is achieved by cutting the cost of labor. This is further encouraged by establishments using tenders to recruit the cheapest contractor each year. Moreover, desperate and often uneducated workers are not only willing to work for very little, but they are unlikely to sue (whether because they do not know their rights, or because they fear unemployment).[12] The result is an environment in which contractors *can* easily take advantage of workers, and they have an *incentive* to do so, in order to stay competitive. Many indeed end up doing so, whether by not paying overtime, by not paying for holidays or an annual leave, or any other benefit provided by law. These contractors are usually incorporated, they pay taxes, they report the names of their employees and make payments to the National Insurance Institute and so on. They also usually abide by the minimum wage law (although sometimes they misreport the hours of work, thereby not paying for some of them). So these are certainly "formal" businesses, and in principle also "formal" jobs. But the violation of *some* labor and employment laws is systematic and widespread.

The attempt to explain the reasons for this phenomenon should certainly not be seen as justifying it. I see no room for the argument that these inferior jobs—in which workers get less compensation or benefits than the minimum required by law—are better than no jobs at all. I see no reason to accept the view that the existence of such jobs is unavoidable or that they are needed in a period of persistent unemployment. As I have argued above, adjustments can be made *within* the framework of the law. Thus, for example, when Israel went through a severe recession a couple of years ago, the minimum

12. *See* William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC. REV. 631 (1980). For an application in the context of Israeli labor and employment law, see Ronen Shamir & Michal Shatray, *Equality of Opportunities in the Labor Court: Towards a Sociology of the Legal Process*, 6 LABOR LAW YEARBOOK 287 (1996) (Hebrew).

wage—which is usually updated automatically—was frozen by an amendment to the law itself. Whether this was justified or not is a separate question. Arguably a better response would have been to invest public funds in education and training, and in helping to create new employment opportunities. Either way, it shows that the legislature can and does respond to market conditions when necessary. There is never a justification for private "initiatives" of violating the law "to create employment opportunities" or for any other reason.

Partial exclusion of employees from labor and employment benefits is also common in other sectors, wherever the workers are most vulnerable. Thus, for example, in Arab villages in Israel unemployment is especially high, and employment opportunities—especially for women—are extremely scarce. These women are also less likely to know their rights, and certainly not likely to sue. Local businesses that otherwise appear legal will often refrain from obeying some of their legal requirements vis-à-vis such vulnerable employees. The same is true for other areas in Israel characterized by low socio-economic status. Such violations are not always limited to the same geographical area. Thus, for example, contractors of cleaning services, who provide services for governmental institutes and universities, sometimes do so by bringing workers of low socio-economic status from other areas and paying them less than the required minimum wage. In such cases, the institute may not be aware of the violation, or in some cases turn a blind eye, even though the work is performed on its own grounds. Similar violations can also be found with respect to migrant workers, employed in particular in the construction sector and in agriculture. Language and culture barriers often make it difficult for such workers to know their rights and use the legal system. Immigration laws make their status fragile. This creates fertile ground for employers wishing to cut costs by violating some labor and employment laws.[13]

13. Violations of the Minimum Wage Law are estimated conservatively to be as high as 48% for male migrant workers, 35% for female migrant workers, 25% for Arab women, and 16% for Arab men—while only 7% for Jewish women and 5% for Jewish men. *See* Daniel Gotlieb, *Compliance with the Minimum Wage Law and its Enforcement*, 110 ISRAELI TAX Q. 65 (2000) (Hebrew). Other empirical estimates, cited by Gotlieb, are even significantly higher. A particular group that is not considered here separately—because its size has dropped significantly, and for our purposes here it is very similar to the group of migrant workers—is workers from the Palestinian Authority or the occupied territories. For a detailed account, see Guy Mundlak, *Power-Breaking or Power-Entrenching Law? The Regulation of Palestinian Workers in Israel*, 20 COMP. LAB. L. & POL'Y J. 569 (1999).

Another sector that merits attention here is temporary employment agencies (TEA). Over the past two decades the use of TEAs has flourished in many countries, with Israel being a notable and extreme example.[14] Often these agencies are used for "payrolling" purposes only, creating in fact a sham arrangement in which the TEA is considered the legal employer (and delivers the paycheck), even though the only real contact of the employee is with the user, and the employment continues with the same user for long and even indefinite periods of time.[15] This system is often used by firms trying to sidestep their collective agreement obligations. By formally maintaining that certain workers who actually work for them are not their employees, but rather the employees of another entity (the TEA), such firms are cutting costs. They also, in my view (although the National Labor Court is yet to consider this issue directly), circumvent the Israeli Collective Agreements Law, according to which a collective agreement applies to all the employees in the same bargaining unit.[16] Assuming that the union did not agree to the exclusion of this group of workers, this appears to be a violation of labor laws, which is also systematic and quite common in Israel. Thus, for example, cashiers in supermarkets and tellers in banks, are often employed in this model. It appears that basic employment standards are followed in such cases; the users will normally insist that the TEA pay the minimum wage and comply with other employment laws. However, by evading the additional obligations included in the applicable collective agreements, such methods of employment should also be seen as violating specific legal requirements.

B. Sweeping Exclusion in Declared Employing Entities

In the second type of cases, as in the first, the business is declared to the relevant authorities and generally pays taxes, thus creating an appearance of operating legally. At least for some workers, however, the business refrains from following labor and employment laws *entirely*. Employers in the previous (first) type usually observe the minimum wage law, or at least make an effort to create such an appearance. Thus, for example, they usually provide employees with pay slips and make payments to the tax authorities and to the

14. Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. IND. REL. 727 (2004).

15. *See id*. *See also* ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET ch. 5 (2003).

16. Collective Agreements Law, 1951, §§ 15–16. The concept of bargaining units does not appear in the law itself, but has been prominent in the National Labor Court's interpretation.

National Insurance Institute, declaring a salary that is not below the minimum wage. As noted, violation of labor and employment laws in the first type of cases is systematic, but found in the context of specific legal requirements only. In the second type, on the other hand, labor and employment regulations are ignored *across the board*. There are two common methods in which this is done: falsely presenting some employees as "independent contractors"; and concealing, i.e., not declaring, the employment of certain employees. Each of these methods is briefly discussed in turn below.

Disguising employees as independent contractors was very common in Israel in the 1980s, in the private as well as the public sector. But the phenomenon has steadily dropped in magnitude as a result of the National Labor Court's forceful treatment. In a series of judgments over the past two decades the Court made it clear that the status of "employee" will be determined by the reality of the relationships, without giving weight to contradictory formal stipulations nor to any other sham arrangements.[17] Moreover, the tests used to distinguish employees from independent contractors, while basically similar to the ones used in many other countries,[18] have been applied in recent years in ways that clearly favored the inclusion of more and more workers as part of the group of "employees."[19] The message to employers was loud and clear. Indeed, while there is no empirical evidence on the extent of this phenomenon, anecdotal evidence and a review of the case law suggest that it has declined significantly. In this particular context, Israel may serve as an example for many countries that are still struggling with disguised employment.[20] To be sure, many employers simply substituted this method of evasion with some other method. But the forceful reaction to this method by the Court has certainly made the evasion of labor and employment laws more difficult.

An additional form of disguised employment curtailed by the National Labor Court in recent years concerns volunteer work. Volunteers work without pay and are not considered "employees" for the purpose of labor and employment laws. This was seen by some employers as yet another route toward the goal of escaping these laws.

17. *See*, *e.g.*, Asulin v. Israel Broadcasting Authority, 36 PDA 689 (2001); Isaac v. Israel Water Industries, 36 PDA 817 (2002).

18. Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002).

19. *See*, *e.g.*, Tsdaka v. The State of Israel – IDF Radio, 36 PDA 624 (2001).

20. For a comparative survey of the problem, see ILO, *The Employment Relationship*: *Report V(1) to the 95th Session of the International Labor Conference* (2005), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf.

But the Court was quick to close this potential opening, for example by refusing to accept that legal or accounting articling could be performed in a volunteer status.[21] The agreement of the persons articling to work under this arrangement was deemed irrelevant in these cases, even though they were unlikely to get the job—and the opportunity to complete the required articling period—without it. In another case, a person who worked for a number of years for a governmental institute, at times as a temporary employee and other times—when there were no funds available to pay her salary—as a volunteer, was deemed to have been an employee the entire period.[22]

While in the cases described above the employer relies on a legal argument—however dubious—to justify the fact of not following labor and employment laws, in other cases employers simply refrain from declaring the employment of certain (or all) employees, to reach the same result. So the business (or other employing entity) itself is declared to the appropriate authorities, pays taxes, and maintains an appearance of a legal establishment. However, it refrains from reporting the employment of some employees, in effect concealing their employment, thereby not paying the required dues and deductions to the tax authorities and the National Insurance Institute, and not following any labor and employment laws. Once again, to the best of my knowledge there is no empirical data on the extent of this phenomenon. Anecdotal evidence, however, suggests that it is widespread where the workers are most vulnerable. I noted earlier that partial exclusion from labor and employment benefits is common in areas of low socio-economic status, for example Arab villages. Sometimes the same environment leads employers to non-declaration of the employees and *sweeping* exclusion from labor and employment benefits. This is probably most common in very small businesses, which, because of their physical presence (a shop, a restaurant, etc.), cannot keep the business as a whole undeclared, but find it relatively easy to refrain from declaring employees (who are often family members). Similarly vulnerable to such sweeping exclusion are migrant workers without work permits, who are quite numerous in Israel.[23] Sometimes they are engaged for short periods of time, even a

21. *See* Twilli v. Dahari, 37 PDA 746 (2002); Kazis v. Ariat, 38 PDA 394 (2002).

22. Saruggi v. The National Insurance Institute, judgment of May 3, 2004 (National Labor Court).

23. The number of migrant workers in Israel peaked in 2001 at 247,000 (12% of the workforce), approximately 145,000 of them without permit. *See Planning a System for Migrant Workers Employment in Israel* (a report of a committee appointed by the Ministry of Finance and the Ministry of Industry, Trade and Employment, 2004) (Hebrew).

single day (especially in small constructions, painting etc).[24] Others are engaged for lengthy periods (especially as domestic workers). Either way, their fear of any contact with legal authorities makes them even more vulnerable to exploitation by employers.

C. Sweeping Exclusion in Non-Declared Employing Entities

The third and final type of enforcement problem includes situations in which the business as a whole is not declared to the tax and other relevant authorities. In such cases the violation of labor and employment laws is only part of a bigger picture, going hand in hand with tax evasion, violation of business licensing regulations, and so on. Obviously this is the situation in all instances of organized criminal activities; however, it can also exist in businesses conducting legitimate activities. While unfortunately there is no data on the extent of this phenomenon either, it seems fair to say that the existence of non-declared (and otherwise legitimate) businesses is quite significant in Israel, but at the same time, that most of them consist of own-account workers, i.e., independent contractors without employees. Non-declared entities engaged in legitimate businesses and employing workers are probably not that common. Nonetheless, surely such instances exist as well, and it would be useful to consider them as a separate type, because they require very different solutions.

III. SOLUTIONS EMPLOYED BY THE ISRAELI LEGISLATURE AND COURTS AND SOME ADDITIONAL PROPOSALS

The previous section revealed a number of contexts in which enforcement problems of labor and employment laws are most acute. The unsatisfactory level of enforcement in this sphere has not eluded the Israeli legislature. So far this has not led to an allocation of significant resources (which could be used, for example, for the appointment of additional inspectors[25]). The legislative response has

24. And see Abel Valenzuela, Jr. et al., *On the Corner: Day Labor in the United States* (UCLA Center for the Study of Urban Poverty Working Paper, Jan. 2006, *available at* http://www.sscnet.ucla.edu/issr/csup/pubs/papers/item.php?id=31) (finding widespread violations of labor and employment laws in the U.S. day-labor market).

25. There are only twenty-five inspectors employed by the Ministry of Industry, Trade and Employment for the purpose of enforcing labor and employment laws, covering as much as 2.3 million workers. *See Background Document on the Employment Characteristics of Security Workers in Israel*, Knesset Research and Information Center, at 10 (July 2005), *available at* http://www.knesset.gov.il/MMM/data/docs/m01173.doc. There are additional inspectors for specific purposes such as preventing employment on the Sabbath and preventing the employment of migrant workers without permit; in both cases, the State has an interest that is external to the protection of workers themselves.

focused on two fronts: the minimum wage (considered the most basic and important entitlement), and the protection of TEA workers and migrant workers (two specific groups considered especially vulnerable). The efforts of the legislature in these three contexts are described below in turn, together with a discussion of their limitations, additional responses of the judiciary, and some other proposed solutions.[26] I will then briefly consider the other contexts in which enforcement is especially problematic, but with no legislative response thus far: the cleaning and security contractors sector, and areas where workers are generally characterized by low socio-economic status (most notably the Arab sector). I will consider the role of the courts in this context, and some additional proposals. Finally, I will conclude this part with brief notes on possible solutions for improving enforcement in the context of non-declared entities.

A. The Minimum Wage Law

The attempt to bolster the enforcement of the Minimum Wage Law represents, at least on paper, an exceptional success of Non-Governmental Organizations. Significant amendments were introduced into the Law in 2002 as a direct result of efforts by a coalition of NGOs dedicated to the protection of workers' rights. The new sections require every employer to post a visible poster detailing the rights of employees with respect to the minimum wage,[27] create new rights for unions to file suits on behalf of employees for violations of this law,[28] create a legal presumption that the minimum wage was not paid when employers do not keep records of working hours or do not provide pay slips as required,[29] strengthen the criminal sanctions that courts can impose on employers violating the law,[30] bestow new and sweeping powers on governmental inspectors,[31] and require all governmental bodies engaging contractors to include a stipulation

26. Recently "soft law" solutions have become popular. Indeed, voluntary and semi-voluntary solutions could be useful, alongside traditional, "hard law" enforcement. My own focus, however, is on the latter. This seems more appropriate when discussing systematic violations of the most basic rights.

27. Minimum Wage Law 1988, § 6B, as amended in 2002; Minimum Wage Regulations (Notice on Workers' Rights under the Law) 2005. Those working outside the employer's premises or employed by small employers (less then six employees) should receive the notice personally.

28. Minimum Wage Law 1988, § 7 (amended 2002).

29. Minimum Wage Law 1988, § 7B (amended in 2002).

30. Minimum Wage Law 1988, § 14 (amended in 2002).

31. Minimum Wage Law 1988, § 14B (amended in 2002).

making a violation of the Minimum Wage Law also a violation of the contract.[32]

One additional and important amendment to the Minimum Wage law places direct responsibility on the user to pay the minimum wage when a TEA fails to do so.[33] This may seem extreme at first, given that at least in some cases the user will be required to pay the workers after already paying the agency for the same work. Nonetheless, this seems justified given the superior position of the user vis-à-vis the agency (in contrast to the position of the worker). The user is typically in a much better position, compared with the worker, to *prevent* violations of the Minimum Wage Law or at least secure itself against the risk of double-payments. Thus, for example, the user can choose only TEAs that are known to be reliable. It can also insist on getting collaterals from the agency. This may make the engagement of a TEA slightly more costly. However, given the fact that the user is the one enjoying the work, and the fact that the employees are performing this work on its own premises, such a burden seems perfectly justified.

The final amendment introduced in 2002 prohibited public sector employers from contracting with contractors that have been convicted of violating the Minimum Wage Law, unless a year has passed since the conviction, or three years in the case of more than a single conviction.[34] In 2004 this section was extended to include convictions for violating the Migrant Workers Law (discussed below) as well. At the same time, at the initiative of the Ministry of Finance, the prohibition was relaxed, now allowing public employers to contract with firms with multiple convictions, as long as one year has passed since the last conviction; as well as introducing a number of exceptions in which the prohibition does not apply.[35] This recent development is unfortunate. The number of convictions in any case is very low, compared with the widespread violations of the Minimum Wage Law. The State initiates criminal proceedings only in cases of systematic and multiple violations. The Government itself is responsible for the unsatisfactory level of enforcement. It should not aggravate the problem by rewarding convicted employers with additional contracts. In my view, rather than relaxing this prohibition, the legislature would be wise to strengthen it by banning employers who have been found

32. Minimum Wage Law 1998, § 15D (amended in 2002).
33. Minimum Wage Law 1998, § 6A (amended in 2002).
34. Minimum Wage Law (amend. No. 3) (2002), § 9.
35. Public Entities Contracts Law 1976 (amended 2004).

to violate the Minimum Wage Law in more than one *civil* judgment as well.

Notwithstanding this reversal, the 2002 amendments introduced an altogether impressive package of steps aimed at improving the enforcement of the Minimum Wage Law. Unfortunately, however, they did not succeed in attaining dramatic changes. The number of inspectors remains small, without proportion to the extent of the problem. The fears of low-waged workers from complaining or suing have not decreased; and the risk to employers violating the law, while somewhat larger, could not in itself make much difference. The legislature was right in focusing much attention to improving the enforcement of the Minimum Wage Law, which is indeed the most basic and important (monetary) entitlement. In my view, however, the 2002 amendments prove that good intentions are not sufficient. Allocation of resources must follow. One cannot rely on the self-enforcement (i.e., civil suits) of low-waged workers. Enforcement in this context requires *enforcers*: more inspectors, prosecutors, judges, and police officers dedicated to the enforcement of labor and employment laws, with special emphasis on the Minimum Wage Law. Without such new resources, improvements in enforcement are likely to remain minimal indeed.

B. TEA Employees

We have seen that the amendments to the Minimum Wage Law included a special section dedicated to the protection of TEA workers. This is intended to complement the Employment of Workers through the Employment Agencies Law, dedicated entirely to the protection of such workers. First enacted in 1996,[36] and significantly amended in 2000, this law is based on the understanding that the exploitation of TEA workers is widespread, and introduces a number of different measures to prevent it. However, the two most significant sections of the law have been curtailed by the legislature itself. Section 12A was supposed to turn every TEA employee into an employee of the user after a period of nine months with the same user. This would have cancelled the incentive for using TEAs for lengthy periods of employment, thus significantly minimizing the extent of the phenomenon and the violations of labor and employment laws that come with it.[37] Unfortunately, though, as a

36. For an analysis of the original law, see Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LAB. L. & POL'Y J. 413 (1999).

37. *See also* Davidov, *supra* note 14.

result of objections by the Ministry of Finance and by employers' groups, this section was put on hold before coming into force, and the freeze has been extended ever since.[38]

The other important protection introduced in 2000 is found in section 13, according to which TEA workers are entitled to the same benefits enjoyed by comparable employees of the user in the place of their work. Once again, this could have cancelled the incentive for using the "payrolling" model. However, the same section includes a "derogation clause," which allows the representative union and the TEA to agree, in a general collective agreement that has been extended by the Trade, Industry and Employment Minister, on a different arrangement. Why would the workers agree to forgo their legislated right to equality with the user's employees? This can only make sense for employees in the "traditional" TEA model, i.e., those assigned for short-term assignments, who could trade their right to benefits enjoyed by the user's employees for rights related to the continuity of assignments and pay. Unfortunately, though, the unions—perhaps too eager to secure dues from so many new workers—have succumbed to an agreement with the major TEAs that gives no continuity rights, and relatively insignificant benefits. The agreement was extended by the Minister in 2004 to the entire private sector. This means that the right contained in section 13 now applies only to the public sector, where benefits are meager—at least as far as the low-skill jobs that the TEA workers perform are concerned—and the main advantage of being directly employed by the user is job security. Although a different interpretation is possible, section 13 has so far *not* been construed as granting comparable job security rights to TEA employees working for public sector users.

The legislative attempts to confront the long-term employment of workers through agencies—which, as we have seen, were half-hearted—have been complemented by the National Labor Court in its jurisprudence concerning triangular employment relationships. It has been assumed for many years that the TEA is always the legal employer—until the case of Ilana Levinger arrived before the Court.[39] Levinger was a secretary at the Ministry of Employment and Welfare(!). She had worked there, side-by-side with other secretaries who were employees of the State, for twenty years. However, Levinger's status was different: for the first eleven years she was considered an "independent contractor." Then, when the Ministry

38. See most recently Economic Policy for 2005 Law (various amends.) 2005, § 54(a).
39. Levinger v. The State of Israel (National Labor Court, judgment of Oct. 2, 2000).

officials realized that the Court will not accept such a sham arrangement, they contracted with a TEA to employ her. Levinger was then employed, like many others, through a TEA that she hardly knew. The agencies have changed from time to time, and so have the names on the top of her pay slips, but Levinger continued to do the same job. After another nine years, the Ministry officials became worried that she might some day be considered a State employee, because of the length of her engagement. To avoid this "risk," they fired her (formally, they asked the TEA not to send her anymore). She then applied for an injunction against her dismissal. The judges were furious when learning about this extreme case of "payrolling." The Court ruled that Levinger should be considered a State employee, thus enjoying job security, and ordered her reinstatement.

It is now clear that the Court will not accept employment of many years through intermediaries. In such cases the user will be considered the legal employer. It is much less clear, however, which length of employment through TEAs will be considered illegitimate by the Court. In one Regional Labor Court case, a number of typists working for the judiciary itself and employed through TEAs for periods of four years and more were considered employees of the State.[40] On the other hand, the National Labor Court has shown reluctance to accept the turning of such workers into civil servants, in a way that in practice sidesteps the strict rules concerning the acceptance of employees into the public sector.[41]

Despite the combined efforts of the legislature and the courts, TEAs are still commonly used in Israel to evade collective bargaining obligations and otherwise exclude workers into peripheral positions. There is still much that can be done to prevent this phenomenon. I have argued elsewhere in favor of legislation that will decisively prevent employment through TEAs for lengthy periods of time; coupled by a determination that both the TEA and the user are "joint employers" from the first day of employment.[42] This could have a significant impact, preventing the exploitation of TEA workers in a relatively simple method.

40. Avni-Cohen v. the Judiciary Administration, judgment of July 29, 2001 (Tel-Aviv Regional Labor Court).

41. *See*, *e.g.*, Chason v. Ministry of Housing (National Labor Court, judgment of Sept. 4, 2003). This may now be changing. *See* recently Nakash v. The State of Israel (National Labor Court, judgment of Apr. 9, 2006).

42. Davidov, *supra* note 14.

C. Migrant Workers

If low-waged workers through TEAs received very limited protection from the legislature, the situation of migrant workers is even worse. This is hardly surprising, considering that they do not vote. Israeli immigration laws do not allow for the possibility of migrant workers becoming permanent residents or citizens; work visas are given for limited (and usually short) periods of time, thus excluding migrant workers in effect from becoming full members of the community. Indeed, a piece of legislation from 1991 dedicated to migrant workers focused entirely on ensuring their departure from Israel upon the expiration of their visas.[43] Although public outcry on the exploitation of migrant workers resulted in a 2000 amendment purported to protect their rights, the amendment does not deviate from the same basic approach. It requires employers to provide employees with a written contract of employment in a language they understand; to ensure that they are covered by medical insurance; and to provide suitable housing.[44] There are also requirements that the employer deposit collaterals with the State to ensure the payments to the employee; and limitations on the ability of employers to deduct payments for medical insurance or housing from migrant workers' salaries.[45] At the same time, the Migrant Workers Law requires employers to deposit some of the payment to the employees in a special bank account, from which the funds are transferred to the employees only after departing from Israel, "to ensure their departure."[46]

In recent years the Israeli Government devoted significant resources to locating and deporting migrant workers without permits. Unfortunately only a very small fraction was devoted to the enforcement of labor and employment laws for the protection of migrant workers (including the many who work *with* permits). The 2000 amendment to the Migrant Workers Law can hardly make a significant difference in this regard. Admittedly, more recently a welcome change was introduced to the rules concerning work permits; the new rules allow migrant workers to find alternative employment within the same sector (subject to some procedures). This was in response to mounting criticism on the previous arrangements, which in effect tied the worker to a particular employer (the one who

43. Migrant Workers Law 1991.
44. Migrant Workers Law 1991 (amended 2000), §§ 1C, 1D, 1E, respectively.
45. Migrant Workers Law 1991 (amended 2000), §§ 1D(c), 1E(b), 1H.
46. Migrant Workers Law 1991 (amended 2000 and 2005), ch. 4.

applied for the permit). The inability of the worker to seek alternative employment in Israel resulted in extreme forms of exploitation. These detrimental market conditions—a direct result of the previous regulations—are alleviated to some extent by the new rules. This is important, but, again, hardly sufficient.[47]

Within its limited powers, the National Labor Court has been much more active than the legislature or the Government in trying to protect migrant workers. It considers all employees—whether residents or migrant, whether with or without permits—as fully covered by labor and employment laws.[48] Moreover, in a series of judgments during the last decade, the Court prohibited the practice of employers holding employees' passports;[49] and adopted various procedures to make it easier for migrant workers to sue, considering that normally their period of stay in Israel is shorter than the length of legal proceedings.[50] It is also worth noting that a number of NGOs working in Israel are dedicated to the protection of migrant workers, providing invaluable service, sometimes with significant success. But all this is hardly satisfactory, particularly as far as workers without permits are concerned. The original sin of the Israeli Government was in inviting numerous outsiders to work in Israel without giving them any prospect of becoming full members of the community. They are not allowed to bring their family, nor legally extend their stay beyond a few years, nor apply for citizenship. Moreover, in practice migrant workers have to come for a number of years in order to work sufficient time to cover the significant expenses related to traveling to Israel, obtaining the permit, paying to intermediaries, and so on. So often they stay after the end of their permit.[51] If the State would consider not only its own interests, but those of the workers as well, it can devise a plan that would result in fewer work permits but much

47. Further changes are now expected following the decision of the High Court of Justice that the tie between migrant workers and a specific employer is unconstitutional. *See* Kav-La'Oved v. The Government of Israel (judgment of Mar. 30, 2006).

48. *Contra* Hoffman Plastics Compounds Inc. v. NLRB, 535 U.S. 137 (2002).

49. *See*, *e.g.*, Buchiman v. Best Entrepreneurship and Construction Ltd., 38 PDA 824 (2002).

50. *See*, *e.g.*, Kinyanjui Mwangi v. Olitzky Soil Roads and Development Works Ltd., 35 PDA 625 (2000) (migrant workers who leave the country *do not* need to deposit collaterals to ensure the payment of legal costs should they lose); Orsatz v. Denya Sibus Ltd., 37 P.D.A. 305 (2002) (even when migrant workers left the country before the date scheduled for cross-examination, the case will proceed); Sofand v. Korkus, Judgment of May 6, 2002 (Tel-Aviv Regional Labor Court) (migrant workers can be exempted from the payment of court fees even without the formal documents usually required from welfare authorities).

51. A recent piece of legislation places limitations on the payments that intermediaries, including foreign intermediaries, can charge employees for their services. *See* Employment Service Law 1959 (amended 2004), ch. D1. However, it seems naïve to believe that such a law can prevent intermediaries operating in China (for example) from charging higher sums.

better terms for those who end up getting the permit. This, in turn, would minimize the number of workers without permit, who as noted often arrive *with* permits, then staying longer to make their stay sufficiently beneficial.[52]

D. Cleaning and Security Contractors' Employees

We have seen in the previous part that enforcement problems are also acute with regard to cleaning and security workers working through contractors. Unfortunately, so far the legislature has not offered any response to this problem. In the specific context of the minimum wage, and more specifically concerning employment through TEAs, we have seen that the legislature placed residual responsibility on the users. While the TEA is the one primarily responsible for paying its employees, if it fails to pay the minimum wage the user will be required to do so. In principle the same arrangement seems appropriate in the context of cleaning and security contractors as well. Here, too, the user is in a better position, compared with the workers, to *prevent* violations of labor and employment laws, or at least to secure itself against the risk of double-payments by choosing only reliable contractors and by insisting on collaterals. Here too, the user is the one enjoying the work, and the employees are performing this work on its own premises, thus making it perfectly justified to place this burden (which is not that significant) on the user.[53] Indeed, such an arrangement was recently proposed by a group of thirty-one MKs (members of the Knesset—the Israeli Parliament) but unfortunately rejected because of the Government's objection.

It is interesting to note, however, that a significant step toward the same goal was undertaken in the case law. In a couple of cases during the last decade the National Labor Court was willing to consider a user and a contractor as "joint employers," in effect placing responsibility on the user firm for employment law obligations toward the contractor's employees.[54] Admittedly, in both cases some direct contact between the user and the workers was established. It is

52. *See* Ronnie Bar-Tsuri, *Migrant Workers without Permits in Israel, 1999* (Ministry of Employment and Welfare Working Paper, 2001).

53. *See also Informal Employment and Promoting the Transition to a Salaried Economy*, OECD EMPLOYMENT OUTLOOK 262 (2004) (describing developments in some European countries placing responsibility on the chief contractor for violations of sub-contractors); Jo Foo, *supra* note 9, at 2192.

54. Ha-Kibbutz Ha'artzi Building Department v. Abed, 29 PDA 151 (1995); Xue Bin v. U. Dori Engineering Works Corp. Ltd., 38 PDA 650 (2003).

noteworthy, however, that the Court was willing to accept very minimal contact as sufficient to ensure the protection of particularly vulnerable workers. Thus, in the *Building Department* case, a construction contractor fled the country after getting his payments from the user but without paying his employees. The Court gave much weight to the fact that the employees continued to come to work for a few days after the contractor disappeared. This was the main piece of evidence deemed sufficient to prove a direct user-workers relationship. In the *Dori* case, a major construction firm had used a Chinese sub-contractor to employ workers on its construction sites in Israel. But the work was supervised to some extent by employees of the Israeli firm, which was also involved in the various financial arrangements between the sub-contractor and its employees. This was deemed sufficient for the Court to place direct responsibility on the user firm for the extreme violation of workers' rights that was exposed in this case. This is not to say that all users could be considered responsible for violations of their contractors, as far as the current state of Israeli law is concerned. But there are certainly important and welcomed developments in that direction.

Another solution that could improve enforcement in the cleaning and security sectors is to prohibit engagement of "serial violators" by public employers. We have seen that such limitations exist in the Minimum Wage Law, although they can (and should) be strengthened. If public employers—from Government ministries and institutes, through municipalities, to universities, and more—will not contract with any contractor who has repeatedly violated labor and employment laws, this could have a dramatic effect on this market and on the protection of workers' rights. Often contractors in these sectors abide by the Minimum Wage Law, but refrain from paying various other benefits. By extending and strengthening the limitations on the engagement of such contractors, the law could have an important impact. So far such initiatives have not been considered by the Israeli legislature. Nonetheless, there is growing awareness among some public institutions (e.g., universities) to this issue, which sometimes leads to voluntary acceptance of such limitations, albeit informally.

E. Areas Characterized by Low Socio-Economic Status

Another group of workers that merits special concern—given the grave empirical estimates regarding the lack of enforcement—is the group of workers in areas of low socio-economic status, most notably

Arab villages. The legislature has not shown such concern, nor have the courts (although, admittedly, it is doubted whether the latter had an opportunity to do so). The problem in these areas is two-fold. First, the workers themselves are more vulnerable, due to the high level of unemployment and lack of education, which together mean very limited employment opportunities. The difficulties to overcome before suing or complaining are also more pronounced: there is less knowledge about rights, workers may lack the necessary empowerment and funds to sue, and sometimes cultural barriers prevent going out of the community to the authorities. Second, the level of non-declaration of employees is relatively high in such areas. This is a result of the fact that businesses are often small and struggling, employment of family members is common, and feelings of alienation toward the State abound. Obviously the long-term solution must be to improve the socio-economic status in such areas, by improving the local education system, by creating local employment opportunities, and generally by allocating significant resources to this goal. This would certainly result in better enforcement of labor and employment laws as well. In the shorter term, in my view the Government should recognize the severity of the problem in these particular areas and increase its efforts on two main fronts. First, in order to improve the awareness to labor and employment rights, initiate a publicity campaign aimed specifically at groups of low socio-economic status, addressing them in their own language. Second, increase the number of inspectors, and their familiarity with the community and its customs, by delegating powers of inspection to local municipalities and providing the necessary funds for the appointment of locals for this purpose.

F. Employment by Non-Declared Entities

So far our discussion focused entirely on enforcement problems in the so-called "formal" sector—systematic violations of labor and employment laws by employers that are known and declared to the relevant authorities. The situation of non-declared businesses is different. The Government already invests significant efforts and resources in an attempt to thwart the criminal activities and the tax evasion of such businesses. Should it be concerned at the same time with the enforcement of labor and employment laws?

Where workers themselves are engaged in criminal activities, it would be highly problematic to protect their rights concerning such "work." Sometimes, however, the criminal liability falls only with the

employer. This is the situation with regard to the employment of prostitutes, for example. Prostitution in itself is not illegal in Israel; but the employment of prostitutes is. Faced with the question of whether a prostitute in entitled to minimum wage and other employment rights from her employer, the National Labor Court answered positively.[55] Such workers are especially vulnerable, noted the Court, and therefore in need of employment law's protection. Moreover, the application of employment laws would make the employment of prostitutes less profitable, and as a result less common. This judgment sparked an interesting debate on whether it is appropriate to consider prostitution as any other employment. Some argued that it legitimizes an inherently exploitative and dehumanizing practice. Others argued that as long as the phenomenon exists, it is better to protect the employment rights of prostitutes, thus minimizing at least one aspect of their exploitation. This is indeed a complex issue, a discussion of which is beyond the scope of this article.

Much less controversial is the case of tax evasion. This is another example of violations of the law by the employer, without any illegality in the workers' actions. Non-declared businesses that do not pay taxes are also very likely to ignore labor and employment laws. In this context cooperation between the tax authorities and employment inspectors could be very useful. The former are much better funded and have a lot more inspectors, because of the State's strong and obvious interest in maximizing its tax income. Once they find a non-declared business, it would be relatively easy for them to examine whether the business has any employees and whether labor and employment laws have been followed. Then the information could be transferred to the employment inspectors to proceed with the separate legal proceedings. So far, to the best of my knowledge, no such cooperation exists.

IV. CONCLUSION

This article combined a number of general arguments concerning enforcement problems with a description and analysis of the situation in Israel. The main arguments can be summarized as follows. First, the term "informal sector," and other variations referring to violations of labor and employment laws as a state of "informality," are misleading and damaging. Where complete sectors are characterized

55. Ben-Ami v. Glitsansky, 31 PDA 398 (1996).

by systematic violations of the law, this should be considered and analyzed as an enforcement problem. Second, it is useful to distinguish between three types of enforcement problems, each inviting different solutions. There are cases in which specific legal requirements are not followed (i.e., the workers are only partially excluded from labor and employment laws' protection). There are cases in which the workers are not declared—the employment is in effect concealed—and the exclusion from labor and employment protections is sweeping. Finally, there are cases in which the business as a whole is not declared. Such cases are also characterized by sweeping exclusion, but only as part of a larger problem of illegality. The article offered various examples from the Israeli experience for each type of enforcement problem. This description also revealed the main sectors and settings in which Israeli workers suffer from enforcement problems. Third, the article reviewed the various solutions employed by the Israeli legislature and courts to alleviate these problems. While certainly important and somewhat useful, for the most part I have shown that such solutions are insufficient. I have argued in favor of a number of additional solutions. Most significantly, I have called for the allocation of resources to appoint more inspectors, some of whom should be locals employed by municipalities; argued that users of the work should assume responsibility in cases of employment through TEAs or through cleaning and security contractors; suggested dramatic changes concerning work permits given to migrant workers; and called for cooperation between employment inspectors and the tax authorities.

At the end of the day it must be acknowledged that there are no easy solutions for the grave enforcement problems in the labor and employment field. Nonetheless, a combination of multiple solutions could certainly make a difference.