

## Reclaiming Labour Law and Beyond

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The introduction to the previous Labour Law Review, published by AMRC in 2003, stated that 'labour laws and their capability to protect workers are under threat across the region. New forms of work, increased mobility of capital and labour, the rising influence of FDI are all changing the terrain upon which labour law functions'.<sup>1</sup> Five years have passed since then. Have labour laws gotten any more effective during the last five years?

As all contributors of this book would strongly agree, labour laws have become more effective mostly in terms of mobilizing labour 'flexibly' in correspondence to the need of mobile capital, but not as effective in terms of protecting workers' livelihood in the region (with some exceptions). We have been witnessing that more flexible labour arrangements have been invented and have allowed, if not encouraged, more and more informal and irregular workers to be excluded from protection by labour laws for the last five years.

In this chapter I try to reflect points made by following country chapters, however with some more strategic points highlighted. The first part of this chapter deals with the intrinsic contradiction of labour law in which labour features as a commodity to be protected from market despotism, but nonetheless a commodity. The second part discusses the relations between formal/informal labour and labour laws by tracing the historical trajectory of modern labour law and the forms of 'formal labour' as a reference point for all the discussion about the informalization of labour. The third part addresses the uneven development of the informalization of labour in Asia, with particular focus on its impact on women workers. The last part of the tries to draw some strategic implications of the informalization of labour on the future of the labour movement in Asia.

### **Intrinsic Contradiction of Labour Law**

Labour activists often believe that labour law is by nature good and is basically 'for' workers. Many argue that a major obstacle against the realization of the good nature of labour law is its implementation. If put this way, labour law becomes an inherently good thing and the problem is perhaps either economic, i.e. lack of resource to train and pay labour inspectors or corruption that allows local or national governments not to strictly monitor individual capitals to comply labour law at the workplaces. This analysis has truth in it as labour laws are the most commonly violated laws in Asia, perhaps only second to traffic regulations. However, the nature of labour law may not be that simple. It is important to recognize that labour law itself, implemented or not implemented, has dual aspects and an inherent contradiction even without corruption or 'resource' problems. On the one hand it is 'the' law which constitutes labour in modern society as a 'private property' and labour relations as private property relations of buying and selling. Therefore it is not simply a bunch of regulations and rules over the workplaces and 'industrial' relations, but it is

at the core of organizing capitalist society the way it is: commodity-production and consumption by workers who sell their labour power to capitalists for money income and purchase products made by some other workers in some other places with the money paid for their labouring activities. On the other hand, labour law reforms toward more protection and collective labour rights of the workers shows the ultimate challenge, often imposed by the workers movement, to labour being framed as a pure commodity exchanged through pure market relations.

There, we are able to see the clearly distinguished two poles of labour law: as a law that defines labour as exchangeable and buyable private property just like any other property, on the one hand; and on the other hand, labour as a particular quasi-commodity that is attached to human body and soul and therefore cannot be completely subjected the rule of the market. The pendulum of labour law reform swings in between those two aspects of the law and it reflects power relations between labour and capital. *Yet even if, after much effort made by labour,* increasing number of workers came under the protection of labour law, it could only be done by their labouring activities becoming increasingly commodified in doing so. This intrinsic contradiction of labour law is well reflected in the historical development of labour law. In this, a formal form of capitalist labour, finally became established (and survived very briefly as a dominant form of capitalist labour) in contrast to informal labour that is our concern in this book.

### **Labour Law, Formal and Informal Labour**

If reforms in the last quarter of the 20th century and the early 21st century witnessed capital claiming back labour laws as laws making labour into a property for sale, it was the early 20th century's labour law reforms, mostly in developed countries, that had made many 'real' concessions to the working class. Needless to say, it was the early labour movement that changed the focus of labour law toward more protection for labour, so that labour would not to be treated as merely an object for exchange, but as more of a quasi or 'fictitious' commodity that cannot be entirely subjected to the rule of money and market. The early labour movement did so by turning the area of 'production' into a frontline of struggle for political, economic and social rights of ordinary people.

Factories became the most important arena of power struggle for labour, political and human rights. The labour movement often put the reproduction of capital relations to a halt by turning labour relations, which were supposed to be individual economic relations of exchange, into collective and political relations, by challenging and testing the existing legal and political boundaries and system. During this period, workers saw many illegal activities that could have brought the death penalty to those involved become legal rights of workers.

The natural and technical outlook of capitalist social relations then needed to be compensated for by the modern liberal-democratic state, which offered one vote to one person, without regard to the property owned by the individual (While this was a gain for citizens who gained the vote, it also effectively meant that workers' only source of revenue, labour power, was recognized as a kind of property). Political parties whose strength was based on organized labour soon grasped or at least heavily influenced the state through class voting and then the state introduced more protective labour legislations for worker-voters. It was this time that 'modern' labour laws started being shaped.

With this modern labour legislation and socio-political rights which were enforced by the state and treated labour as a 'commodity' but not as a 'pure' commodity, we saw the emergence of 'formal capitalist labour', elements of which include regular hours and pay, the provision

of a designed workplace, pensions, sick leave and payments, minimum wage, right to join a trade union, right to collective bargaining, workers' councils, tripartite committees, and most importantly right to strike. In other words, labour became 'formal' with the introduction of these legal and institutional protections that were described in labour laws and guaranteed by the democratic state. The recognition of workers' collective rights, especially the right to strike, was nothing but the recognition of the stark difference between the ideal free-contractual relations between property owners and labour relations in reality. While the rights earned were certainly a great achievement of the labour movement as they really improved workers' livelihood, these institutional regulations were, importantly, ultimately backed by the solidarity-based power of industrial trade unions. 'The formal form of labour' was thus ultimately a result of the power of solidarity that involved not only industrial actions but also political and social alliances for democratic control over capital.

It might seem as if it was only the working class which had made a great leap forward by the mid-20th century. However, this was not the case, insofar as labour remained nonetheless a commodity, whether protected or not protected. The irony of this period was that labour was increasingly regarded as a 'fictitious' commodity with increasing protective legislation, but at the same time work was becoming a 'commodity' more than ever before as more social services were industrializing, livelihood commercializing, and circuit of capital expanding with the economic boom.

Over the first half of the 20th century, capital also made great progress by continually introducing organizational and technological innovations thereby subjected labour worldwide to a greater degree of the control of capital. Capitalists in advanced economies introduced Taylorist labour processes by which workers became deskilled and lost their control over the labour process. Subsequently, so-called Fordist production made human labour an appendage to machinery. By standardizing and fragmenting the labour process, these innovations enhanced capital's control over the labour process, if not over the society and politics, and promoted geographical movement of capital within and beyond borders. Workers might have gained more income and job security but not much control over work processes.

Although factory workers were increasingly becoming appendages to the Fordist labour processes, most formal rights of the established unions were respected. Their efforts were more firmly materialized later in the welfare state that guaranteed the rights to a certain degree of human dignity without regard to one's economic ability. The labour movement enjoyed its heyday with more political, civil and social rights *within* capitalist social relations. This was the social basis of the post-war boom then: a consensus, often disputed but more or less reasonably managed, between institutionalized labour (trade unions), capital, and the state, for better productivity (from union to capital) and distribution through welfare (from capital and the state to workers). While the deal between more social rights for workers and more productivity for capital may have been expensive, it soon turned out to be not a bad deal at all for capital. Impressed by its own achievement for workers' rights, the labour movement was increasingly limiting its activities to 'democratizing and dignifying capitalist social relations'.<sup>2</sup> In doing so, it reaffirmed that labour was a commodity, however much protection it needed, rather than challenging the commodity nature of labour itself. The labour movement which had initially manifested the incomplete nature of capitalist social relations began to function as an example of the sustainable and democratic nature of the same relations.

Furthermore, the traditional labour movement, once having achieved a protected and secured formal form of capitalist labour in the core industrialized countries through labour

legislation, began to concentrate mainly, if not exclusively, on securing industrial workers' interests by regarding only 'factory labour' as 'normal' capitalist labour. Consequently, labour rights never became universal rights but remained rights for some part of the working population only. Protection for non-core members of the working class, often mostly women and migrants, was either ignored or rendered to the state without social alliances supporting it. These workers were permanently kept as 'to-be-organized'.

While the union was gate-keeping the interest of industrial workers whose labour rights were protected by labour laws, capital was going beyond the factory gates with increasing mobility, which was perhaps the best way to get around increasing world-scale competition and expensive deals with trade unions in the developed countries. In doing so, individual capitals started utilizing more 'fluid' forms of labour outside the core industries, effectively isolating protected formal labour. This trend accelerated in the late 1970s when the post-World War boom was deemed to have reached an end and many individual capitals lost not only the willingness but also the capacity to afford the deal between productivity and welfare.

Informalization did not start with the flexibilization of the core part of traditional industrial workers in developed countries - therefore by the time they felt it, it was too late to stop. While workers in the core industries were still enjoying much of labour protections, workers in services and other peripheral industries had been experiencing employers using indirect forms of employment, creating grey areas between employment and self-employment and detouring protection of the labour law. More importantly, largely unorganized workers in those sectors could not enjoy their rights even if they were 'legally' entitled to them as they have no power to enforce it. This was all done amid the massive expansion of the (inter)national circuit of capital during the post-World War economic boom period, during which almost all aspects of human livelihood became commodity-dependent. This brought a lot more population into the expanding circuit of capital, working directly or indirectly for the profit-making process. The direct consequence of it was that increasing numbers and portions of population came under the control of capital not only as manufacturing workers, but also as service providers, emotional labourers, and then as mass consumers. At least in developed countries, society itself was already becoming a factory where the entire population was subsumed to profit-making and the realizing process of capital. With this, the distinction between factories and society or between working and living spaces has been destroyed to a critical extent.

Another crucial fact was the informalization of 'world labour', i.e. the increasing portion of the world population doing capitalist labour without labour protection. This had started well before the late 1970s with the more serious industrialization of developing countries where 'imported' labour legislations lacked the most important element in establishing formal labour: democratic alliance controlling and challenging capital. In those countries, labour laws and the state in general merely had the function, if they had any, of incorporating local labour forces into the world of capitalist labour and exposing local labour forces to market despotism often through state violence. This was then accelerated by the widening international circuit of capital that led to what we called the international division of labour on the basis of which some developing countries, such as Korea, Taiwan and Hong Kong, initiated export-oriented industrialization. This was possible based on what we have mentioned above: a fragmented and simplified labour process for mass production that could be easily relocated and copied. Now, the more people in developing countries were integrated into the domestic and then world market, the faster informalization of world labour developed at the global level. An increasing number of workers without clear employment relations and/or protection of labour law, entitled or not entitled, was undermining the entire basis of formal form of labour and with it the modern 'labour law'

world-wide even during the heydays of formal labour in the West. What allowed this was indeed the disintegrating social alliance for the democratic control over capital: *capital expanded but not the social alliance and support*. Capital became increasingly mobile, internally and externally, but the labour movement had become increasingly rigid. When informalization finally appeared to be threatening the industrial heartlands, the ‘protected fictitious commodity labour’ already accounted for too small a portion of the world labour force relative to that part of which was subsumed to the control of capital without any protection.

### **Informalization of Labour**

There are many different theories and explanations of the informalization of labour. The definition of informal labour in fact varies country to country, union to union, and scholar to scholar, as readers will observe in following country studies. The most common one though has been the ‘informal sector’ understanding of the issue that focuses labour conditions in particular economic sectors that were outside formal regulation and control in developing countries, particularly in Africa and Asia, or developing countries in general. Initiated by the International Labour Organization (ILO), this has been the most commonly used understanding until quite recently. The reason why the ILO and its researchers began to look into this matter was that the existence of a relatively large population working in unregistered and unregulated economic activities was very interesting matter in contrast to the western counterparts where capitalist work enjoyed by and large stable, secure, and clear-cut employment relations. The diagnosis for this ‘interesting’ problem was the problem of underdevelopment. It is important to note that during this period enthusiasm about economic development on the basis of the Western model was still high and almost all social problems were attributed to the problem of underdevelopment. Therefore, the solution for the problems was obviously more economic development, backed by the right policy to promote it. Then the formal form of capitalist labour would appear and become dominant as it did in the west. However, this understanding soon came under heavy criticism for many reasons. Let us mention a few of them here:

- Informal labour was neither temporary in nature, nor a by-product of the lack of capitalist development. Rather, the greater the capitalist expansion of the economy, the greater the portion of the population that would come to work informally. It was rather reflecting a way in which capitalist social relations expanded.
- Informality was no longer to be constrained to unfortunate workers in the South, as it once seemed, but expanded to the workers in the formally established economies in developed and developing countries, often referred as ‘flexible’ labour rather than informal labour. It was not an abnormal problem, but has been proven to be rather ‘a tendency accentuated by globalization for work and workers to become informalized’ and ‘[recognition] that informalization is a critical component in capitalist globalization today, particularly but not exclusively in the global south’.<sup>3</sup>
- Most of all, an ‘imaginary’ boundary between formal and informal sectors on which the informal sector argument was based has been increasingly dismantled by the cross-sectoral penetration and expansion of the informality of labour.

These undeniable points were recognized later by the ILO, which has changed its focus from the informal sector to the ‘informal economy’. The term ‘informal economy’ has come to be widely used to encompass the expanding and increasingly diverse group of workers and enterprises in both rural and urban areas operating informally.<sup>4</sup> This means the focus of discussion

of the informal labour has been transferred from the nature of enterprises or industries to that of employment.<sup>5</sup> As the concept focuses on 'informal employment', it now incorporates 'all forms of informal employment', such as 'employment without secure contracts, workers' benefits, or social protection, both inside and outside informal enterprises'.<sup>6</sup> Therefore, informal labour came to refer not only to own-account (self-employed) workers, contributing family workers, and employees in informal industries and unregistered enterprises, but also to family workers and employees in formal enterprises.<sup>7</sup>

However, again, the informal economy framework cannot fully overcome the shortcomings of the informal sector approach, in the sense that informal labour still appears to be a peculiar phenomenon in a particular 'realm of economy'. In other words, despite recognizing informal labour an integral part of globalizing capitalist development, 'informal economy' theory presents informal labour as something that exists outside of 'normal' economy. Therefore the informalization of labour is described as an 'object' rather than a 'process'.<sup>8</sup>

Accepting wholesale the concept of 'separate' economies, an informal and a formal one, has the danger of allowing informal labour to continue being regarded an exceptional misfortune of the 'working poor' or something related to the workers in backward individual capitals, i.e. sweatshops. In doing so, this may blind one to the increasing informal nature in the works of formal workers and create an imaginary distinction between formal and informal workers that again creates barriers to solidarity between those workers in reality and therefore to united struggle to confront informalization.

The growth of the informal sector is still described merely as a product of poverty as if economic development will automatically remove the informal nature of labour in developing countries, rather than as a consequence of a particular form of capitalist 'development'. This contains the implication that the existence of the informal sector the informalization of employment stem from two different causes.

Rather, however, surviving jobs of the informal sector and the informalization (or irregularization) of employment are two different aspects of the same origin: *the expansion of capital through more fluid forms of capitalist labour that can be treated as any other commodities, selling, buying and disposing* – this is the nature of the informalization of labour. The common nature between those who working at some points of the expanded circuit of capital for the creation and realization of profit as manufacturing or agricultural workers, street vendors, service workers or tenant farmers is indeed much bigger than the differences between them. The informalization of capitalist labour is the way that capital expands in the era of globalization: it is not an abnormal or extraordinary phenomenon. Without informalization of capitalist labour, capital will not and cannot expand the way it is now.

Of course, this is not to say that informalization is a natural process. It is a historical product created by a particular development of conflict between capital and labour as described above. Informalizing labour means effectively marketizing labour relations, and once again challenging the once dominant idea that labour is a commodity needing protection. The informalization of labour is a realization of the capitalist ideal where labourers, just like any other actors in the market, can benefit the best from the market when they exchange their commodities, labour power, according to the exchange rate that the market offers without distortion by non-market factors such as the state or excessive labour legislations. The expanded circuit of capital is too wide and expensive to be institutionally regulated and decently paid, and there are no significant social alliances to pursue such regulation. This naturally results in an increasing number of people

working under no regulation.

In spite of the dismal conditions of labour, it is more often than not necessary for workers to sell labour power to survive as the entire swathes of human activity in society has been anyway commodified and continuously needs money income to sustain lives in it. Capital moves through these areas exercising its control yet less agreeable to paying much for them, at least not as willing as it was for the workers in core industries during the heyday of the workers movement. In Asia, the 1990s has a particular importance in shaping Asian labour because it was through this period that capitalist labour finally became the common substance for the survival of Asian population. At the same time it was through the accelerated globalization in 1990s when capitalist labour took on a particular nature; it had become *commonly informal*, as particular historical forms, conditions, and definitions of 'labour' as formal labour have been eroded worldwide. This development has been faster in speed, bigger in scale and 'smoother' in process in Asian countries where 'formal' capitalist labour had not yet been firmly established. In this accelerated globalization, capital no longer wanted or needed to rely on regular, protected and formal jobs in order to expand.

### Uneven Development of Informalization in Asia and the Gender Question

Development of labour informalization in Asia has been highly uneven and accordingly many different forms of informalization exist. Informal capitalist labour broadly includes mainly two forms: labour in informal 'employment' and un-waged capitalist labour largely in the informal sector. Informal forms of employment here refer to the wide range of people whose working relation is based on direct and indirect 'wage relations'. This includes the whole range of workers who are not permanent and full-time employees. They can be categorized in many different ways and in fact different countries have different systems to distinguish one from another informal employment. According to the period of labour contract, there are short-term contract workers, which again include many different forms such as seasonal agricultural workers, project-based construction workers, and most migrant workers whose work contract is inherently short-term in nature. According to the indirect nature of employment, there are dispatched workers, in-company subcontract workers, agency workers, home workers, and disguised self-employed. And according to the forms of labour service provision, there are part-timers, on-call workers and so on. One form of informal employment does not exclude others. More often than not, different forms of informal employment overlap. For instance, dispatched workers are mostly short-term contracted.

While the forms of informal 'employment' just mentioned are those which appear in the statistics as irregular employees, the 'un-waged' forms of capitalist work get excluded, even though, it is a prevalent form of making a living particularly in low income countries, such as many forms of self-employment in agricultural, manufacturing and service sector. Often, self-employed workers are related to employers or corporation service users through commercial not wage relations, even if they do work for corporations. Though their relations with employers may be vague and untraceable, they are still doing capitalist work because their works provide essential services to reproduce capital by reproducing labour power of others, distributing petty products among consumers, cleaning the streets, providing cheap meals and transportation to workers, etc. Often, they do not own any means of production, nor do they have employees under their command. These are the people who constitute most of the urban poor and large scale reserve army of labour in developing countries. They are often more vulnerable to market despotism and bullying of authorities than informal employees in industrial establishments, lacking any form of social security, not to mention union protection.

As our country studies show, different countries present different dominant forms of informal labour according to the pathways and degrees of capitalist development and power relations between capital and labour. In low income developing countries in Asia, such as Cambodia, India, Laos, Mongolia, Pakistan and Viet Nam, the lack of institutional labour protection, the immaturity of industrialization, the often forced integration of the population into capitalist social relations and the fast expansion of the circuit of capital that quickly commodifies people's livelihood deprive people of the means of production and subsistence, on the one hand, and provide no decent jobs, on the other. This creates a particular form of development: an increasing informal sector where different survival forms of incoming-earning activities are mixed up with traditional self-subsistence and reproductive labour. This has, as Arnold points out in his chapter on Cambodia, much to do with 'disruption in rural-agricultural livelihood'. People in rural communities lose their means of production and subsistence in various ways. Occupation of land for property development or plantation often deprives small scale cultivators of their inherited right to land and forces them to leave their lands. Many of them flow into urban areas in search of jobs. Commercialization of agriculture often involves aggressive inroads by big agribusinesses and forces rural villagers to migrate to cities. Mega-scale development plans of the state do the same, as described in the chapter on Laos.

Apart from rural-urban migration, other factors contribute to the increase of un-waged jobs in the informal sector. Many workers once employed in the formal economy and laid off in the process of restructuring, for example, become urban dwellers in search for survival jobs and often permanently stay in the informal sector. As Van Thu Ha illustrated in the chapter on Viet Nam, the privatization of former state-owned enterprises (SOEs) in Viet Nam forced many into the informal sector due to different 'private sector barriers' against the former SOE workers. One of the barriers is 'age' as private sector prefers young workers. Similar cases have been reported in China as well after the state-engineered mass lay-offs of SOE workers that axed at least 27 million workers between 1997 and 2003.<sup>9</sup> Older workers and particularly middle-aged women workers could not succeed in finding new formal jobs. Daily work experiences in the informal sector in fact represent people's livelihoods in Asia, as the size of population in this condition in the most populated countries in Asia well exceeds people in formal employment in Asia. Informal jobs in the informal sector accounted for 86 per cent of the total workforce in India between 2004 and 2006, according to Mansingh (see the chapter on India). More than 70 per cent of Indonesia's workforce is also known to be in the informal sector.<sup>10</sup>

Workers in Japan, as well as workers in core manufacturing industries in some high income countries in Northeast Asia, were once known for secure jobs, since experiencing a period of the formalization of labour with the emerging labour movement and democratization. The institutional protection of labour which workers in the core industries had enjoyed later expanded to the manufacturing sector in general and solidarity-based protection also appeared by the early 1990s, in the cases of Korea and Taiwan, and decades earlier in Japan. In these parts of Asia, the growing informality of labour largely (though not exclusively) has meant the dissolution of regular employment, as we see in the following chapters on Korea, Japan, Taiwan and Hong Kong. An increasing number of workers, previously in standard forms of employment with institutional protections, have now become disposable as they join the irregular workforce in dispatched, contracted and part-time arrangements. Most striking is the collapse of the Japanese employment system with emerging informal jobs and in particular the steep increase in the number of part-timers as described by Sakai and Hiroki. Kim's chapter describes South Korea's switch from one of the countries with the highest job security during the heydays of the militant trade unions to one with the highest level of irregular jobs among the OECD countries after neoliberal reforms. It is also a striking example of informalization as South Korea has been known as a



good example of new unionism that could survive the fast expansion of capital. With much less active and politically divided unions and workers collective rights under threat, as Liu describes, Taiwanese workers also have difficult choices between informal jobs or no jobs. This trend of formal employment being replaced by informal employment is felt hard even in Hong Kong and Macau where the portion of formal and secured jobs was relatively smaller than other Northeast Asian countries. In particular, as Wu describes in her chapter on Hong Kong, Hong Kong's swift restructuring of economy from manufacturing to a service and finance-based economy appeared to have accelerated the informalization of employment. In cases of Hong Kong and Macau, the fast informalization of employment has more to do with weak trade unions and sluggish development of collective labour rights during its industrialization. Workers in both Special Administrative Regions of China – Hong Kong and Macau - lack the right to collective bargaining although both cities have freedom of association that is missing in mainland China. Now with massive outflow of capital to China, unions have even more difficulty in upholding labour protection. In Macau, as described in detail in Choi's chapter, continuous inflow of migrant workers from mainland China to Macau opens the way to more informalization and puts the weak unions and labour activists in a difficult position.

These different trends can also appear all together in one country. India is a good example of this. The core manufacturing sector that developed with protected formal labour on the basis of relatively strong union power and protected domestic market now faces increasingly informalizing employment, whereas the vast majority of previously self-subsisting agricultural labour forces dwell in the informal sector. By and large the middle income countries in Southeast Asia, such as Malaysia, Indonesia, Thailand and the Philippines, share same experiences and problems with India, however with unwaged labour of a smaller scale in the informal sector. In these countries, as Xavier, Ofreneo, Bundit, Voravith and Suntaree succinctly show, subcontracting and outsourcing of works to work units that cannot be monitored and regulated causes a major concern. Home-based work is a typical case of this. Existing labour laws often do not cover home workers and new regulations and protective measures, if any, are highly selective and limited so that workers in these particular strata of the supply chain work in risky and often fatal working conditions. In the so-called least developed countries, the informalization of labour can be accompanied ironically with more formalization of economy as the chapter on Laos presents. Countries like Mongolia share the same experience. This means that more of the population previously engaged in self-subsistence economic activities move to formalized work arrangements in more formal industries often as waged workers. However, this does not mean that their labour relations will be formal in the sense they are regulated, protected and unionized. It is very unlikely that newcomers from largely agricultural self-subsistence or petty market economy to manufacturing industries or other urban industries through the formalization of economy will have 'formal' jobs. Therefore, workers in these countries are not free from the worldwide informalization process. Cambodia's experience is perhaps a good illustration of this. Cambodia is also experiencing the formalization of economy with an increasing number of wage workers, which however goes together with the informalization of labour. According to Arnold's chapter on Cambodia, even jobs in the garment sector which had been the driving force of Cambodia's development and created most of Cambodia's foreign currency earnings are being informalized to a significant extent.

*Perhaps the most important uneven development of informalization appears along the line of gendered division of labour.* As many contributors to this book have clearly pointed out, informalization is not a gender-neutral process but a highly gendered process. Women's work tends to take more informal forms than men's work and women tend to be the majority both among the informal sector workers and informal employees. With no exception among Asian countries, developed, developing or least developed, women workers are being targeted for the

replacement of permanent full-timers with workers in non-fixed form of employment while women's survival forms of service provision are usually more mixed up with traditional household or communal labour in domestic and other non-industrial spaces. The informalization of women's work is pre-contextualized in gendered-class hierarchy (or often classed-gender hierarchy). The prevalence of women in informalizing employment and non-waged capitalist labour force is precisely because women's work has been traditionally counted as 'informal' in capitalist society.

The reason why women's work is considered 'informal' is again because women's work at home is regarded as not 'immediately' creating capitalist value, a belief shared even by many radicals and reformists. Women's work at home is recognized not as producing 'value' or profits but only creating 'use value' at home. Therefore, women's work is regarded as perhaps important but not as valuable as men's work. This widespread and deeply rooted idea of women's work as 'secondary' imposes disadvantages to women at work. Women's integration into the labour market for 'real jobs' gave many women opportunities for economic independence but was also used by capital to create a massive reserve army of labour that could guarantee a cheaper supply of labour to capital. By and large, jobs given to women were largely humble unskilled jobs and this tendency still remains strong with only a few exceptions. The more serious integration of women into the labour market was then a product of the process in which many essential domestic works done by women at home and communities got commodified and the service provision in domestic and communal spaces became a domain of business for capital. Many women became employees in these 'women' sectors but the gendered connotations of these women's services remained intact and therefore wages in these sectors remain cheap.

The gendered division also affects those who do the same jobs as men do in the formal labour market, often reflected in slower promotion for women. There is also a strong tendency to sack women workers during recession and re-employ them during a boom—largely treating women as surplus labour. In this sense, the 'secondary' nature of women's work is therefore inscribed from the very beginning of capitalist development, rather than new to the informalization of labour.

However, this ideology of women being secondary labour force has been fully utilized in informalization process as our country studies show. Although informalization is an overarching development across the region, it is true that informalization attacks women workers first and more effectively. One of the most common rationales given by employers and governments is that women are more suitable for flexible arrangements for work and they themselves prefer those arrangements. Indeed, our country studies show that in many cases women workers prefer flexible arrangements. In particular, home-based work often makes a good example of informal jobs offering 'opportunities' to women who cannot work full-time away from home. However most women 'have to' prefer these forms of work arrangement. It is the combination of women's unshared obligation for work at home, which many men and women believe 'natural', and the informalizing labour market, that makes informal work appear to be women's own choice. The real reason for women to 'choose' these jobs is the lack of decent jobs with a social system for child care, the unshared burden of domestic work, and excessively long working hours with too little wage for the male counterparts, rather than women workers' 'natural preference'.

Furthermore, the labour movement has not done much to prevent women workers from being informalized. The labour movement, both radical and reformist, has not counted the exploitation of women at home seriously, nor that of women at work. However, women's labour has been absolutely essential in the (re)production of capitalist social relations and therefore it is not possible, contrary to the typical argument that resolving class contradiction would remove gender inequality, to address the exploitation of capitalist labour without addressing women's exploitation both at work and home.

Organizing women workers has long been regarded as a secondary, and women's work at home and work regarded as lower priority, by many trade unions; but as many feminist activists and academics have found, the exploitation of women's work at home and work is an essential part of the exploitation of capitalist labour. Women's unpaid and unwaged domestic and emotional labour is indeed an important root origin of the value exploited from labourers by capital. Profit comes not only from the non-paid work of male workers (as in the traditional radical argument) but also from the unpaid labour of women that reproduces labour power commodity at home. So the concept of exploitation has to always integrate the unpaid women's work. More importantly, it is urgent for the labour movement to recognize that the entire class exploitation has been built upon the specific mediation of women's exploitation and patriarchy is an important and essential basis of capitalism. One of them cannot be overcome without overcoming the other together. It is precisely because of this that the problems women are facing in informalization of labour cannot be regarded as women's problems only but as the problems of all.

### Reclaiming or Reforming Labour Law

In most of the Asian countries we have studied, we find that labour law is indeed a contesting ground for capital and labour struggling for a better economic and political position in the continual reformulation of conditions for development. Labour law reforms gearing toward more flexibility and informality in most of the Asian countries manifest the power relations between labour and capital after the Asian economic crisis of 1997-98. Organized labour has been losing ground, if not been made irrelevant, whereas capital has taken full advantage of the crisis to reformulate the basis of capital accumulation nationally, regionally and globally. Neither the recovery from the economic crisis nor formal democratization following the crisis has accommodated further political mobilization of the working class or improved labour protection. However, as we see also in our country studies, struggles to create a new paradigm of labour protection have already begun. They have begun with women workers organizing in India, informal workers building alliances in Korea and Cambodia, regular workers campaigning for informal workers' rights, home workers networking throughout Southeast Asia and, most of all, the increasing number of informal workers who are realizing that they are the ones who can change the conditions that make their livelihood intolerable and our society unsustainable.

Then, where are these struggles leading us to? While there is a consensus that informal workers should be organized to gain more protections and social rights, there are various approaches to the matter of informalizing labour. Our particular concern in this book is indeed about our strategy regarding the use of labour law. Where does labour law fit into these struggles for better livelihood of informal labourers? Can a better labour law be achieved, and if achieved, can its implementation stop the gendered informalization of labour in Asia? Few reader of this book would argue against the idea that we need to reclaim those labour laws that have been 'reformed' toward labour informality in favour of capital and against the interest of the working class. However there may be different ways to reclaim labour laws in the interest of the working class. One way is perhaps to go back to where we were before the informalization of labour, in other words, re-formalizing labour. In this strategy, labour law is indeed at the centre of discussion. This strategy involves 1) expanding protective labour laws to cover not only existing formal form of labour but also informal form of labour, on the one hand, and 2) restricting the use of informal labour, on the other. The other possible strategy to reclaim labour laws on behalf of labour is rather more fundamental in the change it seeks, as it involves 'reinventing labour law' to be a law that allows democratic control and allocation of social labour, rather than a law that constitutes labour as a commodity to be exchanged through the market.

The former strategy, i.e. restoring 'formalization' may look quite familiar; it is precisely because we have, or, to be more correct, the labour movement in the West has, been there. This strategy believes in putting things back into place, i.e. re-formalizing labour is the solution. For this 'global reformation' strategy, it is necessary to rebuild the social setting of state-based labour regulation and protection. For them *the combination of the state, labour law, and formal labour* is presented as the ultimate form of democratic control and there is no intrinsic problem with it. In this sense, this argument is in line with that of ILO and perhaps, that of the US President-elect Barack Obama – the market and democracy as two wings of modern society. The only problem is that they somehow lost the social alliances and solidarity upon which the combination relied for being relevant. Informalization is problematic because labour law cannot protect those workers at the edge of the legal boundaries of the old labour law. Things will get better by 'recovering' the particular social settings in which protective laws could be powerful and the state could implement the law. What concerns them then is the fact that particular commodity was not protected enough.

However, there are serious problems with this strategy in spite of the immediate feasibility and therefore persuasiveness of it. Firstly, this strategy does not seriously address the reason why the seemingly perfect combination broke down in the first place. The given answer to the question is rather too simple: too much market and too little state. Actually the power of social alliances started declining as soon as organized labour tried to 'democratize' capitalist social relations with clearly self-imposed limits, within which labour could be exchanged as commodity, nonetheless protected commodity. Labour became a 'protected' commodity, but only at the expense of being more like a commodity in nature (just like one can be 'respected' slave only by becoming a better slave). This is what I named the intrinsic contradiction of labour law. As mentioned above, labour law only covers labour insofar as it is sellable and buyable. As long as labour remains as a commodity, labour only has two choices, to be protected or not protected. Reforming labour laws can make this particular commodity more protected but cannot challenge the commodity nature of labour. The solution based on labour law reform is therefore a solution within the inherent contradiction of labour law.

Furthermore, it may no longer be possible to recycle this strategy even within the inherent contradiction of labour law because it relies on the social form of labour that existed about a half century ago. The combination of the state, labour law and formal labour might have been suitable strategy for the industrial form of social labour. A particular form of democratic control over capital developed on the basis of it. However, as the social form of labour evolved, the feasibility of the same strategy is at best highly questionable. The very combination of the state, labour law and formal labour that developed was a strategy pursued on the basis of the industrial form of social labour that was the contemporary form of labour at that time—not designed on the basis of any previous social form of labour, such as indentured labour or slavery. A new strategy is required for the present era of informalization. Furthermore, having seen the recent development of so-called representative democracy in developed countries, it is also doubtful that the combination of the state, labour law, and formal labour is the ultimate form of democratic control over capital.

Perhaps then it is time for us to reclaim labour law differently. This does not mean relying on labour law to get things right or relying on the state to do the job. Rather this means we reclaim the underlying spirit of the struggles for conditions that would not treat human labour as commodity. This means that we widen the scope of labour rights and once again, just as the earlier labour movement did, test the legal boundaries, establish a new paradigm of labour regulation and protection that goes beyond the existing legal boundary of employment and the state power, as imaginatively as the earlier labour movement went beyond the poor law with labour laws. In

so doing we can invent an alternative labour regulation based on a different form of democratic control of capital. In this case, reclaiming labour law is to go beyond the inherent contradiction of labour law. We need a lot more than the existing labour law. That is to say, challenging current power relations between labour and capital is to be prior to legal reform. The former works for the latter, not the other way around.

It is important for us to notice that workers in informalizing labour relations have indeed employers even if it does not seem so. The employer is the society itself that is subsumed to the process of making and realizing profit for capital. The labour movement needs to be the movement of socialized labour that organizes all those who are working for capitalist (re)production within the extended circuit of capital with or without institutional protection and rights. In doing so, the labour movement perhaps needs to be almost completely reformed according to the changing form of labour to effectively challenge the power relations. Even the old concept of democratic/independent unionism that was used to define a 'real' union needs to be changed. There are many 'democratic' and 'independent' trade unions that do nothing for workers outside their territories and constituencies. The vast majority of informal workers are excluded 'democratically'. In many cases unions appear to be just and only as democratic as the state whose dictators are elected by universal suffrage. Almost all strategies, developed, written, and formalized in text books and manuals of the labour movement are rarely useful as much as the protective clauses in the labour law are now. The question is whether we are ready to change everything we have or not.

## Conclusion

The problem created by informalization is more about the effectiveness of 'labour law in general' as a traditional means of enhancing labour standards, rather than the 'quality' of different Labour Acts in different countries. The problem lies with the fact that protective elements of labour laws have become more and more powerless. The reason why existing labour law is not effective is that *capital has left, or rather was allowed to supercede, the limited time-space dimension* that was the basis of modern labour law and formal labour. It is a consequence of *the declining effectiveness of the particular form of democratic control*, based on social solidarity which had the power of endorsing the state. That is why all the efforts to lobby parliaments to make 'labour law' better to 'protect' labour, without changing the existing system of politics and building wider democratic alliances, have only limited impact even at their maximum. Indeed, all that matter is not the law itself but the power relations between labour and capital behind the law, the relations that appear to be legal relations in the law.

The meaninglessness of law is indeed one of the most common experiences of the working people today when they try to claim their entitled rights. Then why do we need to study labour law after all? We believe it is important to know labour law not simply because it is 'the' tool to protect us from increasing attack on the labour movement and security of livelihood (not job security) but because knowing labour law is a prerequisite to overcoming the intrinsic contradiction of labour law, and to overcoming the social power that is reflected in it in general.

Amid the currently deepening world-scale crisis of capitalist development, the labour movement once again faces great challenge: whether or not the crisis is to be overcome at the expense of workers, particularly of the most vulnerable part of the working class including informal, migrant and women workers. It is in this context that our study would like to enlighten some strategic points and, in so doing, to assist labour activists across the region to develop a strategic approach to future 'labour reform'.

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## ENDNOTES

1. Frost (2002), p. 12.
2. Neary (2002), p. 244.
3. Munck (2002), p. 112, 115.
4. ILO (2002), p. 2.
5. Chen (2003)
6. Chen (2003), p. 4.
7. ILO (2003), pp. 121-9.
8. Castells and Porters (1990), p. 11.
9. Zhang (2003)
10. Sedane Labour Information Centre (LIPS) (2004).