Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges*

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The problem of enforcement has become a major concern of labour law in recent years. Instances of violations are increasing, or at the very least awareness to this phenomenon is increasing, leading legislatures and scholars around the world to search for innovative solutions. Clearly there is not much point in labour laws if employers do not comply with them, and especially if the most vulnerable employees, who need labour laws the most, do not actually enjoy them. The goal of this contribution is to review the main tools and possible solutions to improve compliance. I will offer a broad overview of such solutions, without getting into the details (which require much more space), except for pointing out some of the main current challenges.

Section I explains why labour laws are inherently challenging to enforce, and why the problem has exacerbated in recent years. Section II explains the difference between a focus on compliance and a focus on enforcement. Although the two are sometimes described as opposing approaches, I argue that they are both needed and compatible, and in section III combine them into a framework of three steps needed to secure compliance. I then focus most of the discussion on methods to reduce the ability of an employer to benefit from a violation (section IV) and methods to increase the cost of violations once they have occurred (section V). Throughout the article, most of my examples will come from Israeli law, which I am most familiar with; but there are similar examples in other legal systems (which I will sometimes point out).

I. The challenge of labour law enforcement

It is quite obvious that we expect people to comply with the law, and we need to use enforcement mechanisms to ensure that. Laws are enacted for a reason – they have a purpose – and if we fail to ensure compliance, this purpose is frustrated.[1] This general truism assumes special prominence in the context of labour laws, because of their distributional nature. For the most part labour laws are seen as taking from employers and giving to employees. This is somewhat misleading, because the background rules of private law favour employers, and labour laws are a necessary addition on private laws for constituting a functioning market.[2] However, whether this is justified or not, labour laws are commonly considered by employers as a burden and a cost, impeding their managerial flexibility and cutting their profits. For these reasons, employers are often reluctant to comply with labour laws and might look for ways to evade them.

Labour laws are usually seen as merging aspects of private law with public law.[3] The regulation of employment contracts, although extensive, retains the basic structure of private law, in which people are expected to enforce their own rights. At the same time, because of the public importance of labour laws, their violation is often considered a criminal offence, and as such requires State enforcement. So, in theory, the propensity of employers to violate labour laws is met with two enforcement apparatuses: they can be sued by the employee and at the same time can be prosecuted by the State. In practice, neither of these systems is effective, making the enforcement of labour laws inherently challenging. Self-enforcement is often unrealistic, because many employees do not know their rights; others do not have the resources to sue; and those that pass these two barriers might be fearful of retaliation from the employer or a »trouble-maker« reputation that will follow them in the labour market.[4] Criminal enforcement often fails for similar rea-

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1 *Davidov*, A Purposive Approach to Labour Law, Oxford 2016, p. 224.

2 *Deakin/Wilkinson*, The Law of the Labour Market, Oxford 2005, Ch 5.

3 See, eg., *ACL Davies*, in: Bogg/Costello/ACL Davies/Prassel (eds.), The Autonomy of Labour Law, Oxford 2015, p. 231.

4 For an important theoretical exploration of such barriers (not specifically in labour law) see *Felstiner/Abel/Sarat*, 15 Law & Society Rev. 631, 1980–1981; For applications to the current context, see *Alexander/Prasad*, 89 Indiana L.J. (2014), 1069; *Lee/Smith*, 94 Washington L. Rev. 759 (2019), 784–789.

sons because it relies mostly on complaints filed by the victims. Most employees do not file complaints, either because they are unaware of their rights, or because they are afraid of negative repercussions for them.[5] It does not help that criminal proceedings are lengthy and place a high bar in terms of evidence and the burden of proof (for obvious, justified reasons) – meaning that the likelihood of a complaint ending in a conviction within a reasonable timeframe is not high. A criminal-law approach to labour law violations may be useful in the background, as a threat and an expressive statement, but it is unsuitable to curtail violations that are widespread, repeating and often covert (without triggering complaints).

The inadequacy of standard private law and criminal law enforcement in the labour context suggests that we need a unique labour law solution, and indeed, unions play a significant role in this regard. Although their main goal is to secure benefits that go *beyond* what labour laws dictate, the presence of unions is also an important factor in ensuring that employers comply with the dictates of the law.[6] Works councils, in legal systems that have them, also play a role in advocating for workers and as part of that, monitoring compliance with labour laws (or at least *some* labour laws, that fall within their jurisdiction).[7] However, unions and works councils can only assist workers in bigger, more established workplaces. They cannot help the domestic worker, or the employee at the small shop or small office. A workplace with a very small number of employees cannot be unionized – and it is unrealistic to expect works councils to form in such workplaces as well.

Because of these inherent difficulties, violations by employers have always been part of labour law. Sometimes the evasion manifests itself by misclassification of employees as independent contractors, which leads to avoidance of *all* labour laws. At other times, specific obligations are not met; for example, an employer pays less than the minimum wage, or fails to pay overtime as required by law, and so on. Data shows that the most vulnerable employees – such as migrant workers, and more generally women, minorities, uneducated workers and part-time workers – suffer from violations more commonly than others.[8]

There are reasons to believe that the problem has exacerbated in recent years, because of several developments.[9] First, globalisation and technological advancements create enhanced competition, which in turn increase the pressure on employers to cut costs. Second, the decline in union density (in most countries) reduces the power and overall reach of unions, and as a result their ability to curtail violations. Third, the increase in the number of migrant workers – who have the most severe barriers for self-enforcement – means that more employees are unlikely to be able to help themselves. Fourth, for the past few decades, corporations have gradually moved away from internal vertical integration, and instead are opting for external collaborations, by way of outsourcing, subcontracting and supply chains.[10] As a result, more people are working for smaller, less established organisations, with higher propensity for violations. Fierce competition between contractors further exacerbates the problem. Finally, and also for a number of decades now, there is a shift away from »traditional« employment relations towards various non-standard forms of employment. Some of these non-standard forms, such as working part-time or from home, are detrimental to the ability to engage with other employees, whether for the purpose of unionizing or simply to get information about what the law requires. All of these developments combine with the inherent challenge of enforcement noted above to create a crisis of enforcement in the field of labour law.

II. Between compliance and enforcement methods

It is possible to distinguish between two groups of methods designed to deal with violations of labour laws. We can focus on preventing violations in advance (*ex ante*), or alternatively on detecting and punishing violations after

5 See *Weil/Pyles*, 27 Comparative Labour Law & Policy Journal 59 (2007); Vosko et al. (eds.), Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs, Toronto 2020, Ch. 2; *Alexander/Prasad*, 89 Indiana L.J. (2014), 1069; *Lee/Smith*, 94 Washington L. Rev. 759 (2019), 784–789.

6 *Weil*, in: Freeman/Hersch/Mischel (eds.), Emerging Labor Market Institutions for the Twenty-First Century, Chicago 2005, p. 13; *Landau/Howe*, 17 Theoretical Inquiries in Law 201 (2016).

7 *Waas*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

8 See, eg., *Fine/Galvin/Round/Shepherd*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

9 I describe these in more detail in *Davidov* (Fn. 1), pp. 226–229.

10 On the impact of these developments for aggravating enforcement problems, see most notably *Weil*, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It, Cambridge (Massachusetts) 2014.

the fact (*ex post*). There is, obviously, a strong connection between the two; after all, one of the main reasons for punishments is to prevent additional (future) violations. And some measures will be hard to allocate into one of these two groups. Still, there is often a difference of focus that is noticeable and requires a different approach: are we trying to get into the mind of the employer, to find ways (often through incentives) to improve compliance *ex ante*, or should we focus on methods of detection and punishment? This difference of focus has led to two separate strands of literature. My goal here is to bring them together, because both are important for ensuring that employees are actually protected by labour laws.

The term compliance is sometimes associated with methods that aim to induce *voluntary* compliance, or self-regulation, which some believe should come instead of sanctions. *Leah Vosko* and her colleagues, for example, present the »compliance model« as the opposite of a »deterrence model«, the former focusing on educating employers and helping them comply, the latter focusing on detecting violations and inflicting significant punishment.[11] This comes together with a critique of the lack of sufficient enforcement (deterrence) methods. I agree with the substance of this critique,[12] but I use the term compliance differently in this article. It includes all methods that aim to ensure compliance *ex-ante* by employers, not only »soft« measures that look for voluntary compliance, and certainly nothing that comes *instead* of detecting violations and punishing.

The compliance approach, which puts the focus on raising awareness, building capacity among employers to comply, and methods of persuasion, is often associated with the theory of responsive regulation, first developed by *Ian Ayres* and *John Braithwaite* three decades ago.[13] This theory starts from a critique of »command and control« methods, arguing that a system that tells people what to do and punishes them if they fail to do as required is often not practical, too costly and not effective. It is better, according to *Ayres* and *Braithwaite*, to persuade and build capacity and internal motivation – at least in some cases. An important part of the theory was the sanctions pyramid. The idea was that we should start with soft measures such as persuasion and warning letters, and move gradually to civil penalties and only later to harder sanctions such as criminal penalties – with the assumption that many violations are not intentional and this will be better for making people understand the law and build capacity to follow the law in the future.

These ideas have been very influential, leading to rich academic discussions, and have also found their way into labour laws of different countries. For example, in Israel, since 2011 there is a multitude of possible sanctions for labour law violations, with different levels of severity, and inspectors can gradually escalate their response.[14] It is good to have more options, especially if they include the availability of quick administrative sanctions, alongside the criminal ones that require a very long process. At the same time, if authorities find a violation of the minimum wage, for example, it seems ill-advised to settle for a warning letter without any punishment. This suggests to employers that they have a »free pass« for violations until the first time they are caught, with nothing to lose; they will only start paying some price on the second time. And the reality of the labour market teaches us that employers do not get caught very often.

Another development that relies on responsive regulation is the idea of »enforceable undertakings« – also called compliance agreements – which can be found notably in Australia[15], the U.S.[16] and the UK.[17] Such agreements can be used to get a commitment for future compliance, with some assurances – for example an agreement for a reporting mechanism and also high sanctions in case of future violations. As part of such an agreement, the enforcement agency can agree to smaller sanctions for the current, first violation. Unlike mere warnings, a compliance agreement can be justified if a reduced sanction comes with improved prospects for future compliance by the employer. If the enforcement agency secures assurances that are backed up by significant binding commitments with a mechanism to closely monitor them, this can have better long-term effects than a one-time severe sanction.

11 *Vosko et al.*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

12 *Davidov*, 26 International Journal of Comparative Labour Law & Industrial Relations 61 (2010).

13 *Ayres/Braithwaite*, Responsive Regulation: Transcending the Deregulation Debate, Oxford 1992.

14 Act to Improve the Enforcement of Labour Laws of 2011.

15 For analyses see *Hardy/Howe*, 41 Federal Law Review 1 (2013); *Hardy*, forthcoming in the International Journal of Comparative Labour Law and Industrial Relations 2021.

16 *Weil*, in: Vosko et al. (Fn. 5), pp. 260, 269.

17 Immigration Act 2016, s. 14 ff.

Legal systems that give enforcement agencies powers to gradually escalate the response (with discretion to choose from a »menu« of different sanctions), and the power to reach compliance agreements, are taking a step towards the Franco-Iberian model of enforcement. In France, Spain and Latin America, inspectors are put in charge of all labour law issues at a specific workplace and given very broad discretion to decide on the appropriate sanctions or other actions. *Michael Piore* and *Andrew Schrank* have argued that the advantage of this approach is the focus on the root cause of the problems that lead the specific employer to violate labour laws, allowing inspectors to tailor the right solution.[18] Such a system has its own risks: notably, the law might not be applied equally to all employers, and inspectors might be tempted to give employers too much leeway. Also, in order to be effective, it requires frequent visits by the inspector at each workplace, meaning significant resources. Moreover, it is likely that in many cases the »root cause« behind violations is simply that the employer wants to make more money. Notwithstanding these difficulties, at least in some cases allowing an inspector to work with the employer to create (and monitor) a plan for long-term compliance, with a focus on educating and building capacity, can be very beneficial.

Methods like escalating sanctions, enforceable undertakings and tailored solutions show how compliance and enforcement are closely intertwined with each other. These methods are used by enforcement agencies but are directed towards improving future compliance, by ways that depart from traditional punishment. They are designed to improve overall compliance by minimizing future violations. At the same time, these methods expose the tension between the two approaches, because they rely (to some degree, at least) on employers to improve their ways. These relaxed sanctions (at least for the current offence) are based on the assumption that employers plan in good faith to cooperate – that they are not ill-intentioned. Otherwise put, a compliance approach assumes (at least to some extent) that employers are basically »good people« who have strayed and can be brought into line.[19] This may be true for some employers, but others are calculative wrongdoers, who will only respond to hard sanctions.[20] Admittedly, when enforcement agencies are granted broad discretion to choose the sanctions, they may use it wisely and avoid giving any »discounts« to »bad« employers. But this will likely become the exception, that requires clear evidence of intentional wrongdoing. And it is far from clear that most employers are indeed »good« employers.

Notwithstanding these difficulties, I believe that methods focusing on improving compliance *ex-ante* and those focusing on enforcement *ex-post* are both equally important and necessary. Efforts can be made to minimize the risk and try to tailor forward-looking solutions only to »good« employers. This was also the approach adopted by enforcement agencies in the U.S. and in the UK when, in recent years, they enjoyed the benefit of being led by leading academics from the labour enforcement field.[21] Under the heading of »strategic enforcement«, they »in many ways rejected the dichotomy between command-and-control regulation and regulatory new governance, instead embracing productive pieces of both but in a larger context of pursuing strategies and supportive organizational changes that sought to improve employment standards conditions by *changing the behaviour of businesses that lead to non-compliance*.«[22] Empirical research outside the field of labour law confirms that a mixture of methods that »blends cooperation with punishment« is the most effective way to minimize violations.[23] I therefore proceed with the assumption that it is possible and useful to integrate compliance and enforcement methods into a single framework. I turn now to describe such a framework, which is broader in scope than strategic enforcement, because it covers methods that go beyond those advanced by enforcement agencies.

18 *Piore/Schrank*, Root-Cause Regulation: Protecting Work and Workers in the Twenty-First Century, Cambridge (Massachusetts) 2018.

19 *Feldman*, The Law of Good People: Challenging States' Ability to Regulate Human Behavior, Cambridge 2018.

20 As Feldman also acknowledges, *Feldman*, The Law of Good People: Challenging States' Ability to Regulate Human Behavior, Cambridge 2018, Ch. 6.

21 In the U.S., Professor *David Weil* was the head of Wage and Hour Division of the U.S. Department of Labor, in charge of the agency enforcing Federal employment standards, from 2014 to 2017. In the UK, Professor *David Metcalf* was the Director of Labour Market Enforcement from 2017 to 2019.

22 *Weil*, in: Vosko et al. (Fn. 5), p. 260 f.; The general approach was explored in detail in *Weil*, Boston U. School of Management Research Paper No. 2010–20; In the UK, see *Metcalf*, United Kingdom Labour Market Enforcement Strategy 2018/19, May 2018, p. 32.

23 *Schell-Busey/Simpson/Rorie/Alper*, 15 Criminology & Public Policy 387 (2016), 408.

III. The three conditions needed to secure compliance

There are three conditions, or steps, or stages, that are needed to ensure compliance with labour laws: awareness about the law; acknowledging violations; and fear of punishment or losses.[24] For »good« employers, who would not knowingly and intentionally violate the law, the first two steps should be enough.[25] These first steps could be described as taking a compliance approach. They may seem naive if considered sufficient by themselves, but when they come alongside hard sanctions (for the »bad« employers) they are an important component. In fact, for the »bad« employers they are needed as well. Whether they are well-intentioned or ill-intentioned, employers' route towards compliance starts with understanding what the law requires, and acknowledging violations (to themselves) when they occur. Then we also need deterrence; for many (perhaps most) employers, the fear of sanctions or other losses is crucial to ensure compliance with the law, especially labour laws that are costly for them. The three steps therefore adopt a framework that focuses on conditions for compliance, but this framework includes within it also measures of deterrence (which are commonly associated with *ex-post* enforcement).

In this section I briefly explain the first two conditions. I will then focus most of the current contribution, in the following sections, on the third condition, taking a broad view of deterrence, that includes any measure that impacts the employer's cost-benefit calculation.

The first step towards compliance is that an employer has to be aware of the law, and understand what it needs to do. For this stage, we need methods that raise awareness to the law; for example, the government can initiate media campaigns that bring attention to a specific aspect of the law (such as: »You must pay your employees at least €9.19 per hour – it's the law!«). For some employers, who are law-abiding, this will be enough. Alongside awareness, we need employers to have capacity to understand and be able to follow the requirements. For small employers, methods might be needed to help build such capacity, on the assumption that at least some employers are interested in following the law, but find it too complex. In some legal systems, inspectors are working with employers, giving them information and advice to help them comply.[26] Other methods could be focused on simplifying the law and building an easy-to-follow compliance scheme that is tailored to different types of employers (for example, people who employ a housekeeper in their home cannot be expected to have capacity to follow the same detailed rules directed at big corporations).

The second step that is important to secure compliance is for the employer to acknowledge violations and their immorality. There is a wealth of evidence in the field of behavioural ethics showing that people tend to deceive themselves to believe that they are acting morally and legally; in other words, people often prefer a convenient interpretation of reality, rather than the inconvenient truth.[27] Some people would tell themselves that employees are better off this way (because compliance would lead some of them to lose their jobs). Others might convince themselves that the law is unjustified, or that they have good reasons to violate it just this time (perhaps because of economic pressure). When the law is ambiguous (which is not unusual), some employers will use the ambiguity to self-deceive themselves that they are not violating at all. *Yuval Feldman* has argued that most people are »good people« who are not »calculative wrongdoers«, but rather violate the law unintentionally, often with the help of psychological self-deception mechanisms. There are various ways in which we can try to counter such tendencies; for example, putting a mirror (metaphorically) in front of employers to make them realize the violation. We can also use persuasion methods to explain why following the law is important and the violation is immoral, thereby making it more difficult for people to convince themselves that even if a violation is illegal, it is somehow justified and not immoral.[28] Here too public campaigns can be helpful;

24 These three conditions can be divided into sub-conditions, and some other related conditions can be added. I chose a rather simplified way to describe the main stages that are especially relevant for compliance in the labour law context. For a more general and complete overview of compliance steps, see *Parker/Lehmann Nielsen*, in: Drahos (ed.), Regulatory Theory: Foundations and Applications, Canberra 2017, p. 217.

25 *Feldman* (Fn. 19), p. 62; For a recent empirical study showing that some organizations follow the law even without any risk of sanction – albeit a law imposing only minimal costs on them – see *Cronert*, forthcoming in Regulation & Governance 2021.

26 This is more common in the Franco-Iberian model; see *Piore/Schrank* (Fn. 18).

27 For a review of this research, see *Feldman* (Fn. 19), Ch. 2.

28 For discussions of possible regulatory solutions to behavioral ethics problems, see *Feldman* (Fn. 19); *Ayal/Gino/Barkan/Ariely*, 10 Perspectives on Psychological Science 738 (2015).

imagine for example a campaign to prevent safety violations, which puts the focus on personal stories of victims of such violations (injured employees; family members of employees who died in work accidents). Although it should be obvious to every employer that violating safety rules can lead to grave results (and is therefore immoral), because of the human tendency to self-deception such reminders are important to raise compliance.

Let us now turn to the third condition, which is the most important, given the reality described in section I. As noted, we can assume that at least some employers (and perhaps most of them) perform a cost-benefit calculation, and will only comply with the law if violating would end up being more costly for them. This may be because they are »bad« (calculative wrongdoers), or because they convince themselves, through some rationalisation, that their actions are not illegal or not immoral. The goal would be to impact both sides of the cost-benefit equation to make compliance more likely. Admittedly, employers are not always rational and fully informed, so cannot be assumed to perform a correct cost-benefit analysis necessarily; and studies in criminology suggest that higher penalties do not, in themselves, succeed in securing deterrence.[29] Nonetheless, using a multitude of methods as discussed below can certainly be expected to influence the attitudes of employers towards compliance with labour laws.

Legislatures, governments and courts all have a role to play in influencing this cost-benefit analysis to improve compliance.[30] In the next section (section IV) I discuss several methods that can reduce the ability of an employer to benefit from a violation. The following section (section V) will then focus on methods that can increase the costs of violations once they occur. Although these are *ex-post* solutions, to a large extent they are designed to improve compliance *ex-ante*. The distinction between the two groups of methods is not sharp; there is a strong connection between them and some overlap. However, I believe that this structure of presenting them is nonetheless useful.

IV. Reducing the ability of the employer to benefit from violations

Thinking about labour laws from an employer's point of view, imagine that the employer understands what a specific law requires, but given the costs of compliance, is considering violating the law. The employer is then likely to weigh the benefits (gains) of a violation, before turning to consider the costs (losses). We can take two routes towards minimizing as much as possible the gains from violations. This can be done by raising the likelihood of self-enforcement, or by supporting the ability of other actors to prevent or curtail violations. Let me address each of these options in turn.

1. Raising the likelihood of self-enforcement

Within the group of methods designed to raise the likelihood of self-enforcement, I would like to mention and briefly discuss four methods: class actions, punitive damages, access to courts, and disclosure duties. This is not a complete list; other methods could fit into this group as well. My goal is to present a structure that can be useful for categorising different methods, and to point attention to some of the main methods in each group and their current challenges.

a) Class actions

It is quite likely that an employer ignoring a specific duty towards one employee will do the same towards other similar employees. Imagine for example that employees have to arrive at 8:45am in order to prepare their workstation to be able to start accepting customer calls at 9:00am. Assume also that the law requires the employer to pay for this preparation time, but the employer fails to do so. The payment owed for those 15 minutes each day can accumulate to a meaningful amount. But for an employee earning low wages, this amount might not be high enough to justify legal action. As noted above, there are barriers that an employee will need to overcome before we can expect her to pay for a lawyer and sue. Often, the amount owed will not be enough to overcome these barriers. But what if a large number of employees who are exposed to the same violation join hands and sue together? With the total expected compensation much higher, taking a lawyer and suing becomes more pos-

29 For an excellent recent review of the literature on deterrence in theory and practice, in the context of employment, see *Hardy*, forthcoming in the International Journal of Comparative Labour Law and Industrial Relations 2021.

30 On the role of courts, see *Davidov/Eshet*, Improving Compliance with Labor Laws: The Role of Courts [unpublished draft, **https://ssrn.com/abstract=3776134** (10 February 2021)].

sible. Still, it is not very likely. Employees rarely sue their employers when the relationship is ongoing. Most legal suits concerning employment rights occur after the relationship ends. And at this time, the connection between different employees is much weaker, so the prospects of a large group joining forces to sue together are slim – especially considering that each employee usually leaves at a different time.

It is here that the class action tool becomes highly useful. In Israel, for example, since 2006 the law allows a single employee to file a suit on behalf of all similarly situated employees, and promises significant compensation for the representative plaintiff and her lawyer as an incentive to initiate the proceedings.[31] The similarly situated employees will enjoy the benefits resulting from the suit as if they were parties to it, unless they choose to opt-out. Such class action suits have quickly become common in Israeli labour courts, resulting in a changed cost-benefit calculation for employers. They can no longer rely on the fact that most employees will not sue, and the minority that might sue is likely to settle for a smaller amount than the one taken from them. They have to take into account the risk of having to pay the entire amount taken from all employees, as well as compensation for the late payments and additional sums for the representative plaintiff and her lawyer.

There are two challenges that impede the success of this method, to some extent. First, judicial resistance or at least hesitation towards the deviation from the traditional model of litigation. In some countries legislatures have been slow to accept the possibility of class actions or have allowed them only in very limited form.[32] But even where legislation opens broad opportunities for class actions, judges have to approve them, and could remain timid. In Israel, judges have to ascertain that a class action is the most efficient and fair way to settle a dispute in the circumstances, and that it is reasonable to assume that the interests of the entire group will be represented in an appropriate manner.[33] In many cases, representative plaintiffs have failed to pass this barrier. It seems that labour courts often fail to realize that without the class action the dispute will not be litigated at all. They do not fully appreciate the importance of this tool for improving compliance with labour law – not only in the particular case, but more generally. Employers need to see class actions as a realistic possibility, in order to factor this into their cost-benefit calculations (which will improve compliance *ex-ante*). This will not happen until a significant number of class actions are approved, without too many procedural hurdles.

A second challenge concerns the relationship between class actions and labour unions. Class actions were originally developed for the field of consumer law, where multiple consumers with small claims are separated from each other. In labour law, in contrast, there is already a system in place for the joint action of many employees: they can join a union which can act on their behalf. If a workplace is unionized, and the union is active, we can expect it to take actions to ensure compliance with labour laws.[34] In such cases, a class action may be disruptive: it represents an attempt by a single employee to act on behalf of all other similarly situated employees, when there is already another body acting on their behalf (by other means). The union is more democratic, and it represents the employees for the long term and not only *ad-hoc* (so might have broader considerations). For these reasons, Israeli law, for example, gives unions the advantage, by prohibiting class actions by employees whose working terms are regulated by a collective agreement.[35] This is supposed to ensure that class actions do not create »competition« for unions and do not undermine them.

The problem is that sometimes unions are not sufficiently active. In Israel a clear example was the security sector, where terms have been regulated by an old sectoral collective agreement, but in practice most employees were not union members, and the union (the *Histadrut*) was inactive, failing to respond to persistent labour law violations. The National Labour Court decided that in such cases class actions should be allowed,[36] which indeed fulfils the purpose of the law. Interestingly, in several cases class action suits have prompted the *Histadrut* into action, contributing to »awaken« it, thereby raising another challenge. It was eventually decided by the Supreme Court

31 Class actions were allowed to some extent before 2006 as well; but the Class Actions Act of 2006 expanded this possibility significantly.

32 For recent (limited) developments in Germany in this regard, see *Waas*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

33 Class Actions Act of 2006, s. 8.

34 *Weil*, in: Freeman/Hersch/Mischel (Fn. 6), p. 13; *Landau/Howe*, 17 Theoretical Inquiries in Law 201 (2016).

35 Class Actions Act of 2006, second supplement, s. 10 (3).

36 Viron v. Tevel Security Cleaning and Services Ltd., judgment of 3 January 2011.

that if the »awakening« is genuine, the union can be given priority, considering the long-term advantages – but the representative plaintiff and her lawyer should still be compensated, to preserve the incentive for filing class actions in the future.[37]

b) Punitive damages

Class action suits have significant potential to improve compliance with labour laws, but they are only suitable for a certain group of cases. Alongside the difficulties mentioned above, they are in practice limited to situations of the same violation against a large group of employees. There is, however, another method that can be used to make repeated small violations more costly for the employer: punitive damages. For a single employee, or a small group of employees, initiating a legal suit against the employer is often not worthwhile, because the potential gains do not outweigh the costs of legal expenses alongside other costs of confronting the employer and the ensuing »trouble-maker« reputation. Punitive damages, if significant, can have a double effect: creating an incentive for the employee to sue, even when the sum of the violation itself is not very high, and increasing the cost of the violation for the employer. My main focus at this stage is on the first effect: by making it more beneficial to sue, punitive damages can raise the likelihood of self-enforcement, thereby reducing the ability of the employer to benefit from violations.

Punitive damages cannot be justified when an employer is already facing punishment for the same violation in criminal or administrative proceedings. But in practice, most violations are not subject to such punishments, and are also not leading to self-enforcement, creating overall a situation of under-deterrence.[38] Punitive damages can help correct this problem. In Israel, legislation has given labour courts explicit power to award punitive damages in several contexts: when wages are not paid in full and in time; when employers fail to provide a notice of the employment terms; when an employer dismisses an employee because she exposed illegal activities (a whistleblower); when an employer is trying to prevent an organizing attempt; and when the employer requires an employee to stand up (rather than sit down) during work for no justified reason. These are mostly new protections that have been legislated in recent years, reflecting a growing recognition of the legislature that there is an enforcement problem, and that punitive damages can be part of the solution.[39] Other pieces of legislation, especially creating protections against discrimination at work, give the labour courts broad discretion to award damages for non-pecuniary harms. These were also used to impose punitive damages in some discrimination cases.[40]

c) Access to courts

The realistic ability to bring a claim to court – and do so successfully – is crucial for our efforts to improve compliance. If bringing a case to court is not likely, or must face many barriers, employers realize that the chances of self-enforcement are small, which leads to a cost-benefit calculation often favouring violations. The existence of an independent labour court system is highly important in this regard – by its very nature and specialization (the focus on workers' claims) it tends to be more understanding to workers' difficulties and as a result more accessible compared to the general court system. More specifically, major factors that affect workers' access to courts that have been litigated in recent years are court fees and arbitration clauses.

Plaintiffs are usually required to pay fees when filing a suit in court. Such fees are usually very small, or even non-existent, in labour courts and tribunals. This reflects an understanding that in many cases employees are self-enforcing basic rights necessary for subsistence and other minimal terms. Right-wing governments sometimes try to raise the fees, ostensibly in order to cut public costs, thereby impeding the ability of employees to enforce their rights. In the UK, until 2013 claimants could bring a case before employment tribunals without fees; but from that year a new Order has set up fees ranging between £390 and £1200

37 Israeli Security Companies Association v. National Labour Court, judgment of 30 August 2015.

38 In situations of under-deterrence punitive damages are justified from an economic perspective; see *Polinsky*/*Shavell*, 111 Harvard Law Review 869 (1998).

39 See Wage Protection Act of 1958, s. 17–18; Notice for Employees and Prospective Employees (Terms of Employment and Screening of Job Candidates) Act 2002, s. 5 (as amended 2011); Protection of Employees (Exposing Violations and Corruption) Act 1997, s. 3 (as amended 2008); The Right to Seating and Suitable Conditions at Work Act 2007, s. 4; Collective Agreements Act 1957, s. 33 (11) (as amended 2009). The Wage Protection Act, aimed to ensure payments of wages in full and in time, is the exception: it is not new. Also, unlike the other pieces of legislation, it does not use the term punitive damages. But the idea is the same.

40 See, eg., Sharon Plotkin v. Eisenberg Brothers Ltd., judgment of 8 September 1997.

for a single claimant (more for groups, and more on appeals).[41] Even though there were some exceptions and a possibility to recover fees when the suit is successful, the UK Supreme Court understood that the fees created a significant barrier. This was very clearly demonstrated by data presented to the Court, showing a staggering reduction in the number of claims following the Order.[42] The fees Order was struck down because it was ruled to be an unjustified infringement of a constitutional right of access to the courts.[43]

A somewhat similar issue was raised in Israel in 2016 when new Regulations placed a burden on access of migrant workers to labour courts.[44] The new law requires plaintiffs who are not Israeli residents to deposit a collateral sum at the time of bringing a case to court, in order to ensure the payment of expenses to the employer, should they lose the case. Although a judge can allow a suit to proceed without a collateral if the plaintiff shows preliminary evidence of her case (or for some other exceptional reason), this is the default rule. It means that quite often, migrant workers who are claiming that their basic labour rights have been violated can only bring the case to court if they deposit a significant amount of money at the court. Considering that these workers are most vulnerable and without resources, this is a significant barrier, and for this reason the Regulations were challenged by Kav-La'oved, a non-profit organization assisting migrant workers in Israel. The new law was justified by the Government by raising the possibility of non-resident plaintiffs leaving the country before the end of the proceedings; in such cases, recovery of expenses (if the claims are rejected) will be extremely difficult, if not impossible. However, the Government had no data on the phenomenon of »false claims«, and in all likelihood, a wholesale rejection of a legal suit by a migrant worker is extremely rare. Unfortunately, the Supreme Court refused to intervene, allowing this new barrier on access to justice to stand.

A second and probably much more dramatic impediment on access to courts is arbitration clauses, by which employees agree (when entering the relationship) to bring any claim against the employer before a private arbitrator. Often the employer enjoys significant control over the process, and the identity of the arbitrator, which is obviously detrimental to the worker's case.[45] In some countries such clauses in the contract have no force; in Israel, for example, the rule is that mandatory (non-waivable) rights cannot be a topic for arbitration.[46] Although there are some minor exceptions developed by the courts – if the employee's objection is raised only after the arbitrator's decision, in some cases the decision can be upheld – the law is very clear about securing the ability to bring a claim against labour law violations to court.[47] In contrast, in the U.S. arbitration clauses have been validated by the Supreme Court,[48] where the majority has completely ignored the inequality of power between the parties and the devastating harm of this decision to the enforcement of workers' rights. One of the most troubling implications is that it also relinquishes the possibility of class action suits.

A recent case in Canada exposed an extreme version of this problem: Uber required all of its drivers in Canada to sign an agreement by which they agreed to bring any claim before an arbitrator in the Netherlands, and pay an »administrative fee« of $15,000 for such claims. This amount is beyond all the other expenses they will have to incur (for lawyers and otherwise) when bringing their claim in another *continent*. Quite obviously this is an outrageous contractual clause, designed to prevent drivers from bringing any claims against Uber. This was not strictly an employment case, because Uber considers its drivers to be independent contractors, so the contract with the arbitration clause was not drafted as an employment contract. However, the plaintiff, *David Heller*, filed a class action suit in which he claimed that the drivers are in fact employees. The Supreme Court of Canada ruled that the clause was unconscionable and therefore void, allowing the class action suit before a Canadian court to proceed.[49]

41 Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.

42 The reduction was between 58 % and 70 %. See R (UNISON) v. Lord Chancellor, (2017) UKSC 51, par. 39.

43 R (UNISON) v. Lord Chancellor, (2017) UKSC 51, par. 66 ff.

44 Labour Court Regulations (Legal Procedures) (amendment) 2016, reg. 116A.

45 I am not discussing here arbitration in collective disputes, which is quite common, and arbitration organized by the State with an impartial arbitrator who is not controlled in any way by the employer.

46 Arbitration Act 1968, s. 3; Dayan v. National Labour Court, judgment of 29 May 1980 (Supreme Court of Israel).

47 See Me'onot Yeladim Be'Israel v. National Labour Court, judgment of 11 May 2016 (Supreme Court of Israel).

48 Epic Systems Corp. v. Lewis, 584 U.S. (2018).

49 Uber Technologies Inc. v. Heller, 2020 SCC 16.

d) Disclosure Duties

Another method that can be used to raise the likelihood of self-enforcement – thereby also reducing the ability of employers to benefit from a violation and encouraging *ex-ante* compliance – is placing disclosure duties on employers. This can include duties to post information about the law and the rights of employees; In Israel, for example, such duties can be found in the laws concerning minimum wage and sexual harassment.[50] Even more importantly, the law can require the employer to regularly provide *personalized* information to employees related to their own rights, including the number of hours they have worked, the number of vacation days they have left to use, and so on.[51] Both types of information – general and personalized – are a necessary starting point that employees need in order to understand when their rights have been infringed.

One can wonder whether it is useful to fight non-compliance with labour laws with the enactment of *more* laws, that employers can also fail to comply with. One way to respond to this difficulty is by creating incentives for compliance, which is especially fitting with disclosure duties. The information that an employer has to disclose is needed for employees to be able to self-enforce their rights. When an employer fails to provide this information, it places a higher burden on the employee. This can be punished by shifting the burden to the employer to prove that the employee worked less hours than he claims, took more vacation than he claims, and so on. This means that any doubt will work against the employer, significantly raising the legal risks. At least *some* employers are likely to comply with disclosure duties in order to avoid the risk of shifting the burden of proof. This, in turn, will ensure that workers have more information about their rights, raising (at least to some extent) the possibility of self-enforcement.

In Israel, for example, such provisions can be found in three contexts. First, at the beginning of an employment relationship, an employer must provide a detailed notice on the terms of the contract and the employee's rights. According to the legislation, failure to provide a notice shifts the burden of proof to the employer on any issue that should have been listed, subject only to a duty on the employee to provide an affidavit on her claims.[52] Second, if an employer fails to provide a detailed wage slip, as required by law, and there is a dispute about whether the salary included different components (such as vacation pay, overtime pay, travel expenses etc.), there is a presumption that these were not included, and the burden is on the employer to prove otherwise.[53] Third, when an employer fails to keep records on the hours of work, as required by law, the burden shifts to the employer to disprove a claim of overtime by the employee, with regard to claims of up to 15 hours per week. In other words, failure to produce the records – which are crucial for employees' ability to self-enforce their rights – puts the employer at risk of paying significant amounts of overtime (for 15 overtime hours each week) unless it can prove that the plaintiff did *not* work during those hours.[54]

Similar methods are also included in the new EU Directive on Transparent and Predictable Working Conditions.[55] The Directive requires employers to provide documented information to employees, and Member States have been advised to create favourable presumptions in favour of the employee in case the employer fails to comply. An additional provision concerning on-demand workers advises EU Member States to adopt a presumption that they are employees, »with a minimum amount of paid hours based on the average hours worked during a given period«.[56] The preamble notes in particular the need to improve enforcement of labour laws,[57] which can explain these welcome provisions.

50 The Minimum Wage Act of 1987, s. 6B, requires employers to post a notice on employees' rights according to this law. The Prevention of Sexual Harassment Act of 1998, s. 7, requires an employer to adopt internal regulations for dealing with sexual harassment complaints and to publish the information on these regulations among the employees.

51 See, for example, in Israel, the Notice to Employees and Prospective Employees Act of 2002, which requires employers to give employees a detailed notice of their working terms and conditions upon entering employment; the Wage Protection Act of 1958, s. 24, which requires giving a detailed wage slip with each salary, including the number of hours worked, vacations days used, sick days used, and so on.

52 Notice to Employees and Prospective Employees Act of 2002, s. 5A.

53 Wage Protection Act of 1958, s. 26B (3) (added in 2008).

54 Wage Protection Act of 1958, s. 26B (1)–(2) (added in 2008).

55 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, which replaced the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

56 See Article 11 and Article 15, respectively. In both cases, the Directive lists additional methods and allows Member States to choose »one or more« of these methods.

57 Section 39 of the preamble.

2. Supporting the ability of other actors to prevent violations

Part 1 of this section considered four methods that can raise the likelihood of self-enforcement by employees. I now turn in part 2 to discuss four additional methods, that shift the focus to other actors that can be instrumental in curtailing violations: unions, worker centres, lead companies and independent monitors. These are sometimes called public-private compliance initiatives.[58] The common feature of all of these legal methods is that they reduce the ability of the employer to benefit from a labour law violation – thereby affecting the cost-benefit calculation that leads to a decision to violate in the first place.

a) Unions

The first and most obvious actor that can be used to fight labour law violations is the labour union. As already noted, empirical evidence shows that in unionized workplaces the possibility of violations is reduced significantly.[59] Unions can give employees the necessary information about their rights; they can help employees check whether they are getting everything they are owed; and they can approach the employer if violations are found and demand correction. Perhaps most importantly, by increasing job security unions provide the background security that is crucial to make any complaint. It has been rightly noted that in practice, job security is often a necessary precondition for the enforcement of all other rights.[60] For this reason, unions have a greater role as enforcement agents in legal systems that do not have protections against unfair dismissals, most notably the United States. In such legal systems, the difference created by job security instituted in collective agreements has a huge impact on the ability of employees to enjoy other rights. But even in countries that *do* have legislated »just cause« protections, the actual protection against unfair dismissals is stronger, or at least much easier to enforce, when a union is present. And as a result, there is a heightened sense of security that can give employees the courage to complain about violations.

Once we recognize the existence of an enforcement crisis, and the important role of unions in minimizing violations, it stands to reason that unions should be given powers to help employees in this regard. In some countries there are debates about whether a union should be allowed to sue the employer directly in case of violations against employees (as the plaintiff and not just representing the employees).[61] While unions can obviously file legal claims in collective disputes, it is less obvious that they can do so when the employer has failed to comply with legislative requirements in its relationship with specific employees. Allowing them to do so is helpful in order to allow the specific employees to remain »behind the scenes« rather than putting themselves front and centre in the fight against the employer.

A separate but related question is whether collective action (and particularly, strikes) should be allowed as a method of enforcing rights. In Israel, for example, when the labour court system was established (in 1969), one of the main goals was to replace strikes with judgments. The National Labour Court precedents maintain that as a rule, strikes are justified (and allowed) only for economic disputes. In contrast, legal disputes should be brought to court. When an employer fails to follow an agreement, or is violating the law, a union is excepted to request a remedy from a court of law, rather than using the strike power. The rule is understandable, given the interest in limiting unnecessary strikes, with the accompanying harms to the public. But sometimes, filing a legal suit is not an effective solution to a problem. And indeed, the Israeli National Labour Court has recognized exceptions to the rule. When local municipalities, facing significant budget cuts, have systematically failed to pay wages in time – for thousands of workers employed by many different employers – the Court allowed a national strike.[62] It was understood that the magnitude of the violations, as well as the difficulty of getting a suitable remedy from the courts (because the municipalities could not pay the punitive damages, due to their financial crisis), justified collective action. And indeed, the strike was successful in putting pressure on the government to find a solution. Arguably, strikes should be allowed to ensure compliance with labour laws in less extreme situations as well (even if still as an exception to the rule).

58 For additional such initiatives see *Hardy/Ariyawansa*, ILO 2019, 59 ff.

59 *Weil*, in: Freeman/Hersch/Mischel (eds.) (Fn. 6), p. 13; *Landau/Howe*, 17 Theoretical Inquiries in Law 201 (2016).

60 See, eg., *Blades*, 67 Columbia Law Review (1967) 1404.

61 See *Waas*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

62 Tel-Aviv Chamber of Commerce v. The Histadrut, judgment of Sep. 22, 2004.

A final issue that should be mentioned here is derogation clauses, ie. legislative provisions which allow a union to agree to a *lower* standard (derogate from an employment standard set in legislation).[63] Sometimes, alongside the union's agreement, an approval by a government authority is also required. When the law allows such derogations, the idea is to open room for localized solutions; perhaps in the context of a specific workplace, employees are better off »selling« a specific right in return for some other right that is more important for them. It is assumed, therefore, that such derogations could lead to agreements that are preferred by employees. At the same time, this possibility offers flexibility to employers, and is attractive for them as well. So much so, that at least in some cases, it could encourage them to be more supportive towards organizing drives and more cooperative towards a new union. And if unions are important, among other things, for improving compliance with labour laws, derogation clauses can be seen as a method to (indirectly) improve compliance. It is important, however, to use them carefully – remembering that labour laws secure a »floor« of basic rights that are generally considered non-waivable. Derogations by unions should be limited in context and scope.[64]

b) Worker centres

Unions are an ideal solution for improving compliance, but union density has dropped over the last few decades in many countries. Moreover, in some types of workplaces the prospect of unionization is unrealistic. Low-wage non-unionized workers are sometimes assisted by non-governmental organizations specializing in protecting workers' rights, who have been dubbed »worker centres«. This is especially prominent in the U.S., in correlation with the low union density there,[65] but can be found in other countries as well.[66] Some of these organizations are based on membership of workers, and are similar to unions in this respect, but for various reasons (often because of U.S. legal limitations) are not considered labour unions. Other organizations do not put emphasis on recruiting members.[67] Either way, to help workers enforce their labour rights, these worker centres rely mostly on donations, ie. on the good will of individuals and organizations who care about this issue. Although we cannot assume that such worker centres will continue to exist and to secure sufficient funding, in light of the important work they are doing to help workers self-enforce labour rights, two issues are raised.

First, should worker centres be granted standing to file legal claims? Obviously, they can provide legal services to workers, ie. lawyers on their behalf can represent the workers. But in some cases, it can be useful to allow them to initiate legal suits without implicating any specific worker. In Israel, at least some labour laws open such possibilities. For example, according to the Right to Seating and Suitable Conditions at Work Act of 2007, in case of violation a legal suit can be filed by the worker, by a labour union, or by an organization dealing with workers' rights provided it secured the worker's consent. In a similar fashion, the Equal Wage to Female and Male Employees Act of 1996 allows an organization dealing with women rights to file suits (again with the worker's consent).

Second, and more significantly, some scholars, notably *Janice Fine* and *Jennifer Gordon*, have proposed instituting cooperation between worker centres and State enforcement agencies.[68] After showing that such collaboration is already taking place in some American cities, they pointed out the advantages; for example, the fact that worker centres have ongoing direct contacts with workers, in their own language, and can be very helpful in gathering information on violations and in educating workers. The authors argue that the Government should offer grants to worker centres, thereby contributing to their funding and creating a more formal collaboration which can be called »co-enforcement«.[69] There are some examples for such cooperation already taking place, including with State funding.[70]

c) Lead company/client liability

Outsourcing and subcontracting have led to exacerbated compliance problems in recent decades, as noted above.

63 See *Finkin*, 36 International Journal of Comparative Labour Law and Industrial Relations 1 (2020).

64 For more on the idea of »constrained waivers« see *Sunstein*, 87 Virgina L. Rev. 205 (2001); *Estlund*, 155 U. Penn. L. Rev. 379 (2006); *Davidov*, 40 Oxford J. of Legal Studies 482 (2020).

65 For an overview and analysis of such organizations in the U.S., see *Fine*, Economic Policy Institute Briefing Paper No. 159 (2005).

66 In Israel, Kav-La'Oved (Workers' Hotline) has a prominent role in assisting low-wage workers, especially migrant workers, and advocating for them.

67 *Fine*, Economic Policy Institute Briefing Paper No.159 (2005).

68 *Fine/Gordon*, 38 Politics & Society 552 (2010). The authors call for similar cooperation between the State and unions as well.

69 This title appears in later contributions by *Fine* and other colleagues; see, eg., *Amengual/Fine*, 11 Regulation & Governance 129 (2017).

70 *Amengual/Fine*, 11 Regulation & Governance 129 (2017), describe examples from the U.S. and Argentina.

Consider, for example, cleaning and security workers. In Israel, firms and other organizations that need ongoing cleaning and security services used to employ the workers directly, but over the last few decades have shifted to outsourcing. By choosing contractors through tenders, they lower the price, thereby shrinking the contractors' profit margins and often pushing them to violate labour laws. Sometimes the clients are directly at fault for such violations, when they pay the contractors less than the minimum required to cover employment costs (a situation which can be termed »losing contracts«). Even if the clients are not directly responsible, at the very least they are in a position to curtail such violations to some extent. They can do so by paying more, but also by using their power as »big« clients to choose only reliable, law-abiding contractors; by demanding in their contracts with contractors compliance with all labour laws, and taking collaterals (guarantees) to ensure that; by monitoring such compliance; and by taking steps to stop violations once they are found, including by severing ties with violating contractors.

In Israel, the Act to Improve the Enforcement of Labour Laws of 2011 created an incentive structure designed to harness the power of clients in this way. It places direct liability on a client towards cleaning and security workers, in case of violations by the contractors who employ these workers.[71] The client can escape liability if taking several steps, including paying the contractor more than the minimum necessary to ensure compliance, and employing an independent monitoring agent (see more on that below). Failure to pay the minimum set by the law, and failure to prevent violations by the contractor, are considered a criminal offence – not only of the client (lead company) but also of its general manager if he or she could have prevented this offence and failed to do so.[72] This system has proved quite successful in improving compliance in the cleaning and security sectors.

One might wonder whether it is justified to place liability on one body for violations of another, just because the latter has the power to prevent violations (even when it has not caused them). Should we extend liability also to lead companies for violations by their contractors all through the supply chain? For example, should an American company who uses manufacturing contractors in Bangladesh be liable for violations of the contractors there, even if it pays enough to make compliance possible? Also, should franchisors be liable for violations by their franchisees? For example, when a company which has a license to operate a McDonald's restaurant violates labour laws, should there be any liability on the McDonald's Corporation as well? This has been a topic of some debate.[73] Personally I believe that such liability is justified but only when there is some direct connection between the client and the workers.[74] Cleaning and security workers are a good example, because they work on the premises of the client and in practice become part of the same workplace community together with its employees. In Germany there is broader liability, not limited to specific sectors, although only for minimum wage violations: clients who use contractors for »a significant amount of work« will face administrative fines if they knew or should have known about violations by the contractor or by its subcontractors.[75] Arguably, the duty on the client in such cases is not unreasonable: to make a minimal effort to know if its contractors are violating labour laws, and to stop working with them if they do. It is certainly an exception to the rule about the separation between different legal entities, but could be justified in light of the enforcement crisis and the importance of securing a minimum wage for all employees. Perhaps liability can also be placed on franchisors, if through the brand name they create an impression that they are in fact operating the business.[76] At the same time, it would be more difficult to extend such liability when the workers are far removed from the lead company, for example when they work in another country and the lead company has no control over their work conditions – and is not causing the violation by not paying enough.[77]

71 Such liability is limited to clients who employ at least four workers through contractors, on a regular basis, for a period of at least six months. See s. 25 of the Act.

72 Section 31, 33 of the Act. For a discussion of criminal »accessory liability« for labour law violations, see *Bogg/Davies*, in: Bogg/Collins/Freedland/ Herring (eds.), Criminality at Work, Oxford 2020, p. 431.

73 See, eg., *Rogers*, 31 Berkeley J. Empl. & Lab. L. 1 (2010); *Dahan/Lerner/Milman-Sivan*, 34 Mich. J. Int'l L. 675 (2013); *Anner/Bair/Blasi*, 35 Comparative Labor Law & Policy Journal 1 (2013); *Hardy*, 29 Australian Journal of Labour Law 78 (2016).

74 *Davidov*, 37 Comparative Labor Law & Policy Journal 5 (2015); *Davidov* (Fn. 1), pp. 234–238.

75 Minimum Wage Act of 2014, s. 21 (2) [for an English translation see **https://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html** (11 February 2021)].

76 *Davidov*, 37 Comparative Labor Law & Policy Journal 5 (2015).

77 But some have argued in favour of such liability: see, eg., *Dahan/Lerner/Milman-Sivan*, 34 Mich. J. Int'l L. 675 (2013); *Anner/Bair/Blasi*, 35 Comparative Labor Law & Policy Journal 1 (2013).

d) Independent monitoring

A final example of using another actor – other than the employee itself, and other than the State enforcement agencies – to prevent or curtail violations, is the idea of independent monitoring. It is obviously not possible to have a labour inspector of the State regularly monitoring compliance at each and every workplace. Could we require employers – perhaps of a certain size or from specific sectors – to employ in-house inspectors? Although the law has not gone that far, there are increasingly situations in which firms and organizations are pushed to do so (using »soft law« incentives rather than a mandatory obligation). One such example can be found in the Israeli Act to Improve the Enforcement of Labour Laws of 2011, which encourages firms and organizations using cleaning and security contractors to hire a »certified wage-checker« that will monitor the contractors' compliance with labour laws. As long as they pay enough to allow compliance (ie. avoid a »losing contract«), hire a wage-checker and act when violations are found, they are immune from the risk of direct liability towards the employees. In other countries, internal monitoring mechanisms have been part of »enforceable undertakings« (see above), ie. employers can voluntarily agree to impose such monitoring on themselves, as part of a deal with an enforcement agency that reduces their punishment for labour law violations.[78]

The main challenge of such internal monitoring is how to keep it independent. It cannot have a meaningful impact unless the monitors are completely independent from the employer and from those who pay their fees (eg. clients) who might expect specific results. In Israel, the clients choose the wage-checkers and pay their fees, which is problematic because they are »repeat players« and it is most convenient for them if the wage-checker does not find any violations. It is perhaps expected that wage-checkers, who are usually lawyers or accountants who undergo a short training, will feel bound by the ethical standards of the profession to protect the interest of the employees. But the incentive structure does not ensure that. A possible solution is to give the employees (through their representatives) the power to choose the wage-checker from a list provided by the Government. Another option is to allow worker centres to provide this service. At the international level, some brands which voluntarily decided to engage monitors (under consumer pressure) have turned to such non-profit organizations in order to gain credibility for the monitoring process.[79]

V. Increasing the cost of violations

The previous section detailed eight different methods that can help reduce the benefits that employers can expect from violating labour laws. These methods can raise the likelihood of self-enforcement, or the ability of other actors to prevent violation. Overall, they make it less likely that the employer will be able to get away with the violation and benefit from it. The next group of methods, which I discuss briefly in the current section, is more focused on the cost side of the cost-benefit analysis. By raising the cost of violations, we can further push employers towards a decision to comply with the law. I should reiterate that the distinction is not strict; there are methods that can be listed both as reducing the benefit and as increasing the cost. This is not critical. The point is simply to stress the importance of using methods that impact employers' cost-benefit calculation, and to evaluate the methods in this light.

1. Criminality

At least some parts of labour law impose criminal liability on violations – in some legal systems more than others. Assuming that this is justified in terms of criminal law theory,[80] the question remains whether it is helpful in practice for improving compliance. One might assume that the fear of a criminal conviction would create significant deterrence, given the stigma attached to it as well as other possible costs (from closing access to certain offices/positions, to the possibility of incarceration in extreme cases). But for this to happen, criminal sanctions should attach to managers and not only firms (who are usually the employers), and the imposition of such sanctions

78 See *Hardy/Howe*, 41 Federal Law Review 1 (2013).

79 See, for example, the Worker Rights Consortium [**https://www.workersrights.org** (11 February 2021)] and the Fair Labor Association [**https://www.fairlabor.org** (11 February 2021)].

80 For a discussion of this point see *Cabrelli*, in: Bogg/Collins/Freedland/Herring (Fn. 72), p. 53; *Collins*, 31 King's Law J. 373 (2020).

must be seen as a realistic possibility. There has to be perception among employers that this is a real risk, rather than merely a theoretical empty threat. In practice, this does not seem to be the case.[81] But there is certainly potential if prosecutions become more common and if they are well publicized to raise awareness among employers to this risk.

Until we reach a time when criminal cases are more common for labour violations, are the criminal prohibitions »on the books« (but not in practice) useful or rather detrimental? It is important that they do not take away the availability of civil remedies in any way.[82] It is also important not to use lack of criminal convictions as an indication of a »clean record«, for example when choosing a metric for identifying »repeat offenders« (see on that below). Subject to these important caveats, having criminal prohibitions seems important even if it is only in the background and rarely applied – if only to »send a message«, ie. make an expressive statement, about the importance of labour laws and the harm caused by their violation.

2. Administrative sanctions

While we should certainly try to make criminal convictions more probable, they are likely to remain quite rare. The criminal process has plenty of (justified) elements designed to prevent unjust convictions, including an extremely high burden of proof. It requires ongoing collaboration between labour inspectors and prosecutors, and overall a lengthy and complex process. In recent years there is a trend to replace criminal sanctions with administrative sanctions, which do not carry the same stigma, but are much easier to implement. In Israel, for example, since 2011 a senior labour inspector can impose administrative fines (also sometimes termed regulatory fines) for labour law violations.[83] Once the inspector determines that a violation has occurred, the employer has to pay the fine, or appeal. Much like a parking ticket, when a fine is imposed it applies by default, unless the decision is reversed on appeal. In a similar fashion, the German Minimum Wage Act stipulates that violations are considered regulatory offences, and allows enforcement agencies to impose significant fines.[84]

This system does not escape a major challenge of State enforcement: it relies on detection and some investigation of violations, which requires an expensive apparatus of inspectors, and it depends to a large extent on complaints from workers, which are not common. Nonetheless, the ability to impose fines swiftly, in a relatively easy process, is an important improvement.[85] Employers quickly realize that fines are more than a theoretical possibility, and have to factor that in their cost-benefit calculations.

3. Shaming

Another way to raise the cost of non-compliance is through shaming: by making the violation known to clients, customers and business collaborators of the violating employer. For this to be effective, there has to be broad societal awareness to the importance of labour law and the immorality of violations; and the publicity has to be broad enough to reach the relevant communities. In Israel, the law specifically directs the enforcement agency to publicize on a governmental website the details of administrative fines imposed on employers.[86] I suspect this has very minimal impact, because the information will only reach those who look for it on the specific webpage, where one can find a long list of firms and the fines they had to pay. A more effective system was used until recently in the U.S. with regard to health and safety violations. For the past two decades, the Occupational Safety and Health Administration (OSHA) has been issuing a press release to inform the public of violations, whenever the penalties imposed were over a certain threshold. A press release can reach a broader audience, and given the focus only on one specific employer, it directs more attention to the violator. It also details the violations and can explain their severity. A recent empirical study found that »press releases revealing OSHA noncom-

81 In Israel, during 2019 there were only 25 criminal labour cases which led to verdicts. See the report of the Enforcement Unit of the Ministry of Labour (in Hebrew), **https://www.gov.il/BlobFolder/dynamiccollectorresultitem/summary-of-activities-2019/he/summary-of-activities-2019.pdf** (11 February 2021). For a critical analysis of the effectiveness of criminal sanctions for labour violations in the UK, see *Barnard/Fraser Butlin*, in: Bogg/Collins/Freedland/Herring (Fn. 72), p. 70; One can assume that the same problem exists in other countries as well.

82 *Barnard/Fraser Butlin*, in: Bogg/Collins/Freedland/Herring (Fn. 72), p. 70.

83 Act to Improve the Enforcement of Labour Laws of 2011, s. 3.

84 Minimum Wage Act of 2014, s. 21 [for an English translation see **https://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html (11 February 2021)**].

85 In Israel, during 2019 the Ministry of Labour imposed administrative fines in the amount of app. 200 Mio. NIS on 2193 employers [see the enforcement unit report, (Fn. 81) above]. This is many fold higher than penalties imposed in criminal proceedings in the past.

86 Act to Improve the Enforcement of Labour Laws of 2011, s. 17.

pliance lead to substantial improvements in workplace safety and health. A press release leads to 73 % fewer violations at ›peer‹ facilities in the same sector within a 5 km radius.«[87] That is a very impressive impact. Further testimony to this impact is the fact that the pro-employer Trump administration has recently decided to stop this practice.[88] It remains to be seen whether it will be restored under the new Democratic administration.

4. Withholding privileges

Many businesses need something from the State, and this can be used to raise the cost of violations. For example, in some sectors a license is required to operate. It is possible to refuse granting a license, or to revoke an existing license, in cases of repeated labour law violations. In Israel, for example, a license is required to operate a temporary employment agency, as well as a business providing security or cleaning services.[89] The legislation explicitly instructs the Minister to revoke a license or limit it, in case of labour law violations, after the licensee has been given an advance warning.[90] This seems especially justified for businesses whose main activity is to employ people. A temporary employment agency, and a cleaning contractor, do very little besides employing people and making a profit from selling their labour time to others. Such firms do not produce anything, or offer a service in any real sense beyond mediating the sale of labour power. While society can expect *all* employers to act legally and refrain from violating labour laws, if all you do in your business is to employ people and you consistently fail to follow the law in this activity, there is no reason to allow you to keep doing it.

Another example of withholding privileges, with much broader impact, is to consider labour law compliance record when taking procurement decisions. In Germany, according to the Minimum Wage Act of 2014, employers who received a regulatory fine of €2500 or more »are generally to be excluded from participating in a tender for a delivery, construction or service contract« of public authorities, »until their reliability has been proven to be re-established«.[91] Such provisions can have a dramatic impact on the cost-benefit calculation of employers. In many sectors, a business cannot take the risk of being excluded from public procurement. The German rule seems extreme, because it refers to a single fine and not an especially high one. If the rule is too broad, it might not be applied in practice. In Israel, the procurement privileges are withheld only from repeat offenders, of relatively serious magnitude. This is easier to justify;[92] although setting the line to define repeat offenders can be contentious.

5. Strategic enforcement

Finally, it seems pertinent to point out the importance of effective enforcement action as a factor in raising the cost of violations. This is a major area in itself, that can only be mentioned here very briefly. Various strategies for effective enforcement have been proposed, most notably by *David Weil*, under the heading of »strategic enforcement«.[93] The basic idea is that enforcement cannot rely on complaints, which cover only a tiny fraction of violations and not the most extreme ones. Enforcement has to be proactive, look for the places where violations are most common, identify the causes and tailor the solutions to be most effective for each context. That includes some of the methods discussed above, like compliance agreements and shaming. The goal is to use the resources of enforcement agencies most effectively to counter more violations and especially the most severe violations. This approach is also influential at the ILO, where it is called »strategic compliance«, with a multitude of resources and techniques for effective enforcement offered to inspectors.[94] Improving effectiveness is, of course, easier said than done in practice; but has achieved

87 *Johnson*, 110 American Economic Review (2020), 1866, 1868.

88 *Scheiber*, Labor Department Curbs Announcements of Company Violations, New York Times, 23 October 2020 (reporting on a memorandum issued by the Deputy Secretary of the Labor Department).

89 Employment of Workers through Employment Agencies Act of 1996, s. 2, 10A.

90 S. 6 of the Act.

91 Minimum Wage Act of 2014, s. 19 (1) [for an English translation see **https://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html** (11 February 2021)]; See also the Act to Combat Undeclared Work and Unlawful Employment of 2004 (amended in 2017), s. 21 [for an English translation see **https://www.gesetze-im-internet.de/englisch_schwarzarbg/englisch_schwarzarbg.html** (11 February 2021)].

92 For a discussion of justifications see *McCrudden*, Buying Social Justice: Equality, Government Procurement, and Legal Change, Oxford 2007, Ch 5.

93 *Weil* (Fn. 10), Ch. 9; *Weil*, Boston U. School of Management Research Paper No. 2010–20; *Weil*, 60 Journal of Industrial Relations 437 (2018); See also *Fine/Galvin/Round/Shepherd*, forthcoming in International Journal of Comparative Labour Law & Industrial Relations 2021.

94 See ILO Approach to Strategic Compliance Planning for Labour Inspectorates 2017, available at **https://www.ilo.org/global/topics/labour-administration-inspection/resources-library/publications/WCMS_606471/lang--en/index.htm** (11 February 2021).

some success in different countries. For current purposes, the important point is that using enforcement resources effectively and strategically can raise the chances of catching and punishing violations, thereby affecting the cost-benefit calculations of employers contemplating them.

VI. Conclusion

Labour laws are important; for employees and for society at large. They are costly for employers, thereby inviting frequent violations. This is an inherent problem, but one which has exacerbated in recent years. Labour lawyers cannot assume that the laws are being applied in practice. Too often they are not, meaning that vulnerable employees are left unprotected, without basic employment rights, and the various goals of labour laws are frustrated. The goal of this contribution was to provide an overview of various methods that are being used in different legal systems to address this problem, and to highlight some of the current challenges and debates that these methods raise.

There are two different strands of literature that study the problem of labour law violations. There are those who focus on compliance – on ways to change the behaviour of employers – usually based on the assumption that many violations are not intentional. In contrast, there are those who focus on detecting and punishing violations to rectify the harm and create deterrence. The current article offered a way to bring the two approaches together. We need to make sure that employers are aware of the law and understand it; that they acknowledge violations and their immorality (despite human tendencies for self-deception); and that they are fearful of punishment and other losses attached to violations. Most of the discussion was devoted to the last stage, ie. to a consideration of different methods that can impact employers' cost-benefit calculation. I have listed and briefly discussed 13 different methods, divided into three groups: methods to raise the likelihood of self-enforcement, thereby reducing employers' ability to benefit from violations; methods supporting the ability of other actors (who are not the employee nor the State) to curtail violations, thereby also reducing employers' ability to benefit from violations; and methods that increase the cost of violations for employers, mostly through different ways of punishment after violations have occurred. It is important to emphasise that all of the methods can work side by side; there is no need to choose between them, but rather find the best way to use all of them. Improving compliance is a never-ending challenge, which requires a holistic solution.