

Realizing Rights for Homeworkers: An Analysis of Governance Mechanisms

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CARR CENTER DISCUSSION PAPER SERIES

Discussion Paper

2019-004

For Academic Citation: Marlese von Broembsen, Jenna Harvey and Marty Chen. Realizing Rights for Homeworkers: An Analysis of Governance Mechanisms. CCDP 2019-004, March 2019.

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This discussion paper was developed with the support of a Carr Center Faculty Fund Grant to Marty Chen and her research collaborators at WIEGO.



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Discussion Paper
MARCH 2019

Abstract

Following the Rana Plaza factory collapse in Bangladesh four years ago, the labour rights violations in global supply chains, and indeed the governance of global supply chains, has become a pressing global issue. This paper evaluates key existing global and national supply chain governance mechanisms from the perspective of the most vulnerable workers in supply chains—informal homeworkers.

1. Introduction¹

Homeworkers, who overwhelmingly are women, represent a significant share of the workforce in South and South-East Asia.² Homeworkers make products or parts of products for domestic or global supply chains from their homes, public spaces outside of their homes, or workshops close to their homes. Whereas traditionally their activities involved labour-intensive, artisan work (such as stitching, weaving, embellishing or craft-making),³ homeworkers now also perform unskilled work (such as cutting threads, threading track pants, affixing beads)⁴ and assembling and packaging goods for the electronics, pharmaceuticals and auto parts industries.⁵

Many work seven to twelve hour days, six days a week. Others work intermittently, when the factory cannot cope with its orders (Von Broembsen 2018). They are paid by the piece, earn less than factory workers, and earn below any statutory minimum wage (Piper and Putri 2017). Because homeworkers are underpaid, many rely on family members to help them earn more. A study of 406 homeworkers in Pakistan found that homeworkers and their assistants together worked 12.5 hours a day, six days a week, generating PKR 4,342 (equivalent to \$41.42) per month: less than one third of the statutory minimum wage of PKR 14,000 (Zhou 2017:26). Similarly, in Tirapur, India, the “T-shirt capital of the world” and in the soft toy and fishing net industries in Thailand, women are working 10-12 hour days, seven days a week, and earning below the statutory minimum wage (Sinha and Mehrotra 2016; Von Broembsen 2018)

Apart from low wages, homeworkers carry costs and risks. They carry *non-wage costs*, such as training and occupational health and safety costs.⁶ They also absorb *production costs*, including the cost of equipment; space and electricity; some raw materials (Zhou 2017; Von Broembsen 2018). And they absorb *production risks*, including the risk of fluctuating demand; of poor or incomplete raw materials; and of contractors rejecting finished products or cancelling work orders.⁷

¹ Our thanks to the Global Labour University and the Carr Center for Human Rights at Harvard University for providing the funding for this research, and to Firoza Mehrotra and Janhavi Dave from HomeNet South Asia, and Sunataree Saen-ging from HomeNet South East Asia for their assistance with the fieldwork.

² The magnitude of home-based workers in general, and homeworkers in particular, is not captured by labour force surveys and population censuses in most countries, which complicates efforts to estimate their numbers and economic contributions. Often home-based workers are listed as unpaid domestic workers on censuses, by enumerators not being trained to recognize home-based work. Many home-based workers not identifying and reporting themselves as workers complicate this.

³ See Chen 2014; ETI 2010.

⁴ See Naqeeb et al. 2014; Sinha and Mehal 2016.

⁵ See ETI 2010; Ozguler 2012; Chen 2014.

⁶ Homeworkers typically bear the responsibility for ensuring that they are protected from hazardous toxic products and production methods, and bear the cost of safety equipment.

⁷ See ETI 2010; Chen 2014; Zhou 2017

Homeworkers have little bargaining power and fear that if they bargaining with contractors, they will lose their work (Sinha and Mehrotra 2016; Zhou 2017; Von Broembsen 2018). These fears are often realized. In the Pakistan study, more than a third of the homeworkers who had tried to negotiate an increased piece-rate had experienced retaliation -- threats that they would lose their work, a decrease in the volume of work, and even a decrease in piece-rates (Zhou 2017). Sinha and Mehrotra found that homeworkers were too frightened to be interviewed, lest their contractors find out and they lose their work, and Von Broembsen found that even where factories are breaking the law, Thai homeworkers were too frightened to discuss a higher piece-rate with contractors lest they lose their work.

Homework is as old as capitalism itself: Since the 14th century, factories have subcontracted aspects of production to transfer some of their production costs to homeworkers/outworkers (Fulcher 2004). The contemporary form of subcontracted work differs from previous forms, as global (as opposed to domestic) supply chains often span several continents, with different parts of one product made in different countries. And, the procurement practices of the most powerful firms in the chain -- buyers and retailers -- impact more decisively on workers' terms and conditions of work than their relationship with the factories from which they receive their orders.

This paper is interested in whether the emerging rights-based international law instruments for realising decent work in global supply chains holds any promise for homeworkers. The academic literature refers to global value chains, global commodity chains or global production networks. The ILO uses the term supply chains. This paper will use supply chain and value chain inter-changeably.

We begin the paper with a discussion on global value chains so as to contextualize homeworkers' terms and conditions of work within the political economy of global capitalist production. Thereafter, we discuss the UN Guiding Principles on Business and Human Rights and the three human rights based international instruments on global value chains -- the ILO MNE Declaration, the OECD Guidelines, and the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. While only the OECD instrument on the garment and footwear sector explicitly includes homeworkers, we argue that homeworkers are covered implicitly by the other instruments. These instruments constitute soft law, meaning that they are legally non-binding. Nevertheless, recognition at the global level is often a precursor to securing recognition, and rights, at the national level. We explore how homeworkers in Thailand and Bulgaria used ILO Convention 177 on Home Work to fight for the recognition of homeworkers as workers, at the domestic level.

Our argument is for a plural, over-lapping governance perspective that focuses on regulatory mechanisms at local, national, regional and global levels, and support for, and the participation of, representative organisations of homeworkers is key. If homeworkers are excluded from law and law-making processes, it is likely

that MNEs will ban homework. Apart from the implications for homeworkers, other workers' rights will also be compromised.

2. Global Value chains and homeworkers.

Most homeworkers participate in supply chains that produce consumer goods such as garments and shoes, appliances, toys, cosmetics, etc. Global Value Chain (GVC) scholars describe these labour-intensive, mass-produced chains as "buyer-driven," in that the buyer – a brand-name merchandiser or a retailer – places the order and determines the specifications, the timing, the price and any conditions (including environmental and labour conditions) that must the supplier must adhere to. The buyers' decisions indirectly determine the structure of the entire chain, including the share of the value of the product that goes to each party in the chain, including to workers⁸

A recent International Labour Organisation (ILO 2017) survey of 1454 factories from 87 countries that supply multi-national enterprises (MNEs) found that suppliers face intense competition to produce goods for as little as possible, and buyers exploit this competition by continually pressuring their suppliers to drop their prices. Up to 52 per cent of suppliers that were surveyed have signed contracts to produce goods at a loss. They do so to secure future orders. Demanding unpaid overtime, keeping wages low, and outsourcing to homeworkers are the suppliers' primary tactics for keeping their costs low. Homeworkers *can* be exploited because they are largely invisible and seldom enjoy legal protection, as this telling quote shows: "The manager candidly admitted that since government inspectors cannot inspect private homes, it is cheaper and easier to simply outsource work to home-based workers" (Zhou 2017).

The question is how to improve working conditions within these chains? Global value chain scholars argue that countries and firms can appropriate more value by pursuing "upgrading" strategies. Humphrey and Schmitz (2000) suggest four different ways in which firms can "upgrade": *product upgrading*, which involves producing a different, more complex product (and therefore being able to charge more for it); *production upgrading*, which involves improving the efficiency of the production process, often by improving technology (which lowers production costs); *functional upgrading*, which involves building the capacity and skills of workers to assume more sophisticated functions; and *chain upgrading*, which involves transitioning into a different industry. What are the implications for homeworkers if they, or the factory, pursue one of these strategies?

The Donor Committee for Enterprise Development, comprising the major enterprise development funders, has published case studies showing that functional

⁸ Navdi 2004; Humphrey & Schmitz 2004; Gereffi et al 2005; Gibbon et al 2008; Barrientos et al.

upgrading (improving home-based workers' skills) leads to higher incomes. Country-level studies, however,⁹ show that when factories' upgrading strategies are successful, their gains are often short-lived. Consequently, they are resistant to passing on their gains to workers (including homeworkers) (Millberg and Winkler 2009). The oligopoly power of lead firms means that technocratic "upgrading" solutions are not the answer. And, given that the buyers are domiciled in industrialised countries and factories in developing countries, these global supply value chains effectively escape regulation.

In 2011, in response to this "governance gap", the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights ("Guiding Principles" or "GPs"), which were drafted by UN Special Representative for Business and Human Rights, John Ruggie, following global consultation. Ruggie argued that because states are unable to regulate transnational corporations, their activities resulted in human rights abuses (Ruggie 2008). The GPs have been incorporated into the OECD Guidelines for Multinational Enterprises (the "Guidelines") and the ILO's MNE Declaration. The next section discusses these rights-based governance mechanisms and explores whether they hold potential to improve homeworkers' wages and working conditions.

2. International Human Rights Instruments

This section explains each instrument and explores whether the instruments covers homeworkers. Thereafter, we compare the different instruments in terms of their strengths and weaknesses.

2.1. The UN Guiding Principles on Business and Human Rights

The Guiding Principles represent the first UN endorsed *corporate* human rights responsibility initiative. The GPs constitute soft law, meaning they do not impose any binding legal obligations upon states or corporations. Nevertheless, they represent an important instrument as the first framework that outlines the duties of national states derived from human rights treaties, and that outline corporations' moral responsibilities. The GPs establish three pillars: states' duty to protect human rights; corporations' responsibility to respect human rights; and access to remedy. Each is discussed in turn below.

⁹ Reporting on their study of 30 countries, and drawing on four other studies, one of which sampled 45 and another 127 countries, Millberg and Winkler (see *supra* note 109) state that with the exception of a study of the apparel and footwear industry, the data contest the correlation between economic and social upgrading. The data reveal a negative correlation: 'often economic upgrading leads to social downgrading'. Ironically, as firms capture more value, the real wages and working conditions of their workers deteriorate. Beinhardt and Milberg (2011)'s study of nineteen countries across four sectors concludes that there is a trade-off between employment growth and growth in wage. More jobs mean a decline in wages. And, the reverse is also true: "higher growth in value added per worker is associated with lower employment growth".

State duty to protect human rights

While the GPs are not legally binding, they nevertheless frame states' responsibility to protect human rights as mandatory, based their obligations under international human rights law to individuals within their territory (Simons and Macklin 2014). The GPs also establish that states should take steps to ensure that their corporations respect human rights in *other* countries.¹⁰ The GPs recommend that states:

- Enforce existing laws (including labour laws) that protect human rights and require corporations to “report on their human rights impacts;”
- Ensure that human rights are respected in their own supply chains;
- Establish complaints mechanisms to address alleged human rights violations.

Corporate responsibility to respect human rights

The GPs cite two international legal instruments – the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work – that provide the framework for businesses' responsibility. The GPs state that businesses have a responsibility to address “human rights impacts” which they have caused or contributed to through their own activities, but also to “prevent or mitigate” behavior by actors in their supply chains (such as suppliers or subcontractors) that violate workers' rights, even where they have not contributed to those violations. Businesses are expected to fulfill this responsibility by:

- Drafting a human rights policy, which should be communicated to all their stakeholders and adhered to in their business practices.
- Undertaking a due diligence of each supply chain to assess whether any act or omission in the production process might be contravening domestic law and/or causing human rights violations to workers.
- Implementing remediation processes, including an operational-level grievance mechanism.

Access to remedy

States are responsible for establishing both judicial and non-judicial grievance mechanisms¹¹ as part of a “comprehensive state-based system for the remedy of

¹⁰ Indeed, one of the principal criticisms of the GPs is that it does not go far enough to address the need for extra-territorial regulation (Simons and Macklin 2014; Delaney et al. 2013).

¹¹ The GPs outline a set of effectiveness criteria for non-judicial grievance mechanisms. Specifically, these should be: legitimate, accessible, predictable, equitable and transparent.

business-related human rights abuse” (Ruggie 2011:30).¹² The GPs state that remediation measures could include “an apology, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition” (Ruggie 2011:27). Businesses are expected to establish operational-level grievance mechanisms as a first port of call for grievances that should be “accessible directly to individuals and communities who may be adversely impacted by a business enterprise” (Ruggie 2011:31).

The GPs do not explicitly refer to homeworkers. Homeworkers may, however, be covered implicitly, in terms of two provisions. First, the GPs state that a corporation’s due diligence should include activities linked to its “operations, products or services by its business relationship” (Ruggie 2011:15). “Business relationship” is defined as “relationships with business partners, entities, in its value chain, and any otherentity directly linked to its business operations, products or services”, which arguably includes sub-contractors who contract to homeworkers. Second, the due diligences process should involve “meaningful consultation with potentially affected groups and other relevant stakeholders” (Ruggie 2011:19). Businesses should “seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement” (Ruggie 2011:20). This consultation requirement could present an opportunity for homeworker organizations to participate in due diligence processes. A weakness is a lack of clarity as to the form that consultation should take, which undermines the requirement.

2.2 OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the “Guidelines”) apply to the forty-seven countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises. The Guidelines represent governments addressing MNEs that are operating from, or in, signatory countries and constitute “non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards” (OECD 2011:3). They cover numerous areas, among them: employment and industrial relations; the environment, bribery and extortion; consumer interests; and competition and taxation. The Guidelines were amended in May 2011¹³ to incorporate the UN Guiding Principles by adding a chapter on human rights and

¹² These grievance mechanisms could include: civil and criminal courts, administrative bodies, human rights institutions, national contact points, labour tribunals, mediation, “or other culturally appropriate and rights compatible processes” (Ruggie 2011:30).

¹³ The OECD Guidelines were first signed in 1976.

including a section in chapter II on supply chain management that applies the GPs risk-based due diligence process. As the OECD Guidelines mirror provisions in the UN Guiding Principles, they implicitly cover homeworkers.

The Guidelines respond to the GP's recommendation that states provide a non-judicial grievance mechanism¹⁴ by requiring signatory countries to establish a "national contact point," (NCP) that can take a range of institutional forms. NCPs are tasked with promoting and implementing the Guidelines, and reviewing complaints of corporate non-compliance by trade unions, non-profit organizations, governments, and even members of the public (Simons and Macklin, 2014). As of 2017, NCPs in over 100 countries have handled over 400 cases.¹⁵

Although participation in the process is voluntary, MNEs engage to prevent reputational risk, or to avoid formal legal charges (Backer 2009). Some of these complaint processes have resulted in dialogue or mediation between the parties, and in some cases corporations have agreed to remedy the violation and pay compensation to affected individuals or groups (Simons and Macklin 2014).

Assessments of NCPs' effectiveness are mixed. Backer (2009) argues that NCPs can play an important role in changing corporate behavior, which over time, could have an effect as binding as hard law. NCPs' efficacy, he argues, is attributable to their autonomy and their flexibility to apply domestic or international law rules in their findings, while at the same time conducting a decision-making process unconstrained by these same rules. Simons and Macklin (2014) are more critical and argue that a lack of required procedural standards means is responsible for a lack of consistency and accountability among NCP's. For example, there is no requirement that NCPs establish an appeals process, monitor the implementation of a decision, or issue a decision when parties do not reach agreement, and no required timeframe for a dispute resolution process.

We think that the NCPs could be a strategic site of struggle for homeworkers and allies, in particular because the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector—a key sector for homeworkers—explicitly recognizes that homeworkers are legitimate workers in global value chains.

2.3 OECD Due Diligence Guidance in the Garment and Footwear Sector

The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (the "Guidance") was agreed to in 2017,¹⁶ after a multi-stakeholder consultative process. The Guidance includes a module on "Responsible sourcing from homeworkers," which establishes that homeworkers are "an intrinsic

¹⁴ Although authors such as Simon and Macklin (2014) have pointed out that the NCPs do not necessarily meet the "effectiveness criteria" outlined in the Guiding Principles for non-judicial grievance mechanisms (see footnote 21).

¹⁵ For a full list of these cases see: <http://mneguidelines.oecd.org/database/>

¹⁶ Since the 2011 update to the Guidelines, the OECD has clarified what the due diligence process should involve and developed a due diligence guidance has been developed for five different sectors including the garment and footwear sector—a key sector for homeworkers.

part of the workforce entitled to receive equal treatment” (OECD 2017:182). The module includes both a framework for “preventing and mitigating human rights and labour abuses when engaging homeworkers” – directed at a range of stakeholders – and a set of recommendations for enterprises to follow in designing their due diligence processes. The framework advocates the formalization of homeworkers through legal identity, recognition of their worker status, and contracts and/or authorizations that would facilitate the legalization of their work. The text notes that formalization is a process, and that legalization should not involve the imposition of requirements that would be prejudicial to homeworkers. The framework also states that organizing homeworkers is as a critical step towards their participation in social dialogue. Unfortunately, the chapter does not reference ILO Recommendation 204 on Transitioning from the Informal to the Informal Economy, which provides guidelines on achieving progressive formalization, with an emphasis on extending labour rights and social protection to informal workers.

Enterprises are encouraged to (a) identify potential and actual harms and (b) prevent or mitigate harms that are caused by the enterprise or are present in the supply chain. Under the first objective, enterprises are encouraged to identify production processes and sourcing countries where homeworkers are likely to be prevalent, and to assess whether suppliers in these areas have procedures in place for responsible sourcing from homeworkers. Enterprises should build their suppliers’ capacity to implement the following measures: (i) a “pre-qualification system” for intermediaries who contract work to homeworkers; (ii) internal protocols for contracting work to homeworkers; (iii) training for intermediaries involved in contracting work to homeworkers; and (iv) contractual transparency requirements from intermediaries that contract work to homeworkers (OECD 2017:184-185). Transparency requirements could include keeping records of all workers receiving orders; the details of the orders; and of any social benefits provided to homeworkers e.g. transporting the raw materials and finished goods.

The recommendations also include supportive measures that MNEs can take, including partnering with local initiatives that support homeworkers, and engaging with local and national governments to “promote the rights of homeworkers to access equal treatment [to other workers] under the law” (OECD 2017:185).

Although the Guidance represents significant progress in explicitly mentioning homeworkers, its potential to protect homeworkers is limited by its soft law status. Also, there are significant omissions to the framework and recommendations. For example, while it mentions the importance of organizing homeworkers, MNEs are not encouraged to recognize existing representative organizations of homeworkers as legitimate partners in the due diligence process, including discussions on the form that transparency requirements and grievance procedures should take. And, a key recommendation should be that MNEs require their suppliers to mention the name of their brand in sub-contracting agreements – a

requirement in the Australian supply chain legislation. Homeworkers would then be able to identify the brand, research its commitments to decent work, and register complaints through its complaint mechanisms.

Despite these shortcomings, the Guidance represents a potential mechanism for advocacy. Although the recommendations are limited and not binding, they recognize homeworkers as integral to supply chains and give legitimacy to their claims.

2.4 The ILO MNE Declaration

In November 1977, the ILO adopted the “Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” (the “MNE Declaration”). The ILO Governing Body approved amendments to the MNE Declaration in 2000 and 2006 to reflect the changing realities of global production and new international labour standards. The MNE Declaration provides guidelines for “enhancing the positive and social labour effects of the operations and governance of multinational enterprises to achieve decent work for all...” (ILO 2017:v). It is a voluntary instrument, therefore not binding and cannot be adjudicated by any international adjudicatory body.¹⁷ Governments, multinational enterprises and employers’ and workers’ organizations are simply invited “to observe the principles embodied therein” (ILO 2017:1).

After the 2016 International Labour Conference (ILC) general discussion on supply chains, the Declaration was revised to incorporate the UN Guiding Principles. A human rights dimension is now included, which establishes responsibility on the part of corporations to identify, mitigate, prevent and account for adverse human rights impacts in their supply chains. And it establishes meaningful consultation with potentially affected groups as integral to the due diligence process. While the Declaration does not explicitly refer to homeworkers, such a provision covers homeworkers indirectly.

The Declaration recommends that national, tripartite constituents (governments employers and workers) establish national focal points (ILO 2017:Annex II, 1b) to promote its principles, engage in capacity-building, information dissemination, and facilitate tripartite dialogue.

The Declaration does not mention homeworkers, but given that it is based on the UN Guiding Principles, which we argue include homeworkers, the same arguments can be made with respect to the Declaration.

¹⁷ If, however, a particular principle in the Declaration reflects an ILO convention that has been ratified by particular countries and the countries promulgated legislation to give effect to the ratification then that principle would be binding in those countries and capable of adjudication and enforcement.

2.5 International instruments' potential to protect homeworkers

Although only the OECD Guidance on the garment and footwear sector explicitly mentions homeworkers, there is an argument that the other instruments would also cover homeworkers. The OECD instruments have most traction because homeworker organizations could report non-compliant companies to National Contact Points, including their failure to engage in “meaningful consultation” with them (as in the successful *Vedanta* case) as part of an advocacy strategy with allies.

Our analysis of these international agreements elides the contestations that underpin them, of course. The ILC tripartite general discussion on supply chains' Conclusions recognize that homeworkers are an ineluctable part of supply chains, which established a basis for their inclusion in the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. This recognition was hard-won: Homeworker organisations participated in the discussions and the global research-advocacy network, WIEGO's¹⁸ participated in pre-conference caucuses with the International Trade Union Confederation (ITUC) and in post-conference workshops facilitated by the Global Labour Union.

Despite their soft law (non-binding) status, these instruments are significant for homeworkers for several reasons: First, human rights rhetoric shifts public consciousness, which is often a precursor to “enforcement” through social pressure by civil society groups, which legal theory calls “new governance” and it can be used in advocacy to generate the political will necessary to enact legislation at the national level. Second, recognition at the global level is often a precursor to securing recognition, and rights, at the national level. For example, Homeworkers in Thailand and Bulgaria have used ILO Convention 177 on Home Work to fight for the recognition of homeworkers as workers, at the domestic level.

The next sections reflect on this interplay between international and international law. We start with a discussion on ILO Convention 177 on Home Work, which is followed by a discussion of national legislation in three countries: Bulgaria, Thailand and Australia. Our aim is to remind us that both the existence of law and its content is an outcome of political struggle, *as is its enforcement*. And enforcement is contingent upon strong organisations of homeworkers and support from civil society – most notably from trade unions, but also from non-profit organizations, development organisations, and from donors.

3. ILO Convention 177 on Homework

The Self-Employed Women's Association of India (SEWA), the world's largest trade union of informal workers, facilitated international exchange and dialogue among homeworker groups in South East Asia and Europe in the 1980s. In

¹⁸ Women in Informal Employment, Globalising and Organising – a research advocacy network of membership based organisations, researchers and development practitioners. See www.wiego.org

the mid-nineties, it spearheaded the formation of an international network, Homenet, and a global campaign for a Convention on homework in the mid-nineteen nineties.

Prior to the adoption of Convention 177 on Home Work in 1996 (C177), the ILO's stance on homework was that it was exploitative, and that homeworkers were too disparate and isolated to be organized (Jhabvala and Tate 1996). In the absence of formal representation at the ILO, HomeNet advocated homeworkers' demands through formal trade union channels, and received support from the International Union of Foodworkers (IUF), the International Confederation of Free Trades Unions (ICFTU) and the International Textiles, Garments and Leather Workers Federation (ITGLWF). Homeworkers' principal demand that they should enjoy the same labour rights as other waged- workers ("Commemorating" 2016). The Convention was agreed to in 1996.

C177 advocates that homeworkers must be treated the same as other waged-workers. It establishes homeworkers' rights to freedom of association, occupational health and safety, fair remuneration, freedom from discrimination, social security protection, access to training, a minimum employment age and maternity protection (Article 4). And it states that homeworkers must be included in national labour statistics. Only eleven countries have ratified the Convention.

HomeNet dissolved, but organizing and network-building continued at the regional level, and HomeNet South East Asia (HNSEA),¹⁹ Home Net South Asia (HNSA),²⁰ and HomeNet Eastern Europe were formed.²¹ Since the adoption of Convention 177, homeworkers' organizations and their allies have advocated for legislation at the domestic level. We review efforts in Bulgaria, Thailand and Australia below.

4. National Legislation that Protects Homeworkers

Legislation that protects homeworkers typically employs one of three approaches. The first approach expands the traditional employment and/or labour relations legislation that covers employees to include sub-contracted work, including homeworkers. The legislation therefore creates labour rights for homeworkers as if they were employees. The second approach is to legislate specifically to protect homeworkers, as is the case in Thailand. The third approach, which Australia has

¹⁹ HomeNet South East Asia (HNSEA) has five affiliated national organizations from Cambodia, Indonesia, Thailand and the Philippines that represent 25,698 workers

²⁰ HomeNet South Asia (HNSA) has 57 affiliate organizations representing over 600,000 workers from Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka)

²¹ HomeNEt Easern Europe (HNEE) has thirteen affiliates – the largest, AHBW, has 30,000 members (from Albania, Armenia, Bulgaria, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Montenegro, Serbia, Tajikistan, Turkey, Ukraine, and Uzbekistan) (WIEGO 2017). Organizing efforts are ongoing in Africa and Latin America.

adopted in the textile, garment and footwear sectors, is to combine a “due diligence” human rights approach with a mandatory code that contains stringent enforcement mechanisms. Below we describe each of these approaches, including the political struggle that resulted in the legislation.

4.1. Bulgaria: expanding existing labour legislation

Several countries, including Bulgaria, Chile, Brazil, Nicaragua, Uruguay and South Africa, have amended their labour legislation to incorporate sub-contracted work, including homework. We discuss Bulgaria because the legislation was amended as a result of campaigning by a movement of home-based workers, and Bulgaria has ratified C177.

The Association of Home-Based Workers, Bulgaria (the Association), a democratic, membership-based organization that registered as an association in 2002, boasts 35,000 members²² drawn from 22 of Bulgaria’s 28 provinces. It is governed by a General Assembly, which is comprised of approximately 150 elected delegates, meets annually. It elects a national board and chairperson every five years. Each province elects a committee and coordinators who represent the province at quarterly national meetings. Were the Association recognized as a trade union, it would be one of the largest trade unions in Bulgaria (Spooner 2013).

The Association and its allies, including international NGOs, campaigned for the Bulgarian government to ratify Convention 177, which it did in July 2009. Subsequently, in November 2010, the government signed a “National Agreement on the Regulation of Home-based Work” (Spooner 2013; Marshall 2017)²³ that outlined the basis on which the Labour Code would be amended. The Labour Code was amended in 2011 to cover sub-contracted ‘dependent’ workers,. The Labour Code stipulates that dependent workers must have a contract and must enjoy the same entitlements as employees including entitlements derived through collective bargaining agreements or through social security legislation. (Marshall 2017).

According to the Association, the government has neither complied with C177 (for example there is no homework policy, nor are homeworkers visible in statistics), nor has it implemented the Code because “the government holds the opinion that because [homeworkers in Petrich] don’t have contracts they are independent units and thus fall outside of the scope of C 177.”²⁴ The Association was instrumental in the formation of the union of informal workers (“Unity”), which was founded in May 2014, and which represents several sectors of informal workers

²² For a history of AHBW see Spooner 2013 at <http://www.wiego.org/publications/challenges-and-experiences-organizing-home-based-workers-bulgaria>. Home-based workers comprise both own account workers, and waged-workers. Often the same worker is an own account worker for part of the year, and a waged-worker in a different season (Spooner 2013).

²³ Correspondence between the Association and the ILO’s International Labour Standards Department, that monitors compliance with Conventions (on file with the author)

²⁴ E-mail exchange with by Violeta Zlateva on 22 July 2017.

(Zlateva 2014). Unity's appeal to the ILO to pressure its government to comply with C177 and to enforce its Labour Code, had not met with success. WIEGO is supporting Unity to craft a strategy for the implementation of the code. Bulgaria's ratification of C177 will be critical to such a strategy. But, implementation of a strategy requires a strong movement, allies, and financial and other resources.

4.2 Specific legislation to protect homeworkers: the case of Thailand

HomeNet Thailand, a HomeNet Southeast Asia affiliate, has been at the forefront of national advocacy efforts in Thailand for the recognition and legislative protection of homeworkers. Their decade-long struggle resulted in the Homeworkers Protection Act of 2010. Below we discuss the political process that led to the legislation, the terms of the Act, and reflect on whether the Act has made a difference to homeworkers.

In 1995, Thailand experienced an economic crisis. Factories closed or laid off workers. Many workers became informal home-based workers and approximately 80 per cent of the work was sub-contracted. HomeNet Thailand, supported by the ILO (whose Thailand representative was previously a trade unionist), began to organize and advocate for the recognition of homeworkers' contributions and for their being organized. They argued that the Ministry of Labour should extend statutory labour protection to homeworkers, including that the statutory minimum wage should apply to them. Officials argued that this was impossible, since informal workers were not recognized as workers, and villagers' livelihood activities did not constitute legitimate employment.

HomeNet Thailand, campaigned for a national Act that would establish homeworkers' labour rights and social protections, with the support of WIEGO, the ILO, HomeNet Southeast Asia, the Foundation for Labour and Employment Protection (FLEP) and other allies, (WIEGO 2015). They pursued the following strategies: First, they focused on increasing visibility of homeworkers through statistics: "We have statistics, so they cannot deny their existence."²⁵ Second, they increased organizing homeworkers to build a democratic membership-based organization that could be mobilized as a political constituency. Third, they conducted research to identify issues for homeworkers, which they used to mobilize homeworkers and to engage them in legislative processes. Fourth, they drafted legislation with the participation of homeworkers. And fifth, they conducted a campaign that included both a media strategy and a series of hearings.²⁶

In 2010, the Thai Parliament passed the Homeworkers Protection Act, which is premised on equal protection of homeworkers and factory workers. The Act is

²⁵ Meeting with 10 people who were part of FLEP and/or HomeNet Thailand and who recounted the history of the struggle for the Act to the author.

²⁶ The history to the Act was collected through interviews with 10 members of HomeNet Thailand who were at the forefront of the struggle, in April 2017 by one of the authors.

innovative in a number of respects: First, the Act stipulates that homeworkers must be given a written contract²⁷ and provides that where a contract gives the hirer an “undue advantage,” the court has the power to order that the terms of the contract only be enforced in so far as the terms of the contract are reasonable (sec 8).

Second, it is a criminal offence to pay homeworkers less than the statutory minimum wage. Payment to homeworkers must be made at their place of work within seven days of delivery of the finished products, and limited deductions may be made from such payment (sec 19). Third, homeworkers must be informed if work is hazardous or involves toxic substances, and the hirer must provide safety equipment. If hirers contravene these provisions, they will have to pay medical expenses, rehabilitation or funeral expenses (sec 24). Fourth, the Act stipulates that the Ministry of Labour must draft “secondary laws” or regulations for the act to come into effect, which should be overseen by a tri-partite committee comprised of Director Generals from several Ministries, three homeworkeer representatives, and three “hirers.” At the time of writing, 17 of the 21 laws had been drafted, including one dealing with minimum piece rates. Finally, Section 6 provides that where a particular case by a homeworkeer against a hirer is believed to be “*for the common good*,” the state will appoint a legal representative to represent the home worker in the Labour Court.

Homeworkers may lodge complaints with the Department of Social Protection, and HomeNet Thailand delivered “know-your-rights” training to its members. But no one has yet complained. Interviews with homeworkers suggest that fear of losing their job has a significant chilling effect. HomeNet Thailand has pressured the Department for the Protection of Informal Workers within the Labour Ministry to engage in a collaborative pilot project in three provinces to “implement” the Act, which is under-way.

4.3. Australia’s Supply Chain Legislation

In Australia, homeworkers, who are mostly immigrants from Vietnam and Cambodia, comprise an estimated 40 per cent of the workforce in the textile, clothing and footwear industries (Rawling 2014). The Textile, Clothing and Footwear Union of Australia (TCFUA) initiated a campaign to realize labour rights for homeworkers. The campaign mobilized 4000 Australian homeworkers to raise public awareness of their work conditions; created an organization called Asian Women at Work (AWATW) and the FairWear Campaign (which involved other unions, students, community organizations, faith groups and other civil society allies). (Rawling

²⁷ This stipulation addresses a common complaint from homeworkers: where a written contract exists, the terms are unilaterally decided and they are not given a copy.²⁷ In the absence of a written contract, homeworkers are only given copies of work orders, which only stipulate the number of items to be produce and the rate per piece.

2014). The campaign resulted in a public outcry, senate enquiries on homework, and placed pressure on industry leaders to support the regulation of supply chains (Burchielli et al. 2014).

Labour law in Australia is comprised of legislation—the Fair Work Act of 2009—as well as collective bargaining agreements that establish minimum conditions of employment for the industry (Marshall 2017). The collective agreements are negotiated with multi-employer bodies and are given statutory force as they are extended to the entire industry, including workers and employers not party to the agreements. These collective bargaining agreements are known as Federal “Awards.” In 1987, the Federal Clothing Trades Award (now the Textile, Clothing, Footwear and Associated Industries Award 2010) was extended to include homeworkers (Marshall 2017). Homeworkers were now entitled to the same labour rights, such as minimum wages, overtime pay, paid vacation, maternity leave etc., as employees.

Marshall notes that firms responded by requiring homeworkers to register as self-employed own account workers, which enabled the firms to claim that they were contracting with independent businesses and therefore the Award did not apply. In response, the “Fair Wear Campaign” developed a *voluntary* Code of Practice—a soft law instrument that companies signed onto to avoid public scandal.²⁸ In 2012, the union and allies’ lobbying resulted in the Fair Work Act being amended to provide for a federal *mandatory* code that would require retailers to require their suppliers to extend labour rights enjoyed by employees, to homeworkers (Rawling 2014). While a federal mandatory code is yet to be enacted, three states have enacted retailers’ codes as legislation – New South Wales (“NSW Code”), South Australia and Queensland (the latter was repealed in 2012).

The NSW and Southern Australian Codes are similar and we therefore analyze only the former. The “Ethical Clothing Trades Extended Responsibility Scheme” (referred to as the NSW Code), was enacted in terms of the Industrial Relations (Ethical Clothing Trades) Act 2001 in December 2004. The NSW Code is subordinate legislation, enacted by way of proclamation under the Industrial Relations (Ethical Clothing Trades) Act 2001. It is therefore a mandatory code and compliance is obligatory as a matter of law. The NSW Code is not only applicable to the “lead firm” or “effective business controller” at the top of the chain but also applies to lower levels of the chain, namely suppliers and contractors. This broad coverage in itself is an innovative provision. The terms “retailer,” “supplier” and “contractor” are widely defined, which makes it difficult for these parties to escape their obligations through creative corporate structuring. The Code regulates corporations incorporated in NSW *and* retailers that sell clothing in NSW that sub-

contract production to homeworkers in any Australian state. It therefore regulates corporations domiciled in other jurisdictions, including international brands.

The code applies a “due diligence” approach envisaged by the UN Guiding Principles, but it takes this a step further by *requiring* firms to report both to the state and to unions; non-compliance is a criminal offence.

Retailers have the following obligations under the Code: before entering into an agreement with a supplier, the retailer must ascertain whether the supplier, or any of its subcontractors, will contract work to an outworker (homeworker).²⁹ Where an outworker is to be engaged, the retailer must request the supplier to provide the names and addresses of each contractor, and of each outworker.³⁰ Retailers must in turn disclose both to the government and to the NSW branch of the Textile Clothing and Footwear Union of Australia (the NSW Union) the names and addresses of all suppliers, and whether outworkers are engaged in production.³¹ Also, “where a retailer becomes aware that an outworker has been engaged on less favourable terms than the conditions described under the applicable award or other industry instrument, the retailer is obliged to report the matter to the NSW Union or the government” (NSW Code sec 11).

Section 7 of the NSW Code stipulates that the provisions of the code are mandatory and apply to all persons engaged in the manufacturing of clothing products in Australia *and* the supply and retail sale of those products in NSW. Breaches of the NSW Code may therefore be prosecuted by the State. We are not aware of any prosecutions in terms of the NSW Code, but according to Rawling (2014), the regulator frequently deploys the threat of prosecution and retailers comply in order to avoid prosecution and the risks of negative media exposure.

The legislation is enforced by different mechanisms—government inspectorates, union monitoring, and through voluntary membership in the multi-stakeholder body, Ethical Clothing Australia. Ethical Clothing Australia assists companies to map their supply chains and to establish whether their suppliers and contractors are complying (whether homeworkers are “receiving their legal entitlements” and accredits compliant companies (Marshall 2017; Nolan 2017).

4.4 A comparison of different approaches at the national level

The three approaches described above are quite different, and rely on different enforcement mechanisms. In the case of Bulgaria and countries such as South Africa, Chile, Brazil, Nicaragua and Uruguay, existing labour legislation was amended to address disguised employment. Each country has a different legal mechanism by which the homeworker can prove that she is an employee, which

²⁹ NSW Code Sec 10(1)

³⁰ NSW Code sec 10 (1) (b) read with Part B of Schedule 2 to the NSW Code.

³¹ NSW Code sec 12(3), read with Schedule 1.

triggers employee rights. The weakness of this approach is that the legislation assumes an employer/employee relationship. This has two implications: First, if the homemaker contracts directly with a factory, the legislation would help her show that she is *de jure* the factory's employee and is entitled to the same rights as other employees. If, however, she contracts with a contractor, sub-contractor, or another homemaker, she is likely only to be able to establish an employment relationship with the contractor, and not with the factory (unless the contractor is a factory employee or an agency relationship can be proved). This means that the claims for labour rights are against a supply chain actor who often enjoys as little bargaining power as the homemaker. The Thai legislation has the same effect, in that the "hirer" is liable and the legislation does not deal with the hirer's claim against the factory. There has been no litigation to see how the courts are likely to deal with this lacuna. Second, if a homemaker works for three different contractors on an intermittent basis, she may not be able to satisfy a court that any one is her employer.

Australia's legislation, by contrast, regulates the entire chain, rather than the "employment" relationship only. The homemaker can claim from anyone who she regards as the "employer" and if that person is a contractor or sub-contractor, he can make a claim against the actual employer.

The three approaches differ in another important respect. In the case of Bulgarian and Thai legislation, the burden of enforcement rests with homeworkers. In Thailand, HomeNet Thailand is pressuring the government to enforce the legislation through campaigns targeted at factories complying voluntarily, rather than because of inspection, and is loathe to litigate.³² In Australia, by contrast, several value chain actors bear responsibility for enforcement. The retailers, factories, suppliers and contractors each have transparency and disclosure duties to the state, and to the trade union. The state has a duty to inspect and can be a party to litigation, and trade unions participate in enforcement by reviewing the details reported by the retailers and other parties, and have powers of inspection.

5. Conclusion

The global instruments recognise that lead firms (retailers and brands merchandisers in buyer-driven chains) exercise considerable power in their supply chains. The instruments are animated by a human rights framework that is based on the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. They rely on several regulatory techniques, including:

- Normative commitments – MNEs should draft a human rights policy, distribute it to its stakeholders and provide their suppliers with training

³² The author, Von Broembsen, spent two weeks in Thailand with HomeNet Thailand from 27 March to 7 April. One of the purposes of the visit was to discuss the implementation of the Home Worker Protection Act.

- Disclosure requirements – MNEs need to make disclosures about their own business practices and about their supply chains that are based on their a due diligence of their supply chains. A due diligence includes consultations with “affected parties,” which include homeworkers.
- Using Commercial “leverage” – MNEs are to use their market power to insert labour rights in contracts with their suppliers’ and to withdraw from contracts if their suppliers refuse to address human rights violations.
- Grievance mechanisms and remedies where “human rights violations” have taken place.

None of these corporate responsibilities are mandatory, of course. And none of the instruments challenge corporations’ procurement practices, including pressure for lower and lower prices.

Nevertheless, these global instruments are significant. First, the language of human rights provides a universal standard of behaviour and a floor of rights that is dis-embedded (to borrow from Polanyi) from market rationales. And importantly, in the case of the OECD instruments, it enables civil society to engage in enforcement processes through national contact points. Second, the global and the national are over-lapping: often recognition of rights at the global level is a precursor to the recognition of rights at the national level and visa-versa. We have discussed the examples of Homeworker legislation in Bulgaria and Thailand as an example of the recognition at the global level, in the form of Convention 177 on Home Work, fuelling advocacy efforts at the national level. It works the other way around too -- the Australian legislation was cited several times by the Worker Group in the ILC General Discussion on Supply Chains as an example of legislation that hold lead firms to account, aspects of which could be replicated at the global level.

With the exception of Australia, national legislation has yet to make a difference to homeworkers. One of the reasons why the Bulgarian and Thai HomeNets are reluctant to litigate is because they fear that factories will move to another country.³³ As Humphrey and Schmidt (2005) argue, in the case of “captive supply chains,” which are labour-intensive, require little technical skill on the part of the supplier, and therefore few sunk costs on the part of retailers, retailers can, and do, easily move from one country to another. From a governance perspective, what is required are overlapping, plural governance mechanisms at local, national, regional and global levels. Efforts at creating regional pacts—for example countries in a region agreeing to legislate and enforce minimum living wages (see the Asia Minimum Wage Campaign)—are therefore as important as focusing efforts on international or national law.

In March 2017, France enacted a Corporate duty of vigilance Law, which makes supply chain due diligence mandatory for its corporations. It is hoped that it is the first country. The task for homemaker organisations is to advocate for their explicit inclusion in such legislation. Otherwise, there is a real risk that MNEs will ban their suppliers from subcontracting to homeworkers. Homeworkers are organised, despite significant challenges. But they need support in the form of (a) donor funding to build strong movements, advocacy campaigns, and to participate in global and national regulatory setting processes; (b) alliances with formal trade unions; and (c) their collective organizations to be legally recognised as trade unions.

Alliances between formal trade unions and homeworkers have proved critical to the adoption of Convention 177 and to Australia's comprehensive legislative framework. Formal trade unions' institutional power and leverage lends legitimacy to homeworkers' claim that they are inextricably part of global value chains. While unions are organized internationally along sectoral lines, informal workers (including contractors, subcontractors and homeworkers) are largely excluded from collective bargaining between transnational sectoral unions and brands (resulting in global framework agreements) and from tripartite social dialogue at the national level.

The challenges for homeworkers simply to participate in the rule-making processes are numerous, but their participation is critical. If they are excluded from law (whether soft law at the global level, or legislation at the national level) the risk is that corporations simply ban homework. Apart from the devastating implications for homeworkers, the hard-won rights for factory workers will also be compromised. Homework will not be eradicated – it will simply go underground. Factories will still be under pressure to produce more for less, and they will continue to rely on the age-old mechanism of reducing their costs by subcontracting work. In the words of Zehra Kahn, General Secretary of the Home-Based Women Workers Federation from Pakistan, in her address to the International Labour Conference plenary on behalf of homemaker organisations at the General Discussion on supply chains:

Failure to recognize the economic contribution of homeworkers as part of global supply chains will simply mean that the bottom of the supply chain remains unregulated.

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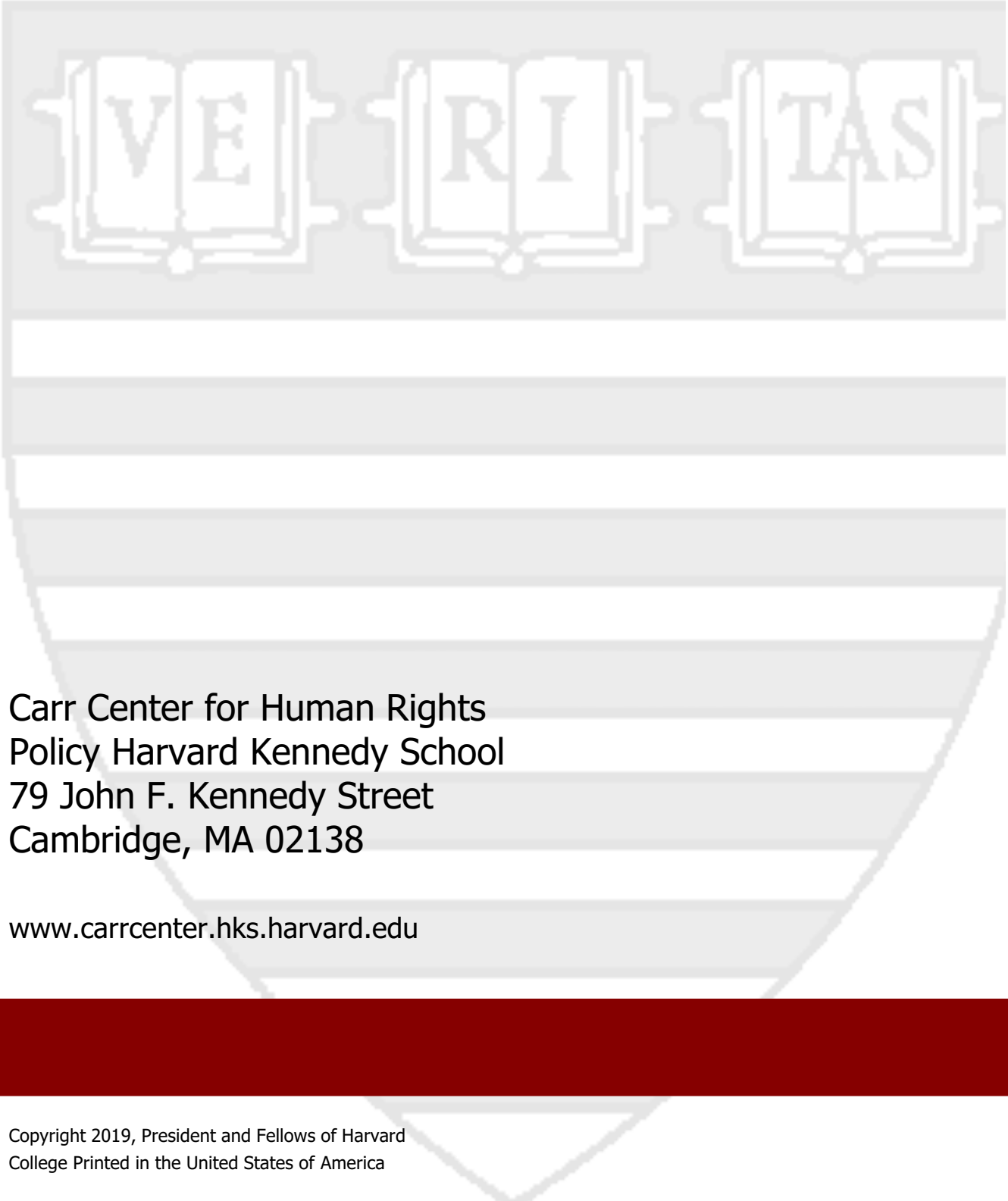
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**Realizing Rights for Homeworkers: An Analysis of
Governance Mechanisms**