

Law & Informality Insights N° 5



Shoe shiner in Mexico City in 2019. Photo: Lorena Reyes Toledo

Social Movement Lawyering: A Reflection on the Nature of Law and Lawyering Through the Lens of Informal Workers

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“When I started approaching the law through the lens of the disadvantaged, it became clear to me that only through a “genealogy”² of the law – a deliberate examination of its origins, rationale and ultimate purpose – it is possible to understand the power dynamics, political struggles, and hegemonies that underpin legal provisions and to identify what and whose interests they serve.”

¹ Written with support from Krithika Dinesh and Marlese von Broembsen

² This is a reference to Michel Foucault’s analytical methodology. Foucault uses a genealogical approach to enquire the origins of the present and understand how current situations are originated. See: Foucault, Michel. *The Archeology of Knowledge and The Discourse on Language*. A M. Sheridan Smith, Pantheon Books New York, 1982.

Introduction

In 2009, when I was working as a consultant for the World Bank, I enrolled in a 3-day training on access to justice. The training was held by Justice for the Poor, a programme hosted by the World Bank Justice Reform unit. The programme promoted a bottom-up approach to access to justice, focusing on the justice needs of the poor and marginalized. In the introductory session, the facilitator surprised us with a seemingly trivial question: what is the law? Was he really asking us, a group of seasoned lawyers, to dwell on the concept of the law? Indeed he was. As the discussion picked up, it became clear that the answer was not as straightforward as it looked.

By this time, I had already been working on access to justice for marginalized groups for several years. And yet, that question - what is the law? - caught me off-guard. The provocation prompted a decade-long reflection on the nature of law, development, and the relationship between the two.

When I joined WIEGO in 2018, I co-presented a workshop on **administrative justice** for organized street vendors and shoe shiners in Mexico City. The objective, I thought, was to train workers to use administrative justice to challenge officials' actions (e.g. evictions and confiscation of their goods) and hold local authorities accountable. We invited local pro-bono lawyers to participate in the workshop, with the aim of establishing long-term relationships with worker organizations to bring cases against local officials violating worker rights. To my surprise, the participants had little interest in taking local officials to court. What they wanted, they told me, was to keep their good relationship with those officials and use existing contacts and pathways to find solutions suited to their needs. Indeed, street vendors and shoe-shiners experience law as mostly punitive because it often sanctions their livelihood activities as undesirable – prohibited at worst, tolerated (with extensive limitations) at best. Once again, I had to question my deeply ingrained assumptions

about the law, its nature and purpose, and listen to the lived reality, perceptions and understanding of those impacted by the law that I thought I was there to teach them about.

What follows is a reflection on what my work with WIEGO has taught me about the nature of law and what lawyering for social movements is about. Because it is based on my experience, it often refers to my work with vendors and other workers in the informal economy working on public space, as part of my role with the WIEGO Law Programme. However, most of the points discussed apply to social movement lawyering in general. Rather than presenting solutions, this is an invitation to engage with us in re-imagining our role as advocates supporting the poor and marginalized.

Bargaining in the “Shadow of the Law”

Vendors in the informal economy often see going to court as a double edged sword – a last resort when all else has failed. In situations of informality, personal relationships are often highly valued and individuals and groups are in constant conversation to negotiate rights and benefits, often outside of, or even in contradiction to, existing laws and regulations. For these vendors, there are strong incentives to protect their relationships with local authorities who manage access to public space, and to work out conflicts amicably.

The law, however, is far from absent from these relationships and negotiation processes and their outcomes. Rather, the law shapes them, influences the power relations between the parties, and distributes “endowments”.³ From this perspective, workers can use the law to access formal or informal negotiation spaces and to strengthen their bargaining position – Mnookin and Kornhauser’s famous “bargaining in the shadow of the law”⁴ concept. From this perspective, the law provides each party with bargaining chips in the forms of rights, entitlements and/or obligations. The parties’ behaviour during negotiation is shaped, in part,

³ Kennedy, Duncan. “Legal Economics of U.S. Low Income Housing Markets in Light of “Informality” Analysis”. *The Journal of Law in Society* (2002) 4:71.

⁴ Mnookin, Robert H and Lewis Kornhauser. “Bargaining in the Shadow of the Law: The Case of Divorce”. *The Yale Law Journal* (1979) Vol. 88: 950.



Participants at an administrative justice workshop in Durban, South Africa, in 2017. Photo: WIEGO

by their knowledge of such entitlements and the outcome they could expect were they to take the dispute to court.⁵ Three factors are relevant: 1. the existence of legal provisions recognizing rights and entitlements of the parties; 2. the parties' knowledge of such legal provisions; and 3. the parties' ability to make a credible claim that they will seek a judicial resolution to the controversy if negotiations fail. Street vendors are often involved in this type of bargaining, which can happen both in vendors' everyday relationships with public authorities as well as in formal negotiation processes.

A review of the evaluation reports of the administrative justice workshops we held in South Africa, Ghana and Mexico between 2017 and 2018 illustrate how vendors used their newly acquired knowledge of the law to stand up to local authorities who were acting unreasonably, unprocedurally or beyond the scope of the empowering provisions. One is the case of a *boleador* (shoe-shiner) working in Mexico City, whom the authorities wanted to relocate due to alleged renovations in the area. Based on his

knowledge of the principles of administrative justice, Jose Alfredo Hidalgo Lemus was able to show the officials that their actions were illegitimate due to lack of previous notice and to the fact that he was not in any way impeding the renovation works. Jose concluded that

“[public officials] thought that we did not know the law, but they saw that I knew it and they realized that they cannot do what they want... I didn't know anything about administrative law before the workshop. I did not know whether or not an action was legal. Now I know that administrative actions need to be grounded [in law]. And now I can say it better.”

Similarly, other shoe-shiners successfully avoided eviction from public spaces by pointing out that the regulation⁶ governing their trade provides that they cannot be relocated without written motivation. In South Africa, Rosheda Muller, President of The South African Informal Traders' Alliance (SAITA), used the Promotion of Administrative Justice Act (PAJA) to fight back

⁵ Ibid.

⁶ Reglamento Para los Trabajadores No Asalariados del Distrito Federal 1975 (1975 Regulation for Non-salaried Workers of the Federal District).

against an attempt by the Cape Town city council to move traders from their habitual place of work where they are contractually entitled to vend – to make way for a film crew. Rasheda wrote a letter to the council, referring to the PAJA. When the city council failed to respond, she played another bargaining chip: she would ask the Socio Economic Rights Institute (SERI), which had participated in the administrative justice workshop, for help. The Council rapidly agreed to meet with the traders and reversed its decision.

In a broader sense, knowledge of the law and the credible threat of enforcing it in court can help workers overcome and upend skewed power relations. Consider two alternative negotiation models that Mnookin and Kornhauser analyze. In the strategic model, a relatively norm-free process centered on the “transmutation of underlying bargaining strength into agreement”, negotiating parties rely on sheer power. In these cases, informal workers are likely to be at a disadvantage. Knowledge of the law and the ability to use it effectively allows workers to move from the strategic to the “norm-centered model” where bargaining happens against the backdrop of rules and the ability of the parties to enforce them.⁷ In this situation, workers use legal entitlements as cards in a game: they will consider the entitlements available to the other players and their counterparty’s ability to make credible threats and to bluff.⁸

A key element of the norm-centered model is the expectation the parties have with regard to the outcomes were the dispute to be decided in court. This is especially relevant when the law leaves a high level of discretion to the judge (for example, in the case of vagrancy laws).⁹ The level of access to justice that workers enjoy also impacts whether they would be willing and able to play their legal entitlements in negotiations. Elements such as cost, availability of legal assistance, expectation of enforcement and, in general, trust in the justice system and perception of

the law (together with their willingness to “bluff” in the negotiations should they conclude that going to court is not really an option) also determine the value of legal entitlements and add to workers’ bargaining power.

“Everything is Political”: Uncovering the Distributive Role of the Law

For many of us, particularly lawyers trained in the civil tradition, the law is technical. Its purpose is to keep order in society and to guarantee safety. The law fulfils these functions by creating binaries: legal/illegal, permitted/not permitted. Viewed through this lens, the law seems non-negotiable, especially to those relegated into the categories of illegality/not permitted. This is how laws regulating access to public space operate, when they define what uses are permitted or prohibited, and where. In Dakar, the use of sidewalks by itinerant vendors to sell their merchandise is prohibited; the economic activity of these traders is labelled illegal and sanctions (such as evictions, confiscation of merchandise, arrest and fines) apply to those who trade in violation of such prohibitions. The bundle of laws and regulations that make up the law regulating access to public space includes urban planning laws and regulations, street vending regulations, environmental and urban codes, traffic laws, health and safety regulations, and nuisance laws. Such laws and regulations distribute power, rights and resources. They reflect political choices, which are underpinned by the prioritization of particular visions of a city and of particular social and economic interests. The decision to designate portions of public space as green areas for recreational use; or the prioritization of foot or vehicular traffic – or parking – over occupation of space by street vendors; or the decision to replace a traditional market with a modern mall are political choices that benefit certain groups over others. The law thus reflects and reproduces ideological stances that deem certain rights – and not others – as worthy of protection and certain livelihoods – and not others – as worthy of being enabled and supported.

⁷ Mnookin, Robert H and Lewis Kornhauser. 950, 973

⁸ Ibidem. This concept of a card game has been coined and is used in the context of the critical legal studies (CLS) theory. See Kennedy.

⁹ For an analysis of vagrancy laws and their implications for workers in the informal economy see: Dinesh, Krithika, Pamhidzai Bamu, Roopa Madhav, Teresa Marchiori and Marlese von Broembsen. “Re-examining Legal Narratives on Vagrancy, Public Spaces and Colonial Constructs: A Commentary on the ACHPR’s Advisory Opinion on Vagrancy Laws in Africa”. Law and Informality Insights (2021) No.4



*Street vendors in Durban, South Africa, in 2018.
Photo: Jonathan Torgovnik*

Recognizing the intrinsically political nature of the law is essential for workers to be able to use the law to their advantage. As a lawyer educated in a civil-law system, law was presented to me in abstract terms, often disconnected from the very reality that it seeks to regulate. But when I started approaching the law through the lens of the disadvantaged, going beyond the legal text and analyzing the underlying interests it reflects has become an essential part of my “on-the-job” legal education. It became clear to me that only through a “genealogy”¹⁰ of the law – a deliberate examination of its origins, rationale and ultimate purpose – it is possible to understand the power dynamics, political struggles, and hegemonies that underpin legal provisions and to identify what and whose

interests they serve. Senegal’s legal framework regulating vending in public space illustrates this point. The normative framework revolves around law 50/1967, an obsolete piece of legislation perpetuating colonial discriminatory attitudes. The Ministry of Interior and the Commission for Legislation, Justice, General Administration and Internal Regulation prepared preliminary reports to accompany the submission of the bill to parliament. The reports label informal vending as a sign of underdevelopment and state that the aim of the proposed law is to “[keep] the “undesirables” from the streets”.¹¹ They eloquently describe the rationale that guided the drafting of the bill as “the need to regulate the disorderly occupation of public space by itinerant traders, porters, street acrobats (cireurs), and car guards (gardiens de voitures)”. The reports note that such activities are “frequently of such a nature to bring serious threat to the country’s prestige”, and are not only inappropriate for the level of development of the country, but are also “dangerously incompatible” with its economic aspirations as a “hospitable country and touristic attraction.” When commenting on the nature of sanctions set up by the law – which are criminal in nature and include imprisonment – the Ministry’s report notes that while they are indeed severe, they are “adequate” to end the “plague” of this “beggary in disguise.”¹² To this day, law 50/1967 and its implementing decrees and regulations still govern street vending in Senegal. As a result, itinerant vendors are outlawed, regulations prohibit vending in areas that constitute vendors’ natural markers, urban plans allocate insufficient or undesirable space to street vending, and national and local development strategies include measures to relocate street vendors or further limit their access to public space. Similar legal regimes are prevalent across the world. They include vagrancy laws, still in force in many countries across the continent – and **recently challenged by the Pan African Lawyers’ Association (PALU)**. These laws criminalize individuals for “being idle and

¹⁰ This is a reference to Michel Foucault’s analytical methodology. Foucault uses a genealogical approach to enquire the origins of the present and understand how current situations are originated. See: Foucault, Michel. *The Archeology of Knowledge and The Discourse on Language*. A M. Sheridan Smith tr, Pantheon Books New York, 1982.

¹¹ Krithika Dinesh et al.

¹² Ibidem; Republic of Senegal, Law n°1967/50 29 November 1967

disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer”.¹³ They create “status offences” that target individuals for “being who they are, rather than for what they do”.¹⁴ The African Court on Human and Peoples’ Rights, in the Advisory opinion delivered on 20 December 2020 in response to PALU’s petition, found vagrancy laws to be a “reflection of an outdated and largely colonial perception of individuals without any rights.”

Unearthing the ideological stances, prejudices and assumptions that shape these punitive laws and regulations (and policies) helps workers see the law for what it is – a mirror of underlying ideologies, political arrangements and power structures. This is important for a number of reasons. First, this type of analysis sheds a different light on regulations and actions of authorities that are commonly seen as technical or a-political, and thus shielded from scrutiny. This is the case, for example, of urban plans which are presented as highly technical documents prepared by technical bodies. In fact, urban plans are powerful political tools that allocate precious resources, including access to and permitted use of public and private space, buildings and infrastructure. These plans heavily impact informal workers, including homeworkers whose homes are also their place of work and street vendors who need secure access to vending space. Second, unveiling the intrinsic political nature of the law allows workers to identify entry points and paths towards change. If laws and regulations reflect the prioritization of certain rights over others, change starts by raising the profile and visibility of those rights that are marginalized or ignored. Strategies include invoking the human rights, constitutional and labour rights

frameworks to anchor workers’ demands and show that their rights deserve equal realization and protection to the rights of other citizens.

Analyzing the politics inherent in law and its redistributive effects is essential for workers to use it effectively as a lever for change. What then is the role of lawyers supporting informal workers and their organizations in their struggles?

Insights for Social Movement Lawyering

In April 2019, the WIEGO Law Programme organized an “**Exposure Dialogue Programme**” (EDP) in **Dakar, Senegal**. EDPs¹⁵ are immersive learning experiences that bring together researchers and practitioners from different fields with workers and workers’ leaders. Their purpose is to challenge participants to revisit their assumptions about workers in the informal economy. In the case of this particular “**law EDP**”, our aim included **creating institutional relationships between lawyers and workers’ organizations**. Twelve participants (seven lawyers, one trade unionist, one local government official and three WIEGO team members) lived and worked with leaders of street vendor and waste picker organizations for two days. The experience was transformational. For Senegalese participants, it meant leaving behind the tropes about the informal sector as tax evaders and attributing workers’ problems to lacking knowledge of the law and a lack of organizing. Several lawyers committed to support the worker organizations after the workshop. I learned that we lawyers can and *must* learn from those we seek to support and that we are often out of touch with their reality – their struggles, needs and demands for change.¹⁶

¹³ See African Court on Human and Peoples’ Rights Advisory Opinion, December 2020. The Court found vagrancy laws to be in violation of the human rights sanctioned in the African Charter on Human and Peoples’ Rights, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.

¹⁴ Usha Ramanathan, “Ostensible poverty, beggary and the law.” *Economic and Political Weekly* (2008) 33-44. As cited by Krithika Dinesh et al., 6.

¹⁵ Exposure Dialogue Programmes are based on a methodology developed by Karl Osner. Between 2004 and 2009 WIEGO co-organized **a series of EDPs** with SEWA and Cornell University. Starting in 2013, WIEGO, together with Namrata Bali of SEWA Academy, organized a series of EDPs focused on Law and Informality.

¹⁶ Teresa Marchiori and Olga Abizaid, “In Dakar, lawyers experience informal workers’ daily lives and rethink policy”. WIEGO, 1 October 2019. Available at: <https://www.wiego.org/blog/dakar-lawyers-experience-informal-workers-daily-lives-and-rethink-policy> Accessed 26 January 2022.



Maguette Diop, Project Assistant, Reducing Waste in Coastal Cities (RWCC) Project speaks with street vendors in Dakar, Senegal, in 2019. In April of that year, the WIEGO law programme organized an Exposure Dialogue Programme. Photo: Dean Saffron

Often, progressive public interest lawyers privilege impact/strategic litigation over other legal strategies, and sometimes unwittingly privilege their social change goals over the material needs or political goals of their client.¹⁷ Personally, in my work as part of the WIEGO law team, I have been struggling with two challenges. The first has to do with how we lawyers see our role as public interest lawyers – and the need to shift the deep-seated conviction that our task is to solve problems and devise legal solutions *for* our clients, as “providers” of legal knowledge and assistance. This attitude underpins social justice programmatic work based on a “know-your-rights” approach.¹⁸ The second relates to the nature of legal assistance for the poor that in many instances focuses on individual issues unrelated to shared political goals and the strategies of the individuals or communities it intends to serve. In both cases,

the legalistic nature and top-down approach that characterize these activities limit their ability to build the consciousness of their beneficiaries, their identities as “citizens” and to enable them to challenge existing power structures.¹⁹

These challenges emerged vividly as my colleagues and I engaged in the design and implementation of our **administrative justice project**. Through a gradual process of questioning and negotiating our assumptions and practices, we sharpened our focus on the actual needs and preferences of the worker organizations we partner with. Learning about the social and institutional context they operate in, their existing relationships with local authorities, and preferred paths for dispute resolution, their demands and political goals are now foundational elements of our activities. To avoid the pitfalls of the top-down, “know-your-rights” approaches, we used the **Legal**

¹⁷ In the United States, this has spawned the “rebellious lawyering”; “poverty lawyering”; “community lawyering” approaches to lawyering for social movement. See Charles Elsesser “Community Lawyering - The Role of Lawyers in the Social Justice Movement”. *Loyola Journal of Public Interest Law*, (2013) Vol. 14, Issue 2 (Spring 2013) 375-404

¹⁸ von Broembsen, Marlese. “Legal Empowerment of the Poor: The Re-emergence of a Lost Strand of Human Rights?” *Rapoport Center Human Rights Working Paper Series* (2012) 1/2012

¹⁹ *Ibidem*, 5; Elsesser, cit.

Empowerment for the Poor (LEP) framework²⁰

as a starting point. In an ongoing learning-by-doing process, we have experimented with a sequenced methodology which aims to build the capacity of workers to “know, use, and shape the law”.²¹ As I see it, the ultimate goal of our partnership with informal workers is to support their struggle for recognition, helping them to build their capacity for effective participation in key decision-making spaces.

The following learnings underpin our work and can provide useful insights for social movement lawyering:²²

- **Legal education for change works best when it:**

- **starts with the problem, not with the law.** In my experience legal education is more effective when it engages workers as active participants in the learning process through “problem-posing” rather than “passive -recipients” of knowledge.”²³ Our contribution as lawyers is to fill the knowledge gaps and translate and situate the law to make it more accessible. But it’s best when those we work with approach and understand the law in their own terms, based on their existing knowledge and experience.²⁴
- **unearths the political nature of the law.** This is a key element of legal empowerment, as it allows us to see the law as a social construct that can be contested and modified.

- **includes training in negotiation and collective bargaining.** If change is the goal, it is necessary to build the capacity of our partners to effectively advocate for and negotiate their goals. We have experimented with role-play activities where workers have acted out interactions with local authorities and the police. Collective bargaining workshops are also part of the administrative justice project.

- **Legal empowerment activities should engage all relevant stakeholders** to facilitate dialogue and create synergies. Our experience is that these activities are essential when working with groups that operate in contexts of skewed power dynamics. In these cases, knowing the law and gaining entry into negotiation or policy- and decision-making spaces is not enough to yield change. Strengthening workers’ “*power with*” by facilitating alliance building and partnerships among workers, legal professionals and authorities contributes to break the barriers of fear and isolation that hinder meaningful participation.²⁵
- **Effective lawyering for social movement builds on partners’ needs, preferences and existing strategies.** We have learned that mapping what dispute resolution institutions workers access, what alliances they have built with local authorities, and their access to legal assistance services, makes our work more effective and helps avoid waste of time and resources.
- **Work with organizations** that have the capacity to formulate shared political goals and strategies, rather than with individuals.

²⁰ Golub, Stephen. “Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative”. Carnegie Endowment for International Peace Working Papers Rule of Law Series Democracy and Rule of Law Project (2003) No. 41; Dhital, Sukti and Tyler Walton. “Legal empowerment approaches in the context of COVID-19”. *Journal of Human Rights* (2020) Volume 19, 2020 - Issue 5, 582-592. Published online: <https://www.tandfonline.com/doi/full/10.1080/14754835.2020.1816164> Accessed 31 January 2022; Vogiazides, Louisa. “‘Legal Empowerment of the Poor’ versus ‘Right to the City’ - Implications for Access to Housing in Urban Africa” (2012) Nordiska Afrikainstitutet. Available at: <https://www.diva-portal.org/smash/get/diva2:545666/fulltext01.pdf> Accessed on 25 January 2022; von Broembsen, cit.

²¹ Namati, the organization which convenes the **Legal Empowerment Network**, defines its mission as advancing “social and environmental justice by building a movement of people who know, use, and shape the law”.

²² These learnings and principles are not new. Many of them overlap with the LEP approach. They underpin the women’s movement of the 1980s, that began to challenge traditional right-based approaches to development. The Movement of the Landless (MTS) in Brazil integrated the use of law with organization and political mobilization to effect change. See von Broembsen (2012), 6 ff.

²³ Freire, Paulo. *Pedagogy of the oppressed*. Herder and Herder, 1972.

²⁴ See Lev Vygotsky’s theory of “experiential learning” and education through “scaffolding”, an approach that emphasizes the learner’s existing knowledge and experience.

²⁵ Gaventa, John. “Finding the Spaces for Change: A Power Analysis”. *IDS Bulletin* (2006) Volume 37 Number 6.

Conclusion

The law is, indeed, a powerful tool to further the rights of the poor and marginalized, including workers in the formal sector. It can be used in different ways and with different purposes.²⁶ to obtain remedies in court; to challenge unjust and inequitable laws and regulations; to settle a dispute extrajudicially; and to access decision-making spaces and strengthen one's negotiation position. But when and how to use it, and with what ultimate goal, is for our partners and their organizations to decide. And it is for them and their organizations to capture the intrinsically political nature of the law and identify the levers for change.

Our role as lawyers supporting social movements is the role of facilitator and enabler. It's a fine line to walk. For me, it has been a long journey, and I am still a traveller. The first step for me was to learn that there was a lot I did not know: the law "written on the books"²⁷ is only part – and sometimes a small part – of the story. I learned that we must listen to those who live and experience it. I found that my role is not to impart but to co-produce knowledge through inclusive research led and validated by workers. If the ultimate goal of lawyering for social movement is to support poor and marginalized groups and their organizations to bring about sustained, long-term change, it is them who need to drive that change and we lawyers are privileged to accompany them in their journey.

About Law and Informality Insights

Law and Informality Insights reflect on our work supporting informal worker organizations to know, use and shape the law, and analyze statutory developments, law-making processes and jurisprudence that impact informal workers and their advocacy strategies. In 2019 they replaced our legal briefs.

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²⁶ See Nyemb, Jacques Jonathan and Teresa Marchiori. "Turning the Law into a Shield for Street Vendors in African Countries". WIEGO Legal Brief (2019) No. 4. Available at: https://www.wiego.org/sites/default/files/publications/file/Nyemb_Marchiori_Law_Shield_Street_Vendors_Africa_WIEGO_LB4_2019-0.pdf Accessed February 2, 2022.

²⁷ See Roscoe Pound for his famous distinction between the "law on the books" and the "law in action". Pound, Roscoe. "Law in Books and Law in Action". 44 Amer Law Rev (1910), p 12.



Food vendor in Mexico City in 2019.
Photo: Lorena Reyes Toledo

WIEGO's Law Programme strives to see a world in which:

- international instruments, national and local laws and regulations recognize, include and protect the rights and work of informal workers; and
- informal workers know, use and shape the law to realize secure livelihoods and labour rights. To advance these goals, we seek three mutually reinforcing outcomes at both global and national levels:

Outcome 1: Membership-based organizations of informal workers are better able to use the law (including international legal instruments and administrative justice) in their advocacy strategies.

Outcome 2: Legal and civil society organizations support the recognition, inclusion and protection of informal employment in law and policy at local, international and global levels.

Outcome 3: Legal scholars and labour lawyers advocate for informal workers in their scholarship and in policy contexts.

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