

**Technical Note: First EDP on Law and Informality: Informal Workers
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INTRODUCTION

Crafting legislation is a complex and politically demanding activity. This is particularly true in democracies, where divergent interests and ideologies have to be reconciled and leveraged by political power, whether between or within ruling power blocks. Technical skill, pragmatic accommodation and political horse trading are essential tools in this process. The challenges of passing legislation increase in line with the disparities between the players: a homogeneous set of stakeholders will produce legislation more easily and rapidly than a heterogeneous set, particularly if power is distributed.

In complex contexts – such as large modern cities – an interlocking set of laws exist, all of them the products of this process of technical word smithing and political negotiation: district level regulations, city ordinances, state provisions, national laws, regional agreements and treaties, and finally international conventions and trade agreements. This multilayered legal edifice constitutes the normative backdrop of social and political life. Most lawyers concentrate their attention and energies on one or more parts of the edifice: crafting it (as draftsmen), understanding and interpreting it (as academics and judges), invoking it (as advocates). They are enclosed in a self referential circle, where the messy facts of social and political life are fitted into the neat logic of law.

As soon as one's gaze shifts from the legal edifice and its presumed legitimacy to the manifestly harsh inequalities of life for the poorest constrained within it, the neat logic of law assumes a different aspect: it becomes a site of contested interpretation, a challenging battleground for access to voice and justice, a dangerous terrain justifying sanctions, oppression, yet greater hardship. Lawyers interested in looking beyond their normal circle of legal references can benefit hugely from being helped to shift their gaze by living for a period – even a very short one – with some of the most vulnerable subjects of law, the deeply impoverished and marginalized.

The EDP experience provided a unique and precious opportunity for this gaze shift. It revealed the complexity of navigating law in order to benefit from its potential protections but resist its manifest oppressions. It highlighted the legal creativity needed to extract from legal norms the potential pro poor benefits embedded within them. And it demonstrated the dilemmas and choices that present themselves to those committed to enhancing inclusion and justice within complex, highly stratified modern cities. This short note proceeds in three sections. The first looks at the

complexity of navigating law – making it, applying it and resisting it. The second looks at access to law – the strategies available to increase such access, in terms of locus standi and other procedural tools, and the pros and cons that flow from these choices. The third and final section briefly addresses the dilemmas arising in promoting inclusive cities through the rule of law.

THE COMPLEXITY OF NAVIGATING LAW

The Ahmedabad EDP exposed participants to the lived reality of two groups of informal sector female workers in urban India – those who make a living as street vendors (SV), and those who survive as waste pickers (WP). The two groups share many features vis a vis the complex edifice of applicable law: their livelihood depends on preserving a space (physically or conceptually) for working, a space which is on the margins of legality; many aspects of their daily life bring them into contact with oppressive and powerful constituencies they are ill equipped to resist; and they depend on the rule of law for minimal protections to their bodily and social integrity which are hard to enforce. However, for the purposes of this EDP, the differences between SV and WP in their encounters with and demands on the applicable legal structures are at least as significant as the similarities. Whereas SV make their income from selling goods legally acquired through regular contractual exchange, WP make their income from asserting their claim to goods they do acquire contractually; and whereas SV primarily encounter the oppressive arm of the law because of local ordinances regarding zoning, planning permission and the management of urban spaces with residents and city planners as their main opponents, WP encounter legal challenges that arise through competition with other workers or groups of workers claiming rights over the property/goods they seek to sell. I briefly consider both similar problems, and different problems.

(a) Similar problems

People living in informal situations risk experiencing the oppressive force of the law on a daily basis. This is because their claim to fundamental human and constitutional rights implicit in the right to work – the human right to dignity, the constitutional right to life – is precarious, informal, on the margins of legality. In the case of the SV in Ahmedabad, the work *place* is precarious – no licence protects it, no zoning ordinance enforces it, no city official is charged with guaranteeing it. In the case of the WP, access to the work *commodity*, waste, is precarious – typically there is no contractual entitlement to it and therefore no enforceable legal claim to protect it. Human and constitutional rights are anchored in principles of non discrimination and equality. Informal workers demonstrate the illusory nature of those principles in practice, when critical life anchors are at stake.

People living in informal situations whatever their work trade share regular encounters with oppressive and powerful constituencies they are ill equipped to resist. Landlords, upper caste neighbours or shop keepers, loan sharks, school teachers and principals all impinge on the lives of informal workers and their families in potentially oppressive ways. A common denominator is the extreme lack

of economic resources to cushion petty, vindictive acts of exploitation and extortion. Legal remedies for individuals are unaffordable, even if theoretically available.

Another common feature is the low social status, often associated with caste and within caste always with gender, that militates against assertion of rights – the freedom from nuisance and harassment, the freedom to equal access to educational support, to non exploitative credit, the freedoms “from” and “to”. Legal remedies (through tort, contract and constitutional law) are simply inaccessible unless a group demand can enforce them. The EDP confirmed clearly that as individual citizens these protections are illusory. My host lady, Geetaben, was mired in escalating debt because of loans taken to secure living accommodation for her family of five. She was harassed by upper caste flat owners who objected to the vending activities on the street below their apartment block; she felt impotent to intervene in either situation on her own. It took well connected in laws to help her navigate the loan, and an upper caste customer to report the abuse from the flat owner to the police. Noone assisted her with her nagging worry that the educational system was failing her children.

(b) Different problems

SV are informal workers because of the space they conduct their business in, the street. In some contexts the space is licensed by the municipality and so the vendors are protected by a legal entitlement to exercise their activities; but securing licenses is time consuming (and time is money for SV), politically challenging and often mired in complex bribery requirements which are beyond the economic and tactical reach of SV. In other contexts the space is secured by payment of a fee, a simpler process that creates some legitimacy and avoids the pitfalls of bureaucracy and bribery associated with licenses, but places extra financial burdens on already insolvent workers. Constitutional litigation has been an invaluable tool for addressing these challenges – the hawkers and Olga Tellis cases of the 1990s being prominent examples. But these constitutional gains secured at the federal level need to be policed if they are to work – enforcement doesn’t flow automatically from court judgments. It is a separate and demanding aspect of public governance. WP are informal workers because of the product they sell; the ownership of waste is an interesting and complex matter. Is it a part of the “commons”, which all constituencies have equal claims to? Is it a resource that constituencies used to claiming it over decades (or generations) can claim to have secured a right to by estoppel (estopping others from interfering with a right they have accumulated), is it an aspect of property rights, to which WP are entitled by adverse possession (like squatting rights for land)? Certainly WP do not acquire their goods by contractual exchange as SV do. Their claims abut against the claims of other workers in the waste industry – municipal workers, contract workers hired by private enterprises, other WP competing over access to dump sites and other sources of goods.

Another difference in navigating legal frameworks arises in relation to the relevant authority imposing sanctions. SV are in contestation with zoning and planning authorities, those who regulate the use of space in crowded and complex urban

contexts. The market place where they trade their goods is a public space, and their occupation of part of it with their cart can constitute a nuisance, or trespass if the street is claimed as a thoroughfare by the highway authorities. To claim an entitlement to vend in such circumstances is beyond the resources of individual vendors – you cannot claim to be part of a “natural market” on your own, you cannot oppose eviction orders unless you have a market committee of similarly placed and collaborative fellow vendors. To enforce the right to vend requires not only legal resources, then, but organizational and political skills. Formal workers also benefit from such collective organizational assets – through trade unions, collective bargaining strategies etc – but they have the advantage of confronting a single employer. Informal workers have to challenge multiple ordinances, laws, authorities – interlocking layers of authority – to preserve their work space. This exemplifies a common paradox – the legal problems of the poor, especially the very poor, are typically more challenging than the legal problems of those who are better off. This reflects the law’s framing and intent – powerful constituencies craft laws, and the laws thus reflect and protect their interests. Inserting into this framework the protection of the vulnerable and disempowered requires much ingenuity and skill. WP on the other hand are pitted against municipal authorities responsible for rubbish collection and sanitation. To secure a permanent entitlement to the goods they market, WP have to exclude other possible claimants. Constitutional law again has provided the legal resources to do this – the Colombian litigation being a powerful and inspiring precedent. They also have to advance complex arguments to justify their activities over the more systematic and predictable practices of the formal waste collection sector. A fascinating strategy advanced is the “ecology dividend” approach, pioneered by Brazilian activists. By collecting and recycling waste, the claim goes, WP are contributing to ecological resources and should be rewarded accordingly. The legal lacunae in 20th century constitutional protection are hereby converted into powerful 21st century environmental claims.

ACCESS TO LAW

The EDP context provides a rare opportunity to investigate access to law from the bottom up. To what extent do workers in the informal economy have access to the protective mantle of law, situated as they are at the bottom of a sharp pyramid where they need protection more than most other citizens and residents?

The answer to this question depends on whether access is sought individually or as a collective. It emerged very clearly from the EDP that individual access is fraught and rare: informal workers lack the economic and social resources that enable effective legal access. With pro bono or publicly funded legal services shrinking dramatically with respect to their hey day in the last decades of the 20th century, and with the advent of more aggressive globalizing market driven state policies, pro poor legal resources are hard to come by. Legal aid clinics and publicly funded advocacy resources are poorly funded, overwhelmed with needy clients and increasingly hard pressed to deliver. Individual legal access is therefore elusive. My host lady could not rely on any legal support to enforce her right to protection from physical assault when an irate resident hurled bags of rubbish at her head to deter

her from vending in the street: “if I go to the police station, who will listen to me?” she said. Collective enforcement of legal rights is more effective, particularly where – as in the case of our EDP – a powerful worker rights organization, SEWA, is at hand. The market committee, that my host lady chaired for her stretch of the SV area, had secured some concessions from the local planning authorities, including a truce on removals; they had also managed to make progress in securing a permanent market site close by – not ideal because off the main thoroughfare, but a step forward. Legal protection from constant harassment had therefore been accessed through a form of collective bargaining rather than through enforcement of individual constitutional rights to hawk or work.

Access to legal protections has been secured through several innovative litigation strategies, leveraging procedural protections to advance pro poor rights. Nowhere than in this area of law are the importance of procedures more apparent. Indeed one can argue that the substance/procedure dichotomy is a false one: no bright line divides the substance of “the right to life” in a constitution from the right to litigate the right to life, a procedural asset. In the last decades in India, Public Interest Litigation or PIL strategies have been developed to advance access to law for constituencies who would otherwise lack it because of their social and educational deprivation. A procedural innovation to secure substantive change.

The idea of a PIL is simple: anyone can advance a claim to the Supreme Court of India on the basis that a constitutional right is being violated. Normal rules of *locus standi*, that ring fence access by investigating the plaintiff’s legitimate connection to the case, are thereby suspended. This is a radical and powerful remedy and indeed it has wrought important gains. However, there are disadvantages that flow from PILs too. The procedure essentially entails establishment of a consultative process – getting round the table to negotiate and bargain rather than relying on adversarial court room proceedings to secure victory. It thus depends on effective negotiation skills or, more concretely, a plaintiff with organizational heft and deep grass roots ties that enable an equal dialogue. If a weak, unrooted plaintiff finds him or herself in negotiation with powerful vested interests of state or state-like forces, the PIL procedure will fail. This is an important limitation which suggests – as one might expect – that legal access for individuals depends on and reflects grass roots solidarity and organizing capacity of collectives, rather than vice versa. Differently put, you have to grab justice, no one is going to hand it over to you, and it is only when you have the power of numbers and experience that such redistribution of power and resources will be successful.

Procedural innovation then is a critical tool for promoting access to law. The EDP experience revealed various shining examples: the suggestion that social security rather than labor protections might be effective means for accessing state resources, so a switch in defendant (so to speak); the importance of cooperatives as conduits for claiming access; the emphasis on the principle of subsidiarity – that the agency of poor constituencies depends on keeping claims as close to the ground level as possible. Thus if a claim can be made against a local municipality rather than

against the city or the state or the federal government it should, because the plaintiffs will have more voice, more control over the claim, more of a chance to build valuable experience for future claims. It is fascinating to see how the subsidiarity discussion – familiar from EU law and from discussions about international criminal justice – applies equally in this, quite different, context: keeping claims as close to the communities affected is a critical procedural protection for access in a range of contested situations.

The question of access to the law also arises in the context of control, a different lens on subsidiarity. Handing over enforcement capability to state entities might increase the resources available to fight the struggle but it deprives affected communities of the ability to control the priorities and outcomes of the fight. Domestic violence is a case in point: where the police rather than the woman is the prime enforcer outcomes may not reflect the woman's priorities or what is in the best interests of her children. Similarly if municipal officers rather than SV co-ops control and police public space, the outcomes may not be to the advantage of the SV but rather reflect a different set of political priorities.

Ultimately consideration of questions of access to law in the EDP context highlighted the relationality of disadvantage and poverty: the very mechanisms that generate the power and resources of the beneficiaries of the formal economy – salaried residents, secure public officials, powerful landlords - interests protected by enforceable and enforced laws, are those that perpetuate the exclusion and marginalization of the informal sector. Access is a critical battleground for challenging this status quo, and it depends on collective organizing heft at the bottom as much as on legal ingenuity, dedication and intelligent creativity at the top.

PROMOTING INCLUSIVE CITIES

Modern metropolises are complex, contested and constantly changing spaces. They are sites of extraordinary wealth accumulation and consumption, just as they are sites of desperate destitution and degradation. Nowhere encapsulates the contradictions of a market driven global economy more powerfully than the 21st century developing world urban space. As writers from Saskia Sassen to Katherine Boo have observed, the third world city captures the vivid paradox of shared space and exclusive space to perfection. The EDP provided an opportunity for those of us habituated to the exclusive sector of such cities to gain insights into the life and priorities of those living in the destitute sector.

Several paradoxes emerged clearly. The overarching one was the tension between protecting and strengthening the place of informal workers within the city (and national) ecology while questioning the medium and long term viability and desirability of this place. SV and WP do not, in the main, want their children to inherit their trade or life – hence the extraordinarily powerful and moving investment in education, the commitment to seeking out a better and more secure

life for the next generation. My host lady paid for private schooling for 2 of her 3 children (not the daughter) and for private after school daily tuitions for all 3 children. Already in debt, these costs just exacerbated her financial predicament but were not negotiable in her eyes. The family had been without electricity or cooking fuel the week before we arrived, but the children had carried on with their tuitions. She had arranged a marriage for her 17 year old daughter with a boy from a higher socio-economic bracket (though same caste). She emphatically asserted the desire that her children would not be SV.

It is not just a question of what the SV want. Their trade is unviable. With the shrinking of the formal labor economy, and especially the industrial sector, and the concurrent growth in rural to urban migration, SV proliferate – none of them able to really make a viable living. My host lady was surrounded by other SV selling what she was selling at a lower price. No wonder she was having difficulty making ends meet. Should the emphasis of legal action and of organized collective action be preservation of the place of SV (“freezing undesirable jobs” to quote Michael Piori) or something else? What would that something else be? The demand for basic educational training, for skill development, for public – private job creation partnerships? How viable would that strategy be in the face of the large numbers of informal workers needing accommodation?

Another dilemma concerned the place of individual vs collective strategies. The EDP experience – no doubt because of the extraordinary organizing legacy of 3 decades of SEWA work – illustrated the power of solidarity, of collective strength and mutual support. My host lady worked with not against her fellow SV. It was clear that they all relied on each other for help at numerous junctures – to guard the stall when someone went to the bathroom, to provide small change when a customer had none, to advise on solutions to particular contingencies (health problems, school issues, marital difficulties). It was also clear that despite the very straightened economic circumstances, there was a high degree of honesty and trust: my host lady left her cart out on the street unlocked at night, she didn’t lock her house/room when leaving, she gave and received produce to/from other vendors, a form of simple bartering. But eventually, there is only so much of a market for SV – the more people do it, the less everyone earns. And the more someone succeeds in marketing himself, in being an effective salesperson, in securing a good spot or a good price for wholesale, the less others will make. So how, in a competitive context like this, can solidarity persist? How can a collective good – access to market space – trump individual goods such as competitive advancement, individualized social security claims which inevitably fragment the collective spirit? How can solidarity be compatible with the inexorable onslaught of privatization?

These dilemmas relate to the vibrant discussion about the urban commons, and the relative role of government, private sector and cooperative mechanisms as strategies for managing it. From this perspective the law takes a secondary place, as a tool invoked by competing constituencies to bolster their claims. But from the perspective of the informal sector, and of SV and WP in particular, the law cannot

just be left to this technical and subservient role, because its contribution to the advancement of social justice will be limited and fractured. Legal technicians, such as those of us who participated in the EDP, have an obligation to use the lens of our host ladies to aggressively promote legal strategies, not just post facto – to counter violations (evictions, prosecutions, appropriations) but to prevent continuing structural injustice. From this perspective preventative intervention in promoting social and economic rights – to education, health care, personal safety and bodily integrity – are as fundamental to the promotion of inclusive cities as are the more familiar strategies embedded in employment, housing and criminal law.