

Informal Economy: Law and Policy Demands

Lessons from the WIEGO India Pilot Study

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I. Introduction

In 2008, WIEGO initiated the Law and Informal Economy project to contribute to the development of an enabling legal environment for informal workers that promotes work and economic opportunity, labour rights, benefits and protection. Specifically, the project traced the development of law and policy vis-à-vis workers in the informal economy so as to contribute to the development of a platform of legal demands and a web based observatory that documents legal and policy changes and their implications for workers. Starting with a pilot project in India the project is currently underway in Ghana, Peru, and Thailand and is expected to be completed by the end of 2012.

This paper highlights some of the key lessons learned thus far from the pilot project in India regarding the nature of the informal economy and the manner in which legal and policy tools can address the concerns of those working in the informal economy.

II. Taxonomy of Informal Economy Workers and the Legal Regulatory Regime.

Informal employment is not homogenous and covers a wide range of employment arrangements. It includes both (a) *self employment in informal enterprises* (i.e., employment in unincorporated enterprises that might also be unregistered or small, including employers, own account workers, and unpaid family workers); and (b) *wage employment in informal jobs* (i.e., employment without social protection through work in formal or informal firms, for households, or with no fixed employer). The latter category includes informal employees of both informal and formal enterprises; other informal wage workers (such as casual or day laborers, domestic workers, unregistered or undeclared workers, and temporary or part-time workers); and industrial outworkers / home workers (Chen 2006).

While this broad categorization is useful, it does not capture the many intricacies and nuances that abound informal employment relations. This section attempts to build categories of informal workers based on the legal regulatory regimes that impinge on them. This exercise however, is merely indicative and draws primarily on the experiences of the legal framework and informal economy experiences in India.

A critical legal characteristic in identifying many informal workers is their inability to access employment rights in the absence of an exclusive legal relationship of “employer-employee”. The latter has been narrowly defined across the world by labour jurisprudence, influenced primarily by the early industrial era. Since a lot depends on the legal definition of an “employee” or “worker”, we examine the various employment relations that fall outside this traditional category.

- a) Contract or Sub-contracted workers: Driven largely by trade liberalisation, and the need to cut costs to be competitive, formal employers are increasingly farming out a large number of jobs through a process of sub-contracting to small firms or home-based workers. These workers include a large number of skilled workers. The workers may enjoy some degree of employment rights through an established legal relationship with the principal employer but typically lack the range of benefits that would accrue to a 'permanent' formal worker.

- b) Self-employed: Many workers turn to self-employment in the absence of wage employment opportunities, especially in many economies around the globe. Self-employed workers can be further classified into different categories –
 - (i) own-account workers employed in their own informal enterprises who do not hire others: either single person operations or family enterprises
 - (ii) Employers who hire others and are employed in their own informal enterprises
 - (iii) unpaid contributing family workers, whether in the formal or informal enterprises

Developing countries such as India are characterized by a high proportion of workers who can be classified as self employed, with a high proportion of them working as own account workers.

With this background in mind, WIEGO set out to examine the legal demands of informal economy workers in five occupational groups in India. The India Pilot project – a two year study - examined the following occupational groups in India – Domestic Workers, Fish workers, Forest workers, Street Vendors and Waste Pickers. With the exception of domestic workers who generally fall within the traditional employer-employee relationship, the other sectors were chosen because they broadly fall within the categories of own account workers, with or without employees. Domestic workers were selected keeping in mind the (then) ongoing mobilization around the campaign for an ILO Convention on domestic work which was passed by the International Labour Conference in June 2011.

A quick background to the India WIEGO pilot study is useful here. The sectors taken up for study involve looking closely at the work processes, the dependence between the parties, the manner in which the work is controlled, control over the process of production, degree of economic risk, the remuneration systems to understand how many could be deemed to be in an employment relationship. For those who cannot be brought into such relationship and who are in self employment the project looks at how far other laws could be utilised to improve their conditions.

III. Informality and the Legal Regulatory Framework

Traditionally, debates around informal economy and law, have centred around the limited protection accorded by labour law to those in the informal economy. Struggles of certain workers in the informal economy such as domestic workers or home-based workers have centred around obtaining recognition as workers and increasing the social protection or regulation of working conditions afforded by labour law to other workers. Other sections of the informal workers have focused on other regulatory

frameworks that have a direct impact on their livelihoods. For instance, resource based workers such as forest workers, fish workers and waste pickers depend heavily on legislations that determine their access to resources or public spaces such as forest laws, coastal regulations or municipal legislations. Acknowledging this leads us into a complex investigation of the regulatory regimes that have an impact on each occupational group. This section therefore, explores the question of law and informality in two parts – a) labour law and the informal economy; and b) applicable regulatory laws and the occupational groups.

a. *Labour Law and the Informal Economy*¹

The contract of employment has been the primary means through which a person is recognised as an employee. Benefits and protection are also granted to those within a contract of employment. One of the challenges has been to extend the definition of employee to those who are not directly employed by the principal employer or user enterprise (contract labour, labour employed via intermediaries) and also to extend the definition to those who appear self employed but who continue to display characteristics of subordination, economic dependency or vulnerability akin to employees. Such self employed persons who share “employee-like” characteristics are sought to be brought within the province of labour law in order that social protection and regulation of working conditions can be governed by standards set by the labour law. Amongst the groups of workers covered by the WEIGO pilot project, domestic workers have been most successful in getting their status as workers recognised under the specific laws enacted by some states in India conferring certain welfare measures. In addition the recently enacted Unorganised Workers Social Security Act, 2008 has the potential to cover all “workers” including the self-employed (both dependent and independent) for the purposes of ensuring access to basic social security while working hours, safety and employment relations continue to be unregulated for these workers.

Even when informal workers are covered by labour law de jure, this does not ensure that their position is immediately on par with formal workers. Erratic working hours, variable working conditions and poorly demarcated work spaces have meant that many of the minimum standards contained in the labour laws are incapable of being applied to bulk of these workers. For these reasons, social security and recognition as workers are often the principal benefits that are afforded to these workers in India.

b. *Applicable Regulatory Laws and the Occupational Groups*

A complex range of sector-specific regulatory laws impact workers in the informal economy, especially own account workers and self-employed more generally, including laws relating to natural resources and the use of public resources such as forests and urban space. A sectoral approach is necessary to

¹ The distinction between labour and employment laws as applicable in some jurisdictions is not followed in this paper.

enable critical understanding of the legal demands raised in each sector. However, the laws that impinge on workers in the informal sector can be broadly categorized thus –

- a) Regulations that determine access to – and sustainable use of–resources
- b) Regulations that balance conflicting needs and users
- c) Regulations that impact markets and pricing

a) *Regulations that determine access to resources and sustainable use:* A large number of self-employed or own account workers are resource-based workers who rely on the land, forests, water bodies and waste dumps for access to resources that enable their livelihood. Whether the access relates to *tendu/kendu* leaves, fish or plastics in waste dumps, laws and policies that enable or limit such access have a direct impact on many livelihoods. Related to the access are legislations and policies that seek to protect sustainable use of the resource, thus contributing to protecting livelihoods. For instance, a policy or legislative choice that encourages composting and recovery of recyclables can protect greater number of waste related livelihoods as opposed to a policy choice in favour of incinerators.

b) *Regulations that balance conflicting needs and users:* Several regulatory frameworks seek to balance competing interests of workers and citizens, thus impacting workers in the informal economy. This is again best illustrated with an example. The right of the citizen to access pavements competes with the rights of street vendors to use pavements to carry out their business. Likewise, public health or pollution concerns have a direct bearing on several informal economy livelihoods. The legal strategies and demands of informal economy workers in such instances need to be carefully chosen to enable a balancing of these competing interests.

c) *Regulations that impact markets and pricing:* Markets and pricing form an important component of work of nearly all informal economy workers. Ensuring steady markets and reasonable prices for the inputs and products of informal workers is an unmet challenge. Invariably access to credit, markets, support prices are critical issues that are rarely addressed as important to determining sustainable livelihoods. Existing regulatory frameworks either do not address issues of markets and pricing or are not necessarily sensitive to the specific needs of informal workers. Transforming the debates on markets and pricing for informal economy workers needs to be prioritized.

Securing livelihoods of workers in the informal economy requires focused and sustained attention on all policies and legislations that have direct or indirect impact on the workers in each occupational group. Thus, while broad demands for strengthening labour rights and working conditions are maintained, specific sectoral demands of each occupational group needs to be pursued independently.

IV. Mapping the Legal Demands and Strategies.

Three of the chosen sectors in the India law pilot project indicate the need to develop arguments for those who work even outside this extended notion of employee or wage employment. Where there is

only a clear commercial relationship, we argue that the idea of a worker needs to be developed further in order to obtain some claims and benefits from the commercial commodity chain.

The fish worker is a case in point. Attempts in the state of Kerala to cast liability through legislation on fish traders and exporters for welfare benefits payable to fish workers, was struck down as unconstitutional by the court in India recently. The court held that the burden by way of a cess (tax) or impost could not be placed on a person who did not stand in the relationship of an employer.² The economic dependency of the fish workers, who may hire a boat from such traders and who are often under an obligation to sell their catch exclusively to such traders, was not noticed by the court in such cases. The court merely examined if there was an employee-employer relationship between the parties, and on the basis that there was no such employment relationship, struck down such a cess upon traders as falling outside the province of labour law and hence unconstitutional. (To overcome the court judgement, the Kerala government recently promulgated another legislation which imposes a cess on them as contribution to the Labour Welfare Fund.)

The assumption of the Supreme Court in this case was that liability to contribute to the welfare and social protection of workers arises only within an employer-employee relationship. Yet we have instances in India where this is not entirely the case. Governments typically contribute to welfare funds and the liability is not upon the workers and employers alone. The Unorganised Workers Social Security Act passed by the Parliament in December 2008 is funded in the main by the central and state governments. The funding for this is to be mobilised by a cess on a concerned industry or a general tax to be levied on the population as a whole. This approach of broad basing contributions by the industry as obligatory along with the employers to meet the welfare needs of the small producers and workers is an important innovation to protect 'workers' and to cast liability upon traders and vendors who are part of the industry which benefits from such work and may be tied ostensibly to such workers only by commercial relationships.

Our study of the forest workers reveals that many forest workers are engaged in gathering of Non Timber Forest Products (NTFPs). These are sold to the forest development corporations or cooperatives, such as in the case of tendu/kendu leaf in those states where the trade is nationalised or to middle men who process or sell to the eventual consumer, such as in the case of mahua, gum, amla etc. A small fraction of these forest workers are in employment relationships to the forest corporations. Their minimum rates of wages are notified by the state government under the Minimum Wages Act, 1948. For most others, they are placed in commercial arrangements vis-à-vis the trader or collection agents.

Given the characteristics of such collection of NTFPs where there is no stipulation over place/time of work, or where there is no supply of equipment or resources by the trader/buyer, or where the forest worker is not integrated in any manner in the enterprise of the trade/buyer, the 'facts' needed to bring such workers within the scope of an employment relationship may be missing. Yet the economic dependency of such forest workers on the eventual trader remains. They are not self-employed persons

² Koluthara Exports Ltd. v. State of Kerala & Ors (2002(2) SCC 459), Hindustan Times v. State of Uttar Pradesh decided 1/11/2002.

in the sense of entrepreneurs who can develop their own independent markets. Their position as forest workers, living deep within the forest, with very fragile rights over the natural resources they collect and dependence on the traders/buyers cannot place them as self-employed persons or entrepreneurs.

This is also the case of waste pickers whom we have studied in this project, whose access to waste in the public domain is very contingent, who are not in a relationship of employment vis-à-vis either households whose waste they collect nor with the municipalities whose waste they sort and segregate. The draft policy that the WIEGO pilot project developed for the alliance of waste picker organisations in India, as part of the project activity, characterises waste pickers as workers working in the recycling industry and points to the need for households, municipalities, itinerant waste traders, recyclers in the recycling industry to contribute towards a fund that will provide welfare benefits for such waste pickers.

The idea that such forest workers, fish workers and waste pickers are 'workers', outside of an employment relationship, but nevertheless capable of raising a claim upon the industry is crucial. The idea of a 'worker' independent of an employment relationship but nevertheless with a right (for the present, albeit a moral right) upon a commercial contract is one that needs to be lobbied for and taken further if vulnerable own-account workers studied in the project are to enjoy even a modicum of what ILO calls 'decent work'. They expend their labour, but very little capital, and obtain a poor price for the forest, fish or waste they collect. In the case of forest and fish workers, the price at which their produce is bought does not reflect their deep traditional knowledge of the oceans and forest they bring to bear in their harvesting of fish or collection forest products. Further, the newly enacted Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Forest Rights Act, 2005) makes many such forest workers owners of such NTFPs which should allow them to compete in the market in which prices have largely been fixed unilaterally by state governments which carry out annual price-fixing for some forest produce.

Apart from rationalisation of the price fixation process, the economic dependence of such workers upon traders and eventual buyers implies that they cannot be viewed as independent contractors. Levying of a cess upon traders and buyers of such goods and services even though there is no employment relationship requires the recognition of a category of 'workers' that is distinct from both an employee on the one hand and a true self-employed person who is not solely dependent upon a trader or buyer for his/her economic survival on the other. This economic dependence provides the basis for arguing that the eventual user/consumer, perhaps through a cess/ impost, should bear the cost in some form for the work performed at the primary stage. Such a claim can also arise from human rights principles and the need to ensure decent work conditions, that will then permit the claim to be placed on not only the user/consumers, but upon the public at large through a general tax. Such a cess then moves the impost away from the purview of the liabilities arising from labour law and bases the claim upon human rights principles of ensuring fair and reasonable contractual terms that arise from broad public policy considerations.

Sub-contracted workers and own account workers, who do not enjoy an employee status but are also not fully independent, have been accepted in the 1996 ILO Home Workers Convention and in the 2002 International Labour Conference Resolution and Conclusions on Decent Work and the Informal Economy

as “workers”: in recognition of the broad continuum of working arrangements within which workers in the informal economy may fall.

Regarding other laws which also impinge on the rights of own-account workers, their working environment is to a great extent governed by laws other than labour laws. (The various background papers on the India pilot project discuss the legal and policy environment affecting these workers in greater detail: http://wiego.org/informal_economy_law/india-pilot-project.) To illustrate, the enactment of the Forest Rights Act, 2005 has given ownership, and therefore, collection rights, to forest dwellers challenging the existing assertion of a state monopoly over collection rights. Such a law could have greater impact on the earnings and working conditions of forest workers than their coverage under any labour law perhaps could. Across all sectors of this project, access to markets (public spaces for street vendors, access to waste for waste pickers, equal access to the oceans alongside trawlers for artisan fish workers) emerge as a crucial requirement. The right to access natural resources for workers working with nature emerges as a condition precedent to ensure work. The nature of work, the quality of work and the working environment, in short the subject matter of labour law, are in a sense subsequent to fulfilling this preliminary requirement. The consultations held during the course of this pilot project brought home sharply the need to nurture the natural resources as one of the most important issues confronting these sections of informal workers. Issues such as trade related aspects of Intellectual Property Rights (TRIPs) and the impact on fishing rights, the impact of the Kyoto Protocol and carbon trading on forest cover, privatisation and licensing of inland water resources, the conversion of commons into private or state property, these were the important issues raised.

The struggle to ensure this substratum of ‘work’ manifests itself in the fight for the right to market access and the right to urban spaces or urban ‘commons’ in the other sectors that we studied. How the various urban renewal missions view urban land and the geography (and cleanliness) of the city, emerge as major concerns for waste pickers and street vendors. The quantum of remuneration or quality of livelihood or ‘returns’ for bearing risks (a concomitant of an own-account worker), safety at work place and other traditional concerns of labour/worker rights appear to be secondary compared to demands that arise relating to the manner in which laws governing the environment, natural resources, urban planning appear to impact such workers. This is one of the reasons why the draft legislations for unorganised sector workers, such as the bills proposed by the National Campaign Committee for Unorganised Sector Workers and the National Commission for Enterprises in the Unorganised Sector (NCEUS) have a broader conception of the right to livelihood and social security as encompassing claims to use natural resources in a judicious manner, right to urban spaces and access to resources and markets.

Expanding the law to deal broadly with all those working, for instance in the beedi (thin hand rolled cigarettes made using the *tendu/kendu* leaf) industry, would enormously benefit large numbers of own-account and sub-contracted workers. *Tendu* and *kendu* leaf collectors, instead of merely beedi rollers, as at present, could get included under this conceptualisation. As in the case with other sectors such as forest workers, fish workers or waste pickers being studied in the pilot project, an expanded ‘worker’ concept would include not just those in the final stages of production or value addition, or those who work in what the labour law understands as an ‘industry’, but would also cover those engaged in the

collection of natural resources or waste material which constitute the vital inputs for these industries. Based on the experience of the recent Kerala law relating to fish workers, one could argue that a cess on all forest products/recycling industry could be levied to help the traditional own-account forest collectors (sal, gum, chironji, mahua etc) or the own-account waste pickers.

Overview of Regulatory frameworks impacting select Occupational Groups in India

Occupational Groups ----- Legal Regulatory Framework	Forest Workers	Fish Workers	Waste Pickers	Street Vendors	Domestic Workers
Constitutional Framework	Right to life and livelihood; non discrimination	Right to life and livelihood; non discrimination	Right to life and livelihood	Right to life and livelihood	Right to life and livelihood
Labour Laws	Several states provide for minimum wages through notification but no effective regulation of working conditions.	State Welfare Fund Act ensures some welfare protection.	No effective protection of wages or working conditions.	No effective protection of wages or working conditions.	Some states ensure minimum wage payment and social welfare measures; Inter-state migrant laws that protect migrant workers.
National Laws	Forest Laws; Environmental Laws	Coastal Regulations; Trade laws that impact export and import of fish and fish products	Environmental Regulations on Solid Waste Management and Pollution	National Policy on Street Vendors.	Several national level bills pertaining to domestic workers floated. Health cover for domestic workers extended under the National Health Insurance Scheme (RSBY)
State Laws	State Regulations on access to Non-	State Marine Fishing Regulation	Regulations on Solid Waste	State Police Acts; State laws that	State laws such as Shops and Establishments

	Timber Produce	Acts	Management and Pollution	determine access to urban land and water.	Act invoked to regulate placement agencies.
Municipal Laws	-	Vending laws have an impact on fisher women who sell directly	Municipal laws vest primary task of waste management in Municipalities. Tendering of waste collection determine access of Waste pickers to waste.	Municipal Regulations on Street Vending, Licensing and Health;	-

V. Common Themes and Issues that Emerge

Legal Recognition - Underpinning the many legal demands raised by the occupational groups was a primary demand for legal status or recognition as ‘workers’ under the law. This demand was more pronounced within two occupational groups – i.e., domestic workers and waste pickers, as they battled their invisibility as workers. The strategies for taking forth the demand for legal recognition has largely centered on law and policy initiatives. In the case of domestic workers, the debates and advocacy work informing the ILO Convention provided the impetus for several efforts – both national and sub-national – to take forth the domestic debates on legislation for the sector. During the pilot study period, two national level bills, initiated both by the government and civil society groups, were the subject of extensive debate and discussion. In 2008, the state of Maharashtra enacted a legislation setting up a welfare board and providing social security to domestic workers in the State.

Access Rights - The struggles of forest and fish workers are intricately linked to their access to resources, more particularly natural resources. (While waste pickers also depend heavily on their access to waste as a resource, the same needs to be distinguished as being a resource generated by human use and largely operating within an urban context). These workers are largely own account but heavily depend on natural resources as primary capital for their very survival. The legal demands raised by these occupational groups revolve around protecting traditional and existing access rights to resources. A related battle is also to ensure a decent price and market for their products and this legal demand could take the form of a minimum support price. The strategies adopted by these occupational groups is necessarily multi-fold as the battles are not merely of workers’ rights but expand into the domain of protecting their capital resources i.e., the natural resources in a form and manner that ensures sustainable use.

In India, the fish workers have adopted several strategies ranging from interventions at the policy level such as the lobbying for regulations which have a bearing on traditional fisher folk, regulations that permit deep sea and commercial fishing and on the legislative front, lobbying for laws that protect their traditional and community rights of access to resources.

Municipal Regulations – Informal workers within urban spaces invariably struggle to transform municipal laws and policies to carve out spaces for the urban working poor. These struggles range from recognition, licensing, land and private monopoly over urban resources, including urban public land

In the case of India, the pilot study found that the legal demands for waste pickers are varied. At one end of the spectrum is the workers' demand for recognition and access to waste as a resource while at the other end of the spectrum, their battles deal with municipal policy on disposal of waste, environmental law and regulations, mechanisation through privatization of waste collection, and tendering policies and practices for solid waste management. Similarly with street vendors, the efforts have been to regularize their access to urban land, negotiating for licenses that allow them better markets and more importantly, struggling to transform municipal policies that privilege formal commercial enterprises marginalizing the urban poor further. In both these instances of urban occupational groups, collectivization has been a critical strategy for negotiating and reordering the law and policy landscape of municipal fiat that governs who can do what and where to the disadvantage of large numbers of informal enterprises and workers in urban areas.

Social Security Protection - A demand that all sectors have raised and successfully lobbied for is social protection. Both in the policy and legislative domains, there is greater receptiveness to this demand of the workers than the other core demands for employment rights. As the India pilot study records, states have been willing to set up welfare funds, expand existing funds and schemes to cover workers in these occupational groups, enact legislations setting up welfare funds, invite employers to contribute to welfare cess funds, set up new health and welfare schemes that have an overarching reach for all workers in the informal sector.

Regulation of Working Conditions – The most challenging and contentious of all the legal demands raised and critical to all sectors is the one pertaining to working conditions. Despite this being a persisting demand for many years, both government and unions (and perhaps even civil society groups and NGOs) have struggled to formulate and respond to this demand innovatively. They operate within the bounds of traditional labour jurisprudence of establishing “employer-employee” relations or have remained focused on the state being the arbiter and regulator of working conditions, across all sectors.

Political and Economic Implications of legal demands

Although merely representative of the legal demands of the informal economy, the broad themes discussed in the preceding section point to wide ranging political and economic implications. We discuss a few vital issues here –

- Collectivisation is critical to realizing any legal demand raised by an occupational group. Unionisation trends in the informal economy are gradually transforming but remain weak. Critical to the transformation of collectivisation, is the expansion of the traditional union base to include informal workers, transformation in traditional union strategies to accommodate informal economy worker demands and re-politicisation of the traditional union understanding of the role of informal workers in the economy. Transforming traditional unions can lend voice to informal economy workers and their legal demands and conversely new forms of informal economy organising can look beyond the traditional triad of employer-employee-state to the formal enterprise-informal enterprise-state triad for addressing their legal demands. Also the legal demands indicate that union strategies need to expand and engage at the level of policy making, not merely for labour rights but in the arena of environment, trade and market, to ensure effective protection.
- Labour jurisprudence needs to expand to include broader notions of collective bargaining and dispute resolutions. Current legislation on the rights to representation and negotiations with appropriate counterpart (i.e. collective bargaining) should not be seen as only applicable to employees but could be legislated as a right for own account workers to be able to negotiate with municipalities, governments and policy making bodies that have an impact on their livelihoods. Similarly access to dispute resolution processes outside of the traditional court process can also be envisaged.
- Acknowledging the links between resource-based workers and sustainable resource use has huge implications for the political alliances that can be forged between environmental movements and labour movements. The legal demands indicate the need to protect resources and environment from a livelihoods perspective, thus re-examining the collective rights based demands of workers.
- The legal demands expand the jurisdiction of markets and pricing policies to ensure a level playing field for workers in the informal economy. It also expands the need to review credit and marketing policies to strengthen the protection accorded to workers.
- Acceding to the legal demands of recognition, regulation and social security for workers would have an upward-spiralling effect on the growth and the economic wellbeing of the economy, thus expanding the arena of registered workforce in the country.
- More critically, recognition of occupational groups dominated largely by women will have a direct and dramatic bearing on earnings and poverty levels of this class of workers.

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