WIEGO Law Pilot Project on the Informal Economy

Informal Economy, Own-account Workers and the Law: An Overview

Author: Kamala Sankaran

I. Introduction

1.1 The informal economy in India is often referred to as the unorganised economy. Enterprises in the unorganised economy are termed the unorganised sector and defined as “all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis and with less than ten total workers.”\(^1\) According to data available in 2005, the unorganised sector accounted for 395 million persons or 86 per cent of the work force. Most of these workers (253 million) were engaged in agriculture and who are mainly self-employed. Together with the 29 million in unorganised employment in the formal sector, there were 422.6 million persons in the unorganised economy (sector plus employment) who comprise 92.4 per cent of the work force.

1.2 The informal economy consists of both wage workers and those in self-employment. The constitutional framework and laws that deal with the unorganised workers in India have been well-documented in the chapters relating to Regulations of Condition of Unorganised Workers in India and Legislative Protection for Minimum Conditions of Work and Comprehensive legislation of the Report on Conditions of Worker and Promotion of Livelihoods in the Unorganised Sector prepared by the National Commission for Enterprises in the Unorganised Sector in 2007. (See www.nceus.gov.in).

1.3 The current WIEGO law pilot project focuses on own-account workers in the informal economy and the manner in which law impacts their working life, and documents legislative and policy initiatives to improve their incomes and livelihoods. The project has also focussed on five groups of informal sector workers – domestic workers, fish workers, forest workers, street vendors, and waste pickers. The present paper provides an overview of the pilot project relating to law and the informal economy, in particular the own-account workers in India in these sectors, and the main conclusion drawn by the project over the one year period. (The background papers on these specific sectors and reports of the consultations with stakeholders in many of these sectors and supplement this paper.)

1.4 The large numbers of persons in the work force who are self-employed has been highlighted in recent data and government reports.\(^2\) As of January 2005, the total employment in the Indian economy stood at 458 million of which those in the

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\(^1\) Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector, National Commission for Enterprises in the Unorganised Sector, Government of India, 2007 at p. 3.f the National Commission

unorganised sector\(^3\) accounted for 395 million (86 per cent). Of these 395 million unorganised sector workers, 253 million were engaged in agriculture and the rest 142 million in the non-agricultural sector. Within the agricultural sector 65 percent were self-employed (around 166.2 million)\(^4\) while within the non-agricultural sector 63 percent (92.1 million) were self-employed. Clearly in both these segments of the unorganised sector, the predominant form of work is in self-employment. Indeed, around half of the total workforce of India is self-employed.

1.5 The self-employed in the unorganised sector are described as “persons who operate farm or non-farm enterprises or engage in a profession or trade, whether on own-account, individually or with partners, or as home-based workers. Own-account workers include unpaid family workers also.”\(^5\) The NCEUS reports that self-employed largely consist of own-account workers with or without assistance from family labour, and are micro entrepreneurs though their conditions of work are similar to wage workers and they struggle to maintain themselves through self-exploitation.\(^6\) It is for this reason that the NCEUS recommends several measures for livelihood promotion targeting the huge swathe of the self-employed in India.

1.6 Own-account enterprises (OAE) operate without hired workers, while those that do hire workers are called ‘establishments’ in the Indian data. Most informal enterprises are OAEs (87 percent, accounting for 94 percent of all enterprises in rural areas. The rest of the informal enterprises are ‘establishments’ with hired workers; 11 per cent have 2-5 total workers and less than 2 percent have 6-9 total workers.\(^7\)

1.7 According to the Expert Group on Labour Statistics (Delhi Group) persons who are engaged in their own farm or non-farm enterprises are defined as self-employed.\(^8\) Those self-employed persons who do not hire any worker on a fairly regular basis are considered as own-account workers and others are considered as employers. According to this current classification, the following are termed as informal employees:

i. Self-employed own-account workers in the informal sector or private households and self-employed employers in the informal sector are regarded as informal employees.

ii. Unpaid family workers, whether in the formal or informal sector, are informal employees.

iii. Employees in the formal and informal sectors are classified as informal employees, if they do not enjoy specific employment security, work security or social security.

\(^{3}\) The NCEUS Report (at p. 3) defines the unorganised sector as “The unorganized sector consists of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on proprietary or partnership basis and with less than ten total workers.”

\(^{4}\) NCEUS Report at p. 49.

\(^{5}\) NCEUS Report at p. 5.

\(^{6}\) NCEUS Report at p. 9.

\(^{7}\) NCEUS Report at p. 51.

1.8 This has been elaborated further in the Report of the Task Force on Definitional and Statistical Issues. The Report starts by identifying the term informal sector which is based on the “characteristics of the enterprise rather than in terms of the characteristics of the persons involved or their jobs.” The NCEUS Task Force subsequently defines informal employment in line with 17th International Conference of Labour Statisticians, which is based broadly on those excluded from protection and social security benefits. The Report thus arrives at the term ‘Informal Sector Workers’ based on the activity status of those in such informal employment. This term distinguishes, amongst others, between self-employed own-account workers and self-employed employers. (Unpaid family workers are also recognised as self-employed.).

1.9 We must bear in mind that the expression informal workers is distinct from the expression informal sector workers used by the NCEUS. The expression informal worker is a larger category because it includes those in informal employment in the formal sector also. It also includes informal employment in the informal sector. This last category is also included in the expression informal sector worker as used by the NCEUS. (The current bill pending in Parliament uses the expression unorganised sector and unorganised sector worker).

1.10 What is striking in the above classification is that ‘self-employed employers’ are also classified as part of the informal workforce. This should not surprise us since the term ‘informal employment’ and the derivative term ‘informal worker’ is used to describe the nature of the employment relationships which falls outside protection or regulation, in short, the informality of the nature of their work. This approach is distinct from the understanding of the expression ‘worker’ as understood in traditional labour law which constructs the worker at the opposite pole to that of an employer. The autonomy and economic independence that characterises the self-employed is what the NCEUS Task Force has identified as crucial to the self-employed status. The blurring of the distinction between employers and employees for the purpose of the enumeration of the informal workforce in essence “de-classes” them. This could also be used as an indication that many of the self-employed persons resort to self-employment as a survival activity, often due to lack of employment opportunities or to supplement their meagre wages obtained in waged employment. It could also be an indicator of the reality that many in the informal economy often move between waged employment and self-employment seasonally or over their life cycles. It must also be noted that in the above classification such persons are termed ‘employees/workers’ even though there is no contract of employment within which they work.

1.11 In the Discussion on Decent Work and the Informal Economy at the 2002 International Labour Conference, the class distinction between employers and own-account workers among the informal self-employed was highlighted and a case was effectively made that own-account workers should be organized by and represented in the Workers Group of the ILO tripartite system. The Resolution on Decent Work and the Informal Economy adopted at the 90th session of the ILO in 2002 stated that “Workers in

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10 Ibid. at para. 2.8.1
11 Ibid. at para. 3.7.1.
the informal economy include both wage workers and own-account workers”. This distinction can be well understood if we bear in mind that the statistical approach focuses more upon the nature of the employment relationship whereas the discussion at the ILO was focused far more on the class of the worker, noting that own-account workers rely on their labour (not just capital). The distinction between the understanding of the notion of a worker from a statistical and labour point of view is one that continually arises and is dealt with in this paper. The present overview paper of the WIEGO India Law Pilot Project is confined to an analysis of own-account workers i.e. those who use their own labour or at best that of their family members for their income-generating activities. Further, we have sought to avoid the confusion that arises in the above broad use of the term ‘employee’ and will use the term worker and employee in the manner described below in this paper.

1.12 Prior to the 61st round survey of the National Sample Survey Organization (NSSO) conducted during July 2004 to June 2005, private households employing paid domestic workers were not identified as a separate sector. However, in the 61st round survey of the category of ‘enterprise type’, the category has been expanded to include ‘Private households employing maid servants, cooks, etc.’ as a separate category. As a result households employing domestic workers are now categorised as ‘enterprise’. We must of course bear in mind that this is true for statistical purposes; the labour law is yet to acknowledge domestic workers as workers for their purpose. We can at this stage also point out that for the purpose of statistics, unpaid family workers are also treated as informal sector workers, whereas the labour law in India often does not consider such persons as workers/employees. To illustrate, the Child Labour (Prohibition and Regulation) Act, 1986 does not consider unpaid family child labour as falling within its scope; resulting in the continuation of unpaid family child labour even in prohibited processes.\(^{14}\)

1.13 From the point of view of statistics and their collection, homeworkers are usually classified as self-employed. There are estimated to be at present around 8.2 million homeworkers in India. The NCEUS Report describes them as “falling in an intermediate position between the self-employed and the wage workers, or the employee. Consequently they may also report themselves as either wage workers or as self-employed workers in a survey.”\(^{15}\)

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2. Brief profile of the Self-employed in India

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\(^{14}\) Improving working conditions by dis-incentivising the use of unpaid family, particularly child labour, improving the conditions under which unpaid family labour is performed by women within the households also have major impacts on the lives of those in the informal economy, most particularly women and children.

\(^{15}\) NCEUS Report at p. 5.
The following section is drawn almost entirely from the NCEUS Report.

2.1 Access to land:

2.1.1 Around 17 percent of the self-employed in agriculture are landless or sub-marginal access (land possessed) to land (0.1-0.40 hectares). While they may have homesteads which may provide some food security, they resort to wage work to sustain them. 28 percent of the self-employed in agriculture have marginal holdings (0.41-1.00 hectare), 18 percent had small holding (1.00 – 2.00 hectares) while about 30 percent of the self-employed in agriculture had over medium-large (over 2 hectares) of land.

2.1.2 The NCEUS Report notes that in the non-agricultural sector, owner ship of land was much reduced, with 13.8 percent of the self-employed having nil or sub-marginal land, 13.2 percent having marginal land and only 4.7 having medium-large land. In the sub marginal segment we can note that they comprise 48.4 of the Scheduled Tribes (ST), 64.4 per cent of the Scheduled Castes (SC), 60.5 of the Other Backward Classes (OBC)\textsuperscript{16}, 57.7 of the Hindu Upper Castes, 73.2 of the Muslim OBCs and 67.2 of the Muslim Others. The overall lack of access to land for the self-employed is crucial since an important safety net is missing without such access.

2.2 Employment, self-employed status

2.2.1 Women self-employed workers constitute 70 percent of those in the unorganised sector. Data for employment reveals that the upper caste Hindu is least likely to be a causal worker and more likely to be self-employed. Among both men and women Muslims predominantly work as self-employed workers in the unorganised sector.\textsuperscript{17}

2.2.2 The non-agricultural self-employed persons in the unorganised sector are reported to be concentrated in production related activities, which is greater among women in the self-employed workers.\textsuperscript{18} Around one-third of self-employed men are engaged in sales and production related activities each, while among women, over 53 percent are engaged in production related activities.

2.3 Poverty

2.3.1 The NCEUS Report notes that about 21 percent of the self-employed in the unorganised sector in urban areas and 16 per cent in rural areas are below the poverty line. It is to be noted that the numbers are far greater in the casual workers compared to self-employed persons with regular workers the best off., with workers belonging to socially backward and minority communities being more vulnerable and worse off.

2.4 Value of assets:

\textsuperscript{16} SCs, STs and OBCs are constitutionally recognised categories of persons who may receive certain constitutionally permissible protections and special provisions mainly in education and government jobs.

\textsuperscript{17} NCEUS Report at p. 22.

\textsuperscript{18} NCEUS Report, at p. 23.
2.4.1 OAEs in rural areas have an average value of fixed assets at Rs. 20 thousand per enterprise, while in urban areas it is around 70 thousand per enterprise. The average annual gross value added per worker is Rs. 19,000 or Rs. 1583 per month. By computing its equivalence to the daily minimum wage of Rs. 45 in 1999 used by the Ministry of Labour, multiplying it by 159 working days and into 1.89 earning units per family it reaches the annual notional floor level minimum income of Rs. 13,523 in 1999-2000. On this basis the NCEUS calculates that 57 percent of such OAEs in rural non-agricultural areas have incomes below such estimated minimum incomes while 30 percent of OAEs in urban areas fall below. Thus most OAEs can truly be said to be self exploitative yielding less than subsistence livelihoods for its members.

3. Conceptual issues

3.1 A large body of academic literature in recent times has emphasised the emergence of newer forms of work, particularly in developed economies, that do not readily fall within the established notions of regular, (for-life), full-time work. The new forms of contingent, precarious work have often been brought on to ensure flexibility in the work places and often deepen the vulnerability of the workers. A crucial dimension of the attempts to ensure greater protection for such workers has been to ensure their coverage under labour law which often did not include such workers. Given the flexibility in working time, place of work, lack of constant control and supervision by the employer, payment not on time-rated basis but only upon completion of a specified task, several of these workers would have traditionally been classified as independent contractors.

3.2 One of the challenges confronting the law has been to establish the ‘employee’ status of these workers since their conditions of work and economic dependence are to a large extent similar to that of regular employees. The challenge gets further complicated when such flexible workers do not work on the premises of the employer but in their homes or other premises; when they are not directly hired by the employer, but work is supplied by an intermediary or contractor.

3.3 Even in the formal sector there are a large number of workers who have informal employment status i.e. who are outside legal protection and benefits. These are often workers employed via a contractor/intermediary (‘contract workers’ in India), casual workers, workers on short term contracts.

3.4 What is peculiar in the case of own-account workers in India is that they often work in their homes or in public spaces such as streets, markets or the seas and rivers. Some own-account workers, such as street vendors, directly sell their goods and services to various customers, while others are tied economically to selling their goods to one

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contractor or intermediary. Yet other own-account workers, such as forest workers, who gather non-timber forest produce (NTFPs) such as tendu leaf gatherers, sell their goods to a long chain of intermediaries who either trade or engage in value-addition (such as beedi manufacturers who use the tendu leaf as a raw material). This is also the case of artisan fish workers, who either sell their catch directly to the consumer, or, as is more often the case, hire/use boats belonging to the large fish traders, who in turn have a claim to buy the entire catch with an income-sharing arrangement in place with the fish workers.

3.5 The challenge for law and policy makers is whether to treat these as employees/disguised wage workers and thereby to bring them within the confines of the labour law, or else to treat them as a category subject to a different legal regime. One the one hand while some own-account workers share the economic dependency seen in wage employees, others are more independent and have a larger degree of autonomy. However, given the relative lack of control and supervision exercised by the intermediary/customer who buys their goods or services, attempts to bring such own-account-workers within the scope of the term ‘employee’ would not be possible may often not be appropriate.

3.6 This paper argues, based on the nature of work carried out in the five project areas, that in those sectors or kinds of work where it is difficult to attribute employment status for certain persons, one can argue for a wider notion of a ‘worker’ category where the right to claim certain benefits such as social security or welfare claims can be raised against those who purchase the commodities or services that such own-account workers are engaged in. These benefits could range from the need for a higher support price for the price of the forest produce they gather, to financing of their welfare benefits from the traders/institutions that buy the products from them through a system of cess. The broadening of the notion of ‘worker’ may help conceptualise a new legal paradigm that is less linear and more responsive to the complexities of work arrangements.

4. ILO’s position on identification and rights of worker/self-employed

4.1 Several ILO Conventions and Recommendations identify the expression ‘worker’ to include both those within employment relationships and those who are self-employed. Thus, Convention No. 87 dealing with Freedom of Association and Protection of the Right to Organise uses the term ‘worker’ that is not confined to only employees but includes own-account workers, members of co-operatives etc. An ILO Resolution of 1990 sought to protect those who were self-employed by improving the nature of subcontracting arrangements. The ILO Home Work Convention of 1996 confronted but did not fully resolve this dilemma. It defined the activity without determining the status of a home worker or deeming such a home worker to be an employee. The discussions in the ILC choose to leave to individual members to determine whether employee status

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21 Arts 1, 8, Home Work Convention, 177.
be granted to such workers. Thus the question of whether such home workers be treated as employees or ‘employee-like’ was kept open. After the aborted attempt to have a Convention on Contract Labour in 1997, the debate reached one level of resolution in 2006.

4.2 The Employment Relationship Recommendation, 2006 (R 198) has arrived at some important conclusions that are worth noting. It noted the difficulties of establishing whether or not an employment relationship exists in certain situations. The Recommendation has sought to draw bright lines around what could be considered to be a worker in an employment relationship, what rights the worker has and who the employer is. The Recommendation calls for a national policy to be formulated which should provide guidance on how to effectively establish an employment relationship and on the distinction between employed and self-employed workers. Interestingly the Recommendation declares that “National Policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due” (Art. 8, emphasis supplied). Obviously, the veil could be lifted from commercial relationships that disguise or prevent an employment relationship from being legally noticed.

4.3 The un-stated premise of Recommendation No. 198 is of course that one is either in an employment relationship or within a true civil or commercial relationship; and that the implied liabilities of protecting or providing for the ‘other’ in a relationship only arise within employment relationships, because of the historical peculiarity of the contract of employment. In the case of the civil or commercial ones all liabilities are to be expressly written and therefore limited by the terms of the contractual relationship. However, as this paper argues, the binary of ‘either-or’ posited in the current conception of treating employment and civil/commercial relationships as distinct needs to be revised. As we argue later in the paper, the liability to protect the vulnerable party in commercial relationships, i.e. the own-account workers, can also flow from civil/commercial relationship.

4.4 The method of determining an employment relationship, according to the Recommendation, should be primarily guided by facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed upon by the parties. (Art.9). Thus, according to the ILO, countries could consider the facts and context within which the work is carried out, the manner in which wages are provided, the extent to which the employer benefits from the work performed, the place of work, working hours, provision of tools, availability of leave periods, etc.

4.5 Such a policy which seeks to bring a larger number of persons within the purview of an employment relationship, and thus within the category of an ‘employee’, holds great promise for those currently outside the labour laws premised on an employer-employee relationships. Domestic workers, currently falling outside all-India labour

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legislation (some states do have provisions providing them benefits and recognizing the employer-employee relationships), some categories of contract labour, casual workers, amongst other categories of those in informal would be those who stand to benefit the most if such a wider idea of what constitutes an employment relationship were to be adopted in India.

5. Position in India

5.1 The laws in India recognise a category of worker and employee in the sense that we have used them in this paper. Quite apart from the terminology used in the myriad labour laws in India, an idea of a worker, that is, a person engaged or employed in a trade or industry is recognised in the Trade Unions Act, 1926. The Self-employed Women’s Association is thus able to obtain registration as a trade union, notwithstanding the fact that many of its members are not in any employment relationship and are self-employed (mostly as own-account workers, in the sense used in this paper), on the basis that they are engaged in an industry. The amendment to the law in 2001, explicitly recognised that unorganised workers are to be allowed to form trade union, clearly an indication that the existence of an employment relationship is not a sine qua non for determining if a person is a worker for the purpose of this law. On the other hand, most laws dealing with dispute resolution, managing of conditions of employment, social security or welfare benefits require a person to be in employment before they can be included within the scope of a workman/employee. To illustrate: the Industrial Dispute Act, 1947 requires firstly, a person to be employed, and further, to be employed in certain kinds of employment and earning within a certain wage limit before such a person is treated as a workman under that law. Therefore, the labour laws in India, as indicated by the broader approach of the Trade Unions Act, 1926 and the more traditional position taken by the Industrial Disputes Act, 1947, clearly recognise the two categories of workers and employees noticed above.

5.2 Dealing with those in indirect employment relationship, in the sense of those employed via intermediaries, we may at the outset note that the Indian position is in some respects an advance of the international position, thanks to the Contract Labour law of 1970 and also the creative interpretation by the courts of what the legal status of those in a sub-contracting chain. The question of self-employed is of course a more difficult one for the courts to grapple with. Triangular relationships in the form of employment via an intermediary but performing work for the principal employer have been the subject matter of the Contract Labour (Abolition and Regulation) Act, 1970. The Act does not make the contract labour a direct workman of the principal employer, and nor expressly of the contractor, though the latter could be implied. It only regulates the conditions of work and provides parity of wages for contract labour (Rule 25(b)) with the workman of the principal employer.

5.3 The matter is further complicated where the contract appears to be a mere supply of goods or a sale purchase agreement. The case of the beedi law is well known, where the economic dependence of the beedi worker upon the sattedar led to the deeming

23 Terms such as worker, person employed, workman, and employee are some of the expressions used.
provision in the Beedi and Cigar Workers (Conditions of Service) Act, 1966 deeming such sale-purchase agreements, where tendu leaves were supplied and rolled beedi bought back in return, as employment relationships. The facts of the situation, i.e. the economic dependency of the worker upon the contractor, the supply of raw materials, the control exercised over the manner of performance of the work by the contractor through the over to reject beedis, are constitutive of the decision to treat such persons as workers under the law.

5.4 On the other hand, the law currently under debate in Parliament (based partly on the bill prepared by the NCEUS) merely declares that all self-employed persons working in the unorganised sector as defined in the bill to be unorganised sector workers and further that they should earn less than Rs. 7000 p.m. in order to be eligible for the benefits. Such a blanket deeming provision is not on the lines of the ILO Recommendation which would require a case-by-case factual analysis to determine if ostensible self-employed person would be brought within an employment relationship.

5.5 The reason for this discrepancy is obvious. The NCEUS bills (covering both social security and conditions of work) do not treat self-employed person as being in an employment relationship with the concomitant consequence of casting liability on an employer. Rather, the bill merely makes such self-employed person benefit from the social security provisions available to all unorganised workers. The provision relating to conditions of work continue to remain confined to workers who in an employment relationship.

6. WIEGO Project areas

6.1 How far one can transform self-employed persons into a category of workers covered in an employment relationship, on a sectoral, case-by-case basis remains an exercise to be done and it is one of the areas the WIEGO Pilot project is engaged in studying. 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, 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.

6.2 There is obviously a crying need for India to evolve a National Policy as required by the ILO Employment Relationship Recommendation, 2006 in order that disguised employment relationships can be brought under the labour law. However, three of the project areas in the current law pilot project indicate the need to develop arguments for those who work even outside this extended notion of 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.

6.3 Attempts in 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 or impost could not be placed on a person who did not stand in the relationship of an employer. 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 a formal employment relationship between the parties, and the basis that there was no such employment relationship, struck down such as 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.)

6.4 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 employment relationships. 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 proposed Unorganised Workers Social Security Act that has been passed by the Parliament finally 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 contribution by the industry 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.

6.5 Our study of the forest workers reveals that many forest workers are engaged in gathering of NTFPs. These are sold to the forest development corporations or cooperatives, such as in the case of tendu/kendi 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, aonla 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.

6.6 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 a employment relationship may be missing. Yet the economic dependency of such forest workers to the eventual trade remains. They are not self-employed person 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 cannot place them as self-employed persons or entrepreneurs.

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25 For further details, see the Background Note on Fish Workers, prepared as part of this pilot project.
6.7 This is also the case of waste collectors 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.

6.8 The idea that such forest workers, fish workers and waste collectors 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 spend their labour, but obtain a poor price for the forest, fish or waste they collect. In the case of forest and fish workers, the price at which they produce is bought does not reflect their deep traditional knowledge of the oceans and forest they bring to bear in their collection. 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 would enable them to participate in the until-now, largely unilateral price fixation that state government carry out annually for some forest produce.

6.9 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 dependant 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 a fair and reasonable contractual terms that arise broad public policy considerations.

6.10 The kendu/tendu leaf industry in certain states has made some benefits available to such collectors. The proposed Unorganised Workers Social Security Act, 2008 too permits the government to levy a cess upon the public at large to finance its benefits. This goes beyond what the various state-level Welfare Fund Acts have sought to do – viz., merely collect contributions from own-account workers such as vendors, tailors, auto rickshaw drivers, without imposing a cess on the eventual user, that is the specific industry concerned. The proposed social security legislation for the unorganised sector
purposes government funding, which if the need arises, can be backed by a county level
cess for this purpose. Such a category of a ‘worker’ who does not enjoy an employee
status, has been accepted in the ILO Home Workers Convention, 1996 and is a
recognition of the broad continuum of working arrangements within which workers in the
informal economy may fall.

6.11 Regarding other laws which also impinge of the rights of own-account
workers, the working environment for the workers in the informal economy is to a great
extent governed by laws other than labour laws. (The various background papers discuss
the legal and policy environment affecting these workers in greater detail.) 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 be more significant for the lives of forest workers
in improving their remuneration from forest produce 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 collectors, equal access to the oceans along side
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 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.

6.12 The struggle to ensure the substratum of ‘work’ manifests itself in the fight
for right to market access and right to urban spaces 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 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.

6.13 Expanding the law to deal broadly with all those working, for instance in the
beedi industry, would enormously benefit large numbers of own-account 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.

7. Conclusion

7.1 This paper argues for the need to develop differing categories of ‘worker’ and ‘employee’ to capture economic dependant categories of own-account workers. Further detailed studies in each of these areas can lead to refinement of these typologies with varying claims upon the end user, intermediary or the government for the purpose of their remuneration/wage, benefits or improvement in working conditions. The paper also clarifies why the demands of own-account workers in the informal relate to the protection of livelihoods in a sustainable manner and the quality of working life. The traditional confines of labour law and what are considered to be ‘proper’ labour issues seem unduly narrow for the own-account workers studied in the project. We hope to develop these themes further in the second phase of the pilot project.