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ARTICLE

Transition from the Informal to the Formal Economy: The Need for a Multi-faceted Approach

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Abstract

The recent international attention paid to the formalization of the informal economy finds reflection in ILO Recommendation No. 204 concerning the transition from the informal to the formal economy and the Sustainable Development Goals (Target 8.3). There is great diversity within the categories of the informal sector, informal employment, and informal economy in India. This paper examines the category of the 'informal economy' as understood in international instruments as well as in international statistics and maps these onto legal categories recognized within Indian law. The categories of 'employed', 'engaged', and 'work arrangement' used in Indian laws, and their interpretation by the courts, are useful to understand the links between the concepts of work, employment, and livelihoods. The paper also focuses on the diversity of the informal economy, focusing on wage employment, self-employment, including the diverse forms of own-account work and contributing (unpaid) family labour. The categorization of gig and platform workers as own-account or waged workers continues to pose a normative challenge. The regulatory responses for formalization of each segmented category of informal workers and informal enterprises cannot be uniform, and neither do they need to be linked to any particular domain of the law. Moving beyond the extension of social security coverage as the key vehicle for formalization, the paper suggests various entry points through which law and policy can improve conditions of work and protect the livelihood of those in the informal economy as measures to achieve formalization.

This is a revised version of the VB Singh Memorial Lecture delivered at the ISLE 62nd Conference at IIT Roorkee in April 2022. I am grateful for the comments and questions received from the participants.

Kamala Sankaran: Views expressed are personal. I have partly drawn upon research done previously for a background paper prepared for the ILO, and which I gratefully acknowledge.

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Keywords Formalization · Informal workers · Labour law · Livelihood protection · Platform workers · Contractualization

1 Introduction

The formalization of the informal world of work has received considerable attention in recent years. In 2015, the ILO adopted Recommendation No. 204 concerning the transition from the informal to the formal economy. The UN's Sustainable Development Goals, adopted in 2015, have also focused on greater formalization. What is ironic, however, is that with the Covid pandemic, the world has seen informality—and consequent impoverization—*increase* across different countries. The ILO Monitor that regularly tracked the effects of the pandemic noted that more than 75% of the world's 2 billion workers in the informal economy were adversely affected, with lock-downs and curbs reducing the earnings of those in informal employment significantly.[1] Subsequent editions of the Monitor noted that informal women workers were hit harder than their male counterparts.[2]

Does a long-term response to such distress, as was faced and continues to be faced by our working poor, warrant a public policy and regulatory focus on reducing informality? Can there be a common set of policy responses on ending informality, or, is the reality of informality in the Global South different from that of the Global North? I ask these questions because the discourse on informality from the Global North has focused on the 'standard' employment relationship; deviations from that standard have been seen as characterizing informality. Policy prescriptions that flow from such a diagnosis are then centred on identifying critical aspects of the employer–employee relationship (the employment relationship) which are required to be strengthened. This course of action is premised on the employment relationship as being central to the world of work. The policy measures required to formalize the informal economy in the Global South, however, need to necessarily focus on not only the employment relationship, but also on self-employment, which predominates the world of work.

Another challenge in formulating policies towards formalization is to map the categories of work that the law recognizes and to understand how well they correspond to the categories of work recognized internationally by labour statistics relating to informality of work and informality of enterprises. The convergence, if any, of the legal and statistical categories would assist in developing suitable policies to aid formalization of workers and enterprises. I propose to look at the different types of informal employment/work in India. Broadly speaking this would cover persons who are directly employed, persons working via intermediaries/contractors under a contract to supply labour, those employed in product outsourcing (or supply chain) economic units which are under a contract to supply goods or services to a brand,

[1] *ILO Monitor: COVID-19 and the world of work*. (2020). Third edition.

[2] ILO Monitor on the World of Work (2022). Ninth edition. The ILO Monitors are available at https://www.ilo.org/global/publications/books/WCMS_845642/lang--en/index.htm.

persons who work via platforms, and own-account enterprises that produce goods or provide service using only family labour. In all these instances, as R. 204 of the ILO notes, informality exists *where economic units or workers are not covered or insufficiently covered by formal arrangements*. I propose to examine the varieties of ways in which work is organized to explore entry points for formalization of informal work.

2 Diversity in the Legal Regulation of Employment and Work

H.L.A. Hart, in his highly influential book *The Concept of Law,* remarked that trying to fit 'varieties' of laws into one type or category, resulted in what he went on to describe as, 'Distortion as the price of uniformity'.[3] That assessment appears to hold true when we look at the legal landscape dealing with employment and work. Those in jobs and who are employed on the one hand, and those who may work on own-account or in arrangements that fall outside of employment need distinct normative arrangements.

The growth of trade unions, and the ability to enter into contracts of employments (rather than work based on status) had guaranteed 'market freedom' to the workers.[4] Deakin and Wilkinson have traced how emerging industrial production together with the growth of collective bargaining paved the way for the emergence of the contract of employment.[5] This freedom to contract was also embedded in the formal equality of persons. Thus, Marx could remark on the seeming equality of employers and workers that, '*There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself*'.[6]

The contract of employment required workers to give up some of the freedoms that were available to them during a prior period where they 'worked' but were not 'employed', in return for some measure of employment and income protection (the employment contract serving as a pre-condition for the delivery of social protection during their working life and beyond), and with the employee subordinated to the employer. The 'standard' employment relationship was further strengthened during

[3] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994) Second edition at p. 38.

[4] Judy Fudge and Eric Tucker. 'Pluralism or Fragmentation? The Twentieth-Century Employment Law Regime in Canada'. *Labour/Le Travail*. 46, Special Millennium Issue (2000). 251–306.

[5] Simon Deakin and Frank Wilkinson. *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005).

[6] Karl Marx, *Capital*, Vol. 1, Chapter 6, available at https://www.marxists.org/archive/marx/works/1867-c1/ch06.htm.

the post-War, Fordist form of full-time employment with its attendant social protection and other benefits that flowed not only from the contract of employment or collective bargaining agreements, but also from a social floor developed by social *legislation* covering areas of minimum wages, social insurance and minimum working conditions.[7]

The income earned was to support not an individual but a wage rate carefully calibrated to support the breadwinner's family. The social contract of the standard employment relationship went beyond merely the workplace, and was a key component of the social and political life in a country. These employment rights were sometimes given an additional layer of protection and treated as human rights and constitutional rights in certain jurisdictions, thus allowing the worker in such employment relationships to leverage both the labour law and political and constitutional remedies to defend their rights. This 'standard' served as the benchmark for a formal employment relationship in the highly developed economies of Europe and North America for several decades. The labour law which developed through much of the twentieth century, and which influenced and which in turn was influenced by international labour standards, has been dominated by the standard employment relationship model which has underpinned the contract of employment.[8]

The closing decades of the twentieth century witnessed the increasing *informalization* and the increase in precarious forms of work in much of the Global North. These forms of employment deviate from the standard form of employment in significant ways: regular, full-time work has often been replaced with part-time, casual work; the place of work might no longer be the premises of the employer, instead the place of work could be the home of the worker or user enterprise/brand; direct employment by an employer could now be mediated by agencies or intermediaries which makes it difficult to pin ultimate liability for social protection or occupational health and safety concerns on a distinct entity.

In 2006, the ILO adopted the Employment Relationship Recommendation No. 198. That recommendation was adopted in the backdrop of changes in the forms of employment that had been unfolding across the world, and particularly in the Global North. The adoption of Recommendation No. 198 acknowledged that the protection offered to workers under the (standard) contract of employment is '*linked to the existence of an employment relationship*'.

Yet, this 'standard' employment relationship has never been the predominant work relationship in countries of the Global South. Persons with regular waged

[7] See generally, G. Rodgers and J. Rodgers (eds.). *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. (Geneva: International Institute for Labour Studies, 1989); J. Fudge and L.F. Vosko. Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy. *Economic and Industrial Democracy*. 22(2) (2001) 271–310. For the culture of discipline and time-management demanded by industrialization, see E. P. Thompson, 'Time, Work-Discipline, and Industrial Capitalism'. *Past & Present*, 38 (1967) 56–97.

[8] See S. Deakin. The comparative evolution of the employment relationship in G. Davidov and B. Langille (eds). *Boundaries and Frontiers of Labour Law* (Oxford: Hart, 2006) 89–108.

work have always constituted a small proportion of the labour force, while persons in self-employment have always had a larger share in India. Recent data shows that in developing countries, 90% of all workers are informally employed and 72% are self-employed.[9]

The explanatory power of the standard employment relationship, with its threshold of minimum protection, has been considerably diminished in countries such as India where worker rights and the protection of labour law has bypassed the bulk of the working population. Historically, the introduction of the contract of employment in India did not uniformly result in the attendant freedoms for the wage worker i.e. the protection of worker rights, or the laying down of clear boundaries of managerial power typically associated with such contractual arrangements. Speaking of rural India under colonial rule, Dasgupta notes that, '*However, the change from the traditional feudal control to control exercised by the foreign-owned capitalist farms, e g, in tea gardens, did not necessarily make the labourers in the countryside the equivalent of factory-workers in terms of the freedom they enjoyed*'.[10] (In fact, low wages and indebtedness pushed many such 'wage workers' into bondage). Further, a large presence of the self-employed had been the norm even during colonial times.

The recent global focus on informality has served to put the international spot light on the *contemporaneous* existence of multiple forms of work relationships—from the formal contract of employment to the older traditional forms of eking out a livelihood based on subsistence self-employment carried on with the help of family which are to be found in the Global South.[11]

The ILO Centenary Declaration adopted in 2019, while recognizing the central role of the employment relationship also recognizes multiple work arrangements by calling for, '*Strengthening the institutions of work to ensure adequate protection of all workers, and reaffirming the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers, while recognizing the extent of informality and the need to ensure effective action to achieve transition to formality*'. Thus, the present focus on the transition from informality to formality allows us to examine appropriate policy responses to address formalization—not only of reversing the trend of informalization of the standard employment relationships but of formalizing those work relationships which always fell beyond such an employment-related focus.

[9] Martha Chen and Françoise Carré, Introduction in Martha Chen and Françoise Carré. *The Informal Economy Revisited: Examining the Past, Envisioning the Future*. (London and New York: Routledge, 2020) 6.

[10] Biplab Dasgupta, Agricultural Labour under Colonial, Semi-Capitalist and Capitalist Conditions: A Case Study of West Bengal, *Economic and Political Weekly* 39 (1984) A-129-A-148).

[11] The ILO in its labour standards, uses the term 'worker' in the sense of both a person employed, as well as an independent contractor/self-employed/own-account worker. For example, the early Right of Association (Agriculture) Convention (No. 11), 1921 applied to all those 'engaged in agriculture', which would include self-employed agricultural workers.

3 The (Il)logic of Labour Law and Its Exclusions

Industrialization and the emergence of labour law as a distinct domain of law share a common history. Traditional sectors of the economy, such as agriculture or handicraft production, could never feature as players in the legal framework that arose with industrialization. The labour relations of this period have been termed 'industrial relations', the labour law governing such relations, as 'industrial law', and employer–employee disputes termed as 'industrial disputes', not without reason. It therefore comes as no surprise that agriculture, petty production within households using family labour, and other forms of self-employment often lay outside the labour law.

Yet, certain labour relations were still within the regime of *other* domains of the law. For instance, labour historians in India have noted that the abolition of slavery in the Global North resulted in the adoption of a related law in 1843 in India. This was followed by Section 370 of the Indian Penal Code, 1860 which provided punishment for buying or disposing of any person as a slave. This development went hand in hand with the Workman's Breach of Contract Act, 1859, which, in effect, provided for *criminal* consequences for violating a civil contract of employment (See Section 490 and 492 of the IPC; repealed in 1925). This was also reflected in the use of criminal law (instead of civil/labour law) to regulate employment relations which resulted in harsh conditions of unfreedom in the newly emerging industries, such as the railways and plantations. It took the Report of the Assam Labour Enquiry Committee, as well as the imminent adoption by the League of Nations of the Slavery Convention in 1926, for India to scrap the 1859 law in 1925.[12] Bonded labour, as well as what Jan Breman terms neo-bondage, with their varying degrees of unfreedom, has continued to operate outside the main focus of labour law, which, as already noted above, was centred on the contract of employment.[13]

The law has followed a rather complex route in determining which groups of workers to cover and which to exclude. By casting employment relations as 'industrial' relations, the term industry and its interpretation has acquired enormous salience (and this continues even under the new Codes).[14] Agriculture falls outside the term 'industry' (unless it is an agricultural farm attached to a sugar mill, for example). A household that employs domestic workers is similarly not treated as an 'industry'. Education, the legal profession, clubs, etc., had been brought within the scope of the term 'industry' through a process of judicial interpretation.[15]

[12] See for instance, Christine Molfenter. Overcoming bonded labour and slavery in South Asia: the implementation of anti-slavery laws in India since its abolition until today. 3 *Südasien-Chronik—South Asia Chronicle,* (2013) 358–82. Available at https://edoc.hu-berlin.de/bitstream/handle/18452/9122/358.pdf?sequence=1&isAllowed=y. Also see, Ravi Ahuja,. 'The Origins of Colonial Labour Policy in Late Eighteenth-Century Madras'. *International Review of Social History* 44:2 (1999) 159–95.

[13] Jan Breman, Isabelle Guerin and Aseem Prakash (eds.) *Bonded Labour in India* (New Delhi, Oxford University Press, 2009).

[14] The Code on Wages, 2019, the Industrial Relations Code, the Code on Social Security and the Occupational Safety, Health and Working Conditions Code, enacted in 2020, but yet to be enforced.

[15] *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa* AIR 1978 SC 553.

Inclusion via the entry point of industry is only the first hurdle for a worker to cross in order to come within the scope of the industrial relations law. Workers also have to cross the second hurdle of being identified as 'workmen' (the new Codes use the gender-neutral term, workers). Teachers and doctors (and managers) are not workers (though they may work in an 'industry'), because the conception of a blue-collar worker, based on the functions she performs, is writ large in the law.[16] The law appears to hold that a person whose work is not 'controlled' or supervised, whose skill-set may be more advanced than that of the supervisor or management, could never be a worker. (The new Codes now create two categories of workers and employees, thus maintaining a blue-collared and white-collared distinction within the labour law.) Persons who work at a place, which is not the place of work of the employer (such as outworkers or homebased workers), could also get excluded.[17] Despite liberal interpretation by the courts, working persons may fail to qualify as a workman/worker due to the nature of the work, and fail to get covered by the industrial relations law in India. What causes confusion to any observer is that the same agricultural worker, or teacher may, however, be covered by the minimum wage law or the gratuity law, respectively.

It is a question left wide open in every case whether or not a worker is covered by a particular labour law. Entry barriers relate to the kinds of work done by the establishment, the kind of work done by that particular worker, the wages/salary paid, or the overall number of persons in the establishment. Added to all this complexity is the power of exemption granted to the appropriate government in almost all these laws whereby the central/state Governments can exempt classes of establishments or workers from the scope of the law. Witness the manner in which various state governments increased working time to 12 h a day during the pandemic in 2020 overriding the provisions relating to working time under the Factories Act, 1948, using such sweeping executive powers. This was finally reversed due to a successful challenge before the Supreme Court.[18]

There is, in several senses, a 'colonial continuity' within labour law and other laws regulating work.[19] While most of our labour laws are focused on the employment relationship, the law relating to trade unions (the Trade Unions Act, 1926) is drafted in broader terms and is not restricted to only those in an employment relationship. In addition to defining a workman/worker as one 'employed' in a trade or

[16] See for instance, *Miss A. Sundarambal* v. *Government Of Goa, Daman And Diu* A.I.R. 1988 S.C. 1700 regarding teachers and *Muir Mills Unit Of N.T.C. (U.P) Ltd* vs *Swayam Prakash Srivastava & Anr* (2007) 1 SCC 491 more generally regarding professionals.

[17] The Contract Labour (Regulation and Abolition) Act, 1970 (CLRA) defines an 'outworker' in S. 2(i)(C) as a person to whom any articles or materials are given out by or on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out-worker or in some other premises, not being premises under the control and management of the principal employer. Such outworkers are excluded from the scope of the CLRA.

[18] *Gujarat Mazdoor Sabha & Anr v. The State of Gujarat,* (2020) SCC OnLine 798.

[19] Arudra Burra has used the term, 'arguments from colonial continuity' to refer to arguments against an institution, or a law, which is based on the fact that such a law or institution is associated with colonial rule. See A. Burra, The Cobwebs of Imperial Rule', *Seminar*, No. 615, November 2010.

industry, this statute uses the expression '*engaged'* in addition to '*employed'*. This terminology allowed employer associations as well as associations of self-employed workers (e.g. SEWA) to obtain registration as trade unions under the law. Here is an example of a law that was designed to cover those in regular or casual employment relationships as well as the self-employed. The Code on Social Security, 2020, defines a self-employed worker as one who 'engages' himself in the unorganized sector (S. 2(75)). The new Industrial Relations Code, 2020, continues with the use of the term 'employed' and 'engaged' but domestic workers and homebased workers are still doubtful about their inclusion under this law even though they may be covered under the social security code.

Some of those who perform forms of work not recognized by the labour law may yet be regulated through other domains of law such as the those 'employed' in agriculture in conditions of bondage, persons regulated by criminal law (prostitution, trafficking), those in self-employment (regulated either by professional bodies in the case of large, well-established professions, or those who in smaller survival activities such as forest collectors, street vendors, artisanal fishers regulated by other laws governing natural resources or public spaces.

Moving beyond employment and self-employment, the new definition of gig and platform workers under the Code on Social Security, 2020, creates a third category that applies to a '*work arrangement outside of a traditional employer employee relationship*' where a worker participates in a such work arrangement or uses an online platform to solve a problem or offer a specific service (S. 2 (35) and (60) of The Code on Social Security, 2020). A '*work arrangement*' does not confer employee status on gig or platform workers but neither are they engaged in self-employment.[20]

4 Towards Convergence in the Categories Created by Law and Statistics?

How do these categories in the law: persons employed, engaged or in work arrangements, compare with the categories created by statistics that describe and define informality? The International Conference of Labour Statisticians (ICLS) convened by the ILO had in 1993 defined the informal sector (as production and employment within unincorporated or unregistered enterprises), and informal employment as employment that takes places without social protection. As a result, within the informal economy (covering both the enterprise-centric sector definition, as well as informal employment, whether it occurs within the formal or informal sector), the lack of social protection was identified as a key feature of informality. Universalization of social protection, one of the key pillars of decent work, is an important pathway for formalization.

[20] Gig and platform workers are not mentioned as belonging to the unorganized sector. The Codes have a definition of the unorganized sector that covers the home-based worker, self-employed worker, or wage worker, and a residual category.

The revision of the International Classification of Status in Employment (ICSE) adopted by the 20th ICLS in 2018, created a new category of '*dependant contractors'* who have contractual arrangements of a commercial nature with an economic unit to provide goods and services, but who are not employees of that economic unit. Such persons cannot be characterized as independent contractors because of their economically dependent position vis-à-vis the economic unit with whom they work, which can control the activities that such dependent contractors perform. The category of dependent workers/contractors is a newly recognized category that is in the continuum between an employment relationship and self-employment.[21]

The patterns of increased flexibility and informalization in India over the past three decades have seen two kinds of processes at work. There has been an increase in the numbers of contract labour ('contractualization') where directly employed workers are replaced by workers working at the premises of the principal employer/user enterprise but who are now employed via a contractor/intermediary. There has also been a shift in work patterns in a manner which is 'external' to the enterprise (product outsourcing) where part or the entire production of the brand/manufacturer is outsourced to another economic unit. Product outsourcing finds some reflection in supply chains, where the relationship between two entities in the chain is seen as commercial and governed by commercial law, with limited or no liability under labour law for the entity that outsources part of its production or components to the supplying enterprise.

5 Contractualization

In the contractualization cases, the demand of trade unions has been to establish an employer–employee relationship between the principal employer/user enterprise and the contract labour engaged via a contractor/intermediary. Most relationships of this nature are 'triangular' with the direct employment relationship between the subcontracted worker (contract labour in Indian law) and the contractor/intermediary. Work is performed in connection with the work of the user enterprise which enters into arrangements with the contractor for supply of labour. This form of contractualization or triangular relationships, mediated through an intermediary, and with contract labour working occasionally alongside directly employed workers in the premises of the principal employer, denies the protection of the full gamut of labour laws to such contract labour.

According to the ILO's Employment Relationship Recommendation, 2006 (No. 198), the determination of whether there is an employment relationship must be based primarily on *facts* relating to the performance of work and the remuneration of the workers, notwithstanding how the relationship is characterized in any contractual arrangement between the parties. In India, courts have lifted the veil in certain

[21] See 20th International Conference of Labour Statisticians (2018) resolution concerning statistics on work relationships, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648693.pdf

situations of contractualization to hold that the role of the contractor/intermediary is a sham based on the facts and to declare that there is a direct employment relationship between the principal employer and contract labour. But such instances are few.[22] (Though the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA) terms the user enterprise which hires contract labour through a contractor, as a Principal Employer, in fact, the principal employer is rarely treated as the employer of contract labour, but is instead made to bear liability in certain circumstances which we note below).

6 Fall-Back Liability as a Route to Formalization

The unique feature of the Indian law as it stands is that even in the absence of a direct employment relationship between the principal employer/user enterprise and the contract labour, there is what I have termed as '*fall-back liability'* for payment of wages, payment of social security contribution, and for providing conditions of work placed upon on the principal employer/user enterprise.[23] This 'fall-back liability' arises in case the actual employer (i.e. the contractor/intermediary) does not fulfil the provisions of the commercial contract between the principal employer and the contactor/intermediary or does not comply with the liability cast upon the employer under applicable labour laws.. In some senses, fall-back liability is a form of vicarious liability borne by the principal employer/user enterprise even in the absence of an employment relationship.

These provisions in the CLRA make the Indian position unique and beneficial to workers even in the absence of a declaration that they are 'employed' by the principal employer/user enterprise. The courts have distinguished the two types of control exercised by the principal employer as forms of primary and secondary control.[24] The power of appointment, dismissal and the right to take disciplinary action is identified as a form of *primary* control while the control and supervision of work done in the premises of the principal employer is treated as a form of *secondary* control. Consequently, such a distinction helps demarcate the specific responsibilities of the contractor and principal employer in such triangular relationships and subcontracting chains.

In terms of the ICSE, contract labour would bear a close resemblance to the position of a dependent contractor, who performs work in the premises of the economic unit (user enterprise). The principle of 'fall-back liability' addresses the vulnerability of the worker who is not an employee of the main economic unit where work is performed, who is economically dependent on the economic unit and who is simultaneously an employee of the intermediary that supplies labour to the

[22] *Hussainbhai, Calicut* v. *Alath Factory Thozhilali Union* 1978 AIR SC 1410.

[23] Contract Labour (Regulation and Abolition) Act, 1970, and the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, impose such 'fall-back liability' on the principal employer/employer for providing amenities in the event the contractor defaults.

[24] *Balwant Rai Saluja and Anr* v. *Air India Ltd.& Ors* (2014) 9 SCC 407.

economic unit. Strict enforcement of the fall-back liability principle will ensure formalization of workers in such relationships mediated by an intermediary who supplies labour. The increase in the enrolment under the Employees' Provident Funds Act and Miscellaneous Provisions Act, 1952, that has brought increasing numbers of contract labour under the social security cover in recent years is an instance of such formalization.[25]

7 Product Outsourcing and Extension of Fall-Back Liability

Can the principle of fall-back liability be extended to persons who perform work in premises *external* to the economic unit/user enterprise as is found in product outsourcing or in supply chains? The CLRA in India does not impose any deemed liability in such instances for out-workers or homeworkers, and who may be provided work by an intermediary. There is an exception in the specific case of beedi workers, where workers, working at their own homes, are extended the protection of an employment relationship under the Beedi and Cigar Workers (Condition of Employment) Act, 1966. Recently, the Supreme Court has held that *women workers who were home workers and provided with cut fabric, thread, buttons,* etc*., to be made into garments at their own homes using their personal sewing machines could be treated as workers of the respondent company.*[26] This decision of the India's apex court signals a step forward in the transition to the formalization of many homeworkers engaged in informal employment in the country.

In other jurisdiction such as the USA, the courts have held the manufacturer/brand are jointly liable alongside the 'jobber' contractor who employed workers to finish garments for the manufacturer under the US minimum wage law (the Fair Labor Standards Act, 1938).[27] This finding of the US Circuit Court finds some resonance with the principle of fall-back liability created under the Indian CLRA (and the OSH Code, 2020) that imposes fall-back liability on the principal employer with regard to the payment of social security contribution for contract labour without imposing the other trappings of the employment relationship on the principal employer/manufacturer/brand. Once again, the statistical category of a 'dependent contractor' underscores this link between the user enterprise and the informal worker, and forms the basis for imposing fall-back liability on the principal employer even in the absence of an employment relationship.

[25] Government of India, *Economic Survey 2021–22* (2022), Chp. 10.

[26] *The Officer In-Charge, Sub-Regional Provident Fund Office & Anr v. M/s Godavari Garments Limited,* (2019) 8 SCC 149. In this case, the work was distributed directly by the user enterprise which had sought to treat these homeworkers as independent contractors. The 2-J bench of the Supreme Court in this case drew upon its earlier 3-J bench decision in Silver Jubilee Tailoring House and others v. *Chief Inspector of Shops and Establishments and another* AIR 1974 SC 37.

[27] *Zheng* v. *Liberty Apparel Co.,* 389 F. App'×63 (2d Cir. 2010), upholding an earlier appeals court decision in *Zheng* v. *Liberty Apparel Co.,* 355 F3d 61. See A. Hyde. Legal Responsibility for Labour Conditions Down the Production Chain, in J Fudge, S McCrystal and K Sankaran (eds.) *Challenging the Legal Boundaries of Work Regulation* (Oxford: Hart Publishing, 2012).

I suggest that the situation which obtains in subcontracting where work is performed within the user enterprise (triangular relationships) could be treated on par with situations where there is product outsourcing (domestically or as part of global supply chains) in order to achieve uniformity within the law and extend benefits for workers. Extending fall-back liability in all triangular relationships (subcontracting) as well as in product outsourcing and along supply chains would extend *certain* benefits such as payment of statutory wages, decent working conditions and payment of social security contribution in the event the direct employer (i.e. the subcontractor or entity that has entered into a commercial contract with the manufacturer or brand for supply of goods or labour) avoids compliance with labour law. This limited extension of fall-back liability towards social protection or payment of statutory minimum wages would not impose an employment relationship under the ILO Recommendation No. 198 and may be a first step in the road to formalization of such dependent contractors.

8 Imposition of Cess as a Route to Formalization

An alternative route for formalization of informal workers in industries where production is based on a product outsourcing supply chain model is the imposition of a cess on turnover to finance welfare boards. Such forms of social security financing have been attempted successfully in those industries where large numbers of workers are directly or indirectly employed through a chain of subcontractors, and where it would be administratively expensive to obtain contributions from subcontractors or home-based workers. The law requires each manufacturer to contribute a specific sum of its turnover to a welfare fund constituted for workers in the industry. The welfare fund for building and construction workers set up under the Building and Other Construction Workers' Welfare Cess Act, 1996 provides medical, maternity, and other benefits financed though levying a cess (tax) on construction activities across India.

This route of financing social security that targets an industry rather than employers has been used in the non-ferrous mining industry and the beedi industry for financing such social security/welfare benefits.[28] For production based on product outsourcing/supply chains within the country, such cess-based financing of social security, as a route to formalization, could be a policy worth pursuing. In recent times, the Supreme Court has adjudicated on the constitutionality of levying a specific cess on persons/parties who are neither employers nor beneficiaries of social security benefits, but who are yet called upon statutorily to contribute to such social security funds. The court was concerned with a law that made every litigant in Kerala pay an additional amount of court fees to finance a welfare fund that provided a retirement fund for advocates. The court upheld such a broad incidence of liability

[28] See for instance the Building and Other Construction Workers Welfare Cess Act, 1996, the Beedi Workers Welfare Cess Act, 1976, and the Iron Ore, Manganese Ore and Chrome Ore Mines Labour Welfare Cess Act, 1976.

on the litigating public even though there was no employer–employee relationship or a professional relationship between the litigant and the advocate who eventually benefits from such a retirement fund. What is distinctive in such an approach is that advocates are not treated as merely self-employed (which could have required that they alone contribute towards social security).[29] The litigating public which uses the services of the justice delivery system has been made co-contributors to such welfare funds. The individual advocate who benefits from such a welfare fund can be viewed as falling within the normative position of a 'dependent contractor', and the litigating public pays the additional court fees for availing the services of the justice delivery system.

Such an approach, where the duty of providing social protection is not imposed upon an employer but upon an industry, opens up several possibilities for formalizing informal enterprises. By imposing a liability on every eligible enterprise in the industry, it allows the formalization of such informal enterprises based on their production and turnover rather than on the number of persons employed or capital invested. An industry-specific method of financing, rather than an employment/commercial relationship-specific one, can be considered as an alternate method for providing social protection to all vulnerable persons engaged or employed in an industry, and serve as a step towards the formalization of such workers. As the Kerala example discussed above shows, even consumers of the industry may be required to pay a certain sum towards social security of those employed in an industry. This cess-based route of financing would still fall well short of a universal tax-financed public assistance scheme, to warrant it being termed as a formalization scheme based on extending social security cover.

9 Platform Workers

I turn now to the situation of platform workers. As the ILO has noted in its flagship WESO Report, platform workers (whether working on web-based or location-based platforms) connect businesses and clients with workers, and those whose work is mediated by the platform are usually considered self-employed or independent contractors.[30] There is a concern about the 'mis-classification' of workers in such situations and whether those who obtain work via a platform should be treated as employed by the platform or the client. The Indian law has also partly addressed this dilemma in the case of cab/taxi aggregators.

The Motor Vehicles (Amendment) Act, 2019, now defines an aggregator. Section 2 (1)(1A) as amended now states that 'aggregator' means a digital intermediary or market place for a passenger to connect with a driver for the purpose of

[29] Kamala Sankaran. Realising Employer Liability for Informal Workers: lessons from India in Martha Chen and Françoise Carré, Introduction in Martha Chen and Françoise Carré. *The Informal Economy Revisited: Examining the Past, Envisioning the Future*. (London and New York: Routledge, 2020).

[30] ILO. *World Employment and Social Outlook: The role of digital labour platforms in transforming the world of work* (2021).

transportation. Under S 93 an aggregator has to obtain a license and the failure to do so makes an aggregator liable to punishment of fine. The route adopted for regulating intermediaries is an industry-specific law such as the Motor Vehicles Act, 1988 which does not seek to regulate the conditions under which taxi drivers work and consequently does not address the 'worker/employee' status, if any, of persons working in such industries.

The Supreme Court in a recent 3-J bench decision held that the use of an algorithm and its dynamic pricing by app-based taxi companies such as '*Ola and Uber do not facilitate cartelization or anti-competitive practices between drivers, who are independent individuals, who act independently of each other*'.[31] Reflecting a similar approach, the new Code on Social Security, 2020, allows platform workers to obtain social security without granting them the status of employees. This hybrid position is in keeping with what we have discussed above with regard to workers in triangular relationships and workers in product outsourcing units. The Code uses the term 'work arrangements' to distinguish platform workers from either employees or independent contractors and highlights their economic dependence on platforms. Whether or not such platform workers are employees would, of course, continue to be an open question and one which can be determined based on the guidance provided by ILO Recommendation No. 198, as well as the jurisprudence developed by the courts in India, including that of primary and secondary control discussed earlier. However, the liability of platforms to contribute to the social security benefits of platform workers is not made *compulsory* in the current framework. Ascribing compulsory liability on platforms/aggregators to contribute for social security of platform workers will be an additional step towards formalization.

10 Formalization of Pre-existing Form of Informal Work and Livelihoods

The forms of work that existed prior to and independent of the emergence of the contract of employment, took the form of self-employment—more prevalent in small agricultural holdings, handicrafts, traditional services, fishing, and food processing. Production here is targeted either for own consumption or for the market, and these forms of work make use of contributing family labour. These forms of livelihood are more accurately described in labour statistics as working on own-account with, perhaps, the contribution of family labour.

The access to markets, land, public spaces, and public goods required for ensuring livelihoods have rarely been the focus of labour institutions or labour law. Public acquisition of land for industrial/commercial and non-agricultural purposes results in loss of livelihoods. There is a need to provide alternative livelihoods to land owners, those in possession of the land, and those working on those lands, in cases of land acquisition.A transition to formality in these sectors requires a land acquisition

[31] *Samir Agarwal* v. *Competition Commission of India*, Supreme Court of India Civil Appeal No. 3100 of 2020 decided on 15.12.2020.

policy that not merely provides for monetary compensation to land owners or those in possession of land, but which also provides for rehabilitation and capacity building for creating alternative livelihoods for those who are adversely affected by such land loss.[32] The FAO has adopted voluntary guidelines that recognize the importance of land, forests, and fisheries tenures for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth.[33]

In urban areas, access to public spaces is critical for those who eke out a livelihood there. A private right of ownership over public land is not possible; yet a license to enter upon such public spaces for one's livelihood and the recognition of such access to public spaces as a labour right or a right to livelihood is essential for street vendors, waste pickers, itinerant hawkers, and small establishments that do not have a permanent or formal location.[34]

In the case of forest workers, access to forests and forest produce is critical for their livelihoods. In India, such licences are granted to contractors and local communities to gather and commercially exploit forest resources which in turn feed into the pharmaceutical, food, and fashion industry. The rights to access and collect forest produce are also provided in India alongside a 'voice' to such communities to determine the extent of developmental activities or the scope of extractive industries that may endanger the environment.[35] In the case of fish workers, there is a loss of livelihood in 'no-fish zones and seasons' during the time of spawning. Some states in India provide a compensation to fish workers during such spawning/monsoon season.[36] The interface between labour law and environmental concerns of sustainability, and the challenges posed by the Anthropocene starkly affect distributive justice,[37] and the livelihood of many communities. The right to livelihood as a constitutional and human right and its incorporation as a labour right (critical for formalizing such own-account informal workers) was recognized in the draft

[32] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, provided for compensation, rehabilitation and resettlement to those affected by land acquisition.

[33] Food and Agricultural Organizations of the United Nations (FAO), *The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security*, Rome, Italy, 2012. Paragraph 13.3 of these Guidelines states: '*Where appropriate, States may consider encouraging and facilitating land consolidation and land banks in environmental protection and infrastructure projects to facilitate the acquisition of private land for such public projects, and to provide affected owners, farmers and small-scale food producers with land in compensation that will allow them to continue, and even increase, production*'.

[34] Kamala Sankaran. 'The Human Right to Livelihood: Recognising the Right to be Human'. 34(1) *Comparative Labor Law and Policy Journal* (2012) 81–94.

[35] See for instance the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which recognized certain key rights of livelihood and control over resources of forest dwellers.

[36] For details see, Kamala Sankaran. *Towards greater inclusivity and equality in minimum wages: The case of piece-rate wages* (Geneva: ILO, 2022) available at https://www.ilo.org/travail/projects/WCMS_844446/lang--en/index.htm.

[37] Upendra Baxi. Towards A Climate Change Justice Theory? 7(1) *Journal of Human Rights and the Environment* (2016) 7–31.

bill 'Unorganised Sector Workers (Condition of Workers and Livelihood Protection) Bill, 2005 prepared by the National Commission for Enterprises in the Unorganised Sector.[38]

However, merely addressing the concern over access to land, forests and water as well as access to produce is not sufficient for the transition to formality. Just as minimum wages provide for a floor below which work cannot be performed, so too, a minimum support price (MSP) at which agricultural or forest produce will be bought can help sustain livelihoods. India has for long experimented with a minimum support price which may or not cover the basic input costs but which prevents a drive to the bottom in a buyer-dominated market. A similar demand for an MSP in forest produce has arisen in the past few years following the formalization of rights of forest dwellers to access forest and non-timber forest produce. Some states have announced an MSP for minor forest produce collected by tribal communities such as *chironji*, *sal* seeds, *amla*, and tamarind. The price is expected to reflect the time spent by forest workers in collection as well as in any value addition to the product. Collection of forest produce is rarely indicated in the schedule of piece-rated wages under the notifications issued under the minimum wage law. Time and motion studies are not conducted among forest workers to determine the equivalent minimum wage for collection work. The MSP needs to reflect the equivalent piece-rate minimum wage for the time spent in collection, based on the appropriate skill-level, with additional mark-up to reflect the price that many of these commodities command in the market. The piece-rated minimum wage based on time and motion studies for the collection of forest produce must necessarily form the *floor* of the MSP above which market-related factors could determine the actual MSP fixed by the state governments. However, this functional link between the minimum wage and the MSP is not made explicit and often denies forest workers even a 'national floor level minimum wage'.

Such interventions in the minimum price payable for commodities need to be viewed as a form of a labour rights to ensure the transition to formalization since contribution to social security schemes by such own-account forest workers would be possible only if viable and sustainable livelihoods are generated. Where a high proportion of those who work in a sector are own-account workers, the focus could be upon ensuring a decent livelihood by securing the prices of goods and services sold as indicated by the MSP intervention suggested above.

11 The Way Ahead

An important factor to determine informal employment is the absence of social protection. The conflation of an employer's liability/responsibility with the liability to contribute to social protection schemes unduly restricts the coverage of social protection schemes. The legal question of imputing *employer* liability on a user

[38] Also see, K.P.Kannan. Social Security in the Lockdown: A Time to Revisit the NCEUS Recommendations. *Indian Journal of Labour Economics.* 63 (2020)139–144.

enterprise/principal employer therefore needs to be separated from the question whether liability to *contribute* towards social protection can be imposed upon such an entity that benefit from such informal workers.

The 20th ICLS has suggested a binary between social security schemes which are linked to employment and those that are universal in nature.[39] There is a continuum between these two extremes. Policies to formalize informal workers can focus on achieving social security contributions from principal employers/social enterprises in the form of fall-back liability in the case of contractualization and product outsourcing as well as targeted contribution via imposition of a cess on the industry, or brand or consumers, discussed above, that go beyond employer-centric liability for social security schemes but still fall short of universal social protection schemes.

Where it is not possible to establish an employment relationship, it would be useful to extend the fall-back liability already available in contractualization cases, to those enterprises which are part of the product outsourcing/supply chain as discussed above. Social protection liability in the first instance could be statutorily on the industry/sector that benefit as a whole, which has the merit of allowing the formalization of informal employment as well as formalization of the enterprises using informal workers, relying on an industry-wide or sectoral approach for levying such a cess/tax.

The alternative routes to formalization suggested above seek to go beyond the approach at adopted by the ILO in its Employment Relationship Recommendation No. 198. The Recommendation No. 198 sets out guidelines to 'lift the veil' and extend the notion of an employer and ascribe an employer status in instances where such employment relationships may not immediately be apparent or readily acknowledged. The routes to formalization suggested above above seek to broaden the categories of those eligible for work-related social protection, even if they may not be eligible to be covered by social protection that is contingent upon their employment status.

In addition, in the case of own-account workers, ensuring their access to land/markets/public spaces/natural resources that is bounded by the requirements of environmental sustainability, will help in creating and recognizing the right to a decent livelihood for this section of informal workers. Where own-account workers are engaged in the collection of natural resources (such as forest or fish workers), the use of an minimum suport price (that is in functional terms equivalent to a piece-rated minimum wage) to set the floor at which such produce is bought will ensure a minimum livelihood (and therefore a capacity to contribute towards social protection) for such workers.

The Covid pandemic has shown the deep distress suffered by working people across the world. Access to health care and social protection is not just a labour right but a human right. Acknowledging the many categories of informal workers, and

[39] *Job-dependent social protection* provides information on whether the person is entitled and in practice has social protection as the result of employment in a particular job. It therefore excludes 'universal' protection schemes that are not dependent on holding a job. For details see, supra 21.

tailoring policies to take the first step towards formalization, viz. access to social protection and decent livelihoods, is an urgent need today.

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