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Electronic version

URL: <https://journals.openedition.org/rdctss/2268>

DOI: 10.4000/rdctss.2268

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017

Number of pages: 110-123

ISSN: 2117-4350

Electronic reference

Supriya Routh, "Transitioning to the Formal: A Misdirected ILO Strategy?", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021. URL: <http://journals.openedition.org/rdctss/2268> ; DOI: <https://doi.org/10.4000/rdctss.2268>

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TRANSITIONING TO THE FORMAL: A MISDIRECTED ILO STRATEGY?

RÉSUMÉ

Cette contribution revient sur la Recommandation 204 de l'Organisation internationale du Travail (OIT) concernant la transition de l'économie informelle vers l'économie formelle. Elle sera mis en perspective à travers l'étude d'une initiative juridique récente en Inde visant les travailleurs domestiques

MOTS-CLÉS : *Economie informelle, transition, droit du travail, Organisation internationale du travail, travailleurs domestiques, Inde.*

ABSTRACT

This article evaluates the International Labour Organization's (ILO) Recommendation on transition from informal economy to formal economy, analyzing it in a comparative context with reference to a recent legal initiative with domestic workers in India.

KEYWORDS: *Informal economy, Transition, Labour Law, International Labour Organization, Domestic Workers, India.*

In this article I evaluate the International Labour Organization's (ILO) Recommendation on transition from informal economy to formal economy, analyzing it in a comparative context with reference to a recent legal initiative with informal workers in India. I examine what an emphasis on the "form" of the economy, that is, formal and informal economy might have to inform us about the conditions of workers that work in the informal economy. I also analyze what should be the contours of an appropriate ILO approach to an effective legal strategy aiming at improving working and living experiences of informal workers. I argue that legal emphasis on the form does not necessarily inform us about the conditions and aspirations of workers working in the informal space. In order for legal strategy to make a real difference in the lives of informal workers policy emphasis should lay on the substance of workers' deprivations rather than the form of organization of their work. The focus on the substance of workers' conditions does not necessarily mean that the formal and informal conceptualizations are irrelevant. Since the "informal" is conceptualized in its opposition to "the formal", these categorizations *prima facie* tell us that the traditional law and practice of the formal space is unsuitable and (mostly) irrelevant in administering the informal space of operation.

This *prima facie* knowledge means that when we think about the informal space (or spaces) we need to reevaluate our existing conceptual categories and entitlement approaches. This revaluation should mean that seeking to mould the informal space in the image of the formal space is bound to falter by missing a nuanced understanding of valuable informal activities. Accordingly, I suggest that the ILO adopts specific informal activity-based legal policies, such as the Convention and Recommendation on domestic workers, insofar as it is possible. In any case, I argue that the real significance of the ILO Recommendation on transition to formality lies in its ability to mainstream concerns of the informal space in international policy-making. The Recommendation should, then, be seen as a step in the continued politics of recognition of informal activities as valuable work. In the following part, I discuss the prominent features of the ILO Recommendation on transition to the formal economy and its underlying assumptions. In part 2, I discuss why might the form of an activity be important and what could it inform us about legal policy-making for informal workers. In part 3, I analyze recent Indian legal initiatives on informality with reference to a specific category of informal worker. I end the article with a brief conclusion summarizing my main arguments.

I - ILO RECOMMENDATION ON TRANSITION FROM INFORMAL TO FORMAL

In June 2015, the ILO adopted the *Recommendation Concerning the Transition from the Informal to the Formal Economy* (ILO Recommendation 204).¹ Although not a binding legal instrument, ILO Recommendations serve as advisories to ILO member-states. The 2015 Recommendation notes that the “informal economy in all its aspects”² poses significant obstacle in the realization of workers’ substantive rights. In particular, it posits that denial of rights at work, lack of quality employment, insufficient social protection guarantees, and absence of social dialogue characterize the informal economy.³ Accordingly, the ILO sets itself a normative goal, that of transitioning to formal economy by means of public policy and social dialogue. The transition to formal economy is, thus, seen as a way to attain “inclusive development” and “decent work.”⁴

There are two predominant underlying assumptions to the Recommendation. First, that the *form* (i.e., formal/informal) itself is inherently connected to the actual realization of substantive rights. And second, that achieving a *specified form* (in this case “the formal”) delineated in the Recommendation ought to be the normative aim of legal policy. In the backdrop of these assumptions, the Recommendation calls on the ILO member-states to adopt an *integrated legal policy* in furtherance of “sustainable development, poverty eradication and inclusive growth” and securing access to justice for informal workers.⁵ An integrated legal policy ought to secure right to association and collective bargaining; eliminate forced labour, child labour, and employment discrimination; guarantee safe and healthy conditions at work; guarantee minimum wages, social security including social insurance, and maternity benefits; and childcare provisioning for workers in informal economy.⁶ Not only should these safeguards be legally institutionalized, they ought to be *practiced in reality*.⁷ Accordingly, the Recommendation devises elaborate provisions on legal compliance and enforcement, which ought to be mindful of the *specific needs of informal workers*.⁸

The Recommendation defines informal economy as “... economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements”⁹ On the basis of this definition, the Recommendation identifies own account workers; informal employers; members of cooperative and solidarity economy; contributing family members; “employees holding informal jobs in or for formal enterprises, or in or for economic units in the informal economy, including but not limited to those in subcontracting and in supply chains, or as paid domestic workers employed

1 ILO, Recommendation Concerning the Transition from the Informal to the Formal Economy, 15 June, 2015, Geneva (No. 204), available at http://www.ilo.org/wcmsp5/groups/public/---ed-norm/---relconf/documents/meetingdocument/wcms_377774.pdf (site visited 7 August 2017).

2 See Preamble to Recommendation No. 204, *ibid*.

3 *Ibid*.

4 *Ibid*.

5 Articles 8, 9, 10, 11, *ibid*.

6 Articles 16, 17, 18, 19, 20, 21, *ibid*.

7 Article 18, *ibid*.

8 Articles 22-30; Article 18, *ibid*.

9 Article 2(a), *ibid*.

by households"; and employees outside legally determined employment relationship, as informal workers.¹⁰ It is true that several of the abovementioned categories of workers do not work under circumstances resembling the "formal arrangement" of industrial employment; it is also true that in several regions of the globe these workers remain excluded from legal imagination, working under precarious conditions. However, in some parts of the globe informal workers often work under clearly specified detailed rules.¹¹

Although the Recommendation defines and delineates instances of informal economy, it leaves some scope for social dialogue amongst several social partners in determining the exact nature and expanse of informality.¹² Taking account of the heterogeneity of the informal economy, the Recommendation advises ILO member-states to devise specific policies for particular circumstances of informality.¹³ While these specific provisions might suggest that the ILO furthers a nuanced decentralized policy to improving conditions of marginalized informal workers, in reality, however, the Organization seems unable to overcome the urge to accept one specific economic model (i.e., the industrial employment model) as *the* normative model of formality.

Thus, the Recommendation advises tripartite consultation in developing appropriate employment policies, including macroeconomic policies, trade and tax policy, enterprise policy, labour market policy, and education and training policy for the informal workforce so that they could be transitioned to the formal economy.¹⁴ The Recommendation also suggests that member-states aim at promoting productive investment, structural adjustment, business confidence, and conducive environment for fair competition among enterprises.¹⁵ In this respect, the Recommendation reiterates the role of workers' associations and collective bargaining, including bringing the "most representative" employers' and workers' organizations at the bargaining table, including, if possible, informal workers' and informal entrepreneurs' representative organizations.¹⁶

There are two major problems with this approach to transition promoted by the ILO – first, a conceptual one and second, a structural one. First, as I mentioned, the conceptual problem is triggered by the ILO when it calls on member states to promote investment; structural adjustment; and conditions for fair competition, and in that respect fix their macroeconomic policies; employment policies; enterprise and labour market policies; and trade and tax policies, thereby advocating the replication of the free-market incentive-based industrial organization, heavily shaped by the interests of transnational capitalists, at the global level.¹⁷ This approach is conceptually problematic because, especially in the

10 Article 4, *ibid.*

11 Ana Maria Vargas, *Outside the Law: An Ethnographic Study of Street Vendors in Bogota* (Lund University 2016); also see different chapters in Supriya Routh and Vando Borghi (eds), *Workers and the Global Informal Economy: Interdisciplinary Perspectives* (Routledge 2016).

12 Article 6, Recommendation No. 204 (n 1).

13 Article 7(a), *ibid.*

14 Articles 14, 15, *ibid.*

15 See Article 15, *ibid.*

16 Articles 31, 34, 38, *ibid.*

17 David Harvey, 'Neo-liberalism and the Restoration of Class Power', in David Harvey (ed.) *Spaces of Global Capitalism: Towards a Theory of Uneven Geographical Development* (Verso 2006) 7; David Harvey, 'From Globalization to the New Imperialism', in R Appelbaum and W I Robinson (eds.) *Critical Globalization Studies* (Routledge 2005) 91.

last few decades, the logic underlying the movement of formal economic organizations into informal arrangements has been shaped largely by market-competitive concerns and investment opportunities of transnational enterprises.¹⁸

Therefore, this ILO approach begs the question as to how can the same policies that have been responsible for the expansion of informal economic arrangements could be expected to do away with it. However, this is not to deny that there might be other informal arrangements that are not directly connected to competitive concerns of market-enterprises (such as traditional miniscule economic operations performed in several societies), some of which might even benefit from the ILO approach to transition. However, in order for that to happen, those activities need to be separated at the very outset for specific policy focus. One general policy outline, formulated primarily to further global capital circulation and competition, is inadequate in addressing the complexities of a range of informal arrangements.

The second problem with the Recommendation is structural, but somewhat linked to the conceptual problem. In endorsing social dialogue by means of tripartite bargaining mechanism, the ILO adheres to the conventional industrial bargaining mechanism. Of course, the ILO recognizes that informality is not covered (or insufficiently covered) by formal arrangements, including that of the tripartite bargaining structure. Between the formal tripartite bargaining structure and the complete absence of negotiating power of informal workers, there is a range of circumstances with varying levels of worker participation and negotiation in the domain of informality.¹⁹

While the ILO is mindful of this heterogeneity it is structurally bound to the “formal” tripartite model. This structural allegiance, which is arguably the *raison d’être* of the ILO’s existence, blinds the Organization from conceiving social dialogue in an expansive manner capable of integrating the embodied experiences of heterogeneous informal workers in the policy-making process. In spite of this structural limitation, the Organization calls on its member-states to include representative organizations of informal workers in the social dialogue process whenever possible, but any such integration is an *additional outreach* to the core tripartism. Thus, in its attempt to formalize informality, the ILO somewhat fetishizes the industrial employment model as the only normative model to formality. Apart from its focus on a unitary normative goal, which may have itself been responsible for the expansion of informal economic arrangements, the ILO Recommendation also conflates issues of *form* with that of *substance*. I discuss this conflation in the following part.

18 Supriya Routh, ‘Building Informal Workers Agenda: Imagining ‘Informal Employment’ in Conceptual Resolution of ‘Informality’ (2011) 2:3 *Global Labour Journal* 208. Also see generally Manuel Castells and Alejandro Portes, ‘World Underneath: The Origins, Dynamics, and Effects of the Informal Economy’, in Alejandro Portes, Manuel Castells and Lauren A Benton (eds.) *The Informal Economy: Studies in Advanced and Less Developed Countries* (The Johns Hopkins University Press 1989) 11; also Harvey, ‘Neo-liberalism’ *ibid*.

19 For example, see Supriya Routh, ‘Informal Workers’ Aggregations and Law’ (2016) 17 *Theoretical Inquiries in Law* 283.

II - THE REAL SIGNIFICANCE OF FORM (FORMAL/INFORMAL)

While the ILO was initially enthusiastic about the opportunities offered by informal economic activities, its perception of the informal sphere turned negative upon more reflection.²⁰ Although it was through an ILO initiative that the informal sphere was conceptualized and defined, the Organization itself seems to have conflated the “form” (i.e., structure of the informal) with the “substance” of workers’ entitlements and conditions. In spite of acknowledging that “the term “informal economy” tends to downplay the linkages, grey areas and interdependencies between formal and informal activities”,²¹ the Organization ends up equating absence of rights and precarious conditions of workers with the informal domain of their operation.

This conflation of form and substance results from the Organization’s explication of the relationship between law and informality. As the ILO defines, while it is true that informal means exclusion from formal arrangements – in law and practice – its explanation of the formal/informal continuum remains incomplete. The Organization explains that exclusion in practice means non-enforcement of laws, even when such laws *de jure* cover informal economic activities.²² What the Organization does not emphasize is that the term “practice” (in conceptualization of the informal) also refers to all conventions, rules, norms, and behaviours that shape the formal structure, that is, the industrial relations framework with entrenched bureaucratic involvement, but have not attained the status of (enacted state) law – that was, at least, the intention of Keith Hart when he conceptualized those activities.²³

This ILO definition led several legal scholars conclude that informality means complete legal void.²⁴ Therefore, some of them note that informality should be seen as grey or black economy – of questionable legality or illegality.²⁵ In addition to confounding regulation with statutory enactment, this way of reasoning shifts focus from the complexities of actual activities and experiences of workers in working in those activities to a legally formalised *structure* of taking cognizance of social phenomenon. The emphasis in these accounts is dichotomous, that is, informal/formal, or black/white, or illegal/legal. Because of this dichotomous understanding of informality in its relationship to formal industrial organization, it is no surprise that strategies of formalization will propose introduction of laws and policies that would help structure informal activities along the industrial model signified by the “formal” structure.

20 Routh, ‘Building’ (n 17) 211.

21 ILO, ‘Resolution Concerning Decent Work and the Informal Economy’, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf> (site visited 20 August 2017) para 3.

22 *Ibid.*

23 See Keith Hart, ‘Bureaucratic Form and the Informal Economy’ in Basudeb Guha-Khasnobis, Ravi Kanbur and Elinor Ostrom (eds.), *Linking the Formal and Informal Economy Concepts and Policies* (Oxford University Press 2006) 21; also see Keith Hart, ‘Informal Income Opportunities and Urban Employment in Ghana’ (1973) 11:1 *The Journal of Modern African Studies* 61.

24 Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2012) 349-358; Guy Davidov, ‘Enforcement Problems in “Informal” Labor Markets: A View from Israel’ (2005-2006) 27 *Comparative Labor Law & Policy Journal* 3, 13, 23-24; Kamala Sankaran, ‘Informal Employment and the Challenges for Labour Law’ in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (Oxford University Press 2011) 223, 226.

25 Freedland and Kountouris, *ibid.*

This perspective misses the point that enacted parliamentary laws are not the only way of social ordering; neither does statutory exclusion make a phenomenon illegal. In establishing a law-oriented understanding of informality, these scholars offer a simplistic and linear relation between law and informality. As per them, diverse range of activities are either recognised or not recognised by enacted legislation and hence, either legal or illegal. Accordingly, these scholars call for the abandonment of the very use of informal and instead focus attention towards proper implementation of statutory safeguards to improve deplorable conditions of workers.²⁶ What underlies this proposal of legal formalization is acknowledgement of the fact that legally enumerated labour rights that have become structurally entrenched in industrial relations should be extended to informal workers too.

Although the intention behind extending recognized labour rights to the informal space is noble, it is shortsighted in view of the non-comparability of heterogeneous informal structures with that of the “model” formal structure. The oversight in recognizing the complex relation between legal rights and informal workers leads to a much poorer legal account of informality and misses the central relevance of the concept “informal” for legal analyses. By ignoring empirical evidence on heterogeneity of informal activities and situated experiences of informal workers, legal scholars find themselves unable to move beyond the formal industrial employment frame of reference. The formal/informal continuum with sharp differences at the edges and fluidity in the middle (of the continuum) gets lost in a dichotomous characterisation of legal-formal and extra legal/illegal-informal.

However, if the idea of formal is seen in a broader light as indicated by Hart (and pursued by other social scientists),²⁷ meaning that it signifies a specific manner of organization of economic activities constituted by law and practice; informal becomes those arrangements that are (in law and in practice) differently organized than the formal domain, formal and informal, then, occupies two different non-dichotomous spaces of economic operations.²⁸ “Non-dichotomous” because while formal might suggest one specific structure, informal consists of heterogeneous activities and hence, formal/informal constitute a continuum rather than a dichotomy.²⁹ If this is how informal is understood, informal arrangements does not *per se* become legal exclusions whether *de jure* or *de facto*. The nature of laws, rules, norms, and behaviours become *different* resulting in the different organization of informal activities.

26 Davidov (n 24); also see Claire La Hovary, ‘A New International Labour Standard for Formalizing the Informal Economy? A Discussion of its Desirability’ in Routh and Borghi (eds) (n 11) 91.

27 See references in n 23; also see Collin C Williams and Alvaro Martinez, ‘Tackling the Informal Economy: A Critical Evaluation of the Neo-liberal Policy Deregulatory Perspective’ in Routh and Borghi (eds.) (n 11) 29; Zoran Slavnic, ‘The informal economy and the state’ in Routh and Borghi (eds) (n 11) 51.

28 Although my emphasis in this essay is on economic activities, the informal domain also consists several activities that may not be economically productive, even though those are immensely important in their social contribution, a prominent example being unpaid domestic work including care work. I have elsewhere argued that insofar as “work” is concerned, it has to be seen with a broader reference to society rather than in its economic relevance. Accordingly, I argued that several kinds of unpaid work should be seen as different work arrangements in the informal domain. See Supriya Routh, ‘An Ambitious Interpretation of the Informal for Policy-Makers’ (2014) 58 YOJANA – A Development Monthly 41.

29 See generally Guha-Khasnobis, Kanbur and Ostrom (eds.) (n 23).

Some of these laws, rules, regulations, and behavioural codes often also ensure certain entitlements for informal workers, including provision for credits, emergency funds, safety, and so on.³⁰ Just as formal *per se* does not mean a decent dignified life for workers, informal does not *per se* mean a desolate impoverished life. What, then, is the significance of informal from a legal point of view? To answer this question we will have to tap in to the rationale distinguishing informal from formal, as I articulated it. For policy purposes, then, informal should suggest that space of activity wherein our present ways of conceptualizing and organizing entitlements including labour rights, might not always be effective, because the informal space is conceptually different; organized differently than that of the formal industrial model of organizing production.

While this distinguishing justification may not immediately signify precariousness of informal workers, it should alarm us of the dangers in trying to replicate legal entitlement policies developed for the formal space into the informal space. The very idea “informal” should lead to a *prima facie* assumption that formal arrangements would not work in the informal context. This assumption in itself will have far reaching implications about the openness to understanding the problems and prospects of heterogeneous informal activities. Once this *prima facie* assumption becomes the backdrop to policy-making, legal policy could make a good start developing from a perspective of actual working conditions of specific categories of informal workers. This emphasis on specific conditions is necessary because the heterogeneity in informal economic activities and conditions of informal workers engender attempts to generalization very difficult, if not futile.

If generalization about informal workers is an improbability and their specific empirical condition needs to inform legal policy-making, what need mainstreaming are the situated experiences of informal workers engaged in these particular activities. That experiences of workers should form the basis of legal policy-making is not a new argument.³¹ Once it is recognized that workers’ lived experience needs to become the informational basis for policy restructuring, it becomes clear why instead of advocating access of informal workers to internationally recognized labour rights, a far more important task is to ascertain how might legal entitlements make actual changes in the lives of workers so that their aspirations are fulfilled.

30 See Supriya Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (Routledge 2014) 59-84, 190-220; also see different chapters in Routh and Borghi (eds) (n 11).

31 Feminists have argued this for long. For example, see Dorothy E. Smith, *The Everyday World as Problematic: A Feminist Sociology* (University of Toronto Press 1987); Marjorie DeVault, ‘Mapping Invisible Work: Conceptual Tools for Social Justice Projects’ (2014) 29: 4 *Sociological Forum* 775. Legal scholars too have brought their argumentative force behind this argument. For example, see Alain Supiot et. al., *Beyond Employment - Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001); also see Supriya Routh, ‘Do Human Rights Work for Informal Workers’, [forthcoming] in Diamond Ashiagbor (ed.), *Re-imagining labour law for development: Informal work in the global North and global South* (Hart 2018) [in file with author].

This proposal of context-specific entitlements is not substantive in its nature. It does not preconceive a set of substantive legal entitlements as prerequisites for informal workers (although it would not be unreasonable to conceive a few basic entitlements that they may require). What it does propose is that legal policy-making on informal workers needs to integrate a discursive dialogue process that informs the substantive legal entitlements in specific contexts. In this sense, the proposal I advocate is primarily procedural in nature. What underlies this procedural approach to legal policy-making for informal workers is recognition of the autonomy and respect for the knowledge (about their own lives) generated by informal workers.³² This approach to legal policy-making, then, does not require converting “informal” space(s) to the “formal” space; its focus firmly lies on improving condition of workers in their heterogeneous uniqueness. To be sure, such an approach should also be effective in the context of formal workers, but it is more important for informal workers. In the following, I corroborate my argument by analyzing one specific category of informal activity – domestic workers in India.

III - THE TRANSITION STRATEGY IN A COUNTRY CONTEXT: INDIA

In India 83.6 percent of the non-agricultural workers are engaged in informal economic activities, wherein 47 percent are self-employed, 41.9 percent are employees, and 11.2 percent are contributing family workers.³³ However, when agriculture is integrated into the measurement, the size of the informal workforce reaches as high as 92 percent.³⁴ According to some scholars, this enormous percentage of informal workforce is a result of broadly defining what constitutes informal economic activities.³⁵ In India, informal workers are defined as: “those working in the informal sector³⁶ or households, excluding regular workers with social security benefits provided by the employers and the workers in the formal sector without any employment and social security benefits provided by the employers.”³⁷ Although this definition is broad, it captures the essence of informality, that is, workers excluded from employment-related and social security benefits. Seen from the workers’ perspective, the bureaucratic-commercial *form* of industrial employment mainly consists of labour (i.e., employment-related) rights and social security benefits. Additionally, the industrial employment form also does include the judicial mechanism (employment-related tribunals) and a taxation framework.

32 DeVault, *ibid*; Vando Borghi ;From Knowledge to Informational Basis: Capability, Capacity to Aspire and Research’ (2017) 00:0 *Critical Sociology* 1 [online].

33 See ILO, *Women and Men in the Informal Economy: A Statistical Picture*, 2nd Ed. (Geneva: ILO, 2013) 8, 107-109.

34 NCEUS, *Report on Definitional and Statistical Issues Relating to Informal Economy* (New Delhi: NCEUS, 2008) 62.

35 KP Kannan and TS Papola, ‘Workers in the Informal Sector: Initiatives by India’s National Commission for Enterprises in the Unorganized Sector (NCEUS) (2007) 146: 3-4 *International Labour Review* 321, 323.

36 Informal sector is defined as unregistered private businesses employing less than ten total workers. See NCEUS, (n 34) 61.

37 *Ibid*.

However, the problem with the Indian conceptualization of informality is that its “measurement focus” is on legal coverage and total employee number (informal business if less than ten employees), not on the distinctiveness of informal economic activities. For example, the Trade Unions Act, 1926 covers all workers employed in all “trade or industry”, whenever any seven or more members decide to form a trade union and register it under the 1926 Act.³⁸ Accordingly, all workers – formal or informal – if they form a group of seven are potentially covered under the Trade Unions Act. There are some other statutes, which were enacted with reference to the formal industrial model, that do also cover informal workers to some extent.³⁹ The challenge these statutory coverage poses to the conceptualization of informal, then, pertains to the degree of exclusion rather than exclusion *per se*. The confusion this solely legal criterion generates is this: should workers who are *de jure* completely excluded from employment and social security statutes to be considered informal or workers who are covered only by some statutes could also be considered informal? The answer remains somewhat unclear in the official account. The enormity of informality in India seems really to result from characterizing less-than-ten-employee businesses as informal.

This less-than-ten-employee criterion does not really tell us anything about the heterogeneity in the informal space in India. The informal space in India is occupied by a range of diverse activities from street vending to waste-picking, from domestic work to home-based work, and from construction work to manual work, and others in between. There are also diversities within each category of informal work. An example will be instructive. Domestic workers form one of the prominent categories of informal workers in India. There are two kinds of domestic workers in India – live-in, wherein the worker lives in the same household where she works and live-out, wherein the worker only works in the household while living at her own place (usually in close proximity to the employer household). Additionally, workers’ location in her life-cycle and their circumstances of living determine their actual experiences at work. Because of this intricate link between their lives and their work, and the malleable concept of their workplaces (i.e., employer’s home where they live or living in close proximity to employer’s home), conditions of domestic workers at work cannot be assessed in isolation from “other insecurities and vulnerabilities in their lives.”⁴⁰ Domestic workers’ caste, religion, ethnicity, class, and migration status also determine the nature (and experiences) of work they engage in.⁴¹ Religious notions of purity (which is one of the underlying themes of the caste system) often dictate whether domestic workers are engaged in cooking or some other activities such as childcare or old-age care.⁴²

38 Sections 2 (g), 4, the Trade Unions Act, 1926 (Act No. 16 of 1926).

39 For a discussion see Routh, *Enhancing* (n 30) 59-69.

40 Kaari Mattila, ‘Gendered Vulnerabilities: Work-life Trajectories of Female Domestic Workers in Jaipur’ in Saraswati Raju and Santosh Jatrana (eds.), *Women Workers in Urban India* (Cambridge University Press 2016) 67, 74-84, 85-86.

41 *Ibid* 85; also Neetha N and Rajni Palriwala, ‘The Absence of State Law: Domestic Workers in India’ (2011) 23 *Canadian Journal of Women and the Law* 97, 102-104.

42 Kaari Mattila, ‘Gendered Vulnerabilities: Work-life Trajectories of Female Domestic Workers in Jaipur’ in Saraswati Raju and Santosh Jatrana (eds.), *Women Workers in Urban India* (Cambridge University Press, 2016) 67, 73-74.

Domestic workers could be waged employees employed through a bilateral contract or self-employed workers offering services to multiple households. When they work at several households, they consider themselves as service providers rather than being in an employment relationship.⁴³ Although this distinction should not be taken to mean that self-employed domestic workers are independent service providers,⁴⁴ it does shape the contours of rights and obligations between the workers and their clients. While some domestic workers prefer flexibility at their work so that they are able to balance work and family responsibilities, others feel insecure under flexible conditions.⁴⁵ Since their work does not conform to the industrial employment model directly contributing to economic productivity, domestic workers have been traditionally excluded from the coverage of labour welfare and social security laws in India. Since labour and social laws in India have traditionally been justified in its role of industrial structuring including shaping of industrial relations, those have functioned in establishments that employed at least a threshold number of workers (i.e., ten or more, as I mentioned earlier). Activities such as domestic work were beyond the frame of reference of labour and social laws.

However, in recognition of the pervasiveness of domestic work, in some states in India, such as Kerala, Karnataka, Maharashtra, and Bihar minimum wage is legally guaranteed for domestic workers.⁴⁶ Some states such as Kerala, Maharashtra, and Tamil Nadu have also enacted social security laws for domestic workers.⁴⁷ Recently the Indian parliament enacted a universal social security guarantee for workers who are excluded from labour laws that have an industrial employment frame of reference. This law was enacted after a high-level government instituted commission⁴⁸ recognized that the manner of addressing the problems of workers working outside the industrial form of work arrangement has to be different from the ones addressing industrial employees. It is as a result of this recognition that the commission proposed the enactment of a law on social protection for informal workers including domestic workers across the country.

The Unorganised Sector Social Security Act⁴⁹ covers both waged and self-employed workers working in establishments engaging less than ten workers.⁵⁰ It divides responsibilities between the federal and the state governments for creating specific social security guarantees such as life and disability benefits, health and maternity benefits, old age security, provident fund, employment injury benefit, housing, educational schemes for

43 J. Devika, P.R. Nisha, and A.K. Rajasree, 'A Tactful Union': Domestic Workers' Unionism, Politics and Citizenship in Kerala, India' (2011) 18:2 Indian Journal of Gender Studies 185, 198.

44 *Ibid*; also see Mattila, (n 43) 69.

45 Sudipta Sarkar, 'Decent Work Deficit in Domestic Work: A Focus on Part-time Women Workers in Delhi', 58 The Indian Journal of Labour Economics (2015) 503, 509-513; also Neetha N, 'Persistent Inequalities and Deepened Burden of Work? An Analysis of Women's Employment in Delhi' in Saraswati Raju and Santosh Jatrana (eds.), *Women Workers in Urban India* (Cambridge University Press, 2016) 139, 158-159.

46 Sarkar, *ibid*, 504; Neetha N and Palriwala (n 42) 115-116.

47 Neetha N and Palriwala, *ibid*.

48 The National Commission for Enterprises in the Unorganised Sector (NCEUS). For a discussion see Routh, *Enhancing* (n 30) 37-41.

49 The Unorganised Sector Social Security Act 2008, Act No. 33 of 2008.

50 See the definitions of "unorganised sector" (section 2(l)), "self-employed worker" (section 2(k)), and "wage worker" (section 2(n)), *ibid*.

children, provision for skill-upgrading, old age housing, and funeral assistance.⁵¹ The 2008 law constitutes federal and provincial social security boards in order to monitor, review, and advise the government(s) in implementing the law suited to the actual needs of informal workers including domestic workers.⁵² In spite of this decentralized orientation of the law, some scholars emphasize – I think correctly – that a statute with universal coverage will have difficulty in intervening in specific concerns of both self-employed and waged employees at the same time.⁵³ Some also note that the statute fails to reflect a women workers' perspective on social security despite the fact that women constitute a significant percentage of the non-industrial (informal) workforce.⁵⁴

In the context of our example, that is, domestic workers, both of the abovementioned drawbacks of the statute are particularly problematic. We have seen that domestic workers – most of whom are women – understand their work both as self-employment as well as waged employment depending on the way their work is organized. We have also noted that domestic workers' social identity such as religion and caste, ethnicity, and migration status often shape their experience at work. It is also worth noting that their specific life situations – marital status, childcare obligations, old age-care obligations, and number of dependants – all contribute to their overall experience at work. Unless specific statutes take cognizance of these diversity of factors in instituting a legal regime for domestic workers – and informal workers in general – legal regimes will remain incomplete in addressing informality problems.

To continue with the same example in the backdrop of our discussion, the ILO approach to introducing an international legal regime on domestic workers⁵⁵ seems a better strategy than the Recommendation No. 204 on transitioning to the formal. The Decent Work for Domestic Workers convention (No. 189) recognizes the private household as a public regulatory concern, thereby mainstreaming domestic work as a valid regulatory agenda. Although the Convention on domestic workers mandates treating of domestic workers *at par* with industrial workers, it does call upon member-states to develop juridical frameworks recognizing the unique characteristics of domestic work.⁵⁶ While articulating a more nuanced strategy than the Recommendation No. 204, certain aspects of the Convention too, are problematic. For instance, the Convention takes account only of paid domestic work and conceives of such work as waged employment, thereby leaving unpaid and self-employed (paid) domestic work outside the legal imagination.⁵⁷ Relatedly, the other problem with the Convention is that it perceives domestic workers as a single homogeneous group. This perception results in a prescription for broad substantive standards for all

51 Section 3, *ibid.*

52 See Chapter III, Chapter IV, *Ibid.*

53 Rohini Hensman, 'Labour and globalization: union responses in India' in Paul Bowles and John Harriss (eds.), *Globalization and Labour in China and India: Impacts and Responses* (Palgrave Macmillan 2010) 189, 198; also see Indira Hirway, 'Unorganised Sector Workers' Social Security Bill, 2005: Let Us Not Go Backwards!' (2006) 41:5 *Economic and Political Weekly* 379.

54 Paromita Goswami, 'A Critique of the Unorganised Workers' Social Security Act' (2009) 44:11 *Economic and Political Weekly* 17.

55 See ILO, *Decent Work for Domestic Workers, Convention 189, Recommendation 201* (Geneva: ILO, 2011).

56 Articles 10, 14, *ibid.*

57 Preamble, *ibid.*

domestic workers⁵⁸ undermining their internal (i.e., internal to the activity) diversity. This unitary formulation is further aggravated by the ILO's conceptual bottleneck of tripartite industrial relations, which stands as an obstacle to the recognition of work relations outside the traditional industrial relations framework.⁵⁹

These recent legislative initiatives on – informal workers in India and domestic workers at the ILO – seek to understand, even if minimally, how might legal entitlements make real difference in the lives of those workers whose lived experiences are different than formal workers because their work is organized on a different logic than the formal domain. Their emphasis is on actual working and living conditions of workers rather than the *form* in which their work is organized. Although this legislative approach is in the right direction, there are problems, particularly with the Indian initiative. The legal entitlement scheme for informal workers in India is devised in a universalistic manner seeking to cover the entirety (or at least a wide gamut) of heterogeneous informal workers. An effective legal entitlement regime, on the other hand, needs to be attentive to the uniqueness of each specific category of non-industrial informal work. Even in this specific (in distinction to universalist) orientation, a legal regime further has to recognize the diversity within each specific category – such as the internal diversity of domestic work. This decentralized legal entitlement strategy, then, mandates direct participation of specific categories of informal workers in the social dialogue process leading to law-making for specific contexts. The ILO Recommendation (No. 204) on transition to formality is unhelpful and manifests a certain naiveté in this respect.

CONCLUSION

India has not ratified the ILO Convention on domestic workers. Neither has it enacted a specific federal statute on domestic work. It is, accordingly, doubtful how much influence the Recommendation on transition to formality will exert on India, particularly when the purpose of the Recommendation is to envisage a unitary “form” of industrial employment. However, Indian juridical initiatives on informality could help inform and reorient the ILO policy-focus from the “form” (i.e., formal/informal) to the “substance of workers’ claims” (i.e., rights and entitlements). Further, while focusing on the substance, a distinction between workers’ *rights in general* (i.e., one that the ILO Transition Policy adopts) and *specific claims* of particular categories of informal workers needs to be made and the latter should be the focus of legal entitlements. This legal entitlement strategy would mandate that in addition to securing conventional workers’ rights, informal workers’ contextual non-right claims should also be legally secured.

The ILO needs to pursue this lived experience-centric legal policy aimed at developing contextual informal activity-specific standards rather than the general approach to “transition” from informal to formal. The domestic workers’ Convention, in spite of its shortcomings, is perhaps, the more appropriate approach for the ILO to follow in this respect. In any case, does this focus on “substance” mean that the formal/informal concepts are irrelevant from a policy point of view? The answer has to be in the negative. The neutrality in the definition

58 Articles 5, 6, 7, 8, 11, 13, *ibid*.

59 Although during the discussion process leading to Convention 189, non-employer and non-trade union organizations were heard, they were heard as additional participants to the dialogue process, not integral to it. See Adelle Blackett, ‘The Decent Work for Domestic Workers Convention and Recommendation, 2011’ (2012) 106 *The American Journal of International Law* 778, 791-793.

of formal/informal is indirectly helpful in legal imagination of workers' conditions and policy-initiatives to be pursued in that respect. What the idea of "form" indicates is that our analytical lens needs to shift: from the traditional industrial relations space to newer ways to understanding work relations. Since form is not substance but an indicator of organization of work, there needs to be a further level of analysis to understand substance of experiences in specific forms. In charting this path, before innovating newer strategies, a change in our mindset needs to happen. The ILO instruments, are perhaps, aimed at a change in mindset by politically mainstreaming the informality discourse. And there lies the significance of the Recommendation No. 204.

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