

# Examining the Legal Legitimacy of Informal Economic Activities

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**Supriya Routh**   
*University of Victoria, Canada*

## Abstract

This article explains the disjuncture between formal parliamentary laws and norms of informal economic activities on the basis of a contextual and layered idea of legitimacy. This explanation clarifies a misunderstanding in certain scholarly and policy circles characterising informal economic activities as extra-legal or illegal. The idea of legal legitimacy helps explain divergent normative logics of formal and informal spaces while indicating that informal activities are not performed in a regulatory void. In addition to helping redefine the informal space, the idea also helps clarify the interaction between formal and informal regulation. By employing Jürgen Habermas' analytical characterisation of society as constitutive of lifeworld(s) and system, and drawing on the empirical literature, the article argues that a cautious interpretation of Habermas' analytical categorization helps explain the legality of the informal space. If formal laws need to become legitimate for the informal context, they must integrate the contextual standards of legitimacy recognized in the informal space.

## Keywords

Informal economic activities, informal law, Jürgen Habermas, legitimacy

## Introduction

In this article, I examine the idea of legal legitimacy of informal economic activities such as street vending, domestic work, smallholder farming, home-based work, waste

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### Corresponding author:

Supriya Routh, Faculty of Law, University of Victoria, Murray and Anne Fraser Building, Room 228, McGill Road at Ring Road, Victoria, British Columbia, Canada V8P 5C2.

Email: [srouth@uvic.ca](mailto:srouth@uvic.ca)

recycling, and a range of other work practices, which have generally been relegated by international institutions and prominent legal scholars to the domain of illegality or, at least, extra-legality because of the ostensible legal void in which these activities are undertaken. Informal economic activities are legally organized, but the rationale of informal laws organizing these activities is different from that of formally enacted laws. The idea of legal legitimacy acts as a benchmark to clarify the authenticity of legal regulation in the informal domain. Clarifying the idea of legal legitimacy in this context is important because of the disjuncture between the logic of legal rules in formally organized economic activities and the logic through which informal activities are often regulated. Informal economic activities primarily operate outside the (formal) institutional structure (of property rights and formal contractual obligations) of industrial capitalism, but not outside capitalist relations of production.

Unless the normative logic of informal modes of economic activity is properly assessed, an integrated conceptualization of the production process (involving both formal and informal activities), and concomitant legal regulation, will elude policy-makers and scholars alike. The idea of legal legitimacy, I argue, offers an evaluative tool through which regulation of this productive continuum (formal and informal) could be rationalized. Legal legitimacy, in the sense I use it, is the claim that legal actors adhere to certain norms because they accept the validity of (some sort of) normative reasoning for approving or limiting their conduct and practices by those norms.

In elaborating this idea, Habermas' insight of conceptually dividing society into two levels and locating normative legitimacy in two different justifications is particularly helpful. Habermas argues that formal enacted laws often have an 'artificial character' when they are justified only on the basis of the parliamentary procedure of law-making, ignoring the authenticity of the substance of such laws that evolves through a discursive dialogue among the citizenry (Habermas, 1996: 111). There is a legitimating force without coercion in the 'discursive process of opinion- and will-formation', which brings reason and will (i.e., choice) of the communicating participants together (Habermas, 1996: 103–104). Unless formal enacted legislation is able to integrate uncoerced insights of social actors, formal laws remain illegitimate from the perspective of the informal social spaces (while legitimate according to formal parliamentary procedure).

Employing this layered perspective-based insight of legitimacy and considering vignettes of informal economic activities and their regulation, I argue that it is simplistic – and overly positivist – to characterize informality as unaccounted for extra-legal or illegal space. Actors engaged in informal economic activities normatively organize their activities on the basis of the norms of kinship, locality, friendship, community, class, religion, ethnicity, caste, gender, and so forth. They adhere to these social norms, often at the cost of bypassing formal legal standards, because of their contextual validity. To be sure, these norms are not always unproblematic, but recognizing their proper role is important for legal policy-making.

The diverse – and often competing – spheres of normative regulation have been recognized by the legal pluralism literature for some time now (Benda-Beckmann, 2002; Benton, 2012; Merry, 1988). Legal pluralism recognizes the 'sustainable diversity in law', that is, the expansive and enduring nature of informal laws beyond state law (Glenn, 2012: 96, 103–104). Legal pluralists have called for abandoning the definition of

law solely in terms of the institutions of the state, noting that legal centrism is an ideal whereas legal pluralism is a fact – ‘an empirical state of affairs in society’ (Glenn, 2012: 104–105; Griffiths, 1986: 4, 8). Despite emphasizing the diversity in law, legal pluralism notes that although the sources of different legal orders may be varied, legal orders are not insular. Instead, these legal orders often interact with each other in complex ways wherein legal actors learn to navigate the different legal orders (Hoekema, 2017; Tamanaha, 2012; Ubink, 2018: 214–223). This recognition of the diverse sources of law in legally pluralist societies suggests a diffused idea of legal legitimacy, apt particularly to understand the regulation of informal economic activities (Benton, 1994: 225–227; Brown, 2017: 21–23; Griffiths, 1986: 38; Provost, 2012: 9; Tamanaha, 2012). The inadequacy of casting the behaviour of informal economy actors as unlawful is accentuated through the lens of legal pluralism (Benton, 1994: 227, 229–230, 236–237).

While legal pluralism emphasizes the diversity of legal sources, the approach suggested here that focuses on the contextual legitimacy of legal regulation helps us clarify the idea of informal space and its relationship to formal space. First, it helps us redefine informal economic activities (or the informal economy) as a largely legitimate space inhabited by multiple – often competing – legalities instead of an extra-legal domain. Second, the idea of legal legitimacy is instructive in putting these multiple legalities into a productive dialogue. If the informal space is not devoid of regulation, yet insufficiently covered or not covered by formal laws, the latter, in order to become relevant for the informal domain, must generate institutional opportunities to communicate with the norms of the informal domain without subsuming informal economic activities into its normative industrial relations framework. Concurrently, norms of the informal realm also need to be cognitively open, but not deferential, to the logic of the formal laws. Third, the idea of legal legitimacy also acts as a benchmark to analyse the validity of both informal and formal laws insofar as they are able to facilitate contextual aspirations of workers. Accordingly, the idea could be employed to evaluate formal laws from the perspective of the actors in the informal domain.

In the following part, I argue that to conflate the informal with the extra-legal or illegal, as some international institutions and legal scholars do, is analytically flawed since it fails to account for the normative justifications inherent in informal activities. Using selected accounts of informal economic activities, I emphasize the varieties of regulatory sources that justify and organize such activities in heterogeneous contexts. In part 2, based on Habermas’ analytical concepts of lifeworld and system, I contend that the idea of legal legitimacy both explains the distinctiveness and indicates the continuity of the informal and formal spaces. In part 3, I outline the conditions of legitimacy of informal laws and assess how this helps clarify the relationship between the formal and the informal spaces. I end the article with a brief conclusion.

### ***The Context: Is ‘Informal’ Illegal or Extra-Legal?***

The concept of informal economic activities emerged from anthropological studies of low-income economic activities and workers such as smallholder farming, market gardening, sawmilling, *posho* milling, building contractors, carpenters, self-employed artisans, shoemakers, tailors, brewers, cornmill entrepreneurs, transport workers (e.g.,

*matatu* driver), leather tanning workers, petty traders, street vendors, food caterers, bartenders, carriers, commission agents, dealers, fitters, washerwomen, musicians, launderers, shoe shiners, barbers, manual scavengers, photographers, vehicle repairers, maintenance workers, brokers, ritual service providers, and medicine people in Africa (Hart, 1973: 61–62, 66–69, 71–73; ILO, 1972: 223–230). Since the organization of these varied economic activities did not resemble the characteristics of orthodox contractual waged employment model of industrial production, they were termed informal.

It is worthwhile to note that many of the economic activities that are undertaken informally in some jurisdictions could also be undertaken formally in others if they followed the mandates of the state's formal structures, such as licensing, registration, reporting, and structuring the workplace on the basis of legal categories such as employment contracts and bargaining units enumerated in different statutes. Thus, at a generic level, the term informal is deployed to contrast economic activities that are not organized in the same institutional form as that of the industrial production process characterized by formal employment contract and bureaucratic mediation by the state (Hart, 2006: 22–26, 29). The latter relationships – between workers, capital, and the state – are mediated by a range of enacted statutes, from labour and social laws to taxation and competition laws. It is law that gives shape to this industrial production 'form'. As a natural corollary of this legally structured institutional form, it is indeed attractive to characterize informal as an obscure extra-legal space.

Legal scholars often struggle to come to grips with the concept of informal economic activities. Since they usually attempt to tabulate informal work with reference to conventional labour welfare statutes, they commonly relegate informal economic activities to illegality or, at best, legally exempt categories of productive activities (Davidov, 2005: 23–24; Freedland and Kountouris, 2012: 349–358; Goldin, 2006: 109–110, 117; Goldin, 2011; Rittich, 2017: 113; Sankaran, 2006: 206–207; Sankaran, 2011). While some contend that informal work is part of a grey, black, or shadow economy (Freedland and Kountouris, 2012: 355; Sankaran, 2006: 210), others conclude that what is incorrectly termed as 'informal' work is 'simply [...] an enforcement problem' of labour and industrial law (Davidov, 2005: 6). Accordingly, legal scholars often adopt either a hands-off approach to what they see as a false categorization of a legally exempt realm or propose better enforcement of existing employment relationship laws to solve problems of informality. In so understanding informal work practices, these scholars forego the opportunity to more substantively engage with informality as a complex problem of legal legitimacy.

While judging the juridical usefulness of the idea, legal scholars often take the International Labour Organization's (ILO) definitions on informality as their frame of reference, even when noting the divergence in such conceptualizations (Davidov, 2005; La Hovary, 2014, 2016: 92–97; McHugh-Russell, 2019: 51–53, 54–59; Rittich, 2017: 111). However, ILO definitions – of the 'informal sector', 'informal economy', 'informal employment', and 'non-standard work' – aim primarily at statistically measuring informality rather than offering a tangible basis for legal evaluation (ILO, 2013; La Hovary, 2016: 94–100). The ILO defines informal economy as economic activities that operate outside the law either because of the lack of formal legal coverage or because the law is not enforced (ILO, 2002). However, the ILO does acknowledge that 'the term

“informal economy” tends to downplay the linkages, grey areas and interdependencies between formal and informal activities’ (ILO, 2002: para 3).

While the ILO seeks to explain informality on the basis of legal characteristics, the World Bank explains the reasoning of that extra-legal space by resorting to neo-classical (profit-maximizing) market logic (De Soto, 1989: 132, 151; Perry et al., 2007: 1–2, 7–16). According to this economic justification, enterprises and individuals move their activities to the less complex and cost-saving informal space for economies of scale because the formal space is overregulated and costly (De Soto, 1989: 132–134, 143–182). Although the abovementioned rationale might have some empirical basis, what it misses is that informal activities are often embedded in social institutions and relations, and not a phenomenon that can be explained solely through legally positivist institutional characteristics or the logic of market competitiveness.

While it may be true that workers and economic units move from the formal to informal space as a cost-saving strategy, it is also true that actors and activities in the informal space sustain historical and continuing relationships to their communities and work-based identities that are inseparable components of these workers’ lives and livelihoods. There are then historical and cultural components to many of the informal economic activities. Acknowledging this continuity is not to deny that many of these activities are linked to – and often go on to subsidize – the formal economy; rather, it is to indicate that informal activities also exist outside of the logic of reducing costs and that they do not operate in a regulatory void. This more expansive perspective of informality serves to disrupt the dichotomy of costly ‘legal’ and cost-reductive ‘illegal’ spaces, which mischaracterizes the complexity of the informal space and results in narrowly cost-benefit focused regulatory logic as evidenced in the ILO proposal to formalize the informal economy (ILO, 2015; La Hovary, 2016: 97–103; Routh, 2017).<sup>1</sup>

Informal economic activities are often (partially) impacted by criminal law, municipal zoning law, social protection law, and so on. However, at the same time, labour relations, market relations, and interaction with the state in the informal domain are often heterogeneously structured on the basis of varied social norms not emanating from the legislature. It is this gamut of differential relationships, not lawlessness per se, that should define informal economic activities. In spite of the divergent legalities of informal economic activities, it is on the basis of the ILO definition of informal economy that many legal scholars seem to understand – I have to add, incorrectly – that informality is the domain of legal exclusion (including exclusion through non-enforcement). According to some of them, since informal activities are legally excluded, they are part of the grey or black economy (i.e., of dubious legality or complete illegality) (Freedland and Kountouris, 2012: 355). By confounding regulation with enacted statutes and judicial opinions, this argument shifts focus from actual activities and experiences to a formalized legal-institutional structure in understanding a social phenomenon. This perspective misses the point that formal laws are not the only way of social ordering; neither does statutory exclusion per se make a phenomenon illegitimate.

Although the idea of informality has substantial legal underpinnings, the conceptual evolution of informality has not primarily been legally focused; the idea was originally conceptualized by economists and anthropologists. Consequently, in articulating a legally weighted understanding of informality, the dominant approach in legal scholarship

often asserts a simplistic relationship between law and informality. According to them, a diverse range of activities are either recognized or not recognized by enacted labour legislation and, hence, are categorized as either legal or illegal. Accordingly, these scholars call for abandoning the very term informal and instead advocate the proper implementation of statutory safeguards to improve deplorable working conditions (Davidov, 2005; Guha-Khasnobis and Kanbur, 2006; La Hovary, 2016).<sup>2</sup>

There are, however, others who do recognize that informality, either in its substantive content or in its implementation, is not synonymous with legal exclusion. For example, Shamir (2011: 619) notes that even though informal activities are ‘often misconceived as existing outside the law’, they have different degrees of relationship to social protection, private, and criminal laws. Other scholars, while recognising that informality does not mean complete exclusion from the law, generally equate law with enacted legislation and judicial opinion in their conceptual frame (Goldin, 2011: 72–84; La Hovary, 2016: 94–97; Shamir, 2011: 619; Trebilcock, 2006: 65–66). A few socio-legal scholars, such as Mahy et al. (2017, 2019) and Trebilcock (2006: 64–65), reflect that what are generally called ‘informal activities’ are often structured by social rules (and other background legal norms on property, contract, and criminal activities).

Social scientists such as Webb et al. (2009), Williams et al. (2015), Harriss-White (2010: 172–175), and De Soto (1989: 17–19, 65–90, 95–109) have long-established the centrality of social rules in organising informal activities. These social rules that order informal activities either fill in the regulatory vacuum left unaddressed by formal laws to structure the industrial production process or they coexist with formal legislation, often contradicting the latter. What gives legitimacy to these social rules in regulating informal economic activities is their embeddedness in particular histories, recognition, and general acceptance by the groups and communities – workers, employers, customers, civil society, and so on – engaged in or interacting with such activities. However, recognizing the historical continuity of social rules should not lead us to overlook the (often patriarchal) power structures and often inegalitarian social order preserved by them. In the context of informal economic activities, the role of power in shaping norms is exacerbated by unequal exchange relationships, often as a consequence of the marginalization and impoverishment of informal workers.

Thus, mere historical embeddedness is not a marker of legitimacy of social rules, unless they continue to be endorsed by the groups and communities concerned. Continued engagement with social rules on the basis of contextual lived experiences – often confronting structures of power – is what bestows legitimacy to social rules. In this sense, when social rules are legitimate, informal economic activities shaped by them also become legitimate. However, depending on the socio-political context, the state – particularly the government – responds to this legitimacy in a divergent manner, ranging from deference to intolerance to such rules and resultant activities (Chatterjee, 2011: 15–17; Gordon, 2005; Snyder, 2004: 218; Routh and Borghi, 2016).

In an important contribution, Webb et al. (2009: 493) note that informal enterprises operate within ‘informal institutional boundaries’. These informal institutional boundaries are constituted by norms, values, and beliefs emanating from ethnicity and identity of large societal groups, but may often diverge from and be in conflict with state laws and regulations, which constitute the ‘formal institutional boundaries’ (Webb et al., 2009:

492–501). Informal economic activities are legitimate practices that are considered proper and desirable by groups engaged in, interacting with, and closely observing such practices, even if they seem extra-legal on a formal institutional evaluation. Informal activities, then, may often be socially legitimate but formally extra-legal, in contrast to economic activities that are neither formally legal nor socially legitimate, such as activities involving drug cartels, bank robberies, dog fights, and the downright violation of safety, health, and labour rights (Harriss-White, 2010: 171, 174–175; Webb et al., 2009: 495). These latter activities are legally prohibited, and at the same time, not recognized as legitimate by the communities in which they are undertaken.

It is on the basis of this disconnect between formal law or ‘government morality’, and the norms and values of society’s informal institutions or ‘societal morality’ that Williams and Horodnic (2016: 722–725) explain workers’ participation in the informal economy in the United Kingdom, which constitutes 10% of the country’s GDP. By activities in the informal economy, they mean undeclared work by individuals and firms, workers’ that engage with and are undeclared by registered firms, and activities where workers commonly don’t declare their income. These activities are informal because they remain fully or partly unreported to social security and taxation authorities, and accordingly, do not adhere to the (somewhat universal) ‘form’ of industrial ordering mandated by state laws. The authors argue that the tendency to operate informally increases with the widening of the gap between governmental and societal morality (Williams and Horodnic, 2016: 723). In another study, that surveyed 27563 participants across 28 European countries, Williams et al suggest that informally organized economic activities thrive in jurisdictions where formal laws are unable to integrate, and substantially diverge from, informal social norms and rules (Williams et al., 2015). They conclude that informal economic activities are ‘socially legitimate activities’ that derive their legitimacy from unwritten norms of kinship, neighbourhood, friendship, and acquaintance (Williams et al., 2015: 296–297).

Likewise, having discussed a range of informal economic activities in New York City – unreported or underreported forms of self-employment such as apartment painter, saxophone teacher, acupuncturist, massage service provider, spiritualist, dog walkers, personal trainers, and workers running errands for clients – which remain outside the purview of state regulation (i.e., operating without formally mandated licensing, permit, or insurance, but not without comparable social or identity-based affiliations and obligations), Snyder (2004: 219, 228–229) argues that, by working informally, these workers establish ethnic, communal, family, anti-establishment, and gender identities through their work. However, developing these identities and the social rules emanating from them often comes at a cost: the social stigma of being seen as working ‘under-the-table’ and ‘off-the-books’, rather than as a real working professional (Snyder, 2004: 232). Thus, even when workers develop group identities through work, their social legitimacy may not be equally recognized by all groups in society. Similarly, the state’s attitude towards such identity-based regulation is also varied.

In a less industrialized context, examining informality in the Nigerian movie industry, Uzo and Mair (2014: 56, 57, 70) indicate the movie industry’s choice to operate informally rather than following formal regulations. They explain the industry’s preference for informal norms by noting the disconnect between actual situations, that is, lived

experiences of industry-actors including their distinct operational needs and hurdles on the one hand, and the prescriptions of formal rules on the other (Uzo and Mair, 2014: 65). The authors suggest that in developing post-colonial societies, norms of informal institutions – family, religion, friendship, ethnicity, and polity – are deeply rooted and predate those that are mandated by formal institutions (Uzo and Mair, 2014: 57, 61, 66). It is this historical embeddedness of norms that legitimize the conduct of industry-actors. Similarly, for another major post-colonial society, India, Harriss-White (2010: 171–174) notes that informal activities, such as agricultural work, casual labour in farming, forest-based work, fishing, *bidi* (cigarette) rolling, weaving, construction work, waste recycling, petty trades, unskilled labour, and informally performed work in formally registered businesses, are embedded in social institutions of caste, gender, language, ethnicity, religion, life-cycle, and locality, in addition to the state. Social norms emanating from these institutions not only ‘structure’ work but also ‘structure informal entitlements’ by facilitating access to work, securing support during absences, and providing ‘primitive form[s] of occupational welfare’ for medical and personal needs (Harriss-White, 2010: 173–174).

These instances are merely indicative, not exhaustive. It is indeed possible to multiply these instances (Vargas, 2016; Routh and Borghi, 2016; Coletto, 2010; Gordon, 2005). However, the point is not to chart the global expanse of the disjuncture between statutory regulation and social regulation; it is rather to emphasize that a range of social norms and customary laws operate outside the formal legal framework. Lumping these instances with actions and practices that are truly illegal (i.e., both formally extra-legal and socially illegitimate) hinders the capacity to effectively regulate informal work practices. Additionally, informal economic activities are not totally untouched by enacted laws. They are often influenced by universal laws that institute the market and regulate goods or services alongside *sui generis* schemes devised by provincial and local governments to address specific categories of workers (Agarwala, 2013; Harriss-White, 2010: 176; ILO, 2016: 247–315; Vargas, 2016: 84–108). Hence, the contention is not that they are in complete isolation from formal law but that a major part of their (heterogeneous) operations is shaped by non-state regulation.

As the above instances show, while the sources of informal laws and their relationship to the institutions of the state may be divergent, the simultaneous existence of both informal and formal legal orderings may be found in a range of societies, both in the global North and the global South. Acknowledging that informal legal ordering – informal law – could be located both in industrially advanced and industrializing jurisdictions, Mahy et al. (2019) emphasize the role of non-state sources of law in regulating informal working relationships. From their analysis of substantive regulation in the restaurant industries of Melbourne, Australia and Yogyakarta, Indonesia, Mahy et al identify family-like moral bonds (*kekeluargaan* or fictive kinship) in Indonesia as well as location-specific and ethnicity-based norms in Australia as sources of informal laws in the restaurant industry in addition to formal legislation, case law, administrative decisions, and collective bargaining agreements (Mahy et al., 2019: 216, 221–227). In a related study, Mahy et al. (2017: 8–16) document the varied sources of non-state informal law as institutions of social identity (gender, religion, caste, class, and ethnicity), patron-client relationships (often centred on debt), kinship and community (including

fictive kinship), location-specific self-regulation by businesses, self-regulation by workers (on the basis of multiple identities), and civil society regulating industry through consumer action campaigns.

These informal laws determine how workers are recruited (through familial or fictive kinship networks), their working conditions (which remain adaptable to novel situations and the parties' changing needs), emergency support (provision for loans on the basis of trust and familiarity rather than contractual relations), leisure (business owners' religious/fictive kinship-based obligation to their workers' enjoyment outside of work), and the manner in which problems are resolved (through honest discussion centred on trust) (Mahy et al., 2017: 32–35). Additionally, when informal laws regulate the workplace, the space is not always perceived solely as a contractually determined workplace; it is also seen as a space for discussing workers' personal problems and non-workplace vulnerabilities (Mahy et al., 2017: 32–35).

Although informal laws may not always be ideal and just, ignoring the organizing role of such laws altogether in legally conceptualising informality results in a less robust regulatory account of informality and undermines the pertinence of informal laws for legal and policy analyses. By ignoring empirical evidence on the organisation of informal activities and situated experiences of informal workers, many legal scholars find themselves unable to move beyond the narrow industrial employment frame of reference. Even when scholars recognize that social rules organize informal activities, they conceptualize informality as part of the *labour market* engaged in *employment relationships* (Davidov and Langille, 2011: 2; Sankaran, 2006: 208–209, 213–216; Shamir, 2011: 604–605, 610–611, 616–620; Weiss, 2011: 44–46). Some even go to the extent of identifying two distinct markets – formal and informal (Rittich, 2017: 110–112, 115–116, 118–119).<sup>3</sup>

Once this industrial employment market-based model becomes the epitome of *the legal*, all other working arrangements, particularly those without a formal employment contract, inevitably remain susceptible to being perceived as extra-legal or illegal. The complexities, heterogeneities, and continuities in the organisation of work are missed. The formal/informal continuum, with sharp differences at the edges and fluidity in the middle, gets lost in a dichotomous characterisation between legal-formal and extra-legal/illegal-informal. However, even recognizing that all of the instances of informal activities mentioned above operate within a plurality of rules structuring and regulating work, the substantive contents – and secured entitlements – of informal laws (just as with enacted laws) are often far from ideal. While these instances indicate that informal economic activities do not operate in a legal void, they do not suggest that informal laws regulating these activities are always just and equitable. As noted earlier, these informal laws could often be shaped by power relations embedded in respective communities and economic exchanges. Thus, just as it is important to recognize that informal economic activities are predominantly embedded in informal laws (or social norms), it is also important to question the legitimacy of those informal laws.

In the following part, I employ Habermas' concepts of lifeworld and system as two broad socio-political realms to theoretically conceptualize the empirical instances of informality on the basis of their legal legitimacy, that is, legitimacy of informal laws. My attempt is not to replicate Habermas' justification for distinguishing the two realms;

instead, my intention is to problematize the idea of ‘legitimacy’ by interpreting his distinction between lifeworld and system, by which he means the organically evolving social space and bureaucracy-mediated capitalism, respectively. In problematizing the idea of legitimacy I aim to dissociate the idea from the exclusive preserve of parliamentary and judicial law (i.e., formal law) and locate it also in the realm of informal law (or social norms). The advantage of deploying the ideas of lifeworld and system, not as categorical divisions of the society but as broad and porous domains, is that they help us centralize actual situated experiences of informal workers in their heterogeneous contexts in legally conceptualizing informality. This categorization of society cautions us against understanding informal workers’ activities and demands through the lens of fixed legal classifications, instead suggesting that legal concepts and standards emerge from factual knowledge supplied by workers.

### *Conceptual Foundation of Legal Legitimacy of the Informal: Pertinence of Contextual Justification*

Legal conceptualization of informality must clarify the normative validity of the heterogeneous informality phenomena across different societies. In fact, for the coherent legal ordering of both informal and formal production processes, it is first necessary to understand the underlying logic of why informality is socially acceptable. In this part, I propose a contextual justification of the legitimacy of legal norms for informal economic activities. The method of contextual justification – different in substance for informal and formal spaces – acts as a technique for evaluating the legitimacy of legal regulation of both informal and formal economic activities even when the specific conditions in which these activities occur are often remarkably divergent. Habermas’ conceptual categories help decipher this internal logic of the two spaces of informal and formal.

Habermas (1984 [1981]: xxxix–xl) proposes his theory of communicative action as ‘the beginning of a social theory’ to overcome the limitations of a linear, rationality-guided modernization thesis for explaining the capitalist economy. He develops the idea of rational communication, by which he means everyday language-based unfettered communication guided by reason (rather than strategic interest), by independent and autonomous social actors to arrive at mutual understandings, and links it to the capitalist process. In doing so, Habermas (1996: 17–19) conceptually divides society into two interrelated realms, the (sociocultural) lifeworld and the system.<sup>4</sup> The lifeworld, in this instance, constitutes the informal domain of communication-based mutual agreements that further social integration. The system, in contrast, is constitutive of the formally structured domains of the economy and state bureaucracy, guided by the logic of money and power, and instituted by means of parliamentary legislation (Habermas, 1996: 42–45; McCarthy, 1991; Rehg, 1996: xxxi–xxxiv).

In Habermas’ (1991: 251–252) conceptualization, lifeworld and system are *analytically* distinct categories, which may not be clearly distinguishable empirically in modern societies. The objective of this analytical distinction is to better assess the social order as the interaction between ‘social integration’ and ‘system integration’ in modern capitalist societies (Habermas, 1991: 252–255, 262; McCarthy, 1991: 121–122, 127–128). In the lifeworld, socially embedded actors (Hammer, 2019) use everyday language to arrive at

a consensus to organize their social interactions. This everyday language-based interaction is not intended to achieve carefully predetermined goals by exerting power and influence on others; its natural social purpose is to develop a mutual understanding as a prerequisite to the social condition of cohesion and coexistence, unfettered by motives outside the social lifeworld (Foessel, 2019: 558–559; Habermas, 1991: 240–243).

In reasoned discussions, lifeworld actors comprehend the dialectic in a largely identical manner because of the similar background assumptions guiding such communication. These assumptions are so interwoven into the fabric of the lifeworld that people grow up inculcating collective social knowledge of them without special training or orientation. These social understandings are primarily derived from religious ideas and perpetuate by means of everyday practice in the lifeworld (Habermas, 1984 [1981]: 5, 7, 15–16). Social behaviour-shaping mores and norms derived from religion are sustained through kinship relations. To be sure, each specific group and strata in the society could have their own respective lifeworld, wherein behavioural norms are different from that of other groups and strata (Habermas, 1987 [1981]: 377). Even if social actors share the same space (location and time), they may belong to different lifeworlds on the basis of their religion, kinship, gender, class, caste, race, ethnicity, work, and so forth, in a pluralist society. The practice of behaviour-shaping social norms, however, does not mean that the religion-based social norms could not be challenged by the actors living in a given lifeworld domain.

It is possible for actors in every one of these lifeworlds to internally challenge their religion-based background assumptions and culminating social mores and norms. Habermas notes that this capacity to challenge is inherent in the idea of rationalization. Rationalization in the lifeworld signifies the use of communicative *reasoning* for social integration. Reason-guided communication leads social actors to question the justifiability and validity of existing social values and norms, many of which may be sustained through power relations rather than rational justification. Habermas locates the source of this rationality in communicative reasoning as opposed to religious or mythological thinking on the one hand, and autonomous pursuit of self-interest on the other (Habermas, 1984 [1981]: 66). According to him, rationality emerges out of specific local social contexts instead of being found in isolated individual reflections. This contextual rationality-induced communicative reasoning may sometimes lead to questioning existing social values and norms, at others, with increasing social complexity and plurality, it may trigger specialized areas of normative ordering of human activities. In this sense of modernization as rationality-induced social evolution, specialist domains of activity – such as the capitalist economy and the bureaucratic state – represent unique forms of normative organization. Habermas calls these increasingly specialized domains collectively ‘the system’; and each such domain as a ‘subsystem’. Thus, the system, while emerging out of the lifeworld(s), comes to be structured by its own normative logic.

In Habermas’ scheme of things, the system is the realm of the formally institutionalized organization of social affairs by means of enacted legislation. He argues that each of the two prominent subsystems (the capitalist economy and the bureaucratic state) are held together by the logics of *money*, in case of the capitalist economy, and *power*, in case of the bureaucratic state. In the system, these logics substitute for communicative action as a mechanism for social integration. Money and power are then *non-linguistic*

*mediums* of social integration (Rehg, 1996: xviii). These mediums are institutionalized (in market and bureaucratic subsystems) by ‘profoundly ambiguous’ parliamentary law (Habermas, 1996: 40, 75). It is in this manner that formal legislated law replaces religion- and kinship-based norms in now-specialized domains (i.e., the subsystems). The formal organization of the subsystems occurs when social relations ‘are constituted in forms of modern [i.e., formal] law’ (Habermas, 1987 [1981]: 357). This juridification of erstwhile important social functions, Habermas (1987 [1981]: 356) argues, leads to the colonization of the lifeworld by the system.

By colonization of the lifeworld, Habermas means the increasing co-option of social domains into the logic of the formally organized system. The lifeworld becomes colonized when ‘legal symbolism’ and ‘competences acquired via legal socialization’ in the lifeworld occur by means of enacted law rather than lifeworld values and norms (Habermas, 1996: 81). Thus, in regulating social conduct in the lifeworld, when formal law derives its validity solely from the institutional procedure of law-making, fashioned through the logic of money and power but bereft of lifeworld values and norms, it ends up colonizing the lifeworld. By increasingly taking up the normative role of the lifeworld, the system forces the relocation of the role of social integration from communicative action to (‘inappropriate modes of’) legalized formal mechanisms (Scheuerman, 2019: 494). In the process of this relocation, people’s actual lived experiences become abstract principles of regulation. In resolving disagreements and disputes, people increasingly refer to positive legal claims, rather than social customs and norms, in a departure from their historical practices (Habermas, 1996: 75–76). Their lifeworld becomes less and less important in organizing society while the prominence of the system grows by means of money, power, and a (favourable) structure provided through the enactment of law. The system thereby subjugates the lifeworld to its institutional forms. What is often lost in this process is the legitimacy of the system as a social integration force.

It is when communicatively agreed lifeworld norms get integrated into, and articulated through, formal enacted statutes that those laws can be called *legitimate laws* because they arise through the unfettered communicative consensus of the lifeworld, from which substantive legitimacy emerges. It is in this situation that formal law is not colonizing the lifeworld. Therefore,

Habermas proposes that we combine the two [lifeworld and system] perspectives and conceive of society as a ‘system that has to satisfy the conditions of maintenance of socio-cultural lifeworlds,’ or as a ‘systemically stabilized nexus of action of socially integrated groups’. (Rehg, 1996: xxvii)

Thus, in Habermas’ social theory, the ‘lifeworld perspective enjoys a certain priority, as it corresponds to the basic structure of a communicatively mediated reality’ (Rehg, 1996: xxvii–xxviii). In this narrative, legitimate law needs to institutionalize the situated experiences of social actors because these experiences constitute the foundation that elicits uncoerced communicative discourse, which is not based on the self-interest-based rationality of the (profit-maximizing) market-centric system. The wider the gap between social actors’ situated experiences and the legal abstraction of their lives, the greater is the legitimation problem.

Habermas' conceptualization of the lifeworld could be seen as a prototype of the 'informal' space. On the other hand, the system is equivalent to the 'formal' domain of interaction. The advantage of conceptualizing the informal/formal spaces along the life-world/system logic is that, in a socio-legal concept of informality, one could then begin by taking cognizance of the informal space (i.e., the lifeworld) in its internal constitutive logic and evaluate the legitimacy of the formal space with reference to the informal without a priori succumbing to the economic and institutional logics of the formal space. The legitimacy of one or the other (i.e., informal or formal) is then, not preordained, but depends on a number of factors, as I elaborate below.

In accordance with Habermas' conceptualization of the lifeworld, the informal space can be seen as the socially integrated domain created by cultural traditions; religious orders; and values of family, kinship, and proximate social relationship. In this domain of informality, '[c]ulture, society, and personality mutually presuppose one another' (Habermas, 1996: 80). Rather than being an officially recognized space, the domain of the informal is the natural, organically evolving, space wherein, under relatively uncontroversial presumptive circumstances, people communicatively organize their lives and activities. In this sense, the informal domain is also the domain of knowledge, which is produced and nurtured in the context of people's relationships unencumbered by state-imposed limitations (or its conceptual frameworks) (Honneth, 1993: 240–241, 257–259). Social knowledge in this domain has historical roots and is embedded in the experiences of social actors. However, from this proposition, it does not follow that actors and actions in the informal space must always remain bound to these constitutive norms (or knowledge). Social actors can internally challenge outdated and unjustified norms by freely employing reasoned communicative action. This reasoned communicative action is the product of the ever-evolving local contexts, rather than isolated individual self-interests, which is the conceptual basis of formal institutional regulation (Foessel, 2019: 560). Thus, Habermas' account not only explains the normative logic of the informal space but also makes room for mounting internal critiques of that space.

In contrast to this communicatively generated social knowledge (or informational basis of norms) and the consequent norms emerging out of that knowledge in the informal domain, in Habermas' narrative, norms are supportive of – and subordinate to – the *strategic agendas* of money and power in the formal domain. Social agents engaged in 'strategic' actions by negotiating in the formal space end up objectifying each other to further their goal-oriented strategic action (Hammer, 2019: 341). The attitude is adopted to convince other actors of one's self-interest, rather than building mutual understanding for social integration. The basis of knowledge in the formal domain is primarily (the scope and limits of) *purposive-rational*, that is, self-interested action pursued in the industrial capitalist economy and the bureaucratic state.

The precise legal *form(s)* that different institutions in the formal economic space have taken emerged out of the logic of industrial capitalism that needed state bureaucracy to proliferate capitalist activity (Hart, 2006). The formal space is not only constitutive of institutions of capitalism and bureaucracy (such as the industry, banking and finance, employment relationship, welfare provisioning, government ministries, inspectors, tribunals, commissions, and so forth) but is also geared to the strategic interests of capital and power; and formal law holds these institutions together. Formal law is not inherently

legitimate; the legitimacy of this legal formality lies in its ability to protect the strategic interests of capital and power, as is its goal. Democratic institutions of the state through which formal law is promulgated and operationalized only endows formal law with procedural legitimacy. The substantive legitimacy of formal law is derived from the rationale for its enactment, which is the protection of the interests of capital and power. This substantive legitimacy is different from the source of legitimacy of informal norms, which is supplied primarily through unfettered communicative action.

Thus, following Habermas' two-level concept of society, it is useful to think of the informal/formal continuum as two interrelated *spaces of legitimacy*, rather than legal coverage or exclusion of specific activities. In this characterisation, the formal space does not consist simply of legal activities, nor does the informal space(s) consist of illegal or extra-legal activities. Instead, both the formal as well as the informal spaces consist of activities and interactions that are organized on the basis of norms and conventions. In Habermas' characterisation, in the informal space norms receive legitimacy mainly through communicative action, with the backdrop of collective social knowledge. Informal laws are therefore executed through the logic of family, kinship, social relations, solidarity identities and created on the basis of class, gender, religion, race, caste, ethnicity, and so forth. On the other hand, formal laws are enacted through the logic of money and power in the formal space and are executed through the institutions of the state. However, this informal/formal divide cannot be clearly demarcated; the divide is often porous (Honneth, 1993: 253–256; McCarthy, 1991: 124, 130).

As Honneth (1993: 253–256) notes, it is often difficult to distinguish between the two spaces of lifeworld and system (or informal/formal, as I propose) exclusively on the basis of communicative and strategic (i.e., self-interested) actions. Although the informal space is better characterized as the space defined by networks of communicative action, it is not devoid of strategic actions or power relations. In criticising Habermas' account of the lifeworld/system divide, Honneth (1993: 268–269) argues that it is deficient to see the lifeworld as an integrating social space where social actors always mutually agree through ordinary linguistic communication. He contends that Habermas foregoes the opportunity to offer a much richer account of the lifeworld (and society) by ignoring the everyday conflicts and negotiations of power – whereby one group imposes its will over others and subordinated groups oppose such imposition – that also characterize the lifeworld (Honneth, 1993: 269–270, 278–279, 298–301; Joas, 1991: 104–105).<sup>5</sup> Honneth (1993: 275–277) observes that although there are mutual agreements undergirded by background assumptions in the lifeworld, lifeworld norms are often the product of conflicts and disagreements among contending groups. These conflicts and disagreements are often resolved through the negotiation of power, which Habermas underemphasizes (Honneth, 1993: 288, 298–301).<sup>6</sup> A much richer account of the lifeworld – the informal space – emerges once this possibility of conflict, too, is integrated as a lifeworld concept.

When the informal normative space is conceptualized not only on the basis of a communicative agreement but also on the basis of possible conflicts and power relations,<sup>7</sup> the interaction between informal and formal legal norms becomes more complex. In a conflict-ridden informal space, regulating norms do not emerge only through communicatively derived consensus but also through the strategic (purposive-rational

or self-interested) negotiations of different informal groups. In this multifaceted interaction within the informal space, the negotiation of power (i.e., the resolution of disputes) may not always be mediated through informal laws; often, formal laws need to be evoked as an arbiter to resolve conflicts in the informal space. In these situations, when formal law is called upon to intervene in the informal space, it supplies knowledge to the informal space that gets integrated into informal laws over time.

However, it is not necessary, often improbable, that formal laws resolving informal disputes are specifically attuned to resolving a particular conflict in question. For example, disputes about *modus operandi* and profit sharing for activities in informally organized spaces (e.g., street vending, informal transportation, waste recycling) are often resolved through municipal zoning law or criminal law rather than industrial, labour, or fiscal laws (Aliaga, 2018; Falla and Mosquera, 2019; Reed and Bird, 2019; The Hindu, 2016). Under these circumstances, during their enforcement, criminal or zoning laws are often, in turn, influenced by the existing informal laws and practices organising these activities. Thus, although some branches of the formal law such as zoning regulation or criminal law are not specifically targeted at resolving unique challenges of informal economic activities, by meaningfully interacting with informal norms, formal laws could potentially become relevant for, and at the same time, minimize their legitimacy deficit for, the informal space. From this perspective, colonization of the informal space ensues only when formal law attempt to totally replace informal laws, which causes the formal law to lose its legitimacy in the informal space.

Apart from the intervention of formal law, once the possibility of conflicts and the negotiations of power are also accepted as characteristics of the informal space, serious questions arise about the possibility of ‘consensus’-guided informal (lifeworld) laws. If the informal space represents both communicatively derived agreements and also disagreements from strategic interests, consensus may not operate as a basis of informal laws. This possibility, however, is not severely damaging for Habermas’ schema. Communicatively derived agreements do not have to be consensual; what needs to emerge – and often emerges through communicative action – is a rough agreement or a workable solution to social problems (Sen, 2000: 253–254; Sen, 2009: 9–17, 54–69, 82–108, 149–152, 395–407). In any case, these agreement-generated informal laws attain only a provisional finality; that is until they are challenged from within the lifeworld. By creating conceptual space for this internal challenge to informal laws, Habermas’ account – with some modifications – works as a satisfactory analytical framework even after accounting for Honneth’s critical evaluation on the basis of power relations in the informal space.

Thus, informal economic activities primarily derive their legitimacy from communicatively structured and everyday practice-based informal laws, even when all or some components of these activities may fall outside a formal legal framework. Formal laws might also supply legitimacy to informal activities if their intervention survives communicative discourse and ends up supplying knowledge to the informal space. However, from the perspective of the informal social space, formal laws become illegitimate if they fail to integrate the communicatively-generated knowledge of the informal space. Formal laws’ legitimacy for the informal domain would have to depend on the additional step of integrating communicatively generated agreements. I expand on this idea in the following part.

### *Condition of Legal Legitimacy: The Primacy of Lived Experience*

The idea of legitimacy, in terms of authenticity of norms, is the benchmark to examine the effectiveness of both formal and informal laws regulating informal economic activities. If historically grounded, communicatively derived, agreement in a specific context is the source of legitimacy of norms, such an idea of legitimacy could be employed to evaluate formally enacted laws even when such laws are the creation of the state's formal institutions. One of the chief insights of Habermas' theory of communicative action is that legitimacy of substantive norms depends on more than the mere stipulation of formal electoral practice and the institutions validated only by means of such electoral representation. While the electoral-democratic underpinning of the state's institutions may provide procedural legitimacy to laws, the substantive legitimacy of norms should emerge from agreements shaped by the contextual lived experiences of actors.<sup>8</sup> The centrality of the discursive practice is not to deny that practices of electoral democracy are now a part of the social lifeworld; it is to emphasize that in the absence of continued deliberation, the authenticity of norms cannot be anchored *only* by the practices of electoral representation. It is true that the state has a monopoly over the enforcement of laws and is able to enforce laws enacted by the legislature even if such laws are inauthentic from the point of view of the actors in the informal economy. However, in a democratic polity, said state monopoly should not rest only on the routines of formal democracy but also on the state's moral standing as a representative polity. Thus, the authenticity of contextual norms of the informal economic activities should persuade the state, as it has in certain jurisdictions (Chatterjee, 2011: 15–17), to re-evaluate and abridge the gap – when there is one – between such norms and formally enacted laws.

On the other hand, once we recognize with Fuller (1969), the broader idea of law as the normative order that organizes 'smaller systems' outside the institutional framework of the state, law becomes amenable to contextual evaluation within those systems. In such a contextual evaluation, informal laws as per se grey or black cannot be a foregone conclusion. Legal scholars often incorrectly view informal laws as inferior to formal laws and banish such laws as amorphous and chaotic (Benton, 1994: 224–225, 230–231; Mahy et al., 2017: 4–5). However, responding to such claims with the mere assertion that informal laws are unconditionally valid laws is equally short-sighted. While the full import of informal laws should not be dismissed, at the same time, their contextual legitimacy must also be examined, not assumed. We should also recognize that the relationship between informal and formal laws is complex and multi-layered. Informal laws should not be seen to exist in their own silo uninfluenced by the formal legal order (Benton, 1994: 225–226; Frazer, 2014: 6–7; Santos, 1987: 289–291, 298–299). Historically, just as formal laws have often integrated customary laws into its fold, thereby seeking to legitimize formal laws for specific (colonial) societies, informal laws too were – and are – often influenced by formal laws in their interpretation (Benton, 1994: 225–237; Cohn, 2018: 150–151; Merry, 1988: 870–876; Santos, 1987: 296–297). It is also true that in post-colonial societies, formal laws, when pursuing the agenda of uniformity, have met with resistance from communities that wanted to preserve their *sui generis* legal orders (Merry, 1988: 871–874, 880).

Given this dynamic interaction between formal and informal law, it is only when one looks at the informal space solely from the vantage point of the formal space, as some scholars do (discussed earlier), that the informal space might falsely appear to be an extra-regulatory space because of the exclusion of some activities from formally enacted labour and social security laws. Relatedly, the assumption that, with proper enforcement, informal activities could be efficiently regulated by enacted (labour, industrial, and tax) laws is somewhat problematic. In different ways, this assumption underlies the policy approach of international institutions such as the ILO (2002, 2015) and the World Bank (Perry et al, 2007), who assume that formal law is all there is to regulation and, therefore, informal activities are mainly a problem of the non-implementation (i.e., avoidance) of existing formal regulation, thereby making them extra-legal or illegal activities. By assuming that problems in the informal space are mechanically solvable by enacted laws that are part of the formal space, these scholarly and policy positions ignore the fact that formal laws are often mere abstract expressions and often removed from actual situated experiences of social actors, whereby their legitimacy remains in doubt. Thus they fail to acknowledge the fact that knowledge and authenticity in the informal space are often different from the formal space.

When formal laws take account of the contextual experiences of actors in the informal space, they are legitimate laws from the dual perspectives of the informal and the formal; if they do not, their legitimacy is in doubt from the informal perspective (Scheuerman, 2019: 495). In reality, however, formal laws, predominantly following the logic of industrial capitalism, institute legal structures that are conducive for the non-communicative mediums of money and power, and are often detached from contextual communicative interaction in the informal sphere. The emergence of labour and social security laws in the aftermath of the industrial revolution – as a response to the industrial mode of mass production, catering to the industrial capitalist logic – is an instance of this disjuncture (Deakin and Wilkinson, 2005: 30–34, 42–46, 51–52, 62–82, 90–106; Deakin et al., 2007: 139–142; Hay, 2004: 103–116; Morin, 2005: 7–11).<sup>9</sup> In keeping with the industrial capitalist logic, the point of departure for labour and (workers’) social security laws is the private contract or the employment relationship model, in which the freedom of contract and formal equality-based model, rather than lived experiences, become the basis of law-making.

In the context of our discussion, the conceptual significance of the interrelated informal/formal social spaces lies in its ability to emphasize the gap between diverse actual work experiences and abstract industrial labour and the regulatory implications of this gap. While actual working conditions are part of workers’ overall lived experiences, the abstract notion of labour detaches workers from their contexts and frames their work in terms of relations of exchange to that of capital (DeVault, 2014: 785; Solomon, 2008: 184). In this backdrop, the regulatory challenge is to keep laws closer to workers’ lived experiences and their contextual aspirations so that laws remain relevant to their actual situations. The more the distance between workers’ concrete situations and regulatory standards, the more irrelevant the laws are to workers.

If we transpose this logic to the formal and informal spheres, it is easy to see that informal laws that emanate through communicative (and strategic) action by ordinary linguistic means would be the closest type of law to the situated experiences of workers.

The challenge for formal laws that emanate from the logic of industrial capitalism is to come closer to the contextual experiences of workers in the informal sphere to be relevant for their situations. When formal laws lose touch with the concrete heterogeneous work experiences in the informal space yet seek to regulate activities in the informal sphere, the legitimacy of such laws becomes dubious. Additionally, generally applicable formal laws also do not address all conceivable heterogeneous activities organized in the informal space because of the sheer diversity of those activities.

Thus, from a legal point of view, if the informal space is not devoid of norms regulating activities and behaviours, the informal/formal duality really becomes a framework for analysing the contextual legitimacy of substantive laws. From this point of view, we should define informal economic activities as heterogeneously structured activities by means of multiple substantive laws often intersecting each other and emanating from diverse sources, including non-state sources. The ILO definition centring on how the informal economy is not regulated by formal law fails to capture this legal complexity, leading to narrow universalizing policy-remedies for circumstances lacking any uniform structure. In view of the multiple, often competing, substantive laws (and legal orders) in structuring informal economic activities, what the proper policy-concern should be, is, whether or not any or all of these substantive laws are legitimate from the perspective of the actors in the informal space.

From this policy-concern, the proper aim of legal norms should be to integrate concrete experiences of workers so that workers can relate to and consent to adhering to such laws, rather than compelling workers to adhere to formal 'illegitimate' laws. The advantage of conceptualising informal and formal as different but related social spaces instead of isolated activities or regulations is that while avoiding rigid demarcation based on activities and legality, it also creates a useful distinction for legal policy purposes. The idea, then, is to bring the two social spaces into dialogue to bring legal norms of the two spaces into continuous interaction with each other. Therefore, the legal debate should concern how this interactive state is to be achieved through the law-making process.

The practical significance of the idea of legitimate law, from a law-making perspective, is that it militates against pursuing a policy of subsuming (heterogeneous) informal arrangements into the formal legal structure. Instead, recognizing the distinctive logic of the two spaces, in engaging with informal economic activities formal laws should create an institutional channel to be in conversation with sources and structures of the informal space. Likewise, sources and structures of informal laws (some of which are already influenced by formal substantive laws) should consciously recognize the integrated nature of economic activities, even if informal activities do not fit the legally instituted universal 'form', thereby remaining responsive – but not deferential – to the justifications of formal laws. The proposal is not to overthrow formal laws *in toto* in favour of informal laws; it is rather to harmonize the two, whereby legitimacy of the regulatory framework is prioritized. Thus, even if formal laws were to encroach into the informal space, the informal space would not be *substantively* colonized insofar as formal regulation caters to the needs and aspirations of actors in the informal space. Additionally, it would be useful for formal law-making institutions to create an internal institutional channel of communication whereby a significant amount of law-making autonomy is left to the informal space while still leaving spaces of integration with the formal structure.

This internal channel might mitigate if not completely prevent possible conflicts of interests between actors in the informal and formal spaces.

Although the informal and formal spaces signify two different domains of authenticity, it is important to note that the informal/formal demarcation is only instructive and does not create strictly regimented and separate social spaces. It would, therefore be wrong to think that concerns of the actors in the two social spheres are always diametrically opposed. Although the underlying justifications in legally organizing activities and lives in the informal and formal spaces differ, concerns about unencumbered social interaction, individual well-being, and freedom of choice permeate both spaces. Accordingly, the real challenge is to analyse to what extent legal norms and practices promote these aspirations for workers engaged in the informal space (and also in the formal space).

This analysis calls for the recognition that laws conceived in the industrial mass production context (and structured through specialized institutions with the active participation of the government bureaucracy) are not always suitable for workers engaged in the informal domain. As I note earlier, while some formal laws (such as penal laws, municipal zoning laws, licensing laws, waste management laws) partly influence some of these activities, they differ from the legally instituted universalizing industrial relations structure. For example, in spite of being a central organizing principle of formal industrial relations law, the employment relationship model is often an unsuitable basis for the legal promotion of informal workers' aspirations in the context of the above-mentioned activities.<sup>10</sup> Because of this mismatch, when conceptualising legal regulation of informal activities, it is necessary that the frame of reference excludes the formal employment relationship and, instead, takes specific activities as their point of reference. Attempting to solve problems of the informal space by using tools of the formal space undermines the justificatory bases (i.e., communicative and purposive-rational actions) of the two analytically separate spaces.

While it is important to be mindful of the disjuncture between formal laws and informal workers' aspirations, idealising informal laws in organising informal activities should be equally avoided. Informal laws can often be the source of discrimination and marginalisation. It would be wrong to assume that merely because informal laws emanate primarily from communicative interaction, they are free from power structures and strategic agendas, as noted earlier. Informal laws are often the product of social power structures and unequal economic relations. As some scholars note, although religion, identity, gender, caste, class, and kinship-based social norms organize activities in the informal sphere, these norms often discriminate against the most marginalized of the working population (Harriss-White, 2010: 172; Vargas, 2016: 148–150, 156–157). Thus, in both regulatory contexts – informal and formal – overcoming the distance between laws and workers' demands is of paramount importance, as it is to address the relations of power in formulating these norms. Accordingly, the idea of legitimacy is also pertinent in the contextual evaluation of informal laws. In fact, in the context of informal activities, there are prominent instances where, by means of worker centres, workers' aggregations, social movement unionism, and several other innovative collective actions, workers have sought to bridge this gap between laws and their demands by engaging the political processes (Gordon, 2005: 65, 73–82, 149–156, 281–282; Routh,

2016: 289, 295–312; Vargas, 2016: 131–141, 155, 231–234).<sup>11</sup> By advocating and providing for workers' health and safety measures, rights at work, market access, unemployment benefits, emergency provisioning, and skills upgradation, these collective initiatives seek to address the effects of power imbalances in the informal space.

If we interpret Habermas' discursive approach to law-making by drawing on Honneth's insights, we could conceptualize a rational communication-based law-making process originating in the informal domain, and characterized by conflict and strategic negotiation within and between groups, in addition to collaboratively achieved agreements. Following Habermas, the *legitimacy* of law is attained through the mutual agreements arrived at discursively in the informal space. Discursively achieved agreements do not have to be consensual, but workable rough agreements. It is also important to recognize that legitimacy of informal law is grounded not only on the tradition-bounded communication of actual social context but also on the ability of actors in the informal space to critique and reformulate social agreements (Webber, 2006: 169, 179–180). Such contestability of informal law is also a marker of its legitimacy (Webber, 2006: 169–170, 180–181).<sup>12</sup> In this formulation, legal relevance and legitimacy are closely entwined ideals.

In a discursive law-making process, where strategic action also plays out, the relevance and legitimacy of laws should be judged by their capacity to integrate as many voices as possible in the communicative discourse.<sup>13</sup> This discursive process would be less complicated in situations where only one specific informal activity (i.e., specific lifeworld) is concerned. With the expansion of social space and the inclusion of several heterogeneous informal activities, it becomes increasingly difficult for laws to be representative of agreeable positions on areas of common interests. Accordingly, with the increasing heterogeneity of the informal space, the legitimacy of law should lie in genuine participation and dialogue, resulting in workable legal solutions rather than consensual outcomes.

## Conclusion

The idea of legal legitimacy offers us a benchmark not only to judge the validity of formal laws for heterogeneous informal activities, but also to evaluate the appropriateness of informal laws for specific categories of informal activities. Since legal legitimacy is tied to the contextual discursive law-making process, it advances a meta-theoretical ideal in reconceptualizing and rearranging institutions of law-making for heterogeneous informal activities across diverse societies. At the very least, the idea of legal legitimacy clarifies the perceived regulatory obscurity of the informal space. More immediately, by employing the idea of legal legitimacy, in this article, I clarify the legal definition of informal economic activities and note the proper interaction between formal and informal laws in regulating such activities.

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### **ORCID iD**

Supriya Routh  <https://orcid.org/0000-0001-7202-6929>

### **Notes**

1. In its Recommendation concerning the transition from the informal to the formal economy (2015), the ILO ends up promoting the same macroeconomic policies, such as transnational investment, structural adjustment, competition, employment promotion, enterprise and labour market policies, and trade and tax policies, which have been responsible - as policy triggers for cost-cutting strategies - for the very expansion of informal economic activities.
2. For a similar proposition articulated from a different position that actually recognizes that informality is not a lawless domain, see Rittich (2017).
3. Markets are generally categorized as product markets or geographic markets. If we think of either products or jurisdictions (i.e., geography), formal and informal ways of operating cannot be categorically separated. For example, while the recycling industry ('product market') is generally formal, collection of solid waste (plastic, glass, and metal) is a combination of formal and informal activity (municipal collections and informal private individual collections). Thus, it is problematic to assert that informal products have their own market or that informal activities are geographically isolated markets.
4. See Schnädelbach (1991: 7, 16–19), for a critical evaluation of the lifeworld/system distinction.
5. Habermas responds to this charge by noting that although it is true that the role of power in lifeworld interactions cannot be totally ignored, the question of power is only really a serious analytical issue in the context of strategic actions of the system. He further notes, since the question of conflict and negotiation of power in the lifeworld will generally play out in the backdrop of common (i.e., consensual) social assumptions and conventions, the influence of conflict and power will have substantially diminished influence in mutual understanding through communicative action (Habermas, 1991: 245–248).
6. This does not, however, mean that Habermas completely ignores dispute resolution in the lifeworld domain. In Habermas' account, lifeworld disputes are also resolved by means of communication through ordinary language. See Habermas (1991: 214, 223–224, 243, 245–247).
7. For an empirical documentation of the same point, see Harriss-White (2010: 172), who notes, norms are often regressive and are cast-based and gendered; likewise, see Vargas (2016: 148–150, 156–157), on violent enforcement of local business norms.

8. Recognizing the prominence of the discursive ‘content of democracy’, the philosopher Amartya Sen notes: There is, of course, the older – and more formal – view of democracy which characterizes it mainly in terms of elections and ballots, rather than in the broader perspective of government by discussion. And yet, in contemporary political philosophy, the understanding of democracy has broadened vastly, so that democracy is no longer seen just in terms of the demands for *public balloting*, but much more capaciously, in terms of what John Rawls calls ‘the exercise of public reason’. Indeed, a large shift in the understanding of democracy has been brought about by the works of Rawls and Habermas, and by a large recent literature on this subject, including the contributions of Bruce Ackerman, Seyla Benhabib, Joshua Cohen, Ronald Dworkin, among others [internal citations omitted] (Sen, 2009: 324).
9. However, the authors emphasize that the relationship between social change and legal change is not straightforward, but a ‘complex and multi-linear’ process.
10. This point has been well documented by legal scholars including Supiot (2001), Stone (2004), Stone and Arthurs (2013), Langille (2011), Freedland (2016), Freedland and Kountouris (2012), and Albin and Pressl (2016). The same charge could be levelled against other institutions of formal labour law such as collective bargaining, workers’ council, trade unionism, and so on.
11. Workers’ collective action taking some of these organizational forms – even if to a limited extent – might be able to overcome objections of *representativity*, *participation*, and disjuncture between *ideal condition* and *real situations*, that, some scholars note as shortcomings of Habermas’ discourse theory of legal validity. On the latter objections, see Dukes and Christodoulidis (2012).
12. Without taking into account capitalist structures or bureaucratic power, Webber, however, believes that democratic institutions of the state often facilitate this contestability, thereby contributing to informal law’s legitimacy.
13. These voices should not only be limited to actors who are directly regulated, it should also extend to voices that are outsiders to the immediate stakeholders (that is, objective perspectives). It is these outside voices who often possess the distance and impartiality to identify and critique power relations.

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