

EDITORIAL NOTE

NAVIGATING LABOUR LAW IN THE GIG ECONOMY

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I. THE EVOLVING LEGAL LANDSCAPE FOR GIG WORKERS

The question of regulation (or non-regulation) of the gig economy has presently acquired a global character, continuing the age-old debate in labour law as to what constitutes a relationship of employment, *i.e.*, who is a worker/employee (a contract of service) versus who is an independent contractor (a contract for service). The question is a hotly contested one, as employment status invokes the application of various labour laws which determine employers' obligations with respect to, *inter alia*, minimum wage, working conditions, social security benefits and the mechanism for resolving disputes between employers and employees.¹

The boundaries of legal interpretation are now being tested with technological advancements which have facilitated the emergence of new forms of work organisation. Broadly speaking, the gig or platform economy includes “crowdwork” by which workers and clients connect online, and “work-on-demand via app” by which businesses offer and assign traditional work such as transportation, cleaning, running errands, or clerical work.² The likes of Uber, Ola, Zomato and Swiggy, for instance, would fall in this latter category, which is the focus of

* Editors, NUJS Law Review, 2021-2022.

¹ Presently, the four Labour Codes—namely, The Code on Wages, 2019, The Industrial Relations Code, 2020, The Occupational Safety, Health and Working Conditions Code, 2020 and The Code on Social Security, 2020—have been passed, which consolidate prior central labour laws. The Codes use the term ‘employee’, subsuming previous legislation of which some applied a definition of “workman” (for *e.g.*, the Industrial Disputes Act, 1947), and others that of an “employee” (for *e.g.*, The Employee Provident Funds and Miscellaneous Provisions Act, 1952, The Employees’ State Insurance Act, 1948) with their own surrounding (at times overlapping, and at other times diverging) jurisprudence on the determination of employment status.

² Valerio de Stefano, *The Rise of the “Just-in-time Workforce”: On-Demand Work, Crowdwork and Labour Protection in the “Gig Economy”*, Vol. 37(3), COMPARATIVE LABOR LAW & POLICY JOURNAL, 473-474 (2016).

this Note. The resurgence of the question of employment status in the context of gig work at the global level has been driven by the sheer scale and reach of Uber's ride sharing platform, rendering the gig-economy to be commonly termed as the "Uber Economy".³ For convenience, we illustrate gig work and its position in labour law primarily with respect to Uber and its drivers.

In February 2020, the United Kingdom Supreme Court had recognised Uber drivers as "workers" rather than independent contractors, entitling them to certain benefits and placing concomitant obligations on employers.⁴ It must be mentioned however, that in the U.K., "workers" from a distinct category as against "employees", with only the latter enjoying the full extent of employment benefits;⁵ regardless, the judgment has given fresh impetus to the movement for gig worker rights. Recognition of an enhanced employment status for Uber drivers has been made in some decisions of other jurisdictions as well,⁶ and the Indian gig economy now stands at this very precipice with the Indian Federation of App-based Transport Workers ('IFAT' or 'the Federation') having filed a Public Interest Litigation with the Apex Court in September 2021, seeking social security benefits for gig workers.⁷

Apart from the challenge to the exclusion of gig workers from employment status—which was made by Ola and Uber drivers before the Delhi High Court in 2015⁸—the IFAT in its petition has sought social security coverage for gig workers as "unorganised workers" under the Unorganised Workers' Social Security Act, 2008 ('UNWSS Act, 2008') and the recognition of social security as a fundamental right.⁹ Though this Act did not make explicit reference to gig work, the Federation has bolstered their argument with reference to the recognition

³ See, for e.g., Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, Vol. 49(4), UNIVERSITY OF CALIFORNIA, DAVIS LAW REVIEW, 1511 (2016).

⁴ Uber BV v. Aslam, (2021) UKSC 5 (United Kingdom Supreme Court).

⁵ See GOV.UK, *Employment Status*, available at <https://www.gov.uk/employment-status/employee> (December 20, 2021).

⁶ Recent decisions include that of the Amsterdam District Court in September 2021 (Dutch Trade Union Federation v. Uber BV, 8937120 CV EXPL 20-22882) and the Court of Cassation of France in March 2020 (Cass. Soc. n. 2020/374).

⁷ "Gig Workers" Approach Supreme Court Seeking Social Security Benefits from Zomato, Swiggy, Ola, Uber, LIVE LAW, September 21, 2021, available at <https://www.livelaw.in/top-stories/gig-workers-approach-supreme-court-for-social-security-zomato-ola-uber-swiggy-182107> (Last visited on December 10, 2021).

⁸ Delhi Commercial Driver Union v. Union of India, W.P.(C) 3393 of 2017 (The petition had been dismissed as withdrawn via order dated December 12, 2017 with the liberty to approach the appropriate government for making reference under the Industrial Disputes Act, 1947).

⁹ LIVE LAW, *supra* note 7.

of social security schemes for “gig workers”¹⁰ and “platform workers”¹¹ (who are defined as being outside the “traditional employer-employee relationship”) in the Code on Social Security, 2020 (‘SSC, 2020’ or ‘the Code’),¹² which is yet to be implemented,¹³ and under which the UNWSS Act, 2008 is subsumed.

It has been rightly observed that the ambiguous provisions of the Code with respect to gig workers and the wide discretion it confers on the Government (instead of a mandatory obligation) in framing appropriate social security schemes thereon are inadequate in securing the welfare of workers in the gig economy.¹⁴ Moreover, the SSC, 2020 is the only one of the four Labour Codes to address gig work, leaving such workers deprived of labour protections offered by the other three Codes in terms of wages, working conditions and most crucially, collective bargaining – which holds historical significance as a powerful instrument for workers to agitate for their rights while protecting their activities from criminal prosecution by the State.¹⁵

Admittedly, the emergence of the gig worker and its related questions for labour law is not a new phenomenon, as there has been a gradual shift in the dependence on traditional models of work towards other “alternative work arrangements” such as contract labour and temporary workers.¹⁶ However, technology can arguably be said to have exacerbated this process, and though gig workers comprise only a small fraction of the labour population, they are nonetheless capable of constituting a hard case for testing the jurisprudence on employment relationships.¹⁷

¹⁰ The Code on Social Security, 2020, §2(35) defines a “gig worker” as “a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship”.

¹¹ The Code on Social Security Code, §2(60), (61) respectively define “platform work” as “a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment” and a “platform worker” as “a person engaged in or undertaking platform work”.

¹² The Code on Social Security Code, Chapter IX, *Social Security for Unorganised Workers, Gig Workers and Platform Workers*.

¹³ Only the Draft Rules under the Social Security Code, 2020 have been notified as of yet. See PRESS INFORMATION BUREAU, *Union Labour Ministry Notifies Draft Rules under the Code on Social Security, 2020*, November 15, 2020, available at <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1673004> (Last visited on December 15, 2021).

¹⁴ Vidhi Centre for Legal Policy, *Devise Legal Protections for App-Based Workers* in TOWARDS A POST-COVID INDIA: 25 GOVERNANCE CHALLENGES AND LEGAL REFORMS, 20-21 (2020).

¹⁵ Benjamin Levin, *Criminal Labour Law*, Vol. 37, BERKELEY J EMP. & LAB. L., 43 (2016).

¹⁶ Valerio de Stefano, *The Rise of the “Just-in-time Workforce”: On-Demand Work, Crowdswork and Labour Protection in the “Gig Economy”* (International Labour Office Conditions of Work and Employment Series, No. 7, 2016).

¹⁷ *Id.*

The Indian Courts in establishing the jural employer-employee relationship—which includes unveiling ‘sham contracts’—has gone beyond the common law test of ‘control’ over the manner of work, to encompass a multitude of factors such as powers to appoint, dismiss and take disciplinary action, ownership of equipment, prescribing of standards for quality of output, economic dependence on the employer, etc.¹⁸ However, the purpose of this Note is not to predict the judgment of the Indian Supreme Court on this point with respect to gig work, nor to comment on what the appropriate position ought to be in terms of extant labour jurisprudence. Rather, we employ the debate on worker status to characterise larger issues on rule-making which require revisiting, as the law grapples with challenges posed by rapidly evolving technology such as that which has facilitated the emergence of gig work.

II. GIG WORKERS IN CONTEMPORARY ECONOMY

The rising prevalence of gig workers across a multitude of commercial sectors is predicated upon the shifting contours of the economy. In recent years, the commercial space has been dominated by venture capitalism funding the rapid growth of start-ups and other business ventures.¹⁹ Such ventures rely upon a workforce that is scalable (which means the workforce can expand quickly in tandem with the growth of the business enterprise), flexible, and more crucially, cost effective. The lacuna in labour protection for gig workers serves to fuel the commercial interests of such business ventures, and persists despite repeated criticisms on the extent of ‘control’ which these companies are able to leverage while evading the responsibilities of an employer.²⁰

Uber for instance, states that it is a “technology company that has developed an app that connects users (riders) with driver partners who provide transportation to the user” and further that it “is not a transportation carrier, and does not employ any drivers”.²¹ While their standard form contract for drivers (or

¹⁸ See, e.g., Manashi Pathak, *An Overview of Contract Labour Related Laws in India*, NLS BUS. L. REV. (2017) (for the development of Indian jurisprudence on this point); Sushilaben Indravadan Gandhi v. New India Assurance Co. Ltd., (2021) 7 SCC 151 (In this recent judgment, the Supreme Court considered various factors applied in past cases for distinguishing between a contract for service (a relationship of employment) from a contract of service (hiring of an independent contractor)).

¹⁹ Gené Teare, *Global Venture Funding Hits All-Time High in First Half of 2021, With \$288B Invested*, July 7, 2021, available at <https://news.crunchbase.com/news/global-vc-funding-h1-2021-monthly-recap/> (Last visited on December 19, 2021).

²⁰ See, for e.g., Manasa Venkataraman, *A deconstruction of Uber and Ola’s Terms and Conditions in India*, MEDIANAMA, April 20, 2017, available at <https://www.medianama.com/2017/04/223-uber-and-ola-terms-conditions/> (Last visited on December 10, 2021).

²¹ UBER INDIA SYSTEMS PRIVATE INDIA LIMITED, *Uber Guidelines for Law Enforcement Authorities*, available at <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=india&lang=en> (Last visited on December 10, 2021).

as Uber calls them, “partners”) can be said to confer a degree of flexibility uncharacteristic of traditional employment, it also typically includes arguably inequitable terms and conditions which warrant greater scrutiny. These include, as had been stated in the writ petition (now withdrawn) before the Delhi High Court, the inability of drivers to negotiate the fare and route which is entirely determined by the Uber app,²² drivers being required to accept ride requests while being uninformed of the trip destination throughout the ride,²³ and the use of customer ratings to determine performance and suspend drivers with falling ratings.²⁴ Consequently, it cannot be overlooked that Uber drivers’ capacity to earn is heavily dependent upon Uber despite not being under formal employment.

The impugned downsides of the ‘gig-contract’ correspond with the purported benefits of according the workers with the comparatively greater freedom or flexibility to decide their work hours, their manner of work, adjust their work to their earnings requirements and to generally “be your own boss”.²⁵ These purported benefits accorded to gig workers align with the emerging business models which are based on low-cost digitised services with little to no profit margins and sizeable venture capital funding.²⁶ The rapid technological advancements in terms of increased digitisation and access to internet is central to the ubiquity of gig workers.²⁷ These disruptions have played a facilitative role in connecting consumers and gig workers at an unprecedented scale.²⁸ Without the skyrocketing growth of the internet, it is rather inconceivable to imagine an economy with similar prevalence of gig-workers.

Since the turn of the century, venture capitalism has given rise to major corporations in India and around the world, such as Uber, Lyft, Oyo, Zomato, Swiggy, We Work and Urban Company, to name a few.²⁹ Furthermore, other massive corporations such as Amazon have also resorted to using gig workers as a

²² Delhi Commercial Driver Union v. Union of India, W.P.(C) 3393 of 2017, ¶7.

²³ *Id.*

²⁴ *Id.*, ¶12.

²⁵ David Peetz, *THE REALITIES AND FUTURES OF WORK*, Chapter 6 (Australian National University Press, 2019); UBER INDIA SYSTEMS PRIVATE INDIA LIMITED, *Driver Requirements*, available at <https://www.uber.com/in/en/drive/requirements/> (Last visited on December 10, 2021).

²⁶ *Id.*

²⁷ See Megan Jenkins, Brian Isom & Christopher Koopman, *Tech-Enabled Gig Jobs: Policy Solutions for the Future of Work*, April 23, 2021, available at <https://www.thecgo.org/research/tech-enabled-gig-jobs-policy-solutions-for-the-future-of-work/> (Last visited on December 20, 2021).

²⁸ *Id.*

²⁹ See Paris Marx, *WeWork and Uber's Struggles Show how Venture Capital-Backed-Tech Giants Fail Workers*, November 1, 2019, NBC NEWS, available at <https://www.nbcnews.com/think/opinion/wework-uber-s-struggles-show-how-venture-capital-backed-tech-ncna1074881> (Last visited on December 20, 2021); Durba Ghosh, *Swiggy, Udaan, OYO and More: The Eight Start-Ups that Joined the Unicorn Club in 2018*, THE SCROLL, December 20, 2018, available at <https://scroll.in>

central component of their business model to drive down operational costs and maximise profits.³⁰ Suffice to say, such corporations play a central role in the modern day economy and are ubiquitous aspects of our daily lives.

By taking into account the economic context behind the emergence of gig workers, we can appreciate the sheer complexities which emerge in the debate pertaining to the legal facets of the gig economy.³¹ The trade-offs are inexorably tied to the economic incentives centred around rapid growth at the expense of profits, which results in consumers benefitting from low-cost, highly ubiquitous services which become entrenched in their daily lives.³² This generates fears that that any re-orientation in the status-quo towards strengthening the rights of gig workers could potentially stifle economic growth, deteriorate the end-consumer experience, and could ultimately lead to a lower number of job opportunities overall.³³ At the same time, no one can deny that the exploitative conditions faced by gig workers stemming from the lack of social security³⁴ and capacity to unionise and cement their bargaining position merit revisiting their position in labour law.³⁵

It is evident that the economic and technological changes highlighted above have rapidly outpaced the imagination of the legal regime governing them. Labour laws and their associated jurisprudence in jurisdictions across the world evolved prior to the shifts highlighted above. This means that Governments, the Courts, policymakers and academia are now forced to confront the complexities of gig workers by taking into account the economic realities of the world centred around venture capitalism.

in/article/906282/swiggy-udaan-oyo-and-more-the-eight-startups- that-joined-the-unicorn-club-in-2018 (Last visited on December 20, 2021).

³⁰ Rob Taylor, *Amazon Embraces the Gig Economy: Small Business Risk or Game-Changing Opportunity?*, FORBES, September 4, 2018, available at <https://www.forbes.com/sites/forbestechcouncil/2018/09/04/amazon-embraces-the-gig-economy-small-business-risk-or-game-changing-opportunity/?sh=25fe1a417e63> (Last visited on December 20, 2021).

³¹ See Richard Heeks et al., *Systematic Evaluation of Gig Work against Decent Work Standards: The Development and Application of the Fairwork Framework*, Vol. 37(5), THE INFORMATION SOCIETY, 267-286 (2021).

³² Sarah Kaine et al., “*The Way they Manipulate People is Really Saddening*”: Study Shows the Trade-Offs in Gig Work, THE CONVERSATION, available at <https://theconversation.com/the-way-they-manipulate-people-is-really-saddening-study-shows-the-trade-offs-in-gig-work-79042> (Last visited on December 20, 2021).

³³ Brishen Rogers, *The Social Costs of Uber*, Vol. 82(1), UNIVERSITY OF CHICAGO LAW REVIEW ONLINE, 85 (2017).

³⁴ Pete Ross, *The Gig Economy: Brave New World and Pure Exploitation*, September 28, 2016, OBSERVER, available at <https://observer.com/2016/09/the-gig-economy-brave-new-world-and-pure-exploitation/> (Last visited on December 20, 2021).

³⁵ Soumya Jha & Ulka Bhattacharya, *How Trade Unions Recharged for the Gig Economy*, THE HINDU BUSINESS LINE, October 28, 2021, available at <https://www.thehindubusinessline.com/opinion/how-trade-unions-recharged-for-the-gig-economy/article37210395.ece> (Last visited on December 20, 2021).

The ongoing COVID-19 pandemic has further exacerbated the vagaries of the gig economy. Corporations relying on gig workers were able to swiftly optimise the size of their workforce in accordance with the challenges posed by the pandemic,³⁶ and the procurement of essential commodities via these platforms has been treated as ‘essential work’ (exempt from certain restrictions regarding the containment of COVID-19) even as gig workers themselves are ironically deprived of basic labour protections. These precarious circumstances have fermented disdain and disillusionment among gig workers in India and around the world, resulting in protests, petitions and ‘strikes’ (the legality of which is uncertain at best).³⁷ The policy responses to the gig conundrum must therefore be centred around contemporary economic realities and the reorientation of the society in light of the pandemic, in order to be effective.

While the increased vulnerability of gig workers to exploitative practices during the pandemic is an unprecedented situation requiring an urgent response, it must be remembered that stop-gap measures are no substitute for an effective, over-arching legal framework. As explained in the following Part, while laws cannot be capable of accounting for every possible exigency, they may be still framed in a manner which makes them more capable of addressing new situations.

III. PARAMETERS FOR RULE-MAKING

There are some relevant tenets of rule-making which become all the more important to take cognisance of in an era of increasing technology disruptions. The prevailing uncertainty of gig-worker status, and their continuing vulnerability to exploitative practices while they await what they hope will be a favourable judgment, provides a fertile ground to illustrate the consequences arising from a failure to consider these parameters.

Alok Prasanna Kumar rightly observed that the new Code on Wages, 2019—which consolidated previous legislation addressing the wages of workers—missed out on the opportunity to go back to the drawing board in redefining who is an ‘employer’ and an ‘employee’ in light of the already emerging gig economy and trends in technological advancements.³⁸ This definition of an employee has

³⁶ Rebecca Henderson, *How Covid-19 has Transformed the Gig Economy*, FORBES, December 10, 2021, available at <https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy/?sh=3e245fe66c99> (Last visited on December 20, 2021).

³⁷ See Harshit Rakheja, *2020 in Review: From Zomato and Swiggy to Ola and Uber — A Year of Protests by India's Gig Workers*, INC42, December 29, 2020, available at <https://inc42.com/info-focus/year-end-review-2020/from-swiggy-to-ola-a-year-of-protests-by-indias-gig-workers/> (Last visited on December 20, 2021).

³⁸ Alok Prasanna Kumar, *Code on Wages and the Gig Economy*, Vol. 54(34), ECONOMIC & POLITICAL WEEKLY, 10-11 (2019) (At the time of Kumar's writing, the other three labour codes had not yet been passed).

been adopted across the four Labour Codes for uniformity, which appear to simply consolidate laws rather than solve for problems, in what Kumar calls a “backward-looking” approach.³⁹ Though it provides a definition of an “employee” which is broad enough to potentially encompass gig workers,⁴⁰ Kumar points out that this by itself does not necessarily address pertinent issues arising from their employment status, such as who would be considered the ‘employer’ of a gig worker using multiple platforms, or how the minimum wage would be calculated for such tasks which cannot be strictly categorised as piecework or timework.⁴¹

We identify four major parameters which may be borne in mind if Parliament ever chooses to revisit the gig worker question, vis-a-vis the drawing of bright line rules, approaches of objectivism and subjectivism, the balancing of stakeholder interests and the overlap of technology with other areas of law.

First, the attempt at fixing bright line rules for any classification test must be met with caution. As no law can attempt to anticipate every possible scenario⁴²—such as the worker/employee definition when initially confronted with emergence of gig workers—it is understood that there is a need to strike a balance between universality (generality) and selectivism (specificity) in law-making which is capable of responding appropriately to different situations.⁴³ Guy Davidov has pointed out that while more categories of people could be brought within the ambit of labour protections through a broad definition of an employee, this could dilute the standard of protection capable of being offered for those in greater need of it.⁴⁴ On the flip side, he observes that while selectivism may serve to provide appropriate protection to cater to the needs of a particular group, as an approach it runs the risk of resulting in numerous classifications which make it difficult for people to know their rights.⁴⁵ This could defeat the very objectives of creating such classifications as employers could also use the resulting complexity

³⁹ *Id.*, at 11.

⁴⁰ The Code on Wages, 2019, §2(k) defines an “employee” as “any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union”. Similarly-worded definitions are prescribed in the Industrial Relations Code, 2020, §2(l), The Occupational Safety, Health and Working Conditions Code, 2020, §2(t) and The Code on Social Security, 2020, §2(26).

⁴¹ Kumar, *supra* note 38, at 11.

⁴² Andrew M. Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, Vol. 44(3), LOYOLA UNIVERSITY CHICAGO LAW JOURNAL, 649 (2013).

⁴³ Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, 5 (Hebrew University of Jerusalem Legal Studies Research Paper Series, Paper No. 17-7, 2017).

⁴⁴ *Id.*

⁴⁵ *Id.*

and incoherence of the law as an excuse not to implement them in light of uncertainty as to the applicable category.

Davidov observes that certain jurisdictions have recognised an intermediate category of ‘dependant contractors’ who are not granted the same protections as employees, but possess the right to collective bargaining.⁴⁶ On the other hand, the multiple classifications of “gig-workers”,⁴⁷ “platform workers”,⁴⁸ and “unorganised workers”⁴⁹ in the SSC, 2020 does not appear to be driven by an attempt at balancing universality and selectivism. Indeed, it is difficult to understand what the purpose of these classifications was at all, there being so much overlap between them that Uber drivers could potentially be placed under all three of these categories.⁵⁰

Second, there should be a conscious adoption of either an objective or subjective definition of an employee beyond the mere consolidation of extant laws, which happens to have resulted in a broad, and consequently subjective, definition. Unlike the universal-selective continuum which is concerned with the degree of generality of the application of a law, the objective-specific continuum refers to the extent of formal realisation of the law.⁵¹ Thereby, an objective definition would be one which sets precise criteria, and is effective only where such criteria are capable of being precisely measured and can be easily used for testing legalities.⁵² For instance, at the extreme end of objectivity in this continuum, the legislation could employ the various factors adverted to in jurisprudence in defining and sorting different categories of workers through precise criteria, such as the number of hours of supervision and direction which could constitute ‘control’, the income level of a person and proportion earned from a particular employer which constitutes ‘economic dependence’ and so on.

In the context of employment status, objectivity could render the law ineffective as employers may evade the law through changes to their methods of work organisation,⁵³ which in part can be evinced from the creation of the gig

⁴⁶ *Id.* (Davidov suggests choosing an appropriate level of abstractions, by articulating general goals as far as possible while defining specific goals in line with general goals).

⁴⁷ The Code on Social Security, 2020, §2(35). *See supra* text accompanying note 10.

⁴⁸ The Code on Social Security, 2020, §2(60). *See supra* text accompanying note 11.

⁴⁹ The Code on Social Security, 2020, §2(86) defines “unorganised worker” as “a home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by the Industrial Disputes Act, 1947 or Chapters III to VII of this Code.”

⁵⁰ Santosh Mehrotra & Kingshuk Sarkar, *Social Security Code, 2020 and Rules: A Critique*, Vol. 56(12), ECONOMIC & POLITICAL WEEKLY, 17, 19 (2021).

⁵¹ Stumpff, *supra* note 42, at 662-663.

⁵² *Id.*

⁵³ Davidov, *supra* note 43 (Davidov conflates the objective-subjective and general-specific continuums, which have been distinguished in this Note).

work model itself (as well as alternative work arrangements which emerged prior to it).⁵⁴ The adoption of a subjective definition (not based on measurable criteria) of an employee or other categories of workers shifts the onus of determining the appropriate classification from the legislator to the judge.⁵⁵ Subjectivity can be an appropriate strategy where establishing precise criteria is difficult, and where it may be desirable to confer greater discretion on judges to employ purposive interpretation in ensuring that welfare objectives are met – an approach which Davidov endorses for labour law.⁵⁶

Third, there has to be an appreciation for not only the potential effects of a legislation—such as implications for labour protection, consequences for the pace of innovation and its resultant quality of service delivery to consumers—but also the interplay between these effects. Rahul Matthan has pointed out that in some situations, such as with privacy and innovation, it may be helpful for legislators to visualise an adjustable “policy dial” whereby a move towards either of the two ends comes at the cost of the other.⁵⁷ In assuaging fears that regulating gig work could stifle or kill growth driven by aggregators in the digital space, proponents of gig workers’ rights in seeking to reject the possibility of an ‘either-or’ relationship between innovation and gig-work regulation may be quick to point to the scope for regulation of gig work being in the interest of business and innovation as well. Advocate

N.S. Napinnai had thus commented that the objective of the law is only to set minimum standards, beyond which it seeks to strike a ‘balance’, advertising to how laws can also be framed to act as an impetus to the growth of innovation so long as the variety of employment relationships and their requirements are properly understood.⁵⁸ While this may be true, it is worth giving due consideration to the notion that an ‘either-or’ duality between possible consequences arising from a legislation could exist in some circumstances. In the failure to recognise such a relationship and its reciprocity, an objective of worker welfare, for instance,

⁵⁴ Peetz, *supra* note 25; Stefano, *supra* note 16.

⁵⁵ Stumpff, *supra* note 42, 663.

⁵⁶ Davidov, *supra* note 43 (Davidov argues in favour of some indeterminacy in the law by which judges can use purposive interpretation in determining the existence of an employment relationship in terms of democratic deficits and dependency of workers. Applying this framework, he determines that Uber drivers should be classified as employees).

⁵⁷ Rahul Matthan, *Lessons from Photography on the Privacy-Innovation Trade-Off*, MINT, September 1, 2021, available at <https://www.livemint.com/opinion/online-views/the-online-trade-off-between-privacy-and-innovation-11630429431272.html> (Last visited on December 10, 2021) (Matthan was speaking in the context of privacy regulation which seeks to limit the availability of personal data, consequently restricting the ancillary beneficial uses of such data as well).

⁵⁸ CNBC-TV18, *Experts Discuss SC Agreeing to Hear Gig Worker’s Plea Seeking Benefits*, YOUTUBE, December 19, 2021, available at <https://www.youtube.com/watch?v=HabJGmyrUJ8> (Last visited on December 20, 2021).

could stand compromised in the attempt to simultaneously refrain from hampering the advancement of a digital economy.

Fourth, the pervasiveness of technological growth is likely to bring technology law in contact with diverse areas of law, which includes labour law in the instant case. It is important to be mindful, to the extent possible, as to how technology law may have implications for these fields. For Uber, avoiding liability as an employer involves taking the argument that they are merely an online facility connecting drivers and riders; and while India's Information Technology Act, 2000 at the present moment is not geared to address online aggregators of this nature, if or when it does there could arise implications for labour law. Gautam Bhatia had already observed the likelihood of overlap in technology law and labour law with reference to a 2017 Opinion of the Advocate General of the European Court of Justice (ECJ) which classified Uber as a "transport service" as opposed to an "information society service".⁵⁹ Therein, Bhatia pointed out that even as the Advocate General took care to state that the Opinion would have no bearing on the employment status of Uber drivers (who could well be working on a contractual basis) the opinion still implied that Uber was something more than a mere 'intermediary', which prevented it from falling within the ambit of an "information society service".⁶⁰

While these parameters are certainly not exhaustive, they may serve as useful guides for policy makers and academia in furthering discourse on the kind of legislative changes which would be required for securing the rights of gig workers in the long run, and for the IFAT and gig workers generally to align their strategies accordingly.

IV. LESSONS FOR THE FUTURE

The Fairwork report of 2021 has revealed the increasingly vulnerable position of people in the gig economy in terms of fair pay, health and safety conditions, fair contracts, equitable management of workers and representation in voicing their conditions, with Uber scoring a 'zero' across these assessment criteria.⁶¹ Under these circumstances, which are only escalating, it is understandable

⁵⁹ *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, Case C-434/15, May 11, 2017 (Opinion of Advocate General, European Court of Justice).

⁶⁰ Gautam Bhatia, *Delhi High to Decide if Uber/Ola Drivers are Employees:: ECJ Advocate-General's Opinion on Uber as a Transport Service*, THE PUBLIC SPHERE, May 12, 2017, available at <https://indiapublicsphere.wordpress.com/2017/05/12/delhi-high-court-to-decide-if-uberola-drivers-are-employees-ecj-advocate-generals-opinion-on-uber-as-a-transport-service/> (Last visited on December 10, 2021).

⁶¹ Fairwork, *FAIRWORK INDIA RATINGS 2020: LABOUR STANDARDS IN THE PLATFORM ECONOMY (2020)*, available at https://fair.work/wp-content/uploads/sites/131/2020/12/Fairwork_India_2020_report.pdf (Last visited on December 21, 2021).

that the IFAT sought to move the Supreme Court directly, even though it may not have been the most sound legal strategy for securing a favourable outcome.⁶² Now that the petition has been filed, the gig worker question will continue to be riddled with uncertainty until such time as the judgment is delivered; and in the meantime, exploitative labour practices would subsist.

While the COVID-19 pandemic has brought the plight of gig workers and their lack of legal remedy to the fore, their employment status was a latent question rather than a new one as the gig economy was already incipient. However, going a further step back, these uncertainties could potentially have been avoided (or at least, been limited) had labour legislation been framed in a manner which was more accommodating of the emergence of new forms of labour which have been facilitated by changes in technology. The complexities surrounding the appropriate classification for gig workers highlights the necessity for the right balances to be struck in framing legislations to avoid a situation of the law playing a constant (and ultimately futile) game of catch-up with a rapidly changing landscape driven by technological developments.

A failure to appreciate this results in the rights of vulnerable groups being kept in abeyance pending legislative changes such as with the Social Security Code, 2020 and Draft Rules thereunder, which often tend to be merely reactive and short-sighted. We can only hope that the plight of our gig workers performing essential services during the pandemic serves as a lesson for law-makers to adapt their approaches to an era of ever-increasing technology disruptions.

IN THIS ISSUE

The NUJS Law Review credits our authors and our dedicated team of Associate Members for the successful publication of Issue 14(3). We strived to work with the utmost diligence and responsibility with our authors amidst the challenges posed by the Covid pandemic in order to produce quality legal scholarship. In this Issue, the Editorial Board of the NUJS Law Review for the academic year 2020-2021 proudly presents five articles on a diverse gamut of contemporary legal issues, featuring novel contributions to legal scholarship backed by extensive research.

Aishwarya Deb, in her article ‘Defending Women Who Kill: Analysing Provocation in the Context of Intimate-Partner Homicide’ analyses the

⁶² Gautam Bhatia, *Extremely Iffy about...Guess*, TWITTER, December 14, 2021, available at <https://twitter.com/gautambhatia88/status/1470474352290324486?s=21> (Last visited on December 20, 2021); Saurabh Bhattacharjee, *Given that Complaints...Prudent*, TWITTER, December 14, 2021, available at <https://twitter.com/saurabhbbbh/status/1470573197842018307?s=21> (Last visited on December 20, 2021).

jurisprudence surrounding the use of the provocation defence by women for cases involving homicide of the intimate partner. She highlights the discrepancy with which the provocation defence has been applied to men and women, and argues that the prevailing jurisprudence perpetuates the notion of inherent aggression among males and violent subordination of females. Deb argues that the experiences of females must be given adequate recognition in the existing law in order to challenge the legal fictions of neutrality and universality.

Megha Mehta, in her article 'The Inefficiency of Internal Complaint Mechanisms in Resolving Sexual Harassment Claims - A Study in the Context of Sexual Harassment Law and #MeToo in India' posits that sexual harassment law in India has been a failure because of its dependence on a 'desire-dominance' paradigm. Under this paradigm, sexual harassment is deemed to be unwelcome sexual behaviour, as opposed to an indicator of the broader workplace gender discrimination, and therefore attempts to penalise individual instances of sexual misconduct instead of holding the employers accountable for a hostile work environment. Mehta argues that the legal definition of sexual harassment must be reconceptualised in order to include all forms of behaviour which contributes to a hostile work environment on the basis of gender. She further argues that internal complaint mechanisms should be substituted by external bodies which could regulate discriminatory employment practices.

Gayathri Puthran, in her article 'Litigating Insider Trading: Decoding Evidences in Cases Under SEBI (Prohibition of Insider Trading) Regulations, 2015' explores the vagaries of evaluating evidence for charges pertaining to insider trading. She delves into the discussion by examining evidence submitted by prosecution and the defence in proving or disproving each of the prongs of the charge of insider trading. Firstly, she engages with the evidence taken into consideration by adjudicating and appellate authorities for determining whether the information in question is unpublished price sensitive information. Secondly, she analyses the evidence that attest or refute the status of the individual as an insider with possession of insider information. Lastly, she probes the evidence that rebuts the presumption that an insider trading with possession of unpublished price sensitive information relied upon such information.

Anirudh Gotety, in his article 'Regulating the Ethics of the Unknown: Analysing Regulatory Regimes for AI-Based Legal Technology and Recommendations for its Regulation in India' studies the prospects of incorporating Artificial Intelligence by legal regulators, along with associated ethical issues. The paper acknowledges that the Indian legal regime does not presently have a framework pertaining to AI-based legal technologies. Gotety argues that the Bar Council of India should consider adopting versions of the American Bar Association

Model Rules which stipulate lawyers to be cognisant of the advantages and risks of AI-based technology for the provision of legal services. Furthermore, he recommends a light-touch approach adopted by the Solicitors Regulation Authority of England as the ideal regulatory approach for the Bar Council of India to emulate.

Tanishk Goyal and Sarthak Sethi, in their article ‘Reassessing Free Speech Protection(s) of Elected Representatives: Addressing Responsibility Concerns vis-à-vis Individual Dignity’, map the fundamental parameters of individual dignity that stand to be violated by the speech-acts of elected representatives. The authors argue that elected representatives, by virtue of their position in society possess the capability to discredit the narrative of a targeted class of individuals through their speech-acts. Against this backdrop, the authors make a case for restricting the speech-acts of elected representatives under Article 19(2) of the Constitution when they violate the fundamental parameters of individual dignity embedded in the Constitution.

Truly,

Editorial Board (2021-2022),

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