REGULATING THE GIG ECONOMY IN INDIA: HOW SECURE ARE GIG WORKERS?

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I. INTRODUCTION

“There were laws enacted for businesses and there were laws enacted for people. What the sharing economy did was create a third category: people as businesses.” Airbnb’s co-founder Brian Chesky’s comment eloquently summarizes the situation of the “gig economy”.1

The Gig Economy is a free market system in which individuals or businesses employ an independent worker for a limited time. The term ‘gig’ was a slang used by artists to describe jobs that lasted for a specific time.2

The Gig Economy is a platform for contract workers who are hired and fired on a temporary basis. They may be found in a variety of industries that need human services to be supplied through a web-based platform. Platform owners act as a middleman between service providers and the agents that provide the services. Amazon, Ola, Uber, Zomato, Swiggy, etc. are some of the common examples. Agents that charge or earn a commission from the service provider and the customer are known as platform providers.3

The term “gig worker” refers to someone who takes on a temporary work to be completed in a specified time in non-standard work arrangement. On the other hand, “platform workers” in general means those workers who works for businesses providing services using web-based platforms directly to the consumers.

The advantages of temporary employees, such as the freedom to pick their workhours, shifts, holidays, workdays, and preferred organizations, have resulted in a significant increase in their percentage of the workforce. Rather of being coerced into a job, employees here have the freedom to choose their organization for whatever time period they like. From the standpoint of freelancers, the gig economy may help them achieve a better work-life balance than conventional professions allow. Their aspirations for increased autonomy and flexibility in both their work and personal lives are met by Gig platforms.

The gig economy has now cleared the door for vulnerable employment. The new mantra is to replace full-time workers with freelancers and independent contractors. In the next decade, the gig economy is expected to become a greater element of the informal sector, with the Boston Consulting Group predicting a possible increase to 90 million

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II. EMERGENCE OF GIG ECONOMY IN INDIA

India has become the world's fifth largest labour market for gig workers after USA, China, Brazil and Japan. With 15 million skilled individuals, India accounts for almost 40% of all freelance work available worldwide, supporting the ever-increasing need for contract-based jobs or the freelancing sector. According to research by ASSOCHAM, India's gig economy is predicted to grow at a CAGR of 17% to US$455 billion by 2024, with the potential to grow at least twice as fast as pre-pandemic forecasts. According to another prediction, by 2025, India will have 350 million gig jobs, providing a great potential for job searchers to thrive on and adapt to shifting work dynamics.

We must not lose sight of the fact that "India is a cheap labor market." The availability of 'cheap labor' allows businesses to extract the majority of the benefits from employees. Many workers or employees in traditional working systems are unable to fulfill their expenses; as a result, they are paid less and are confined to a single firm. The gig economy gives individuals of all ages and backgrounds a chance to work in a variety of industries. According to several studies, a significant portion of the population has jumped on the gig train in the previous five years. Because of its autonomy and flexibility, the gig economy is moving from low-skilled to higher-skilled services. Uber, Ola, Amazon, Swiggy, UrbanClap, Justdial, Kapoor Amit, ‘Challenges with gig economy’, (2021).


and other companies have employed a large number of blue-collar employees.

III. OPTIMISTIC AND CRITICAL VIEW OF GIG WORK

Businesses may "enjoy multiple advantages from working with freelancers, such as a flexible workforce adaptable to change, greater access to hyper-specialized expertise, cost savings, and an increase in productivity," according to this fairly idealistic portrayal of the gig economy. 6Gig workers have a lot of freedom in their jobs: they may work from anywhere at any time, they have autonomy, and they can choose how many hours each day and how long they work for. As a result, the upbeat perspective of gig labor is that it may be liberating for employees who want to break free from the constraints of company hierarchy and bureaucracy.

Many blue-collar workers already work in insecure settings, endure income instability, and lack job security in countries like India, where casual working environment rule the economy. The gig economy, on the other hand, is a better option. It is differentiated by its simplicity of entrance as well as a more egalitarian structure than informal employment arrangements. In the gig economy, there are no informal networks that may establish barriers to entry for outsiders. Gig work has also provided as a source of extra income for individuals in need, enabling them to tide themselves over until they can find work.7

Besides the pros of gig work, it also has certain cons. One of the main criticisms of gig work is the ambiguity around the employment relationship, that requires to explicitly determined. Because of the rise in the platform-driven gig economy, a new kind of employer-employee relationship has emerged, which differs from the traditional employee-employer relationship as defined by most labor laws. Gig workers are not covered by any particular legislation or case law in the area of labor law. Platforms all around the globe have taken advantage of this gap. According to Uber, Zomato, Swiggy, and others, there are no defined hours of work or a physical location of employment, hence they are not protected by current labor laws. Not only this but the employer takes advantage of a labor law loophole to get away with mistreating its workers. They refer to their workers as "delivery partners" rather than "employees" in order to dodge duties such as minimum wage, PF ( Provident Fund), ESI ( Employee State Insurance), and other perks.8 The actual payment terms are determined by a complicated series of formulae that are completely at the aggregators' discretion and susceptible to change without consultation or approval from the workers.

The food delivery companies claim that their application is an "internet service" or a "platform" that links the client, the eating

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7 Kapoor Amit, “Challenges with gig economy” (2021), https://economictimes.indiatimes.com/jobs/the-
challenge-with-gig-
economy/articleshow/85031089.cms.
outlet, and the person delivering it. As a consequence, companies like Zomato and Swiggy try to avoid a high retention rate despite hiring 50,000+ delivery executives. This is because the great majority of individuals who work on the platform will be exempted from most of the employee-protection laws.

Another issue is that these aggregators may anytime make changes to compensate their workers, often to their disadvantages. This could be explained through the case of Zomato. Zomato changed their incentive structure in late 2019 from Rs. 20 per touchpoint to Rs. 18 per touchpoint without consulting delivery executives. During the epidemic, this 'basic pay' was reduced to Rs. 15 and the workers got no say in it.

Furthermore, these gig workers' working conditions are often poor and dangerous. Most delivery partners work long hours, squeezing through narrow lanes, braving inclement weather, zipping across highways and delivering late night, sometimes dealing with rude customers, just to make a little extra money.

Despite the fact that companies such as Swiggy and Zomato offer voluntary initiatives such as the Hunger Service Fund and Swiggy Smiles Program which provide medical and accidental insurance to its employees, according to some reports, these initiatives only apply to a limited number of persons, they call ‘employees’ and hardly have any bearing on the workers who perform the vital functions.

Employers also have a major issue in protecting data confidentiality and gaining intellectual property for freelancers' products and services. Because there is no "non-compete" agreement in casual work arrangements, the freelancers might be working for numerous rivals at the same time, jeopardizing the company's interests.

As a result, hiring workers on a temporary basis and entrusting them with sensitive data may be a big worry. As a result with the gig economy changing the basis of the employer-employee relationship and worker rights, including gig workers in legal frameworks and social security benefits is essential.

IV. REGULATORY FRAMEWORK IN INDIA

The four key labor laws for employees that consolidated 44 labour laws are listed below, with just one of them recognizing gig workers:

- **The Industrial Relations Code (2020)** only applies to employees who work in an industry unit. Gig workers, who may not have a fixed place of employment, are not eligible. As a consequence, no laws

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governing right to form unions, collective bargaining, or fair hiring and firing apply to gig workers.

- **The Occupational Health, Safety, and Working Conditions Code (2020)**[^14] does not apply to gig workers. This is troubling, especially considering that many gig workers put themselves in peril by actively working throughout the pandemic.

- Gig workers are not covered by the **Wage Code (2019)**[^15] which means that they are not even entitled for minimum wages.

- The final one is the **Code on Social Security (2020)**[^16]. It is the only code that provides provisions for gig workers, platform workers and unorganized workers. The Code has made provisions for life and disability insurance, health and maternity benefits, old age security, education, provident funds, accident benefits, and other things. Under section 2(35),[^17] the Code defines the term gig worker as “a person performing a work or participating in a work arrangement and earning from such activities outside of traditional employer-employee relationships.” The work is mostly temporary and is completed within a specified period under the arrangement. Under section 2(61),[^18] the Code defines a platform worker as “a worker working for an organization which uses an online platform for providing specific services to individuals or organizations.” For example, Uber, Ola, Zomato, etc. Further, section 2(86)[^19] describes an unorganized worker “as a self-employed, home-based, or wage worker in the unorganized sector”.[^20]

It has separated these categories of employees by defining the three words individually rather than widening the definition of employee under the statute. Platforms like Uber, Zomato, Swiggy and Ola are further required under the Code to donate a part of their yearly earnings (1-2%) to provide social security to their platform employees. The aforementioned contribution should be provided by June 30th of each year by self-assessment and submission of a document showing the number of gig workers linked with it at the start of each fiscal year.[^21] The government also seems to recognize the need for gig worker security by including the National Social Security Board, that will oversee the welfare of gig economy employees, with five members from aggregator businesses and five representatives from gig workers. Under the Code, the Union government shall also create a Social Security Fund for gig economy employees, according to the Code.

However, the Code fails to include gig workers in the laws governing wages, occupational safety, or industrial relations in the social security legislation. The issues concerning the draft are as discussed:

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First and foremost, issue with the Code is that it fails to provide them with basic employment rights such as minimum wages and workplace safety.

The Legislature has simply added to the confusion by creating the many distinctions between the categories of workers. Platform and gig workers, it has been suggested, are not two different groups, but rather components of a larger totality in which employees are hired outside of the typical employer-employee relationship.

While the Code protects platform (or gig) workers' social security rights, it also gives the government a lot of flexibility by using terms like "may," "from time to time," and "from time to time." This creates uncertainty for both employers and workers. Experts argue that in the absence of definite and fast timeframes for the adoption and execution of such programs, they will become a "dead letter of the law" or would be so delayed that its fundamental purpose will be defeated.

The concentration of powers and authority is a major concern that arises. The Board (responsible for devising schemes) and the funds to finance them have both been established at the national level. A central authority has also been given the registration aspect. However, given that Labour is on the concurrent list, such concentration may make it more difficult to execute such systems effectively.

Even while social security benefits constitute a start in the right direction, they will not be enough to adequately protect the interests of gig workers. Gig workers must have job stability and be covered by a universal minimum wage that applies to all sorts of employment, as well as the ability to form legally recognized unions. It's odd that the government understands the value of giving life insurance and gratuities to gig workers, but not workplace safety or minimum pay.

Furthermore, gig workers must create legally recognized unions so that their pay is determined via collective bargaining rather than just on the wants and desires of the service aggregators.

V. LEGAL DEVELOPMENTS IN INDIA AND OTHER COUNTRIES

A recent United Kingdom Supreme Court ruling against Uber, stated that, “…It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that give rise to the need for statutory protection in the first place.” Under the UK Employment Rights Act 1996, the court defined Uber drivers as "workers," entitling them to benefits such as paid vacations and minimum wages.

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Last month, the Dutch High Court issued a similar judgement, holding that Uber's legal connection with these drivers had all of the elements of an employment contract.

Similar rulings have spread across Europe too, with Spain and Italy emerging as new frontiers for the rights of gig workers and the European Commission as well as the French Government actively seeking consultation to formulate policies to provide further protection to platform workers.26

In the United States, the legislation established in the Dynamex case27 and subsequently codified passing the Assembly Bill 5 (AB5) broadens the conventionally accepted definitions of employees to include gig workers and other similar individuals. It does this via the use of a three-tier examination that has considerably limited the scope of individuals classified as independent contractors.

The court established a new criterion known as the 'ABC Test,' which requires an employer to establish that its employees are independent contractors who are not entitled to any social benefits. This can only be shown, according to the court, if all three conditions of the ABC Test, as listed below, are met:

In terms of a contractual right or in actual practice, the hiring entity does not control and direct the worker with regard to the performance of his work; the worker performs work that is outside the usual course of the hiring entity's business or the worker would not ordinarily be viewed as one of the hiring entity's employees with respect to the kind of work he performs for the hiring entity; and the worker is usually involved in a self-established trade, profession, or company that is similar to the job done by the employing organization.28

Indian courts have ruled on industrial disputes between employers and contract workers, as well as employers and independent contractors on numerous occasions. According to one of the first judgments on the issue, Dhrangadhara Chemical Works v. State of Saurashtra,29 the supervision and control test is the most basic criterion for establishing an employer-employee relationship. If the employer controls and supervises the kind and manner of work that the employee will accomplish, this implies that there is an employer-employee relationship. This must be decided on a fact to fact basis, taking all relevant facts and circumstances into account.30

Later judgments, on the other hand, considered whether a person who works directly as a contractor or is permitted by a vendor who, in turn, has a manpower supply contract with an ultimate employing company qualifies as an employee. It was concluded in these situations that supervision

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27 Dynamex Operations West Inc. v. Superior Court of Los Angeles 4 Cal.5th 903 (Cal. 2018).
28 Pathak Manish and Srijita Jha, ‘India and The Gig Economy (2019),
30 Pathak Manish and Srijita Jha, ‘India and The Gig Economy (2019),
and control are not the sole determining factors in these scenarios. In actuality, India's Supreme Court (the "Supreme Court") embraced a broad view that included the employer's right to recruit and dismiss workers, pay remunerations, and deduct insurance payments, among other things. The employer and the contractor's employees have an employer-employee relationship if the employer has control over the means and modes by which the contractor completes his task.  

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In another case32, The Supreme Court emphasized on the key determining factors, declaring that simply because a company's management has control over the proper execution of work or dismissal and disciplinary proceedings does not automatically render its workers employees of the company.

Lately, The Indian Federation of App-based Transport Workers (IFAT) filed a public interest litigation in India's Supreme Court on September 20, 2021, on behalf of gig workers. The petition urged that "gig workers" or "platform workers" be classified as "unorganized workers", so that they come under the purview of the Unorganized Workers’ Social Security Act, 2008 (the UWSS Act), and, hence, are provided statutory protection in the form of social security benefits.33

VI. RECOMMENDATIONS AND CONCLUSION

There seems to be a considerable need and scope for reform in the gig economy. There are numerous approaches that can be used to accomplish this.

To begin with the government should start confirming and enforcing current labor provisions to include gig workers.

The second approach, which is now being employed in the United States is to construct a qualifying test in order to broaden the definition of employee to include gig workers so a result, workers will have the same level of security and benefits as formal and regular employees. Similarly, the definition of an employer might also be expanded to include who bears responsibility for social security of these workers.

The third alternative is to impose certain limits on the service aggregators, which would prevent them from unilaterally suspending and dismissing employees from their services without notice, in turn giving gig workers more security and safeguarding them against unjustified terminations.

Fourthly, a dispute resolution clause (Mediation-Arbitration) must be included in gig-work contracts and a Commission (such as Australia's Fair Work Commission) should be established to monitor gig-worker issues. Workers' rights would be equalized, and they would have a fair and impartial venue to express their concerns. Instead of an arbitrary decision for Indian gig workers’, 2021.  


31 Ram Singh and Ors. v. Union Territory, Chandigarh and Ors 2004(1) BLJR 490.  
32 Haldia Refinery Canteen Employees Union and Ors. v. Indian Oil Corporation Ltd. and Ors. AIR 2005 SC 2412.  
33 Kavia Haritima, 'the gig is up: international jurisprudence and the looming Supreme Court
and abrupt suspension, the suspended workers would have had the right to be heard and a fair trial in the presence of such an Alternative Dispute Resolution Body.

Lastly, anti-discrimination clauses can be included, enabling these contractual workers to publicly criticize platforms’ "dangerous corporate practices" without fear of retaliation. This would empower workers to establish collective organizations or unions and speak out against unfair labor practices such as decreased pay, increased control, and so on.

In conclusion, it can be said that the number of gig workers in India is continuously increasing. As a result, an effective regulatory framework for recognizing their rights and responsibilities is critical. Although the Social Security Code of 2020 is a great start in the right way for protecting and regulating such platform or gig workers, numerous difficulties continue, such as the lack of rules for occupational safety and minimum salaries, among others. Allowing such a major portion of the economy to go unchecked is a huge disservice to these individuals. In many ways, a legal framework that consider gig workers in a status equivalent to that of regular employees is badly required. If the aggregators persist on classifying them as non-employees, they should be classed as such and given benefits like the opportunity to form unions, universal minimum wages, and workplace safeguards better suited to the gig economy. Whatever course policymakers choose, it's critical that the gig economy change quickly. Millions of people's rights are at stake, and the gaps must be plugged as soon as possible.

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