

Determining the Status and Treatment of “GIG-Workers” under the Industrial Disputes Act, 1947

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Abstract

The gig economy, characterized by short-term contracts, freelance work, and on-demand tasks, has witnessed rapid growth in recent years, reshaping the way people work and earn a living. India is the fifth-largest country in terms of gig-workers. Gig workers offer a cost-effective solution, often working on a project basis, reducing continuous payroll expenses. Moreover, the gig economy facilitates market expansion and job opportunities, making it accessible to students, retirees, stay-at-home parents, and those seeking additional income. They may thus have a different type of job, but their significance is equal to that of a regular employee. Although this new work paradigm gives workers flexibility and possibilities, it also raises serious questions regarding the rights and protections afforded to gig workers.

Due to the nature of the work, they are perceived as “second class workers” and denied social security benefits that come with formalised employment. Unfortunately, the law is yet to catch up with this fast-paced economy. Existing Indian labour laws fail to recognise Gig workers under its organised labour legislation i.e., the Industrial Disputes Act, 1947. They are clubbed with unorganised labourers and are thus deprived of all the benefits given to a traditional employee; all benefits that are rightfully due to them. Gig workers are now an essential component of the contemporary economy, adding to its flexibility and dynamism. Governments, corporations, and society as a whole must address the difficulties that gig workers encounter and provide a framework that protects their rights and well-being while allowing them to benefit from their invaluable contributions as the economy grows. The former half of this paper highlights the social issues around their employment and legislative lacunae in their recognition. The latter half comparatively analyses the international position to propose additional tests to be adopted in India. Lastly, it explains the challenges that could be faced in bringing a change to the current system and the way forward from there.

Keywords: *Gig-Workers, Industrial Disputes Act, Labour Law, Employee, Social Security, Workmen*

Introduction

Gig workers, often referred to as independent contractors, freelancers, or platform workers, play a vital role in the global workforce. The emergence of the gig economy has brought about a profound change in the way individuals work and conduct business. Gig workers are vital to the modern economy. They provide various services, such as driving for rideshare companies, delivering food, offering freelance writing services, or performing short-term tasks through online platforms. The gig economy, which emphasises on-demand services, freelance labour, and short-term contracts, is a break from traditional employment arrangements. Gig workers

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accept remuneration in return for their time, talents, and services.³ The labour market has changed and technological improvements have led to a rise in popularity for this approach. There are multiple benefits that this sort of business model brings to the business world.

- They offer unparalleled flexibility and convenience, benefiting both businesses and consumers.
- Their availability for short-term projects allows businesses to adapt to market demands more efficiently, while consumers enjoy a wide array of services at their fingertips.
- These workers possess diverse skill sets, contributing to various industries from transportation to software development.
- The gig economy fosters entrepreneurship, with many gig workers launching their businesses, driving economic innovation.
- Businesses can access specialized talent without long-term commitments, tapping into a global pool of experts.⁴

Gig workers are also a cost-effective solution, often working on a project basis, reducing continuous payroll expenses. Moreover, the gig economy facilitates market expansion and job opportunities, making it accessible to students, retirees, stay-at-home parents, and those seeking additional income. Therefore, their nature of employment might be different but their importance is just as much as that of a traditional employee. Unfortunately, the law is yet to catch up with this fast paced economy. Existing Indian labour laws fail to recognise Gig workers but under its organised labour legislation i.e., the Industrial Disputes Act. they are clubbed with unorganised labourers and are thus deprived of all the benefits given to a traditional employee; all benefits that are rightfully due to them.⁵

Gig-Workers – What, How, and Why?

India is the fifth-largest country in terms of gig-workers.⁶ According to SHRM (2016), the Indian gig economy includes online platform workers, on-call workers, temporary contractual workers and self-employed individuals. The essential feature that binds all of them is that their remuneration falls outside the conventional employer-employee relationship. There are certain factors based on which a gig-worker could be paid, which would include –

- i. Predetermined fees set at the time of entering a contract
- ii. Based on the time and effort of the worker
- iii. The amount of work accomplished
- iv. Quality of the resultant work-product
- v. A combination of these factors⁷

India's informal labour market has also grown due to advent of start-ups and e-commerce. Even according to the global crowdsourcing and freelancing platform Freelancer.com, the Indian gig economy shows one of the highest growth rates in the world.

Some analyses claim that the willingness of workers to engage in the gig economy shows that gig work is a beneficial arrangement. Indeed, there may be advantages to gig labour over

³ Neelam Kshtriya, Daisy Kurien, "Gig workers in India: Emerging Opportunities in the New Economy" (2023) JOUR 78

⁴ Kiran Singh, "An Analysis Of The Gig Economy In India", (The Amicus Curie, 11 Sept 2022) <<https://theamikusqriae.com/an-analysis-of-the-gig-economy-in-india/>> Accessed 17 October, 2023

⁵ Nilanjan Banik, "All Is Not Well with India's Gig Economy" (The Wire, 9 May 2022) <<https://thewire.in/economy/all-is-not-well-with-indias-gig-economy>>Assessed on 17 October, 2023

⁶ India Staffing Federation, *ISF Annual Report* (2022)

⁷ Shreeya Thakur, "What Is Gig Economy: Understanding The Meaning, Factors, Types And More!" (UnStop, 13 Oct 2022) < <https://unstop.com/blog/what-is-gig-economy>> Assessed on 17 October, 2023

traditional employment in terms of ease of employment and increased flexibility in terms of choosing jobs and hours. In addition, the gig economy may encourage bridging employment, particularly in novel circumstances like the COVID-19 pandemic. Watson, G. P. (2021) proposes five categories of gig workers based on secondary characteristics:

1. gig goods providers,
2. gig service providers,
3. gig data providers,
4. traditional gig workers, and
5. agency gig workers.

However, the commonality of these gig workers are the vulnerabilities that they are exposed to. These include occupational vulnerabilities, precarity, and platform-based vulnerabilities.

The primary problem with Indian gig economy workers is this. The majority of the time, businesses can treat their gig workers as employees in terms of the control they exercise over them, but without providing them with any employee benefits like insurance, medical benefits, an employee provident fund, bonuses or gratuities, etc.

India's gig economy employers view their workers as partners. If so, gig workers should have an equal vote in the compensation and terms of employment. In addition, gig workers should have the freedom to accept or reject proposals without consequences. But in reality, things are different.⁸ In its most basic form, the gig economy offers a working arrangement that benefits all parties, but the delicate balance is upset when power dynamics enter the picture.

When there is a plentiful and more dispensable labour force, as there is for blue-collar employees in India, gig workers are powerless to affect salary offers, working conditions, etc. Due to their inability to negotiate an unclear professional path, receive a steady salary, etc., they continue to be financially vulnerable.

Gig workers in India claim that the poor remuneration frequently forces them to put in more than 8 hours a day and work every day of the week. For actual problems, gig workers do not have access to a proper Grievance Redressal Mechanism. For instance, Mumbai drivers chose to go on a "strike" when Ola and Uber began reducing incentives. However, it remained unclear who they were attacking. The local transport commissioner had to inform the protesters that he did not control the hail-a-taxi industry when they became irate at his office.

Gig economy which is driven by gig-work can be understood to be a non-traditional type of labour characterized by 'temporary' contracts and on-demand employment. However, in the modern terms and with the advent of digital platforms, this arrangement has become organized in certain sectors such as travel, delivery, and other such services.

Cambridge dictionary⁹ defines Gig Economy as -

"a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer."

Gigs are essentially pieces of work or tasks done for different clients over a stipulated period. The Social Security Code, 2020 has also defined the term 'gig worker' as –

⁸ Tabassum Sultana. J, "Gig Economy And Laws Protecting Gig Economy In India's Gig Economy/Gig Worker", (2014) 2 (1) JLRJS 562

⁹ Andrew Harley, "Cambridge Dictionaries Online" (Cambridge University Press, 1999)

“a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship”¹⁰

Furthermore, the term “platform work” is defined under the Code 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”¹¹

It is laudable that, both platform workers and gig workers have been recognised by the Social Security Code. However, the fallacy lies in their disconnected from the definition of workmen which will be discussed in detail further.

The need for their inclusion under the Industrial Disputes Act

Social Issues and Lack of Security

The primary reason why gig-workers need legal protection under the broader umbrella of labour laws is due to a lack of social security. As it is established, a large portion of India’s workforce would be classified as gig-workers. The law should therefore, recognise their professional rights. Unfortunately, due to the lack of such protection, they are faced by multiple set of problems.

Second class treatment

Various companies typically identify gig workers as “self-employed” to avoid labour rules because independent contractors have sparse protection of labour laws. This is the case with a number of aggregators. They are required to sign documents that make it seem as though employees use the service provider’s platform¹² to interact with customers and offer their employers a share of the money they earn as compensation. This common industry practice is popularised in the naming of such workers, for example: Gig workers who are engaged by service providers like Swiggy, Zomato and Dunzo are called “Delivery Partners”. They are treated differently as compared to the executives hired by these companies. A regular employee is supposed to be given various benefits such as unemployment insurance, health insurance, paid sick leaves, vacation time, worker’s compensation, retirements benefits and so on. All of these are covered under social security measures. In contrast to this, a gig-worker would not be legally eligible for any of these benefits. Many gig workers rely on digital platforms and apps for work, which can make their employment status less clear-cut. This platform dependency plagues their livelihood by issues such as unpredictable pay rates and inconsistent schedules. On top of this, they do not have any provisions for pensions, health insurance and other legally recognised incentives. This deliberate exclusion of “worker status” to such workers is motivated by the aim of safeguarding the interests of businesses.¹³

Working conditions

According to a report by the People's Union of Democratic Rights, service providers have adequate control over the job performed by gig workers. The share to be provided to the

¹⁰ The Code on Social Security 2020, s. 2(35)

¹¹ The Code on Social Security 2020, s. 2(60)

¹² Vinay Aravind, “Swiggy strike is a reminder that service aggregators care little for workers’ rights” (Newslaundry, 2 Sept 2020) <<https://www.newslaundry.com/2020/09/02/swiggy-strike-is-a-reminder-that-service-aggregators-care-little-for-workers-rights>> Assessed on 17 October, 2023

¹³ Subir Bikas Mitra & Piyali Ghosh, “Engaging Contract Labour: Learnings from Landmark Judgements”, [2021] 47 (1) XLRI 1

platforms is arbitrarily chosen without input from the workforce.¹⁴ With the majority of them being solely dependent on a single employer, they even labour in adverse weather conditions. Furthermore, they are forced to work for multiple players as they do not receive the protection from one single employer.¹⁵ The size of tech giants like Swiggy and Uber leave these gig workers with no bargaining power to negotiate for their rights. The contract signed between these workers and their “engagers” are often standard form contracts which are biased in favour of the hirer. As a result, the worker is at the mercy of the conditions of employment imposed by the hirer. This eventually leads to a bottleneck. The Delhi Commercial Driver Union, which is made up of over 1.5 lakh drivers, filed a writ suit with the Delhi High Court in 2017. They claimed that Uber and Ola were exploiting its workers by failing to consider them as employees. The Delhi Government, Uber, and ANT Technologies have all received notifications, but the case still remains pending in court.¹⁶ Additionally, in 2018, drivers working for ride-hailing services in India went on strike to express their dissatisfaction with the payment systems of Ola and Uber.¹⁷ Both these are companies operate intermediary technology platforms and are competitors of each other. The lack of legislation is the cause for the unchecked reduction of fares and wages to these workers. Furthermore, the obligation over gig workers to utilize the Aarogya Setu app involves deliberations concerning their privacy and personal independence. Another issue that is prevalent with respect to gig workers is the gender disparity in this sector. The inapplicability of legislation on this sector promotes such disparity. Social security and benefits, workplace harassment, and contract enforcement are few such issues that are persistent to this day.¹⁸

To control and curb these, a mixed approach is recommended. This includes methods to include services with features of a traditional job description combined with skill-based gig-work.^{19,20}

Current Legal Position

Gig workers in India are often classified as independent contractors or freelancers rather than traditional employees. This classification has significant implications for their legal rights and benefits. In the current legal framework, there is unfortunately no explicit recognition of gig workers under the Industrial Disputes Act. On the contrary, they come under the ambit of The Unorganised Workers’ Social Security Act, 2008.²¹ This Act is for those employees who are not covered under any of the other labour legislations. Therefore, the security offered to them is significantly lesser than that of workmen.

Potential Legislative protection

There are certain regulations under which Gig worker can claim benefits. These include:

¹⁴ Suneera Tandon, Varsha Bansal, “The loneliness of a delivery man” (Mint, 18 Sep 2019) <<https://www.livemint.com/news/india/inside-the-lives-of-food-delivery-riders-1568800031736.html>> Assessed on 17 October, 2023

¹⁵ Id.

¹⁶ Radhika Chitkara, Vikas Kumar, ““Behind the veil of algorithms: Invisible workers” -A Report on Workers in the ‘Gig’ Economy” (PUDR, 15 Dec 2021) <<https://www.pudr.org/release-pudrs-report-behind-veil-algorithms-invisible-workers-report-workers-gig-economy>> Assessed on 17 October, 2023

¹⁷ Harsh Upadhyay, “Coming Monday Ola and Uber drivers to go on strike in Mumbai, NCR and Bengaluru, demand commitment of Rs 1.25 lakh business” (EnTracker, 15 March 2018) <<https://entrackr.com/2018/03/ola-uber-drivers-strike-2/>> Assessed on 17 October, 2023

¹⁸ Aditi Mishra and Suyog Ghosh Dastidar, “Navigating the Challenges of the Gig Economy: A Legal Analysis of Protection to Gig Workers in India and Overseas” (2021) 6(1) IJLMH 2183

¹⁹ Tyagi, Akanksha, “GIG Economy and Its Impact On India. ” (2018) 4 (7) IJETSRS 18

²⁰ Ministry of Commerce and Industry, *India’s Booming Gig and Platform Economy*, NITI Aayog, (Policy Brief 2022) Pg 3

²¹ Unorganised Workers’ Social Security Act 2008, s. 2(m)

- Minimum Wages Act, 1948²²: Gig workers are entitled to receive minimum wages as prescribed by the respective state governments. However, determining minimum wages for gig work can be challenging due to the variable nature of tasks and earnings.
- Payment of Wages Act, 1936:²³ This act governs the payment of wages to employees, including gig workers. It mandates timely payment and the mode of payment.
- Employees' State Insurance Act, 1948:²⁴ Some gig workers, depending on their income and engagement, may be eligible for benefits under the Employees' State Insurance (ESI) scheme, which provides medical and cash benefits.
- Employees' Provident Funds and Miscellaneous Provisions Act, 1952:²⁵ Gig workers may be eligible for provident fund benefits if they meet certain criteria, such as earning a minimum wage threshold set by the government.

Industrial Disputes Act

All the above mentioned legislation only govern an aspect of the employment of these Gig workers. The Industrial Disputes Act is the one of the only legislations that provides for a multi perspective protection to the workers covered under it.²⁶ To claim protection under the Act, any individual must fall within the scope of the Act. This scope can be determined by the definitions of industry, workmen and in case of disputes, then industrial disputes as well

Section 2(j) defines an “industry as

*“any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;”*²⁷

Section 2(s) defines a “workman” as

*“any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute.”*²⁸

An elemental analysis of these provisions determine the procedure to be followed while determining the scope of the Act. They also highlight the lacunae in the legislation that impede the inclusion of Gig workers under the Act. These requirements are as follows:

1. Employer-Employee relationship: India, this relationship is established by the control and supervision exercised by the employer. This is determined by the Terms and Conditions of the employment including the hours of service and other quantitative and qualitative requirements²⁹. If an employer exercises significant control, it may indicate an employer-employee relationship. In the case of *Tata Consultancy Services v. State of Andhra Pradesh (2016)*³⁰, the Andhra Pradesh High Court examined various factors, including the control exercised by TCS over its employees' work, and ultimately

²²Minimum Wages Act 1948

²³Payment of Wages Act 1936

²⁴ Employees' State Insurance Act 1948

²⁵ Employees' Provident Funds and Miscellaneous Provisions Act 1952

²⁶ S C Srivastava, *Industrial and Labour Laws* (5th edn. Vikas Publishing House, 2007) 167

²⁷ Industrial Disputes Act 1947, s. 2 (j)

²⁸ Industrial Disputes Act 1947, s. 2(s)

²⁹ Chintaman Rao v. State of Madhya Pradesh AIR (1958) SC 358

³⁰ Tata Consultancy Services v. State of AP (2004) 271 ITR 401

determined that an employer-employee relationship existed between TCS and its workers. The Apex court had devised the test of ‘supervision and control’ in the case of Dhrangadhara Chemical Works Ltd. v. the State of Saurashtra

2. Whether where said worker is employed in an industry: This requirement is to be read along with the three-prong test that is mentioned in the Bangalore Water Supply Case³¹. The case laid down the triple test to qualify whether a given arrangement will be considered an industry. This test includes:
 - Systematic Activity
 - Cooperation between Employer and Employee
 - Activity Pertaining to Goods and Services Production to Fulfil Human Needs

If the arrangement between the Gig worker and his employer satisfies the above three conditions, it will be considered an industry.

3. Whether the nature of work done falls under the list given under the definition: the definition gives an exhaustive list of the nature of work done by a workman³². It may be “*manual, unskilled, skilled, technical, operational, clerical or supervisory work*”.
4. Whether employment is for hire or reward: To be considered a workman, individuals should have an ongoing employer-employee relationship with continuous remuneration, as opposed to sporadic or project-based work under the Industrial Disputes Act.³³³⁴
5. That the nature of work is not managerial: This can be seen as the exclusionary aspect of the requirements. If the primary function of the employee is to manage the daily affairs, take decisions or supervise workmen under him, he shall not be covered by the ambit of the Industrial Disputes Act.³⁵

Therefore, while the first two requirements are narrowing in nature, the third aims to be inclusive of as many professionals as possible. However, each of these conditions are to be fulfilled for the act to be applicable³⁶. Due to the nature of Gig Work, it becomes difficult employ a single blanket test to suit these requirements. The “control and supervision” is test is inadequate in assessing gig workers. Their nature of work is such that, they can sometimes be engaged by multiple agencies. Prima facie, this “flexibility” seems beneficial. However, for the time that they are engaged by these employer, the relationship assumes nature of employer-employee. Therefore, this becomes a tricky situation for the gig workers to prove in a court of law.³⁷

Whether gig workers fall within this definition would depend on the specific circumstances and nature of their engagement. The Delhi High Court in *Management of Safdarjung Hospital v. Kuldip Singh Sethi*³⁸ reiterated that “workmen” under the Industrial Disputes Act can include various categories of employees, including skilled and technical employees, provided

- their work is integral to the industrial process and
- not predominantly supervisory or managerial.³⁹

³¹ Bangalore Water Supply vs A. Rajappa & Others AIR 1978 SC 553

³² John Joseph Khokar v. Bhadange B. S. & Ors. 1998 (1) LLJ 447 (Bom);

³³ Larsen & Toubro Ltd. vs. Employees' State Insurance Corporation W.P. Nos. 22960 of 2007

³⁴ Ranjit Kumar Mondal vs State & Ors W.P. 16209(W) of 2018

³⁵ Industrial Disputes Act 1947, s. 2 (j)

³⁶ S C Srivastava, *Industrial and Labour Laws*, (5th edn. Vikas Publishing House, 2007) 167

³⁷ Id.

³⁸ Management of Safdarjung Hospital v. Kuldip Singh Sethi AIR 1970 SC 1407

³⁹ Kirloskar Brothers Ltd. v. The Presiding Officer, Labour Court, Delhi and Anr., 1977 (34) FLR 206

However, the spectrum of individuals considered gig workers is so wide that each case much be assessed on its facts and circumstances to determine whether the arrangement between the employer and gig worker is an industry or not. Furthermore, the legislative wording of the Act is such that it creates a restriction towards the inclusion of workers whose terms of employment is not confined to the traditional sense. Chapter 5A and 5B of the IDA⁴⁰ addresses compensation for workers in case of retrenchment. It requires “continuous service” for 240 days or 120 days as an essential to be fulfilled. This chapter, therefore disregards the innate customer dependence and related unpredictability of Gig Workers.⁴¹

However, efforts have been made to extend the provisions of the Industrial Dispute Act via other legislations. One such example is that of Contract Labour (Regulation and Abolition) Act, 1970⁴². This act makes a provision for Gig workers who are engaged through intermediaries or platform-based work. Under Section 20⁴³ of the Act, the onus of paying the wages to contract workers engaged through an intermediary can fall on the principal employer instead of the contractor. Although there is no provision directly linking the Industrial Dispute Act and the Contract Labour (Regulation and Abolition) Act, 1970, these provisions can be interpreted to provide protection to Gig workers.

It's important, however, to note that the legal status and rights of gig workers in India are still evolving, and there is a lack of specific legislation addressing the unique needs and challenges of gig work. The next section shall discuss the approach taken by the courts

Recontextualizing the Definition ‘Workmen’ under the Industrial Disputes Act

Indian Judicial Interpretation

Over the years, Gig workers have not been given explicit protection under the Industrial Disputes Act. However, the courts have in multiple instances shown inclination towards the greater protection such workers.⁴⁴ In cases where gig workers are considered to be workmen under the industrial disputes act, they may be entitled to the protections and benefits provided under the act, such as the right to raise industrial disputes, seek redressal for unfair treatment, or claim compensation for wrongful termination. The first landmark case that discussed contracted workers was that of Hussainbai Alath vs Factory Thozhilali Union, in 1975⁴⁵. It discussed the relationship between the employer and contract workers that were hired through an intermediary. The issue before the court was whether the definition of ‘Workman’ under Section 2(s) of the Industrial Disputes Act 1947 included workers hired by independent contractors to work in the employer’s factory. Refusing the Special Leave petition, the court upheld the decision of the lower courts. The court held that:

The degree of economic control that the employer has over the elements of the employment, is the main identifying characteristic of the real employer. These characteristics include such as their income, skill development, and job security. In essence, the true employer is the organisation that has control over these important variables. Furthermore, even if the contact between the worker and the intermediate contractor is direct and immediate this does not prove

⁴⁰ Industrial Disputes Act 1947, ch 5A, 5B

⁴¹ Sudeep Sudhakaran, Tanvi Malpani, “Not Fancy Tags, Gig Workers Need Legal Rights and Protections” (NewsClick, 8 Aug 2023) < <https://www.newslick.in/not-fancy-tags-gig-workers-need-legal-rights-and-protections> > Assessed on 17 October, 2023

⁴² Contract Labour (Regulation and Abolition) Act 1970

⁴³ Contract Labour (Regulation and Abolition) Act 1970, S. 20.

⁴⁴ Secretary, Haryana State Electricity Board vs. Suresh & Others 1993(3) SSC 601

⁴⁵ Hussainbai Alath vs Factory Thozhilali Union 1978 I LLJ 397

that the intermediary contractor is ultimately in charge of the worker's working conditions. The court emphasised that going beyond formal contracts and evaluating the larger employment system are necessary to identifying the real employer. It is crucial to look past outward manifestations and comprehend the true dynamics affecting the employment. When the overarching commercial entity has a large impact on the employees' means of subsistence, prospects for skill development, and employment opportunities, it is evident that this corporation, not the intermediate contractor, is the true employer.⁴⁶

Another landmark judgment that took a progressive approach was that of *Ram Singh vs Union Territory, Chandigarh 2004*,⁴⁷. In this case held that the “control and supervision” test that was applied in India is cannot be the sole test to determine an employer- employee relationship. Furthermore, if the employer exercises the control and supervision of a contractor, there shall be deemed employer-employee relationship.

This stance was reiterated in the case of *Workmen of Nilgiri Cooperative Marketing Society v State of Tamil Nadu*⁴⁸. The court in this case had to decide whether graders and porters are workmen can be included as “workmen” under the Industrial Dispute Act. In addition to this, the court also addressed the prolonged debate of “Contract of service” v. “Contract for Service”. An arrangement in a "contract of service" involves a person working as an employee under the direction and control of an employer i.e., a master-servant relationship is established. In contrast, a "contract for service" relates to a working relationship in which a person performs services for clients on their own and is in charge of their own taxes and business expenditures. The degree of control and independence in the working relationship is what makes the difference in both cases. Citing the case of *Dharangadhara Chemical Works v. Management*⁴⁹ in the court said that the “control and supervision” test should only be used prima facie. The court must also get into the nature of work in such cases. Thus the court also suggested the use of the integration test. This test decides whether the individual was embedded in the employer's operations or maintained a separate and autonomous status.

The Apex Court in 2019, upheld this position in the case of *Bharat Heavy Electricals Ltd. vs Mahendra Prasad Jakhmola*⁵⁰. The court laid down certain factors to determine the relationship:

1. Who appoints the workers,
2. Who pays salary/remuneration,
3. Who can take disciplinary action,
4. Whether there is continuity of service, and
5. The extent of control and supervision.⁵¹

There were several cases that followed this judgement.⁵²

‘General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lala & Another [(2011) 1 SCC 635]’ laid down a two pronged test to determine whether contract labourers are the direct employees of the principal employer. These two tests were

- (i) whether the principal employer pays the salary instead of the contractor; and

⁴⁶ Yogesh.M, Tr. Kalai Lakshmi, “a study on the challenges faced by gig economy workers in Indian facility management industry with special reference to Chennai city” (2022) 10 (5) IJCRT 834

⁴⁷ *Ram Singh and Ors. v. Union Territory, Chandigarh and Ors 2004(1) BLJR 490*

⁴⁸ *Workmen of Nilgiri Cooperative Marketing Society v State of Tamil Nadu (2004) 3 SCC 514*

⁴⁹ *Dharangadhara Chemical Works v. Management AIR 1957 SC 264*

⁵⁰ *Bharat Heavy Electricals Ltd. v. Mahendra Prasad Jakhmola 2019 (2) LLJ 1*

⁵¹ Avtar Singh Harpreet Kaur, *Introduction to Labour and Industrial Law* (3rd edn. LexisNexis, 2014) 521

⁵² *Balwant Rai Saluja & Another vs. Air India Ltd. & Others] (2014) 9 SCC 407*

(ii) whether the principal employer controls and supervises the work of the employee.

Using these judgements as sound precedents, courts across the country have strived to bridge the gap that lied in the first requirement i.e., Employer- Employee relationship.

In the case of *Food Corporation of India v. Jagdish Balaram Bahira*⁵³, the Supreme Court held that a worker who performs services for a company for remuneration is an employee under Indian labor laws, regardless of their designation or contract. This case was further cited in the recent case of *Prachi Agnihotri v. Urbanclap Technologies India Private Limited*,⁵⁴ where it was contended that Service professionals should be categorized as employees of Urban Company. They said that Urban Company had full control over their job, including setting the price, setting the schedule, and monitoring performance. As a result of this, they were entitled to social benefits under the Industrial Disputes Act. This case is still pending before Apex Court.⁵⁵

However, there are judgements which explicitly deny the inclusion of gig workers under the Industrial Disputes Act. In the case of *Himanshu Kumar Vidyarthi v. State of Bihar*⁵⁶ the court discussed the concept of retrenchment under the industrial disputes act and the exclusion of temporary employees from its purview. Furthermore, in the case of *Haldia Refinery Canteen Employees Union and Ors. v. Indian Oil Corporation Ltd. and Ors.*⁵⁷ the Supreme Court emphasised the important criteria for making a decision, stating that just because a company's management has authority to order dismissals or other disciplinary actions or control over how work is carried out does not automatically qualify its workers as employees of the company. '*Steel Authority of India Ltd. & Others vs. National Union Water Front Workers & Ors*'⁵⁸ while overruling '*Air India Statutory Corporation vs. United Labour Union*'⁵⁹ held that the user-establishment was not obligated to formalize the status of its contract workers following the abolition. As per this ruling, contract workers wouldn't have the same entitlements as permanent employees and wouldn't possess a legal claim to automatic absorption.

Therefore, it is evident that due to the disparity in the opinions of the courts over the past years, there is considerable ambiguity with respect to Gig worker inclusion. This has been fuelled by the rapid development of the sector due to technological advancements. As the needs of society changed, it is imperative for the law to change with it. Such change can also be brought about by drawing inspiration from international approach to the dilemma.

International Position

In the UK, gig workers are categorized as "workers," which offers them certain legal safeguards like minimum wage, holiday pay, and anti-discrimination measures. The landmark case of *Uber BV v Aslam*,⁶⁰ was pivotal to such categorisation. In this case the court held that when customers book rides through the Uber app, the app itself sets the fare, and drivers have no discretion to charge additional fares. The unanimous view of the court was that the app's software determines the fare, leaving drivers without the authority to charge more than what the app dictates. This means that Uber's software essentially controls how much drivers earn

⁵³ *Food Corporation of India v. Jagdish Balaram Bahira* (2017) 8 SCC 670

⁵⁴ *Prachi Agnihotri v. Urbanclap Technologies India Private Limited*, 2021 SCC OnLine CCI 18

⁵⁵ Aditi Mishra and Suyog Ghosh Dastidar, "Navigating the Challenges of the Gig Economy: A Legal Analysis of Protection to Gig Workers in India and Overseas" (2021) 6(1) IJLMH 2183

⁵⁶ *Himanshu Kumar Vidyarthi v. State of Bihar* 1997 4 SCC 391

⁵⁷ *Haldia Refinery Canteen Employees Union and Ors. v. Indian Oil Corporation Ltd. and Ors.* AIR 2005 SC 2412.

⁵⁸ '*Steel Authority of India Ltd. & Others vs. National Union Water Front Workers & Others* (2001) 7 SCC 1

⁵⁹ *Air India Statutory Corporation vs. United Labour Union* 1997 LLR 305 (SC)

⁶⁰ *Uber BV v Aslam* (2021) UKSC 5

based on the work they perform. The drivers, therefore, are not mere “partners” but shall be treated as employees of Uber.

California is one of the earliest jurisdictions to recognize the labour framework which involves platform-based workers. In California, the Assembly Bill 5⁶¹ initially classified gig workers as "employees" with associated benefits, but a subsequent election indicated a preference for gig work's flexibility. The 'ABC test' elucidated in the landmark case of *Dynamex Operations West Inc. v. Superior Court of Los Angeles*⁶² in California puts the burden of proof on employers to establish independent contractor status. According to this case, a worker may only be categorised as an independent contractor under the three-pronged ABC test established in this case if they can:

- a) Work without receiving any direction or control from their employer.
- b) Their job differs from that which is typically performed in an office environment.
- c) They carry out a side business or activity that is comparable to the work they do for the hiring organisation.

If either of these requirements are not met, the employee will be considered a workmen and thus be entitled to all the benefits he is due.

On the other hand, in the European Union, directives⁶³ were introduced to improve the conditions of short-term independent contractors and on-demand workers. It emphasized rights and protections by setting standards for transparency, multiple job engagement, and protection against abusive practices. The landmark Uber judgment of UK is also followed by the courts of Spain and France.⁶⁴ Furthermore, the Dutch court in the case of *Federation of Dutch Trade Unions (FNV) v. Uber*⁶⁵ held that all components of the activity that are engaged in between Uber and the Uber driver create an employment contractual connection. A policy framework in furtherance of this would serve the objective of protecting the rights of platform employees⁶⁶.

It is evident that the United States and countries of the European Union have successfully recognised Gig workers under their respective labour laws. This in turn makes such workers eligible for all the social benefits that arise out of a formal employment.⁶⁷ Therefore, Indian courts can adopt the jurisprudence behind the same to extend the protections of the Industrial Dispute Act to Gig workers. It is important to note that after such recognition, however, these jurisdictions are now facing ancillary issues that arise with respect to the benefits available to such gig workers. These shall be highlighted in coming sections of the paper.

Proposed Tests

There needs to be a change in the test employed to assess the professional relationship between Gig Workers and their employees. This need was highlighted in the Nilgiris case

⁶¹ California Assembly Bill 5 (AB5) 2019

⁶² *Dynamex Operations West Inc. v. Superior Court of Los Angeles* 4 Cal.5th 903

⁶³ EU Directive 2019/1152 2019

⁶⁴ Prakhar Dubey, “Gig & Platform Workers: A Way Towards Formal Labour Recognition”, (2022) 1(2) SLSNMLR 58

⁶⁵ *Federation of Dutch Trade Unions (FNV) v. Uber* ECLI:NL:RBAMS:2021:5029

⁶⁶ Anthony Deutsch and Toby Sterling, “Uber drivers are employees, not contractors, says Dutch court” (Reuters, 13 Sept 2022) <<https://www.livelaw.in/know-the-law/the-code-on-social-security-2020-gig-workers-ifat-indian-federation-of-app-based-transport-workers-industrial-disputes-act-1947-189769?infinitiescroll=1>>

Assessed on 17 October, 2023

⁶⁷ Id.

where the court expounded the integration test. However, the nature of employment of Gig work can differ between two ends of a vast spectrum.

Employer-Employee relationship: additional tests

It is not possible to correctly assess an arrangement using a blanket test. Therefore, apart from the test currently employed, it is suggested that the court can take the following tests into account to assess an employer-employee relationship:

Economic Realities Test: This test evaluates elements including the employee's financial dependency on the employer and the stability of the working arrangement.⁶⁸ The California Supreme Court expounded the Borello test, which considers a number of characteristics to establish the employment connection, in *Borello & Sons, Inc. v. Department of Industrial Relations* (1989).⁶⁹ The significance of the financial reality of the labour arrangement was highlighted by this case.

Payment and Benefits: The method and regularity of payment, as well as the provision of benefits like health insurance, can be indicators of an employer-employee relationship.⁷⁰ In *Grubhub, Inc. v. Lawson* (2018)⁷¹, the U.S. District Court considered whether drivers for Grubhub were employees or independent contractors. The court took into account factors like payment structure, reimbursement of expenses, and control over the work.

Nature of the Work: The type of work performed can also be a factor. Some industries or professions have specific regulations that affect the classification of workers. In the case of *Air Line Pilots Association, International, v. Federal Express Corporation*,⁷² the U.S. Court determined that FedEx pilots were properly classified as employees, not independent contractors, based on their roles and the level of control exercised by FedEx.

“Continuous Service” requirement: legislative change

Another major challenge faced by Gig workers is their failure to fulfil the criteria of “continuous service”. Without this they do not qualify for “hire or reward” as mentioned in the definition⁷³. Given the nature of their work, gig workers are engaged throughout the year, but only when they are required. Furthermore, they are engaged by multiple employers. It is highly likely that a “partner” delivering for Swiggy also delivers for “Zomato”.⁷⁴ Therefore, there needs to be a change in continuous service requirement. It is suggested that instead of “continuous service”, the requirement must be liberalised. It must be restricted to prescribing a minimum number of days of employment. Furthermore, a mandate must be established via a circular wherein the total number of days of employment are clearly laid down in the employment contract. These must exceed the limit mentioned in the act unless otherwise agreed to by the worker.⁷⁵

Miscellaneous

⁶⁸ R C Sharma, *Industrial Relations and Labour Legislation* (Eastern Economy edn. PHI learning, 2016) 365

⁶⁹ *Borello & Sons, Inc. v. Dept. of Industrial Relations* 48 Cal. 3d 341 (1989)

⁷⁰ S C Srivastava, *Industrial and Labour Laws* (5th edn. Vikas Publishing House, 2007) 167

⁷¹ *Lawson v. Grubhub, Inc.* 302 F. Supp. 3d 1071

⁷² *Air Line Pilots Association, Int'l, Petitioner, v. Federal Express Corporation*, Respondent 32 F.3d 1079

⁷³ S C Srivastava, *Industrial and Labour Laws*, (5th edn. Vikas Publishing House, 2007) 167

⁷⁴ Ramar Veluchamy, ‘A Study on Work Life Integration of GIG Workers’ (eds. 1), *An Anthology of Multi-functional perspectives in Business and Management Research* (Eureka Publications 2021)

⁷⁵ S C Srivastava, *Industrial and Labour Laws*, (5th edn. Vikas Publishing House, 2007) 167

Each establishment must be assessed according to the three-prong test laid down in the Bangalore Water Supply Case to be considered an industry. In the case of Gig workers, it is proposed that the arrangement between the workers is assessed not in isolation but the business of the conglomerate as a whole under Section 2 (j) of the Act. It is imperative to do so as this allows the Gig Workers to claim protection under the organised sector legislation rather than the Contract Labour (Regulation and Abolition) Act.

Challenges to the Proposal and the Way Forward

Challenges

As seen from the above, the legal system has developed a number of criteria to determine whether a person belongs in either category—employee or independent contractor. The degree of control that the employer exercises and the shared goals of the partners are common topics of discussion in these exams. These assessments are susceptible to change on a worldwide level. They may cover topics including working methods, hiring and firing privileges, equipment ownership, job titles, and the creation of norms and standards. Even when applied to identical instances, these criteria might result in different interpretations of whether gig workers can be classified as employees or independent contractors. The spectrum of Gig Workers stretches from workers engaged in driving and delivery services to performing artists engaged for entertainment purposes.⁷⁶ Owing to the diversity, it is near impossible to club all such workers together. Furthermore, such workers are engaged by multiple agencies. This is beneficial not only for these agencies but also these workers. It helps then maximise their income. However, if Gig workers are to be included under the Industrial Dispute Act, major questions arise with respect to the ancillary benefits that arise out of the same. These challenges involve:

- The classification of Gig workers for their tax filings, operational costs, Gratuity.
- Who pays for the Employee Provident Fund when multiple agencies are involved
- Insurance for Gig workers
- Extent of medical leave and maternity benefits.

Additionally, gig workers' decentralized and flexible nature can make it challenging for them to collectively negotiate with platform companies effectively.

The recently introduced Social Security Code, 2020⁷⁷ makes a provision for gig and platform workers. They are defined under these new labour codes to extend social security benefits to them. However, from a plain reading of the definition it is clear that the code classifies these workers outside the ambit of an arrangement of an employer-employee relationship. It fails to recognise the near similarity that a gig workers employment exhibits of traditional employment. The code extends a variety of benefits outlined in the law, including gratuities, pay, insurance, provident funds, and maternity benefits for workmen. However, the code gives both the federal and state governments the responsibility of developing appropriate social security programmes for gig workers. By creating a separate legal status, it leaves no room for their inclusion under the Industrial Disputes Act and thus excludes them from all the benefits mentioned.

Way Forward

⁷⁶ Vijeta Banwari, "Gig Economy: Challenges and Opportunities in India", (2018) 5(11) JETIR 413

⁷⁷ The Code on Social Security 2020

On the contrary, the legislators have tried to be progressive in the Industrial Relations code. The term workmen as defined in the code makes a provision for the inclusion of those workers covered under Unorganised Workers' Social Security Act, 2008.

“Provided that for the purposes of Chapter III, “worker”—

(a) means all persons employed in trade or industry; and

(b) includes the worker as defined in clause (m) of section 2 of the Unorganised Workers' Social Security Act, 2008.”⁷⁸

Chapter III of the code talks about trade unions and their regulations. However, this does mitigate the issue of separate legal recognition.⁷⁹ This can only be solved by a multi-stakeholder. This involves cooperation between governments, corporations, civil society organisations, and worker representatives, are necessary to address the issues facing gig workers.⁸⁰

The Ministry of Labour and Employment has recently launched the e-Shram portal in August 2021. This portal will register unorganised workers to create a centralised database and it will be seeded with their identification number- the Aadhaar.⁸¹ The creation of a centralised database can make way for this data to be used to establish a centralised system of accounting for these workers. This could include:

- Firstly a classification of gig workers based on their industries.
- Establishment of escrow accounts for each worker enrolled within this centralised database
- A connection system between the accounts and each of the agencies that engage these workers.

Once this is done, an automated system of calculation must be devised. For example: for each order or ride or gig that a worker completes a part of the income he received for the same shall go to his registered escrow account. That same amount shall be contributed by the employer to this account. The rates of these shall be fixed by the legislature. Furthermore, to adapt to the multi-employer nature of Gig work, the benefits that a gig workers will receive (maternity benefit, insurance etc) can either be delegated to the employers or they can as per the proportion of work done for each employer. The intricacies of these suggestions, however, run much deeper. Therefore, a separate comprehensive set of rules must be enacted under the Industrial Disputes Act. This must involve the a discussion between representatives of both employers, workers, intermediaries and the government so as to cover all details and aspects. Lastly, there must be efficient and strict adherence to these compliances for this system to function smoothly.

Conclusion

Despite their contributions to the economy, gig workers confront numerous challenges. Gig workers often lack job security and can be deactivated or terminated by platforms without much recourse. Majority of them do not have access to healthcare, retirement plans, or other employee benefits, making them financially vulnerable. The legal classification of gig workers

⁷⁸ Industrial Relations Code 2020, s. 2(zr)

⁷⁹ Industrial Relations Code 2020, ch. 3

⁸⁰ Aditi Mishra and Suyog Ghosh Dasttidar, “Navigating the Challenges of the Gig Economy: A Legal Analysis of Protection to Gig Workers in India and Overseas” (2021) 6(1) IJLMH 2183

⁸¹ Suresh Chand Aggarwal, “The Status of Self-employed, Contract, and Gig Workers in India: Some Recent Changes”, (2022) IARIW 1

as independent contractors is a grey area, leaving them without certain labour protections. Existing labour laws and regulations were designed with traditional employment in mind and often fail to address the unique needs of gig workers.⁸² Furthermore, the ambiguity in the legislation has led to no clear judicial stance on the same. Therefore, governments, corporations, and society as a whole must address the special difficulties that gig workers encounter.

A framework must be provided that protects their rights and well-being while allowing them to benefit from their invaluable contributions as the gig economy grows. The gig economy is here to stay, and in the years to come, its importance will only increase. Therefore, it becomes imperative for the legislature to offer them higher degree of protection.⁸³ In light of the same, an analysis of the International position provides course of action which can be adopted by the India. By adopted a multi-test approach the scope of the Industrial Dispute Act can be widened to accommodate Gig workers. In addition to this, legislative can usher societal change which is much needed for these workers to be given the benefit and respect that are rightfully due to them.

Gig workers are essential to the contemporary economy because they boost growth while giving customers flexibility and convenience. In addition to being an issue of social fairness, defending the rights of gig workers is essential for a steady and prosperous workforce.

⁸² Yeong Gug Kim, Yeasun Kate Chung & Eunju Woo, "Gig Workers' Quality of Life (QoL) and Psychological Well-Being in Service Delivery Platform" (2023) 15(11) Sustainability 8679

⁸³ Deepika M G, Madhusoodhan M, "Labour Laws for Gig Workers in the Context of Labour Law Reforms" (2022) 57 (30) EPW < <https://www.epw.in/journal/2022/30/perspectives/labour-laws-gig-workers-context-labour-law-reforms.html> > Assessed on 17 October, 2023