

## RECONCEPTUALISING LABOUR REGULATIONS FOR WORKERS IN THE GIG ECONOMY

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### *Abstract*

*The prevailing labour jurisprudence categorises a worker as either an ‘employee’ or an ‘independent contractor’ on the basis of the degree of control and supervision exercised by the enterprise. The inception of the gig or sharing economy—characterised by the prevalence of digital platforms, who avail the services of workers categorised as business partners or self-employed—has substantially altered labour relations. Given the nature of labour relations in the gig economy, it becomes difficult to systematically sort workers in the gig economy into any one of these employment categories. As a result, it has led to unpredictability regarding the applicability of labour laws to workers in the gig economy.*

*This paper uses the case study of Ola and Uber drivers, who constitute an important element of the labour force, to highlight that the business model employed by entities in the gig economy has the potential to undermine*

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*the welfare goals of different labour regulations. In this paper, the Labour Market Regulations perspective, as propounded by Professor John Howe, has been utilised to demonstrate that the prevailing labour regulations fail to cater to workers in the gig industry and there is a need to redefine labour relationships in light of the prevailing industrial policy. In this regard, this paper envisages the creation of a separate employment status of ‘dependent contractors’ for workers in the gig economy in order to ensure that the new industrial policy does not erode the socio-economic objectives of various labour regulations in India.*

## I. INTRODUCTION

The legal notion of what constitutes an ‘employee’ has its roots in the pre-digital period. The advancement of the digital economy has not only resulted in a drastic transformation of labour relations but also led to legal unpredictability regarding the applicability of labour laws in the digital realm.<sup>1</sup>The emergence of new models of businesses in the digital era—that hinge on linking customers directly with sellers or service providers—has resulted in the relegation of employees to the status of temporary workers, and thereby, making them dispensable.<sup>2</sup> Enterprises in this new form of economy avail the services of workers on short-term contract basis and classify them as

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<sup>1</sup>Adrián Todolí-Signes, *The ‘gig economy’: employee, self-employed or the need for a special employment regulation?*, 20 (10) TRANSFER: EUR. REV. OF LAB. AND RES. 1-13.

<sup>2</sup>*Id.*

‘self-employed.’ It is commonly known as the ‘gig economy.’<sup>3</sup> The gig economy, which derives its name from the jargon of musicians, comprises workers that carry out their work at will and are compensated on a piece-rate basis, similar to an individual ‘gig.’<sup>4</sup> This form of economy is alternatively referred to as the ‘sharing economy’ or ‘platform-based economy.’<sup>5</sup>

This form of economy is premised on the model of peer-to-peer or open-source community-based sharing of access to products and services.<sup>6</sup> The wide-spread growth of this form of economy in the past few years is evident from the number of individuals engaged in such type of work across the globe. The population of independent workers in the United States and the European Union is roughly 162 million, which corresponds to around 20-30% of the working population. The internet-based platforms already encompass 15% of the global working population, and it is growing day-by-day. It is ceaselessly making inroads into India, as app-based services have captured the Indian markets.<sup>7</sup> As per a report, in 2018, roughly 70% of Indian business entities engaged the services of gig workers for crucial organisational matters.<sup>8</sup>

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<sup>3</sup>*Id*; See also Priyambada Datta, *Labour laws in the age of the gig economy*, THE INDIAN ECONOMIST, (June 1, 2019) 2018, <https://m.dailyhunt.in/news/india/english/the+indian+economist-epaper-indecono/labour+laws+in+the+age+of+the+gig+economy-newsid-72961139>.

<sup>4</sup>*Id*.

<sup>5</sup>*The rise of the platform economy*, DELOITTE, (June 1, 2019), <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf>.

<sup>6</sup>Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 (9) JOURNAL OF THE ASSOC. FOR INFO. SCI. & TECH. 2047–2059.

<sup>7</sup>Datta, *supra* note 3.

<sup>8</sup>*Gig economy on rise; 70% firms used gig workers in 2018*, THE ECONOMIC TIMES, (June 2, 2019), <https://economictimes.indiatimes.com/news/company/corporate-trends/gig-economy-on-rise-70-firms-used-gig-workers-in-2018/articleshow/68221921.cms>.

The exponential growth of the platform-based economy has brought in the limelight the pertinent issue of deterioration of social and economic conditions of workers.<sup>9</sup> Though the gig economy is characterised by work-time flexibility and labour mobility between different digital platforms, the enterprises in the gig economy exercise considerable influence over the working conditions of the workers. The prevailing labour jurisprudence categorises a worker as either an ‘employee’ or an ‘independent contractor’ on the basis of the degree of control and supervision exercised by the enterprise.<sup>10</sup> Given the nature of labour relations in the gig economy, it becomes difficult to systematically sort workers in the gig economy into any one of these employment categories.

This paper aims to demonstrate that the prevailing labour regulations fail to cater to workers in a growing segment of the industry, and there is a need to redefine labour relationships in light of the prevailing industrial policy. The paper uses the case study of Ola and Uber drivers, who constitute an important element of the labour force, to highlight the same. The second segment explains the prevailing industrial policy and industrial conditions in India. The third segment analyses the existing regulatory environment in India and demonstrates how workers in the sharing or gig economy do not fall either into the traditional category of employee or independent contractor. The fourth segment utilises the theoretical framework of Labour Market Regulations (“**LMR**”) perspective, as propounded by Professor John Howe, to highlight the significance of industrial policy in determining the scope and objectives of labour law. The fifth segment sets out the ambit of the Decent Work program by the

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<sup>9</sup>*Gig economy: Why there is a need to balance employment opportunities with basic rights*, FINANCIAL EXPRESS, (June 2, 2019), <https://www.financialexpress.com/opinion/gig-economy-why-there-is-a-need-to-balance-employment-opportunities-with-basic-rights/1415840/>.

<sup>10</sup>The Industrial Disputes Act, 1947; Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407.

International Labour Organisation (ILO) that can be incorporated in the labour regulations to ensure social and economic welfare of workers in the sharing economy. The sixth segment envisages the creation of a separate employment status of ‘dependent contractors’ for workers in the gig economy in order to achieve the objectives of the Decent Work program.

## II. EMERGING INDUSTRIAL POLICY

The most notable example of the gig economy is the application-based cab aggregators based out of India, such as Uber and Ola. Uber and Ola, employing the ‘sharing economy’ model, have changed the demographics of the Indian transportation market. The monumental growth of Ola in the past few years bears testimony to the fact that it has revolutionised the Indian transportation market. Ola has more than 2,50,000 cabs listed on its platform and registers around 7, 50,000 rides daily.<sup>11</sup>

The operation of the platforms is straightforward. In essence, the cab aggregators allow passengers in need of vehicular transportation to request a cab ride via their software application. The application, in turn, connects the individual with an available driver. The driver, with the location provided by the application, picks up the rider and ferries him/her to his/her final destination. Either the driver or the platform collects a payment from the passenger at the end of the cab ride. The platform keeps or receives a part of the payment as commission for

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<sup>11</sup> MP Jaiswal, Parul Gupta, Prageet Aeron and Rajat Gupta, *Policy Recommendations for Application Based Cab Aggregators (ABCA) in India*, MANAGEMENT DEVELOPMENT INSTITUTE, (June 2, 2019), [https://www.mdi.ac.in/pdf/research/ABCA\\_Report\\_MDI-old.pdf](https://www.mdi.ac.in/pdf/research/ABCA_Report_MDI-old.pdf).

facilitating the transaction.<sup>12</sup> The drivers are not employed by the platforms nor do the platforms own any cars. In contrast, the participating drivers are expected to ferry passengers in their own cars.<sup>13</sup>

Notably, these platforms assert to be a technology-based enterprise and not a vehicular transportation company. For example, Uber claims to be a facilitating digital platform, which enables drivers and riders to execute the transaction for transportation. Uber specifies that its digital platform is merely a facilitator between drivers looking to provide cab services and passengers seeking to reach their destination.<sup>14</sup> Uber has explicitly stated that the product it provides is the phone application software utilised to link drivers and passengers.<sup>15</sup> Uber deftly mentions in its legal contract that the agreement creates a business relationship between Uber and the participating driver. It describes itself as ‘a technology services provider that does not provide transportation services.’<sup>16</sup>

Uber is one of the numerous business enterprises deploying the business structure of sharing economy. The model resembles a two-sided market form, which in itself does not represent a new economic model. However, the widespread use of virtual platforms has resulted in the inception of a networked information culture.<sup>17</sup> Commentators

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<sup>12</sup>*How does Uber work?*, UBER HELP, (June 2, 2019), <https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e>.

<sup>13</sup>*Driver Requirements*, UBER, (June 3, 2019), <https://www.uber.com/en-IN/drive/requirements/>.

<sup>14</sup>*Id.*

<sup>15</sup>*Technology Services Agreement*, UBER, (June 3, 2019), [https://uber-regulatory-documents.s3.amazonaws.com/country/united\\_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf?\\_ga=1.59528685.1558445318.1453903306](https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf?_ga=1.59528685.1558445318.1453903306).

<sup>16</sup>*Id.*

<sup>17</sup>Aditi Surie, *Are Ola and Uber Drivers Entrepreneurs or Exploited Workers?*, ECONOMIC & POLITICAL WEEKLY, (June 3, 2019) <https://www.epw.in/engage/article/are-ola-and-uber-drivers-entrepreneurs->

have stated that the emergence of the gig economy has resulted in formidable structural alterations of ‘formation of markets, economic organisation, and social practices of production.’<sup>18</sup>

The model has certain distinct characteristics that are generating a huge impact on labour relations. Some of the distinguishing features are as follows:

1) Diminished labour dependency: One of the defining characteristics of this form of economy is that the business organisations are not required to supervise and manage work. The platforms take into consideration the evaluation or feedback provided by the passengers while determining dismissal of a driver from its platform and making decisions regarding the nature of control to be exercised. As a result, there is no incentive for these companies to offer training to drivers, as they only allow those workers that are sufficiently trained and equipped to provide services on their virtual platforms. This new form of work allows autonomy to the workers while performing their job and entails diminished labour dependency. Nonetheless, these platforms maintain partial control over their workers and at times, prescribe the manner in which they are supposed to carry out their job. Given the high stakes involved in maintaining value image in this digital economy, these platforms employ additional resources to ensure superior and standardised services.<sup>19</sup>

2) The need for a critical mass or economies of scale: The business model is premised on building a large userbase as well as a driver base. Given the ample supply of labour, these platforms believe that they will always manage to connect a client with an available worker.

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exploited-

workers?0=ip\_login\_no\_cache%3D386794e4e7b9ba739e21d89aa33eebd3.

workers?0=ip\_login\_no\_cache%3D386794e4e7b9ba739e21d89aa33eebd3 (June 3, 2019).

<sup>18</sup>*Id.*

<sup>19</sup>Signes, *supra* note 1.

As a result, these platforms do not require to issue specific instructions or schedules to workers, and thereby, provide flexibility to drivers in terms of working hours. Thus, these companies need critical mass for their efficient functioning.<sup>20</sup>

3) Nature of services: There prevails ambiguity as to the nature of services provided by these new companies. There is a lack of consensus on whether these platforms only act as a database or whether they are offering their product in a particular segment of the industry. In the first instance, if the enterprise controlling the virtual platform is deemed to be a technology company that only acts as a database to assist in matching the sellers and the buyers, it will not be liable for any loss incurred during the course of work. It will, thus, imply that the company is not required to adhere to any sectorial regulations. Furthermore, it complicates the process of establishing the relationship of an employer-employee between a company owning the virtual platform and a worker who is listed on this platform to gain any work.<sup>21</sup>

The business model employed by these platforms raises certain serious questions. Whether workers in the gig economy can be brought under the traditional definition of ‘employee’? If not, then is the sharing economy undermining the socio-economic goals of different labour regulations? Is state intervention warranted in this matter in order to provide a social security net to workers in the gig economy? These questions have no simplistic and common answer. However, while articulating the concerns of workers in the gig industry in order to answer these questions, it becomes pertinent to include the nature of the labour market created by the sharing or gig economy.

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<sup>20</sup>Signes, *supra* note 1.

<sup>21</sup>Signes, *supra* note 1.

### III. DIFFICULTY IN EXTENDING THE LEGAL CONCEPT OF AN ‘EMPLOYEE’ TO THE WORKERS

This segment attempts to answer the fundamental question of whether the customary legal notion of an ‘employee’ can be applied to workers in this new form of economy. For the same, it becomes pertinent to analyse the issue of whether the drivers will come within the ambit of ‘workman’ under section 2(s) of the Industrial Disputes Act, 1947.<sup>22</sup>

In *Dharangadhara Chemical Works v. State of Saurashtra* (“*Dharangadhara*”),<sup>23</sup> the Supreme Court delved into the question of the characteristics of a ‘workman.’ The court stated that “*the broad distinction between a workman and an independent contractor lies in the fact that while the former agrees to do the work himself, the latter agrees to get other persons to do the work.*” The Supreme Court, in *DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras*, (“*DC Dewan*”),<sup>24</sup> held that the categorisation of a worker as an independent contractor by the employer should not be taken at face value. The court highlighted the need to establish the autonomy of the independent contractor.<sup>25</sup>

In the case of *Balwant Rai Saluja v. Air India Ltd.*,<sup>26</sup> the Supreme Court, after reviewing a string of authorities, held that “*the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v)*

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<sup>22</sup>The Industrial Disputes Act, 1947 § 2(s).

<sup>23</sup>*Dharangadhara Chemical Works v. State of Saurashtra*, AIR 1957 SC 264.

<sup>24</sup>*DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras*, AIR 1966 SC 370.

<sup>25</sup>*Id.*

<sup>26</sup>*Balwant Rai Saluja v. Air India Ltd.*, (2014) 9 SCC 407.

*whether there is continuity of service; and (vi) extent of control and supervision, i.e. whether there exists complete control and supervision.”*

The *Dharangadhara* judgment hinges the classification between an employee and an independent contractor on the question of whether the worker has agreed to render ‘personal services’. In the case of workers in the gig economy, there is no determined answer, and it will vary from case to case—as, at times, cab-fleet providers are enlisted on the platform, who, in turn, avail the services of individual cab drivers.<sup>27</sup> Further, the *DC Dewan* ruling requires an evaluation of the driver’s independence, in terms of whether the independence exists in reality. Though the functioning of the drivers is regulated by the platforms to a certain extent, by imposing numerous constraints including predetermined fares and enforced rating system, the drivers are still provided with a substantial amount of autonomy as they have no imposed working hours and they can join and leave the platform at will.<sup>28</sup> Further, most of the Uber drivers are also listed on Ola platform, and vice versa.<sup>29</sup>

An evaluation of the working conditions of the drivers under the six-factor test laid down by the Supreme Court in *Balwant Rai Saluja* will throw light on the extremely ambivalent position of workers in the sharing economy, as the drivers do not meet three out of the six enumerated conditions. Uber is only entitled to receive a commission out of the fare earned by the driver. There is also no continuity of service, as the drivers have the option to provide their services at will

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<sup>27</sup>*Driver Requirements*, UBER, (June 3, 2019), <https://www.uber.com/en-IN/drive/requirements/>.

<sup>28</sup>*Ola and Uber cab drivers strike again to demand fare revision*, TN LABOUR, (June 3, 2019), <https://tnlabour.in/news/6926>.

<sup>29</sup>Athira Nair, *Ola and Uber drivers can now operate simultaneously on both platforms*, YOURSTORY, (June 6, 2019), <https://yourstory.com/2016/04/karnataka-transport-regulation-ola-uber-allow/>.

and opt-out of the platform.<sup>30</sup> This indicates that Uber and Ola exercise a limited amount of control over the drivers, and there does not exist ‘complete control and supervision.’

#### IV. NEED FOR INCORPORATING LABOUR MARKET REGULATIONS (“LMR”) PERSPECTIVE

The concerns of the labour force in any industry are closely correlated with the conditions prevailing in the social and political economy of that industry. A number of factors such as altering labour market norms, rise in non-standard employment agreements, changing technology, globalisation of capital and growing currency of neo-liberal perspectives of the labour market have rendered the traditional discourse on labour law redundant and have divested labour law of its ‘descriptive normative capacity.’<sup>31</sup>

The fact that the gig economy has taken centre stage in the industrial relations prevailing in India has been acknowledged by various governmental functionaries and institutions. In January 2019, in response to the problem of record surge in unemployment rate highlighted by the National Sample Survey Office (“NSSO”), NitiAayog, a government think-tank, claimed that the application-based cab aggregators of Ola and Uber alone generated over two million employment opportunities since 2014.<sup>32</sup> NitiAayog is also

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<sup>30</sup>*Driver Requirements*, UBER, (June 3, 2019), <https://www.uber.com/en-IN/drive/requirements/>.

<sup>31</sup>J. HOWE, *THE BROAD IDEA OF LABOUR LAW: INDUSTRIAL POLICY, LABOUR MARKET REGULATION, AND DECENT WORK IN THE IDEA OF LABOUR LAW*, 295, Oxford University Press (2011).

<sup>32</sup>*NitiAayog tries to counter bleak unemployment data, says Ola & Uber helped create over 2 million jobs*, CNBC, (June 3, 2019), <https://www.cnbctv18.com/economy/niti-aayog-says-ola-and-uber-helped-create-over-2-million-new-jobs-pegs-total-new-jobs-at-8-million-2142841.htm>.

devising a new approach for collating job data in order to factor in the number of persons associated with cab-based aggregators and similar technologies.<sup>33</sup>In March 2019, former Finance Minister, Arun Jaitley, mentioned in his blog that emerging players in the e-commerce and technology segment, such as OYO, Uber et al, have created a significant number of direct and indirect jobs.<sup>34</sup>

The traditional labour market has been upended by the emergence of the gig or on-demand economy. However, there has been no change in the conception of labour relations in terms of extending protection to workers, who are dependent upon these peer-to-peer platforms for their livelihood. The labour relations between the platforms and their workers are being articulated in terms of definitions set by the platforms, which state that drivers are business partners and not employees of the platforms. Further, the legal discourse pertaining to workers in the intricate, dynamic gig economy is limited to the debate of ‘independent contractor versus employee.’<sup>35</sup> The prevailing regulatory landscape demonstrates that comprehending labour relations in the binary of ‘employee’ and ‘independent contractor’ has resulted in a misalignment between workers’ rights and modern labour relations, and thus, it has become pertinent to inculcate industrial policy in the subject-matter of labour law.

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<sup>33</sup>Yogima Seth Sharma &Prachi Verma, *Ola, Uber drivers and CAs to help Modi government solve its job math for India*, THE ECONOMIC TIMES, (June 3, 2019), <https://economictimes.indiatimes.com/news/economy/indicators/cabbiescas-doctors-lawyers-delivery-persons-may-be-added-to-government-job-data/articleshow/63051927.cms?from=mdr>.  
data/articleshow/63051927.cms?from=mdr (June 3, 2019).

<sup>34</sup>Arun Jaitley compares NDA govt's economy report card with UPAs in blog, refutes Opposition's 'fake' campaign on economic data, FIRST POST, (June 3, 2019), <https://www.firstpost.com/india/arun-jaitley-compares-nda-govts-economy-report-card-with-upas-in-blog-refutes-oppositions-fake-campaign-on-economic-data-6294501.html>.

<sup>35</sup>Surie, *supra* note 17.

Labour regulations are under tremendous stress to deal with the new economic structures and labour conditions. To this end, economic policies including industrial policy become critical in safeguarding the interests of the labour force in any nation. Labour Market Regulations (“**LMR**”) perspective, as propounded by Professor John Howe of the University of Melbourne School of Government, envisages providing a wider interpretation to the contents and objectives of labour regulations with an aim to incorporate the modalities of the industrial policy within the larger framework.<sup>36</sup>

The LMR perspective emphasises on enlarging the scope of labour law to inculcate not only employees but also those workers, who rely on labour for their livelihood, irrespective of the fact of whether those workers are employed, involved in any other form of working arrangement or merely present in the labour market to seek work opportunities.<sup>37</sup> John Howe states that, “*the new subject of labour law is the ‘worker’ or ‘active labour market participant’: not the full-time employee pursuing a specific job for life, but a person moving between periods of employment and unemployment, other forms of paid work, unpaid work, training and so on over the course of a lifetime.*”<sup>38</sup>

The LMR perspective is premised on a pluralist notion of regulations, as it acknowledges that a different range of regulations might be in operation to achieve substantive objectives of the labour policy. The LMR perspective takes into account regulations that shape and form labour markets including regulations that influence demand and supply of labour in the external as well as internal (firm-level) labour market. It further incorporates the role and effects of a variety of industrial policies that include government support schemes, tariffs,

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<sup>36</sup>Howe, *supra* note 31.

<sup>37</sup>*Id.*

<sup>38</sup>Howe, *supra* note 31.

distribution of labour between different segments and industries of the economy.<sup>39</sup>

As the Indian experience indicates that the prevailing labour policy has failed to encapsulate the modalities of the emerging industrial policy of gig or on-demand economy, applying the LMR perspective to the labour regulations in India will best help protect the interests of workers while ensuring that the labour regulations capture different forms of employment arrangements appearing in the industry.

## V. ENSURING DECENT WORK PROGRAM TO WORKERS IN THE GIG ECONOMY

The purpose of including the industrial policy within the framework of the LMR perspective is to ensure generation and retention of quality jobs. Decent Work program developed by the International Labour Organisation (“ILO”) can be availed to ensure the attainment of the goal of creation of quality jobs.<sup>40</sup>The Decent Work program of the ILO is not concerned with the generation of any kind of employment opportunities but with the generation of employment opportunities of acceptable quality.<sup>41</sup> The program entails generation of opportunities for workers that ensure social integration, workplace safety, scope for personality development, social security, ability to participate in the decision-making process that has a direct impact on their livelihood. The program has resulted in a shift in focus of regulatory agencies from goals to outcomes and has highlighted the

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<sup>39</sup>*Id.*

<sup>40</sup>*Decent Work*, INTERNATIONAL LABOUR ORGANISATION, (June 3, 2019), <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm>.

<sup>41</sup>G. S. Fields, *Decent Work and Development Policies*, 142 INT’L LAB. REV.239-40.

importance of social and economic policies in uplifting the quality of life of the labour force.<sup>42</sup>

In order to understand the nature of safeguards that should be provided to workers in the gig economy by the government, it becomes pertinent to analyse the treatment of workers by the platforms.

A perusal of the contract between Uber and its participating driver helps uncover all aspects of the relationship. There are numerous onerous terms in the contract. The contract mentions that the payment or fare that the drivers will receive upon the successful completion of each ride, will be determined by Uber on the basis of the distance travelled by the passenger and the period of the ride.<sup>43</sup> Uber takes a commission from the cab drivers for facilitating this transaction. This rate of commission is predetermined by Uber, and the drivers do not possess any bargaining power to negotiate the same. Uber normally charges approximately 20 percent of the total payment as its 'fee per ride.'<sup>44</sup>

Users are permitted to evaluate the work of the drivers, and the evaluations are also made available for other riders. Uber reserves the right to prohibit the driver's access to the virtual platform if the driver fails to maintain the average rating. In addition, Uber can deny access to the platform on other grounds such as criticising the company. The contract further states that the driver has to bear the cost of the car, fuel, data services used for the application and insurance. Furthermore, the driver is expected to assume all the risks of an accident or untoward incident. However, it is important to note here

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<sup>42</sup>*Id.*

<sup>43</sup>Partha Pati, *Ajudicial caution for Aggregator based E-commerce business like UBER*, LEGALLY INDIA, (June 3, 2019), <https://www.legallyindia.com/views/entry/a-judicial-caution-for-aggregator-based-e-commerce-business-like-uber>.

<sup>44</sup>*Id.*

that drivers possess absolute autonomy to choose their working hours. Drivers also have the right to deny rides. However, once a ride is accepted, the driver has to complete it.<sup>45</sup>

The ‘Master Service Agreement’ between Ola and its drivers highlights a similar trend of inequality in bargaining power between the platform and its participants.<sup>46</sup> It states that the agreement will remain in force for a term of three years. It allows Ola to unilaterally set the fares. Further, Ola has been granted the right to provide discounts to customers without consulting any participating driver. The agreement also states that Ola does not owe any responsibility to the participating driver for the functioning of the application and is not liable for any failure in the application.<sup>47</sup> Thus, Ola has carefully limited its liability for any failure, and at the same time, it has imposed a host of conditions on the drivers.

On the back of numerous incentives, drivers were enticed into getting registered on these platforms in large numbers in 2014-15. The drivers joined the platforms in the expectation of earning close to ₹90,000-1,00,000 per month.<sup>48</sup> As the platforms do not provide the drivers with the supporting infrastructure, the drivers made large investments into cabs and numerous mobile phones to facilitate their participation on the platforms. Most of the drivers took loans for the same. The level and size of the investment and the ensuing loan have ensured that the drivers remain on these virtual platforms in order to recoup their

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<sup>45</sup>*Technology Services Agreement*, UBER, (June 3, 2019), [https://uber-regulatory-documents.s3.amazonaws.com/country/united\\_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%202010%202015.pdf?\\_ga=1.59528685.1558445318.1453903306](https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/RASIER%20Technology%20Services%20Agreement%20December%202010%202015.pdf?_ga=1.59528685.1558445318.1453903306).

<sup>46</sup>Alok Prasanna Kumar, *Analysis: Ola’s contract with drivers shows they’ve got a raw deal*, FACTOR DAILY, (June 4, 2019), <https://factordaily.com/ola-contract-driver-analysis/>.

<sup>47</sup>*Id.*

<sup>48</sup>S Prabhakaran, *Ola, Uber drivers don’t earn as much as you think they do*, FACTOR DAILY, (June 4, 2019), <https://factordaily.com/ola-uber-drivers-earnings-reduce/>.

investments, and thereby, permitting these platforms to create a large base of cab drivers.<sup>49</sup> At the same time, this has permitted the platforms to reduce the incentives for the drivers.<sup>50</sup> In the past few years, it has been witnessed that the income of the drivers is rapidly declining. Post the payment of a commission, the drivers only earn around ₹20,000-30,000 per month.<sup>51</sup> This has mobilised the drivers to seek better wages and working conditions.<sup>52</sup> They have organised wide-scale protests against the policies of the cab aggregators. In October 2018, an estimate of forty thousand drivers registered with Ola and Uber went on a strike for more than a week in order to seek an increase in earnings and improved working conditions.<sup>53</sup> The drivers have also held protests in the cities of Delhi, Bangalore and Hyderabad.<sup>54</sup>

These protests have arisen due to the inconsistency between initially proposed earnings and actual earnings, as these platforms have gradually withdrawn the incentives promised to the drivers initially. An evaluation of the contracts also reveals that these platform-based companies have prioritised the need to maintain Indian consumer behaviour and low fare trends over ensuring workers' ability to earn fair and decent wages.<sup>55</sup>

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<sup>49</sup>Surie, *supra* note 17; Shatakshi Gwade, *falling incentives, rising costs push Ola, Uber drivers on a one-way road to debt*, FIRST POST, (June 4, 2019), <https://www.firstpost.com/business/falling-incentives-rising-costs-push-ola-uber-drivers-on-a-one-way-road-to-debt-4459945.html>.

<sup>50</sup>Surie, *supra* note 17.

<sup>51</sup>S Prabhakaran, *supra* note 48.

<sup>52</sup>Surie, *supra* note 17.

<sup>53</sup>Neha Kulkarni, *Explained: Why Ola, Uber are off the roads and its drivers have hit Mumbai streets*, THE INDIAN EXPRESS, (June 4, 2019), <https://indianexpress.com/article/explained/why-app-based-cabs-are-off-the-roads-and-drivers-have-hit-mumbai-streets-5424407/>.

<sup>54</sup>*Ola, Uber Drivers to Begin Indefinite Strike from Tomorrow in Big Cities*, NEWS 18, (June 4, 2019), <https://www.news18.com/news/india/ola-uber-drivers-to-begin-indefinite-strike-from-tomorrow-in-big-cities-1691145.html>.

<sup>55</sup>Surie, *supra* note 17.

These protests highlight the need for immediate state intervention in order to remedy the prevailing structural oppression of workers in the gig economy. They provide impetus to the demand of the workers that the government should introduce new guidelines for such platform-based entities in order to ensure improved working conditions to the drivers.<sup>56</sup> These demands ought to be articulated in terms of the Decent Work program of the ILO.

## VI. A NEW CATEGORY OF EMPLOYMENT STATUS FOR WORKERS IN THE GIG ECONOMY

Most of these platforms deny their status as employers by asserting that they do not have direct control over the workers. Though peer-to-peer platforms do not exercise complete control over the workers as the traditional employers do, they still exercise substantial influence over the manner and means of work. In order to account for workers in the gig economy, the labour regulations should be extended to include within its scope peer-to-peer platforms that exercise material influence over the working conditions of workers.

At the same time, it should also be taken into consideration that the platform-based entities provide opportunities that significantly vary from opportunities provided by traditional employment—as it allows the workers the autonomy in customising their work schedule. Work-time flexibility forms the most distinct feature of the gig economy.<sup>57</sup> The existing labour law regulations cannot encapsulate the

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<sup>56</sup>About 8,000 Ola, Uber drivers go on strike in Mumbai against low incentives, BUSINESS TODAY, (June 4, 2019), <https://www.businessday.in/current/corporate/ola-uber-drivers-on-one-day-strike-in-mumbai-today/story/247754.html>.

<sup>57</sup>Signes, *supra* note 1; M Chen, J Chevalier, P Rossi et al, *The Value of Flexible Work: Evidence from Uber Drivers*, Working Paper No. 23296, NATIONAL BUREAU OF ECONOMIC RESEARCH, (June 4, 2019), <https://www.nber.org/papers/w23296.pdf>.

opportunities provided by the gig economy model. The workers can decide their own working hours—a conception that is quite different from conventional rules on schedules, holidays, working hours and mandatory rest periods.<sup>58</sup>

By providing a purposive interpretation to employment agreements, numerous courts and scholars have attempted to extend protection to all workers, whose independence has reduced in this new form of economy, irrespective of whether there exists dependency or subordination.<sup>59</sup> However, classifying gig workers as employees can result in serious legal implications—as it will entail extending all forms of onerous labour regulations to workers, which will, thereby, limit the work-time flexibility of workers in the gig economy.

In order to resolve the situation at hand, the legislature should formulate a new category of worker called as ‘dependent contractor’, which will, in essence, be an intermediate category between independent contractor and employee, to bolster the labour law rights of workers in the gig economy. The creation of this new form of employment status has been mooted by the ‘Taylor Review of Modern Working Practices’ (“**Taylor Review**”) commissioned by the United Kingdom government.<sup>60</sup> The Taylor Review, which recommends a string of measures to cater to the requirements of the gig economy, suggests that the meaning of ‘worker’ should be widened in order to extend the statutory employment guarantees to a wide range of workers in the gig economy that have been recognised as ‘dependent contractors’.<sup>61</sup>

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<sup>58</sup>Signes, *supra* note 1.

<sup>59</sup>Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, 6 SPANISH LAB. L. & EMP. REL. J. 6-15.

<sup>60</sup>*Good work: the Taylor review of modern working practices*, GOVT. OF UK, (June 4, 2019), <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>.

<sup>61</sup>*Id.*

Workers in the gig economy are subject to different categories of challenges and risks as opposed to those employed in traditional business enterprises. As a result, the dynamics and complexities of the gig economy dictate the need to formulate special, tailor-made legislation for workers in the gig economy. Developing an intermediate category of workers will ensure socio-economic security and stability to workers in the gig economy.<sup>62</sup> Many commentators are of the view that a third category will extend some sorts of benefits that accrue to employees without affecting the autonomy provided to workers in the gig model.<sup>63</sup> Furthermore, an intermediate category will also help settle the existing legal disputes over misclassification of workers in the sharing economy, as the gig workers will be automatically classified as ‘dependent contractors’.<sup>64</sup>

The special legislation for this new form of labour relations should guarantee certain basic socio-economic rights to the workers. The legislation should include the following minimum guarantees:

**Minimum wages:** The most pertinent issue will be extending the protection of minimum wages to the gig workers.<sup>65</sup> Given the workers are completely reliant on the platforms in the gig economy to generate their income, they should be extended certain benefits of progressive legislations to secure their socio-economic interests. The government should ensure that these peer-to-peer platforms are listed as a ‘scheduled industry’ under the Minimum Wages Act, 1948 so that the workers can avail the benefit of minimum wages. Minimum wages can be determined on an hourly basis for workers in the gig economy to ensure that work time flexibility ensured by the gig economy is not compromised. Further, the applications developed by the platform-

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<sup>62</sup>Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” In *the Gig Economy: A Comparative Approach*, 66(3) AM. UNIV. L. REV. 635-85.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>Signes, *supra* note 1.

based entities can assist these entities in precisely calculating the working hours of a worker.

**Collective Bargaining:** As the prices of services are determined by the platforms and workers in the gig economy have little or no say in it,<sup>66</sup> the right to organise and bargain collectively under the Industrial Disputes Act, 1947 should be extended to dependent contractors in order to better safeguard their interests and provide a level playing field.

**Flexibility in selecting working hours:** The new legislation should not undermine the autonomy of the workers to choose their schedule and workhours, as this forms the most notable aspect of the sharing economy. The companies can, however, determine the maximum or the minimum number of workhours per worker in order to help the company manage the demand and supply constraints.<sup>67</sup>

**Freedom to switch between platforms:** To avoid monopolisation of the market and foster the entry of new participants, the legislation should forbid exclusive agreements that will limit the ability of the workers to move from one platform to another. In the absence of this regulation, it will be conducive for the incumbent platforms to monopolise the existing workers in a particular segment, and thereby, denying access to the market to new platforms.<sup>68</sup>

**Imposing a ceiling on commission chargeable:** In order to prevent the digital platforms from extracting a large chunk of the profits earned from the workers in the gig economy, the government should impose a ceiling on the commission chargeable by the digital platforms. To

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<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

this end, the Indian government is considering placing a cap of 10% on the commission charged by cab aggregators.<sup>69</sup>

Extending these safeguards will ensure that workers in the gig economy, who are gradually becoming a major part of the labour force, are provided with decent work as envisaged by the ILO.

## VII. CONCLUSION

India is expected to grow into a \$1 trillion digital economy by 2025.<sup>70</sup> However, concerns regarding the viability of the jobs generated and the larger socio-economic consequences of the gig economy have not featured prominently in the regulatory as well as legal discourse regarding the digital or gig economy. This tendency can gravely impair the social structure of the labour force in India. It, thus, becomes imperative that any discourse regarding the gig economy should focus on filling the existing lacunae in the labour regulations and steering the regulatory structure of the gig economy towards social welfare. As a result, the structure of the gig economy should be designed to create viable and sustainable employment opportunities.

The emergence of the gig economy has exposed the limitations in some of the bedrock doctrines of labour regulations. This doctrinal crisis presents the regulatory authorities with an opportunity to re-examine and reassess some of its foremost doctrines. However, any new change cannot be effectuated without initiating a regulatory

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<sup>69</sup>Alnoor Peermohamed & Naveen Menezes, *Ola, Uber fees may be capped at 10% of total fare*, THE ECONOMIC TIMES, (Dec. 12, 2019), <https://economictimes.indiatimes.com/news/economy/policy/ola-uber-fees-may-be-capped-at-10-of-total-fare/articleshow/72269085.cms>.

<sup>70</sup>Shelley Singh, *India's way to \$1 trillion digital economy*, THE ECONOMIC TIMES, (June 5, 2019), <https://economictimes.indiatimes.com/news/economy/indicators/indias-way-to-1-trillion-digital-economy/articleshow/63561270.cms?from=mdr>.

dialogue. In this regard, this paper attempts to bridge the divide between labour regulations and the evolving digital economy.