

UNDERSTANDING SOCIAL SECURITY FOR GIG WORKERS: ANALYZING RECENT DEVELOPMENTS

Ulka Bhattacharyya^{*} & *Soumya Jha*^{**}

Abstract

Social security is understood as a safety net for workers and their families during times of need, serving critically as a buffer for life's exigencies. Though traditionally, the onus to provide social security has been on the State, the unique status of gig work, characterized by non-formal, non-traditional forms of work, has made this debate especially tricky to navigate. The phenomenal growth of the gig economy in recent years, especially since the advent of the ongoing COVID-19 pandemic, has revealed pressing questions on the status of gig workers, globally. This demonstrates the urgent need to discuss the provision of social security for individuals engaged in gig

^{*}Ulka Bhattacharyya is a Research Fellow at Shardul Amarchand Mangaldas and Co. The author may be reached at ulka.bhattacharyya@gmail.com.

^{**}Soumya Jha is a Research Fellow at Shardul Amarchand Mangaldas and Co. The author may be reached at soumya.jha.2010@gmail.com.

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work. In this context, this paper provides readers an overview of major developments surrounding the status of gig workers, and what this means for attempts to provide social security to such workers. The authors discuss relevant developments in the United States of America and the European Union, as well as the status of India's regulatory framework for providing social security to working individuals. The authors find that social security in the Indian context has been intimately tied with traditional employment status. Consequently, gig workers seem to have little to fall back on. However, the introduction of the Code on Social Security, 2020 seems to promise what has hitherto eluded gig workers – social security. As the authors demonstrate, while this is indeed a first step, questions remain that surround the proposals in the Code, its interaction with the existing regulatory framework governing social security and its subsequent implementation once the code comes into full effect.

I. INTRODUCTION

Most gig platforms emerged in the aftermath of the 2008 global financial crisis.¹ The immediate concern for individuals then, owing to the devastation caused by the financial crisis, was to find new ways

¹Victor G. Devinatz, 'Independent Workers: Growth Trends, Categories, and Employee Relations Implications in the Emerging Gig Economy' (2019) 31(1) Employee Responsibilities and Rights Journal 61, 62.

to save money, as well as new ways to make it.² Gig work fit the bill effortlessly, as it was accepted as a positive trade-off between a certain amount of independence and the loss of employment protections, interest representation, and minimal social security.³ Consideration for social security protections, like health insurance, minimum wage and unemployment benefits were therefore not on the agenda of the gig platform model at the time of its inception. Since then, this model of work has further thrived due to its intrinsic characteristics of flexibility (afforded both to platforms/aggregators and workers), low entry barriers for workers, digitization, an ambiguous regulatory framework, and, operational efficiency.⁴

Referred to as “*independent contractors*”, “*freelancers*” and “*on-demand workers*”, gig workers, world-over are therefore, often unable to claim social security.⁵

With gig work assuming a critical role globally, companies not embracing the phenomenon as a permanent reality may soon be left behind. Further, the ongoing COVID-19 pandemic (“**pandemic**”) has perpetuated the gig work phenomenon, as a result of which several companies have increased engagement with gig operations.⁶

²Abbey Stemler, ‘Betwixt and Between: Regulating the Shared Economy’ (2016) 43(1) Fordham Urban Law Journal 30, 70.

³Colin Crouch, ‘A Long-term Perspective on the Gig Economy’ (2018) 2(2) American Affairs Journal 51, 64.

⁴Niam Yaraghi & Shamika Ravi, ‘The Current and Future State of the Sharing Economy’ (*Brookings India Impact Series No. 032017*, March 2017) <https://www.brookings.edu/wp-content/uploads/2016/12/sharingeconomy_032017final.pdf> accessed 5 September 2020.

⁵Uma Rani & others, ‘World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work’ (*International Labour Organization, ILO Flagship Report*, February 2021) 174 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771749.pdf> accessed 25 February 2021.

⁶Gayatri Nair, ‘The Gig Economy in the Pandemic: Outsourcing Risk, Privatizing Gain?’ (*The India Forum*, 5 June 2020)

Ironically, however, this sector appears to be worst affected by the onslaught of the pandemic,⁷ given the informal manner in which it has so far operated. Recently, the World Economic Forum has also emphasized the urgent requirement to respond to the needs of a growing global informal workforce, including gig workers, by creating newer systems of social protection, especially in light of the ongoing pandemic.⁸ This observation aptly addresses the plight of Indian gig and platform workers, who have either been operating at the forefront during the pandemic, as essential workers, or have had to return to their native places from big cities, having no source of income or social protection. Reportedly, in India, incomes of 90% rideshare drivers, and 75% delivery workers have undergone a sharp decline during the pandemic.⁹

Social security may broadly be described as a safety net available to workers and their families for the vagaries of the future. This may be provided for by the State, or by employers, and workers themselves, however, India is yet to provide universal social security. In this context, the rapid growth of gig work globally, including in India, has started to pose a conundrum for legislators, who are deliberating over how best the nascent, yet burgeoning gig workforce can be provided with social security benefits.

<<https://www.theindiaforum.in/article/covid-19-and-gig-economy>> accessed 2 February 2021.

⁷Josephine Moulds, 'Gig Workers among the hardest hit by coronavirus pandemic' (*World Economic Forum*, 21 April, 2020) <<https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/>> accessed 2 February 2021.

⁸Samir Saran, 'Challenges and Opportunities in the Post-Covid-19 World-Technology: Digital Epiphany? COVID-19 and our Tech Futures' (*World Economic Forum, Insight Report*, May 2020) Ch 5, 27 <http://www3.weforum.org/docs/WEF_Challenges_and_Opportunities_Post_COVID_19.pdf> accessed 5 September 2020.

⁹Tilman Ehrbeck & others, 'The Digital Hustle- Gig Worker Financial Lives Under Pressure' (*Flourish Ventures, India Spotlight*, September 2020) 4 <<https://flourishventures.com/wp-content/uploads/2020/10/FlourishVentures-GigWorkerStudy-India-FINAL-2020-09-29.pdf>> accessed 5 September 2020.

To add to the urgency of this, in India, the passage of the Code on Social Security, 2020 (“**Code**”) has given way to questions on the status of gig workers, and the most appropriate mechanism to provide gig workers with social security. The momentum of this has been further intensified by the proposed Code on Social Security (Central) Rules, 2020 (“**Rules**”), as well as the announcement in the Union Budget 2021-22 of the Government of India’s intent to provide social security benefits to gig workers.¹⁰ Though the Code has not been implemented as of date (barring the provision relating to identification of workers and other beneficiaries through their Aadhaar number), it is undeniable that the issue of how best to provide social security to gig workers will occupy public discourse, in a manner perhaps exceeding the scale of discussion at the present. A recent writ petition filed before the Supreme Court, *Indian Federation of App-Based Transport Workers v. Union of India and Others*¹¹ (“**IFAT petition**”), seeking social security for gig and platform workers precisely demonstrates this. The petitioners have sought a declaration from the Supreme Court that gig and platform workers are “*unorganized workers*” within the meaning of the Unorganized Workers’ Social Security Act, 2008, and therefore, entitled to be registered for social security under the said Act.¹²

In light of rapid developments concerning the critical issue of social security for gig workers, the present paper attempts to discuss various policy questions surrounding the meaning, nature and implications of ‘*gig work*’ and ‘*social security*’. It further analyses the interaction of the concept of gig work with social security, as well as the challenges

¹⁰Government of India, *Speech of Smt. Nirmala Sitharaman, Minister of Finance* (Union Budget, 2021-22) para 112.

¹¹*Indian Federation of App-Based Transport Workers v Union of India and Others*, Writ Petition (Civil), Number 001068 of 2021 (Supreme Court).

¹²‘Petition in SC seeking social security benefits for Uber, Ola, Swiggy, Zomato employees’ (*The Leaflet*, 20 September 2021) <<https://www.theleaflet.in/petition-in-sc-seeking-social-security-benefits-for-uber-ola-swiggy-zomato-employees/>> accessed 16 November 2021.

arising consequently, which is perhaps one of the most pressing issues of our times. Though the paper dives deep into the Indian regulatory framework on the subject, it refers to regulatory frameworks and legal developments in other jurisdictions as well. The paper focuses on gig work primarily from the perspective of the blue-collar workforce (that is, workers engaged in semi-skilled and unskilled work), and not the skilled gig workforce.

The structure of the paper is as follows: The authors first discuss the origins of social security and its evolution in India. Thereafter, they discuss the development of legislation involving gig work in the United States of America (“**America**”) and the European Union (“**EU**”), and how the unique status of gig workers is challenging the very foundations of traditional employment relationship the world-over. Next, they look at how social security legislation has taken shape in India, and how the Code and the Rules are contemplating a new paradigm of providing gig workers with social security. Finally, some of the anticipated challenges that may arise in the subsequent implementation of the Code and the Rules, are touched upon.

II. UNDERSTANDING SOCIAL SECURITY

This chapter sets the context for the paper by briefly discussing the origins of social security, international standards on social security, and in the Indian context, its roots in the Indian Constitution and its status as a socio-economic right.

A. *Origins*

Webster's Dictionary defines¹³ social security as, “*the principle or practice or a program of public provision (as through social insurance or assistance) for the economic security and social welfare*”

¹³‘Social Security’ (Merriam Webster) <<https://www.merriam-webster.com/dictionary/social%20security>> accessed 1 March 2021.

of the individual and his or her family”. The International Labour Organization (“ILO”) refers to social security as a human right, comprising policies and programmes on unemployment, employment injury, maternity, disability etc., designed to reduce and prevent poverty and vulnerability throughout the life cycle.¹⁴ The Universal Declaration of Human Rights also declares social security as a “right” and an “entitlement” of every member of society, the realization of which is to be ensured by national effort and international co-operation.¹⁵ Broadly, then, the origins of social security may be derived from the concept of a Welfare State,¹⁶ wherein the State is committed to providing basic economic security for its citizens by protecting them from market risks associated with old-age, unemployment, accidents and sickness.

Further, bodies like the ILO and the United Nations have been instrumental in urging governments to act the part, by attributing the status of a “right” and “entitlement” to social security.

B. International History

The concept of social security originated in Germany in the 1880s,¹⁷ which started out by establishing an old-age social insurance program for workers, and subsequently disability benefits, workers’ compensation, and sickness and unemployment insurance. By 1925, two-thirds of the German labour-force, mostly blue-collar workers,¹⁸

¹⁴World Social Protection Report 2017-19: Universal social protection to achieve the Sustainable Development Goals’ (*International Labour Organization*, 2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_604882.pdf> accessed 1 March 2021.

¹⁵Universal Declaration of Human Rights 1948, art 22.

¹⁶M. Weir, ‘Welfare State’ *International Encyclopedia of the Social and Behavioral Sciences*, (2001) 16432, 16435 <<https://www.sciencedirect.com/science/article/pii/B0080430767010949>> accessed on 15 November 2021.

¹⁷‘Social Security History’, (*Social Security Administration*) <<https://www.ssa.gov/history/ottob.html>> accessed 10 February 2021.

¹⁸David M. Cutler & Richard Johnson, ‘The Birth and Growth of the Social Insurance State: Explaining Old-Age and Medical Insurance across countries’

had access to these protections, with financing from employers, employees and State contributions. America followed suit in 1935 by enacting the Social Security Act, which provided a system of federal old-age benefits, provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, and public health. America, differing from the European system, created an alternate structure for social security ‘*insurance*’, supported from ‘*contributions*’ through taxes on individuals’ wages and employers’ payrolls, rather than directly from Government funds.¹⁹ Following these developments, the ILO adopted its first Convention on Social Security in 1952 (“C102”),²⁰ framing basic social security principles, and establishing globally accepted minimum standards for nine branches of social security, ranging from medical-care to unemployment benefit. C102, taking into consideration countries’ varied stages of economic growth and development, provides flexibility clauses, allowing ratifying Member States to attain universal coverage, *gradually*.²¹ It bears mention here that India²² has not yet ratified C102.²³

(2004) 120(1/2) JSTOR 87, 121 <<http://www.jstor.org/stable/30025831>> accessed 15 January 2022.

¹⁹Social Security Act 1935.

²⁰ILO, Social Security (Minimum Standards) Convention 1952 (No. 102).

²¹Ursula Kulke & others ‘Setting Social Security Standards in a Global Society: An analysis of present state and practice and of future options for global social security standard setting in the International Labour Organization’ (*International Labour Organization*, March 2008) 10 <https://www.usp2030.org/gimi/RessourcePDF.action;jsessionid=-21jXaaS6dWdd5QAEZIYnG7JkxiHuwFMo7eX_Oyt5nDQ4ukoD8G-11653088929?id=5953> accessed 10 January 2022.

²²‘Ratifications of C102 - Social Security (Minimum Standards) Convention, 1952’ (*International Labour Organization*, 27 April 1955) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTUMENT_ID:312247> accessed 15 March 2021.

²³Other major ILO instruments *vis-à-vis* social security include: ‘*ILO, Social Protection Floors Recommendation, 2012 (No. 202)*’; ‘*ILO, Equality of Treatment Social Security Convention, 1962 (No. 118)*’; ‘*ILO, Maintenance of Social Security Rights Convention, 1982 (No. 157)*’. See International Labour Standards on Social

C. Social Security In India

The Indian Constitution enshrines the concept of social security, wherein the framers have stressed on the need for “*maintenance of workers by the community.*”²⁴ Social security, and public assistance for workers in cases of unemployment, old-age, sickness, disablement,²⁵ and maternity relief,²⁶ is the duty of the State, under the Directive Principles of State Policy (“**DPSPs**”). The State is to further ensure a decent standard of life for all workers.²⁷ DPSPs, enshrined under Part IV of the Indian Constitution, however, are merely State ‘*goals*’, and not ‘*mandates*’. These, therefore, cannot be *enforced* by any court of law, though it shall be the duty of the State to apply these principles in making laws.

This implies that social security may be provided only within the limits of the State’s economic capacity and development.²⁸ In a court of law, litigants have often fought for social security, a “*socio-economic right*”, to be read as the “*right to life*”, a “*fundamental right*” under Part III of the Constitution.²⁹ The success of such litigation, however, has been sparse.

In a departure from this established constitutional position on the status of social security, the recently filed IFAT petition, interestingly, argues that denial of social security to gig and platform workers is

security’, (*International Labour Organisation*)
<<https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>> accessed on 15 January 2022.

²⁴Constituent Assembly Debates, 17 December 1946, vol 1.

²⁵Constitution of India 1950, art 41.

²⁶Constitution of India 1950, art 42.

²⁷Constitution of India 1950, art 43.

²⁸Constitution of India 1950, art 41.

²⁹In *C.E.S.C Ltd. etc. v. Subhash Chandra Bose and Ors*, (1992) SCC (1) 441, the Supreme Court held that civil and political rights enshrined under Part III of the Constitution are mere “cosmetic rights” with respect to labourers, wage earners, soil tillers etc., and that socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful “*right to life*”.

violative of their fundamental rights under Articles 14, 21 and 23.³⁰ The IFAT petition, therefore, raises an important question of constitutional relevance pertaining to the status of social security *vis-à-vis* the State, i.e., whether social security should be a State handout, or a goal the State may endeavour to achieve, or whether it should be a State mandate, by way of being a fundamental right, and an entitlement of workers. It will, therefore, be interesting to see the Supreme Court's observations on this stance adopted by the petitioners, as the petition proceeds.

Coming back to the origins of social security in India, India was the first south-east Asian country to have a major social security program established under the Employee State Insurance Act, 1948 (“**ESI Act**”), originally covering about 2.5 million employees.³¹ Further, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (“**EPF Act**”) created a system of old-age and survivors' savings benefit in certain industries, with its application extending to about 1.6 million employees.³² However, these programs were established solely for employees in the “*formal workforce*”, comprising less than 10% of the total workforce in India.³³ An exception to this standard was made only once by amending the Workmen's Compensation Act,³⁴ (now referred to as Employees Compensation Act, 1923) by which “*casual workers*” were brought within the realm of compensation entitlement under the said statute. This is important, as “*casual workers*” belong to the “*unorganized workforce*”, to which

³⁰IFAT Petition (n 12).

³¹Wilbur J. Cohen, ‘Social Security in India’ (*Social Security Bulletin*, May 1953) <<https://www.ssa.gov/policy/docs/ssb/v16n5/v16n5p11.pdf>> accessed 5 September 2020.

³²*ibid.*

³³‘India Labour Market Update’, (*International Labour Organization*, July 2017) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_568701.pdf> accessed 5 September 2020.

³⁴Workmen's Compensation (Amendment) Act 2000, s 2(1)(n).

the Employees' Compensation Act, 1923 is traditionally, not applicable.³⁵

Capitalism, it has been argued, necessitated the birth of social security systems.³⁶ A capitalist economy creates “*worn-out industrial workers*”³⁷ as it poses the risk of recession due to free markets, raising potential for income degeneration. Further, considering that urban migration is prevalent in capitalist societies, individuals fail to have any familial support, including financial support, in cities. America's adoption of the SSA enacted in response to the Great Depression (1929-30s) to support workers, corroborates this “*ravages of capitalism*” theory.³⁸

Another episode of the ravages of capitalism occurred with the global recession in 2008. Workers, globally, were struck by the financial crisis, but this propelled the world towards ‘self-employment’ and an emergent gig environment, instead of creation of social security systems for the protection of workers. This ‘shift’ in the manner of responding to the ravages of capitalism could be attributed to the changing nature of work over the decades, from more permanent (blue-collar, industrial) work to contractual, temporary work. Gig work, including platform work, belongs to this latter category of workers.

Despite this shift, however, the issue of social security for gig workers has emerged as an important subject of deliberation, globally, and more critically, as a subject of massive litigation in certain jurisdictions. These are elaborated on in the next chapter.

³⁵Unorganized Workers' Social Security Act 2008, s 2(m) r/w Schedule II.

³⁶Cutler and Johnson (n19).

³⁷ibid 91.

³⁸ibid 91.

III. IMPORTANT LESSONS FROM OTHER JURISDICTIONS

In this chapter, the examples of two jurisdictions, America and the EU, torchbearers of the global gig work phenomenon, are discussed briefly. This sets the context for discussions in subsequent parts of the paper. This discussion also helps obtain valuable perspectives, given the pace of the development of regulatory frameworks surrounding gig work, in these jurisdictions.

A. America

i. *The Employee v. Independent Contractor Debate*

In America, the debate over worker classification in the gig economy, i.e., deciding whether gig workers are “employees” or “independent contractors”, has been widespread. This debate is critical, because classification of a worker as an employee is a gateway to the entitlement to social security protections under labour and employment laws in force in America.³⁹ The banning of operations of gig platforms⁴⁰ in some cases, and the institution of class-action lawsuits by workers⁴¹ alleging misclassification, demonstrate the seriousness of this debate in America.

ii. *The Dynamex Case & AB5 Law*

A landmark judgment on worker classification, popularly known as the *Dynamex* case,⁴² decided by the Californian Supreme Court

³⁹Miriam A. Cherry, Antonio Aloisi, ‘Dependent Contractors’ in the Gig Economy: A Comparative Approach’ (2017) 66(3) American University Law Review 635.

⁴⁰Ryan Craggs, ‘Where Uber is Banned around the world’ (*The Condé Nast Traveller*, 20 April 2017) <<https://www.cntraveler.com/story/where-uber-is-banned-around-the-world>> accessed 1 September 2020.

⁴¹‘Gig Economy Lawsuits: On-demand app workers may be misclassified as “Independent Contractors”’ (*Gibbs Law Group, LLP*) <<https://www.classlawgroup.com/gig-economy/>> accessed 1 September 2020.

⁴²*Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, [2018] LA County, Ct. App. 2/7 B249546, Super Ct. No. BC332016

(2019) culminated into codification of law, namely Assembly Bill 5 (“AB5”) which prescribes the *ABC test* for employers to determine whether their workers are indeed “employees” or “independent contractors”. Under AB5, the burden of proving that a worker is an independent contractor rests entirely on the employer. This effectively means that all workers are employees unless proven otherwise by their employers. This is a strong judicial precedent in employment law set by the *Dynamex* case. In fact, similar policies have been initiated in democratic majority states of New York, New Jersey and Illinois ever since.⁴³

In a significant development, it is expected that Joe Biden, the newly elected American President, and a strong supporter of AB5, may establish a federal standard modelled on the ABC test for all labour and employment laws in America. The proposed ‘*Protecting the Right to Organize Act, 2021*’,⁴⁴ another labour legislation backed strongly by President Biden, also prescribes this test to define “employee”.⁴⁵ This Bill, however, has been passed by the House of Representatives, and is awaiting approval from the Senate.

<<https://cases.justia.com/california/supreme-court/2018-s222732.pdf?ts=1525107724>> accessed 1 September 2020.

⁴³Eli Rosenberg, ‘Gig Economy bills move forward in other blue states, after California clears the way’ (*The Washington Post*, 17 January 2020) <<https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/>> accessed 10 January 2022.

⁴⁴‘Protecting the Right to Organize Act of 2021’ <<https://www.congress.gov/bill/117th-congress/house-bill/842/text/ih>> accessed 11 April 2021.

⁴⁵Lynn Rhinehart & others, ‘Misclassification, the ABC test, and employee status: The California experience and its relevance to current policy debates’ (*Economic Policy Institute*, 16 June 2021) <<https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/>> accessed 10 January 2022.

iii. *Proposition 22*

Several gig platforms engaging workers for transportation and delivery services have strongly opposed AB5.⁴⁶ They claim that workers are unwilling to assume employee status in the hopes of retaining work-flexibility. Employee status, they claim, would increase the cost of their services, ultimately leading to job cuts.

In response to AB5, Proposition 22⁴⁷ (“**Prop22**”), backed by major gig platforms⁴⁸ was introduced in 2020 as a ballot initiative in California. A ballot initiative is a process by which the people are empowered to propose legislation and to enact or reject laws at the polls. This labour policy initiative seeks to define app-based transportation and delivery drivers as “*independent contractors*”, and further, to adopt separate labour and wage policies for app-based drivers and companies, exempting such companies from providing employee benefits. Benefits under Prop22 range from minimum wage based on a net earnings floor and health-care subsidies, to protection against discrimination and sexual harassment. Some of these include fixed working hours, vehicle expense compensation, occupational accident insurance, disability payments, and, accident death insurance for workers’ spouses and children.

⁴⁶Andrew J. Hawkins, ‘Uber, Lyft, and Doordash kick off \$90 million fight against California’s Gig Work law’ (*The Verge*, 29 October 2019) <<https://www.theverge.com/2019/10/29/20938452/uber-lyft-protect-doordash-ab5-gig-worker-law-ballot-california>> accessed 16 September 2020.

⁴⁷‘California Proposition 22, App-Based Drivers as Contractors and Labour Policies Initiative (2020)’ (*Ballotpedia*, December 2020) <[https://ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020))> accessed 17 September 2020.

⁴⁸Katie Canales, ‘Uber and Lyft have poured millions of dollars into a November ballot measure to keep California Drivers paid as independent contractors without benefits (Uber, Lyft)’ (*Business Insider*, 22 August 2020) <<https://markets.businessinsider.com/news/stocks/what-is-proposition-22-california-gig-workers-uber-lyft-20208-1029525458>> accessed 17 September 2020.

Prop22 was approved⁴⁹ by Californian voters and became law titled *Protect App-based Drivers and Services Act, 2020*.⁵⁰ It is expected that Uber, Lyft and other gig platforms could begin funding an effort like Prop22 to combat laws resembling AB5 in other American states as well.⁵¹

From a practical standpoint, gig workers do not fit into either of the traditionally accepted binary categories of “*employee*” or “*independent contractor*”, because they have imbibed characteristics from both. Academics, therefore, recommend the creation of a third, hybrid worker category, defined by law, in keeping with modern economic and technological realities of the gig economy.

Harris and Krueger,⁵² for instance, recommend enacting laws establishing the category of “*independent worker*”, to be entitled to a separate set of protections and benefits that intermediaries (i.e., gig platforms) would be required to provide. At the same time, such workers would retain work-flexibility.⁵³ For instance, in Germany,⁵⁴ certain social protections are guaranteed to home-based workers and artists, who are *in some form* dependent on employers. The “*self-*

⁴⁹California Proposition 22 (n 48).

⁵⁰‘Protect App-Based Drivers and Services Act, 2020’ (*Who is my Employee*) <<https://whoismyemployee.files.wordpress.com/2019/11/protect-app.pdf>> accessed 1 April 2021.

⁵¹Rosenberg (n 43).

⁵²Seth D. Harris & Alan B. Kruegar, ‘A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker”’ (*The Hamilton Project*, December 2015) 10 <https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf> accessed 17 September 2020.

⁵³Olga Chesalina, ‘Access to social security for digital platform workers in Germany and in Russia: A Comparative Study’ (2018) 7 (1-2) *Spanish Labour Law and Employment Relations Journal* 17, 28.

⁵⁴*ibid* 20.

employed” may be further classified as “*employee-like persons*”, who are eligible for a separate set of social security benefits.⁵⁵

Cherry and Aloisi,⁵⁶ however, suggest (based on their study of Canada, Italy and Spain) that any legislative intervention for purposes of carving out a third category of workers would require tough decision-making. Determining where a worker would fit within the three categories would have its own doctrinal elements and the potential for misclassification, arbitrage, and confusion, as rights and responsibilities concerning each of the categories would vary.⁵⁷

Prop22 may have been a first step towards creating this third, hybrid category of employment. However, being wary of its impact may be prudent. Recently, a petition (*Hector Castellanos and Ors. v. State of California & Katie Hagen* (2021))⁵⁸ was filed before the California Superior Court challenging the constitutional validity of Prop22, on grounds that it “*purports to limit the legislature’s authority to extend workers’ compensation benefits*” to gig workers in conflict with California’s Constitution. In other words, it has been contended that Prop22 interferes unconstitutionally with the authority of the California Constitution to provide worker benefits, by establishing its own benefits-system for independent contractors. The Court declined to take up the case directly, directing the same to be filed before the appropriate authority, which was ultimately done. As of today, Prop22 stands repealed per a ruling passed by a judge of the Alameda

⁵⁵Paul Schoukens & others, ‘The EU social pillar: An answer to the challenge of the social protection of platform workers’ (2018) 20(3) *European Journal of Social Security* 219, 241.

⁵⁶Cherry, Aloisi (n 39) 680, 681.

⁵⁷*ibid* 681.

⁵⁸US Superior Court of the State of California, County of Alameda, Unlimited Jurisdiction, executed on 10 February 2021 <<https://aboutblaw.com/VA8>> accessed 1 April 2021.

County Superior Court, rendering the Prop22 law “*unconstitutional*” and “*unenforceable*”.⁵⁹

Developing a robust framework to create this ‘*third*’ category of worker, therefore, be it Prop22, or otherwise, may require deeper analysis and further thought. Aiming to strike the right balance between worker protections and rights, and sustaining companies’ business models will be key for the success of any such initiative.

B. The European Union

i. Directive 2019/1152 Under The European Pillar of Social Rights

The European Pillar of Social Rights (“**EPSR**”)⁶⁰ proclaimed inter-institutionally by the European Parliament, European Council and European Commission in November 2017, declares that “*workers*”, and under comparable conditions, the “*self-employed*”, have the right to adequate social protection irrespective of the type and duration of their employment relationship.⁶¹ Accordingly, it made policy recommendations to Member States of the EU, to further this goal.

In order to deliver on the EPSR framework, Directive 2019/1152⁶² (“**Directive**”) was adopted in June 2019, to be implemented by

⁵⁹*Hector Castellanos and Ors. v. State of California and Katie Hagen* (2021), Case No. RG21088725, Superior Court of the State of California, in and for the County of Alameda <<https://catimes.brightspotcdn.com/c5/f5/7bba477c4a839d1edd9f5b5a75e9/prop-22-alameda-superior-ct.%208-20-21.pdf>> accessed 19 November 2021.

⁶⁰The European Pillar of Social Rights’ <https://ec.europa.eu/info/sites/info/files/social-summit-european-pillar-social-rights-booklet_en.pdf> accessed 6 September 2020.

⁶¹*ibid* 19.

⁶²‘Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union’ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019L1152#ntc5-L_2019186EN.01010501E0005> accessed 7 September 2020.

Member States by August 2022. The purpose of this Directive is to “*set new rights for all workers, particularly addressing insufficient protection for workers in more precarious jobs, while limiting burdens on employers and maintaining labour market adaptability.*”⁶³

ii. *Defining “Worker”*: Definitions Under EU And National Laws

Article 1 of the Directive “*lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.*” Defining “*worker*”, in this respect, however, has been contentious in the EU, as the same would determine beneficiaries of social security. This is similar to the American experience wherein defining “*employee*” has been contentious.

While some EU Member States pushed for “*worker*” to be defined as per respective national law,⁶⁴ the EU stressed that it may be defined based on precedent set by Court of Justice of the European Union (“**CJEU**”), which affords a broader interpretation to the term. For instance, in a landmark judgment,⁶⁵ it was held that “*worker*” covers “*any person performing for remuneration work, the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship*”. Upon deliberations, it was ultimately decided that “*worker*” under Article 1 of the Directive would not be defined ‘*based on*’ CJEU case law, but

⁶³‘Employment, Social Affairs and Inclusion’ (European Commission) <<https://ec.europa.eu/social/main.jsp?langId=en&catId=1313>> accessed 7 September 2020.

⁶⁴Bartłomiej Bednarowicz, ‘Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union’ (2019) 48(4) *Industrial Law Journal*, 604, 623.

⁶⁵Case 66/85 *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [1986] ECR 2121.

only ‘*with consideration*’ to it, leaving it open to EU Member States to define the term as per their respective national laws. The issues, however, do not end here. Academics⁶⁶ have observed that Article 1 is worded ambiguously and may prove difficult for Member States to not only implement it in its full capacity, but also for the judiciary to effectively enforce it.

iii. Scope Of the Directive

Member States of the EU have the option of not applying the Directive to workers whose predetermined and actual working time is equal to or less than an average of three hours per week, for four consecutive weeks.⁶⁷ Further, the application of the Directive may be ruled out, on objective grounds, in the case of civil servants, public emergency services, armed forces, police authorities etc.⁶⁸ Lastly, the Directive may not be applied to domestic workers. These conditions leave out a certain percentage of workers from the ambit of the Directive.

While the EU Directive was initially proposed as a tool to implement social policy laid down in the principles of the EPSR, its scope has been diluted by EU Member States insisting on national law definitions. CJEU case law on defining “*worker*” and “*employment contract/relationship*” would, in this respect, prove to broaden the scope and ambit of the EU Directive.

In India, unlike in America and the UK, deliberations over the status of gig workers and their entitlement to social security are at a relatively nascent stage. The Code is a first attempt at recognizing “*gig work*” and “*platform work*”, as novel forms of work. However, widespread discussions on social security entitlements for gig and platform workers have gained significant momentum only recently,

⁶⁶Bednarowicz (n 65).

⁶⁷Directive (n 63) art 1(3).

⁶⁸Directive (n 63) art 1(6).

due to the challenges faced by gig and platform workers on account of the pandemic. The most recent example of this growing momentum is the IFAT petition, currently before the consideration of the Supreme Court.

In the next chapter, we discuss the lacunae in the Indian social security framework with respect to its treatment of gig workers. This, in fact, speaks to the IFAT petition which points to the lack of social security legislation in India, recognizing the concepts of “*gig worker*” and “*partner*”, leaving such workers effectively out of the scope of existing social security laws.⁶⁹

IV. SOCIAL SECURITY FOR GIG WORKERS IN INDIA: HOW DOES THE EXISTING LEGAL FRAMEWORK FARE?

The imperative for providing social security in the Indian context, as discussed, emanates from the Constitution. There is no dearth of social security legislation in India, both at the Central and State levels. Additionally, existing social security legislation in India is both contributory and non-contributory in nature. For instance, the ESI Act and schemes under the EPF Act exemplify contributory social security schemes, while non-contributory schemes include those under the Maternity Benefit Act, 1961.⁷⁰ However, with the emergence of newer forms of work (of which gig work is an intrinsic component), the existing social security framework in India faces certain challenges.

⁶⁹Orchie Bandyopadhyay, ‘India’s gig workers launch legal bid for social security benefits’ (*British Safety Council*, 12 October 2021) <<https://www.britsafe.in/publications-and-blogs/safety-management-magazine/safety-management-magazine/2021/india-s-gig-workers-launch-legal-bid-for-social-security-benefits/>> accessed 16 November 2021.

⁷⁰Planning Commission, *Report of the Working Group on Social Security for the Tenth Five Year Plan* (Planning Commission, 2002-07) Chapter II.

In this Chapter, first, some of the key challenges which arise when envisaging social security for gig workers using existing Central legislations on social security, are discussed. It should be noted that there are other social security *schemes* dealing with the informal workforce, generally.⁷¹ Next, an overview of the key proposals under the Code and the Rules, and their nascent attempt to offer a framework for extending social security benefits to India's rapidly growing gig workforce is discussed. Thereafter, the role of aggregators (and voluntary initiatives) in providing social security to gig workers, in the Indian context, is discussed.

*A. Challenges In Extending Social Security to The Gig Workforce
Via Existing Legislation*

*i. Inadequacies Of the Present Legal Framework On Social
Security*

There is a plurality of social security schemes in India, introduced *via* legislation, both at the Central and State levels, creating a social security regime beset with varying legal standards, differing applicability thresholds and differing definitions.⁷² Consequently, confusion has ensued concerning scope of rights under existing laws, as well as increased compliance costs.⁷³ More importantly, such incongruities have resulted in different sets of workers enjoying differing rights.⁷⁴

⁷¹Mridusmita Bordoloi & others, 'Research Brief: Social Security for Informal Workers in India' (*Centre for Policy Research*, November 2020) <<https://www.cprindia.org/research/reports/social-security-informal-workers-india>> accessed 31 March 2021.

⁷²Saurabh Bhattacharjee, 'Adapting Social Security to 21st Century Indian Economy: A Case for Universalisation' (2016) 1(1) *NUJS Journal of Regulatory Studies* 15.

⁷³*ibid.*

⁷⁴*ibid.*

Most social security schemes in India are contingent on ‘*employee*’ status and are therefore dependent on employer contributions.⁷⁵ This has resulted in a sizable number of individuals being unable to access social security benefits.⁷⁶ Additionally, given that the concept of employment has been interpreted by courts (in the context of Indian employment laws), in a fairly technical manner, individuals not satisfying the test of employment may not usually end up accessing social security benefits.⁷⁷ To illustrate the challenges that abound in determining the question of whether an individual is in a relationship of *employment*, one should consider that over time, the Supreme Court has enunciated multiple tests to determine the existence of an employment relationship. These have ranged from the tests of “*supervision and control*”,⁷⁸ “*economic control*”,⁷⁹ an “*integrated approach*” (involving elements including the power to appoint and the authority to dismiss/take disciplinary action),⁸⁰ and most recently, a “*balancing act weighing all relevant factors*”.⁸¹ Thus, determining employment status under existing employment laws, is not only technical, but also non-simplistic; *there is no clear-cut test to determine employment status at the outset*. Consequently, the question of providing social security to individuals who do not satisfy the test of being ‘*employees*’, becomes even more important to consider and address.

Under the ESI Act, employees, employed for wages or in connection with the work of factories or establishments, are eligible for benefits⁸²

⁷⁵ibid.

⁷⁶ibid.

⁷⁷ibid.

⁷⁸*Dharangadhara Chemical Works Ltd v. State of Saurashtra*, AIR 1957 SC 264.

⁷⁹*Hussainbhai v. Alath Factory Thozhilali Union*, AIR 1978 SC 1410.

⁸⁰*Workmen of Nilgiri Co-operative Marketing Society v. State of Tamil Nadu*, (2004) 3 SCC 514; *Balwant Rai Saluja v. Air India Limited*, (2014) 9 SCC 407.

⁸¹*Sushilaben Indravadan Gandhi v. The New India Assurance Company*, (2021) 7 SCC 151.

⁸²Employee State Insurance Act 1948, s 2(9), 2(14).

The ESI Act also defines “*insurable employment*”,⁸³ to mean employment in a factory or establishment, covered under the Act. Given that the ESI Act primarily provides benefits to employees in case of sickness, maternity and employment injuries,⁸⁴ linking the provision of social security benefits to an individual’s status as an ‘*employee*’, potentially risks excluding others from access to such benefits. Separately, while the ESI Act was amended to allow the Central Government to create Schemes for “*other beneficiaries*” and their families for providing medical facilities in hospitals established by the Employees State Insurance Corporation (“**ESIC**”) in underutilised areas on payment of user charges,⁸⁵ the applicability of the Scheme framed consequently by the Central Government is not the clearest.⁸⁶ This Scheme, meant for “*other beneficiaries*”, again applies solely to individuals ‘*registered*’ under schemes (except the ESI Act), on payment of user charges in ‘*underutilised*’ ESIC hospitals.⁸⁷ This creates inequities in coverage and exacerbates the exclusion of working individuals who are neither ‘*employees*’, nor ‘*registered*’ under any scheme.

Similarly, under the EPF Act, which deals with the institution of provident funds and pension funds, amongst other things, status as an ‘*employee*’ is essential to avail the benefit of the schemes under the Act (*viz.* the Employees’ Provident Fund Scheme, the Employees’ Pension Scheme and the Employees’ Deposit-Linked Insurance Scheme)⁸⁸ The Maternity Benefit Act, 1961 which provides maternity benefits to women, again, applies to women ‘*employed*’ in establishments, either directly or indirectly;⁸⁹ the definition of

⁸³*ibid* s 2(13A).

⁸⁴*ibid* Preamble.

⁸⁵*ibid* s 73B.

⁸⁶Other Beneficiaries and the Members of their Families Medical Facilities Scheme 2010.

⁸⁷*ibid*.

⁸⁸Employees’ Provident Fund Act 1925.

⁸⁹Maternity Benefit Act 1961, s 3(o).

‘woman’ under the Maternity Benefit Act refers to the underlying nature of the work relationship for women to avail maternity benefits, i.e. ‘employment’.⁹⁰

The Employees’ Compensation Act, is yet another significant legislation which provides compensation for employment-related injuries, as well as occupational diseases.⁹¹ However, the compensation framework under the Act applies only to ‘employees’, sustaining such injuries or occupational diseases in the course of *employment*.⁹²

The Payment of Gratuity Act, 1972, which provides for payment of gratuity upon cessation of employment to employees completing “*continuous service*”,⁹³ again provides social security benefits, to individuals who are “*employees*”.⁹⁴

Thus, major central social security laws in India mostly apply to ‘employees’, covered under the ambit of ‘*traditional*’ employment relationships. A detailed table, showing the applicability of the above-mentioned social security laws at the Central level, is given in the **Annexure**.

With the emergence of newer forms of work, the laws indicated above seem to exclude from their ambit individuals such as gig workers, who do not fall within the confines of the traditional employment relationship. This implies that gig workers, in India, may not ordinarily fall within the purview of legislation-mandated social security schemes.

⁹⁰ibid.

⁹¹Employees’ Compensation Act 1923, s 3.

⁹²ibid, s 2 (1) (dd), s 3. The ESI Act bars insured persons from recovering any compensation or damages under the Employees’ Compensation Act, 1923 or any other law or otherwise, in respect of an employment injury sustained by the insured person as an employee under the ESI Act. *See*, ESI Act, s 53.

⁹³Payment of Gratuity Act 1972, s 2A (for the definition of continuous service).

⁹⁴ibid, s 2 (e), s 4.

A potential explanation for this could be that these laws belong to a different era, where traditional employment relationships were the norm, which perhaps explains the singular focus of these laws on ‘*employee*’ status, being the entry point for accessing social security benefits.

This, then, points to the need to perhaps start thinking of how, if at all, such existing laws can cater to emerging forms of work, including work in the gig economy.

Social Security legislation meant for the unorganised sector too had limited success. The Unorganised Workers’ Social Security Act, 2008 (“**UWSSA**”) was one of the first legislative attempts to provide social security to unorganised workers in India. The UWSSA, however, will stand repealed when the Code comes into force.⁹⁵

The UWSSA deals with providing social security benefits to “*unorganised workers*”. This is to be achieved by framing of welfare schemes, both by the Central and State Governments.⁹⁶ It further provides for registration of unorganised workers having completed fourteen years of age, subject to a self-declaration process.⁹⁷ Eligibility under the UWSSA, however, depends upon workers themselves making social security contributions.⁹⁸

Despite its laudable objectives, the UWSSA has had a chequered history. Commentators point out that despite its promise, the UWSSA has a number of flaws. Foremost among these flaws is the absence of a universal or uniform social security entitlements, continuation of existing schemes and policies without rationalising *inter-se* differentials, no roadmap for implementation, as well as the lack of a

⁹⁵Code on Social Security 2020, s 164 (1).

⁹⁶Unorganised Workers’ Social Security Act 2008, s 3.

⁹⁷*ibid* s 10.

⁹⁸*ibid* s 10(4).

dedicated financing mechanism.⁹⁹ Additionally, only a few states have enacted rules under the UWSSA,¹⁰⁰ hindering implementation and leaving open the question of the legislation's overall success in achieving its objectives.

Additionally, the ESI Act does not directly provide unemployment insurance. However, an unemployment allowance scheme, the *Rajiv Gandhi Shramik Kalyan Yojana* (“**RGSKY**”) was introduced in 2005, pursuant to its provisions.¹⁰¹ The scheme provides for unemployment allowance payments for loss of employment in specified situations.¹⁰² The RGSKY does not cover individuals who are not employed, hence, its application to gig workers who are outside the confines of the traditional employment relationship does not arise.

The ESI administers the *Atal Beemit Vyakti Kalyan Yojana* (“**ABVKY**”), which provides unemployment benefits as cash compensation to unemployed persons. The ABVKY targets employees already covered under Section 2(9) of the ESI Act.¹⁰³ Introduced in July 2018 for an initial period of two years, the ABVKY was initially extended till June 2021; subsequently, it was extended till June 2022.¹⁰⁴ However, the ABVKY again ultimately applies to insured persons in ‘*insurable employments*’; therefore, its applicability to gig workers is moot.

⁹⁹K.B. Saxena, ‘The Unorganised Sector Workers’ Social Security Act, 2008: A commentary’ (2009) 39(2) *Social Change* 281, 291.

¹⁰⁰Himanshu Upadhyay, ‘The Missing National Social Security Funds for India’s Unorganised Sector Workers’ (*The Wire*, 28 May 2020) <<https://thewire.in/labour/national-social-security-fund-unorganised-workers>> accessed 31 March 2021.

¹⁰¹Government of West Bengal, ‘RGSKY’ (*Unemployment Allowance, Scheme*) <https://www.esiwb.gov.in/main/home/rgsky_allowance> accessed 31 March, 2021.

¹⁰²*ibid.*

¹⁰³Employees’ State Insurance Corporation, ‘Atal Beemit Vyakti Kalyan Yojana’ <<https://www.esic.nic.in/abvky>> accessed 31 March 2021.

¹⁰⁴Employees’ State Insurance Corporation, ‘Notification dated 11th August 2021’ <<https://egazette.nic.in/WriteReadData/2021/229001.pdf>> accessed 15 November 2021.

Having said this, what may possibly prove to be a game-changer, in respect of the non-applicability of existing social security legislations to the gig workforce is the IFAT Petition. Reportedly, the IFAT Petition has not only claimed the status of “*unorganised workers*” under the UWSSA for gig workers, but also the hitherto elusive “*employment status*” between gig workers and platforms, *in fact*.¹⁰⁵ While it is still early days and the petition is still pending, the outcome of the IFAT Petition is critical for the issues that have been highlighted, and should be closely observed.

B. Providing A Framework for Extending Social Security To Gig Workers: The Code On Social Security, 2020

i. The Passage of The Code

The passage of the Code in September 2020 represents the culmination of substantial efforts directed at overhauling social security legislation, which was initiated by the Report of the Second National Commission on Labour (2002).¹⁰⁶ In view of existing social security laws being scattered with varied applicability, the integration of schemes and universalization of coverage was recommended.¹⁰⁷ This set the context for introducing an earlier version of the Code, namely, the Code on Social Security, 2019 (“**Bill**”) in the Lok Sabha in December 2019.¹⁰⁸ The Bill was referred to the Parliamentary Standing Committee on Labour (“**Committee**”), which submitted its report in July 2020. The Code was introduced and passed in Parliament in September 2020 and received Presidential assent in the

¹⁰⁵Soumyarendra Barik, ‘Plea in SC seeks social security benefits for Ola, Uber, Swiggy, Zomato workers’ (*Entrackr*, 22 September 2021) <<https://entrackr.com/2021/09/plea-in-sc-seeks-social-security-benefits-for-ola-uber-swiggy-zomato-workers/>> accessed 19 November 2021.

¹⁰⁶PRS Legislative Research, ‘The Code on Social Security, 2019’ (PRS Legislative Research) <<https://prsindia.org/billtrack/the-code-on-social-security-2019>> accessed 7 January 2022.

¹⁰⁷*ibid.*

¹⁰⁸*ibid.*

same month. As on date, the Code has not yet been operationalized (barring the provision relating to identification of workers and other beneficiaries through their Aadhaar number).

ii. The Committee's Observations on The Code

The Code, post introduction in the Lok Sabha, was referred to the Committee for examination, in December 2019. After thorough examination and with stakeholder inputs, the Report of the Committee¹⁰⁹ (“**Report**”) was finalised in July 2020. While the Code was passed subsequently, in September 2020, it is appropriate to note some of the Committee’s broad observations and concerns regarding providing social security for gig workers.

The Committee noted that provisions specific to gig work were drafted keeping flexibility in mind, especially since they were nascent. However, the Committee did point out the lack of clarity on the status of gig workers owing to their possessing characteristics of *both* organised and unorganised workers, which was important in order to extend social security to such workers.¹¹⁰

The Committee observed that the definition of “*gig worker*” under the Code required narrowing, and made unambiguous.¹¹¹ On a related note, the Committee also recommended the making of provisions to accommodate emerging forms of labour market activities which would conform to future work models, such as for platform work.¹¹²

iii. Recognition of the Gig Economy under the Code

The Code, for the first time, recognizes, by ‘*defining*’, many concepts associated with the gig economy.¹¹³ These concepts include

¹⁰⁹Ministry of Labour and Employment, *The Code on Social Security, 2019* (Standing Committee on Labour (2019-20) of the Seventeenth Lok Sabha, July 2020).

¹¹⁰ibid paras 4.50, 4.51.

¹¹¹ibid paras 4.50, 4.51.

¹¹²ibid para 4.51.

¹¹³Code on Social Security 2020, s 2.

“aggregator”, “gig work”, “gig worker”, “platform work”, and “platform worker”.¹¹⁴

A gig worker, under the Code, performs works and earns outside the confines of a traditional employment relationship.¹¹⁵ The Code also defines “platform work”, to refer specifically to a subset of non-traditional work arrangements, conducted with the assistance of online platforms.¹¹⁶ The Code further, defines “social security”.¹¹⁷ It views “social security” in a fairly comprehensive manner, comprising protections such as access to healthcare, and income security, conferred on *inter alia* gig workers, envisioned as being operationalised by subsequent schemes framed under the Code itself.¹¹⁸

Given that gig workers, as envisaged under the Code, are engaged in non-traditional work arrangements, questions on provision of social security to such workers assume importance. While the Code concentrates social security measures available for gig workers in Chapter IX, it is interesting to note that gig workers, under the Code, are ineligible at the first instance, for inclusion in established social security schemes such as the Employees’ Provident Fund Scheme (EPF) or the Employees’ Pension Scheme (EPS).¹¹⁹ Rather, they may only form part of *subsequent* social security schemes. They also are ineligible for insurance as employees, for the purposes of Employees State Insurance (ESI) benefits.¹²⁰ This implies that gig workers may be *ordinarily* ineligible for social security benefits (in the nature of

¹¹⁴Soumya Jha & Ulka Bhattacharyya, ‘India’s labour law reforms a threat to gig workers: Extending social security benefits need of hour’ (*The Financial Express*, 19 May 2020) <<https://www.financialexpress.com/economy/indias-labour-law-reforms-a-threat-to-gig-workers-extending-social-security-benefits-need-of-hour/1963533/>> accessed 19 November 2021.

¹¹⁵Code on Social Security 2020, s 2(35).

¹¹⁶*ibid* s 2(60).

¹¹⁷*ibid* s 2(78).

¹¹⁸*ibid* s 2(78).

¹¹⁹*ibid* s 15 (1)(a), (b) and (c).

¹²⁰*ibid* s 28.

sickness benefit, maternity benefit and disablement benefit), as the Code extends these benefits only in respect of “*insured persons*” and their families.¹²¹ The Code enables notifying schemes for gig workers, for providing such workers and their families benefits admissible by the Employees’ State Insurance Corporation (“**ESIC**”); however, salient features of any such schemes have been left for future notification. This is a noteworthy development, as ESI benefits until now, have been admissible only to employees.¹²²

iv. Chapter IX Of The Code and Social Security For Gig Workers

Chapter IX of the Code sets out the structure envisaged for providing social security to gig workers. Given that individuals engaged in gig work have traditionally been excluded from conventional social security, Chapter IX could be regarded as a blueprint for providing gig workers with some semblance of social security.

The primary provision of the Code regarding gig workers states that the Central Government *may* frame suitable schemes for providing such individuals with social security.¹²³ A list of indicative matters which such *proposed* scheme may relate to is provided, along with implementational details (which will be set out subsequently). The National Social Security Board under the Code is tasked with implementing welfare provisions for gig and platform workers.¹²⁴ Amongst other benefits, such schemes may provide for life and disability cover, accident insurance and health benefits. Certain details concerning implementation of such schemes, and which are critical, including the proposed schemes’ administration, funding and role of aggregators, have been left for future notification.

¹²¹*ibid* s 32.

¹²²Employee State Insurance Act 1948, s 1(4).

¹²³Code on Social Security 2020, s 114.

¹²⁴*ibid* s 114 (6) (prescribing the composition of the National Social Security Board as it specifically relates to gig workers and platform workers).

The Code provides that both the Central and State Governments will *subsequently* frame and notify welfare schemes for unorganised workers dealing with social security.¹²⁵ Such schemes may cover different aspects of social security including life and disability cover, provident fund, old age protection and employment injury benefits.¹²⁶ Neither have particulars of funding, nor have implementational details been specifically spelt out. However, it has been provided that funds from various sources (including those earmarked for discharging corporate social responsibility obligations under the Companies Act, 2013) may be channelized, for implementing such schemes.

The Code also leaves open the possibility of aggregators contributing to the funding of such schemes. Such contributions may potentially range anywhere between 1-2% of annual turnover for certain aggregators listed under the Seventh Schedule, subject to a maximum of five percent of the amount payable by aggregators to gig workers and platform workers.¹²⁷ The Central Government has been empowered to exempt certain aggregators from paying contributions, by future notification.¹²⁸

The Central Government, under the Code, may subsequently prescribe modalities of implementation, such as the authority to collect and spend contributions and the self-assessment of contributions by aggregators.¹²⁹

v. *Understanding the Rules Under the Code*

The Ministry of Labour and Employment published the Rules soliciting public comments, in November 2020. While the Rules will

¹²⁵: *ibid* s 109, 110.

¹²⁶: *ibid*.

¹²⁷: *ibid* s 110 (4).

¹²⁸: *ibid* s 114(7)(ii).

¹²⁹: *ibid* s 114(7)(ii).

likely evolve till the time of their finalisation, it is important to broadly take stock of what they propose.¹³⁰

First, the Rules which set out the composition of the National Social Security Board for Gig Workers and Unorganised Workers, allow for the appointment of members on a rotational basis, as well as appointing a potential expert committee on issues concerning gig workers and platform workers.¹³¹

Second, the Rules envisage the registration of eligible gig workers and platform workers through an Aadhaar-based self-declaration system on a specific Government portal. Aggregators are required to share details of gig workers and platform workers electronically, in order to generate a “*Unique Registration Number*”, and each worker is also required to authenticate themselves through Aadhaar. Aggregators are also required to link their databases with such registration numbers, to facilitate registration. Gig workers, between the ages of sixteen to sixty years, and not working for less than ninety days (in the preceding twelve months) need to be registered with Aadhaar, on self-declaration basis, in the portal, as specified by the Central Government.¹³²

Third, gig workers and platform workers are required to be registered in order to avail and continue getting benefits under any social

¹³⁰Dr KR Shyam Sundar, ‘Social Security Code Draft Rules, 2020: Is it Inclusive and Representative: Part I’ (*The Leaflet*, 22 November 2020) <<https://www.theleaflet.in/social-security-code-draft-rules-2020-is-it-inclusive-and-representative/#>> accessed 31 March 2021; Dr KR Shyam Sundar, ‘Social Security Code Limits Workers Access to Benefits Through Bureaucracy-Raj: Part 2’ (*The Leaflet*, 23 November 2020) <<https://www.theleaflet.in/social-security-code-limits-workers-access-to-benefits-through-bureaucracy-raj/>> accessed 31 March 2021.

¹³¹Social Security (Central) Rules 2020, r 50(2).

¹³²*ibid* r 50 (2).

security schemes framed under the Code. Eligibility conditions (to avail benefits), will be specified at a subsequent date.¹³³

Fourth, a self-assessment mechanism has been specified, to enable aggregators to assess and pay contributions due under Section 114(4) of the Code, both provisionally and in final form.¹³⁴

Finally, the Rules provide guidance on the manner in which the proposed Social Security Fund will operate. Tentatively, it has been proposed that this Fund will be administered by a designated agency, subject to the directions of the Central Government.¹³⁵

C. *The Role of Aggregators*

A critical question surrounding the gig work debate concerns the role of aggregators in determining social security for gig workers. Traditionally, the onus of contributing to workers' social security lies with the government, employer, and/or the workers themselves. Aggregators fall outside this traditional *government-employer-worker* realm. The logic behind this emanates from their business model- the creation and delivery of value by "*facilitating*"¹³⁶ buying and selling of goods and services or other interactions, between market participants, and in return, collecting a transaction fee. Aggregators, therefore, consider themselves as providers of a '*platform*' connecting service providers (in this case, gig/platform workers), with consumers.

It is this very logic that has been challenged globally by gig and platform workers who argue that their relationship with aggregators is not merely that of '*facilitation*', but also that of '*control*'. For instance, the first test under the ABC test of America's Dynamex

¹³³ibid r 50 (2).

¹³⁴ibid r 51 (3).

¹³⁵ibid r 141.

¹³⁶Michael A. Cusumano & others, *The Business of Platforms: Strategy in the Age of Digital Competition, Innovation and Power* (Harper Business, 7 May 2019) 20.

judgment¹³⁷ to determine the employment status of workers requires the hirer to establish that “*the worker is free from the control and direction of the hirer in connection with the performance of the work...*” Similarly, in the Netherlands, the court has held the relationship between a popular taxi aggregator and its drivers as being that of an “*employment contract*” whereby a relationship of authority(subordination) exists”, thereby implying control.¹³⁸

The IFAT petition also argues that an employer-employee relationship exists between gig workers and aggregators owing to app companies exercising supervision and control over gig workers.¹³⁹

i. Voluntary Initiatives by Aggregators In India

Prior to the Code and the Rules, there was not much by way of mandated social security benefits for gig workers in the Indian context. As has been previously discussed, the less-than-ideal implementation of the UWSSA also implies that the Code and the Rules represent the first meaningful step in extending social security to gig workers.

However, certain initiatives for gig workers, though *ad-hoc*, have been adopted by some aggregators, at their own behest. For instance, the food delivery app *Swiggy* claims to provide benefits like accident

¹³⁷*Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, [2018] LA County, Ct. App. 2/7 B249546, Super Ct. No. BC332016 <<https://cases.justia.com/california/supreme-court/2018-s222732.pdf?ts=1525107724>> accessed 1 September 2020.

¹³⁸Jenny Gesley, ‘Netherlands: Amsterdam District Court Classifies Uber Drivers as Employees’ (2021) Library of Congress <<https://www.loc.gov/item/global-legal-monitor/2021-09-29/netherlands-amsterdam-district-court-classifies-uber-drivers-as-employees/>> accessed 15 November 2021.

¹³⁹See ‘FPJ Legal: ‘Gig Workers’ approach Supreme Court, seek social security benefits from Zomato, Swiggy, Ola, Uber’ (*The Free Press Journal*, 21 September 2021) <<https://www.freepressjournal.in/india/fpj-legal-gig-workers-approach-supreme-court-seek-social-security-benefits-from-zomato-swiggy-ola-uber>> accessed 16 November 2021.

and medical insurance.¹⁴⁰ Further, *Ola*, the ride-hailing platform, provides an in-trip insurance program for its driver partners, and their families.¹⁴¹

A recent study examined and rated working conditions on eleven Indian platforms.¹⁴² It revealed that most platforms offer accident insurance, safety gear and safety training to workers. However, only two platforms¹⁴³ demonstrated sufficient evidence of taking active steps to improve conditions of workers, by providing health insurance to “*top-performers*”, and career progression programs for the delivery workforce.

More recently, in response to the economic upheaval caused by the pandemic, aggregators ranging from food delivery¹⁴⁴ to ride-hailing services have taken definitive steps towards providing financial and medical assistance to gig workers. For instance, *Ola*, apart from setting up the ‘Drive the Driver’ fund to assist drivers and their families across platforms with access to necessary resources, also announced that it would cover loss of income for driver-partners and their spouses in case they tested positive for Covid-19. Such measures, however, have been taken by a select few aggregators towards protection of their “*delivery*” or “*driver partners*”. Further,

¹⁴⁰‘Benefits of being a Swiggy Pick-up and Delivery Partner’ (*Swiggy*) <<https://ride.swiggy.com/en/tiny-start-up-to-number-one-swiggys-growth-story-1>> accessed 6 September 2020.

¹⁴¹*Ola* rolls out ‘Chalo Befikar’ comprehensive insurance program for its driver partners’ (*Ola*, 15 December 2017) <<https://www.olacabs.com/media/in/press/ola-rolls-out-chalo-befikar-comprehensive-insurance-program-for-its-driver-partners>> accessed 6 September 2020.

¹⁴²Balaji Parthasarathy & others, ‘Fairwork India Ratings 2020: Labour Standards in the Platform Economy’ (*Fairwork India*, 15 December 2020) <https://fair.work/wp-content/uploads/sites/131/2020/12/Fairwork_India_2020_report.pdf> accessed 6 September 2020.

¹⁴³Urban Company and Flipkart.

¹⁴⁴*Zomato*, a food delivery app, proposed to set up a relief fund and COVID insurance plan for its food delivery partners.

these measures have been voluntary, and in response to and for the duration of the pandemic.

Crucially, therefore, a legal liability has not been imposed on these aggregators, towards taking such measures. The advent of the Code, however, may change this. The IFAT petition, too, puts forth clear demands to be met by aggregators. For instance, it requires that aggregators comply with the Motor Vehicle Aggregator Guidelines, 2020, which would legally entitle gig workers to minimum health insurance cover, fixed working hours, a grievance redressal centre and right to minimum wages.¹⁴⁵

ii. Establishment Of The Social Security Fund & The Hybrid Model

As discussed, the Code may require aggregators to contribute¹⁴⁶ towards welfare of unorganized, gig and platform workers. This contribution is said to be equivalent to 1% of the revenue of these aggregators.¹⁴⁷ Most recently, various aggregators have reportedly committed about Rs. 500 crores as contribution to the Code's Social Security Fund.¹⁴⁸

The proposed establishment of the Social Security Fund may be considered as a step towards achieving a *hybrid model* of social security, specifically for gig workers, and independent of social security benefits “employees” are entitled to. The Social Security Fund model, therefore, may successfully explore middle ground to ensure protections for gig workers, while allowing them to retain their ‘*independent worker*’ status. At the same time, it may be prudent for

¹⁴⁵Bandyopadhyay (n 70).

¹⁴⁶Code of Social Security 2020, s 114(4).

¹⁴⁷ibid s 141(1)(ii).

¹⁴⁸Yogima Seth Sharma, ‘Cover for gig workers: Amazon, others pledge Rs. 500 crores to proposed Social Security Fund’ (*The Economic Times*, 26 February 2021) <<https://economictimes.indiatimes.com/news/economy/policy/cover-for-gigworkers-amazon-others-pledge-rs500-crore-to-proposed-social-security-fund/articleshow/80741309.cms?from=mdr>> accessed 1 March 2021.

India to be warned of the unfolding of Prop22 and the constitutional challenges it has come to face, in order to predict issues that may potentially arise at the time of the implementation of the Code, and the Social Security Fund, thereof.

**V. SCOPE FOR IMPROVEMENT: THE GAPS IN THE CODE
AND THE RULES’ IN ITS PROPOSAL TO EXTEND
SOCIAL SECURITY TO GIG WORKERS**

Previously, the framework sought to be provided via the Code and the Rules, for extending social security to gig workers has been discussed. In this Chapter, certain gaps in the Code and the Rules are highlighted, drawing upon discussions in previous chapters.

A. Gig Work Has Not Been Defined Sufficiently

One of the most enduring themes of confusion is the Code defining “*gig work*” broadly, as work falling outside the confines of traditional employment relationship. While the motive behind this may have been to create a sufficiently *flexible* definition, it is likely that the lack of legislative guidance may lead to confusion in terms of implementation, causing potential litigation.

This issue is all the more real, because even globally, litigation surrounding gig work has been pervasive. Adding to the discussion in **Chapter II**, as recently as in February 2021, the Supreme Court of the UK has held that drivers engaged with a prominent ride-hailing platform were “*workers*”.¹⁴⁹ While this is a highly significant verdict for both gig workers and the larger gig economy, the implications of this verdict are already the subject of intensive discussion in the

¹⁴⁹*Uber BV and others v Aslam and others*, [2021] UKSC 5 (Decision of 19 February 2021).

UK.¹⁵⁰ This development comes at the same time when the EU has commenced first-stage consultations on improving working conditions for people working on digital labour platforms, which will possibly culminate in legislation by the end of 2021.¹⁵¹

Therefore, given the global momentum on regulating gig work and the gig economy, and especially in light of the challenges brought about by the pandemic, it seems inevitable that the lack of guidance provided in the Code contains potential for significant litigation, especially once the Code is implemented and the Rules finalised.

*B. Discrepancy In Proposing Social Security Schemes For
Unorganized, Gig And Platform Workers*

There appears to be a conspicuous discrepancy in the manner of laying down “*social security schemes*” for unorganized workers on the one hand, and gig and platform workers, on the other.

While both the Central and State Governments are *mandated* to frame and notify suitable welfare schemes for unorganized workers,¹⁵² only the Central Government ‘*may*’ (recommendatory, implying discretion),¹⁵³ frame and notify suitable social security schemes for

¹⁵⁰John Naughton, ‘Uber’s UK supreme court defeat should mean big changes to the gig economy’ (*The Guardian*, February 27, 2021) <<https://www.theguardian.com/commentisfree/2021/feb/27/ubers-uk-supreme-court-defeat-should-mean-big-changes-to-the-gig-economy>> accessed 31 March 2021.

¹⁵¹European Commission, *Protecting people working through platforms: Commission launches a first-stage consultation of the social partners* (Press Release, 24 February 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_686> accessed 31 March 2021.

¹⁵²Code of Social Security 2020, s 109 (1), (2).

¹⁵³Justice G.P. Singh, *Principles of Statutory Interpretation* (13th edn, LexisNexis Butterworths 2012) 519. In *Brahampal @ Sammay and Anr. v. National Insurance Company*, (2021) 6 SCC 512, the court observed that “*may*” is not a term of compulsion, but only confers capacity, power or authority and implies *discretion*. Further, in *Official Liquidator v. Dharti Dhan (P.) Ltd.*, (1977) 2 SCC 166, it was

gig and platform workers.¹⁵⁴ This point is especially pertinent as the use of the term “*shall*” when referring to provisions for unorganized workers, while using the term “*may*” to refer to gig workers and platform workers, in the law, is telling. As judicially held,¹⁵⁵ the use of “*may*” and “*shall*” in different clauses or sentences of the same section or paragraph of a statute evidences legislative intention that each of the words is to be given its ordinary meaning.

Further, the Code leaves gig and platform workers outside the purview of certain additional schemes¹⁵⁶ that are accessible only to unorganized workers.¹⁵⁷ The Code remains silent about creating this distinction in access to social security benefits between the two sets of workers (unorganised workers on the one hand, and gig and platform workers on the other), both of which are *effectively predicated upon the concept of non-formal work*.

The legislature has demonstrated its intention of encompassing gig workers and platform workers within the broader category of unorganized workers by placing social security provisions for all three categories of workers in the same Chapter, namely Chapter IX of the Code, and by establishing a common National Social Security Board,¹⁵⁸ for all three categories of workers. Given the thin lines¹⁵⁹ separating these categories of work, accessibility and implementation of social security schemes separately for each category of workers, may be challenging. Consequently, dangers of misclassification, arbitrage and confusion at the time of implementation may arise. A

observed that it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the done of the power.

¹⁵⁴Code of Social Security 2020, s 114.

¹⁵⁵*Reynolds v. Board of Education, Union Free School of District of City of Little Falls*, 33 App Div 88, 53 NYS 75.

¹⁵⁶Code of Social Security 2020, s 114(1).

¹⁵⁷*ibid* s 109(1).

¹⁵⁸*ibid* s 6, s 114(6).

¹⁵⁹*ibid* ss. 2(35), 2(61), 2(86).

similar view has been expressed in the Report,¹⁶⁰ where the Code's definition of "*unorganised worker*" has been referred to as "*complex*".¹⁶¹ The Report further observes that the scope of "*unorganised workers*" should be expanded to include "*gig workers*" and "*platform workers*".¹⁶²

C. Possible Implementational Challenges

Though the magnitude of the task of extending social security benefits to the gig workforce is massive, and possibly requires deliberation and specification by subsequent notification, this has the potential to create certain challenges. Till implementational guidance in this nascent area is firmed up, there is the possibility of confusion being created, in the short run. For instance, the Motor Vehicle Aggregator Guidelines, 2020 require motor vehicle aggregators to provide health insurance and term insurance to drivers.¹⁶³ This has seen differing opinions being expressed on whether there will be a duplication of costs for aggregators insofar as providing social security for gig workers is concerned,¹⁶⁴ exemplifying one of the many potential implementational challenges which may arise.

D. Exemption Of Aggregators

The Code grants discretionary powers to the Central Government to exempt aggregators,¹⁶⁵ or classes of aggregators, from contributing to the proposed Social Security Fund on conditions "*to be specified as per notification*". On this, clear criteria based on which such

¹⁶⁰Report (n 110).

¹⁶¹Report (n 110) para 4.68.

¹⁶²Report (n 110) para 4.71.

¹⁶³Motor Vehicle Aggregator Guidelines 2020, para 7.2.

¹⁶⁴Shreeja Singh, 'Could govt's social security measures lead to duplication of costs for aggregators? Here's what experts think' (*Money Control*, 13 February 2021) <<https://www.moneycontrol.com/news/business/could-govts-social-securitymeasures-lead-to-duplication-of-costs-for-aggregators-heres-what-experts-think-6505271.html>> accessed 31 March 2021.

¹⁶⁵Code of Social Security 2020, s 114(7)(ii).

notification may be issued have been sought to determine the applicability of this exemption.¹⁶⁶

Providing clarity in the law, or the corresponding Rules on the nature and duration of such an exemption may be prudent in the interest of both aggregators and gig workers, giving both parties the opportunity to plan ahead. For instance, the EPF Act, subject to certain conditions,¹⁶⁷ exempts those employees from provisions of the EPF Scheme who are already entitled to social security benefits at their establishment, provided that such benefits are in no way less favourable than those offered by the EPF scheme.¹⁶⁸ Providing a thumb-rule of this nature in the text of the law itself ensures a common, base standard for all to follow.

E. Interpretation Of “Annual Turn-Over”

As discussed previously, aggregators are required to contribute between 1-2% of their “*annual turn-over*” to the Social Security Fund.¹⁶⁹ The term “*annual turn-over*” is vague, and clarity on the same has been sought¹⁷⁰ from the Ministry of Labour and Employment, by aggregators.

¹⁶⁶Shishir Rao, ‘App-based gig-workers write to the Labour Ministry, express concerns on Social Security Code’ (*The News Minute*, 23 December 2021) <<https://www.thenewsminute.com/article/app-based-gig-workers-write-labour-ministry-express-concerns-social-security-code-140175>> accessed 13 March 2021; ‘Inputs to the public consultation on the draft Code on Social Security (Central) Rules, 2020 - Joint submission by an alliance of trade unions and Civil Society Organisations’ (*The Centre for Internet and Society*, 22 December 2020) <<https://itforchange.net/sites/default/files/add/Joint-Submission-tothe-Ministry-of-Labour-and-Employment-on-the-Code-on-Social-Security-Central-Rules-2020.pdf>> accessed 13 March 2021.

¹⁶⁷The Employees’ Provident Funds Scheme 1952, paras 27-27AA.

¹⁶⁸Employees’ Provident Funds Act 1952, s 17.

¹⁶⁹Code of Social Security 2020, s 141.

¹⁷⁰Harshit Rakheja, ‘Flipkart, Amazon, Ola, Uber and others seek clarity on Social Security Contribution for Gig Workers’ (*Inc42*, 5 January 2021) <<https://inc42.com/buzz/companies-seek-clarity-on-turnover-for-aiding-gig-workers-scheme/>> accessed 10 January 2022.

F. Clarity On Establishing Call Centres And Facilitation Centres

The Code provides that the appropriate government “*may*” set up toll free call centres and facilitation centres, for information dissemination and registration, to assist unorganised workers, gig workers and platform workers.¹⁷¹ At the same time, unorganised workers, gig workers and platform workers *shall* self-register to be ‘*eligible*’ to avail social security schemes under the Code.¹⁷² Further, under the Rules, a gig or platform worker may *lose eligibility* for social security benefits notified, if their particulars are not updated from time to time on the online portal specified by the Central Government.¹⁷³

As discussed, the term “*may*” implies discretion, an interpretation based on which the appropriate government may not be *mandated* to set up toll free call centres and facilitation centres. It may be argued that the “*purpose of the power*”,¹⁷⁴ conferred upon the appropriate government under the Code is to facilitate social security measures for gig workers, and therefore “*may*” may be interpreted purposively. It may also however be argued,¹⁷⁵ that the choice of words creates distinctions between terms of command and those of authorization, and if such words are carefully chosen,¹⁷⁶ it is reasonable to infer that the legislative intent is for “*may*” to mean may and “*shall*” to mean shall.

Given that gig workers and platform workers risk losing eligibility for social security benefits for the compliance of online updation of particulars,¹⁷⁷ a task for which most such workers would require technical assistance, it may be prudent to provide clarity in language

¹⁷¹Code of Social Security 2020, s 112.

¹⁷²*ibid* s 113.

¹⁷³Social Security (Central) Rules 2020, r 50(2)(h).

¹⁷⁴*Official Liquidator v. Dharti Dhan (P.) Ltd.*, (1977) 2 SCC 166.

¹⁷⁵N.S. Bindra, ‘*Interpretation of Statutes*’ (9th edn, LexisNexis Butterworths 2002) 389.

¹⁷⁶As may be demonstrated by a joint reading of Code, s 112 and s 113.

¹⁷⁷Social Security (Central) Rules 2020, r 50(2)(h).

regarding the power wielded by the appropriate government, in this case, the power of setting up toll free call centres and facilitation centres.

In a country where digital literacy is almost non-existent for a significant percentage of its population,¹⁷⁸ clarity around the setting up of fully functional toll-free call-centres, helplines and facilitation centres, should be provided.

G. Providing Registration-Related Assistance to Aggregators and Gig Workers

The Code and the Rules envisage substantial registration-related obligations on part of aggregators and gig workers. This is critical not only because of magnitude, but also because *sans* registration, gig workers are ineligible to receive benefits under the Code and the Rules.

The Rules require that gig workers register with Aadhaar through self-declaration, on a portal to be specified by the Central Government.¹⁷⁹ Aggregators must share periodical information relating to gig workers (to generate registration numbers), as well as link their databases to such numbers (to facilitate gig workers and platform workers being registered).¹⁸⁰ Further, the Rules indicate that gig workers are to be registered in a manner similar to unorganised workers,¹⁸¹ where there is a direct obligation on aggregators to register unorganised workers, in turn.¹⁸²

¹⁷⁸Venugopal Mothkoo & Fatima Mumtaz, 'The digital dream: Upskilling India for the future', (*Ideas for India*, 23 March 2021) <<https://www.ideasforindia.in/topics/governance/the-digital-dream-upskilling-india-for-the-future.html>> accessed 10 January 2022.

¹⁷⁹Social Security (Central) Rules, r 51(2)(a).

¹⁸⁰*ibid* r 50(2)(b), 50(2)(c).

¹⁸¹*ibid* r 50(2)(e).

¹⁸²*ibid* r 50(1)(j).

While the Rules, in their current form, envisage substantial registration-related obligations, neither the Code, nor the Rules appoint or specify a designated authority to comprehensively oversee and assist both gig workers and aggregators. This is important especially because the technology-dependent nature of the registration process, may prove challenging for gig workers, to navigate.

A possible solution to this, is that the Central Government may consider expanding the scope of authority of the officer or agency which collects and expends aggregator contributions, under Rule 51,¹⁸³ by specifically tasking it with assisting gig workers and aggregators during registration. It should be noted here that this will be different in scope from proposed toll-free call centres provided for under Section 112,¹⁸⁴ which envisages *remote* assistance for gig workers, including during the registration process.

This solution is inspired from Malaysia,¹⁸⁵ where specially appointed “*social security agents*” assist in collecting contributions from self-employed individuals. However, since the Code is based on aggregators contributing towards social security (unlike Malaysia), tweaking the model *via* expanding the scope of duties of the Officer or agency under Rule 51, may be an option worth considering. Consequently, *direct* assistance under Rule 51, combined with *remote* assistance under Section 112, will bridge the gap between the Code’s intent to broad-base social security to gig workers *vis-à-vis* its impact.

H. The Absence Of Universal Social Security Remains A Problem

The rise of the gig economy while allowing individuals flexibility and choice, has simultaneously seen rise in debates about social security, primarily because social security still remains intimately tied to employment status. This poses a conundrum because gig workers may

¹⁸³ibid, r 51.

¹⁸⁴Code of Social Security 2020, s 112.

¹⁸⁵The Self-Employment Social Security Act 2017 (Malaysia), s 12.

be hindered from fully participating in the flexibilities afforded by gig economy, because of their status as non-traditional workers.

While the Code attempts to compensate for the absence of social security for gig workers by putting the responsibility on aggregators to contribute, it does not answer more fundamental questions regarding State's duty to provide universal social security, including unemployment insurance, to all individuals. This question assumes importance, especially in the Indian context, because India has neither ratified the ILO Social Security Convention, nor the ILO Social Protection Floors Recommendation.¹⁸⁶ Both these instruments symbolize minimum global standards on social security and oblige States to provide minimum standards of social security.

Social security is ultimately an investment in people, empowering them to adjust to changes in the economy, and in the labour market, functioning as economic and social stabilizers.¹⁸⁷ This implies that providing universal social security should feature high on the list of any State, especially in light of the perceptible global shift towards gig work. Universal social security, if provided, can therefore incentivise individuals to access the flexibility and choice afforded by opportunities in the gig economy. In India, the eventual realisation of universal social security can serve as an enabling force to allow more individuals to participate in the burgeoning gig workforce, without having to forego traditional employment-status linked social security benefits.

¹⁸⁶International Labour Organisation, Social Security (Minimum Standards) Convention, 1952 (No. 102); International Labour Organisation, Social Protection Floors Recommendation, 2012 (No. 202).

¹⁸⁷International Labour Organisation, ILO Social Protection Floors Recommendation (2012), Preamble.

VI. CONCLUSION

The ongoing pandemic has accelerated the uptake of gig work in a major way. Gig work has emerged as a significant aspect of working for many individuals not just globally, but also in India. *Per* recent estimates, in the Indian context, as many as 24 million jobs may be created via the growth of the gig economy, in the next three to four years.¹⁸⁸ While the capacity of the gig economy to offer individual choice, flexibility and the benefits of large-scale job creation¹⁸⁹ cannot be denied, the flexibilities which the gig economy provides may face hurdles, owing to the unique status of gig workers falling outside traditional employment relationship.

Social security can help enhance productivity, employability and worker and employer well-being. Given the strong stakes the gig economy is likely to possess in times to come, rise in debates about social security for gig workers specifically, has been seen. Since the traditional employment relationship has been the basis for providing social security thus far, new questions and perspectives on gig work, social security and the provision of social security to gig workers has occupied centre-stage in the present day. This, therefore, has led to ongoing debates which are likely to shape the future of gig work, globally. For instance, the American and European debates have primarily focused on the determination of employment status of the gig worker, and associated standards, tests and thresholds for such determination have been developed. Gig platforms, on the other hand, have made their presence felt by introducing concepts as in the case of Prop22 which has loosely created a third category of *hybrid* workers.

¹⁸⁸Prashant K. Nanda, 'India's gig workers may service 90 million jobs in next 8-10 years' (*Livemint*, 30 March 2021) <<https://www.livemint.com/news/india/gig-economy-may-service-90-mn-jobs-in-non-farm-sector-11617098463776.html>> accessed 31 March 2021.

¹⁸⁹*ibid.*

In India, gig workers have traditionally not been part of the formal workforce. Access to social security benefits has also been intimately tied to employment status. However, the pandemic and the national lockdown brought to fore benefits of the gig workforce, while at the same time demonstrating the urgent need to secure them a measure of social security. This is perhaps why the Code, enacted in September 2020, gives momentum to this by recognizing aspects associated with the gig economy, legislatively. Parallely, the outcome of the IFAT Petition, currently pending before the Supreme Court, will be critical to any deliberations surrounding social security for gig workers, in India, in the near future.

As this paper has discussed, while the intent behind the Code and Rules is laudable, there are certain gaps, which may lead to implementational challenges. However, the Rules are awaiting finalisation and the Code has not been implemented. This gives a critical window of opportunity to reflect on these challenges, which should be seized. Doing so will ultimately help in creating a sustainable social security framework for India's gig workforce in the long run, critical to the gig economy's sustainability in the long run.