INFORMALITY, PRECARITY, AND (MIS)CLASSIFICATION: REGULATING PLATFORM WORK IN INDIA

MALCOLM KATRAK

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Abstract

This thesis seeks to address the misclassification of location-based digital platform workers in India and examine the extent of protections that can be accorded to them within the framework of labour and constitutional rights. It firstly argues that the exclusion of platform workers from the purview of the formalistic labour law in India is not a novel phenomenon but, rather, is situated along a continuum of exclusionary regulatory practices dating back to the colonial era. Thereafter, the thesis examines the applicability of India's extant, and fragmented, labour law framework to platform workers. It then embarks upon an analysis of the newly enacted labour Codes, which are yet to come into force and have sought to harmonize and consolidate the existing legal framework, to examine whether the said Codes constitute an improvement concerning platform workers' rights. Lastly, it explores constitutional law as an alternative avenue for litigating platform workers' rights.

Dedication

To the labouring poor in India - *Mornië utúlië, Mornië alantië*

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List of Abbreviations

AITUC – All-India Trade Union Congress

BJP – Bhartiya Janta Party

CCI – Competition Commission of India

CLRA – Contract Labour (Regulation & Abolition) Act, 1970

CoW – Code on Wages, 2019

CSS – Code on Social Security, 2020

DCDU - Delhi Commercial Drivers Union

DLP - Digital Labour Platforms

DPSP – Directive Principles of State Policy

FNCL – First National Commission on Labour

IDA – Industrial Disputes Act, 1947

IFAT – Indian Federation of App-Based Transport Workers

ILO – International Labour Organization

ILP – Independent Labor Party

IMF – International Monetary Fund

IRC – Industrial Relations Code, 2019

Mathadi Act – Maharashtra Mathadi, Hamal and Other Manual Workers Act, 1969

NCEUS – National Commission for Enterprises in the Unorganised Sector

NITI Aayog – National Institute for Transforming India

OSHWCC – Occupational Safety, Health, and Working Conditions Code, 2019

PM Gandhi – Prime Minister Rajiv Gandhi

PM Modi – Prime Minister Narendra Modi

SCITU – Sponsoring Committee of Indian Trade Unions

SNCL – Second National Commission on Labour

TDA – Trade Disputes Act, 1929

UWSSA – Unorganised Workers' Social Security Act, 2008

I. Introduction

In the last couple of decades, a significant shift has occurred in how work is conducted.[1] One of the contributing factors to this is the rise of digital labour platforms (DLP), often referred to as "gig platforms", "sharing platforms", or "on-demand platforms".[2] Different terms are used to define the platform economy; the most used terms are the gig economy and the sharing economy.[3] Defining what digital platform work is arduous, as several academic scholars have given varying definitions. Therefore, Aloisi has claimed that platform work continues to be a "social dilemma" for workers, social partners, policymakers, and society.[4] For the purposes of this thesis, the author uses the neutral term "platform work", which has been defined as a form of employment in which a website or an application connects businesses or individuals who need certain tasks to be performed with those willing to do the work in exchange for payment.[5] Meanwhile, a digital platform can be considered an online entity that provides the infrastructure to match individuals or businesses to others.[6] According to Stanford, this can be divided broadly into two categories: one

[1] Uma Rani & Rishabh Dhir, "Platform work and the COVID-19 pandemic" (2020) 63 Indian J. Lab. Econ. 163, where the authors noted that the rise of digital platform business models started after the proliferation in the use of the internet in the 1990s.

[2] See, Eva Kocher, *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers*" (Hart, 1st edn, 2023) 15.

[3] Vida Česnuitytė et al, "The state and critical assessment of the sharing economy in Europe" in Vida Česnuitytė & others, eds, *The Sharing Economy in Europe: Developments, Practices, and Contradictions* (Palgrave Macmillan, 2022) 387, where the authors pointed out that the deceptive marketing tactic could also be described as 'sharewashing'. Considering this, Uber and Airbnb are more like traditional taxi services and rental agencies than true sharing economy firms. See also, Sebastian Olma, "Never mind the sharing economy: Here's platform capitalism" *Institute of Network Cultures* (16 October 2014) online: <https://networkcultures.org/mycreativity/2014/10/16/never-mind-the-sharing-economy-heres-platform-capitalism/>

[4] Antonio Aloisi, "Platform work in Europe: Lessons learned, legal developments and challenges ahead" (2022) 13:1 European Lab. L. J. 4.

[5] There is a lack of consensus as far as the definition of platform work is concerned. See generally, Rebecca Florisson & Irene Mandl, "Digital age platform work: Types and implications for work and employment Literature review" (Eurofound Working Paper WPEF18004, 2018), where they noted that the main features of the platform work are (i) paid work organized through platforms; (ii) three parties involved; (iii) conducting specific tasks; (iv) form of outsourcing/ contracting out; (v) break-down of tasks; (vi) on-demand services. See also, Chris Forde et al, "The social protection of workers in the platform economy" (European Parliament Directorate General for internal policies IP/A/EMPL/ 2016-11, 2017), where the authors noted that there are varied terms describing this type of economy, *inter alia* "sharing economy", "collaborative economy", and "gig economy". However, there are negative connotations attached to them. Therefore, the neutral term would be "platform economy". See also, Richard Heeks, "Digital Economy and digital labour terminology: Making sense of the "Gig economy", "Online labour", "Crowd Work", "Microwork", "Platform labour", etc. (Center for Development Informatics Working Paper No. 70, 2017), where an analysis of the broad array of terms that have arisen in relation to the digital economy and digital labour was carried out.

[6] See, for a brief overview of the architecture of digital platforms, Sangeet Choudary, "The architecture of digital labour platforms: Policy recommendations on platform design for worker well-being" (ILO Future of Work Research Paper, 2018); Jan Drahokoupil, "The business models of labour platforms: Creating an uncertain future" in Jan Drahokoupil & Kurt Vandaele, eds., *Labour and the Platform Economy* (Edward Elgar, 2021) 33.

that facilitates the exchange of assets, and the other that facilitates actual work and production.[7] The former facilitates access to goods, property, and capital, with *Airbnb* and *Oyo* as examples.[8] The latter, however, engages and organizes labour to undertake value-added production. An example of the latter would be platforms such as *Uber* and *Zomato*. There could be a further distinction within the broader DLP category, between "location-based platforms" (such as Uber) and "online web-based platforms" (such as Upwork).[9] Through location-based platforms, the services are often supplied via an online platform but require the workers to perform them physically. Therefore, generally, the workers are located in a specific geographical area. Location-based workers provide a wide array of services, such as food delivery services, taxi services, home and beauty services, etc.[10] This is certainly not an exhaustive list. Meanwhile, web-based platforms require workers to supply their services online. The International Labour Organization's (ILO) Reference Document on Decent Work in the Platform Economy noted that since location-based workers perform work physically, they are a "visible and traceable" workforce, whereas web-based workers are often an "invisible" workforce scattered around the world.[11] Further classification of web-based platforms is made by Berg, Cherry, and Rani who stated that web-based platforms could be divided into 1) freelance marketplaces, which could be regarded as "macro task" platforms where workers provide professional services such as graphic designing, computer programming, etc.; 2) "micro-tasking", which may include clerical work such as verifying data, content moderation, etc.; and 3) computer programming platforms, which allow for competition between

[7] Jim Stanford, "The past, present and future of gig work" in Jeroen Meijerink et al, eds, *Platform Economy Puzzles* (Edward Elgar, 2021) 46, 47.
[8] Valerio De Stefano & Antonio Aloisi, "European legal framework for "digital labour platforms"" (European Commission Joint Research Centre Report, 112243, 2018) 9.
[9] Florian Schmidt, "Digital labour markets in the platform economy: Mapping the political challenges of crowd work and gig work" (Bonn, Friedrich-Ebert-Stiftung, 2017); ILO, "World Employment and Social Outlook: The role of digital labour platforms in transforming the world of work" (ILO Flagship Report, 2021) 75. See also, Valerio De Stefano, "The rise of "just-in time workforce": On-demand work, crowdwork and labour protection in the "gig-economy" (2016) 37:3 Comp. Lab. L. & Pol'y J. 471, categorized the gig economy into two types of work, i.e., crowdwork and work-on-demand via apps.
[10] De Stefano & Aloisi, *supra* note 8, at 10, analyzed three services – passenger transport services, professional tasks completed online, and manual services carried out on household premises, whether domestic or commercial.
[11] ILO, "Decent Work in the Platform Economy: Reference document for the meeting of experts on decent work in the platform economy" (Reference Document MEDWPE/ 2022, 2022) 7.

workers to develop design ideas and write codes.[12] Like location-based platforms, the categorization of web-based platforms is also not exhaustive.[13]

Some of these DLPs portray themselves as mere intermediaries or "passive matchmakers" and, consequently, workers who often perform tasks through these platforms are characterized as independent contractors, i.e., people who operate their own businesses and are contracted to provide services without having the legal status of an employee.[14] In that sense, an independent contractor is engaged under a contract for services, rather than a contract of service. By ostensibly representing themselves as intermediaries and workers as independent contractors, certain DLPs absolve themselves of their responsibilities of providing social security contributions, sickness and maternity pay, and statutory minimum wages.[15] Previous research has indicated that platforms exercise tremendous control over all aspects of the work such as, *inter alia*, setting terms and conditions, checking qualifications, ensuring proper performance, and regulating wages.[16] Moreover, in recent years, the managerial prerogatives of the platforms have considerably increased owing to the rise of algorithmic management, whereby platforms utilize software tools to track, surveil, and manage the workforce.[17] The characterization of platform workers as

[12] See generally, Janine Berg, Miriam Cherry, & Uma Rani, "Digital labour platforms: A need for international regulation? (2019) 16(2) Revista de Economia Laboral 104, 108-109. See also, Hans Pongratz, "Of crowds and talents: Discursive constructions of global online labour" (2018) 33:1 New Tech, Work and Employment 58, where the author pointed out the difficulty in characterizing global online labour.

[13] See, for instance, ILO World Employment and Social Outlook Report *supra* note 9, at 74; Debra Howcroft & Birgitta Bergvall-Kareborn, "A typology of crowdwork platforms" (2019) 33:1 Work, Employment & Society. 21.

[14] Jeremias Adams-Prassl, "Collective voice in the platform economy: Challenges, opportunities, solutions" (European Trade Union Confederation Report, 2018) 8; Jeremias Adams-Prassl, *Humans as a service: The promise and perils of work in the gig economy* (OUP, 2018) 31.

[15] See, ILO, *Non-Standard employment around the world: Understanding challenges, shaping prospects* (ILO, 2016) 39; Antonio Aloisi, "Commoditized workers: Case study research on labor law issues arising from asset of "on demand/ gig economy" platforms" (2016) 37:3 Comp. Lab. L. & Pol'y J. 653; Christina Behrendt, Quynh Anh Nguyen, & Uma Rani, "Social protection systems and the future of work: Ensuring social security for digital platform workers" (2019) 72:3 Intl Soc Security Rev 17.

[16] See generally, Jeremias Prassl & Martin Risak, "*Uber, TaskRabbit, & Co:* Platforms as employer? Rethinking the legal analysis of crowdwork" (2016) 37:3 Comp. Lab. L. & Pol'y J. 619; Brishen Rogers, "Employment rights in the platform economy: Getting back to the basics" (2016) Harv L. & Pol'y J. 479; Veena Dubal, "Economic security & the regulation of gig work in California: From AB5 to Proposition 22" (2022) 13:1 European Lab. L. J. 51; Gayatri Nair, "New terrains of precarity – gig work in India" (2022) 30:3 Contemporary South Asia 388; Uma Rani & Marianne Furrer, "Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers" (2021) 25:2 Competition & Change 212; Valerio De Stefano & Antonio Aloisi, "Fundamental labour rights, platform work and human rights protection of non-standard workers" in Janice Bellace & Beryl Ter Haar, eds., *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar, 2019) 359, where the authors noted that the platform work as "liberating business models" are nothing more than "a rebrand of casualized forms of work".

[17] Antonio Aloisi & Nastazja Potocka- Sionek, "De-gigging the labour market? An analysis of the 'algorithmic

independent contractors has been termed as the "platform paradox", whereby platforms portray themselves as marketplaces despite acting as traditional employers.[18] Throughout the world, several cases have been litigated to address the persistent misclassification problem of platform workers.[19] Moreover, scholars have also suggested the need for targeted regulatory responses to curb this issue.[20] The main theme arising from the litigations has been that certain platforms, especially location-based platforms, must be recognized as employers rather than mere intermediaries, making them accountable for labour standards of the platform workers. Therefore, Potocka-Sionek has rightly noted that "solving the classification puzzle has been a high-stakes exercise".[21]

For the purposes of this thesis, the author intends to consider the issue of the classification of location-based platform workers from an Indian perspective. There are three specific reasons for this limited approach: 1) the Indian regulators have considered platform work as a quick fix for poverty and, thereby, invested heavily in building the digital platform infrastructure. However, in doing so, the government has deliberately failed to provide platform workers with any meaningful labour safeguards, in turn, considering them collateral damage in the pursuit of economic growth; 2) the limited rights that are ostensibly accorded to platform workers are largely illusory due to the definitional quandaries and the recommendatory language used in the provisions; 3) to consider ways by which some categories of location-based platform workers could be afforded protection either through constitutional rights or labour rights within the formalistic labour laws.[22]

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management' provisions in the proposed platform work directive" (2022) 15:1 Italian Lab. L. e-journal 29; Mohammad Jarrahi et al, "Algorithmic management in a work context" (2021) 8:2 Big Data & Society 1; Antonio Aloisi & Valerio De Stefano, *Your Boss is an Algorithm: Artificial Intelligence, Platform Work, and Labour* (Bloomsbury, 2022), where the authors noted that the digitalization of managerial powers has perhaps resulted in a system of '*boss ex machina*'- automation of all management functions.

[18] Prassl, *supra* note 14, at 5.

[19] See generally, Valerio De Stefano et al., "Platform work and the employment relationship" (ILO Working Paper No. 27, 2021) 30; Christina Hießl, "The classification of platform workers in case law: A cross-European comparative analysis" (2022) 42:2 Comp Lab L & Pol'y J 465.

[20] See, Jennifer Pinsoff, "A new take on old problem: Employee misclassification in the modern gig economy" (2016) 22:2 Michigan Telecommunications and Tech. L. Rev. 341; Keith Cunningham-Parmeter, "From Amazon to Uber: Defining employment in the modern economy" (2016) 96 Boston U. L. Rev. 1673; Daniel Halliday, "On the (mis)classification of paid labor: When should gig workers have employee status?" (2021) 20:3 Politics, Philosophy, & Econ. 229.

[21] Nastazja Potocka-Sionek, "Platformisation of work: Challenges beyond employment classification" (European University Institute, PhD Dissertation, 2023) 39.

[22] See generally, work done by the Center for the Internet & Society on platform work in India, Aayush Rathi & Ambika Tandon, "Platforms, power, & politics: Perspectives from domestic & care work in India" (Center for Internet & Society Report, 2021); Anushree Gupta et al, "Studying platform work in Mumbai & New Delhi" (Center for Internet & Society Report, 2021); See also, Bighnesh Mohapatra & Chandan Sahoo, "Employee relations in the

Additionally, platforms are heterogeneous, and each type of platform, perhaps, requires an in-depth study of its own. However, conducting such a comprehensive investigation is challenging due to the spatial constraints of the thesis. For this reason, the thesis limits itself to only a few location-based platforms, with the aim of being a starting point for a more extensive discussion regarding the regulation of platform work in India. Notably, previous research on platform work that has been carried out by academic scholars in India has specifically concentrated on the impact of platform work on the Indian labour workforce. However, only a few studies have, to a limited extent, delved into considering the regulatory responses of the government or providing solutions to protect platform workers.[23]

Given that the classification of workers is often considered a starting point for research on platform work and recognizing that it represents a "high stakes" exercise, the thesis aims to address this specific concern, focusing on the "visible" location-based platform workforce, such as the workers in the delivery and ride-hailing platforms. This thesis becomes increasingly important since the reports of government-run think tanks in India have considered platform work as a paradigmatic shift, which would reshape the world and open a wide range of new opportunities in the future.[24] However, as the thesis will show, in considering platforms as a panacea, the rights of workers are often disregarded. Since India has the largest platform workforce in the world, it becomes imperative to understand the regulatory responses passed by the State to protect this workforce. In doing so, the author will examine the laws that could be utilized not only to address the misclassification issue but also to safeguard the platform workers.

1) The great Indian platform trick: Precarity Unbound

Mr. Suman Bery, the Vice Chairman of the National Institute for Transforming India (NITI Aayog), the think tank of the Government of India, stated that India is perhaps best positioned to be a leader

gig & platform economy: emergence of legal framework in India" (2023) 58:4 Indian J. Industrial Relations 571; Premilla D'Cruz & Ernesto Noronha, "India's platform economy experience: A site for commodification – decommodification dynamic" in Immanuel Ness, ed., *Platform Labour and Global Logistics: A Research Companion* (Routledge, 2023)

[23] See e.g., M.P. Ram Mohan & Sai Muralidhar, "Tests to determine employer-employee relationships in India: Looking towards the future?" (IIMA Working Paper, 2023); Isana Laisram & Ravi Shankar, "Navigating labour law in the gig economy" (2021) 14:3 NUJS L Rev 1; Vedant Choudhary & Shambulinganand Shireshi, "Analysing the gig economy in India and exploring various effective regulatory methods to improve the plight of the workers" (2022) 57:7 J Asian & African Studies 1343.

[24] NITI Aayog, "India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work" (NITI Aayog Report, 2022).

in the technical and economic transition brought about by the burgeoning growth of the platform.[25] There has been a proliferation of platforms in India, primarily boosted by the increasing use of smartphones and low-cost internet. The seemingly inexorable growth of platforms in India was inevitable due to the distinctive characteristics of the country, making it unlike any other jurisdiction in the world. Firstly, India is home to a large workforce with a working-age population of over 900 million people, which can increase to 1 billion over the next decade.[26] Therefore, India is frequently referred to as the "rising powerhouse" or a "sleeping giant", ready to wake up from slumber.[27] Secondly, India has the second-largest English-speaking population in the world, coupled with the availability of extremely cheap labour. Wages in India are far less compared to the advanced G20 economies and mostly English-speaking countries such as Canada, the U.S., and the U.K.[28] Additionally, due to the segmented labour market, there is a considerable difference between the earnings of casual and regular labour, as well as a stark difference between the earnings of male and female workers in rural and urban areas.[29] For instance, a recent Periodic Labour Force Survey carried out by the Ministry of Statistics and Programme Implementation, indicated that a male casual worker, in a rural area, earns an average daily wage of Rs. 381 ($ 4.58) a day, which is considerably lower than a male salaried worker, in a rural area, who earns an average daily wage of Rs. 550 ($ 6.62) a day.[30] The availability of inexpensive labour plays a pivotal role in attracting businesses from around the world. One such case is the mushrooming of call center companies and the rise of India's Business Process Outsourcing industry in the early 2000s.[31] Moreover, India's large English-speaking population is also the reason for the quick adoption of IT services, including software development and back-office data entry. Thirdly, and

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[25] *Ibid* at v.

[26] Amit Basole, "State of working India, 2019" (Centre for Sustainable Employment, 2019) 51, 71; Diksha Madhok, "India is set to become the world's most populous country. Can it create enough jobs?" *CNN* (17 January 2023) Online: <https://www.cnn.com/2023/01/17/business/india-population-worlds-largest-hnk-intl/index.html>

[27] Kai Schultz & Vrishti Beniwal, "The global economy needs a new powerhouse. India is stepping up" *Bloomberg* (22 January 2023) Online: <https://www.bloomberg.com/news/features/2023-01-23/india-s-1-4-billion-population-could-become-world-economy-s-new-growth-engine?in_source=embedded-checkout-banner>

[28] ILO, "Global Wage Report 2022-23: The impact of inflation and COVID-19 on wages and purchasing power" (ILO Flagship Report, 2022) 52, where real wage indices since 2008 of the advanced and emerging G20 economies are compared.

[29] See generally, ILO, "India Wage Report: Wage policies for decent work and inclusive growth" (ILO Report, 2018) 16, 19.

[30] National Sample Survey Office, Ministry of Statistics and Programme Implementation, "Annual Report: Periodic Labour Force Survey (July 2021-June 2022)" Online: <https://www.mospi.gov.in/sites/default/files/publication_reports/AnnualReportPLFS2021-22F1.pdf>

[31] Meenakshi Rajeev & B. P. Vani, "Problems and prospects of business process outsourcing industry: A case study of India" (LMU Munchen, Institute for Social and Economic Change Report, 2008) 1.

perhaps, most importantly, India has one of the largest informal sector workforces in the world.[32] In India, the informal sector is also referred to as the "unorganised sector",[33] which is defined under the Unorganised Workers' Social Security Act, 2008 (UWSSA) as, "an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten".[34] As such, wherever necessary, the thesis would use the term "informal" instead of "unorganised" for the purposes of brevity, unless specifically referencing quotations or provisions of the statute.

The formal sector workforce, as opposed to the informal sector workforce, benefits from legal protection and regulation by the State. In contrast, informal workers often lack such safeguards and typically endure challenging working conditions, limited access to technology, and an absence of labour rights.[35] Currently, more than 90% of all workers are informally employed in India, and even in urban areas such as Delhi and Mumbai, the proportion of informal workers is 80%.[36] Most of these workers are employed in small enterprises, spread out across all industries, with a portion of them being engaged in some form of casual wage employment or self-employment. The importance of the informal sector cannot be underestimated as it contributes more than 50% of the total GDP.[37] But for most informal workers, there are often no umbrella laws that protect their fundamental labour rights. Significantly, despite the presence of minimum wage laws for several decades, its implementation and coverage are not universal. In fact, more than half of the workforce being self-employed is outside the purview of the Minimum Wages Act of 1948.[38] Fourthly, as per the Global Multidimensional Poverty Index, 228.9 million live in poverty in India, with around

[32] Santosh Mehrotra, "Informal employment trends in the Indian economy: Persistent informality, but growing positive development" (Employment Working Paper No. 254, 2019) 1.
[33] See generally, National Commission for Enterprises in the Unorganised Sector, "Report on conditions of work and promotion of livelihoods in the unorganised sector" (Dolphin Printo Graphics, 2007).
[34] *Unorganised Workers Social Security Act*, *2008*, Act No. 33 of 2008, s. 2(l) [*UWSSA*].
[35] Rina Agarwala, "The State and labor in transnational activism: The case of India" (2012) 54:5 J. Industrial Relations 443.
[36] Govindan Raveendran & Joann Vanek, "Informal Workers in India: A statistical profile" (WIEGO Statistical Brief No. 24, 2020) 1.
[37] See, Jyoti Vij, Anshuman Khanna & Pragati Srivastava, "Informal economy in India: Setting the framework for formalisation" (Report by Federation of Indian Chambers of Commerce and Industry and Konrad-Adenauer Stiftung, 2017) 6; Jacques Charmes, "The informal economy worldwide: Trends and characteristics" (2012) 6:2 Margins: J. Applied Econ. Research 103; NCEUS, "Contribution of the unorganised sector to GDP Report of the Sub Committee of a NCEUS task force" (NCEUS Working Paper No. 2, 2008)
[38] Kashif Mansoor & Donal O'Neill, "Minimum wage compliance and household welfare: An analysis of over 1500 minimum wages in India" (IZA Institute of Labor Economics Discussion Paper No. 13298) 8.

18.7% of people being vulnerable to poverty.[39] The current poverty line for extreme poverty is $ 1.90 per person per day, whereas the poverty line for lower-middle income is $3.20 per person per day.[40] The percentage of poor people in rural areas (21.2%) is greater than in urban areas (5.5%).[41] Notably, India has shown a considerable growth rate of GDP in the last couple of decades; however, this has not corresponded to a growth in employment. For instance, in 2013, Paopla pointed out that India had a GDP growth of 7.5% but the employment growth remained at approximately 2% per annum.[42] This sustained economic growth has failed, to an extent, to promote growth that is socially inclusive, specifically, reducing extreme income poverty.[43] All of these factors make India quite a conducive climate for the proliferation of the platform economy; this includes both location-based and online web-based work.

In India, digital platforms have flourished since the launch of the e-commerce website Flipkart in 2007, and the growth perhaps accentuated by government schemes such as the Pradhan Mantri Jan Dhan Yojana, initiated in 2014, where an account could be opened without having a minimum balance.[44] Another catalyst in the burgeoning growth of platforms was the launch of the mobile network JIO in 2015, which provided inexpensive 4G internet.[45] Initiated by Reliance, a company led by billionaire Mukesh Ambani, it provided cheap mobile data plans in a bid to become India's largest mobile operator. What followed was the "JIO effect", where millions of Indians were able to instantly access cheap internet, successfully luring a massive population online for the first

[39] "Unpacking deprivation bundles to reduce multidimensional poverty" (Oxford Poverty & Human Development Initiative, Global Multidimensional Poverty Index 2022, 2022) 23.
[40] See generally, Surjit Bhalla, Karan Bhasin, & Arvind Virmani, "Pandemic, poverty, and inequality: Evidence from India" (IMF Working Paper WP/22/69, 2022); Surjit Bhalla, Karan Bhasin & Arvind Virmani, "Raising the standard: Time for a higher poverty line in India" *Brookings* (14 April 2022) Online: <https://www.brookings.edu/articles/raising-the-standard-time-for-a-higher-poverty-line-in-india/>
[41] "41.5 crore people emerged out of poverty in India since 2005, but country has the largest poor population globally: UN Report" *Times of India* (17 October 2022) <https://timesofindia.indiatimes.com/india/41-5-crorepeople-emerged-out-of-poverty-in-india-since-2005-but-country-still-has-largest-poor-population-globally-unreport/articleshow/94921655.cms>
[42] T.S. Papola, "Economic growth and employment linkages: The Indian experience" (Institute for Studies in Industrial Development Working Paper No. 2013/01) 1.
[43] See, Sutirtha Sinha Roy & Roy van der Weide, "Poverty in India has declined over the last decade but not as much as previously thought" (World Bank Policy Research Working Paper 9994, 2022); Justin Sandefur, "The great Indian poverty debate, 2.0" *Center for Global Development* (19 April 2022) Online: <https://www.cgdev.org/blog/great-indian-poverty-debate-20>
[44] Mrunal Joshi & Vikram Rajpurohit, "Awareness of financial inclusion: An empirical study" (2016) 1:6 RESEARCH REV. Intl J. of Multidisciplinary Research 1.
[45] Niharika Sharma, "Reliance Jio's cheap data turned India's internet dreams into reality" *Quartz* (7 September 2021) Online: <https://qz.com/india/2055771/reliance-jios-cheap-data-turned-indias-internet-dreams-into-reality>

time.[46] Thereafter, the government initiated the Startup India program in 2016, whereby the government provided funding and incentives to support new startups.[47] These factors, coupled with the Bhartiya Janta Party-led government providing smartphones to millions during the 2019 central government election campaign,[48] resulted in the proliferation of at least location-based DLPs in several industries. Take, for instance, Zomato and Swiggy in the food delivery industry, Dunzo and Zepto in the grocery delivery industry, and Ola in the ride-hailing industry.[49] Apart from the rise of domestic DLPs, there was also a proliferation of foreign location-based DLPs in India, such as Uber and Amazon Flex. A recent report by NITI Aayog estimated that thetotal Indian workforce engaged in platform work during the COVID-19 pandemic was 6.8 million,or roughly 1.3% of the total workforce in India. This is said to rise to 23.5 million by the end of the decade, resulting in 6.7% of the non-agricultural workforce working in the platform economy.[50] With a large platform workforce, it becomes imperative to study the regulatory framework governing the platform economy.

Currently, the Indian labour law framework is marked by the presence of a multiplicity of State (provincial) and Central (federal) legislations covering only a small portion of the workforce.[51] In India, both the center and the states can enact laws concerning employment and labour. The Constitution of India distributes the legislative powers to both the Union Parliament (center) and

[46] The impact of JIO cannot be understated as India currently boasts the largest number of users for platforms such as WhatsApp, Facebook, Instagram, and YouTube. Crucially, in terms of quantity, India has the second-highest number of internet users, making it one of the biggest markets for DLP companies. See generally, Rahul Mukherjee & Fathima Nizaruddin, "Digital platforms in contemporary India: The transformation of Qutodian Life Worlds" (2022) 9:1/2 Asiascape: Digital Asia 5. See also, "India's internet explosion: A manifestation of network effects" *Cornell Networks Blog* (13 December 2020) Online: <https://blogs.cornell.edu/info2040/2020/12/13/indias-internet-explosion-a-manifestation-of-network-effects/>

[47] See, for a brief overview, Anish Tiwari, Teresa Hogan, & Colm O'Gorman, "The good, the bad, and the ugly of 'Startup India': A review of India's entrepreneurship policy" (2021) 56(50) Econ. & Political Weekly 45.

[48] Vindu Goel & Suhasini Raj, "In 'Digital India', government hands out free phones to win votes" *New York Times* (18 November 2018) Online: <https://www.nytimes.com/2018/11/18/technology/india-government-free-phones-election.html>

[49] See, "Labour standards in the platform economy: Fairwork India Ratings 2022" (Fairwork, 2022) Online: <https://fair.work/wp-content/uploads/sites/17/2022/12/221223_fairwork_india-report-2022_RZ_red_edits_10.pdf> where the evaluation of location-based DLPs is carried out.

[50] NITI Aayog, *supra* note 24, at 24.

[51] Richard Mitchell, Petra Mahy, & Peter Gahan, "The evolution of labour law in India: An overview and commentary on regulatory objectives and development" (2014) 1 Asian J. L. and Society 413. See generally, Debi Saini, "Labour law in India: Structure and working" in Pawan Budhwar & Jyotsna Bhatnagar, eds., *The Changing Face of People Management in India* (Routledge, 2008) 60, for a brief overview of the Indian labour law framework.

the State legislatures.[52] Article 246 of the Constitution of India lays down that the Parliament of India (the central government) is exclusively empowered to enact laws on subjects included in List I, i.e., Union List, the State legislatures are empowered to make laws on subjects enumerated in List II, i.e., State List, whereas, both the Parliament (center) and the State legislatures have the power to make laws on subjects mentioned in List III, i.e., Concurrent List.[53] Nonetheless, laws enacted by the Parliament on subjects listed in the concurrent list will supersede the laws passed by the State legislatures on matters also enumerated in the concurrent list. By virtue of Entries 22 ("[t]rade unions; industrial and labour disputes"),[54] 23 ("[s]ocial security and social insurance; employment and unemployment"),[55] and 24 ("Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits") of the Concurrent List,[56] both the Parliament and the state legislatures have the power to enact labour laws. As of now, there are approximately 40 different central legislations and 150 state legislations pertaining to the labour force, most of which do not apply to informal workers.[57] Owing to labour relations evolving co-extensively with industrial relations, there was a conflation of labour and industrial law, and, therefore, employer-employee disputes were regarded as industrial disputes.[58] This meant that most of the workers in the informal economy fell outside the realm of labour laws.[59] A significant factor for this was that the State intended to control both capital and labour by substantially reducing the number of strikes and lockouts. This was done by providing individual and collective rights to only a few workers working in industries and factories in the urban areas. This control, exercised both by the colonial regime and in the post-independence period, enabled the State to apply formalistic labour laws to

[52] See, Mahendra Pal Singh, "The Federal Scheme" in in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 451, for an overview of the Indian Constitution's federal scheme. The author also pointed out that courts and academic scholars have also referred to India as "quasi-federal" in nature.
[53] *Constitution of India, 1950*, Part XI – Relations between the Union and the States, art. 246 [*Constitution of India*].
[54] *Ibid*, Seventh Schedule: List III- Concurrent List, Entry 22.
[55] *Ibid*, Seventh Schedule: List III- Concurrent List, Entry 23.
[56] *Ibid*, Seventh Schedule: List III- Concurrent List, Entry 24.
[57] "List of enactments in the Ministry: Central Labour Acts" Online: <https://labour.gov.in/list-enactments-ministry> where the Ministry of Labour & Employment has laid down a list of 40 Central labour enactments. See also, Trilok Papola, "Role of labour regulation and reforms in India: Country case study on labour market segmentation" (ILO Employment Working Paper No., 147, 2013) 10; Kamala Sankaran, "Labour laws in South Asia: The need for an inclusive approach" (ILO Discussion Paper No., 176, 2007) 6-9, where a higher number of Central enactments have been indicated. However, some of them have been repealed over the years.
[58] Kamala Sankaran, "Transition from the informal to the formal economy: The need for a multi-faceted approach" (2022) 65 Indian J. of Lab. Econ. 625.
[59] "Report of the National Commission on Labour – Vol. I" (Ministry of Labour, Government of India, 2002).

only a miniscule number of industries and workers. For this reason, Mitchell, Mahy, and Gahan noted that the impact of the laws was "limitation and exclusion",[60] rather than universalization of rights. One example, they pointed out was the Industrial Disputes Act of 1947 (IDA), which applied only to a few workmen and industries. Most of the industrial action was unlawful and even when collective bargaining evolved, it was only in the formal sector of the economy.[61] Given that most legislations cover only a small portion of India's workforce, it raises questions about the protection of "precarious, marginal, or atypical labour".[62]

The formalistic approach of labour law is quite recent in the long history of the country, as it was the British colonial rule that established a regulated system of economic organization using structured bureaucracy.[63] However, the informal modes of production remained and, perhaps, were even accentuated when one considers informality in the formal economy.[64] Once India moved towards a free-market trading system in 1991, away from the Soviet-styled planned economy, the large informal workforce became the pillar through which India received a comparative advantage. Unfortunately, the formalistic nature of labour law in India, which had developed co-extensively with industrial relations, created a barrier for more than 90% of the workforce employed in the informal sector. In recent years, this has had a serious implication for platform workers in India, who largely operate under a normative vacuum. The complex and relatively inflexible labour law regime has become insufficient to cover many workers in the modern economic landscape.[65] With successive governments failing to take concrete steps to recognize existing laws into a comprehensive code, fragmentation of these laws has also remained an issue. This may have a major impact on the platform workers, who currently find themselves entangled in a web of different legislations, which, at times, do not provide effective remedies. This necessitates an inquiry into the scope of protection of platform workers under the existing labour framework, especially the IDA and the UWSSA. The object of the IDA was to make provisions for the

[60] Mitchell, Mahy, & Gahan, *supra* note, 51, at 419.
[61] *Ibid*, at 420.
[62] *Ibid*, at 446.
[63] Jan Bremen, *Footloose Labour – Working in India's Informal Economy* (Cambridge University Press, 1996) 5.
[64] See, Supriya Routh, *Enhancing capabilities through labour law: Informal workers in India* (Routledge, 2014) 34, 35, where the author pointed out that even after the 1990s when India changed from a Soviet-style planned economy model, most of the workers were still engaged in agriculture. Those that did migrate to urban areas were perpetually under-employed and informally employed, due to the lack of employment opportunities.
[65] Papola, *supra* note 57, at 10, where the author pointed out that the complexity is visible due to the "typology of workers and thresholds" in different legislations and, occasionally, differences within the same legislation, resulting in a "multi-layer segmentation" among workers.

"investigation and settlement of industrial disputes".[66] In essence, the IDA aimed at regulating the relationships between the "workmen" and the employer, with the primary aim of ensuring social justice for both the employers and the workmen whilst advancing the progress of the industry.[67] In doing so, however, the level of protection was afforded only to those workers who worked in industries. Therefore, the protection vanguard has remained rather small.[68] To provide informal workers with social security, the National Commission for Enterprises in the Unorganised Sector (NCEUS), under the aegis of the Ministry of Micro, Small & Medium Enterprises,[69] recommended the formulation of a separate act to regulate the conditions of work, social security, and the welfare of the "unorganised" (informal) workers, whilst also providing a dispute resolution mechanism for these workers.[70] Taking the NCEUS recommendations, the Parliament enacted the UWSSA in 2008, through which provisions relating to social security and welfare were formulated for the informal workers.[71]

In 2017, the Delhi Commercial Drivers Union (DCDU) filed a Writ Petition in the Delhi High Court claiming that the drivers of certain ride-hailing platforms were "workmen" under the IDA, given that there is an employer-employee relationship between the platforms and their drivers.[72] Since this Writ Petition was filed against the State, the petitioners had appealed to the court to issue a writ of *mandamus*, thereby directing the State to establish a committee tasked with examining the working and remuneration conditions of drivers associated with the ride-hailing platforms. Additionally, the petitioners sought the appointment of a monitoring and implementation committee to ensure compliance with labour laws. Eventually, the petition was withdrawn by the petitioner on other grounds. However, this raised questions regarding the extentof protections provided to platform workers and whether they can be classified as "workmen" under the IDA.

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[66] See, *Industrial Disputes Act, 1947*, Act No. 14 of 1947 [*IDA*].
[67] R.F. Rustamji, *Introduction to the Law of Industrial Disputes* (New Delhi: Asia Publishing House, 1967).
[68] Jan Bremen, "Industrial labour in post-colonial India II: Employment in the informal-sector economy" (1999) 44:3 Intl Rev. Social History 451.
[69] K.P. Kannan & T.S. Papola, "Workers in the informal sector: Initiatives by the India's National Commission for Enterprises in the Unorganized Sector (NCEUS)" (2007) 146:3-4 Intl. Lab. Rev. 321.
[70] See, NCEUS, *supra* note, 33, which included the recommendations of social security for "unorganised workers" and a law pertaining to minimum conditions of work in the "unorganised sector". See also, K. P. Kannan, Ravi Srivastava & Arjun Sengupta, "Social security for unorganised sector: A major national initiative" (2006) 41:32 Econ. & Political Weekly 3477.
[71] *UWSSA*, *supra* note, 34, which was enacted to provide for social security and welfare for "unorganised workers".
[72] *Delhi Commercial Drivers Union v. Union of India*, WP (C.) No. 12422/2018 (HC Delhi) [*DCDU*].

A few years later, during the COVID-19 pandemic, the Indian Federation of App-Based Transport Workers (IFAT), the largest gig workers union in India, having approximately 36,000 members, and representing workers of platforms across different industries, filed a petition in the Supreme Court of India claiming that platform workers ought to be recognized as "unorganised workers" under the UWSSA.[73] This will allow them to avail of social security benefits under the UWSSA. This was coupled with a request to facilitate the registration of the platform workers on the e-SHRAM portal, which is aimed at creating a national database of "unorganised workers" in India.[74] The petition also claimed that the platforms had violated the workers' fundamental rights to equality and life guaranteed under Articles 14 and 21 of the Constitution of India, by denying them basic labour rights. Currently, the case is *sub-judice* before the Supreme Court of India, with no hearings of this petition having taken place. The IFAT and the DCDU petitions raise important questions regarding the classification of platform workers within the legalframework of India. The focus of these questions centers on whether the platform workers should be categorized as "unorganised workers" under the UWSSA or whether they can be classified as "workmen" under the IDA.

While there has been no development with respect to the IFAT petition, the central government, to supposedly safeguard the rights of the platform workers, in 2019, consolidated 29 central labour legislations into four codes, namely, the Code on Wages, 2019 (CoW), the Industrial Relations Code (IRC), the Occupational Safety, Health, and Working Conditions Code (OSHWCC), and the Code on Social Security (CSS), 2020.[75] Notably, the CSS, which subsumes the existing laws, including the UWSSA, that provide basic social security to "unorganised workers", has included separate definitions of gig and platform workers, bringing them within the fold of labour legislation

[73] Shruti Kakkar, "Gig-workers approach Supreme Court seeking social security benefits from Zomato, Swiggy, Ola, Uber" *Live Law* (21 September 2021) Online: <https://www.livelaw.in/top-stories/gig-workers-approach-supreme-court-for-social-security-zomato-ola-uber-swiggy-182107> ; Yatti Soni, "Indian Federation of App-Based Transport Workers files PIL seeking social security benefits" *Business Line* (22 September 2021) Online: <https://www.thehindubusinessline.com/economy/logistics/indian-federation-of-app-based-transport-workers-filespil-seeking-social-security-benefits/article36608449.ece>, indicated that the IFAT petition also claimed that denial of social security to platform workers leads to their exploitation, violating the fundamental rights of life (Article 21), equality (Article 14), and prohibition of forced labour (Article 23), enshrined in the Constitution of India.

[74] Saurav Anand, "Over 28.5 crore unorganised workers registered on e-SHRAM portal: Govt" *Mint* (3rd February 2023) Online: <https://www.livemint.com/news/india/over-28-5-crore-unorganised-workers-registered-on-e-shramportal-govt-11675409026988.html>

[75] Ministry of Labour & Employment, *New labour code for new India: Biggest labour reforms in independent India* (Ministry of Information & Broadcasting, Government of India) 7.

for the first time.[76] The Codes are yet to come into force, with the deployment being unlikely before 2024.[77] Nonetheless, an analysis of the definitions and the protections provided to platform workers through the CSS becomes essential.

To that end, this thesis seeks to answer three research questions: 1) To what extent is the existing Indian labour law framework applicable to platform workers? 2) Do the recently enacted labour Codes, specifically CSS, constitute an improvement in terms of the protections accorded to the platform workers, and, if so, to what extent? 3) Can the provisions of the Constitution of India be used to protect platform workers, and, if so, how?

To answer the aforesaid questions, the research will be purely doctrinal in nature. In the Indian context, it will rely on primary sources in the form of legislation, both under the existing regime and the recently enacted Codes, and case laws determining the existence of an employer-employee relationship under the existing legal framework. The research, apart from engaging with primary sources, will also rely on a growing body of secondary literature that has sought to delineate the very nature of platform work, critiquing the framework regulating it, and advancing policy proposals to accord better protections to the workforce. Moreover, this thesis will examine the evolution of labour law in India from the colonial period until the present day in order to establish a continual trend of the State engaging in deliberate efforts to exclude informal workers from the ambit of the protections accorded by the labour law framework. Tracing the broad contours of this narrative will aid in demonstrating how the State categorizing ostensibly new forms of work, such as platform work, as part of the informal sector merely represents a consolidation of a broader historical trend.

Before delving into the analysis of the classification of platform workers in India, chapter 2 lays down India's labour law framework, which has created barriers for most workers. Although Indian labour laws are treated as espousing a more protectionist approach towards workers as compared to other larger developing economies, most of the workers remain outside the purview of these safeguards. This chapter will first argue that the British colonial government had followed a process of rationalization of laws, i.e., securing efficiency of labour with minimum effort, with the

[76] *The Code on Social Security, 2020*, No. 36 of 2020 [*CSS*] ss. 2(61), 2(35).
[77] Surabhi, "Roll-out of labour codes unlikely before 2024 polls" *Financial Express* (3 April 2023) Online: <https://www.financialexpress.com/economy/roll-out-of-labour-codes-unlikely-before-2024-polls/3030694/>

aim of converting an indigenous working population from "traditional" to a "modern" worker. However, in doing so, the colonial government only provided safeguards to a few workers, specifically the ones who were working in factories and mills in urban India. This resulted in a large population, especially the rural demographic working in agriculture, remaining outside the purview of labour safeguards. Simply, the bifurcation of workers was based on those within the scope of industrial relations and those outside. The impact of this bifurcation was seen even after independence when the post-colonial government continued with this divide under the IDA. Although the post-colonial industrial laws, which were built on state paternalism and socialism, attempted to safeguard workers' rights, the eventual relaxation of labour laws from 1991 onwards, after the liberalization of the Indian economy, has broadened the category of informal labour, which is now visible even in the formal sector. Notably, the chapter would show that in 2014, after the Prime Minister Narendra Modi-led Bhartiya Janta Party government secured a full majority at the central level, the dilution of labour laws was carried out at an accelerated pace, all under the guise of spurring growth and investment, and promoting the ease of doing business. The consequence of this lack of safeguards impacted workers in all sectors, including platform workers. The chapter will also show how the State, with the aim of bolstering a business-friendly environment and attempting to boost the growth of Indian platforms, has failed to meaningfully uphold the rights of platform workers.

In chapter 3, the thesis will seek to delineate the applicability of the existing labour law framework to platform workers. This Chapter will begin with the analysis of two pre-Code legislations, namely the IDA and the UWSSA. The examination of the IDA would, at the outset, entail an analysis of the definition of "workman", as interpreted through judicial precedents. It would start with an analysis of the control test, as laid down in the seminal Supreme Court case of *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*.[78] Subsequently, the chapter will consider how the control test was applied to a series of cases. The chapter will also consider the organization test elaborated by the Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishment*.[79] The analysis undertaken in this Chapter primarily pertains to the Indian labour law framework and jurisprudence. Given the limited space, the chapter will not consider a comparative view of the tests that evolved in other jurisdictions. However, further

[78] *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*, 1957 AIR 264 (SC India) [*Dharangadhara*]
[79] *Silver Jubilee Tailoring House v. Chief Inspector*, 1974 AIR 37 (SC India) [*Silver Jubilee*]

research could certainly glean insights from the tests evolved in other jurisdictions.[80] The chapter will then analyze the UWSSA, which the IFAT has claimed should be applicable to platform workers. The chapter will show the issues with the UWSSA, critically evaluate the structural issues in the legislation itself, and argue that it does not provide for a robust implementation framework, rendering much of its effectiveness subject to government discretion. The chapter will then proceed to examine the provisions of the CSS, a newly enacted Labour Code, which, for the first time, includes the definition of platform and gig workers. The author will argue that the same definitional quandaries that plagued the functioning of the labour laws in the pre-Code era, especially the UWSSA, seem to have been carried forward under the CSS. The chapter will analyze whether the CSS by providing a definition of platform worker has in turn created a dependent contractor category. It will also assess whether the level of protection provided to platform workers under the CSS is adequate or if the CSS simply consolidates the existing labour law framework without bringing about any significant reforms. In the end, this chapter will also provide a brief analysis of the recently enacted State-level legislation in Rajasthan for the protection of platform workers. Through this chapter, the thesis will aim to answer the first two research questions.

Chapter 4 will examine how non-justiciable socioeconomic rights, specifically labour rights embedded in Part IV of the Constitution of India, titled the "Directive Principles of State Policy", can inform the adjudication of justiciable fundamental rights enshrined in the Constitution of India with respect to platform workers. Expanding on the research of Gautam Bhatia, it will argue that there ought to be a "direct horizontal" application of fundamental rights when there is an institutionally mediated difference in power between the employer and the worker. As such, there have been no cases involving the constitutionalisation of the labour rights of platform workers in India. However, this chapter seeks to provide a rather brief overview of the textual scheme of the Constitution of India and its creative interpretation by the judiciary, to create room for utilizing existing constitutional provisions for the protection of labour as an avenue for litigating the rights of platform workers. In chapter 5, the author gives his concluding remarks.

[80] See e.g., *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903, where the California Supreme Court adopted the ABC Test which puts forth a (rebuttable) legal presumption that the person "providing labour or service for remuneration" is an employee rather than a self-employed individual.

II. Continuity of exclusions: The narrative of rationalization of labour laws

India has often been cited as an example of a massive informal economy that is largely unregulated.[81] The First National Commission on Labour (FNCL) in 1969 pointed out that due to the dismal conditions of informal labour, there was a need for the State to ensure stable employment for all Indians.[82] In fact, Jagjiwan Ram, the then Union Labour Minister, noted that the Indian "labour policy has hitherto somehow overlooked this [informal] mass of workers even though they constitute the bulk of those who produce goods and services".[83] The FNCL realized that transitioning from a largely informal economy to a formal one was a slow process and, therefore, in the interim, it was crucial to provide social security and improve the conditions of labour in this economy.[84] However, Agarwala has pointed out that the informal economy in India has increased considerably post the FNCL report. She noted that since the turn of the century, there was a complete volte-face in the government's approach towards informal employment, where it was no longer viewed as an interim phase but was rather considered crucial and recognized as the "primary source of future work for all Indians".[85]

Taking into account that the IFAT has asserted that the platform workers should be classified as "unorganised workers" under the UWSSA and considering the exclusion of platform workers from all the recently enacted labour Codes barring the CSS, it becomes imperative to understand why the State often construes most workers as informal workers, rather than employees.[86] To that end, the first part of this chapter intends to explore the historical origins of "organised/formal" and "unorganised/ informal" economy dualism within labour laws in India and ascertain the reasons behind the rising prevalence of informality.[87] This part will also show how an all-encompassing

[81] Mehrotra, *supra* note 32, at 1.
[82] Government of India, Ministry of Labour and Employment and Rehabilitation, *Report of the National Commission on Labour* (Government of India Press, 1969).
[83] *Ibid*, at A3, Appendix II- Speech of Shri Jagjiwan Ram, Union Labour Minister at the Inaugural Session of the National Commission on Labour Bombay, 18th January 1967.
[84] *Ibid*, at xxxi.
[85] Rina Agarwala, "The state and labour in transnational activism: The case of India" (2012) 54:4 J. Industrial Relations 443.
[86] See generally, Karuna Weilenga, "The emergence of the informal sector: Labour legislation and politics in South India, 1940-60" (2020) 54:4 Modern Asian Studies 1113, where she noted that legislative action post-independence was critical in the creation of a binary divide of formal and informal sectors.
[87] See, for a brief about the informal economy, Jan Bremen, "A short history of the informal economy" (2023) 14:1 Global Lab. J. 21; See also, for a succinct summary of India's informal economy, Barbara Harris-White, "India's informal economy: Past, present and future" in Martha Chen & Françoise Carré, eds., *The Informal Economy Revisited* (Routledge, 2020) 38.

definition of an "unorganised worker" under the UWSSA is an incomplete endeavor towards tackling the challenges of informality. The second part of this chapter aims to demonstrate how platform work is not a panacea for transitioning the largely informal workforce into a formal one.[88] In fact, rather than signifying a departure from informality, it merely serves as an extension of informal labour practices.[89] In that sense, the second part of this chapter will show how platform work is highly precarious and brings with it significant risks,[90] whilst highlighting the precarity faced by the platform workers in India. The final part of this chapter will elucidate how the overarching theme of rationalization, which is the process of systemization of laws, resulting in a predictable and structured environment, had been employed, both during the British colonial era and by successive governments in independent India, to dilute labour regulations, resulting in a greater informal workforce in the country.[91] This narrative of rationalization, which was the foundation of the recently enacted Codes, has perpetuated the precarious conditions of most workers, even in the formal sector. In the end, the chapter will show how the exclusion of platform workers from all the newly enacted labour Codes except the CSS is a deliberate attempt by the State to offer a potential avenue to businesses and the government whilst shifting the risks onto the workers themselves and, thereby, reducing the costs for businesses.[92]

1) Structural exclusion: The dualism of formal and informal labour in India

Historically, a large proportion of the Indian workforce was working in agriculture during the British colonial regime.[93] With the spread of industrialization in colonial India, textile factories and mills started to open in places like Bombay (now Mumbai) and Madras (now Chennai), which

[88] But see, Gregory Randolph & Hernan Galperin, "New opportunities in the platform economy: On-ramps to formalization in the Global South" (G20 Japan, Just Job Network, 2019); World Bank, *The Global Opportunity in Online Outsourcing* (World Bank, 2015).
[89] Alessio Bertolini et al, "Platformizing informality, one gig at a time" in Aditi Surie & Ursula Huws, eds., *Platformization and Informality: Pathways of Change, Alteration, and Transformation* (Springer Nature, 2023) 13.
[90] Harold Hauben, Karolien Lenaerts & Willem Wayaert, "The platform economy and precarious work" (Policy Department for Economic, Scientific Quality of Life Policies, European Parliament, 2020) 29, identified the following risks of precariousness associated with platform work- (i) low pay and in-work poverty, (ii) no social protection, (iii) no labour rights, (iv) lack of career development and training, (v) low level of collective rights, and (vi) impact on stress and health.
[91] Valerian D'Souza, "Modernizing the colonial labor subject in India" (2010) 12:2 Comparative Literature and Culture.
[92] See generally, Barbara Harriss-White, "Work and wellbeing in informal economies: The regulative role of institutions of identity and the State" (2010) 38:2 World Development 170, where the author has pointed out that informal economy may be "deliberately developed" as it has clear advantages, at least in the short term.
[93] Jan Bremen, "A mirage of welfare: How the social question in India got aborted" in Jan Bremen & others, eds., *The Social Question in the Twenty-First Century*: *A Global View* (University of California Press, 2019) 98.

required the transposition of the mostly rural agricultural workforce to the urban areas to work in mills and factories.[94] To keep the workforce in the factories, the British colonial government adopted the English Masters and Servants Acts, which aimed at securing labour supply and disciplining these workers.[95] Notably, the colonial regime passed several pro-employer legislations, such as the Workmen's Breach of Contract Act, 1859 and the Employers and Workmen's Act, 1860, which allowed employers to sue their workers for specific performance of the contract, in addition to compensation for breaches.[96] The development of the Anglo-Indian labour law was largely based on the concept of rationalization, entailing a process of systemization of laws resulting in a predictable and structured environment. Essentially, the British colonial rule aimed at establishing "order", "regularity", and "uniformity", in order to transform the indigenous workforce.[97] Given that most regulations were regressive and granted sweeping powers to employers to manage their workforce, many workers laboured under harsh conditions, including instances of child labour in hazardous industries. Notwithstanding this, reports by British colonial officers pointed out that these conditions in the mill factories were required to curb the rather undisciplined nature of the indigenous workers.[98]

It was only after sustained pressure from British social reformers, such as Mary Carpenter, a British social activist, who visited India four times between 1866 to 1875, that certain social reforms were brought about.[99] The first policy intervention was brought through the Indian Factories Act, 1881, which prohibited child labour under the age of seven. However, this Act was not uniformly applied

[94] Aditya Sarkar, *Trouble at the Mill* (Oxford University Press, 2018).
[95] See generally, Ernesto Noronha, "Bombay Dock Labour Board 1948-1994: From insecurity to security to insecurity?" (2001) 36:52 Econ. & Political Weekly 4851; Simon Deakin, Shelley Marshall & Sanjay Pinto, "Labour laws, informality, and development: Comparing India and China" (Centre for Business Research, Working Paper No. 518, 2020) 11.
[96] See, *Workmen's Breach of Contract Act, 1859*, Act No. XIII of 1859, s. I, II. See also, Michael Anderson, "Work construed: Ideological origins of labour law in British India in 1918" in Peter Robb, ed., *Dalit Movements and the Meaning of Labour in India* (Oxford University Press, 1993) 87; Peter Robb, "Labour in India 1860-1920: Typologies, Change and Regulation" (1994) 4:1 J. Royal Asiatic Society 37, where the author described the 1859 Act as a law made for the convenience of the "colonial trade and European capital", justified to bringing "India nearer to the enjoyment of laws that were analytically correct".
[97] D'Souza, *supra* note 91, at 4.
[98] See e.g., *Report of the commissioners appointed by the Governor of Bombay in Council to inquire into: The Condition of the operatives in the Bombay factories, and the necessity or otherwise for the passing of a factory act* (Bombay: Government Central Press, 1875).
[99] Sarkar, *supra* note, 94, at 41.

and, therefore, had a negligible effect on the actual working conditions.[100] For instance, children above the age of eleven, adult males, and females were excluded from the prescribed working limit of nine working hours.[101] As the industrial sector grew in colonial India, the process of rationalization to create an efficient working-class population continued. This was mainly done through amendments carried out to the Factories Acts. In fact, the growth of industrialization required more workers in the factory mills; therefore, the Report of the 1908 India Factory Labour Commission recommended that children who could produce a certificate indicating that they have passed a required educational standard could work as a "young person" if certified physically fit to work 12 hours a day.[102] The primary objective of the report was to convert the indigenous "agriculturist" population, into an "efficient" Western model factory worker.[103] However, after World War I, the All-India Trade Union Congress (AITUC) was formed; the AITUC was instrumental in influencing certain protective legislations, such as the amendments to the Factories Act, 1911 through the Factories (Amendment) Act, 1922[104] and the Workmen's Compensation Act, 1923.[105] These were largely based on ratifications of the ILO conventions.[106] Subsequent legislations, however, continued to curtail workers' rights.[107] Moreover, through different legislations, two categories were visible: "workers who were protected" and "workers who were not". For instance, the Trade Disputes Act, 1929 (TDA), was formed to investigate and settle trade disputes between an employer and a workman, who was defined in a narrow sense as anyone employed in any trade or industry carrying on skilled, unskilled, manual, or clerical work for hire or reward.[108] Through the TDA and the subsequent Acts, the labour regime under the British

[100] See, *Indian Factories Act, 1881*, Act No. XV of 1881. See also, Avkash Jadhav, "The role of British legislations and the working class movement in Bombay: A historical study of the Factory Acts of 1881 and 1891 in India" (2019) 1:1 Internacional Soc. Sciences Rev. 1.
[101] See, for instance, *Ibid*, s. 2, which defined a "child" as a "person under the age of twelve years".
[102] W.T. Morison, *Report of the India Factory Labour Commission, 1908* (Commerce and Industry Department, 1908) 43.
[103] *Ibid* at 18.
[104] *India Factories (Amendment) Act*, *1922*, Act II of 1922.
[105] *Workmen's Compensation Act, 1923*, Act No. 8 of 1923 [*WCA*].
[106] See generally, V.K.R. Menon, "The influence of international labour conventions on Indian labour legislations" (1956) 73:6 Intl. Lab. Rev 551.
[107] See, for instance, *Trade Unions Act, 1926*, Act No. 16 of 1926 [*TUA*]. See also, *Trade Disputes Act, 1929*, Act VII of 1929 [*TDA*], which restricted the right of workers to strike, by, *inter alia*, providing discretionary powers to the government to declare any strike "designed or calculated to inflict, severe, general and prolonged hardship upon the community" as illegal. This would essentially remove all possibilities of a political strike.
[108] *Ibid*, s. 2(k). See also, Sabyasachi Bhattacharya, "Capital and Labour in Bombay City, 1928-29" 16:42/43 Econ. & Political Weekly PE36, where the author pointed out that the AITUC heavily criticized the TDA, resulting in protests across several industrial sectors.

colonial government only regarded certain forms of industrial work as labour, leading to the conflation of labour and industrial law, with employer-workmen disputes being essentially regarded as industrial disputes. Therefore, any person who was outside the definitional boundaries of "workman" was not covered by the labour laws.[109]

This continued even after World War II, with legislation such as the Bombay Industrial Relations Act, 1946 curtailing strikes and forms of protest.[110] This, in fact, became the template for the IDA, an Act that continues to remain in force.[111] Analogous to the TDA, the IDA defined the category of "workman" in a narrow sense, which excluded most of the informal sector workforce.[112] The post-colonial period saw India have a large majority of the population living in villages and working in agriculture. However, the workers who worked on farms were often riddled with debt bondage to agricultural landowners, thereby succumbing to exploitation.[113] Similarly, the workers working in mines and plantations in rural areas counted as part of the informal workforce were also subjected to brutal working conditions. These workers in rural areas constituted the bulk of the population, which was largely unprotected.[114] Meanwhile, the factory workers in Bombay and Madras that were a minor percentage of the labour force in the country, were provided with almost all the labour safeguards. Although the bifurcation existed since the colonial regime, the post-colonial State considered this informality as a "waiting room", wherein the workforce would be transitioned to the formal economy once growth took place.[115] The worker improvement in both formal and informal economies was considered a necessity as the freedom struggle was not only "freedom from foreign rule" but also "redemption from poverty".[116] It is, perhaps, for this reason that the newly enacted Constitution of India included several welfare provisions, such as Part IV

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[109] Kamala Sankaran, "Flexibility and informalisation of employment relationship" in Judy Fudge, Shae McCrystal, & Kamala Sankaran, eds., *Challenging the Legal Boundaries of Work Regulation* (Hart, 2012) 29.
[110] *Bombay Industrial Relations Act, 1946*, Bombay Act No. XI of 1947.
[111] Mitchell, Mahy, & Gahan, *supra* note, 51, at 426.
[112] See, *IDA*, *supra* note, 66, s. 2(s). See also, Weilenga, *supra* note 86, at 1140, where the author noted that post-independent labour laws were designed in ways that consistently denied the legal standing of most workers.
[113] Bremen *supra* note, 93, at 99.
[114] *Ibid.*
[115] See, *Ibid*, at 104; Jan Bremen, *At Work in the Informal Economy in India: A perspective from the Bottom-Up* (Delhi: Oxford University Press, 2016).
[116] "A tryst with destiny" *The Guardian* (1 May 2007) Online: <https://www.theguardian.com/theguardian/2007/may/01/greatspeeches> , which has the transcript of the first speech given by independent India's first Prime Minister Jawaharlal Nehru, noting that the endeavor of the country would be to bring "freedom and opportunity to the common man, to the peasants and workers of India" and to "fight and end poverty and ignorance".

titled the "Directive Principles of State Policy" (DPSP), which though not justiciable, required the state to apply these principles in making laws.[117] These included, *inter alia*, equality of pay,[118] right to adequate means of livelihood,[119] distribution of ownership and control of material resources for the common good of the community,[120] equal pay for equal work,[121] maintaining health and strength of workers, especially children,[122] and protection of youth and children against exploitation.[123] These DPSPs were largely inspired by the Irish Constitution. Given this, the post-colonial State, with the aim of decasualizing the informal workers of specific sectors, enacted certain legislations such as the Dock Workers (Regulation of Employment) Act, 1948,[124] the Plantations Labour Act, 1951,[125] the Beedi and Cigar Workers (Conditions of Employment) Act, 1966,[126] and, perhaps, most importantly, the Contract Labour (Regulation & Abolition) Act, 1970.[127] Nonetheless, major reforms, like the Employees' Provident Fund and Miscellaneous Provisions Act, 1952,[128] which aimed at providing social security by instituting provident funds, pension funds, and deposit-linked insurance funds for employees in factories, were firmly aimed at the formal sector workforce, inevitably maintaining the bifurcation between the informal and formal workforce established during the colonial regime.

Over the years, relatively little was done to mitigate the plight of the informal workforce. Even the enactment of legislation pertaining to informal workers in specific sectors was primarily a result of persistent efforts made by the workers and unions in those sectors. A notable example is the significant organizational initiative undertaken by Beedi workers in the State of Kerala, which played a pivotal role in the successful passage of Beedi workers' legislations aimed at enhancing labour welfare.[129] The idea was that continuous growth would result in higher industrialization,

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[117] See, for an overview, Gautam Bhatia, "Directive Principles of State Policy" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 644.
[118] *Constitution of India*, *supra* note, 53, art. 38(2).
[119] *Ibid*, art(s). 39(a), 41.
[120] *Ibid*, art. 39(b).
[121] *Ibid*, art. 39(d).
[122] *Ibid*, art. 39(e).
[123] *Ibid*, art. 39(f).
[124] *Dock Workers (Regulation of Employment) Act, 1948*, Act 9 of 1948.
[125] *Plantations Labour Act, 1951*, Act LXIX of 1951.
[126] *Beedi and Cigar Workers (Conditions of Employment) Act, 1966*, Act 32 of 1966.
[127] *Contract Labour (Regulation & Abolition) Act, 1970*, Act 37 of 1970 [*CLRA*].
[128] *Employees' Provident Fund and Miscellaneous Provisions Act, 1952*, Act 19 of 1952.
[129] Suramya Kalathil, "State regulation and class struggle in the Beedi industry of post-colonial Malabar, 1947-1970" (2023) Intl. Lab. & Working-Class History 1.

which, in turn, would allow agricultural labour in rural areas to be absorbed into the formal industrial labour market. However, the post-colonial government soon realized that the growth was slower than anticipated and, therefore, the movement of this agricultural population from the villages was into sectors such as construction, trade, and services, which were largely unregulated. Hence Bremen rightly noted that what was once a "waiting room", turned out to be an "end station" for the swelling workforce to be locked up in it.[130]

Up until this time, the informal sector was considered a separate silo, outside the formal mode of organized production.[131] However, in 1991, which was a precarious year for India, as it was facing a considerable decline in foreign exchange reserves and pressure from the World Bank and the IMF to liberalize the economy, a substantial change was visible in the narrative of the government.[132] Most countries, especially in the developing world, relied on the 1995 Report of the World Bank to consider informality as a solution to achieve quick economic growth.[133] Essentially, this Report highlighted that workers would be better off if they behaved with maximum flexibility, relinquishing their social security safeguards and protections. Therefore, Bremen has rightly described this report as the "late capitalist manifesto".[134] Consequently, informality was also visible in the formal sector.[135] In fact, from a dualist divide between the formal and informal economy, a structuralist conceptualization of the informal economy was visible, wherein "formal" firms were now engaging in informal practices to reduce the cost of production.[136] Furthermore, due to the pressure of competition, the mills in urban areas like

[130] Bremen, *supra* note, 93, at 104.
[131] See generally, Keith Hart, "Informal income opportunities and urban employment in Ghana" (1973) 11:1 J. Modern African Studies 61, where the term "informal sector" was used for the first time, pointing out activities that were not dependent on the formal sector. See also, John Harris & Michael Todaro, "Migration, unemployment and development: A two-sector analysis" (1970) 60:1 American Econ. Rev. 126; Supriya Routh, "Examining the legal legitimacy of informal economic activities" (2022) Soc & Leg Studies 282.
[132] Sarosh Kuruvilla & Christopher Erickson, "Change and transformation in Asian industrial relations" (2002) 41:2 Industrial Relations 171.
[133] See, World Bank, *World Development Report 1995: Workers in an Integrating World* (Oxford University Press, 1995).
[134] Jan Bremen, *The Labouring Poor in India: Patterns of Exploitation, Subordination, and Exclusion* (Oxford University Press, 2003) 167.
[135] Hemal Shah, "Transition to labor law reform: State-level initiatives & informal sector labor relations" (2014) 50:1 Indian J Industrial Relations 33 at 35.
[136] See generally, Supriya Routh, "Building informal workers agenda: Imagining 'informal employment' in conceptual resolution of informality" (2011) 2:3 Global Lab. J. 208, where the author pointed out that the dualist theory is grounded in the contrast between rural/ urban, agriculture/ industry, and non-capitalist and capitalist bifurcation, describing the existence of the formal and informal sectors, which are separate from each other but exist at the same time. By contrast, the structuralist conceptualization states that structural changes are visible in the capitalist mode of production and the market, where formal enterprises, to reduce their cost of production,

Mumbai, which were largely dependent on the State, shut down, plunging most of that workforce into the informal economy.[137] Therefore, rather than a transition from the informal to the formal sector, the informal sector workforce itself increased considerably.[138]

To gauge the spread and size of the informal economy, the government established the NCEUS in 2004, which rightly pointed out that there was no uniform definition of the terms "informal sector" and "informal worker", making it difficult to quantify them.[139] Considering this, the NCEUS recommended that the informal sector must be broadly defined as consisting of "all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary basis with less than ten workers".[140] The NCEUS also recommended a law to regulate the conditions of work, social security, and welfare of "unorganised" (informal) workers.[141] Based on this, the Parliament enacted the UWSSA in 2008.[142] The definition of the informal sector, as recommended by the NCEUS, was tweaked in the UWSSA, which now read as an "enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten".[143] Kannan and Papola pointed out that the definition laid down by the NCEUS was too generic, and the broadest one ever adopted.[144] Most importantly, the NCEUS defined an informal worker as "...those working in the informal sector or households excluding regular workers with social security benefits provided by the employers and the workers in the formal sector without any employment and social security benefits provided by the employers".[145] Similar to the definition

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subcontract most of the work or employ temporary and contractual workers. See also, Kamala Sankaran, "Informal employment and the challenges for labour law" in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford University Press, 2011) 223.

[137] Sharit Bhowmik & Nitin More, "Coping with urban poverty: Mill workers in central Mumbai" (2001) 36:52 Econ. & Political Weekly 4822.

[138] See, for a brief statistical overview of the informal economy, Govindan Raveendran & Joann Vanek, "Informal workers in India: A statistical profile" (WEIGO Statistical Brief No. 24, 2020).

[139] NCEUS, *Report on definitional and statistical issues relating to informal economy* (NCEUS, 2008) 13. See also, K.P. Kannan, "Social security in the lockdown: A time to revisit the NCEUS recommendations" (2020) 63:S1 Indian J. Lab. Econ. S139.

[140] *Ibid*, at 61.

[141] NCEUS, *supra* note 33, pointed out that most laws apply to the formal sector workforce. Therefore, there is a need for a law to protect the informal workers.

[142] *UWSSA*, *supra* note, 34.

[143] *Ibid*, s. 2(l).

[144] Kannan & Papola, *supra* note 69, at 323.

[145] NCEUS, *supra note* 33, at 3.

of the informal sector, Kannan and Papola pointed out that this, too, is generic, as it merely categorized informal workers as those who do not have job security.[146] Further, Routh argued that although the term informality or the informal sector can be broadly defined, a policy aimed at benefitting workers must carefully examine each specific type of informal work in order to develop suitable methods for enhancing working conditions.[147]

By having an all-encompassing definition of an informal worker, it becomes difficult to adjudge the policies to be made for each type of worker. In a situation where the informal workforce is often counted as a "reserve army",[148] it becomes necessary to have a specific policy targeting the worker. In India, this has not been the case, especially since the schemes under the UWSSA are not targeted towards workers engaged in different forms of informal employment, but instead to the general category of an "unorganised" worker. An "unorganised" worker, as such, is a highly heterogeneous category, which would include economic activities, ranging from casual workers, beedi workers, subcontract and temporary workers in factories, street vendors, etc. Therefore, a uniform package that is not targeted would be highly ineffective.[149] Moreover, the definition under the UWSSA is a "measurement focus" one, rather than on the "distinctiveness of the informal economic activities".[150] As Harriss-White and Gooptu pointed out that more than half the working population in India comes under the catch-all category of self-employed who, at times, exploit their own households and hire in and out labour according to seasonal picks. This, essentially, allows them to conceal "sundry forms of wage labour" if the limit is below ten workers.[151] The ILO Recommendation No. 204, which concerns the transition from the informal to the formal economy, specifically recommends that Member States consider the "diversity of characteristics, circumstances, and needs of workers and economic units in the informal economy". Furthermore,

[146] Kannan & Papola, *supra* note 69, at 323.
[147] Routh, *supra* note 64, at 43.
[148] Hemant Kumar & Saradindu Bhaduri, "*Jugaad* to grassroot innovations: Understanding the landscape of the informal sector innovations in India" (2014) 6:1 African J. Science, Tech, Innovation, & Development 13.
[149] See, Indira Hirway, "Unorganised Workers' Social Security Bill, 2005: Let us not go backwards!" (2006) 41:5 Econ. & Political Weekly 379. See also, Rohini Hensman, "Labour and globalization: Union responses in India" in Paul Bowles and John Harriss, eds., *Globalization and Labour in China and India: Impacts and Responses* (Palgrave Macmillan, 2010) 189.
[150] Supriya Routh, "Transitioning to the formal: A misdirected ILO strategy?" (2017) 4 Revue de droit comparé du travail et de la sécurité sociale 110.
[151] Barbara Harriss-White & Nandini Gooptu, "Mapping India's world of unorganized labour" (2001) 37 Socialist Register 89.

it emphasizes "the necessity to address such diversity with tailored approaches" when designing strategies to facilitate the transition to the formal economy.[152]

Additionally, by having this general definition, it incentivizes the states to put "new forms of work" outside the formalistic labour laws.[153] This is especially the case when States have a neo-techno-nationalistic agenda, where there is concerted governmental support for high-tech industries, specifically by allowing businesses to shirk labour obligations.[154] As will be indicated in the third part of this chapter, the platform economy is one such area that has high governmental support and is often considered a "silver bullet".[155] Moreover, as Rani pointed out, several global IT firms often outsource their jobs through web-based platforms, resulting in the creation of a "new augmented workforce". The employers, Rani claimed, under the narrative of new business models, include a small proportion of workers on formal contracts, and the rest are counted as temporary workers, on-call workers, and digital platform workers, all of whom would be categorized largely as informal workers.[156] At times, the State exhibits a tendency to ignore or deliberately exclude these types of work from the formal employment arrangements, as exemplified by the newly enacted Codes.[157] Mezzadri highlighted that the term "informalization" should not be equated with "casualization". Rather, it should be understood as a specific means to attain casualization. In that sense, the State treating different types of work as "informal work" serves as a potent strategy for achieving this objective.[158]

Moreover, most of the workers in the informal economy have restricted access to freedom of association and the effective right to collective bargaining. In fact, Bremen pointed out that there

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[152] "ILO Recommendation No. 204 concerning the transition from the informal to the formal economy" Online: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3243110#:~:text=Through%20the%20transition%20to%20the,considers%20relevant%20factors%2C%20including%20but>

[153] See generally, Uma Rani, "Old and new forms of informal employment" in Martha Chen & Françoise Carré, eds., *The Informal Economy Revisited* (Routledge, 2020) 88.

[154] Dev Nathan, Govind Kelkar, & Balwant Mehta, "Platform economy, techno-nationalism, and gig workers in India" in Immanuel Ness, ed., *Routledge Handbook of the Gig Economy* (Routledge, 2022) 374.

[155] Karishma Mehrotra, "We asked dozens of Indian gig workers about their future. They see none" *Rest of World* (12 December 2022) online: <https://restofworld.org/2022/indian-gig-workers-about-future/>

[156] Uma Rani, Rishabh Dhir, & Nora Gobel, "Work on online labour platforms: Does formal education matter?" in Aditi Surie & Ursula Huws, eds., *Platformization and Informality: Pathways of Change, Alteration, and Transformation* (Springer Nature, 2023) 47.

[157] See, for instance, CSS *supra* note 76, s. 2(35), which defines a gig worker as someone who performs or participates in work that is outside of the traditional employer-employee relationship.

[158] Alessandra Mezzadri, "Globalisation, informalisation and the state in the Indian garment industry" (2010) 20:3 Intl. Rev. Sociology 491.

could be obstructions to collective action for the informal workers, who may, at times, be barred through government policies.[159] This is certainly the case in India for the platform workers, who have expressly been excluded from Codes that allow workers to form legally recognized unions and collectively bargain, making it difficult for them to negotiate wages and working conditions.[160] Moreover, if there is no statutory right to collective bargaining or strike, the Supreme Court of India has categorically stated that there is no other avenue, as the fundamental and moral right to collective bargaining does not exist under the constitutional right of freedom to form associations or unions.[161] This is antithetical to ILO Recommendation No. 204, which requires Member States to strive to achieve decent work and realize the fundamental principles and rights at work for workers in the informal economy, specifically the freedom of association and the right to collective bargaining.[162] Looking at the dire condition of platform workers in India, recently, the Chief Justice of India D.Y. Chandrachud also noted the need for a "distinct blueprint of legal measures to effectively improve the conditions of app-based workers".[163] In the end, the prevailing dichotomy between formal and informal work has resulted in no meaningful intervention for workers working outside of the formal production processes of factories. Additionally, any minimal social security measures extended to informal workers are nugatory if they are not specifically tailored to address their needs. Moreover, the broad definition of the informal economy and the workforce enables the State to push new forms of work, like platform work, into the

[159] Bremen *supra* note 87, at 32.
[160] Independent contractors or informal workers can initiate a *political strike* by involving the government in the negotiation proceedings. However, this takes a prolonged period with hardly any tangible results. Instead, platform workers have chosen to make their voices heard by being a 'political force' in India. See, Bidhudatta Pradhan & Vrishti Beniwal, "Fed-up gig workers emerge as a fledgling political force in India" *Bloomberg* (15 December 2021) online: <https://www.bloomberg.com/news/articles/2021-12-16/indian-gig-workers-take-government-company-demands-to-social-media#xj4y7vzkg>
[161] See, *T.K. Rangarajan v. Government of Tamil Nadu*, (2003) 6 SCC 581 (SC India). See also, Supriya Routh, "Workers and competition law in India" in Sanjukta Paul, Shae McCrystal, & Ewan McGaughey, eds., *The Cambridge Handbook of Labor in Competition Law* (Cambridge University Press, 2022) 193, where the author noted that informal workers possess the right to organize as it is a constitutional right but not a right to the cessation of work. The author also pointed out that the informal workers have in the past organized themselves by means of worker associations and cooperative societies. A prominent example of this is the "Self Employed Women's Association (SEWA)". Nonetheless, if the worker associations engage in economic activities, they will be treated similarly to traditional market enterprises. This, in turn, would mean that they are economic entities under the Competition Act, 2002, which would make these associations anti-competitive cartels.
[162] ILO Recommendation No. 204 *supra* note 152, at para 16.
[163] Dhananjay Mahapatra, "Labour laws don't cover gig workers, need steps to protect them" *Times of India* (10 April 2022) online: <https://timesofindia.indiatimes.com/india/labour-laws-dont-cover-gig-workers-need-steps-to-protect-them-sc-judge/articleshow/90754243.cms>

informal sector. In that sense, as will be shown later, the State has, through formal policies, both directly and indirectly, contributed to the expansion of informality.

2) Platform work exacerbating informality

Before proceeding to show how the State has deliberately excluded platform workers from the formalistic labour laws in India, it is necessary to consider whether platform work can be a route to transitioning into the formal workforce. The transition from the informal to the formal sector can happen once platform workers receive fundamental rights, income and job security, opportunities for livelihoods and entrepreneurship.[164] However, with most of the DLPs, the transition to the formal economy remains a myth.[165] In actuality, it is merely an extension of the already existing forms of informality. This is especially the case in India, where, under the guise of technological innovation and new forms of work, the platform workers are often rendered bereft of any protections or social security benefits, thereby continuing the growth of informality.

At the outset, it is necessary to point out that platform work is not a novel phenomenon due to the use of technology, it is merely an accentuation of pre-existing trends. Finkin has pointed out that, throughout history, most production happened within peoples' homes for their own consumption and, consequently, for selling it to the outside community; a system referred to as "putting-out".[166] The advantages were that the employer did not need to invest in capital-intensive technologies, there was no need to supervise work, the employer could avoid collective action, there was flexibility in the product market, and, most importantly, the employer could avoid regulation. It also provided the worker with enough flexibility and autonomy. However, even when the production processes subsequently moved into the factory, employers attempted to control workers in the putting-out systems, which continued to persist, with modern legal regulation still grappling with such relationships, where the worker is sought to be classified as a self-employed independent contractor rather than an employee. Prassl noted that the matching of on-demand workers with fluctuating demand for work has a long history.[167] Therefore, the claim that the way DLPs function

[164] ILO Recommendation No. 204, *supra* note 152, at para 1, where the recommendation also notes that the Member States must strive to "promote the creation, preservation and sustainability of the enterprises and jobs in the formal economy", whilst preventing the "informalization of formal economy jobs".
[165] Alex Wood & Vili Lehdonvirta, "Platform precarity: Surviving algorithmic insecurity in the gig economy" (Working paper for the 'AI at Work: Automation, algorithmic management, and employment law' online workshop at the University of Sheffield, 31st March 2021, 2021).
[166] Matthew Finkin, "Beclouded work in historical perspective" (2016) 37:3 Comp Lab L & Pol'y J 603.
[167] Prassl, *supra* note 14, at 72.

is revolutionary is rather fallacious. DLPs tend to "demutualize" risks, by engaging in a mix of non-standard forms of employment, such as, "disguised employment arrangements", "part-time/ on-call work", "multi-party arrangements", and "dependent self-employment".[168]

Apart from the misclassification issue, there is persistent precarity in platform work, as there is no guarantee that the worker will receive a certain number of task requests even if the worker is logged onto the app all day.[169] This is often coupled with several variable costs involved with platform work, the workers having to work unhealthy working hours, and a cap on incentives and money that can be made per day.[170] Platform companies often argue that workers on DLPs earn more than they would when performing those activities without the application. In this case, Rani, Gobel, and Dhir, in comparing traditional and app-based taxi drivers in India, noted that there is an earnings disparity between the traditional taxi drivers, with hourly earnings at $ 0.62, and app-based taxi drivers, with hourly earnings at $ 1.13.[171] However, they also noted that it is a real challenge for the workers to maintain these high earnings for several reasons. Firstly, most of the earnings for platform workers come from bonuses, which become difficult for workers to earn if they do not meet specific targets.[172] Research has indicated that the bonuses and incentives are reduced considerably over time, or the qualifications are arbitrarily revised by the platforms, especially once the workers are signed up.[173] In order to fulfill the bonus objectives, platform workers often work extended working hours, with the majority of workers working 67 hours per week and, at times, exceeding 12 hours per day.[174] Notably, the research on ride-hailing platforms

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[168] De Stefano *supra* note 9, at 481; See, for a brief overview, ILO, *supra* note 15, at 47-98; Antonio Aloisi & Elena Gramano, "Workers without workplace and unions without unity: Non-standard forms of employment, platform work, and collective bargaining" in Valeria Pulignano & Frank Hendrickx, eds, *Employment relations in the 21st century: Challenges for theory and research in a changing world of work vol. 107* (Wolters Kluwer, 2019) 37.
[169] ILO, *supra* note 9, at 149.
[170] See, Anna Ilsoe & Trine Pernille Larsen, "Digital platforms at work: Champagne or cocktail of risks?" in Abbas Strommen-Bakhtiar & Evgueni Vinogradov, eds, *The impact of the Sharing Economy on Business and Society: Digital Transformation and the Rise of Platform Businesses* (Routledge, 2020) 1; Prachi Salve & Shreehari Paliath, "Overworked and underpaid, India's' 'gig workers' are survivors of a flawed economy" *Scroll. in* (7 June 2019) Online: <https://scroll.in/article/926146/overworked-and-underpaid-indias-gig-workers-are-survivors-of-a-flawedeconomy>
[171] Uma Rani, Nora Gobel, & Rishabh Dhir, "Is flexibility and autonomy a myth or reality on taxi platforms? Comparison between traditional and app-based taxi drivers in developing countries" in Valerio De Stefano & others, eds, *A Research Agenda for the Gig Economy and Society* (Edward Elgar, 2022) 167.
[172] *Ibid* at 176.
[173] *Ibid* at 179, where the authors observed that an interviewee working with Ola, a prominent ride-hailing platform in India, expressed the following: "Initially it was good to join Ola but now the bonuses are reduced, as are the earnings."
[174] *Ibid* at 181. See also, Kavya Bharadkar et al, "Is platform work decent work? A case study of food delivery workers in Karnataka" (NLSIU Institute of Public Policy Occasional Paper Series 10/2020, 2020).

in Delhi by Fleitoukh and Toyama indicated that drivers work harder for less revenue per kilometer, all while distorting a pre-existing market and reducing overall driver autonomy.[175] Thirdly, workers' earnings are also affected by the platform's charging commission, which is often increased over time by the platform. Lastly, since the workers must maintain their equipment, there are considerable variable and fixed costs involved, which drastically affect their earnings. It is, perhaps, due to low earnings and an unsteady stream of income that most workers rarely rely on platform work for their entire income.[176] At times, due to insufficient availability of tasks on the platform, the worker has to spend even longer hours on the app, spending more unpaid time looking for additional employment opportunities.[177] Additionally, recent evidence has indicated that platforms often selectively target specific workers and users, which Dubal refers to as "algorithmic wage discrimination".[178] Through this, the platform pays different salaries for the same work activity performed by the worker, using intricate algorithms and machine learning technology, which considers geography, behaviour, demand, and supply. Therefore, one of the interviewees during Dubal's research rightly quipped that working for the platforms is "like gambling…the house [platform] always wins".[179]

Apart from the earnings issue, due to the casual nature of platform work, workers are always uncertain of their employment. The workers choosing "when" and "how much" to work is always portrayed as indicating the flexibility of platform work. However, the platforms governing the payment system, determining incentives for workers, and making arbitrary changes in working time, schedules, etc. indicate sufficient control over the workers.[180] As Campbell pointed out, "[m]anagement controls, based on a mix of direct and indirect methods, constrain worker

[175] Anna Fleitoukh & Kentaro Toyama, "Are ride-sharing platforms good for Indian drivers? An investigation of taxi and auto-rickshaw drivers in Delhi" in Rajendra Bandi et al, eds., *The Future of Digital Work: The challenge of inequality* (IFIP Advances in Information and Communication Technology, Springer International, 2020) 117.
[176] Juliet Schor, "Dependence and precarity in the platform economy" (2020) 49 Theory and Society 833.
[177] See, Berg, Cherry, & Rani *supra* note 12; Kurt Vandaele, "Vulnerable food delivery platforms under pressure: Protesting couriers seeking 'algorithmic justice' and alternatives" in Immanuel Ness, ed, *The Routledge Handbook of the Gig Economy* (Routledge, 2022) 205. See also, Janine Berg, "Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers" (ILO Conditions of Work and Employment Series Paper No. 74, 2016) 11, where the author noted that the situation is worse for web-based workers, as they spend on average 18 minutes per hour searching for work on the platform.
[178] Veena Dubal, "The house always wins: The algorithmic gamblification of work" *LPE Project* (23 January 2023) Online: <https://lpeproject.org/blog/the-house-always-wins-the-algorithmic-gamblification-of-work/>
[179] Veena Dubal, "On algorithmic wage discrimination" (UC San Francisco Research Paper No. Forthcoming, 2023).
[180] See generally, *Canadian Union of Postal Workers v. Foodora Inc.*, 2020 CanLII 16750 (ON LRB) [*CUPW*].

behaviour in order to ensure conformity with platform needs and preferences".[181] The result is that the flexibility of platforms tends to override the flexibility of workers. Moreover, even in the presence of flexibility, remuneration is often pushed down due to competition, inevitably leading to employees working overtime to make any realized income.[182] In an interview conducted by Quartz, a Zomato delivery partner noted, "We never actually logged out and tried to fit our meals and bathroom breaks into our schedule while continuing to be online and accepting orders.".[183] Even in situations where there is any realized income, the mostly temporal nature of platforms requires work to be completed during a designated timeframe, restricting flexibility considerably. Furthermore, algorithmic management frequently curbs this flexibility, as the workers are often cajoled into accepting tasks through platforms without adequate information, and the consequences of task cancellations can be severe, including being blocked from the app or account deactivation, detrimental effects on bonuses, lower ratings, fewer tasks, etc., thus depriving workers of any form of autonomy.[184] Therefore, Aloisi has rightly noted that the "price workers pay for extreme flexibility is uncertainty and insecurity".[185]

The precarious situation is exacerbated when the platforms are built on a pyramid of subcontracting arrangements.[186] Gurumurthy, Chami, and Sanjay have pointed out that several

[181] Iain Campbell, "Platform work and precariousness: Low earnings and limited control of work" in Valerio De Stefano et al, eds, *A Research Agenda for the Gig Economy and Society* (Edward Elgar, 2022) 113.
[182] De Stefano *supra* note 9, at 479; See also, Vili Lehdonvirta, "Flexibility in the gig economy: Managing time on three online piecework platforms" (2018) 33:1 New Tech, Work and Employment 13, where the author pointed out that even on web-based platforms, the ability of workers to control their time is restricted due to structural constraints.
[183] Niharika Sharma, "An anonymous Twitter account is delivering the most stinging critiques of India's gig economy" *Quartz* (29 September 2021) online: <https://qz.com/india/2065115/on-twitter-deliverybhoy-tells-whatswrong-with-zomato-swiggy>
[184] See generally, Ifeoma Ajunwa, Kate Crawford, & Jason Schultz, "Limitless worker surveillance" (2017) 105:3 Cal L Rev 735; Ifeoma Ajunwa, "Algorithms at work: Productivity monitoring applications and wearable technology as the new data-centric research agenda for employment and labor law" (2018) 63:1 Saint Louis U LJ 21; Ifeoma Ajunwa, *The Quantified Worker: Law and technology in the modern workplace* (CUP, 2023); Sara Baiocco et al, "The algorithmic management of work and its implications in different contexts" (JRC Working Paper Series on Labour, Education and Technology 129749, 2022); Valerio De Stefano & Mathias Wouters, "AI and digital tools in workplace management and evaluation: An assessment of the EU's legal framework" (European Parliament Study: Panel for the Future of Science and Technology, 2022).
[185] Aloisi, *supra* note 15, at 653.
[186] James Duggan et al, "Multi-party working relationships in gig work: Towards a new perspective" in Jeroen Meijerink, Giedo Jansen, & Victoria Daskalova, eds, *Platform Economy Puzzles* (Edward Elgar, 162); Alex Wood & Vili Lehdonvirta, "Platform labour and structured antagonism: Understanding the origins of protest in the gig economy" (Oxford Institute of Platform Economy Series Working Paper, 2019).

platforms in India use subcontracting arrangements.[187] For instance, Swiggy, a food delivery platform in India, outsourced its city-level delivery operations to third-party logistics operators such as Shadowfax, E-comm Express, and DHL Express. This is especially the case in lower-tier cities in India, exacerbating the difficulty in identifying who is the "employer" for the purposes of claiming social security.[188]

Platform work also tends to undermine the fundamental labour rights categorized by the ILO as Fundamental Principles and Rights at Work: 1) freedom of association and the effective recognition of the right to collective bargaining; 2) elimination of all forms of forced or compulsory labour; 3) effective abolition of child labour; 4) elimination of discrimination in respect of employment and occupation; and 5) safe and healthy working environment.[189] As discussed in the previous section, it is extremely difficult for platform workers to build solidarity, mainly due to the spatial dispersion of workers, and the casual and temporary nature of work.[190] Even when there is a possibility of unionizing, the platforms often give "implicit threat[s]" of deactivation of the application and non-renewal of contracts.[191] For instance, Dunzo, a delivery platform in India, explicitly threatened its workers by saying, "Warning! You have been informed that [delivery partners] IDs found on strike will be permanently suspended. So, please do not be a part of any strike or support any strike [translated from Hindi]".[192] Similarly, Urban Company, India's largest home-service platform, filed a suit against its workers who were on strike outside its offices in Gurugram, as they ostensibly claimed that it amounted to an "unlawful assembly". Eventually, when the protests were called off, several workers were "shadow-blocked" from the application, especially the ones named in the suit.[193]

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[187] Anita Gurumurthy, Nandini Chami & Sadhana Sanjay, "The gig is up! Worker rights for digital day labour in India" (Friedrich Ebert Stiftung, 2020) 10.
[188] *Ibid*; See also, Anita Gurumurthy, Nandini Chami, & Deepti Bhartur, "Platform labour in search of value: A study of workers' organizing practices and business model in the digital economy" (ILO, 2021) 23.
[189] De Stefano *supra* note 9, at 507.
[190] Antonio Aloisi, "Negotiating the digital transformation of work: Non-standard workers' voice, collective rights and mobilisation practices in the platform economy" (EUI Working Paper MWP 2019/03, 2019).
[191] Valerio De Stefano, "Smuggling-in flexibility: Temporary work contracts and the "implicit threat" mechanism: Reflections on a new European path" (ILO Working Document No. 4, 2009) 28.
[192] Tushar Goenka, "Dunzo warns to ban delivery partners if they strike" *Financial Times* (28 July 2022) Online: <https://www.financialexpress.com/industry/dunzo-threatens-to-ban-delivery-partners-if-they-strike-ifat-lashesout/2608586/>
[193] "Urban company partners protest new subscription-based work scheme" *Business Line* (21 December 2021) Online: <https://www.thehindubusinessline.com/companies/urban-company-partners-protest-new-subscriptionbased-work-scheme/article38005571.ece>

Likewise, gender discrimination is particularly prevalent in the Indian labour market.[194] This is especially the case when wages are compared. In fact, recent estimates from the Periodic Labour Force Survey in India showed that the COVID-19 pandemic increased the wage gap by 7%.[195] Additionally, there are several barriers to entry for women. In India, an Oxfam Report noted that 32% of women own a mobile phone compared to 60% of men.[196] The unfamiliarity with technology and lack of digital literacy act as barriers for women entrepreneurs to use the platforms. Moreover, the ILO 2018 statistics indicated that women in India spent 297 minutes per day on unpaid work against 31 minutes spent by men, restricting the hours they could engage in paid work.[197] When earnings are compared in platform work in India, female workers are said to be paid 8-10% lower wages than men for the same work.[198] This disparity exists in India even though constitutional provisions explicitly provide fundamental rights that guarantee equality for all and prohibit discrimination on the grounds of sex.[199] It is worth pointing out that the platforms, at least on paper, have taken initiatives such as a "period leave policy" initiated by Zomato and Swiggy, providing monthly period time-off for all their regular female and transgender delivery partners.[200] However, these have barely made any difference. In fact, ride-hailing and delivery platforms have refused to even allow workers basic amenities such as bathroom breaks or access toilets due to the

[194] Madhusree Banerjee, "Gender equality and labour force participation: Mind the gap" (2019) 4:1 ANTYAJAA: Indian J Women and Social Change 113; "ILO Labour Market Update" (ILO Country Office for India Update, 2017), pointed out that India has one of the worst women's labour force participations in the world, with participation rates on a declining trajectory since 2004-05.

[195] See, "Periodic Labour Force Survey July 2020-June 2021" (Government of India, Ministry of Statistics and Programme Implementation, 2021); Dagmar Walter & Susan Ferguson, "The gender pay gap, hard truths and actions needed" *The Hindu* (19 September 2022) Online: <https://www.thehindu.com/opinion/op-ed/the-gender-pay-gaphard-truths-and-actions-needed/article65907149.ece?homepage=true>

[196] "Digital Divide" (India Inequality Report 2022- Oxfam India, 2022). See also, Mitali Nikore, "India's gendered digital divide: How the absence of digital access is leaving women behind" *Observer Research Foundation* (22 August 2021) Online: <https://www.orfonline.org/expert-speak/indias-gendered-digital-divide/>, pointed out that within the Asia-Pacific region, India has the largest difference between internet usage by men and women. The gender gap is a staggering 40.4%, with only 15% of women using internet, compared to 25% men.

[197] Jacques Charmes, "The unpaid care work and the labour market: An analysis of time use data basedon the latest world compilation of Time-Use surveys" (Gender, Equality, and Diversity & ILOAIDS Branch Study, 2019) 30.

[198] Sanghamitra Kar, "Women bag frontline roles in gig economy, but lag behind in wages" *Economic Times* (30 July 2019) Online: <https://economictimes.indiatimes.com/jobs/women-bag-frontline-roles-in-gig-economy-but-lagbehind-in-wages/articleshow/70442660.cms>

[199] See, *Constitution of India, supra* note 53, art. 14, provides for equality before the law and that no person shall be discriminated on the grounds of religion, race, sex, or place of birth. See also, *Equal Remuneration Act, 1976*, Act 25 of 1976, s. 4, mentions that remuneration paid by the employer must be the same for all workers performing the same work or work of a similar nature.

[200] Peerzada Abrar & Neha Alawadhi, "Swiggy to give 2-day monthly period leave to female delivery partners" *Business Standard* (21 October 2021) Online: <https://www.business-standard.com/article/companies/swiggy-togive-2-day-paid-monthly-period-leave-to-female-delivery-partners-121102001350_1.html>

heavy work schedule. One female Zomato worker stated that "[access to toilets] is not even something we would dare to try…there are no facilities for us as workers. I mostly just rely on petrol pumps in whichever areas I can find".[201] Moreover, in India, due to the lack of safety nets for platform workers, most of them have also experienced discriminatory behaviour. For instance, Uber India drivers have been beaten due to their political affiliation, religion, and caste.[202]

Lastly, there are severe occupational health and safety concerns when working for platforms. Several delivery partners of ride-hailing platforms have lost their lives due to road accidents.[203] The risk is exacerbated when platforms lay down unrealistic timelines for completing the tasks.[204] Furthermore, continuous digital surveillance by the platforms, uncertainty with respect to ratings, and algorithmic management have been seen to pose physical and psychological risks, thereby compromising the health and safety of the drivers.[205] The safety concerns were accentuated during the COVID-19 pandemic, where location-based workers were particularly facing monumental challenges.[206] Most platform workers were unable to take any time off due to financial precarity during the lockdown.[207] In general, Ustek-Spilda, Heeks, and Graham pointed out that many countries did provide support to their workers; however, platform workers in disguised employment relationships were often left outside the purview of protective measures provided by the governments.[208] Furthermore, most location-based platforms started to provide services of

[201] Sabah Gurmat, "No bathrooms, no safety, no formalization: For India's women gig workers, companies' promises ring hollow" *News Click* (19 October 2021) Online: <https://www.newsclick.in/no-bathrooms-no-safetyno-formalisation-indias-women-gig-workers-companies-promises-ring-hollow>

[202] "Hyderabad: Muslim Uber driver alleges he was robbed, forced to chant 'Jai Shri Ram'" *Scroll.in* (06 September 2022) Online: <https://scroll.in/latest/1032214/hyderabad-muslim-uber-driver-alleges-he-was-robbedforced-to-chant-jai-shri-ram>

[203] Arvind Ojha, "Delhi: Zomato delivery agent, 2 others killed in car-bike collision in Shakarpur" *India Today* (2 May 2022) Online: <https://www.indiatoday.in/cities/delhi/story/delhi-zomato-delivery-agent-2-others-killed-in-carbike-collision-in-shakarpur-1944428-2022-05-02>

[204] See, for instance, Ananya Bhattacharya, "Food delivery in 10 mins? This is how Zomato plans to do it" *Scroll* (23 March 2022) Online: <https://scroll.in/article/1020109/food-delivery-in-10-minutes-this-is-how-zomato-plans-to-do-it>

[205] Emilia Vignola, "Workers' health under algorithmic management: Emerging findings and urgent research questions" (2023) 20:2 Int J Environmental Research Public Health 1239.

[206] Rani & Dhir, *supra* note 1.

[207] *Ibid*, at 168, pointed out that workers were dependent on task-based work for remuneration. Therefore, most were willing to work without sick leaves and, even worse, were unable to quarantine even if COVID-19 symptoms appeared.

[208] Funda Ustek-Spilda, Richard Heeks, & Mark Graham, "Covid-19: Who will protect gig workers, if not platforms?" *Social Europe* (28 May 2020) <https://www.socialeurope.eu/covid-19-who-will-protect-gig-workersif-not-platforms>; Kelle Howson & others, "Stripping back the mask: Working conditions on digital labour platforms during the Covid-19 pandemic" (2022) 161:3 Intl Lab Rev 413.

supplying essential goods, which increased their demand drastically.[209] For instance, Swiggy, a food-delivery platform, partnered with several national brands to supply essential products and food items.[210] The situation was worse for workers working with platforms like Uber India. In one case, an Uber India driver in Bangalore attempted self-immolation inside his car due to the rising fuel prices and the lack of rides during the lockdown.[211] Rani and Dhir pointed out that in the absence of any formalized collective bargaining procedures, workers were barely provided with any personal safety equipment, such as PPE kits, during the pandemic, or paid higher wages in the form of hazard pay, forcing some workers to go on strikes.[212] The modus operandi of the platform economy effectively frustrates the realization of the ILO Fundamental Principles and Rights at Work; an issue that is exacerbated in the case of Global South countries such as India.

Informality is consistently seen as a "transitory phenomenon", it has continued to persist in India on a large scale.[213] Moreover, even when the country has witnessed substantial economic growth in the past few decades, informal labour has largely not reaped any rewards. The digitalized platform economy is now considered the way to transition to formality in developing countries.[214] However, this form of work continues the already prevalent precariousness of informal labour. Moreover, as pointed out by Schoukens, Barrio, and De Becker, platform work not only continues the challenges already seen by non-standard workers but also exacerbates them due to algorithmic management.[215] In essence, informal labour, rather than transitioning, continues to persist in a different work arrangement in India.

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[209] Rani & Dhir *supra* note 1, at 164.
[210] "Adani Wilmar ties up with Swiggy to deliver essentials" *Mint* (9 April 2020) Online: <https://www.livemint.com/industry/retail/adani-wilmar-ties-up-with-swiggy-to-deliver-essentials-11586440339113.html>
[211] Nagarjun Dwarakanath, "Bengaluru cab driver dies after setting himself on fire over financial issues" *India Today* (31 March 2021) <https://www.indiatoday.in/cities/bengaluru/story/karnataka-bengaluru-cab-driver-diessetting-himself-fire-financial-issues-1785445-2021-03-31>
[212] Rani & Dhir *supra* note 1, at 168.
[213] See, ILO, "The dilemma of the informal sector: Report of the Director General (Part I)" (International Labour Conference 78th Session, 1991) 15, where it's pointed out that the policymakers in countries "have tended to ignore it [informal sector], in the hope or the belief that it would go away" or be absorbed into the modern sector.
[214] Aditi Surie & Jyothi Koduganti, "The emerging nature of work in platform economy companies in companies in Bengaluru, India: The case of Uber and Ola cab drivers" (2016) 5:3 E-journal Intl. Comp. Lab. Studies, where the authors pointed out that the business leaders and media outlets have consistently lauded the platform economy as a route to the formalization of the Indian urban workforce.
[215] Paul Schoukens, Alberto Barrio, & Eleni De Becker, "Platform economy and the risk of in-work poverty: A research agenda for social security lawyers" in Valerio De Stefano & others, eds, *A Research Agenda for the Gig Economy and Society* (Edward Elgar, 2022) 93.

3) Unseen agenda: The rise of (neo)techno-nationalism fostering informal employment

Scholars such as Harris-White and Bremen have noted that informal work is often "deliberately developed" by registered businesses and the State, as it has clear advantages.[216] Firstly, it tends to transfer the risks of the market to the worker. Secondly, it allows for the reduction of expenses such as overheads, evasion of employer obligations, and undercutting of mandated wage levels. Thirdly, it allows for assimilation and reliance on new forms of inexpensive labour such as rural workers, female and transgender workers, child labourers, and immigrant workers, whilst avoiding any unionization. Fourthly, it absolves the State of its responsibility of protecting the workers and diminishes the State's infrastructural obligations toward businesses and capital. The absolute neglect by the governments at both the central and state levels in India, whether through lack of protective measures or other means such as non-application of labour laws, has incentivized capital to convert swathes of workers into an informal workforce. In fact, even the miniscule workforce that is covered by labour laws has, in the last few decades, seen successive governments dilute their rights considerably, in what could be referred to as "[labour] reforms by stealth".[217]

In recent times, Nathan, Kelkar, and Mehta have asserted that the Indian government has actively engaged in supporting domestic high-tech industries, as evidenced by the recently enacted labour Codes.[218] They argue that this forms part of a broader phenomenon termed as techno-nationalism, through which the government "works to prepare rules which would support India-based platforms, but not rules that would benefit platform workers".[219] The term techno-nationalism was first coined by Robert Reich, an economist in 1987 to describe the ways in which dominant economies such as the U.S., protected their technologies against foreign competitors.[220] Since there was massive competition between the U.S. and Japan in the 1980s in the realm of semiconductor

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[216] Barbara Harriss-White *supra* note 87, at 38; Bremen *supra* note 93.
[217] See generally, Anamitra Roychowdhury, *Labour law reforms in India: All in the name of jobs* (Routledge, 2018); K.R. Shyam Sundar, "State in industrial relations system in India: From corporatist to neo-liberal?" (2005) Indian J. Lab. Econ. 917. Mezzadri, *supra* note, 158, at 504, pointed out that reformism by stealth tends to occur when the institutional structure is maintained by the State on the one hand, while allowing certain classes to introduce acts and tactics amounting to change of this framework on the other hand.
[218] Nathan, Kelkar, & Mehta, *supra* note 154, at 380.
[219] *Ibid*, at 381.
[220] Robert Reich, "The rise of techno-nationalism" *The Atlantic* (May 1987) Online: <https://www.theatlantic.com/magazine/archive/1987/05/the-rise-of-techno-nationalism/665772/> , the author noted that the Reagen administration had intervened and halted negotiations between the American company Fairchild Semiconductor and the Japanese company Fujitsu Ltd. The primary rational behind the intervention was due to "national security". See also, Daniele Archibugi & Jonathan Michie, "Technological globalization or national systems of innovation?" (1997) 29:2 Futures 121.

development, it was realized that the nation's success was dependent on its technological strength.[221] Essentially, as Reich noted, "technological strength is seen as one of the most important determinants of the rise and fall of major power".[222] As such, there are three approaches to techno-nationalism, viz., the protectionist approach where the state directly intervenes in domestic high-tech industries through specific regulations, the innovationist approach considers technological innovation as a key driver in the competitiveness of the nation in high-tech sectors, and the strategic industry approach where the state utilizes the domestic high-tech sector as a means to exert its influence on the global stage, essentially aligning domestic economic policies with national security concerns.[223] Whilst the 1980s techno-nationalistic agenda was limited to semiconductor technologies between the U.S. and Japan, Park noted that this has completely changed in recent years, with the technological competition between the U.S. and China incorporating all advanced technologies, such as electric vehicles, artificial intelligence, big data, virtual reality, etc.[224] In contrast to the current resurgence of techno-nationalism, notably heightened by the Sino-American competition, such a scenario was not the norm during the early years of the 21st century. In fact, it was soon realized that technological advancements and nation-building could progress faster through international collaboration and resource sharing, rather than states solely promoting their own national interests and domestic companies. This was referred to as techno-globalism, which was seen as critical to develop technologies to maintain sustainable economic growth.[225] Luo noted that techno-nationalism and techno-globalism are not necessarily "mutually exclusive", as States may have a mixture of these approaches in different areas, sectors, or industries.[226] In that sense, States may often practice what Yamada refers to as "neo-techno-

[221] *Ibid.* See also, Seohee Park, "Semiconductors at the intersection of geoeconomics, technonationalism, and global value chains" (2023) 12:8 Soc Sciences 466.
[222] *Ibid.*
[223] See, Seohee Park, "The evolution of Japan's technonationalism: Shifted in paradigm of technonationalism from developmentalism-oriented industrial policy to security-oriented geostrategy" (2023) 31:2 Asian J Political Science 87, where the author observed that different approaches are based on the policy direction, goals and orientation and role of the states.
[224] *Ibid*, at 87. See also, James Schoff, "U.S.-Japan technology policy coordination: Balancing technonationalism with a globalized world" (Carnegie Endowment for International Peace Working Paper, 2020) 6; Catherine Banet, "Techno-nationalism in the context of energy transition: Regulating technology innovation transfer in offshore wind technologies" in Donald Zillman, et al., eds., *Innovation in Energy Law and Technology Solutions for Energy Transitions* (Oxford University Press, 2018) 74.
[225] See, David Edgerton, "The contradictions of techno-nationalism and techno-globalism: A historical perspective" (2007) 1:1 New Global Studies 1, 19, where the author noted that "technology like nationalism, crosses national borders". The author gives a rich historical account of the concepts, highlighting that technological internationalism was visible even during the height of the Cold War and in fascist Italy of 1935.
[226] Yadong Luo, "The illusions of techno-nationalism" (2022) 53 J Intl Bus Studies 550.

nationalism", where they make policies to promote domestic technological companies and rely heavily on private initiatives but are still open to foreign investment and foreign entities and businesses.[227] Nathan, Kelkar, and Mehta have asserted that Indian platforms, including DLPs, are counted as high-tech industries by the government; therefore, the government has made policies, including the recently enacted labour Codes, to facilitate the rise of domestic platforms.[228] However, this approach, rather than being techno-nationalistic, seems akin to neo-techno-nationalism as referred to by Yamada, as it not only aims to provide support to domestic high-tech industries, including the DLPs by creating a favorable regulatory climate for them, it also aims at substantial foreign investment in Indian technology startups. For instance, Google is one of the largest shareholders in Dunzo, a domestic consumer goods delivery platform.[229] Similarly, several DLPs such as Amazon Flex and Uber India have large market shares in India. In some sense, India practices both localization and globalization in equal measure. Yamada has noted that countries following neo-techno-nationalistic policies resemble a "salad bowl into which the contradicting elements of nationalism and globalism were joined together randomly".[230] For India, competition against China forms a large part of the Indian government's action of providing a favorable regulatory climate for investors and domestic industries, as most Western states view India as an essential counterweight to China.[231] However, in providing a favorable regulatory climate, the Indian government arguably seems to consider the dilution of labour rights as collateral damage. By expressly excluding platform workers from the purview of the formalistic labour laws to further boost platform companies, they are, inevitably, moved into the informal sector, thereby exacerbating their precariousness. The narrative of promoting the "ease of doing business",[232] which serves as the driving force behind the State's implementation of neo-techno-nationalist policies, could have adverse consequences on workers both in the formal and the informal sectors.

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[227] Atsushi Yamada, "Neo-Techno-Nationalism: How and Why it grows?" (Columbia International Affairs Online Working Paper, 2000)
[228] Nathan, Kelkar, & Mehta, *supra* note 154, at 380.
[229] "Quick delivery company Dunzo raises $ 75 million from Reliance Retail, Google, others: Report" *Business Today* (06 April 2023) Online: <https://www.businesstoday.in/entrepreneurship/story/quick-delivery-company-dunzo-raises-75-million-from-reliance-retail-google-others-report-376330-2023-04-06>
[230] Yamada, *supra* note 227.
[231] David Moschella & Robert Atkinson, "India is an essential counterweight to China - and the next U.S. dependency" (Information Technology & Innovation Foundation Paper, 2021).
[232] Ministry of Labour & Employment, *supra* note 75, at 7.

It is, therefore, imperative to examine the impact of the neo-techno-nationalist policies on labour in India, particularly in light of the enactment of the Codes.

This part considers how the current Prime Minister Narendra Modi-led Bhartiya Janta Party (BJP) government at the federal level has employed tactics similar to those adopted by the British colonial regime before India became independent in 1947. It delves into the historical context of how the British concept of "rationalization" was utilized to transform the indigenous labourers into efficient factory workers while subjecting them to employer domination. It then explores the shift in India's outlook after independence, with the adoption of a socialistic approach and constitutional welfare provisions. However, economic challenges in the 1980s and 1990s, similar to those faced by other developing nations, led to market liberalization and the deliberate dilution of labour regulations. In recent years, the potential regulatory changes introduced in the Codes have been said to outright address the "concerns of capital rather than any concrete improvements or demands from labour".[233] In the end, this part will demonstrate how the labour (de)regulation would impact platform workers, further entrenching them into precarity.

a) India's oscillation from *laissez-faire* "rationalization" to a socialistic outlook

As mentioned earlier, the British colonial regime had carried out a rationalization process to systematize the industrial sector and transform the rural worker into an efficient factory worker. Through this process, the prerogatives given to the employers often resulted in the subjugation of labour. However, the narrative was never about control but was ostensibly about creating a systematic standardization of industrial processes, including regular payment of wages to workers. That was a failed attempt by the colonial regime, as pointed out by the 1946 Labour Investigation Committee, where it was noted that the factories in India were completely non-standardized in a way that "modern industry cannot proceed".[234] Given that workers and unions were instrumental in the freedom struggle, the post-colonial government, headed by Prime Minister Jawaharlal Nehru (PM Nehru), took it upon itself to safeguard workers' rights.[235] However, the independence

[233] Secki Joshi, "India's labour reforms: The informalisation of work and the growth of semi-formal employment" (2022) 57:46 Econ. & Political Weekly; See also, T. Rajalakshmi, "Amendments to labour laws under the Modi government: No love for labour" *Frontline* (7 August 2019) Online: <https://frontline.thehindu.com/the-nation/article28757774.ece>

[234] D.V. Rege, *Report of the Labour Investigation Committee* (Manager of Publications, Government of India, 1946) 359.

[235] Prime Minister Jawaharlal Nehru was also a vital part of the 1939 National Planning Commission, which recommended drastic changes to British legislation such as reducing weekly working hours, a ban on child labour

struggle had taken a toll on the country, plunging most of the population into poverty. Therefore, the government required the rapid growth of industries without any cessation of work. For this reason, the State advocated for a truce between labour and capital through the "Industrial Truce Conference" in New Delhi. This truce provided the State with a buffer period where workers and management in the formal sector agreed to no strikes and lockouts for a period of three years.[236] In place of the truce, the government announced plans for the creation of houses for the workers, at least in industrialized provinces, and incentivized employers with interest-free loans for constructing houses for workers.[237]

The most significant role was played by the former Labour Minister and independent India's Law Minister, Dr. B.R. Ambedkar, who designed the framework of labour and constitutional rights in the post-colonial era.[238] In fact, Damodar and Waghchaure pointed out that Dr. Ambedkar's Independent Labor Party (ILP), formed in 1936, had previously advocated for state-sponsored industrialization and the rehabilitation of old industries, with state ownership and management of most industries.[239] The ILP had also advocated for not only the protection of factory workers but also legislation providing minimum wages, safe working conditions, and paid leave. Moreover, as the head of the Drafting Committee of the Constitution, Dr. Ambedkar was crucial in adopting the DPSPs, which will be elaborated upon in greater detail in chapter 4, as well as the Fundamental Rights under Part III of the Constitution.[240] These rights encompassed, *inter alia*, the right to form associations, including the right to join unions,[241] and the right against exploitation, which

below the age of 15 and implementing minimum wage. See, *National Planning Committee No. 2* (General Secretary, National Planning Committee, 1939) 53.

[236] See generally, Vivek Chibber, "From class compromise to class accommodation: Labor's incorporation into the Indian political economy" in Raka Ray & Mary Katzenstein, *Social Movements in India* (Rowman & Littlefield, Inc., 2005) 32, 39.

[237] P. S. Narasimhan, "Labour reforms in contemporary India" (1953) 26:1 Pacific Affairs 44.

[238] Santosh Suradkar, "The Labour Act of 1938 under the 'Nationalist' government – Strike, violence, and an ideological paradox" (2023) 58:2 Econ. & Political Weekly, where the author pointed out that Dr. Ambedkar was amongst the first to note that labour rights were critical to protecting democratic values.

[239] Vinay Damodar & Jayram Waghchaure, "Dr. Ambedkar's contribution to labor welfare and labor laws in India" *Round Table India* (25 October 2022) Online: <https://www.roundtableindia.co.in/dr-ambedkars-contribution-to-labor-welfare-and-labor-laws-in-india/>

[240] It is for this reason that Dr. Ambedkar is also known as the "Architect of the Indian Constitution". See generally, Kanta Kataria, "Dr. B.R. Ambedkar as a nation builder" (2012) LXXIII:4 Indian J. Political Science 601; Vijayashri Sripati, "Toward fifty years of constitutionalism and fundamental rights in India: Looking back to see ahead (1950-2000)" (1998) 14:2 Am U. Int'l L. Rev. 413.

[241] *Constitution of India, supra* note, 53, art. 19(1)(c). For a brief overview of the fundamental rights, Rajbir Singh Dalal, "Fundamental rights enshrined in Indian Constitution: Provisions and practices" (2009) 70:3 Indian J. Political Science 779. See also, with respect to the interpretation of Article 19(1)(c), Menaka Guruswamy,

prohibited all forms of forced labour,[242] child labour in hazardous industries,[243] and traffic in human beings.[244] A shift was visible from the *laissez-faire* rationalization of the colonial regime to a rather socialistic outlook of the post-colonial state, pioneered through the vision of Dr. Ambedkar.

Dr. Ambedkar also realized that the labour culture in India was completely different from most developed states. Given that the division of labour was also based on caste, even in the formal sector, Dr. Ambedkar realized the need for the State to intervene and enact legislation, instead of leaving it to the negotiations between management and labour.[245] Therefore, post-independence, a raft of amendments to the IDA were made over several decades. Notably, the IDA amendment in 1953 included Chapter V-A, requiring employers to pay compensation to the workers when laid off,[246] placing a duty to maintain muster rolls,[247] requiring notice to be provided to the worker before retrenchment,[248] and requiring the employer to provide an opportunity for re-employment to the retrenched workers.[249] Moreover, the industrial tribunals were given broad powers through amendments carried out in 1965, 1971, and 1982 to the IDA, including the power to make reinstatement and compensation orders if the dismissal was unfair.[250] The most important amendment, which is still heavily debated, was the introduction of Chapter V-B, requiring the employer to give notice to the appropriate governmental authority before lay-off and retrenchment.[251] With considerable state intervention in almost all forms of formalistic labour, owing to the socialistic outlook of the country, the schematics of labour law post-independence had drastically changed. Given that workers played a key role in the independence struggle, the bond between political parties and labour movements had also strengthened, thus making the

"Assembly and association" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 834.

[242] *Ibid*, art. 23(1).

[243] *Ibid*, art. 24.

[244] *Ibid*, art. 23(1).

[245] In that sense, a sort of paternalistic attitude was visible in labour relations, contrasting with many countries in the Global North, where collective bargaining was preferred.

[246] See, *Industrial Disputes (Amendment) Act, 1953*, No. 43 of 1953, Chapter V-A, s. 25(C)

[247] *Ibid*., s. 25(D)

[248] *Ibid*, s. 25(F)

[249] *Ibid*, ss. 25(G), 25(H).

[250] See also, *Industrial Disputes (Amendment) Act, 1982*, No, 46 of 1982, Fifth Schedule- Unfair Labour Practices, which laid down a separate schedule of unfair labour practices by employers, trade unions, and workmen.

[251] *Industrial Disputes (Amendment) Act, 1976*, No. 32 of 1976, Chapter V-B, ss. 25(M)(1), 25(N)(1).

workers and unions important political players.[252] This allowed them to resist significant liberalization measures undertaken by the government, until the 1990s.

b) Liberalization attempts resulting in labour being collateral damage

Like most developing countries in the 1970s, India was facing slow economic growth, hyperinflation, and rising unemployment. During this time, employers and academic scholars pointed to overregulation, especially the State intervention through the IDA retrenchment and layoff process, as the primary cause.[253] Contrary studies, however, indicated that the impairment was not necessarily caused by overregulation but due to poor implementation of laws, and issues with respect to the adjudication and interpretation of the same by the judiciary.[254] At this juncture, trade liberalization was considered the optimal way forward, with the first attempt occurring in 1986 under the aegis of the then Prime Minister Rajiv Gandhi (PM Gandhi). He believed that deregulation, import liberalization, and reliance on foreign technology were the logical steps. With a New Fiscal Policy, the government aimed at lowering tariffs on certain goods, which was unacceptable to the labour unions, who preferred the more protectionist approach that previous governments had adopted.[255] This created a rift between the workers and the government, resulting in multiple general strikes by the AITUC.[256] These general strikes indicated a severe public backlash against these policies, which were eventually reversed by the then Finance Minister, V.P. Singh.

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[252] Sarosh Kuruvilla, "Linkages between industrialization strategies and industrial relations/human resource policies: Singapore, Malaysia, the Philippines, and India" (1998) 49 Industrial & Lab Relations Rev 635.
[253] See generally, Radhicka Kapoor, "Creating jobs in India's organised manufacturing sector" (Indian Council for Research on International Economic Relations Working Paper No. 286, 2014); Ahmad Ahsan, Carmen Pages, & Tirthankar Roy, "Legislation, enforcement and adjudication in Indian labor markets: Origins, consequences and way forward" in Dipak Mazumdar & Sandip Sarkar, eds, *Globalization, Labour Markets, and Inequality in India* (Routledge, 2008) 247. See also, Peter Fallon & Robert Lucas, "The impact of changes in job security regulations in India and Zimbabwe" (1991) 5:3 World Bank Econ. Rev 395, who claimed that there was a considerable decline in demand for employees across industries after the 1976 IDA amendment. Timothy Besley & Robin Burgess, "Can labor regulation hinder economic performance? Evidence from India" (2004) 119:1 Quarterly J Econ. 91, who pointed out that India's poor performance was due to the excessive bargaining power given to organized labour.
[254] Aditya Bhattacharjea, "Labour market regulation and industrial performance in India: A critical Review of the empirical evidence" (2006) 49:2 Indian J Lab. Econ. 211. See also, Aditya Bhattacharjea, "Labour market flexibility in Indian manufacturing: A critical survey of the literature" (2021) 160:2 Int'l Lab. Rev. 197, critically challenging the foundational papers that claimed that India's poor performance was due to its restrictive labour laws.
[255] Atul Kohli, "The politics of economic liberalization in India" in Ezra Suleiman & John Waterbury, eds, *The Political Economy of Public Sector Reform and Privatization* (Routledge, 1991) 364.
[256] *Ibid* at 379.

The second attempt to liberalize came after PM Gandhi's successor, Narasimha Rao, was elected in 1991. This was a challenging period for India as it faced a significant decline in foreign exchange reserves. During this time, the government was compelled to seek assistance from the IMF and the World Bank. However, the assistance provided by them came with a condition – India had to undertake economic liberalization.[257] In view of this, Rao's government introduced reforms similar to those introduced by the preceding government through the New Economic Policy, which aimed to liberalize industrial activities, devalue the rupee, privatize the public sector, and reduce protective barriers to encourage reforms, thereby making it easier to lay-off and retrench workers.[258] Rao's administration realized that there would be a backlash against the proposed reforms.[259] Consequently, to curb any strikes or mobilization attempts, labour repression was deemed necessary. Therefore, the government used labour repression tactics, including bringing some unions that were funded by the government on board. Nevertheless, the first general strike carried out by the Sponsoring Committee of Indian Trade Unions (SCITU) in November 1991 was successful, which motivated the SCITU to call another strike in June 1992.[260] However, this time around, the government used preventive detention provisions to arrest strikers and union heads under suspicion of disrupting public order. Notably, the government also provided monetary incentives to workers who were willing to break the strike. Over the next year, several strikes which were called by the SCITU were met with the same fate, i.e., labour repression, preventive detention, and police brutality.

It was also during this time that a Planning Task Force on Employment Opportunities, referred to as the Ahluwalia Committee, was set up. The Report of the Committee noted that the IDA provisions of retrenchment requiring permission from the government were too protective and had several negative effects on the labour market.[261] It also pointed out that employers require flexibility to remain competitive. The Report cited a passage from the Supreme Court's decision in *Excel Wear v. Union of India*, which stated that "[g]radually, the net was cast too wide and the

[257] Sarosh Kuruvilla & Christopher Erickson, "Change and transformation in Asian industrial relations" (2002) 41:2 Industrial Relations 171.
[258] See, for a brief overview of the changes, Ajeet Mathur, "The experience of consultation during structural adjustment in India (1990-92)" 132:3 Int'l Lab Rev 331.
[259] Rob Jenkins, *Democratic Politics and Economic Reform in India* (Cambridge University Press, 2010) 47.
[260] Adam Dean, *Opening up by cracking down* (Cambridge University Press, 2022) 94, pointed out that approximately 12 million workers joined the public strike, resulting in several industries being crippled.
[261] Montek Ahluwalia, *Report of the Task Force on Employment Opportunities* (Government of India, Planning Commission, 2001) 153-154.

freedom of employer tightened to such an extent by the introduction of the provisions that it has come to a breaking point from the view of the employers".[262] The Ahluwalia Committee argued that a change in labour laws was imperative for the growth of the economy, as "in a globalized world, persisting with labour laws that are much more rigid than those prevailing in other countries makes us [India] uncompetitive". Certain proposed amendments, which aimed at providing the employer with greater flexibility, included: 1) the removal of the provision that required prior government approval for the retrenchment of workers,[263] 2) the introduction of the system of short-term employment contracts, where workers on a fixed term contract could be hired and discharged with relative ease,[264] and 3) amending the notice of change provision, which required employers to give notice and obtain consent of the workers, before, *inter alia*, rationalization, standardization, or improvement of the plant or technique leads to retrenchment of the workers.[265]

A year after the Ahluwalia recommendations, the Second National Commission on Labour (SNCL) in 2002 recommended the "rationalization of existing laws relating to labour in the organised sector".[266] The narrative of "rationalization" was reignited for the first time since independence. The SNCL reasoned that there was a need to simplify and consolidate the labour laws of the country, especially due to the legislative proliferation at both the central and state levels.[267] Interestingly, the SNCL's understanding of rationalization, through its terms of reference, included making laws that were "more consistent with the context".[268] The context, in this sense, was noted as the "changing economic environment, including the globalization of the economy and liberalization of trade and industry…the advancements in technology and their far-reaching impacts on industry".[269] The SNCL also noted that "…because of global competition most of the companies want to reduce costs and be competitive…",[270] which was arguably done by making labour a casualty.[271] In fact, Srivastava pointed out that the SNCL, whilst indicating the dismal conditions of informal labour in the country, also mooted amendments to the Contract

[262] *Ibid* at 155; *Excel Wear v. Union of India*, (1979) 4 SCC 224 (India) at para 25 (SC Ind).
[263] *Ibid* at 156.
[264] *Ibid* at 156, para 7.16 (c).
[265] *Ibid* at 156-157, para 7.17.
[266] Report of the National Commission on Labour, *supra* note 59, at 6.
[267] *Ibid* at 12.
[268] *Ibid* at 10.
[269] *Ibid* at 6, para 1.2.
[270] *Ibid* at 245, para 4.276.
[271] Roychowdhary *supra* note 217, at 1.

Labour Act, 1970, which aimed at providing wages to contract labour at par with regular workers.[272]

The SNCL had almost the same approach as the colonial narrative of rationalization, i.e., ensuring that higher productivity could be achieved through technological changes and providing employers with enough flexibility. As the SNCL noted, "[o]rganizations must have the flexibility to adjust the number of their workforce based on economic efficiency".[273] Consequently, rationalization of labour can be interpreted as the retrenchment of workers, which can be carried out smoothly.[274] This was similar to the idea of "rationalization without tears" in the early years following independence; a phrase used to express that higher productivity through technology and systemized production may not lead to further unemployment.[275] In essence, the SNCL's recommendations can be summarized as granting employers the freedom to retrench and lay off employees as they please. This approach, as evident, constituted a drastic shift from the government's position taken after independence and was particularly divergent from the welfare goals enshrined in the Constitution of India.

The amendments to labour laws, however, were not carried out swiftly despite being recommended by the SNCL and the Ahluwalia Committee. Reforms were slow, less direct, and carried out in a piecemeal approach, due to the requirement of tripartite consultation.[276] Moreover, successive governments refused to take on workers' unions due to them being a political force. Having said that, judicial pronouncements on the interpretation of labour statutes had changed dramatically post-1990. In his empirical study, Sarkar noted that between 1970-1990, 80% of the cases were decided in favour of the workers as opposed to only 20% being decided in favour of the employers. However, this changed between 1990-2010, when 22% of the cases were decided in favour of workers and 78% were decided in favour of the employers. At the very least, it indicated the

[272] Ravi Srivastava, "Structural changes and non-standard forms of employment in India" (ILO Conditions of work and employment series paper no. 68) 20; See also, K. R. Shyam Sundar, "Non-regular workers in India: Social dialogue and organizational and bargaining strategies and practices" (ILO Working Paper No. 30, 2011).
[273] Report of the National Commission on Labour, *supra* note 59, at 364.
[274] Roychowdhary *supra* note 217, at 2.
[275] Charles Myers, "Labour problems of rationalisation: The experience of India" (1956) 73:5 Int'l Lab Rev 431.
[276] Mitchell, Mahy, & Gahan, *supra* note 51, at 426-427.

changing attitude of the judiciary in favour of liberalization, even when the laws remained almost the same.[277]

c) Dilution of labour regulations under the guise of "employer flexibility" and "ease of doing business"

Massive reforms were effected after 2014, when Prime Minister Narendra Modi (PM Modi) came to power with a resounding victory. The first set of reforms targeted the formal sector; these included the amendments targeting the Factories Act, 1948. The government first introduced the Factories (Amendment) Bill, 2014 that aimed at narrowing the scope of the law, essentially increasing the threshold of applicability to factories that use power and employ 20 or more workmen, or factories that do not use power and employ 40 or more workmen; instead of the established cut-off of 10 and 20 workmen respectively.[278] Moreover, the aim was also to increase the working time from 10.5 to 12 hours, and the overtime limit from 50 to 100 hours per quarter.[279] Interestingly, the government also introduced the Small Factories (Regulation of Employment and Conditions of Services) Bill, 2014, which exempted industries employing less than 40 workers from complying with 14 labour laws, including the Factories Act, IDA, and the Minimum Wages Act.[280] Most importantly, these factories were exempted from subscribing to the Employees' State Insurance and the Employee Provident Fund, which ensured insurance coverage for workers. Instead, the small factories were allowed to subscribe to insurance from other market providers without compulsion. The most disconcerting among the legislative changes were the amendments to the child labour and apprentice statutes, which allowed a child below the age of 14 to work in a family enterprise.

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[277] Santanu Sarkar, "How independent is India's labour law framework from the state's changing economic policies?" (2019) 30:3 Econ. and Lab. Relations Rev 422, 431.
[278] *The Factories (Amendment) Bill, 2014*, Bill No. 93 of 2014.
[279] *Ibid* at 26.
[280] PTI, "Government to place Bill for small factory regulation in Parliament", *Economic Times* (17 February 2016) online: <https://economictimes.indiatimes.com/small-biz/policy-trends/government-to-place-bill-for-small-factory-regulation-in-parliament/articleshow/51024621.cms?from=mdr> ; Yogima Sharma, "Small factories bill shelved on rights concerns" *Economic Times* (20 January 2018) Online: <https://economictimes.indiatimes.com/news/economy/policy/small-factories-bill-shelved-on-rights-concerns/articleshow/62576867.cms?from=mdr>

As per the 2011 census, India is home to 10.1 million child labourers, even though a statute seeking to prohibit some forms of child labour has been on the books since 1986.[281] With the recent amendments to the Child Labour (Prohibition and Regulation) Act, 1986, a child under the age of 14 years is now allowed to work in a family enterprise.[282] This has severe ramifications as most of the children employed as labourers work in rural areas in sectors such as agriculture or household industries, which are essentially home-based employment. The UNICEF severely criticized the amendments and recommended the removal of "children helping in family enterprises" from the Act.[283] Meanwhile, the Apprentices (Amendment) Act, 2014 changed the definition of workers to include workers employed through a contractor and not just regular contractual workers,[284] giving employers the unfettered right to appoint apprentices by paying them considerably lower wages than those paid to regular workers.[285] Following the central government, the state legislatures, where the party at the center enjoyed a majority, also amended their labour laws. For instance, the state government in Rajasthan carried out state-level pro-employer amendments to the IDA.[286] Sundar and Sapkal noted that the sudden changes in labour laws in the States of Madhya Pradesh and Uttar Pradesh have, in effect, the possibility of causing "anarchy in the labour market".[287]

During the initial years of PM Modi's tenure, there was a gradual restructuring of labour laws at the central level. However, this approach differed from the post-1991 liberalization period, where the reforms were introduced through the backdoor and rather discreetly, evading the tripartite consultation process. It was only after 2014 that a more aggressive dilution of labour laws began to occur. Most importantly, PM Modi's government launched the Make in India campaign to promote domestic technology companies, including DLPs. The government's aim was to create a start-up ecosystem, after witnessing the meteoric rise of the e-commerce website Flipkart, which became the first Indian unicorn business. The cheap availability of 4G internet through the mobile

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[281] "Child labour in India", *ILO Fact sheet* (8 June 2017) online: <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_557089.pdf>, pointed out that by passing the amendment act, India has ratified the Minimum Age Convention, 1973 (No. 138). But see, for detailed criticisms, Komal Ganotra, "Flawed child labour law amendment" (2016) LI: 35 Econ. & Political Weekly 19.
[282] *The Child Labour (Prohibition and Regulation) Amendment Act, 2016*, Act No. 35 of 2016.
[283] "Concerned by amended child labour bill in India, UN agency urges stronger legal framework", *UN. Org* (27 July 2016) online: <https://news.un.org/en/story/2016/07/535522>
[284] *The Apprentices (Amendment) Act, 2014*, No. 29 of 2014, s. 2(r).
[285] Roychowdhury, *supra* note 217.
[286] See generally, *The Industrial Disputes (Rajasthan Amendment) Act, 2014*, No. 21 of 2014.
[287] See, K. R. Shyam Sundar & Rahul Sapkal, "Changes to labour laws by state governments will lead to anarchy in the labour market" (2020) 55:3 Econ. & Political Weekly (Engage) 1.

network JIO made it easier for domestic platform companies to proliferate.[288] Seeing this, the government launched the Startup India campaign under the Make in India initiative, which aimed to support entrepreneurs to build a robust startup ecosystem.[289] In doing so, the government provided several benefits to startups, including the right to self-certify themselves with respect to several labour and environmental laws, including the IDA and the TUA. Moreover, these startups were exempted from labour inspections for a period of 3 to 5 years, unless a credible and verifiable complaint of violation was filed in writing by a senior officer.[290] With the seed investment and credit schemes specifically designed for startups, the Indian startup ecosystem became the third largest in the world in terms of startup numbers, overtaking China in terms of the number of unicorns created in 2022 and attracting even more foreign institutional investors.[291]

PM Modi's government particularly targeted technology-based entrepreneurship and foreign investment, due to the rise of technological competition with China. To create a favourable regulatory climate for foreign investment and domestic startups, the harmonization and consolidation of the existing labour laws was seen as a critical measure, resulting in the enactment of the new labour Codes, subsuming 29 existing central labour legislations. After the passing of the Labour Reforms Bill in the Parliament, PM Modi tweeted that, "…these reforms will contribute to a better working environment, which will accelerate economic growth. These Labour reforms will ensure 'Ease of Doing Business'. These are futuristic legislations which will empower enterprises by reducing compliance, red-tapism, and 'Inspector Raj'. These reforms also seek to harness the power of technology for the betterment of workers and industry both".[292] However, these reforms have been heavily criticized by workers and scholars for eroding the already limited protection available to workers.[293] The enactment of the new Codes was considered by the

[288] Niharika Sharma, "Reliance Jio's cheap data turned India's internet dreams into reality" *Quartz* (7th September 2021) Online: <https://qz.com/india/2055771/reliance-jios-cheap-data-turned-indias-internet-dreams-into-reality>
[289] "Startup India Programme", *Ministry of Commerce & Industry* (25 July 2016) online: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=147661>
[290] Deepak Patel, "Regarding 6 laws: PMO directs LabourMin to ensure self-certification system for start-ups" *The Indian Express* (15 August 2017) online: <https://indianexpress.com/article/business/companies/regarding-6-laws-pmo-directs-labourmin-to-ensure-self-certification-system-for-start-ups-4796936/>
[291] "India overtakes China as agrifoodtech startups raise record $4.6 bn in FY22" *Fortune India* (1 December 2022) online: <https://www.fortuneindia.com/macro/india-overtakes-china-as-agrifoodtech-startups-raise-record-46-bn-in-fy22/110588>
[292] Ministry of Labour & Employment, *supra* note 75, at ii.
[293] See, Babu Matthew, "From Labour and capital to labour for capital" (2021) 56:39 Econ. & Political Weekly 8, where the author stated that the labour codes "reveal less consultation and more government assertion at the expense of workers"; Keshab Das, "Labour and the State in India: Casualisation as reform" in Pedro Goulart, Raul Ramos, &

government as a massive step towards the "rationalization" of labour laws to enhance the "ease of doing business" and empower enterprises and workers.[294] Even then, this consolidation took place without consulting the workers in stark contrast to the ILO's Tripartite Consultation Convention, 1976 (No. 144), which has been ratified by India.[295]

In the context of DLPs, the government made a move to include them under the CSS, 2020, which has been lauded by some scholars.[296] However, inclusion does not necessarily result in any tangible benefits for the platform workers in the absence of an attempt to classify them as employees. The CSS explicitly states that platform workers and gig workers are outside the traditional employer-employee relationship.[297] Moreover, the CSS barely provides any social security to the gig and platform workers. A detailed discussion of the CSS provisions, particularly with respect to the protections ostensibly accorded to the platform workers, would be undertaken in the next chapter. However, it is still necessary to mention how the platform workers have deliberately been excluded from the other Codes, despite the narrative of universal coverage of labour laws put forth by the government.[298] Firstly, the CoW, which amalgamated laws pertaining to minimum wages, payment of wages, bonuses, and equal remuneration into a single instrument, seems to apply only to workers in a traditional employer-employee relationship, as Section 5 categorically notes that "no employer shall pay to any employee wages less than minimum rate of wages".[299] Since platform workers are outside the traditional employment relationship as per the CSS, the CoW provisions may not apply to them. Although the narrative of the CoW is the universalization of wages, it fails to extend the right to receive a minimum wage to all workers who fall outside the ambit of the law. This is also in stark contrast to the remarks of Bhagwati J. in *Sanjit Roy v. State*

Gianluca Ferrittu, *Global Labour in Distress, Volume I: Globalization, Technology and Labour Resilience* (Palgrave MacMillan, 2022) 409.

[294] Ministry of Labour & Employment, *supra* note 75, at 7.

[295] Matthew, *supra* note 293, at 8.

[296] Nathan, Kelkar, & Mehta, *supra* note 154; See also, Rani, Gobel, & Dhir, *supra* note 171, at 187, 188, where the authors noted that atleast a step has been taken to regulate the activities. However, they also pointed out that the efforts in developing nations remain disjointed, dispersed, and risk maintaining vulnerabilities for workers.

[297] The CSS provides a separate definition of a "gig worker" and a "platform worker". See, *CSS supra* note 76, s. 2(35), which states that a "gig worker" is a "person who performed work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship"; CSS, *supra* note 76, s. 2(61) defines a "platform worker" as a "person engaged in or undertaking platform work".

[298] Ministry of Labour and Employment, *supra* note 75, at p. 28.

[299] *Code on Wages, 2019*, Bill No. 184 of 2019, s. 5 [*CoW*]; See also, Saurabh Bhattacharjee, "Universalization of minimum wages as a pipe dream: Many discontents of the Code on Wages, 2019" (2022) 16:2 Socio-Legal Rev. 1; Nivedita Jayaram, "Protection of workers' wages in India: An analysis of the Labour Code on Wages, 2019" (2019) 54:49 Econ. & Political Weekly (Engage) 1.

of Rajasthan, where he noted that "every person who provides labour or service is entitled at least to the minimum wage".[300]

The second Code is the OSHWCC, 2020, which intends to "simplify, rationalize, and amalgamate" the provisions of 13 central labour laws concerning occupational health and safety.[301] India has ratified only a handful of the ILO Conventions concerning occupational safety and health, which do not include the ILO Occupational Safety and Health Convention, 1981 (No. 155).[302] Like the CoW, the platform workers have also been excluded from the OSHWCC, 2020, as it only applies to industries in which 10 or more persons are "employed". Therefore, provisions of the OSHWCC exclude most of the unorganised sector as well as the platform workforce. When asked by the Standing Committee on Labour (Standing Committee) during the discussion on the OSHWCC regarding the coverage of the unorganized sector and the threshold limit of 10 workers or more, the Ministry of Labour and Employment representatives stated that the "threshold of 10 creates a balance between the rights of the worker and for the survival of small business"[303] and that of the unorganised sector, the Ministry replied "…If a chaiwala (tea vendor) is there and a small shop is there, how we shall provide safety to each and every worker. It is a big question mark…".[304] Although the Standing Committee did not inquire about platform workers, the answer, perhaps, would have been the same as that pertaining to the coverage of unorganised workers. Finally, platform workers have also been excluded from the IRC, which has been heavily criticized for inducing a wide set of pro-employer reforms.[305] The IRC subsumes the three major industrial acts, viz, the IDA, the Industrial Employment (Standing Orders) Act, and the TUA, governing industrial disputes, conditions of employment, and trade unions, respectively.[306] At the outset, it is worth noting that informal and casual workers are still outside the purview of the coverage of the IDA, which is still in force. However, through the IRC, it was possible to include platform workers by expanding the definition of workman or employee, instead of placing them outside the purview of

[300] *Sanjit Roy v. State of Rajasthan*, (1983) 1 SCC 525 (SC Ind), at para 3.
[301] *Occupational Safety, Health and Working Conditions Code*, *2020*, Bill No. 186 of 2019 [*OSHWCC*].
[302] K. R. Shyam Sundar, "Occupational safety continues to be ignored as a right" (2020) Econ. & Political Weekly (Engage) 1.
[303] "Standing Committee on Labour Ministry, Fourth Report on the Occupational Safety, Health and Working Conditions Code, 2019" (Ministry of Labour & Employment, 2020) 23.
[304] *Ibid*, at 24.
[305] See generally, Aishwarya Bhuta, "Imbalancing act: India's Industrial Relations Code, 2020" (2022) 65 Indian J. Lab. Econ. 821
[306] *Industrial Relations Code, 2020*, No. 35 of 2020 [*IRC*].

those categories. However, it should be emphasized that the IRC has vigorously pushed neo-liberal reforms. Therefore, even if the platform workers were to transition from an essentially informal workforce to a formal one, the protections received have been curtailed to a considerable extent. For instance, the IRC has reduced the power of collective bargaining by bringing the largest union (51% or more membership) as the sole negotiating agent.[307] It has also increased the floor for the applicability of standing orders to 300 employees.[308] This, as Sundar pointed out, allows firms that employ less than 300 employees to "discriminate between workers in terms of conditions of employment, avoid providing means of redress against unfair acts, frame charges against "inconvenient workers", dismiss them without a domestic inquiry, avoid paying subsistence allowance to the suspended employees, among others.".[309] Most importantly, the government had the opportunity to include provisions pertaining to the consent of workers or unions to be obtained for the use of technology at the workplace. Instead, the government reproduced the older IDA provision of "notice of change" in the IRC, which states that "no employer, who proposes to effect any change in the conditions of service appliable to any worker…, shall effect such change…without giving the workers likely to be affected by such change a notice".[310] This provision requires the employer to give notice only if, *inter alia*, there is "rationalization, standardization, or improvement of a plant or technique leads to retrenchment of workers".[311] Notice of any technological change must only be given by the employer if it leads to retrenchment. The situation is even more dire for the DLP workers, with respect to whom there is no requirement of consent or notice for the usage of technology. The issue of algorithmic management of platform workers was expressly spoken about by the NITI Aayog report.[312] However, no recommendations were provided by NITI Aayog for tackling these issues.

The CSS is also silent on the issue of the usage of algorithms to control platform workers. Therefore, DLPs in India currently operate in an unregulated sphere, with the government actively supporting flexibility. In fact, the NITI Aayog report pointed out that the workers in platform work

[307] *Ibid*, ss. 14(1), 14(4).
[308] *Ibid*, s. 28(1).
[309] See, K.R. Shyam Sundar, "Industrial Relations Code and Standing Orders Act: A deregulation that spells chaos and hurts workers" *Leaflet* (16 October 2020) Online: <https://theleaflet.in/industrial-relations-code-and-standing-orders-act-a-deregulation-that-spells-chaos-and-hurts-workers/> ; Bhuta, *supra* note 305, at 825.
[310] *Ibid*, Chapter V, ss. 40(1); 101(l)
[311] *Ibid*, Third Schedule, cl. 10.
[312] Niti Aayog *supra* note 24, at 34-35.

are often misclassified by the platforms to evade social security benefits.[313] However, the report did not provide any appropriate measures to address this problem. Contrarily, it suggested that the government invest in platform work by establishing a separate Platform India initiative, akin to the Startup India initiative, with the aim of promoting and expediting the growth of platformization in India. In the end, the report noted that the rise of platformization is possible by "simplification and handholding, funding support and incentives, skill, development, and social and financial inclusion".[314]

India has been in this position previously, for instance, when the policies of successive governments supported the rise of the garment industry, in turn, informalizing labour in that sector.[315] In this context, Mezzadri's observations emphasized that the informalization of labour in the garment industry has always been considered as one occurring "in the shadow of the [s]tate". However, this was not the case, as the State was an "active agent" driving the process of informalization through formal policies and its progressive alignment with the interests of capital.[316] The situation with platform workers is relatively similar. As Rani rightly pointed out, "[m]ost governments in developing countries believe in the notion that platforms are here to create employment and they are the problem solvers for our poverty. All we need to do is invest in digital infrastructure and digital literacy…but we don't see platforms as a 'silver bullet'. They are making workers' lives more precarious".[317] In the end, informality is not determined by the characteristics of the work itself, but rather by the boundaries of state regulation, which are often arbitrarily drawn and amended by the State to facilitate the interests of capital.

III. Applying the existing labour laws to platform workers: An analysis of the IDA, UWSSA, and the CSS

Having demonstrated in chapter 2 how India's labour law framework has largely ignored labour relations in the informal sector, resulting in most of the workforce remaining bereft of the protections accorded by labour legislations, this chapter seeks to examine how India's fragmented labour law framework may be applicable to platform workers. To that end, it primarily analyzes

[313] *Ibid*, at 34.
[314] *Ibid*, at 40.
[315] See generally, Alessandra Mezzadri, "Reflections on globalization and labour standards in the Indian garment industry: Codes of conduct versus 'Codes of pratice' imposed by firm" (2012) 3:1 Global Lab. J. 40.
[316] Mezzadri, *supra* note 158, at 507.
[317] Mehrotra, *supra* note 155.

the provisions of the IDA and the UWSSA. While analyzing whether platform workers can be considered "workmen" under the IDA, reliance will primarily be placed on the tests evolved and applied by the Supreme Court of India. With respect to the UWSSA, the chapter will highlight the issues with the definitions under the Act, the scheme of the Act itself, and the lack of effective implementation mechanisms. Moreover, this Chapter will also look at the recently enacted CSS, which, *inter alia*, subsumes the UWSSA and, for the first time, introduced the concept of platform work. This chapter will demonstrate that, despite the CSS aiming to provide social security to platform workers, the inherent definitional quandaries and the recommendatory nature of its provisions would significantly impact its implementation.

1) Situating platform work in a fragmented legal framework

The IFAT claimed that the platform workers, until the Codes come into force, ought to be recognized as "unorganised workers", thereby affording them basic social security benefits under the UWSSA.[318] It is for this reason that the IFAT filed a petition in the Supreme Court of India, seeking recognition of platform workers as "unorganised workers" under Section 2(m) of the UWSSA. This is coupled with a request to facilitate the registration of platform workers on the e-SHRAM portal, which is aimed at creating a national database of "unorganised workers" in India. The aim of this portal is to collate information about these workers such as names, occupations, addresses, educational background, skills, etc., which would then allow the government to assess the employability of the workers and provide them with social security benefits, thereby, arguably, furthering the goal of formalizing the unorganised workforce. Although the petition is *sub-judice* before the Supreme Court of India, it prompts an inquiry about the classification of platform workers in the Indian legal landscape. Therefore, the analysis of the pre-Code legislations, the IDA, and the UWSSA, assumes significance to shed light upon the legal status of the platform workers in the existing legal framework.

As mentioned previously, India is based on a federal structure, which provides for the distribution of legislative and administrative powers between both the central and the state governments.[319]

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[318] See, for a brief overview, "Writ Petition summary (The Indian Federation of App-Based Transport Workers): Gig Workers access to social security" *Supreme Court Observer* (7 December 2021) Online: <https://www.scobserver.in/reports/gig-workers-access-to-social-security-the-indian-federation-of-app-based-transport-workers-ifat-v-union-of-india-writ-petition-summary/>

[319] See, for a brief overview, Louise Tillin, *Indian Federalism (Oxford India Short Introductions)* (Oxford University Press, 2019); Singh, *supra* note, 52.

Laws pertaining to labour welfare and industrial relations can be made by both the states and the center.[320] The Ministry of Labour's website indicates the existence of a total of 40 Central Labour Acts governing different issues.[321] For the purposes of the analysis undertaken in this section of the chapter, the IDA and the UWSSA are of primary importance.

a) Transcending informality: Bringing platform workers under the IDA

The IDA was the first to establish a framework for an efficient way of settling industrial disputes as well as dealing with questions of what is an "industry" and who is a "workman". Although chapter 2 indicated the challenges that labour law poses for informal workers who fall outside its narrow purview, this part of chapter 3 will examine whether the definition of "industry" and "workman" under the IDA, as interpreted by the Supreme Court of India, could include platform work and workers respectively under its ambit. The primary inquiry, thus, revolves around whether platform workers can be brought under the ambit of the IDA. To determine this, the initial consideration is whether the services provided by the platform would fall under the definition of "industry" under the IDA. Subsequently, the question arises as to whether platform workers can be classified as "workmen" as per the definition in the IDA. Therefore, an examination of how the terms "industry" and "workman" have been defined in the statute and construed by the Supreme Court of India in the past becomes crucial. This is critical in exploring the potential applicability of the IDA to platform workers.

i. The platforms providing a service

Under the IDA, Section 2(j) defines an industry as "any business, trade, undertaking, manufacture, or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workman".[322] The Supreme Court, through a catena of decisions, has

[320] *Constitution of India, supra* note 53, art. 246 lays down that the Parliament of India is exclusively empowered to enact laws on subjects included in List I (Union List), the State legislatures are empowered to make laws on subjects enumerated in List II (State List), whereas, both Parliament and State legislatures have the power to make laws on subjects mentioned in List III (Concurrent List), although the law enacted by Parliament in this regard supersedes any laws enacted by the States. By virtue of Entries 22 ("[t]rade unions; industrial and labour disputes"), 23 ("[s]ocial security and social insurance; employment and unemployment"), and 24 ("Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits") of the Concurrent List, both the Parliament and state legislatures have the power to enact labour laws.

[321] See, Government of India, Ministry of Labour & Employment, "List of enactments in the Ministry" Online: <https://labour.gov.in/list-enactments-ministry>

[322] *IDA*, *supra* note 66, s. 2(j).

interpreted the term "industry" in myriad ways.[323] Rather than analyzing the extensive history of the interpretation of the term under the IDA, three decisions would be sufficient to delineate how the Supreme Court has interpreted industry in the widest possible sense.[324] Issues pertaining to the definition arose a few years after the enactment of the IDA, in the case of *D.N. Banerji v. P.R. Mukherji* (Banerji), where the Court noted that the definition of industry, specifically, the words "trade or business" could also include government or municipal bodies carrying on business without any profit motive.[325] This was the first effort by the Supreme Court to expand the definition of industry. In fact, the Court went further to state that the conventional interpretation of the words "industry" and "industrial conflict" necessarily required expansion and that "…it was necessary to leave aside the original meaning attributed to the words in a simpler state of society".[326] Soon thereafter, the Supreme Court was faced with another question of whether a group of hospitals could be counted as an industry under the IDA. In the case of *State of Bombay v. Hospital Mazdoor Sabha* (Hospital Mazdoor Sabha), the Court, whilst stating that the dispute between the hospitals and the employees could be counted as an industrial dispute, thereby holding that hospitals would fall under the ambit of the "industry", buttressed that the words in the definition must be used in their widest possible sense.[327] Analogous to the reasoning in *Banerji*, the Court pointed out that the conventional and rigid interpretation cannot be adopted for the words "trade and business" in the definition. In doing so, however, the Court pointed out that there should be a demarcation whereby services rendered by a servant in a purely personal or domestic manner or work done in a casual way cannot come within the ambit of industry. Most importantly, the Court laid down certain attributes for judging what could be considered an "undertaking" under the definition. The Court claimed that an undertaking is one where the activity is conducted, with the help of employees, to produce or distribute goods or services to the public at large or a portion of it. The activity is often conducted with the mutual effort of the employer and the employee, with the object being "satisfaction of human needs". Rather vaguely, the Court noted that the activity must be systematic and organized in a manner that a business is generally arranged in. Lastly, it must not

[323] See generally, *Madras Gymkhana Club Employees' Union v. Madras Gymkhana Club*, AIR 1968 SC 554 (SC Ind); *Management of Safdarjung Hospital v. Kuldeep Singh Sethi*, (1970) 1 SCC 735 (SC Ind) [*Safdarjung*].
[324] See, for a brief overview, Bushan Kaul, "'Industry,' 'Industrial Dispute,' and 'Workman': Conceptual framework and judicial activism" (2008) 50:1 J. Indian L Institute 3.
[325] *D. N. Banerji v. P.R. Mukherji*, 1953 AIR 58 (SC Ind).
[326] *Ibid.*; See also, *Baroda Borough Municipality v. Workman*, AIR 1957 SC 110 (SC Ind).
[327] *State of Bombay v. Hospital Mazdoor Sabha*, 1960 AIR 610 (SC Ind).

be at one's own pleasure or casual in nature. *Hospital Mazdoor Sabha* was important as it indicated that the IDA's definitions could not be construed in a narrow and pedantic way but must, instead, be interpreted taking into account the ways in which businesses were organized in the present.[328] This plays a pivotal role in identifying whether the platforms that are providing services such as ride-hailing and food delivery services can be construed as industries under the IDA.

After this case, however, the Supreme Court decided several cases which narrowed the interpretation of the definition considerably.[329] This resulted in a seven-judge bench being formed to determine the ambit of the definition. In the case of *Bangalore Water Supply and Sewerage Board v. A. Rajappa* (BWSSB), the Court was faced with the question of whether the Board, being a statutory body, carrying out a "regal function" of providing citizens with necessary services and facilities would fall within the ambit of the term "industry" under the IDA.[330] Whenever a dispute arises between an employer and workmen, or between workmen *inter se*, the first aspect that warrants examination is whether the said dispute is arising within the sphere of an "industry". Therefore, in that sense, a taxi driver, using his own vehicle and not working under an employer, cannot be construed as having an industrial dispute with his customer. Krishna Iyer J., who gave the leading decision in *BWSSB*, relied heavily on the arguments in *Hospital Mazdoor Sabha* and *Banerji* to lay down what are often referred to as the *triple tests*, namely that an industry exists where (a) there is a systematic activity, (b) which would be organized by the cooperation between employer and employee, (c) for the production and/ or distribution of goods and services to satisfy human needs, wants and wishes.[331] Krishna Iyer J. emphasized that profit plays no role whatsoever and, therefore, public undertakings could be counted as an industry. The main importance must be the functional nature of the activity and the need for an "employer-employee" relationship.

In the aftermath of the *BWSSB* decision, the legislature amended the IDA's definition of industry in 1982 by adopting the three-part test to identify an industry and excluded certain organizations

[328] *Ibid*, paras 8, 12, 13, 14, where the Court adopted the construction maxim *noscuntur a sociis* to interpret the definition. In that, if the words susceptible to analogous meaning are coupled together, they are understood to be used in their cognate sense. See also, *Corporation of City of Nagpur v. Workmen*, AIR 1960 SC 675 (SC Ind); *Ahmedabad Textile Industry's Research Association v. State of Bombay*, AIR 1961 SC 484 (SC Ind).
[329] See generally, *National Union of Commercial Employees v. M.R. Mehta*, AIR 1962 SC 1080 (SC Ind); *University of Delhi v. Ram Nath*, AIR 1963 SC 1873 (SC Ind); *Safdarjung*, *supra* note 323.
[330] *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, (1978) 2 SCC 213 (SC Ind) [*BWSSB*].
[331] See generally, K. K. Chaudhri, "Changing concept of 'Industry' under the Industrial Disputes Act" (1983) 18:2 Econ. & Political Weekly M-67, M-80-M81.

including hospitals, educational institutions, and charitable foundations. However, this definition never came into force. In 2005, in *State of UP v. Jai Bir Singh*, the Supreme Court wanted to reconsider its position in *BWSSB* case and referred it to a larger bench, as the decision in *BWSSB* was not unanimous.[332] Eventually, in 2017, the Court passed an order constituting a nine-judge bench to reexamine the industry question and review the *BWSSB* decision. However, as the Bench has yet to deliver a decision, the broad interpretation provided by the *BWSSB* continues to be good law.

Certain DLPs, despite ostensibly positioning themselves as intermediaries, arguably can be categorized as providers of services that fall within the realm of industry. Consider Uber India, which has claimed on its website that it is a "technology company…[whose] technology(s) develop and maintain multisided platforms that match consumers looking for rides and independent providers of ride service". In essence, Uber India claims that it only matches the user with the driver-partner and, therefore, is a mere intermediary. Consequently, the question arises as to whether Uber India is in the transportation business or functions solely, as claimed on the website, as a digital intermediary. If Uber India does indeed provide transportation services, then it would fall within the definition of an industry. In considering the first test laid down in the *BWSSB* decision, i.e., whether there exists a systematic activity organized or arranged in a manner in which trade or business is generally organized, there is no definitive answer as to how a "business is generally organized". Nonetheless, the Supreme Court has noted that the true test is the decisive nature of the activity, with an emphasis on the employer-employee relationship. Previous studies by scholars in India have indicated that rather than merely being a matchmaker, the driver "partners" are integrated into Uber's business in myriad ways. For instance, the drivers on the platform provide skilled labour through which Uber earns a profit, the recruitment of the driver is controlled strictly by the platform, the platform itself imposes several requirements, the fare is automatically fixed and determined by the platform, the platform provides instructions on how to perform duties, and the platform manages the surge pricing and the incentives, penalties, and bonuses of the drivers.[333] In most cases, the drivers have little information on how rides are fixed

[332] See, for a brief overview, "Definition of Industry: State of U.P. v. Jair Bir Singh" *Supreme Court Observer* Online: <https://www.scobserver.in/cases/uttar-pradesh-jai-bir-singh-definition-of-industry-case-background/>
[333] See generally, Surie & Koduganti *supra* note 214, at 29-30; Chavi Sharma, "Formalising the informal: A critical appraisal" (2018) 53:24 Econ. & Political Weekly 184; Anushree Gupta, "Varieties of labour in platform work" in Noopur Raval & Sumandro Chattapadhyay, eds., *Studying platform work in Mumbai & Delhi* (Centre for Internet &

and allocated, with most of them being algorithmically governed. All of this indicates that it is a systematic activity organized by Uber India, in a manner similar to any other business.

In fact, the Competition Commission of India (CCI) in *Samir Agrawal v. ANI Technologies Ltd.* pointed out that the Uber App is different from Airbnb as it does not merely provide options.[334] According to the CCI, Uber cannot be compared with a "cab aggregators' app where the consumers have no material information about the drivers available in its area of demand".[335] The CCI, in its *obiter*, relied on the decision of the Court of Justice of the European Union in *Asociación Profesional Elite Taxi v Uber Systems Spain SL*.[336] The CCI's ruling determined that the intermediation service provided by Uber was an integral part of the overall service, with the main component being the transport service. If Uber does provide transport services, the third test, namely, the production and/or distribution of goods and services to satisfy human needs, wants, and wishes, is also fulfilled. This test was primarily laid down by the court to exclude services that were provided for spiritual and religious reasons, instead of material ones. In the case of Uber, for instance, the service provided clearly satisfies the "human need" of availing transportation.

In considering the second test laid down by the *BWSSB* decision, i.e., that the aforesaid systemic activity should be organized by cooperation between the employer and the employee, the determination of an employer-employee relationship becomes crucial. This requires a separate analysis carried out in the next section. In the end, the judges have, in the past, noted that the definition of industry lacks clarity. For instance, Krishna Iyer J. categorically mentioned that although a definition must provide a crystallization of a legal concept that promotes precision, the definition of "industry" provided in the IDA does the opposite. To conclude, it is certainly possible that certain platforms such as Uber India may be considered as providing a service, thereby, potentially bringing them under the bracket of the definition of industry. Similar arguments could, perhaps, also be made for food-delivery platforms and platforms providing household and beauty

Society, 2019); Tobias Kutter, "(In)formality and the Janus face of the platform: Production of the 'Space of Taxi Driving' between everyday realities and rationalities of State and Market" in Aditi Surie & Ursula Huws, eds., *Platformization and Informality: Pathways of Change, Alteration, and Transformation* (Springer Nature, 2023) 89; Bertolini & others *supra* note 89.

[334] *Samir Agrawal v. Competition Commission of India*, Case No. 37 of 2018.

[335] *Ibid* at para 21.

[336] *Ibid* at para 22; Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL.* (Judgment of the Court (Grand Chamber) of 20 December 2017)

services. That said, it might be extremely difficult to put all DLPs under the bracket of providing specific services, especially when considering the rather ambiguous tests laid down in *BWSSB*.

ii. The platform worker as a "workman": Establishing an employer-employee relationship and resolving definitional quandaries

To bring the platform workers under the ambit of the IDA, apart from proving that the platforms provide a specific service, it becomes necessary to prove that there is an employer-employee relationship. The IDA does not define the term employee, instead, it defines the term "workman" under Section 2(s). A workman is "...any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward, whether the terms of employment be express or implied…".[337] For certain types of platform workers to receive protections afforded by the IDA, it becomes necessary for them to be brought under the definition of workman. The onus is on the platform worker in such cases to prove that the relationship is one between an employer and an employee.[338] It is, therefore, critical to examine how the Supreme Court had interpreted the term in the past.

(1) The test of "control"

After the enactment of the IDA, the earliest case where the Supreme Court was confronted with the question of classifying an individual as a workman or an independent contractor was *Shivanandan Sharma v. Punjab National Bank* (Shivanandan), wherein it held that control and

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[337] This definition has been amended several times. See, *IDA*, *supra* note 66, s. 2(s), which reads as follows: "workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
(ii) who is employed in the police service or as an officer or other employee of a prison; or
(iii) who is employed mainly in a managerial or administrative capacity; or
(iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature".

[338] See, *Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of Tamil Nadu & Others*, (2004) 3 SCC 514 (SC Ind), at para 47; *N.C. John v. Thodupuzha Taluk Shop and Commercial Establishment Workers Union*, (1973) Lab IC. 398 (HC Kerela), at para 9; *Swapan Das Gupta v. First Labour Court of West Bengal*, (1976) Lab IC. 202 (HC Calcutta), at para 10, where the courts noted that the burden is on the person who sets up a plea of the existence of an employer-employee relationship.

supervision would determine the existence of an employer-employee relationship.[339] Sinha J. concluded that the master is someone who not only sets the goal but also controls and directs the specific methods to achieve the said goals and processes. He further noted that even if the employer hires a worker and directs him to hire additional people in exchange for consideration, as long as they are under the control of the original employer, they would be considered as workmen.[340] This was the first attempt by the Supreme Court to lay down what is referred to as the "control test" in India. Thereafter, in *Birdichand Sharma v. Civil Judge, Nagpur* (Birdichand), the Court dealt with a case pertaining to a beedi factory, where the workers were at liberty to come and go as they pleased but were not allowed to work if they arrived after mid-day even though the factory closed at 7 P.M.[341] Additionally, the factory issued standing orders that granted the management the prerogative to terminate workers who remained absent for eight days and, further, empowered the management to reject beedis falling short of a certain standard.[342] Applying the control test, Wanchoo J., in his decision, affirmed that the management's right to reject beedis, the requirement of arriving before midday, and the possibility of removal for absenteeism of consecutive eight days clearly indicated that there was an employment relationship. The limited freedom of the workers to come and go as they pleased was a mere result of them being piece-rate workers.[343] Noting that there need not be constant supervision for a simple process such as the rolling of beedis and that the right of rejection constituted some degree of supervision.[344] Wanchoo J. buttressed that the existence of the right to supervise, and not the mode in which the said right was exercised would be of relevance. Subsequently, in *Dharangadhara Chemical Works v. State of Saurashtra* (Dharangadhara), Bhagwati J. noted that the distinction between a contract for services and a contract of service was contingent upon the right of control of "the master" over not only "what is

[339] *Shivanandan Sharma v. Punjab National Bank,* 1955 AIR 404 (SC Ind) [*Shivanandan*].
[340] Sinha J. relied on Lord Esher's comments in *Donovan v. Laing, Wharton & Down Construction*, [1893] 1 Q.B.D. 629.
[341] *Birdhichand Sharma v. Civil Judge, Nagpur*, AIR 1961 SC 644 (SC Ind), para 5 [*Birdichand*]. But see, *Shankar Balaji Waje v. State of Maharashtra*, AIR 1962 SC 517 (SC Ind), at paras 11, 15, 16, where the court distinguished *Birdichand* on the basis that the concerned laborer was permitted to work at home, there was no restriction on him working if he arrived after mid-day, and there was no allegation that the appellant had the power to remove him. In that sense, the mere fact that the laborer had to roll the beedis in a particular manner could not imply that the management had the right to control the manner of work. Contra, *Birdichand* at paras 31, 38, Subba Rao J. [*dissent*], where he noted that the "rejection of [*beedis*] found not in accord with the sample is a clear indication of the right of the employer to dictate the manner in which the labourers shall manufacture the [*beedis*]."
[342] *Ibid*, at para 5.
[343] *Ibid*, at para 8.
[344] *Ibid*, at para 8.

to be done" but also "the manner in which the work is to be done", i.e., how it is to be done.[345] Bhagwati J. noted that control is an important factor in determining whether the contract was one for service or a contract of service.[346] The Court, in *Dharangadhara*, also referred to Lord Thankerton's decision in *Short v. J & W. Henderson Ltd.*, which set out four indica of a contract of service, namely, "[t]he master's power of selection of his servant", payment of wages, the right to control the manner of doing work, and the right to suspend or dismiss.[347] The degree and level of control depended on each case's facts and circumstances. Through the decisions in *Shivanandan*, *Birdichand*, and *Dharangadhara*, it was clear that the common law control test was firmly established in Indian jurisprudence.[348]

Merely taking the control test affirmed in *Dharangadhara* into consideration, at the very least, it could be argued that some DLPs be considered employers. For instance, in the context of Uber, Rosenblatt pointed out that the company running the platform determines who can be a "partner", the types of cars that are eligible to be driven, with the same being changed arbitrarily at times, pay rates that must be charged by the 'driver-partner', the incentives provided to the partner, and the full right to suspend or fire the driver at will without recourse.[349] All of this is controlled through an application, which is owned and controlled by the platform company. The control of the app by the platform company, which is programmed to direct and surveil the worker, is similar to the control of capital and means of production in the traditional labour market.[350] Therefore, managerial control is replaced by algorithmically based instructions for the management of drivers.

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[345] *Dharangadhara supra* note 78, para 8.
[346] In *Dharangadhara* and *Shivanandan*, the Supreme Court had placed reliance on the House of Lords decision in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd.*, [1946] 2 All ER 345 HL, clearly hinting towards the transplantation of the common law control test.
[347] *Ibid*, at para 10. Bhagwati J. relied on the House of Lords decision in *Short v. J.&W. Henderson Ltd.*, (1946) 62 TLR 427, 429 [*Short*], to indicate the four indicia for a contract to be one of service- (a) master's power of selection of his servant, (b) the payment of his wages, (c) master's right to control the method of work, (d) master's right of suspension.
[348] Over the years, the Supreme Court has used the term subordination and control interchangeably.
[349] See, Alex Rosenblatt, *Uberland: How algorithms are rewriting the rules of work* (University of California Press, 2019); Prassl & Risak *supra* note 16; Alex Rosenblatt & Luke Stark, "Algorithmic labor and information assymetries: A case study of Uber's drivers' (2016) 10 Int'l J. Communication 3758; Eric Tucker, "Uber and unmaking and remaking of taxi capitalism: Technology, law and resistance in historical perspective" in Derek McKee, Finn Makela, & Teresa Scassa, eds., *Law and the "Sharing Economy": Regulating online market platforms* (University of Ottawa Press, 2018) 357.
[350] See generally, Martin Wiener, W. Alec Cram, & Alexander Benlian, "Algorithmic control and gig workers: A legitimacy perspective of Uber drivers" (2021) 32:3 European J. Information Systems 485; Vincenzo Pietrogiovanni, "Between *Sien* and *Sollen* of labour law: (Civil and constitutional) law perspectives on platform work" (2020) 31:2 King's L. J. 313.

Having said that, algorithmic control represents a slight departure from the traditional forms of control, especially since the control is exercised via an application, instead of human managers. In that sense, algorithmic control is, perhaps, more insidious as it is continuously operating, allowing for control to be on a continual and real-time basis.[351] This is arguably a creation of "platform capitalism", which, as Srnicek described, is a new mode of organizing markets through digital infrastructure and data.[352] That said when categorizing different platforms, Srnicek specifically pointed out that the DLPs, which he referred to as "lean platforms" work on outsourcing and are not novel concepts. They merely operate through a "hyper-outsourced" model, whereby "workers are outsourced, fixed capital is outsourced, maintenance costs are outsourced, and training is outsourced". Nonetheless, the most important element is the control over the platform, enabling a "monopoly rent to be gained".[353]

Moreover, the argument by platforms that the workers own their equipment and the means of production, i.e., mobile phones, and vehicles, is not one that would have a decisive impact on their employment status. What is important is that the platform and the digital infrastructure are the main means of production through which control is possible. The entire economic operation is based on the application. Uber's control over its "driver partners" in India has been well documented by researchers.[354] Similarly, researchers have also shown how other DLPs in the food delivery sector and those in the household services sector, also exhibit control throughout the entire labour process extending beyond the control over the product.[355]

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[351] See, Alex Wood & others, "Good gig, Bad gig: Autonomy and algorithmic control in the global gig economy" (2019) 33:1 Work, Employment & Society 56; W. Alec Cram & others, "Examining the impact of algorithmic control on Uber drivers' technostress" (2022) 39:2 J Management Information Systems 426.
[352] Nick Srnicek, *Platform Capitalism* (Polity, 2016) 27.
[353] *Ibid*, at 43.
[354] See, Ravinder Verma, P. Vigneswara Ilavarasan, & Arpan Kar, "Inequalities in ride-hailing platforms" in Adrian Athique & Vibodh Parthasarathi, eds., *Platform Capitalism in India* (Palgrave MacMillan, 2020) 177; Rani, Gobel, & Dhir *supra* note 171.
[355] See, for home-based professional services, Nair *supra* note 16, Aditi Surie, "On-demand platforms and pricing: How platforms can impact the informal urban economy, evidence from Bengaluru, India" (2020) 14:1 Work Organisation, Lab. & Globalisation 83; Ambika Tandon & Abhishek Sekharan, "Labouring (on) the app: Agency and organization of work in the platform economy" (2022) 30:3 Gender & Development 687; Dipsita Dhar & Ashique Thuppilikat, "Gendered labour's positions of vulnerabilities in digital labour platforms and strategies of resistance: A case study of women workers' struggle in Urban Company, New Delhi" (2022) 30:3 Gender & Development 667; See also, for food-delivery platforms, Sazzad Parwez, "Food for thought: A survey on the nature of work precarity in platform-based on-demand work" (2023) Soc Pol'y & Society (Forthcoming).

(2) "Organization" in conjunction with "control

Apart from the control test, the Supreme Court has also noted that the degree of integration of the worker with the firm must also be considered. The organization test allows the courts to see how far the worker has been integrated into the organization.[356] This allows the courts to identify subordination, as it facilitates the assessment of hierarchy without having to search for direct instructions. Therefore, Kocher highlighted that the type of organizational power derived from integration can serve as an indicator of subordination or control. Alternatively, this power can be evaluated separately from the aspect of control.[357]

In *Silver Jubilee House v. Chief Inspector of Shops and Establishments* (Silver Jubilee), the Supreme Court noted that whilst the control test remained an important factor, and, perhaps, even a decisive one, it had broken down in its traditional formulation with respect to skilled and professional work and, consequently, could no longer be treated as an exclusive test.[358] In *Silver Jubilee*, the Court not only took into account that the owner of the tailoring establishment had the right to reject the end product or remove a worker but also the fact that the machines utilized for sewing were provided to the workers by the shop owner. Given that cutting and stitching are integral to the functioning of a tailoring establishment, the Court arguably implicitly applied the organization test,[359] whilst connecting it with the traditional control and supervision test. The Court also noted that the mere fact that the workers were not under an obligation to work the entire day in the shop, and could accept work from other establishments, did not prevent him from being principally employed in an establishment.[360] After *Silver Jubilee*, the Court was faced with a similar situation in the case of *Shining Tailors v. Industrial Tribunal II*, where the workers were paid remuneration on a piece-rate basis. The Supreme Court noted that the Industrial Tribunal had made a glaring error declaring that there was no master-servant relationship simply due to the

[356] See, Guy Davidov, Mark Freedland, & Nicola Kountouris, "The subjects of labor law: "employees" and other workers" in Matthew Finkin & Guy Mundlak, eds., *Research Handbook in Comparative Labor Law* (Edward Elgar, 2015) 115, where the authors noted that most jurisdictions have similar tests, where the courts generally inquire the degree to which workers are subject to the authority and control of the employer. If there is a stronger presence of indicators pointing towards control, subordination, or integration, the worker would be classified as an employee. The courts also assess the extent to which the worker operates an independent business, indicative of a lower level of dependence on a specific employer. However, the authors that despite the commonalities across jurisdictions, legal systems attribute varying degrees of significance to specific tests or indicators.
[357] Kocher, *supra* note 2, at 82.
[358] *Silver Jubilee*, *supra* note 79, at paras 26-29.
[359] Kaul *supra* note 324, at p. 39.
[360] *Silver Jubilee*, *supra* note 79, at paras 26-29.

payment structure, i.e., wages on a piece-rate basis.[361] Relying on its decision in *Silver Jubilee*, the court noted that piece-rate payment-based remuneration, i.e., payment based on production, is a common and widely recognized method of payment for workers. This, coupled with other factors, such as the employer's right to reject the product and his right to remove the employee, indicated decisive control over the worker.[362] Therefore, the Court concluded that the workers were not independent contractors simply because they were paid on a piece-rate basis but were, in fact, workmen.[363] The Court effectively applied the integration test, in conjunction with the control test, in the case of *Hussainbhai v. Alath Factory Thezhilali Union* (Hussainbhai).[364] The Court explicitly acknowledged that when employees are hired by a contractor, who is subsequently engaged by the principal employer, and their work is deemed essential to the principal employer's business, such workers should be regarded as employees of the principal employer.[365]

Workers of certain DLPs, like Uber India and Zomato, are an integral part of the transaction. In that sense, the worker is a "cog in the economic wheel", forming part of the core of the whole business.[366] The data that is derived from the workers is often used by the platforms to enhance the functioning of their algorithms.[367] For instance, Srnicek pointed out that Uber uses its drivers' data to not only monitor them but also use it in a variety of ways to beat out its competitors. This data is additionally fed into algorithms for the purpose of matching passengers with drivers in close proximity and predicting areas where demand might increase.[368] This datafication not only allows the platforms to control and predict workers' behaviour but is also useful in providing quick and

[361] *Shining Tailors v. Industrial Tribunal, II*, (1983) 4 SCC 464 (SC Ind).
[362] *Ibid*, at para 5.
[363] *Ibid*, at paras 22 and 23. The Court in *Silver Jubilee* did refer to the rulings in *U.S. v. Silk*, 331 US 704 [*Silk*]. wherein it was held that the test ought to be whether the economic reality was that the workers were, in fact, the employees, and *Bank Voor Handel en Scheenpvaart N.V. v. Slatford*, [1953] 1 QB 248., wherein Denning L.J. held that the test was whether the person was a "part and parcel of the organization", the Supreme Court did not fully move beyond the control test.
[364] *Hussainbhai v. Alath Factory Thezhilali Union*, (1978) 4 SCC 257 (SC Ind) [*Hussainbhai*].
[365] *Ibid*, at para 5.
[366] See, Pinsoff *supra* note 20, at 358. See generally, *CUPW*, *supra* note 180, where the Chair, in connection with the organization test, noted that the delivery rider is a "cog in the economic wheel – an integrated component to the financial transaction". See also, for a brief overview of the tests utilized by the courts in Europe with respect to platform workers, Hießl, *supra* note, 19; Potocka-Sionek, *supra* note 21, at 41.
[367] See generally, Javier Sanchez-Monedero & Lina Dencik, "The datafication of workplace" (2019) (Cardiff University Data Justice Lab Working Paper); Katherine Kellogg, Melissa Valentine, & Angele Christin, "Algorithms at work: The new contested terrain of control" (2020) 14:1 Academy of Management Annals 366; Ajunwa, Crawford, & Schultz, *supra* note 184.
[368] Srnicek, *supra* note 352, at 47. See also, Antonio Aloisi & Valerio De Stefano, "Essential jobs, remote work and digital surveillance: Addressing the COVID-19 pandemic panopticon" (2022) 161 Intl Lab Rev 289.

efficient services to consumers. Zuboff rightly noted that, at its core, this is parasitic behaviour by firms, who she claims are "surveillance capitalists".[369] Apart from data collection, other indicators are also critical in indicating the integration of workers, such as platforms like Uber India earning revenue through drivers' fares. Moreover, with respect to Zomato and other food-delivery platforms, the majority of the riders are mandated to wear a designated uniform and transport meals and supplies in a box provided by the platforms, donning the platform logo.[370] Furthermore, these riders are obligated to utilize the application for completing the assigned tasks and providing delivery services. All of these factors indicate that the "riders", "partners", drivers", etc., are integral members of the platform's organizational structure.

The Supreme Court has noted that the organization and control tests may be given varying weightage when considering the classification issue.[371] In addition, the Court has also laid down numerous factors over the years to ascertain the existence of an employer-employee relationship, which encompasses factors beyond the control and organization tests.

(3) Reliance on multiple factors and the categories of "skilled" and "unskilled" labour

Over the years, the Supreme Court has noted that a mixture of tests and factors could be used to assess whether an employer-employee relationship exists. In *Ram Singh v. U.T. of Chandigarh* (Ram Singh), the Supreme Court noted that there might be other factors that might be relevant to consider apart from integration, such as who has the power to select and dismiss workers, the power to pay remuneration, deduct insurance contributions, organize the work, supply tools and materials, and what are the "mutual obligations" between the parties.[372] As such, the "mutuality of obligations" test lays down that the courts must see if there is a contract in existence between the parties and examine the reciprocal obligations in it.[373] This test has garnered substantial criticism from scholars, primarily for arguably giving employers a route to circumvent responsibilities and

[369] Shoshana Zuboff, *The Age of Surveillance Capitalism: The fight for a human future at the new frontier of power* (Public Affairs, 2019), where the author noted that the parasitic behaviour of the firms, revives Marx's adage of a capitalistic vampire feeding on labour, with a perhaps anticipated twist, of surveillance capitalism feeding on every aspect of human experience.
[370] See generally, *Gerechtshof Amsterdam [Amsterdam Appeals Court] of 16/2/2021,* ECLI:NL:GHAMS:2021:392, at para 2.3, the Appeals Court noted that the food delivery platform 'riders' had to wear uniforms and transport meals in a thermobox provided by the platforms, indicating that the "riders" are a part of the organization of the platform.
[371] *Sushilaben Indravadan Gandhi v. New India Assurance Co.*, (2021) 3 SCC (Civ) 777 (SC Ind) [*Sushilaben*].
[372] *Ram Singh v. U.T. of Chandigarh*, (2004) 1 SCC 126 (SC Ind) [*Ram Singh*].
[373] Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 126.

establish a casual employment relationship, devoid of any obligations for either party, through specific contractual clauses.[374] *Ram Singh* does not necessarily lay down the "mutual obligations" test, nor does it elaborate on what constitutes "mutual obligations". In fact, "mutual obligations" are merely referenced in the decision through a passage cited from an English commentary on Industrial Law.[375] Therefore, whether the "mutual obligations" test is enshrined in the jurisprudence in India is moot. Recently, the Supreme Court, in *Sushilaben Indravadan Gandhi v. New India Assurance*, whilst analyzing the jurisprudence developed to determine the employer-employee relationship noted that there are two important tests, namely, control and organization.[376] The Court also highlighted the three-tier framework established by certain English decisions.[377] This entails examining the three key factors: firstly, whether the employer provides wages or remuneration to the workers, secondly, the ownership of assets and the ultimate bearing of profit or loss, and, thirdly, considering the economic reality of the relationship, necessitating an analysis of the party exercising economic control over the workers' subsistence, skill, and continued employment.[378] Nearly all the tests have some sort of overlapping indicators and, therefore, are interrelated. Consequently, unlike the UK and Canada, in the absence of an intermediate category between employment and independent contractors, the classification of work relationships, to some extent, becomes easier. Notably, some scholars have argued that the recently enacted CSS has created a category of dependent contractors, which, as will be argued in the next section of this chapter, is not the case.

In considering the application of the multiple factors test, Mohan and Muralidhar analyzed the "Pick Up and Delivery Partner Agreement" of Swiggy. They noted that the agreement gave the platform the right to suspend and dismiss the workers for breach of terms. Moreover, even though the agreement did not specify minimum working hours, certain guidelines of the platform impress upon the rider to complete a specific number of orders per week. Of course, most platform workers

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[374] See, Hugh Collins, "Employment rights of casual workers" (2000) 29 Industrial Lab J. 73; Nicola Countouris, "Uses and misuses of 'mutual of obligations' and the autonomy of labour law" in Alan Bogg & others, *The Autonomy of Labour Law* (Hart, 2015) 169.

[375] See, *Ram Singh supra* note 372, at para 15, citing I.C. Wood & J.C. Smith, *Industrial Law* (Butterworths, 3rd edn.) 8-10.

[376] *Sushilaben supra* note 371, at para 32.

[377] See, *Ibid*, at para 32, where the Court succinctly culled out the important tests from the following decisions – Lord Thankerton's decision in *Short*, *supra* note 347, at p. 429, *E v. English Province of Our Lady Charity*, 2013 QB 722, at page 765, *Montreal v. Montreal Locomotive Works Ltd.*, (1947) 1 DLR 161, *Lee Ting Sang v. Chung Chi-Keung*, (1990) 2 AC 374.

[378] For the economic reality test, the Court relied on *Silk*, *supra* note 363.

do work on multiple platforms simultaneously; however, the structure of incentives and bonuses and an unsteady source of income, as indicated in the previous chapter, may make it considerably difficult for workers to abandon the platform. This would indicate considerable economic control being exercised by the platform over the workers. Additionally, even the mode of payment is controlled by the platform. All of this indicates that the relationship could be considered as one between an employer and an employee.[379]

Kocher noted that there are atleast four characteristics of DLPs that might assist the courts in the classification exercise: 1) App based management, 2) rating and feedback mechanisms, 3) qualification requirements and assignments of tasks, and 4) access to markets being controlled by the platforms.[380] It is, perhaps, easier for the courts to classify location-based platform workers simply through these characteristics.

Once an employer-employee relationship is established and the platform workers are considered to be employees under the IDA, the subsequent step would be determining whether they would fall under the ambit of the second part of the definition of "workman". The second part of the definition of "workman" requires an employee to fall under certain categories, such as an employee doing "manual, unskilled, skilled, technical, operational, clerical, or supervisory work".[381] If the work done by an employee does not fall under one of these categories, he would not be counted as a workman under Section 2(s) of the IDA.[382] The Supreme Court, in *H.R. Adyanthaya v. Sandoz*

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[379] Mohan & Muralidhar, *supra* note 23, at 19; See also, Bharadkar et al, *supra* note 174; Mohan Mani & Sachin Tiwari, "Platform employment during COVID-19: A study of workers in food delivery sector in Bengaluru" (NLSIU Occasional Paper Series 13/2022, 2022).

[380] Kocher *supra* note 2.

[381] The definition, most importantly, contains exclusion clauses such as "(i) if the employee is subject to the Air Force, or the Navy Act; (ii) he is employed in the police service or as another employee of a prison; (iii) he is employed in a managerial or administrative capacity; (iv) he is employed in a supervisory capacity but draws wages exceeding ten thousand per mensem [$ 122.68] or exercises managerial functions". It is perhaps worth noting the current definition of "workman" was introduced through an amendment in 1982. Prior to the amendment, the definition only included employees doing 'manual, clerical, supervisory, or technical work'. The words skilled and unskilled were introduced through the 1982 amendment. This plays an important role when construing the interpretation provided by the Supreme Court of the term "workman".

[382] See, *May & Baker (India) Ltd. v. Workmen*, AIR 1967 SC 678 (SC Ind); *Western India Match Co. Ltd v. Workmen*, (1964) 3 SCR 560 (SC Ind); *Burma Shell Oil Storage & Distribution Co. of India v. Burmah Shell Management Staff Association*, (1970) 3 SCC 378 (SC Ind), where the court noted that if the worker is performing work that is outside the categories, he shall not be counted as a workman. But see, *S.K. Verma v. Mahesh Chandra*, (1983) 4 SCC 214 (SC Ind) [*S.K. Verma*]; *Ved Prakash Gupta v. Delton Cable India (P) Ltd.*, (1984) 2 SCC 569 (SC Ind) [*Ved Prakash Gupta*]; *Arkal Govind Raj Rao v. Ciba Geigy India Ltd. Bombay*, (1985) 3 SCC 371 (SC Ind) [*Arkal*], where the Supreme Court noted that if the worker does not fall within the four exclusionary clauses (indicated in footnote 381) in the definition, he would be counted as a workman.

(India) Ltd. (Sandoz), noted that what could be counted as skilled, manual, clerical, or unskilled, is fact-based.[383] Through the *Sandoz* decision, the Court considered the interpretation of the term "skilled" in the definition and emphasized the principle of *ejusdem generis*, which required considering skilled work in conjunction with other specified work, such as manual, clerical, unskilled, and operational work.[384] As a result of this narrow construction of skilled work, various categories of workers have been excluded from the definition of workman, even when an employer-employee relationship is established.[385] Consequently, numerous, white-collared professionals, including teachers,[386] doctors,[387] theater artists,[388] medical professionals, and maintenance engineers[389] are not recognized as employees. In essence, this decision shows that if the worker performs any function remotely indicating his independence to take his own decisions, or has performed some supervisory functions, he would not be counted as a workman. Kaul has pointed out that the *Sandoz* decision goes against the government's approach of including more categories under the definition of workman.[390] Post *Sandoz*, there has been no clarity on how these rather ambiguous terms, i.e., skilled, manual, clerical, unskilled, etc., are to be interpreted. Therefore, the Court has often relied on its own understanding of who it intuitively considers a worker, which has been a serious impediment.

Through the foregoing decisions, at least certain basic factors can be identified: 1) being employed to do any skilled or unskilled work; 2) the existence of an employer-employee relationship; and 3) the employment not being in a managerial or administrative capacity.[391] Although it is difficult to characterize the work performed by platform workers across various platforms into a homogenous category, platform workers would not, arguably, be considered to be employed in a managerial or administrative capacity as most of them perform their tasks at an individual level. Moreover, as

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[383] *H.R. Adyanthaya v. Sandoz (India) Ltd.*, (1994) 4 SCC 164 (SC Ind) [*Sandoz*].
[384] *Ibid* at para 33, through *Sandoz*, the Supreme Court counted its decisions in *S.K. Verma supra* note 382; *Ved Prakash Gupta*, *supra* note 382; *Arkal*, *supra* note 382, as *per incuriam*.
[385] Bhattacharjee *supra* note 299.
[386] *Ahmedabad Pvt. Primary Teachers Association v. Administrative Officer*, (2004) 1 SCC 755 (SC Ind). See also, *Miss A. Sundarambal v. State of Goa*, (1988) 4 SCC 42 (SC Ind).
[387] *Sandoz*, *supra* note 383.
[388] *Bharat Bhawan Trust v. Bharat Bhawan Artists Association*, (2001) 7 SCC 630 (SC Ind).
[389] *Vimal Kumar Jain v. Labour Court, Kanpur*, AIR 1988 SC 384 (SC Ind).
[390] Kaul *supra* note 324, at 45, where the author is referring to the 1982 amendment which included the categories of 'skilled' and 'unskilled', in the hopes of broadening the scope of the definition and including more workers under the fold. Unfortunately, there is no mention of why these terms were introduced by the legislature in the statement of objects and reasons of the Amendment Act.
[391] *S.K. Maini v. Carona Sahu Co. Ltd.*, (1994) 3 SCC 510 (SC Ind).

has been discussed earlier, the mirage of independence can be dispelled for most of the platform workers as there is algorithmic app-based control. Regardless of whether the specific work performed by a platform worker is skilled, unskilled, or semi-skilled, as the case may be, it follows that they would fall within the definition of a "workman", provided an employer-employee relationship is established. The decision in *Sandoz* could, perhaps, make it difficult for workers on web-based platforms, who could be counted as being in an employer-employee relationship but still outside the purview of the "skilled" worker. As such the issue of whether platform workers can avail the protections under the IDA hinges on establishing the employer-employee relationship within the ambit of the tests elaborated in the foregoing discussion, coupled with falling into one of the categories set out in the definition.

Additionally, through its decision in *Divisional Manager, New India Assurance Co. Ltd. v. A Sankranlingam*, the Supreme Court concluded that even part-time employees, if they fall within the ambit of Section 2(s) of the IDA, would also be counted as workmen.[392] Nonetheless, given the atypical nature of work performed by platform workers and the vastly varying arrangements between the workers and platforms, it remains to be seen whether the courts would be amenable to viewing platform workers as employees and, further, as workmen under the IDA.

b) Unravelling sham sub-contractual arrangements

Numerous DLPs especially in the ride-hailing and food delivery sectors, have arguably adopted a practice of engaging workers through staffing agencies and third-party contractors, effectively employing contractual provisions as a means to obfuscate the underlying reality that the workers ostensibly employed by the contractors are, in essence, *de facto* employees of the DLP. This is certainly not a phenomenon that is unique as these techniques have been traditionally used by employers in industrial and factory settings. For instance, in India, the beedi industry used a contract system of employment, wherein business proprietors supplied contractors with raw materials who, in turn, either employed workers or distributed the said material amongst home-based, mostly women workers.[393] As such, the beedi industry constitutes a prototypical example

[392] *Divisional Manger, New India Assurance Co. Ltd. v. A Sankaralingam*, (2008) 10 SCC 698 (SC Ind); See also, *Simla Devi v. Presiding Officer*, (1997) 2 LLN 305 (HC Punjab & Haryana), where the bench pointed out that an interpretation of the term "workman" does not exclude part-time workers. Importantly, such exclusion cannot be assumed automatically without evidence of explicit language or clear implication to the contrary.
[393] "Beedi sector in India: A note" *ILO* (22 April 2003) Online: <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/projectdocumentation/wcms_125466.pdf>

of businesses attempting to circumvent socio-economic obligations towards their workers. In the context of the beedi industry, the Supreme Court was faced with several challenging questions. The first of the beedi cases was *Chintaman Rao v. State of Madhya Pradesh*, which involved an instance of the contract system of employment, with the management of a firm supplying tobacco and leaves to independent contractors, called "Sattedars", who, in turn, got the beedis manufactured by third party workers or "coolies".[394] The Supreme Court ultimately held that the Sattedars and their coolies were not workers of the firm's factory within the ambit of Section 2(1) of the Factories Act, with the caveat that the decision did not lay down a general proposition that Sattedars could not be considered to be workers under any circumstances.[395] However, this changed in *Birdichand*, as discussed in the previous section, where the court went into the workings of the beedi industry to conclude that the management was in control of the beedi workers.[396] Subsequently, in *D.C. Dewan Mohideen Sahib v. United Beedi Workers' Union*, a case concerning contractors who hired workmen for manufacturing beedis after obtaining the requisite raw materials from the proprietors, the Supreme Court referring to the previous cases, held that the "so-called independent contractors were mere agents or branch managers of the appellants", and that the workmen employed by the said contractors were actually the workmen of the proprietors.[397] Perhaps, the most important decision in this regard was *Hussainbhai*, where the Supreme Court noted that where the worker's livelihood and sustenance was substantially dependent on producing goods and services for a particular enterprise, the said enterprise would, in fact, be the employer regardless of the presence of any intermediate contractors.[398] The remarks of Krishna Iyer J. in this regard are worth noting: "[w]here a worker or a group of workers labours to produce goods or service and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' sustenance, skill, and continued employment….The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the

[394] *Chintaman Rao v. State of Madhya Pradesh*, AIR 1958 SC 388, para 3 (SC Ind).
[395] *Ibid*, paras 18, 20.
[396] See, *Birdichand, supra* note 341, at para 8.
[397] *D.C. Dewan Mohideen Sahib & Sons v. United Beedi Workers' Union*, AIR 1966 SC 370, para 12
[398] *Hussainbhai*, *supra* note 364.

immediate contractor….the court must be astute to avoid mischief and achieve the purpose of the law and not be misled by the maya of legal appearances."[399]

Through convoluted sham arrangements with contractors, certain DLPs have arguably refused to fulfill their basic obligations, thereby shifting the onus on the worker, making it difficult for the worker to identify the true employer. The Supreme Court has noted that once the veil is lifted from a supposed sham contractual agreement, the workers have the right to raise an industrial dispute in the same manner as any other employee. As such, when any form of control is exerted by the platforms over the workforce, it becomes indicative of them functioning as an employer, regardless of the subcontracting arrangements that the platforms have with their contractors.

c) UWSSA: An illusory promise?

Many people in India face terrible working conditions or have very limited options for making a living. This is especially the case for a large number of workers working in the informal economy, where the working conditions are abominable, with relatively few options for a good livelihood.[400] As mentioned earlier, in order to consider the safeguards that could be provided to the workers in the informal economy and, with the aim of eventually transitioning this large swathe of this workforce into the formal economy,[401] the NCEUS, under the aegis of the Ministry of Micro, Small & Medium Enterprises, suggested the enactment of the Unorganised Sector Social Security Act and the Unorganised Sector Workers (Conditions of Work and Livelihood Promotion) Act. These Acts, as per the NCEUS, would regulate the conditions of work, social security, and welfare of the

[399] *Ibid*, at para 5. See also, *CLRA*, *supra* note 126, ss. 2(c), 2(g), and 2(i) define the terms "contractor", "principal employer" and "workman". As such, in India, temporary agency workers are described as "contract labour" and, thereby, governed by the *CLRA*. Essentially, the contractor has the responsibility of providing remuneration to the labourer who, in turn, is remunerated by the principal employer. However, if the contractors do not pay the wages to the labourer, the onus falls on the principal employer. As such, there could certainly be an argument that platforms function as contractors and, therefore, would come within the bracket of the *CLRA*. Since the thesis aims to consider only a few location-based platforms providing specific services, the analysis would lie outside the purview of the thesis.

[400] See, "Report on employment in the informal sector and conditions of informal employment: Volume IV" (Government of Ministry of Labour & Employment, 2015); S. Sakthivel & Pinaki Joddar, "Unorganised sector: Workforce in India: Trends, Patterns and Social Security Coverage" (2006) 41:21 Econ. & Political Weekly 2107.

[401] K.P. Kannan & T.S. Papola, *supra* note 69.

informal workers, whilst also providing a dispute resolution mechanism for these workers.[402] Taking the NCEUS recommendations into account, the Parliament enacted the UWSSA in 2008.[403]

The IFAT had claimed in their petition that platform workers should be treated as "unorganised workers" under this statute, which would impress upon the Central government to provide them with social security.[404] An "unorganised worker" is defined under Section 2(m) as "a home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in Schedule II to this Act".[405] This Schedule consists of six Acts,[406] namely, the Workmen's Compensation Act, 1923,[407] the IDA, 1947,[408] the Employees' State Insurance Act, 1948,[409] the Employees' Provident Fund and Miscellaneous Provisions Act, 1952,[410] the Maternity Benefit Act, 1961,[411] and the Payment of Gratuity Act, 1972.[412] These Acts generally cover only the workers in the formal sector. Therefore, the unorganised sector workforce has largely been outside the purview of these Acts. At the outset, as indicated in chapter 2, "unorganised worker" under the UWSSA is an all-encompassing category, which does not consider the reality of the informal workforce in India. As highlighted by Hirway, the unorganised workforce is a diverse and heterogenous group engaged in a variety of economic endeavors, spanning from street vendors to beedi workers, and subcontracted or temporary workers in factories. These economic activities exist at varying levels of technological advancement, productivity, wage structures, and profitability.[413] Consequently, the employer's capacity to pay for social security differs and the State's responsibility towards each sector's workforce also differs. Therefore, a uniform package of social security benefits would not be of much use. Chapter 2 provides an extensive exploration of the repercussions of an

[402] See, NCEUS, *supra* note 33, which included the previous recommendations of social security for unorganised workers and law pertaining to minimum conditions of work in the unorganised sector. See also, Kannan, Srivastava, & Sengupta, *supra* note 70.
[403] *UWSSA*, *supra* note 34.
[404] *Kakkar*, *supra* note 73.
[405] *UWSSA*, *supra* note 34, s. 2(m).
[406] *Ibid*, Schedule II.
[407] *WCA*, *supra* note 105.
[408] *IDA, supra* note 66.
[409] *Employees' State Insurance Act, 1947*, Act No. 34 of 1948.
[410] *Employees' Provident Fund and Miscellaneous Provisions Act*, 1952, Act No. 19 of 1952.
[411] *Maternity Benefit Act*, *1961*, Act No. 53 of 1961.
[412] *Payment of Gratuity Act*, *1972*, Act No. 39 of 1972.
[413] *Hirway, supra* note 149.

all-encompassing categorization of the informal sector workforce and the imperative need to have distinct policies catering to the individual requirements of the workers working in different sectors.

Revisiting the definition of an "unorganised worker", it uses three distinct terms a "home-based worker", a "wage worker", and a "self-employed worker". As per the recent narrative of the Central government, platform workers are outside of the traditional employer-employee relationship and, as such, could be counted as "self-employed workers". In this context, the definition of "self-employed worker" requires critical examination. Section 2(k) of the UWSSA defines a "self-employed worker" as a "person who is not employed by an employer but engaged individually in an occupation in the unorganised sector subject to monthly earning of an amount as may be notified by the Central government or the State government…".[414] Only if a platform worker is a "self-employed worker" would he fall within the category of an "unorganised worker" and, thereby, be entitled to the benefits of the UWSSA. There are three specific concerns with the definition. Firstly, as Sankaran pointed out, the definition of a self-employed worker is ambiguous as it is silent on whether informal entrepreneurs and own-account workers would come under the ambit of the UWSSA.[415] Secondly, if platform workers do come under the ambit of the UWSSA as self-employed workers, Section 2(m) categorically states that they would not be covered by the legislations mentioned in Schedule II of the Act, which includes the IDA. As such, availing the benefits of the UWSSA would necessarily preclude workers from receiving the protection of the IDA or any of the laws applicable to the formal workforce. Thirdly and, perhaps, most importantly, the latter half of the definition allows the state and central governments to narrow the category based on the earnings of the worker. As such, both the central and state governments have set an extremely low ceiling, which would exclude all self-employed workers in the unorganised sector who earn a salary above the notified ceiling. Therefore, the UWSSA provides a mirage of social security when, in reality, it excludes large swathes of workers.[416] Several scholars pointed out this problem when the Act was passed, with the National Campaign Committee for Unorganised Sector Workers noting that, through this Act, there is a clear attempt by the State to create a cleavage

[414] *UWSSA, supra* note 34, s. 2(k).
[415] Sankaran, *supra* note 136, at 232.
[416] See, Paromita Goswami, "A critique of the Unorganised Workers' Social Security Act" (2009) 44:11 Econ. & Political Weekly 17, where the author noted that most of the schemes in Schedule II are applicable only to workers who are "below poverty line". In that sense, "unorganised workers" in the "non-below poverty line" categories are provided nothing and face "grave injustice".

among workers above or below the Poverty Line. Generally, the notification of the ceiling is based on the poverty line, which is updated by the central and state governments.[417] If the poverty line ceiling is low, the corresponding ceiling for a self-employed worker would also be low. The definition of a "wage worker" also faces a similar issue, as it requires notification by the central and state governments regarding the monthly wage amounts to classify someone as a wage worker.[418]

Dutta and Pal conducted a study in 2012 to examine the potential of workers to see when the workers, both skilled and unskilled, surpassed the poverty line.[419] Their research mainly aimed at counting the days it can take for a family of five members, having two working members and getting the stipulated minimum wages, to cross the "Below Poverty Line" criteria laid down in different States. The findings revealed that even if one family member is engaged in unskilled labour, the entire household could easily overcome the poverty threshold. Here, however, it is important to emphasize that this does not imply that the workers' earnings are remarkably high; rather, the poverty line is abysmally low.[420] Unfortunately, in India, due to political reasons, poverty estimation has not been carried out ever since PM Modi's government has come to power

[417] See, for a brief overview of the poverty measurements, Seema Gaur & N Srinivasa Rao, "Poverty measurements in India: A status update" (Ministry of Rural Development Working Paper No. 1/2020, 2020).
[418] *UWSSA, supra* note 34, s. 2(n), defines a "wage worker" as "a person employed for remuneration in the unorganised sector, directly by an employer or through any contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or kind, whether as a home-based worker, or as a temporary or casual worker, or as a migrant worker, or workers employed by households including domestic workers, with a minimum monthly wage of an amount as may be notified by the Central and State Government, as the case may be."
[419] Tina Dutta & Parthapratim Pal, "Politics Overpowering Welfare: Unorganised Workers' Social Security Act, 2008" (2012) 47:7 Econ. & Political Weekly 27.
[420] In India, most of the poverty estimations have relied on caloric norms, which consider the consumption of calories necessary for survival. However, scholars have criticized government reports as taking a lower level of calorie consumption than what is required for a healthy diet into consideration. These reports have also recommended very little expenditure on health and education. Moreover, basing the poverty estimates on caloric consumption has been heavily criticized, as it fails to convey any information about the vulnerability of people just above the poverty line. Unlike the Indian government reports, the "Global Multi-Dimensional Poverty Index" developed by the United Nations Development Program considers a wide array of indicators and dimensions, such as education (years of school and attendance), health (child mortality and nutrition), and living standards (covering aspects like cooking fuel, sanitation, drinking water, electricity, housing, and assets). See generally, Nushaiba Iqbal, "How many people live below the poverty line in India? It could be 34 million or 373 million" *Scroll* (30th July 2023) Online: <https://scroll.in/article/1048475/how-many-people-live-below-the-poverty-line-in-india-it-could-be-34-million-or-373-million>; Angus Deaton & Jean Dreze, "Squaring the poverty circle" *Hindu* (25th July 2014) Online: <https://www.thehindu.com/opinion/lead/squaring-the-poverty-circle/article6246084.ece> But see, NITI Aayog, "India: National Multidimensional Poverty Index- Baseline Report" (NITI Aayog Report, 2021), recommending the use of different dimensions and indicators.

in 2014.[421] Poverty estimation becomes crucial not just to gauge the impact of government policies but also to determine the eligibility requirements of various schemes, including the ones provided by various governments under the UWSSA. The last official poverty estimates which were approved by the government were carried out in 2011-12 by the Planning Commission.[422] Considering that the government has not carried out official poverty estimates for over a decade, all socio-economic programs are based on outdated poverty estimates. Moreover, as indicated by Pangariya and Mukim, the government could certainly have two different poverty lines. The first one could track abject poverty, which might be useful to make poverty estimates. Whereas the second poverty line, which would require constant updating and may, perhaps, vary according to state, could be used for government schemes and redistribution purposes.[423] Nevertheless, based on the current poverty line, most of the platform workers would pass that threshold with their earnings with relative ease. For instance, as per the report by the Institute of Public Policy, NLSIU, food-delivery platform workers earn an average of Rs. 10,000 to 15,000 ($ 121.57 to 182.35), whereas the current poverty line is Rs. 1000 ($ 12.15) in urban areas and Rs. 816 ($ 9.92) in rural areas.[424] Dutta and Pal have noted that it is for this reason that workers could easily cross the official poverty line. However, due to the large family sizes, socio-economic status, and limited access to social sector services, they continue to be effectively impoverished.[425] A significant number of unorganised workers and their families are denied essential social security benefits simply because their income exceeds the poverty line.

Even if the platform workers may be categorized as "unorganised workers" under the UWSSA, the schemes provided to the "unorganised workers" are significantly limited, mostly covering only insurance, and often have strict eligibility requirements that would likely exclude a large number

[421] See, Suresh Tendulkar, R. Radhakrishna & Suranjan Sengupta, "Report of the expert group to review the methodology for the estimation of poverty" (Government of India, Planning Commission Report, 2009), using this report as the basis the Planning Commission estimated the poverty line at Rs. 816 ($ 9.92) per capita per month in rural areas and Rs. 1000 ($ 12.15) per capita per month in urban areas. But see, C. Rangarajan & others, "Report of the expert group to review the methodology for the estimation of poverty" (Government of India, Planning Commission Report, 2014), through which the Committee recommended raising the poverty line to Rs. 972 ($ 11.81) per capita per person in rural areas and Rs. 1407 ($ 17.10) per capita per person in urban areas. This recommendation was not considered by the PM Modi-led BJP government.
[422] *Ibid.*
[423] Arvind Panagariya & Megha Mukim, "A comprehensive analysis of poverty in India" (2014) 31:1 Asian Development Rev. 1.
[424] See, Bharadkar et al*, supra* note 174, at 16; Iqbal, *supra* note 420.
[425] Dutta & Pal, *supra* note 419, at 28.

of platform workers.[426] The UWSSA includes ten specific schemes for unorganised workers, as listed in Schedule I of the Act. Some of these schemes cater to specific categories of unorganised workers, such as the Handloom Weavers' Comprehensive Welfare Scheme, Handloom Artisans' Comprehensive Welfare Scheme, Pension to Master Craft Persons, and National Scheme for Welfare of Fishermen and Training and Extension Scheme. The schemes applicable to all unorganised workers generally have eligibility criteria based on age and, in most cases, monthly earnings falling below the poverty line. For instance, the Aam Aadmi Bima Yojana aims to provide social security for poor households, covering only one family member below the poverty line aged between 18 and 70 years. Similarly, the Indira Gandhi National Old Age Pension Scheme is available for individuals aged 60 years and above, who are categorized as Below Poverty Line. Considering this, the eligibility requirements might prove to be restrictive for many platform workers, making it challenging for them to access the benefits and support provided by most of these schemes.

Apart from the UWSSA schemes, there are other central government schemes on social security, most of which are targeted towards providing insurance.[427] Whether the platform workers are eligible to apply for these schemes remains unclear. There are also additional structural issues inherent in the legislation. Firstly, whilst the ILO Convention No. 102 on Minimum Standards of Social Security mandates providing protection in the event of nine contingencies, namely, medical care, sickness benefit, unemployment benefit, old-age benefit, unemployment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor's benefit, the UWSSA is limited to only three of those, namely, life and disability cover, health and maternity benefit, and old age protection.[428] Even those are provided through the schemes mentioned in Schedule I, making it extremely difficult for the workers to gain any benefit under the UWSSA. Secondly, the UWSSA

[426] See, Goswami, *supra* note 416, at 17, where the author pointed out that all the schemes in Schedule I of the Act had already been formulated and implemented. Therefore, there was no need for a separate Act, as there is no new scheme that was introduced.
[427] See, for a brief overview of the schemes, Mohapatra & Sahoo, *supra* note 22, where the authors laid down the different schemes by the Central government, such as Atal Pension Scheme, PM Surakhya Vima Yojana, PM Shram Yogi Mandhan Yojana.
[428] The ILO Convention establishes nine branches of social security, viz. medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors' benefit. See generally: ILO, "The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102)" Online: <https://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm#:~:text=The%20Social%20Security%20(Minimum%20Standards,nine%20branches%20of%20social%20security.>

has been criticized for merely putting together pre-existing social security schemes without the addition of new benefits.[429] It is worth pointing out that apart from social security, the NCEUS, in its report, had also recommended additional legislation on "minimum conditions of work" for unorganised workers.[430] These included an eight-hour working day with at least a half-hour break, one paid day of rest per week, a statutory national minimum wage for all wage workers and home workers, penal interest on delayed payment of wages, no deductions from wages for payment of fines, the right to organize, non-discrimination on the basis of sex, caste, religion, HIV/AIDs status, and place of origin, adequate safety equipment at the workplace and compensation for accidents, protection from sexual harassment, provision of childcare, and provision of basic amenities at the workplace. As of today, no legislation has been made by the central legislature to provide minimum entitlements as laid down by the NCEUS. The legislature, through the UWSSA, was expected to enact a law pertaining to workers' entitlements, particularly by establishing minimum working conditions. However, the inability to achieve this through the UWSSA has resulted in scholars referring to the Act as a "dysfunctional social security law".[431]

Moreover, the Act does not provide any implementation framework, dispute resolution mechanism, penalties, or dedicated financing for schemes, rendering much of its effectiveness subject to governmental discretion.[432] Some of the schemes, as per Section 10(4) of the Act, require an unorganised worker to be registered and contributing towards those schemes. If the worker refuses to contribute, he would not be eligible to avail himself of the benefits under that scheme.[433] Furthermore, even if there is no contribution requirement and the worker has completed the registration formalities, the worker could still be considered ineligible if the application is sent to the wrong agency. Each scheme laid down in Schedule I is governed by a different department. As the Institute for Financial Management and Research in its report pointed out, "the fragmented ownership structure and the lack of coordination among different Ministries running the schemes

[429] Goswami, *supra* note 416, at 17.
[430] See, NCEUS, *supra* note 33, at 202.
[431] Kathyayini Chamaraj, "The dysfunctional social security law for unorganised workers" (Civic Working Paper, 2019).
[432] K. B. Saxena, "The unorganised sector workers' Social Security Act, 2008: A commentary" 39:2 Social Change 281, 283.
[433] *UWSSA supra* note 34, s. 10(4), which reads as follows, "if a scheme requires a registered unorganised worker to make a contribution, he or she will be eligible for social security benefits under the scheme only upon payment of such contribution".

has led to an equally fragmented delivery of schemes, resulting in the end user having to access the schemes through multiple channels".[434]

An even larger impediment for the workers is the process of obtaining social security through the e-SHRAM portal, which was designed to maintain a national database for unorganised workers.[435] This portal, as per the website of the Ministry of Labour & Employment, includes the details of gig and platform workers. The Supreme Court, in the case of *In Re: Problems and Miseries of Migrant Labourers*, stated that the Ministry had been lackadaisical in its approach towards registering unorganised workers, which had proven particularly detrimental to the migrant labourers during the COVID-19 pandemic lockdown.[436] It directed the Ministry to provide easy access to different schemes to migrant workers and facilitate a swift registration process. However, even thereafter, the e-SHRAM portal has not been successful in registering many workers, including platform workers.[437] One reason for the delay in registration is the reliance on Aadhar,[438] a 12-digit Unique Identification Number that can be obtained voluntarily and is issued by the Unique Identification Authority of India on behalf of the Government of India.[439] To register on the e-SHRAM portal, the worker must have a valid Aadhar number, which, in turn, is linked to their mobile number and a bank account, thereby creating impediments to effective registration.[440] Most workers often do not have access to mobile phones to connect their Aadhar number, and the workers that do have often faced difficulties in linking their mobile number with their Aadhar number. Additionally, even if the Aadhar number is linked, a worker who loses a mobile phone or

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[434] Anand Sahasaranam et al, "Comprehensive social security for the Indian unorganised sector: Recommendations on design and implementation" (Report by IFMR Finance Foundation & IFMR Research- Centre for Microfinance, 2013) 6.

[435] Shreya Adhikari & Debojit Dutta, "More confusion, less benefits mar e-SHRAM registration process" *The Wire* (9th May 2022) Online: <https://thewire.in/labour/more-confusion-less-benefits-mar-e-shram-registration-process>

[436] *In Re: Problems and Miseries of Migrant Labourers,* (2021) 14 SCC 169 (SC Ind). See also, Sreeram VG, "A conceptual reading of the Supreme Court's migrant workers judgment" *The Leaflet* (14 September 2021) Online: <https://theleaflet.in/a-contrapuntal-reading-of-the-supreme-courts-migrant-workers-judgment/>

[437] Cf, Saurav Anand, "Over 28.5 crore unorganised workers registered on e-shram portal: Govt" *Mint* (3 February 2023) Online: <https://www.livemint.com/news/india/over-28-5-crore-unorganised-workers-registered-on-eshramportal-govt-11675409026988.html>

[438] Shreehari Paliath, "India's e-Shram registration portal for workers is facing an unexpected obstacle: Aadhar" *Scroll. in* (2 December 2021) Online: <https://scroll.in/article/1011766/indias-e-shram-registration-portalforworkers-is-facing-an-unexpected-obstacle-aadhaar>; See generally, Sareeta Amruta, Reetika Khera, & Adam Willems, "Aadhar and the creation of barriers to welfare" (2020) 27:6 Interactions 76.

[439] Ursula Rao & Vijayanka Nair, "Aadhar: Governing with biometrics" (2019) 42:3 South Asia: J of South Asian Studies 469.

[440] Shreehari Paliath, "E-Sharm should ensure workers' social security, easy registration: Experts" *Business Standard* (30 November 2021) Online: <https://www.business-standard.com/article/economy-policy/e-shramshouldensure-workers-social-security-easy-registration-experts-121113000201_1.html>

forgets their phone number must go through a convoluted process of de-linking.[441] For platform workers, the president of the Telangana Gig and Platform Workers Union stated that the website allowed for workers to self-identify as gig and platform workers, and then provide details for their occupation. This, however, was recently replaced with an exhaustive set of categories to choose from, such as drivers, delivery agents, etc., rather than allowing for self-identification.[442] Moreover, the Supreme Court, through its decision in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, which dealt with the constitutionality of the Aadhar Card and its compulsory usage to avail the welfare schemes, noted that the linking of the Aadhar Card was not a necessary precondition to avail of social security and welfare schemes.[443] In a 2019 Status of the Aadhar Report, it was pointed out that 8% of the population, i.e., approximately 102 million people, did not have Aadhar Cards.[444] Although there are no official statistics with respect to the number of workers, specifically unorganised workers, who do not have Aadhar Cards, it has been reported that the workers have often faced difficulty registering themselves on the e-SHRAM portal due to mandatory requirements.[445] Elsewhere, the Government has claimed that around 99.9% or roughly 1.3 billion people in India have received an Aadhar number; a statistic which has been heavily disputed. Even then, only half of the unorganised workers registered on the e-SHRAM portal have Aadhar linked with their bank accounts.[446] Other questions also arise regarding the protection of workers' data, as frequent breaches of data, including bank details and sensitive personal and financial information, have occurred on government portals using Aadhar.[447]

Apart from the Aadhar and definitional issues under the Act, the funding allocation for almost all the schemes for unorganised workers has been abysmally low. The NCEUS, in 2007, had

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[441] See generally, Sweta Dash, "The incomplete project of E-Shram, India's database of unorganised workers" *Article 14* (17 February 2022) Online: <https://www.article-14.com/post/the-incomplete-project-of-e-shram-india-sdatabase-ofunorganised-workers-620dc42806e13>, where the author interviewed Bibi, a migrant worker from Delhi who lost her phone when her house caught fire. The authorities informed her that she would have to follow a stringent process of de-linking the Aadhar number first, which would require her to get a SIM Card with her previous number for a One-Time Password. This required her to remember her previous mobile number, which she did not remember. For this reason, she informed the outlet that she almost gave up on the e-SHRAM portal.
[442] *Ibid.*
[443] *Justice K.S. Puttaswamy (Retd.) v. Union of India,* (2019) 1 SCC 1 (SC Ind) [*Puttaswamy*].
[444] Swetha Totapally et al, "Status of Aadhar Report, 2019" (Dalberg Report, 2019).
[445] Paliath, *supra* note 440.
[446] See, Moushumi Das Gupta, "Many unorganised workers' accounts not Aadhar-linked, e-SHRAM shows, may not be getting subsidies" *The Print* (29 October 2021) Online: <https://theprint.in/india/governance/accounts-notlinkedto-aadhaar-are-likely-missing-out-on-subsidies-e-shram-data-shows/758078/>
[447] Zack Whittaker, "India's farmers exposed by new Aadhar data leak" *Tech Crunch* (13th June 2022) Online: <https://techcrunch.com/2022/06/13/aadhaar-leak-pm-kisan/>

recommended an outlay of approximately Rs. 32,350 Crores ($ 3.92 billion) for the social security of unorganised workers, working in both agriculture and non-agricultural sectors.[448] After four years, the government, through the National Social Security Fund (NSSF), made an initial allocation of Rs. 1000 Crores ($ 167.9 million).[449] However, it has been alleged that the funds provided for the unorganised sector workers through the NSSF remained unused for 7 years and the total accumulation in 2016-17 accounted for roughly about $ 315 million.[450] In that sense, the schemes have largely remained on paper with little to no efficacy in ameliorating the conditions of unorganised workers. As such, assuming that the platform workers do not succeed in being recognized as employees and, consequently, workmen under the IDA, they would only have recourse to the UWSSA. Whether platform workers would be captured by the definition of an "unorganised worker" remains doubtful. Nonetheless, even if they are counted as "unorganised workers", they would be bereft of most substantive labour remedies and the schemes established under the UWSSA.

The foregoing analysis reveals that the applicability of the IDA, although feasible, remains an open question. Likewise, the UWSSA, even if potentially applicable, may accomplish little in terms of advancing the rights of platform workers. Furthermore, the multiplicity of legislations at the Central and State levels will continue to pose a challenge for all workers, including platform workers, in the context of identifying suitable avenues and applicable laws for successful litigation. The jurisprudential history of the IDA would seem to suggest that platform workers could be counted as "workmen". However, considerable uncertainty exists for the litigants on whether to seek protection for platform workers under the IDA, as pointed out in the DCDU case, or whether to pray to the court to consider them as "unorganised worker(s)" under the UWSSA, as claimed by the IFAT. Given the pendency of the IFAT petition and taking into account arguments that the recently enacted Codes, particularly the CSS, might provide greater clarity on this issue, the analysis of the CSS becomes essential.

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[448] NCEUS *supra* note 33, at 319, 341.
[449] PTI, "Government approves National Social Security Fund" *Economic Times* (28 July 2011) Online: <https://economictimes.indiatimes.com/news/economy/policy/government-approves-national-social-securityfund/articleshow/9397094.cms?from=mdr>
[450] Himanshu Upadhyaya, "The missing National Social Security Funds for India's unorganised sector workers" *Wire* (28 May 2020) Online: <https://thewire.in/labour/national-social-security-fund-unorganised-workers>

2) Code on Social Security: An empty commitment to safeguard platform workers

As mentioned earlier, the SNCL had recommended that there must be a harmonization of the labor law framework.[451] Therefore, the government codified the fragmented laws into four specific Codes. In this part, the thesis will analyze specific provisions of the CSS, with respect to the platform workers, to show that the recommendatory nature of the provisions, the absence of any mechanism to ensure justiciability, the definitional quandaries, and the heavy reliance on the executive for framing schemes through delegated legislation, all raise significant questions regarding the efficacy of the CSS with respect to platform workers.

The CSS, which subsumed, *inter alia*, the UWSSA, is the only Code that mentions gig and platform workers.[452] The aim of the Code as indicated through its long title is to "amend and consolidate the laws relating to social security with the goal of extending social security to all employees and workers".[453] In furtherance of this, the Ministry of Labour & Employment pointed out that it was necessary that specific provisions be made for gig and platform workers, with the aim of providing them with social security. In the words of the Ministry, "the provisions for gig and platform workers [in the CSS] are a new concept and have been drafted keeping in view flexibility to frame suitable schemes for them in the future".[454] Before delving into the draft provisions of the social security schemes for the platform and gig workers, it is necessary to point out the definitional quandaries in the CSS with respect to these categories.

Section 2(35) of the CSS states that a gig worker "means a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship".[455] Meanwhile, a platform worker under Section 2(61) is "a person engaged in or undertaking platform work",[456] which, in turn, is defined under Section 2(60) as "[a] work arrangement outside of the traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services…in exchange of payment".[457] At first blush,

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[451] SNCL, *supra* note 59.
[452] See, *CSS supra* note 76, ss. 2(35), 2(61).
[453] *Ibid.*
[454] "The Code on Social Security, 2019" (Ninth Report of Standing Committee, Ministry of Labour & Employment, 2019) 33. [*Standing Committee*].
[455] *CSS*, *supra* note 76, s. 2(35).
[456] *Ibid*, s. 2(60).
[457] *Ibid*, s. 2(60).

there are several concerns with the definitions. Under the CSS, a gig worker and a platform worker are different categories. A bare perusal of the definition of a gig worker would indicate that it would include all forms of relationships, such as temporary work, part-time work, dependent self-employment, etc. In fact, this was particularly pointed out to the Ministry by the Standing Committee when reviewing the earlier 2019 draft of the CSS, which had the same definition. During the review, the Standing Committee observed that the definition seems to correspond more with the concept of nonstandard forms of employment laid down by the ILO in its 2015 report.[458] Meanwhile, the definition of platform work is more attuned to how DLPs are referred to in common parlance. Although several terms are used to define digitally enabled forms of work, such as the "collaborative economy", "on-demand economy", "sharing economy", "gig economy", or "platform economy", the terms are always used synonymously, rather than claimed as entirely different categories. However, using the terms gig economy and platform economy as separate categories will inevitably impede the proper implementation of the provisions of the Code, as will be indicated below. Moreover, by using the words, "work arrangement outside the traditional employer-employee relationship", the CSS seems to firmly establish that gig workers would not be counted as employees. The Ministry, in no uncertain terms, noted that gig workers lack the conventional employer-employee relationships typically found in traditional employment settings.[459] This arguably indicates the Ministry's stance that the gig and platform workers are independent and outside of the control of the platforms. An editor's note in the Economic & Political Weekly journal rightly pointed out that "CSS 2020 misclassifies both gig and platform workers and edges them outside the ambit of labour laws".[460] Matthew noted that the inclusion of gig and platform workers is nugatory if it comes with a rider that they are not workers.[461] However, Sankaran has noted that the words "work arrangement", perhaps, indicate that there is a distinction between gig workers and independent contractors.[462] In that sense, she argued that this could be conceived as a "hybrid position" that emphasizes the economic dependence of workers on the platform.[463] Therefore, an argument could be made that the Code creates a category of gig and

[458] Standing Committee, *supra* note 454, at 31.
[459] *Ibid*, at 32.
[460] See generally, "Workers in gig and platform economies" (2022) LVII: 8 Econ. & Political Weekly 7; "New labour codes and their loopholes" (2020) LV: 40 Econ. & Political Weekly 40.
[461] Matthew, *supra* note 293, at 8.
[462] Sankaran, *supra* note 58, at 638.
[463] *Ibid* at 638.

platform workers as "dependent contractors", who may have contractual agreements of a commercial nature with another economic unit.[464]

As pointed out by the International Conference of Labour Statisticians through the Resolution concerning statistics on work relationships, a dependent contractor might be operationally and/or economically dependent on another entity that has control over their activities or, at the very least, directly benefits from the work.[465] Whether the words "work arrangement" are enough to indicate the creation of a third category is uncertain. For instance, the Ministry has pointed out to the Standing Committee that the aggregators and workers are partners and, that they "enter into a partnership, [where the aggregators] name or call the drivers/ delivery boys, etc, as microentrepreneur or driver entrepreneur or partners or in various other names".[466] Even if, for the sake of argument, a dependent contractor category is indeed created by the CSS by using the words "work arrangement", apart from some social security measures accorded to the platform and gig workers, there are no rights as such that are extended to them, including, collective labour rights. This is in stark contrast with other jurisdictions, like the UK and some provinces in Canada, which have a dependent contractor or an intermediate category, where workers are provided with a regime of rights and social protection.[467] Moreover, the bifurcation between gig and platform workers is itself troublesome, as all platform workers can be considered gig workers but not all gig workers can be considered platform workers, as they may be hired through means other than the usage of the platforms.[468] The Ministry's response to the Standing Committee, when analyzing a previous 2019 draft, was that the gig and platform work were new concepts and, therefore, the

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[464] *Ibid.*

[465] ILO, "Resolution concerning statistics on work relationship" (20th International Conference of Labour Statisticians (ICLS) Geneva, 10-19 October 2018) laid down the new "International Classification of Status in Employment 2018" (ICSE-18), which, for the first time, introduced the category of a "dependent contractor". See also, for a brief overview of the recommendations concerning 'dependent contractors' at the ICLS, Françoise Carré, " "Dependent contractor: Towards the recognition of a new labor category" in Laura Alfers, Martha Chen, & Sophie Plagerson, eds., *Social Contracts and the Informal Workers in the Global South* (Edward Elgar, 2022) 73.

[466] Standing Committee, *supra* note 454, at 129.

[467] See, for a brief overview of the Canadian, Italian, and Spanish experiences of adopting a third category, Miriam Cherry & Antonio Aloisi, " "Dependent contractors" in the gig economy: A comparative approach" (2017) 66:3 Am. U. L. Rev 635. See also, *Uber v. Aslam*, [2021] UKSC 5, where the Supreme Court of the United Kingdom reckoned that the drivers were "workers" as defined under section 230(3) of the Employment Rights Act, 1996, with "worker", or a "limb (b) worker", being an intermediary category between an "employee and an "independent contractor. See generally, *CUPW*, *supra* note 180, where the Ontario Labour Relations Board decided that workers were dependent contractors and had the right to collectively bargain.

[468] Deepika M. G. & Madhusoodhan M., "Labour laws for gig workers in the context of labour law reforms" (2022) LVII:30 Econ. & Political Weekly 30,41.

broader definition of a gig worker would provide flexibility to the government to make social security schemes.[469] In addition, while analyzing the 2019 draft of the CSS having the same definition, the Standing Committee explicitly noted that there was a lack of clarity as to whether the gig and platform workers belonged to the organised or the unorganised sector, as the work ostensibly contained characteristics of both. Therefore, the Standing Committee urged the Ministry to clearly state the position of the gig and platform workers in the CSS, i.e., whether they are organised workers or unorganised workers. This clarification, as per the Standing Committee, is essential for effectively extending social security based on their distinct categorization.[470] Nonetheless, the final draft, i.e., the 2020 CSS, does not seem to have addressed the concerns of the Standing Committee. Similar categorization issues arise with respect to other categories such as wage worker, which is defined in Section 2(90) as a "person employed for remuneration in the unorganised sector, directly by an employer or through any contractor…whether as a home-based worker, or as a temporary or casual worker".[471] Since social security measures for the gig and platform workers differ from those of the wage workers, the application of the schemes becomes difficult. Take, for instance, a Zomato driver who works as a wage worker in the morning, and as a delivery partner at night, in turn, being categorized as a platform worker. The protections granted to both categories differ drastically. Therefore, arguably, the presence of overlapping definitions, which are ambiguous, would eventually affect the execution of social security provisions of the Code.

In relation to the definition of social security itself, the CSS defines it in Section 2(78) as a means of "protection afforded to the employees, unorganised workers, gig workers and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner by means of rights conferred on them and schemes framed".[472] The protection afforded under this section is considerably less than that required by the ILO Social Security (Minimum Standards) Convention,

[469] Standing Committee, *supra* note 454, at 33. The Standing Committee explicitly noted that the definition of "gig worker" was too broad and that it should be made "specific and unambiguous to obviate any scope for any confusion and misinterpretation".
[470] *Ibid*, at 33, para 4.50, where the Committee noted that the definition was ambiguous in that no clarity is provided on whether the "[G]ig and Platform worker" belongs to the organised or the unorganised sector.
[471] *CSS*, *supra* note 76, s. 2(90).
[472] *Ibid*, s. 2(78).

1952 (No. 102).[473] For instance, the ILO has laid down branches of social security, i.e., medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefits, family benefits, maternity benefits, invalidity benefits, and survivors' benefits. Even though India has not ratified the aforesaid convention, it remains necessary to broaden the scope of the definition, or, at the very least, specifically enumerate what type of "income security", be it through insurance or otherwise.

Lastly, the CSS defines an aggregator under Section 2(2), as a "digital intermediary or a marketplace for a buyer or user of a service to connect with the seller or the service provider".[474] The Seventh Schedule of the CSS classifies aggregators into nine categories, i.e., ride-sharing services, food and grocery delivery services, logistic services, e-Marketplace for wholesale/ retail sale of goods and/or services, professional service providers, healthcare, travel and hospitality, content and media services, any other goods and services provider platform.[475] The words "digital intermediary" have not been interpreted by the courts in India; however, it would seem that, through this definition, the CSS intends to make aggregators mere facilitators of exchange for goods or services.

Apart from the definitional quandaries, the CSS provisions pertaining to social security itself are replete with problems.[476] At the outset, Chapter IX of the CSS has been specifically dedicated to "social security for unorganised, gig, and platform workers", with certain sections being applicable to all three, whereas some are applicable only to unorganised workers. Section 109(1) of the CSS provides the central government with the power to frame suitable welfare schemes for unorganized workers on matters relating to life cover, health and maternity benefits, old age protection, and education.[477] Moreover, since both the central and state legislatures have the power to make laws relating to social security in India, the state government, as per Section 109(2) of the CSS, has also been given the authority to make schemes for unorganised workers relating to provident fund, employment injury benefits, housing, educational schemes for children, skill upgradation of

[473] ILO Social Security Convention, *supra* note 428.
[474] *CSS*, *supra* note 76, s. 2(2).
[475] *Ibid*, Seventh Schedule.
[476] See, Sumangala Damodaran, "Industrial Organisation, employment and labour regulations: Understanding recent changes in India" (2023) 66 Indian J. Lab. Econ. 495.
[477] *CSS*, *supra* note 76, s. 109(1).

workers, funeral assistance, and old age homes.[478] Meanwhile, for the platform and gig workers, Section 114(1) provides that only the central government shall frame welfare schemes on subjects such as life and disability cover, accident insurance, health and maternity benefits, old age protection, and creche.[479] Unlike Section 109(2), which gives the authority to the state government to formulate schemes, there is no power accorded to them for making schemes for platform and gig workers. More importantly, the scope of the number of schemes is larger for the unorganised workers as compared to the platform and gig workers. In this case, as mentioned earlier, definitional issues with respect to worker categorization may seriously impede the functioning of these schemes, especially if a person works as both a platform/ gig worker and an unorganised worker. The protections granted to both these categories differ drastically. Although the Standing Committee did not comment on the number of schemes for unorganised workers and platform and gig workers, they did recommend the merger of Sections 114 and 109, which would allow for the framing of schemes for social security for gig and platform workers to coexist at one place.[480] Evidently, the recommendation was not implemented in the final draft.

Since the language of the Code is merely recommendatory, the CSS, via Sections 154, 155, and 158, conferred powers on the central government to frame rules regarding, *inter alia*, matters of social security, specifically laying down the procedure for availing payments and benefits under the CSS.[481] For the purposes of carrying out the functions of social security, the CSS, pursuant to Section 114(6), recommended the formation of a National Social Security Board for gig and platform workers.[482] Section 6(1) of the CSS notes that this Board would carry out functions such as recommending the formulation of schemes, advising the central government on any administrative issues arising from the Code, monitoring social welfare schemes, reviewing the States record-keeping functions, reviewing the funds and accounts, and such other functions as may be assigned by the Central government.[483] Correspondingly, Section 114(6) notes that a Board will be formulated for the purposes of the welfare of gig and platform workers.[484] In pursuance of

[478] *Ibid*, s. 109(2).
[479] *Ibid,* s. 114(1).
[480] Standing Committee, *supra* note 454, at 149.
[481] See, *CSS supra* note 76, ss. 154, 155, 158. See also, S. C. Srivastava, "Labour law reforms on unorganized, gig and platform workers under the code on social security: Issues and challenges" in Jeet Singh Mann, ed., *Labour Law Reforms 2021* (Centre for Transparency and Accountability in Governance, 2021) 1.
[482] *Ibid*, s. 114(6).
[483] *Ibid*, s. 6(1).
[484] *Ibid*, s. 114(6).

this, the draft Rules provided that the Board would, *inter alia*, consist of five members as representatives of aggregators and five members as representatives nominated by the central government representing different types of gig and platform workers.[485] As mentioned previously, the CSS, in its Seventh Schedule, lays down a classification of aggregators; however, neither the draft rules nor the CSS provide any classification of the "different types of gig and platform workers", who are to be representatives on the board.[486] Therefore, the question of who is to be nominated by the central government to represent the gig and platform workers remains unresolved. Moreover, the CSS has also laid down that the aggregators must contribute towards the social security fund, which is created for the social security and welfare of the unorganised workers, gig workers, and platform workers.[487] The contribution of the aggregator must not be less than one percent and not exceed two percent of the annual turnover of the aggregator.[488] Several scholars have lauded the government's efforts to incorporate aggregator contributor provisions in the CSS, particularly as the draft rules stipulate that aggregators must pay interest on the contribution amount in cases of non-payment or delayed payment.[489] Nevertheless, significant ambiguity arises from definitions of the gig and platform workers, complicating the utilization of the social security fund. Given that the category of gig workers is overly broad, such that the use of an aggregator or a platform is not a prerequisite for inclusion under this category, it appears that the aggregators' contributions may not be intended for gig workers generally but solely for platform workers. The CSS and the draft rules fail to provide any clarification regarding the beneficiaries of the fund. This predicament underscores the issue of making gig and platform workers distinct categories, ultimately impeding effective implementation. Additionally, Mohan and Muralidhar have highlighted that the ceiling on the aggregator contribution, set at 5% of the earnings for the social security schemes for platform and gig workers by Section 114(4), is exceptionally low.[490] This is in stark contrast to the relatively higher contribution that the employer

[485] *Code on Social Security Draft Rules, 2020*, rule 9(2)(c), rule 9(2)(d) [*CSS draft rules*].
[486] *Ibid*, rule 9(2)(d), merely states that the "central government shall nominate five members…from amongst the gig workers and platform workers, on rotation basis, representing the different types of gig workers and platform workers."
[487] *CSS, supra* note 66, ss. 114(3), 114(4).
[488] *Ibid*, s. 114(4).
[489] Nathan, Kelkar & Mehta, *supra* note 154.
[490] See, Mohan & Muralidhar, *supra* note 23, at 25; See generally, CSS, *supra* note 76, s. 114(4) reads as "...the contribution by an aggregator shall not exceed five percent of the amount paid or payable by an aggregator to gig workers and platform workers."

must provide to the workers working in the formal sector through schemes such as the Employee State Insurance and the Employee Provident Fund.

Concerning availing of the social security schemes, the draft rules lay down a mechanism for registering gig and platform workers.[491] Interestingly, the draft rules lay down an age criterion for registration between sixteen and sixty years.[492] They also require that the gig or platform worker must have engaged in work for more than ninety days in a year to be eligible.[493] The reasons for implementing a specific age limit of sixty years and a minimum work duration of ninety days for gig and platform workers, and, consequently, excluding certain individuals from accessing social security benefits, lack clarity. Moreover, the draft rules require the gig and platform workers to provide an Aadhar Card to register for the social security schemes.[494] Issues similar to those pertaining to the use of Aadhar Card for the UWSSA would also be witnessable with the CSS schemes. Furthermore, without registration on the portal, gig and platform workers would be unable to claim any social security benefits.[495] The draft rules also require the platform and gig workers to continuously update their information, which includes phone numbers, current address, occupation, period of engagement with the concerned aggregator or the platform, and skill level.[496] Failure to update this information may result in the workers not being able to avail the benefits of the social security schemes.[497]

Although the CSS aims to universalize social security for all workers, it is arguably merely a façade. Labour legislation in India has always been for the few, with the rest being purposely excluded. In this context, the State is far from a neutral arbiter as rising support for capital is visible. In the case of DLPs, the narrative of workers ostensibly accorded protection through the CSS is a mere mirage. The response of the State to put all forms of gig and platform work outside of the traditional employer-employee relationship makes it harder for workers to transition to the formal sector. Even the baseline protection, following a convoluted process through the CSS, seems to be reserved for only a few platform workers. Matthew rightly concludes that the Codes,

[491] *CSS draft rules*, *supra* note 462, Chapter VIII, rules 50(1), 50(2).
[492] *Ibid*, rule 50(2)(d), rule 50(4).
[493] *Ibid*, rule 50(2)(d).
[494] *Ibid*, rule 50(2)(b).
[495] *Ibid*, rule 50(2)(g).
[496] *Ibid*, rule 50(2)(h).
[497] *Ibid.*

including the CSS, represent a "government assertion at the expense of workers", signifying a transition "from labour and capital to labour for capital".[498]

3) Thin Lifelines: State governments initiatives act as catalysts for change

Most of the State initiatives have regulated the activities of platforms in specific sectors, requiring DLPs to carry out certain mandated requirements, such as licenses and permits.[499] As such, the protection of platform workers has not been prioritized by the state governments. Instead, sector-specific regulations regarding platforms have been brought to safeguard consumer safety. The first regulation was passed to regulate the taxi industry, as established workers and unions in the taxi industry pressurized the state governments to pass legislation mandating the platforms to obtain the same licensing and permit requirements as other taxi service providers.[500] The state governments of Karnataka, West Bengal, Delhi, and Maharashtra were among the first to specifically regulate ride-hailing platforms by enacting legislations, requiring them to complete certain permit and licensing processes. Furthermore, these legislations required the platforms to also provide training sessions to the drivers regarding passenger safety. At the very outset, Uber and Ola, the two major ride-hailing platforms rejected the regulations and, in turn, filed multiple petitions in various Indian high courts challenging these taxi regulations in different States.[501] Some of the courts have passed interim decisions requiring the platforms to obey the regulations and, correspondingly, obtain the required permits and licenses. However, in almost all cases, both the parties, i.e., the DLP and the state government had mutually accepted that the platform is an aggregator as per the Motor Vehicles (Amendment) Act, 2019, which defines an aggregator as a "digital intermediary or market place for a passenger to connect with a driver for the purpose of

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[498] Matthew, *supra* note 293, at 8.

[499] See generally, *Karnataka On-Demand Transportation Technology Aggregators Rules, 2016*; *Maharashtra City Taxi Rules, 2017; Rajasthan On-Demand Information Technology-Based Transportation by Public Service Vehicles Rules, 2016*. See also, "App-based shared mobility: An exploratory study" (Center for study of science, technology & Policy, 2020) 14-17, for an overview of the State level regulations for cab "aggregators".

[500] Kutter, *supra* note 333. See also, Tarini Bedi, "Urban histories of place and labour: The Chillia taximen of Bombay/Mumbai" (2018) 52:5 Modern Asian Studies 1604, where the author noted that the emergence of Uber and Ola had shifted the transport landscape, resulting in increasing anxiety among the drivers of the traditional *kaalipeeli* taxis.

[501] See generally, Sharan Poovanna, "Govt norms for cab aggregators regressive, will dampen investments" *Hindustan Times* (11 December 2020) Online: <https://www.hindustantimes.com/business-news/govt-norms-forcab-aggregators-regressive-will-dampen-investments/story-3g7Qa567xvvFoLo7kGXDkN.html> ; *Uber India Systems Pvt. Ltd. v. State of West Bengal*, WPA No. 8986 of 2022 (HC Calcutta); Sharmeen Hakim, "Strictly follow Motor Vehicles Aggregators Guidelines: Bombay High Court to Ola, Uber" *Live Law* (06 April 2022)

transportation".[502] As per this Act, the "aggregator" is responsible for obtaining the license, with the failure to do so resulting in a fine. Sankaran rightly notes that the approach taken to oversee ostensible intermediaries is industry-specific legislations, such as the Motor Vehicles Act, which do not aim to govern the working conditions of platform workers.[503] As such, these measures may not be indicative of any determination of whether these individuals should be considered as "workers" and "employees". However, recently, the state of Rajasthan passed the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 (Rajasthan Act) to constitute a "welfare board" and set up a "welfare fund" for platform-based gig workers.[504] Furthermore, the Act also aims to facilitate easier registration of platform-based gig workers, aggregators, and primary employers in the state, whilst guaranteeing social security to platform-based gig workers. This initiative by the state government of Rajasthan has been lauded by some news outlets, which have noted that it is "gig workers' first major victory" in India.[505] Certainly, the provisions of the Act are an improvement on the CSS, which is a central-level legislation. However, it still falls short of guaranteeing social security for platform and gig workers, owing to the same definitional issues as the CSS.

The Rajasthan Act defines a gig worker in Section 2(f) as a "person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship and who works on a contract that results in a given rate of payment, based on terms and conditions laid down in such contract and includes all piece-rate work".[506] The first part of the definition is similar to the one provided under the CSS and puts "gig workers" categorically outside the purview of an employment relationship. Meanwhile, an aggregator is defined as a "digital intermediary for a buyer or user of a service to connect with the seller or the service provider and includes any entity that coordinates with one or more aggregators for providing the services".[507] Notably, unlike the CSS, the Act defines primary employers as "those individuals or organizations who directly engage platform-based gig workers for a particular task

[502] *Motor Vehicles (Amendment) Act, 2019*, No. 32 of 2019, s. 2(1)(1A).
[503] Sankaran, *supra* note 58, at 638.
[504] *Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023*. [*Rajasthan Act*].
[505] Akriti Bhatia, "Gig workers' first major victory in India: Rajasthan leads the way" *The Wire* (30 July 2023) Online: <https://thewire.in/labour/gig-workers-first-major-victory-in-india-rajasthan-leads-the-way>
[506] *Rajasthan Act*, *supra* note 504, s. 2(f). Notably, the legislation does not have a separate definition of a platform worker which is unlike the CSS. Instead, the title of the Act uses the term "platform based gig workers".
[507] *Ibid*, s. 2(a).

against payment".[508] The definition must be read with the First Schedule, which along the lines of the CSS, delineates the services provided by the "aggregators" and "primary employers" into an exhaustive list, i.e., ride-sharing services, food and grocery delivery services, logistic services, e-Marketplace for wholesale/ retail sale of goods and/ or services, professional service providers, healthcare, travel and hospitality, content and media services.[509] In the Rajasthan Act, however, the terms "principal employer" and "aggregator" are conflated. Therefore, it becomes unclear whether a particular platform is a "principal employer" or an "aggregator". As per the bare reading of the provisions of the Act, Zomato and Uber might be considered aggregators, whereas a DLP such as Urban Company that uses "platform-based gig workers" to complete specific tasks such as plumbing and pest control might be considered principal employers. Hypothetically, if Zomato does not utilize its own riders for food delivery but uses another platform to get workers to complete the delivery tasks, Zomato may be considered a primary employer. Even if the platform becomes a "primary employer", the platform-based gig workers would still remain outside the traditional employer-employee relationship. In that sense, the bifurcation between an aggregator and the principal employer is infructuous as a DLP could be both an aggregator and a principal employer. Furthermore, the provisions do not lay down any social security schemes for "platform-based gig workers". There are certain important provisions added in the Rajasthan Act, which are lacking in the CSS, such as, *inter alia*, those providing for a platform-based gig workers welfare cess,[510] a grievance redressal mechanism,[511] and stringent penalties on aggregators and principal employers for non-registration of platform-based gig workers.[512] The major difference between the CSS and the Rajasthan Act is, perhaps, the cess levied on the platforms. CSS levies a cess on the annual turnover of the platforms, whereas the Rajasthan Act levies a cess on the company's revenue on each transaction. Interestingly, the Rajasthan Act is based on the 1969 Maharashtra Mathadi, Hamal and Other Manual Workers Act (Mathadi Act), which aimed at protecting the employment of unorganised manual workers in the State of Maharashtra.[513] This Act has been

[508] *Ibid*, s. 2(i).
[509] *Ibid*, Schedule – Services provided by the aggregators and principal employers.
[510] *Ibid*, ss. 2(n), 12, lays down that the "welfare cess" could be levied at such rate as the State government notifies. However, it cannot exceed two percent but shall also not be less than one percent of the value of each transaction.
[511] *Ibid*, s. 15.
[512] *Ibid*, s. 17.
[513] See generally, *Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969*, No. 30 of 1969. See also, Pawanjot Kaur, "Indian state's new tax on digital platforms sets gig workers against firms" *Aljazeera* (27 July 2023) Online:

critical in the creation of more than workers' boards across the State, resulting in protection of employees' wages and bringing them within the fold of social security.[514] Certainly, the Rajasthan Act has been the most far-reaching law made to protect platform workers, which has even prompted other states, such as Karnataka, to follow suit. It remains to be seen whether the trajectory of the Rajasthan Act follows that of the Mathadi Act. Given that the CSS is a Central legislation, the State legislation must be within the contours of the CSS. As such, the criticisms leveled against the CSS, specifically the exclusion of workers from the "traditional employer-employee relationship", apply equally to the state level legislations. Unfortunately, the definitional quandaries and the lack of clear social security measures still plague any measures adopted by the states and the center.

IV. Constitutional remedies: Utilizing the constitutional provisions to ameliorate the conditions of platform workers

In the previous chapter, the discussion focused on the employment status of certain platform workers under the labour law framework. Although the argument was that the IDA could be used to consider certain DLP workers as "workmen" and, thereby, provide them protections, the legislative framework may still be uncertain with respect to ostensibly new forms of work. In that sense, it becomes necessary to find other avenues to protect workers' fundamental rights at work, in consonance with venturing into the "high stakes" classification exercise. The exclusion of informal workers from the ambit of labour legislation is antithetical to the explicit commitment to labour welfare in the Indian Constitution.[515] This textual mandate towards securing the dignity and well-being of workers coupled with the expansive reading of constitutional rights by the Indian courts makes constitutional law an interesting avenue for protecting platform workers' rights in the absence of concrete legislative safeguards. In this chapter, the author does not intend to revisit the debates regarding constitutionalizing labour rights, which have been extensively dealt with by scholars.[516] Rather, the aim of this chapter is to consider how already existing provisions enshrined in the Constitution of India could be applicable to platform workers.

<https://www.aljazeera.com/economy/2023/7/27/indianstates-new-tax-on-digital-platforms-sets-gig-workers-against-firms>

[514] Pravin Khotkar, "Maharashtra's Mathadi Workers" (2013) 48:15 Econ. & Political Weekly 20.

[515] Supriya Routh, "Informal workers' aggregation and law" (2016) 17:1 Theoritical Inquiries in L 283, 287-88.

[516] See e.g., Hugh Collins, "Theories of Rights as Justifications for Labour Law" in Guy Davidov & Brian Langille, eds., *The Idea of Labour Law* (Oxford University Press, 2011) 138; Ian Holloway, "The constitutionalization of

1) "Directive Principles of State Policy" as a medium

The Constitution of India is the framework through which the world's largest and, perhaps, the most contentious democracy was born. Choudhry, Khosla, and Mehta described it as a "charter through which an ancient civilization was set on the road to modernity and radical social reform".[517] The creation of this Constitution is unique as, unlike the other independent nations in Africa and Asia where the Constitution was a "parting gift" by the colonizers, Indians wrote their constitution themselves.[518] Essentially, the "longest living constitution in the postcolonial world", aimed at achieving three overarching goals namely, political freedom, economic development, and social revolution.[519] It is difficult to lay down all the features that make the Constitution of India unique, as Lerner noted that there was no template that India could follow and, therefore, the drafters had to be innovative, in light of deep disagreements over the vision of the State.[520] One of these innovations was the Directive Principles of State Policy (DPSP), enshrined in Part IV of the Constitution, concerning social and economic issues.[521] The DPSPs are non-justiciable principles, largely inspired by the Irish Constitution, essentially, providing socioeconomic ideals that the country should realize over time.[522] Even though political freedom was given importance, the

employment rights: A comparative view" (1993) 14 Berkeley J. Employment & Lab. L. 113; Ruth Dukes, "Hugo Sinzheimer and the constitutional function of labour law" in Guy Davidov & Brian Langille, eds., *The Idea of Labour Law* (Oxford University Press, 2011) 57; Judy Fudge, "The new discourse of labor rights: From social to fundamental rights" (2007) 29:1 Comp. Lab. L. & Pol'y J 29; Hugh Collins & Virginia Mantouvalou, "Human rights and the contract of employment" in Mark Freedland et al., eds, *The Contract of Employment* (Oxford University Press, 2016) 189; Ruth Dukes, "A global labour constitution?" (2014) 65:3 Northern Ireland Leg Q 283; Harry Arthurs, "The constitutionalization of employment relations: Multiple models, pernicious problems" (2010) 19:4 Soc & Leg Studies 403.

[517] Sujit Choudhury, Madhav Khosla, & Pratap Bhanu Mehta, "Locating Indian Constitutionalism" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 1.

[518] Rohit De & Ornit Shani, "Assembling India's constitution: Towards a new history" (2023) Past & Present (Forthcoming).

[519] Ornit Shani, "The long making of India's Constitution: Letters from the past" (2020) 18:3 Intl. J. Constitutional L. 1036.

[520] Hanna Lerner, "The Indian founding: A comparative perspective" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 55.

[521] *Constitution of India*, *supra* note 53, Part IV.

[522] *Constitution of Ireland, 1937*, Article 45 reads as "the principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas…". Over the years, several African nations have also included directive principles in their Constitution, *Constitution of Eritrea*, *1997*, Chap. II, *Constitution of Gambia, 1996*, Chap. XX, *Constitution of Ghana, 1992*, Chap. 6, *Constitution of Nigeria, 1999*, Chap. II, *Constitution of Uganda, 1995*, Art. I-IV.

Constituent Assembly of India, which was tasked with drafting the Constitution for independent India, also realized the importance of the socio-economic goals in the text through the DPSPs.[523]

The Chairman of the Drafting Committee, Dr. Ambedkar, was the strongest proponent of these DPSPs, pointing out that the Constitution is a legal tool through which the promotion of social, economic, and religious reform was possible. While the DPSPs may be constituted as an ideal, they "have a great value, for they lay down that our ideal is economic democracy..".[524] These DPSPs, as mentioned previously in chapter 2 include, *inter alia*, equality of pay,[525] right to adequate means of livelihood,[526] distribution of ownership and control of material resources for the common good of the community,[527] equal pay for equal work,[528] maintaining health and strength of workers, especially children,[529] and protection of youth and children against exploitation.[530] Most of the labour rights are included as the DPSPs in Part IV of the Constitution of India. The DPSPs have two distinguishing features: 1) they are obligatory, as they lay down binding constitutional obligations on the state to promote social values; and 2) they are contra adjudicative, i.e., they are designed to not be given direct judicial enforcement.[531] While they are not justiciable, Article 37 of the Constitution of India requires the State to apply these principles in making laws.[532] Additionally, whilst Article 37 states that the DPSPs are not enforceable by any court, it also states that they are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".[533]

Unlike the DPSPs in Part IV, which grant non-justiciable socio-economic guarantees, the civil political rights enshrined in Part III of the Constitution, have been rendered explicitly justiciable. Part III of the Constitution, titled "Fundamental Rights", primarily includes justiciable civil

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[523] Arun Thiruvengadam, *The Constitution of India: A contextual analysis* (Hart, 2017) 34-35.
[524] *Constituent Assembly Debates*, vol. 7 (Lok Sabha Secretariat, 1986) 494 [*CAD*]. But see, Homi Seervai, *Constitutional Law of India, vol. 2* (Universal Law Publishing, 2002) 1934, where the author has termed the DPSPs as mere "political exhortations" to the legislature.
[525] *Constitution of India, supra* note 53, art. 38(2).
[526] *Ibid*, art. 39(a), 41.
[527] *Ibid*, art. 39(b).
[528] *Ibid*, art. 39(d).
[529] *Ibid*, art. 39(e).
[530] *Ibid*, art. 39(f).
[531] Lael Weis, "Constitutional directive principles" (2017) 37:4 Oxford J. Legal Studies 916. See also, *CAD*, *supra* note 524, where Ambedkar argued that just because the DPSPs have no legal force does not mean they have no binding force.
[532] *Constitution of India*, *supra* note 53, art. 37.
[533] *Ibid.*

political rights.[534] These fundamental rights guarantee, *inter alia*, the right to equality,[535] right to life and personal liberty,[536] right to freedom of speech and expression,[537] freedom of association or unions, freedom to assemble,[538] right to practice any profession or occupation,[539] and prohibition of forced labour.[540] In a sense, apart from the distinction with respect to justiciability, DPSPs may be seen as promoting "substantive welfare outcomes", whereas Fundamental Rights can be construed as "providing the means".[541] Fundamental Rights, unlike the DPSPs, are rendered expressly justiciable by virtue of Articles 12,[542] 13,[543] 32,[544] and 226[545] of the Constitution of India, which allows the right holder to move the constitutional courts, i.e., the Supreme Court and the High Courts, for the enforcement of the rights conferred in Part III of the Constitution.[546] Whilst the fundamental rights are expressly justiciable and the DPSPs are not, there is still a close connection between Part III and Part IV of the Constitution. After the Constitution of India came into force, the Supreme Court was often faced with the question of the role played by the rather abstract DPSPs and their relationship with the even more broadly worded Fundamental Rights. During the initial stages, the Supreme Court was clear that the State could make laws that implement the ideals of the DPSPs; however, these laws could not be violative of any Fundamental

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[534] *Ibid*, Part III.
[535] *Ibid*, art. 14. See also, *Ibid*, art(s). 15 and 17, having anti-discrimination provisions, which have generally been referred to merely illuminate the content of Art. 14. See, for a brief overview, Tarunabh Khaitan, "Equality: Legislative review under Article 14" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 699; Ratna Kapur, "Gender equality" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 742.
[536] *Ibid*, art. 21. See, for a brief overview, Anup Surendranath, "Life and personal liberty" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 756.
[537] *Ibid*, art. 19(1)(a). See, for a brief overview, Lawrence Liang, "Free speech and expression" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 814.
[538] *Ibid*, art(s). 19(1)(b), 19(1)(c).
[539] *Ibid*, art. 19(1)(g).
[540] *Ibid*, art. 23.
[541] Choudhury, Khosla, & Mehta, *supra* note 517, at 7.
[542] *Constitution of India supra* note 53, Art. 12 defines the 'State'.
[543] *Ibid*, art. 13(1), which notes that the laws which are inconsistent with or in derogation of the fundamental rights, enumerated in Part III, shall be void.
[544] *Ibid*, art(s). 32(1), 32(2), provides the right to move to the Supreme Court for the enforcement of fundamental rights. Moreover, it also provides the power to the Supreme Court to issue directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.
[545] *Ibid*, art. 226(1), provides High Courts the power to issue writs and enforce the rights conferred in Part III of the Constitution of India.
[546] Paul O'Connell, *Vindicating socio-economic rights: International standards and comparative experiences* (Routledge, 2013) 80-82.

Rights enshrined in Part III of the Constitution.[547] This approach changed post 1950s, where the Supreme Court noted that a harmonious construction of both the Parts is required and the State "must attempt to give effect to both as much as possible".[548] Over the years, however, the constitutional courts moved away from the DPSPs being subordinate to the fundamental rights to both of them being on-par. In fact, for the adjudication of socio-economic rights, i.e., DPSPs, the Courts have relied on a creative interpretation of civil-political rights, i.e., fundamental rights. Civil-political rights are now often read in light of the DPSPs to further socio-economic rights, thereby blurring the distinction made by the constitutional text between enforceable civil-political rights and unenforceable socio-economic guarantees.[549] This assumes significance, especially in protecting workers, as most labour rights, as pointed out above, are embedded as DPSPs and have been, time and again, read into fundamental rights under Part III by the constitutional courts. For instance, the Supreme Court in *Consumer Education & Research Centre v. Union of India* (Consumer Education),[550] when construing whether there is a right to health of the workers engaged in mines and asbestos industry, the Court noted that the right to health and medical aid, both during service and post-retirement, is a fundamental right under Article 21, which provides for the right to life and personal liberty. However, the Court read this right in conjunction with the non-justiciable socioeconomic goals enshrined as the DPSPs, such as Article 39(e), which requires the State to direct its policy towards securing the "health and welfare of the workers", Article 42, which requires the State to make provisions to "secure just and humane conditions of work", Article 43, which requires the State to "endeavour to secure all workers…decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers", and Article 48-A, which mandates the State to "protect and improve the environment".[551] Similarly, in *Bandhua Mukti Morcha v. Union of India* (Bandhua Mukti Morcha), the Court noted that the "right to live with human dignity" enshrined in Article 21, i.e., the right to life, derives its life-breath from the DPSPs enshrined in Article 39(e), Article 41, which requires the State to "..secure the right to work, to education and to public assistance in cases of unemployment, old age, sickness, and

[547] See generally, *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226 (SC Ind); *Mohd. Hanif Qureshi v. State of Bihar*, AIR 1958 SC 731 (SC Ind).
[548] See, *In Re. Kerala Education Bill*, AIR 1958 SC 956 (SC Ind).
[549] See, *Jugal Kishore v. Labour Commissior*, AIR 1958 Pat 442 (HC Patna); *Chandra Bhavan Boarding and Lodging v. State of Mysore*, (1969) 3 SCC 84 (SC Ind).
[550] *Consumer Education & Research Centre v. Union of India*, 1995 AIR 922 (SC Ind) [*Consumer Research*].
[551] *Ibid*, at paras. 24, 25.

disablement…", and Article 42.[552] Through the cases of *Consumer Research* and *Bandhua Mukti Morcha*, it is discernable that the DPSPs are now used as "interpretive guides", and as establishing framework values.[553] Moreover, unenforceable labour rights, outlined in the DPSPs as socioeconomic goals may be utilized to inform the interpretation of the enforceable fundamental rights. Bhatia, after analyzing the Supreme Court's jurisprudence on the DPSPs, noted that one of the roles played by these principles in judicial interpretation is a structuring role that aids the Court in delineating the specific contours of the abstractly worded conceptions embedded in the Fundamental Rights.[554]

Notably, whilst the DPSPs are non-justiciable, they lay down an institutional responsibility on the political branches to realize the ideals. The realization of socio-economic goals has been limited, perhaps, as the DPSPs have often been considered "an awkward fit" for the constitutional paradigm.[555] It is precisely this "awkward fit", specifically its non-justiciable character, that Ambedkar pointed out was the most notable aspect of it. In his words, "[W]e have deliberately introduced in the language that we have used in the Directive Principles something which is not fixed or rigid…It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is an economic democracy".[556] To realize these socio-economic ideals, it is imperative upon the State to enact legislation in furtherance of the aforesaid goals. The foregoing chapters have already demonstrated that both the existing labour law framework and the recently enacted Codes have failed to adequately protect the fundamental rights at work of platform workers. However, this failure also results in the socioeconomic ideals embodied in Part IV not translating into meaningful rights for platform workers. In this context, it becomes necessary to examine whether the existing civil political rights guaranteed by Part III of the Constitution could provide an avenue for safeguarding the rights of platform workers. Given that platform workers are effectively operating in a regulatory vacuum, it is apposite to consider the scope for horizontal application of the rights

[552] *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 (SC Ind) [*Bandhua Mukti Morcha*].
[553] Bhatia *supra* note 117, at 651.
[554] *Ibid.*
[555] Weis *supra* note 531, at 944.
[556] *CAD*, *supra* note, 524.

provided for under Part III, in order to determine whether it would be possible for platform workers to obtain effective remedies against the platforms through the instrumentality of constitutional law.

2) Beyond Verticality: Unpacking horizontal application of Fundamental Rights and possibility of the institutional approach

In the previous section, it was discussed that there are Fundamental Rights in Part III of the Constitution which are enforceable. However, since the Constitution regulates the relationship between the citizens and the State, the constitutional courts have generally noted that the enforcement of these rights could only be against the State and not private actors.[557] Therefore, most of the rights in Part III of the Constitution have a "vertical effect", whereby the rights would apply only against the government, as opposed to a "horizontal effect", where the rights could be enforced against private actors.[558] Essentially, the interactions between private actors are generally outside the purview of the Constitution, to be specifically regulated by the statutory provisions. Nonetheless, over the years, an expansive interpretation of fundamental rights guaranteed in Part III of the Constitution of India, in light of the DPSPs enumerated in Part IV, has essentially enabled the enforcement of certain fundamental rights against private actors.[559] The courts were hesitant, at first, to allow horizontal enforcement of certain fundamental rights. However, the horizontal enforcement of certain provisions was witnessable since the birthing of the Constitution, as the Constitution aimed at not only transforming the legal relationship between the individuals and the State by transforming the colonial subjects into citizens and providing them basic rights, but also, possibly, aimed at a comprehensive reconstruction of both the State and the society.[560] Bhatia pointed out that this sort of transformation, which sought both freedom from centuries of colonial rules and the dismantling of layered oppressive structures within the Indian society, is embodied by the application of horizontal rights provided by the Constitution itself, i.e., the prohibition of

[557] See, for instance, *Zoroastrian Cooperative Housing Society v. District Registrar*, (2005) 5 SCC 632 (SC Ind). This flows from the understanding that Art. 12 and Art 13(2) expressly note the State as an addressee. Therefore, the enforceability would be only against the State. Moreover, certain fundamental rights use the term State in its provisions, indicating the enforceability against the State. For instance, Article 14 (prohibiting the State from denying any person equality before the law).
[558] See, for an overview of horizontal and vertical effects of constitutional rights, Stephen Gardbaum, "The "Horizontal Effect" of constitutional rights" (2003) 102:3 Michigan L. Rev. 387.
[559] See, for instance, provisions that are generally accepted as being enforceable against everyone, Art. 17, which abolishes untouchability, Art. 23, which prohibits human traffic and forced labour, Art. 24, which prohibits the employment of children below the age of 14 in hazardous industries.
[560] Gautam Bhatia, *The Transformative Constitution: A Radical Biography of Nine Acts* (HarperCollins, 2019), xxv.

discrimination with respect to, *inter alia*, access to shops, public restaurants, and hotels, the prohibition of untouchability, the prohibition of forced labour, and the prohibition of child labour in hazardous industries.[561]

Gardbaum noted that, in India, certain fundamental rights have a "direct horizontal" effect, whereby constitutionally guaranteed rights bind private actors in a manner that allows them to be sued by other citizens.[562] On the other hand, he pointed out that "indirect horizontality" would occur when constitutionally guaranteed rights, despite not imposing duties on private actors or directly regulating them, indirectly impact them in some way.[563] In essence, direct horizontal action would require the cause of action to be directly against the private actors, whereas an indirect one would be directed against the State in order to alter the behaviour of the private actors. When considering the protection of workers in the labour market, the direct horizontal application of Fundamental Rights becomes crucial. An example of "direct horizontality" in the context of workers' rights is the Supreme Court's decision in the case of *PUDR v. Union of India* (PUDR),[564] which involved several allegations of labour law violations, one of which was the non-payment of minimum wages to the workers who were employed by the State via contractors to construct a Games Village for the 1982 New Delhi Asian Games. The State argued that the contractors, who were paid by the State, were the principal employers and, therefore, responsible for paying the workers. Consequently, it was argued that the blame ought not to fall on the State. Moreover, the State argued that the payment of minimum wages, as such, is not a fundamental right, and since there was no violation of a fundamental right, a writ petition against the State was not maintainable. Article 43, which is a non-justiciable DPSP, requires the State to "endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life..". However, since this was non-justiciable, the workers could not rely on the DPSP to challenge the State. Having said that, the Court considered an expansive reading of Article 23, which prohibits all forms of forced labour and is a justiciable fundamental right that is not limited in its application to merely the State but applies against everyone. The Court noted that any person who provides

[561] *Ibid*, xxv-xxvi.
[562] Stephan Gardbaum, "Horizontal effect" in Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2017) 600, 601
[563] *Ibid.*
[564] *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235 (SC Ind) [*PUDR*].

labour or service for remuneration which is less than the minimum wage would fall within the scope of the words "forced labour" under Article 23. As such that "person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied".[565] In its interpretation of Article 23, the Court noted that though socio-economic rights were themselves not enforceable, they are meant to inform the interpretation of civil-political rights. In the words of the Court, "political freedom had no meaning unless it was accompanied by social and economic freedom…it was with this end in view that the constitution makers enacted the Directive Principles of State Policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order".[566] Most importantly, the Court, through *PUDR*, also pointed out that the labour contract is an essential tool in building the market economy. However, where there is poverty and unemployment, generally, there is no equal bargaining power. In that sense, "a contract of service may appear voluntary, but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may be faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer".[567] Therefore, the analysis boils down to the difference in bargaining power between the parties, in construing whether the worker was genuinely "free" or "forced". The Court noted that, in this case, due to the relative positions of the bargaining parties in the market, the workers were unable to even negotiate minimum wages, indicating the power structure between the parties. Additionally, in the case of *Consumer Research*, the Court observed that the right to health is a Fundamental Right.[568] The Court emphasized that apart from the State, the onus also lies on the industries and private employers, to promote the health of the worker during his employment. Furthermore, the Court continued by highlighting that, in appropriate cases, the courts can give directions to the private employers or an undertaking to protect, *inter alia*, the right to health of the workers.[569]

[565] *Ibid*, at para 14.
[566] *Ibid*, at para 12.
[567] *Ibid*, at para 13.
[568] *Consumer Research supra* note 550, at para 24.
[569] *Ibid*, at para 28.

Gardbaum claimed that this is a perfect example of how courts have given "direct horizontal" effect of the right to life provision enshrined in Article 21.[570]

Bhatia has argued that, through *PUDR*, the Court employed what may be described as "direct horizontality", which did not require the Court to limit itself to contractual or statutory remedies but, instead, enabled it to go beyond and enforce a constitutionally justiciable right, i.e., prohibition of forced labour, against a private party.[571] His conceptualization of *PUDR* and other similar cases, results in what he terms the "institutional approach", whereby he argues that constitutional rights ought to be applied to private parties, in situations where "(a) there exists an 'institution' (social, economic or cultural), characterized by its pervasiveness and difficulty of exit (e.g., the labour market, or the family); (b) the institution creates and sustains a difference of power between the private parties; and (c) this difference in power enables one of the parties to violate the rights of the other".[572] His argument builds upon the Supreme Court's *PUDR* decision to advance an "institutional model of bounded horizontality", whereby if there exists an institutionally mediated power difference between private parties that enables one to violate the constitutional rights of the other, the said rights ought to be horizontally enforced.[573] However, his argument is not limited to the enforcement of minimum wages through the prohibition of forced labour, as was the case in *PUDR*. In Bhatia's opinion, the institutional approach is applicable wherever there exists an institutional power imbalance. He particularly noted that the institution that has a considerable power differential is the labour market, where the employer has significant authority and control over the worker.[574] As mentioned earlier, the inequality of bargaining power between capital and labour, owing to pervasive poverty and unemployment, was also highlighted by the Court in *PUDR*, thus shedding light on the nature of this institutionally mediated power imbalance.[575] This imbalance is starkly visible in platform work, with Bhatia arguing that the same constitutes a fitting case for the application of the institutional approach.[576]

[570] Gardbaum *supra* note 562, at 604.
[571] Gautam Bhatia, "Horizontal rights: An institutional approach" (University of Oxford, Ph.D. Dissertation, 2021) 184.
[572] *Ibid*, at 141; See also, Gautam Bhatia, *Horizontal Rights: An institutional approach* (Hart, 2023).
[573] See, *Ibid*, at 142.
[574] *Ibid*, at 232.
[575] *PUDR*, *supra* note 564, at para 13.
[576] Bhatia, *supra* note 571, at 221.

As explored in earlier sections, DLPs, through their applications, wield significant control over the workers. A substantial institutional power disparity is visible between the DLPs and their workers. While this may not be true for all DLPs, research has indicated, as pointed out in chapter 2, that such power dynamics are prevalent, particularly in location-based platforms, offering ride-hailing and food-delivery services. The starting point is often the classification of workers. However, this would require the courts to navigate through the quandaries of tests as discussed previously. Even when control might be visible, the legislature might consider these "new forms of work" as a silver bullet; thereby, not laying down any responsibilities on the employer. Moreover, where there is a normative vacuum regarding the protection of platform workers, it is possible that these legislative gaps are utilized by the DLPs to misclassify workers. The applicability of the institutional approach would begin at the "point of entry" into the work relationship and, thereafter, continue till the end of it. Bhatia, whilst quoting Kahn-Freund, noted that as soon as the worker enters the contract of employment on terms dictated by the employer, submission begins.[577] Meanwhile, being under the hierarchical control of the employer throughout the relationship results in worker subordination. Tucker has noted that there are three dimensions of worker subordination, namely - 1) economic subordination, where the economic interests of the worker are always subordinate to the employers, leading to a lesser share of income of the labour going to the employee, 2) time subordination, whereby the employers have control over the worker's time, and 3) workplace subordination, where the worker is subject to the employer's authoritarian production processes.[578] All of these are clearly visible in the platform economy model, specifically created by the institution, i.e., the labour market. In this context, the institutional approach could provide for a means of addressing the institutional power imbalance between the platforms and the workers. However, it is pertinent to note that Bhatia concedes that legislation must be "the primary vehicle for addressing labour rights, including in the context of platform work", and goes as far as stating that adjudicating every question of labour law at the constitutional level as "undesirable".[579]

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[577] *Ibid*, at 247. See also, Dáire McCormack-George, "The structure of republican labour law" (New Perspectives on Worker Subordination International Symposium, 2022) Online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4268674>

[578] Osgoode Hall Law School, "Osgoode's international symposium on "New Perspectives on Worker Subordination" – Pt 1" (4 November 2022) Online: <https://www.youtube.com/watch?v=KQiZDWvKYFg> . For a summary, see, Valerio De Stefano, Sara Slinn, & Eric Tucker, "Summary: New Perspectives on Worker Subordination" *Osgoode Hall Law School: International Symposium on new perspectives on worker subordination* (25 November 2022) Online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1002&context=worker_subordination>

[579] Bhatia, *supra* note, 571, at 218.

Within the scope of its interaction with the extant labour law framework, constitutional adjudication may be utilized for: 1) issuing declaratory judgements in case there is a legislative vacuum, 2) applying fundamental rights horizontally in order to fill gaps within existing legislations, and 3) utilizing indirect horizontality, i.e., examining whether state inaction or acquiescence has led to the violation of fundamental rights by private actors, in order to interpret existing legislation in a manner that conforms with the provisions of Part III.[580] Essentially, particularly in the context of the first two approaches, Bhatia envisages a declaratory and incremental role for the constitutional courts.

In this case, Bhatia argues that the institutional approach could be beneficial when there is an apparent hierarchical control of the worker. To curb the same, certain individual and collective labour rights could be enforced through the institutional approach, which would, in turn, aid the workers in reducing the disproportionate institutional power of the platforms. The mitigation of this institutional imbalance could be done by providing collective rights, allowing the workers to negotiate with the employer. However, as Collins pointed out, the workers may be apprehensive whether their interests are truly served by collective bargaining.[581] Therefore, it is also necessary to guarantee horizontally applicable individual rights to the workers. The first of these rights would include the right to minimum wages, as indicated through the *PUDR* decision, which would be an extension of the prohibition of forced labour. This is necessary, as Aloisi noted that in this new version of Taylorism, for the workers "minimum wages are often far from being reached".[582] Therefore, horizontal application of Article 23 of the Constitution to the platform workers could effectively serve as a means of enforcing the right to a minimum wage, in a manner analogous to the *PUDR* decision. Secondly, Bhatia argues that the right to a fair trial, flowing from Article 21, would allow the platform workers to challenge the arbitrary decisions made by the platforms.[583] Thirdly, a right against non-discrimination, flowing from Articles 15 and 17, to specifically challenge algorithmic bias and discrimination.[584] Fourthly, the right to safe working conditions has also been interpreted as being an integral part of Article 21, notably through the decision in

[580] *Ibid*, at 218-219.
[581] Hugh Collins, "Theories of rights as justification for labour law" in Guy Davidov & Brian Langille, *The Idea of Labour Law* (Oxford University Press, 2011) 137, 151.
[582] Aloisi, *supra* note 15, at 653.
[583] Bhatia, *supra* note 571, at 250.
[584] *Constitution of India*, *supra* note 53, art(s). 15, 17.

Consumer Research.[585] As the courts engage in an expansive reading of the right to life and personal liberty under Article 21, an increasing number of rights could then be enforced horizontally with respect to platform workers. An example of this is "right to privacy", which is an extension of the right to life, and could enable the workers to protect their personal data.[586] Certainly, the institutional approach could serve as a viable avenue when the legislation is silent regarding the rights of the workers, as is the case with platform workers. Moreover, it could also provide possibilities when the contours of the legislation are extremely narrow, which is exemplified by the case of the CSS. In this regard, Agarwala noted that labour movements from the 1980s onwards began utilizing public interest litigation to ensure the enforcement of existing labour legislation, although the benefits of such an approach were limited by the narrow applicability of the legislations in question.[587] Following the enactment of legislations such as the UWSSA, informal workers have channelized public interest litigation to compel state governments to enact welfare boards, demonstrating how labour movements, after advocating for legislative and executive reform, have resorted to the constitutional courts for enforcement of the legislative reforms.[588] As such, Bhatia's institutional approach, though novel, does provide a path to further realizing the goal of workers being provided their fundamental rights. Regardless, it is necessary to stress that the same is not a substitute for overarching legislative reform and robust implementation of the same at the executive level.

V. Conclusion

Polanyi highlighted that capitalism always reinvents itself when faced with resistance.[589] However, this reinvention is a continuation of pre-existing trends, merely wrapped in a new package. Fisk, writing on the proliferation of "gigs" in Hollywood, noted that these "gigs" are not a new phenomenon, as "Hollywood was a gig economy long before [the] gig economy was a thing".[590]

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[585] *Consumer Research*, *supra* note 550.
[586] See generally, Menaka Guruswamy, "Justice K.S. Puttuswamy (Retd.) & Anr v. Union of India & Ors." (2017) 111:4 Am J. Intl L. 994.
[587] Rina Agarwala, "Using legal empowerment for labour rights in India" (2019) 55:3 J. Development Studies 401, 408.
[588] *Ibid*, at 411.
[589] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001), where Fred Block, writing the introduction noted that Polanyi's claim is that there are "two opposing movements the *laissez-faire* movement to expand the scope of the market, and the protective countermovement that emerges to resist the disembedding of the economy".
[590] Catherine Fisk, "Hollywood writers and the gig economy" (2018) U. Chicago Legal Forum 177, 202.

Therefore, it is necessary to dispel the idea that the platform economy represents a novel phenomenon. Extant literature demonstrates that the platforms exercise significant managerial prerogatives. In that sense, the worker can be rendered transparent in the platform economy with the prevalence of algorithmic management, and yet be controlled through the software accessible only to the employer. Dispelling the myth that platform work is a novelty is imperative, especially since governments of developing countries like India are keen on using the same as a cure for solving the poverty crisis. The hope is that through this ostensibly "new form of work", the transition of the informal worker into a formal one is a possibility. However, in alignment with Nair's argument, this thesis shows that platform work, rather than providing a route to formalization, has perpetuated pre-existing informality.[591] Abysmal working conditions, continuous misclassification through convoluted arrangements, lack of any social protection, and constant control through digital technologies, have made workers' lives more precarious. The government in recent years has tried to actively promote the proliferation of DLP startups, specifically providing them with incentives, which include, at times, the non-application of certain labour regulations. This, coupled with the route to providing employers with more flexibility and ease of doing business by rationalizing labour laws, has resulted in labour becoming collateral damage. In consonance with the analysis of Nathan, Kelkar, and Mehta, the thesis shows that the policies to promote the platforms have favoured capital, which have enabled platforms to employ "captive workforces larger than those of major conglomerate(s)",[592] without providing them with any social security.

With the objective of situating platform workers under the formalistic labour laws, the thesis provided a pathway through which platform workers could be included under the IDA. As such, an argument, as propounded in the thesis, could certainly be made to consider platform workers as "workmen" under the IDA, thereby, granting them labour law protections. Given that the IDA regulates the relationship between the workman and the employer, encompassing matters such as the hiring and firing of workers and change in working conditions, the DCDU petition, referred to in the introductory chapter, rightly, in the author's opinion, requests the court's intervention to consider platform workers as workmen. Additionally, although arguments have been made in the past regarding counting platform workers as unorganised workers under the UWSSA, the Act itself

[591] Nair, *supra* note 16, at 389.
[592] Nathan, Kelkar, & Mehta, *supra* note, 154, at 377, 389.

has been merely an illusory promise, providing limited social security benefits to a limited set of informal workers. As such, the application of either the IDA or the UWSSA to the platform workers depends on the courts' interpretation of terms such as, *inter alia*, "industry", "workman", "unorganised worker", "self-employed worker". Perhaps, most importantly, it hinges on whether the courts construe platform work as an ostensibly new form of work.

On the legislative front, the significant weakening of labour laws and the government's inclination to favour capital is, perhaps, most visible in the recently enacted labour Codes, which, under the pretense of universalization of rights such as minimum wages and social security, have essentially offered nothing substantial. Matthew has correctly observed that since the Codes are yet to come into force, the government could put them "on hold and initiate widespread consultation of all affected interests and not merely the corporate sector".[593] This is imperative, as almost all central trade unions, including the AITUC have criticized the newly enacted labour Codes, with some union activists burning copies of the labour Codes in New Delhi.[594] Regardless, due to the policies being oblivious to the plight of the workers, this thesis has also suggested a constitutional pathway through which the workers could enforce their Fundamental Rights. In doing so, this thesis utilized Bhatia's institutional approach to showcase how constitutional rights could be applied to private parties whenever there is an institutional power difference.[595] At the time of drafting this thesis, monumental shifts have occurred in the fight for the rights of platform workers in India. As indicated previously, the Rajasthan Act is one such piece of legislation that came to fruition due to the mobilization of platform workers. Similar to capitalism reinventing itself, labour corresponds with its own reinvented version, as evinced through considerable mobilization campaigns by all location-based platform workers in India. It is, perhaps, fitting to end the thesis with the simple words of Shaik Salauddin, the co-founder of IFAT, who has 42 cases pending against him for organizing worker strikes: "This is not a small fight…It's a very long fight with many small successes along the way."[596]

[593] Matthew, *supra* note 293, at 8.
[594] T. K. Rajalakshmi, "The new labour codes: Labour's loss" *Frontline* (21 October 2020) Online: <https://frontline.thehindu.com/the-nation/labours-loss/article32749705.ece>
[595] Bhatia, *supra* note 571.
[596] Priya Ramani, "Shaik Salauddin's dreams for gig economy workers" *The Hindu* (17 February 2023) Online: <https://www.thehindu.com/society/shaik-salauddins-dreams-for-gig-economy-workers/article66502963.ece>

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