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EDITORIAL NOTE

Labour and Employment Laws hold indissoluble relevance in a labour-intensive society such as India. The meticulously picked articles for this journal indicate this wide paradigm and demonstrate its ever-evolving nature. We proudly present to you Volume II of the Journal for labour and Employment Law. Through this Volume, we aim at delivering articles that reflect expertise on contemporaneous subjects of Labour, Employment and Service Law.

The Volume begins with the Article, 'Impact of Automation on Labour Law in India'. The Article analyses the effect of automation, machine learning, and AI on the Indian labour market, a world-recognised hub for off-shoring until now. The authors aim to highlight the issues in light of current trends in the labour law regime of India, including a greater focus on capital-intensive industries. Reforms have been suggested to protect the labourers in the face of these challenges.

In 'BCCI, Indian Cricketers, and the Industrial Relations Code: Analysis of the Definitional Aspects' the author brings to light the issues faced by Cricket players, under the direct scanner of the BCCI. It is argued that They must be able to approach a redressal forum and seek an effective remedy in case of a grievance or a dispute arising out of the policies of BCCI. In this light, with other forums not being conducive to the situation of the players, the potential of the Industrial Relations Code has been highlighted. The paper focuses on the definitional issues in players seeking recourse to the IRC.

'The Role of Trade Unions in the Sustenance of Decent Work in Nigeria', examines the historical background of trade unions, challenges, and impacts, as well as their legal framework in Nigeria. Recognizing the role of Trade Unions in ensuring labour welfare, the author highlights the necessity of stakeholder consensus in achieving sustainable decent work, still a distant goal in Nigeria.

In 'Gig Workers and Social Security: Falling Back on the Existing Framework or Tailoring the Regime', the author provides a contextual background to the issue of exclusion and the contemporary need of including gig workers within the purview of social security schemes. The author adopts a critical lens while analyzing the deficiencies in the current system, in providing sufficient safeguards to gig workers. Practices around the world have been analyzed, to advance suggestions suited to the Indian scenario.

In 'The Treatment of 'Special Allowance' for Calculation of Gratuity: Fitting a Square Peg in a Round Hole?', the authors critically examine whether special allowance should be included in basic wages while calculating gratuity. This analysis has been made in light of the jurisprudence constante in India and the Vidyamandir case, in particular. While looking at the legislative and judicial approach towards the non-inclusion of 'special allowance' towards the calculation of gratuity, a comparative reference is made to the EPF Act, the Code on Wages, 2019 and the Social Security Code, 2020.

The Journal for Labour and Employment Law team hopes that the readers of this volume will gain useful insights in the area of labour and employment laws. The Centre for Labour Laws strives for excellence and this Journal is another step in that direction. We would like to thank the authors for their contributions and welcome feedback for any improvement in the quality of the Journal.

IMPACT OF AUTOMATION ON LABOUR LAW IN INDIA[1]

Abstract

Since the mid-twentieth century, following Indian independence, the nation's gargantuan yet growing workforce has seen it emerge as a hub for cheap labour, both skilled and unskilled. The advent of the internet along with the liberalisation of the Indian economy further boosted the off-shoring of repetitive jobs, particularly within the service sector, by large firms. However, technology has further evolved with new prospects such as automation, machine learning and artificial intelligence seeking to render manual labour redundant. Due to development, the first jobs that threaten to be automated are the repetitive ones, i.e., the ones that have been off-shored to India and earn the bread and butter of so much of India's workforce.

To further exacerbate this issue, Indian labour standards have finally begun to catch up with those of the West. Over the past few decades, focus has been shifting towards worker welfare, safety, optimal wages and so on. While these certainly are enlightening changes, they have a counterproductive effect for the following reasons. They have arrived at a time when the focus is shifting away from labour intensive to capital intensive industries and employers seeking to replace workers with machines, placing added burden on the employers in lieu of wages, welfare and the like. Furthermore, with a rise in "Nation first" policies and governments incentivising firms to return to their homelands, more firms are inclined to return and resort to automation rather than off-shore and pay the price. This article analyses the scope of labour reforms needed to insulate Indian labourers against automation and AI.

KEYWORDS: *AUTOMATION, LABOUR LAW REFORMS, WAGES, SOCIAL SECURITY, CONTRACT EMPLOYEES*

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I. INTRODUCTION

Karl Marx prophetically commented thus on the usage of capital by industrialists:

"*Capital is dead labour which, vampire-like, lives only by sucking living labour, and lives the more (sic), the more labour it sucks.*"

Marx in his time was dealing with the original Industrial Revolution, the first true advent of mass production and use of technology and machinery to boost output. What appalled him however, was the degradation of standards of labour that accompanied this sea change in industrial growth. If industrial change and a boom in growth is truly accompanied by a fall in the standards of labour conditions, then the advent of automation and artificial intelligence (hereinafter, "**AI**") and their application for industrial purposes must put the entire workforce on edge, especially in India.

India's economy saw a huge boost in growth due to the liberalisation drive undertaken in the early 1990s. This also allowed for a horde of multinational companies to descend into Indian markets, as both sellers and buyers. In India's teeming working age population of millions, governed and protected by labour laws that were nowhere as stringent as the ones back at home, these companies saw a labour market waiting to be tapped. This process of offshoring by the companies worked out well for both parties involved, with jobs coming to India and the corporations exploiting the cheap, skilled labour India had to offer, particularly in the service sector.[1] With the advent of automation, however, this is set to change and the occurrence of the COVID-19 pandemic has only accelerated this process. The pace of technology adoption is expected to remain unabated and may accelerate in some areas like manufacturing and business platforms, which remain high on the priority list of corporations. There has also been a significant rise in interest for the application of robotics and AI.[2]

A. Foreboding figures:

Automation, in tandem with the COVID-19 recession, is creating a 'double-disruption' scenario for workers. In addition to the current disruption from the pandemic-induced lockdowns and economic recession, technological adoption by companies will transform the job market by 2025. Forty-three percent of businesses surveyed indicate that they are set to

[1]Press Trust of India, 'India Tops 2016 Outsourcing Index' (*The Hindu Business Line*,12 January 2016). <www.thehindubusinessline.com/info-tech/india-tops-2016-outsourcing-index/article8097482.ece> accessed 24 October 2021.

[2]World Economic Forum, 'The Future of Jobs Report 2020' (World Economic Forum 2020) 5 <www3.weforum.org/docs/WEF_Future_of_Jobs_2020.pdf> accessed on 19 March 2023.

reduce their workforce due to technology integration and 41% plan to expand their use of contractors for task-specialized work. By 2025, the time spent on current tasks at work by humans and machines will be equal and 85 million jobs may be displaced by a shift in the division of labour between humans and machines.[3] AI will affect one in five jobs in Asia; removing some but enhancing others, and around 12% of the workforce may lose its job within the next five years.[4]

Furthermore, an examination of 702 jobs has revealed that middle skill jobs requiring routine cognitive and manual applications would be the first to fall to automation. India, which has 65% of global IT off-shore work and 40% of global business processing, would lose 69% of its jobs to automation by 2030.[5] Moreover, the rise in automation means that corporations no longer have to off-shore their labour activities, and can simply automate them at home. They are further incentivised to do this due to increasing stringency in the labour laws of the countries that traditionally received such jobs. This process of '*reverse offshoring*'[6] further causes a recession of jobs in countries like India. A recent review by the British Academy and the Royal Society revealed that nearly two thirds of the labour at risk of automation is found in China, India, Japan and the United States.[7]

To make matters worse, the jobs automation and AI render redundant aren't those of ageing pensioners; it is those of the youth. The relationship between automation and age is U-shaped, with the peak in automatability among youth jobs higher than the peak within senior workers. Consequently, automation is much more likely to result in youth unemployment, than in early retirements.[8] For a nation like India with a median age of 26.8 years and a youthful, albeit untrained workforce, such a change would sound the death knell of unemployment by the droves. For instance, in 2016, HfS research predicted that the Indian IT sector would lose 6.4

[3]Ibid.

[4]MIT Technology Review Insights, 'Asia's AI Agenda: AI and Human Capital' (MIT Technology Review Insights 2019) 12 <https://s3-ap-southeast-1.amazonaws.com/mittr-intl/AsiaAItalent.pdf> accessed 18 March 2023.

[5]Carl Benedikt Frey and Michael A Osborne, 'The Future of Employment: How Susceptible are Jobs to Computerisation?' (2017) 114 Technological Forecasting & Social Change 254.

[6]Sanna Ojanperä and others, 'Data Science, Artificial Intelligence and the Futures of Work' (The Alan Turing Institute 2018) 5 <www.turing.ac.uk/sites/default/files/2018-10/data_science_artificial_intelligence_and_futures_of_work_-_turing_report_0.pdf> accessed 18 March 2023.

[7]British Academy and The Royal Society, 'The Impact of Artificial Intelligence on Work: An Evidence Synthesis on Implications for Individuals, Communities, and Societies' (British Academy and The Royal Society 2018) 36 <www.thebritishacademy.ac.uk/documents/280/AI-and-work-evidence-synthesis.pdf> accessed 18 March 2023.

[8]Ljubica Nedelkoska and Glenda Quintini, 'Automation, Skills Use and Training' (2018) OECD Social, Employment and Migration Working Papers 202/2018, 8 <www.oecd-ilibrary.org/docserver/2e2f4eea-en.pdf?expires=1605360929&id=id&accname=guest&checksum=2A481B7B4F2576AB62B4F08D27B0118B> accessed 30 October 2021.

lakh low-skilled jobs to automation and that India would have the largest negative impact due to automation, losing up to 14% of its jobs in the process.[9]

B. Impending implications on the job market:

Aside from eradicating jobs that are already in short supply, the advent of AI and automation also causes structural damage to the economy at large. Where automation and robotisation lead to productivity gains, the profits are reaped by owners of capital, and if they are not reinvested into the company and its stakeholders, they will concentrate wealth in the hands of a few social actors.[10] This polarisation of the economy and hollowing out of the middle and lower middle class also has other far-reaching consequences. The Indian economy holds very few low-medium skilled jobs like those of tellers and cashiers. These niche jobs are the ones that are most likely to be made redundant by virtue of automation.[11] However, these jobs are the ones that millions of youth working in the unorganized sector seek to land. They offer the safety and benefits of working within the organized sector while also not requiring any copious degree of skill or dexterity that are commonplace prerequisites of organized sector jobs. If these 'gateway jobs' are eliminated, the bridge between the upper class and the lower middle-class collapses, and the gulf between the two widens. The economy is further polarised with the lower middle class and lower class losing yet another way out of poverty and the slope between the crest and trough of India's economic hierarchy steepens,[12] further adversely affecting India's drive to achieve economic equality. Some argue that the greatest threat brought forth by automation and AI is not the net loss of jobs, which can be recovered or substituted over time, but the polarization of the economy as discussed above.

The incorporation of technology into the workplace would implicitly mean that a major reskilling exercise must be undertaken for all existing employees if they are to be able to continue at their current jobs while doing completely different tasks. This reskilling option however, further entrenches upon economic inequality by drawing upon its relations to social

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[9]Phil Fersht, 'Automation Impact: India's Services Industry Workforce to Shrink 480,000 by 2021 - A Decline of 14%' (*Horses for Sources*, 3 July 2016) <www.horsesforsources.com/indias-services-industry-set-to-lose-640000-low-skilled-jobs-to-automation-by> accessed 30 October 2021.

[10]Ojanperä (n 7) 6.

[11]David H Autor, 'Why are there still so many Jobs? The History and Future of Workplace Automation' (2015) 29(3) Journal of Economic Perspectives 3.

[12]Tandem Research, 'Emerging Technologies and the Future of Work in India' (2018) ILO Asia-Pacific Working Paper Series, <www.ilo.org/newdelhi/whatwedo/publications/WCMS_631296/lang--en/index.htm> accessed 30 October 2021.

inequality as well. For instance, only 35% of all the internet users in India are women.[13] Therefore, if there was a job that required reskilling by means of learning over the internet, women would be at an inherent disadvantage, and would therefore stand at greater risk of losing their jobs to automation than men would. Similarly, other socially marginalized classes would face greater consequent economic disadvantage than their more privileged peers in the wake of automation and AI.

These are but some of the anticipated problems that could hit the Indian markets due to automation and AI. Some may argue that making such bleak forecasts in the face of what is assuredly technological progress would seem much like a Luddite. Yet others believe that automation is a harbinger of change for the greater good, and the cull of these obsolete jobs is necessary to shear the dead-weight off the economy and improve general productivity. The fear of machines replacing men is both overstated and oft-stated. Critics such as Malthus had predicted that a growth in population and unemployment caused by industrialisation would eventually mean that humankind ran out of resources, only for the Industrial Revolution to completely disprove such a claim.[14] Yet, due caution must be exercised to ensure that the ill-effects of automation are kept to a minimum, particularly since several sets of statistics paint a grim picture of the future of India if they are not. Therefore, as much as automation may seem a first world problem, it very much hurts India more than any first world nation.

II. HOW TO IMPROVISE, ADAPT AND OVERCOME

With this in mind, how prepared is Indian policy-making and Indian legislation to deal with this problem, and what are the ways in which we could buy time to better prepare and restructure to welcome the age of AI to its best positive effect?

There are three key areas of labour law that will need significant changes in the coming future to deal with the threat of automation. They are:

A. The law on wages and the minimum wage.
B. The laws pertaining to social security of workers both within and outside the organized sector.
C. The protection of workers in the unorganized sector and gig workers.

[13] IAMAI and Nielsen, 'Digital in India 2019 – Round 2 Report' (IAMAI ,2019) 6 <https://reverieinc.com/wp-content/uploads/2020/09/IAMAI-Digital-in-India-2019-Round-2-Report.pdf> accessed 31 October 2021.

[14] Cynthia Estlund, 'What Should We Do After Work? Automation and Employment Law' (2018) 128 Yale LJ 254, 325.

A. Wages – The price of labour:

The main contention for the rise in automation is due to a demand for increase in wages to meet the standard of a living wage as aspired by the Constitution of India. Automation offers an escape within the legal framework for employers seeking to cut their costs incurred on human resources. This creates a counterproductive rise in unemployment via layoffs and retrenchment, an effect which must be countered.

a). Falling wages:

Harvard economist Richard Freeman believes that this new wave of industrialisation is different from anything we've seen so far, as it does not necessarily render people unemployed in an irreparable manner. However, he claims that it would significantly affect the distribution of income into capital rather than labour, with employers spending more on maintaining machinery and equipment than before. The money for this is taken from the wages of the employees, meaning that in several industries, particularly ones that employ physical labour, the wages of labourers would be hit. As technology improves, making robots more effective and less expensive, this strangulation of wages would become more apparent, particularly upon labourers doing competing tasks.[15] In this scenario, labour shortages in some skilled-job categories will coexist with labour surpluses and downward wage pressure outside those categories. These developments may lead to greater income inequality where highly-skilled workers enjoy increasing wages and the middle and lower parts of the skills distribution encounter decreasing wages.[16]

Freeman's observations cause concerns for an economy like India, where a significant chunk of the populace lives within the environs of the poverty line, hovering a little above or sinking below it. Most of them live on a payday-to-payday basis, and their measly earnings will not be able to keep up with inflation and rising costs of living. Inflation aside, every worker would, with due progress at his job, seek greater pay in order to achieve higher standards of living and greater social security. Therefore, a demand for a raise in payment is inevitable. However, when such a demand is made, companies will come to realise that manual labour, even in India, will eventually grow into a greater expense to incur particularly when one of the key reasons

[15] Richard B Freeman, 'Who Owns the Robots Rules the World' (*IZA World of Labour*, May 2015) <https://wol.iza.org/articles/who-owns-the-robots-rules-the-world/long> accessed 31 October 2021.

[16] David Autor, 'Polanyi's Paradox and the Shape of Employment Growth' (2014) National Bureau of Economic Research Working Paper 20485/2014<www.nber.org/system/files/working_papers/w20485/w20485.pdf> accessed 31 October 2021.

for employers choosing to automate was due to labour costs.[17] As technology improves, machines will continue to get cheaper and more efficient, while manual labour will not. In scenarios such as these, labour laws sometimes serve a counterproductive purpose by increasing the cost of hiring manual labour. To understand better, we shall consider the impending amendments to India's labour legislations, as they serve as a reflection of India's legislative intent.

The Code on Wages defines wages[18] and then goes on to define the basic components of a minimum wage,[19] stating that no person shall pay a wage below the minimum wage[20] that is notified by the government.[21] This legislation is clearly created as a holistic mechanism to advance the financial well-being of workers and to prevent their economic exploitation. However, the ironic paradox is that it ends up weakening the position of the worker in the following manner. Once wages continue to rise, especially in mid-skill level jobs that are easily automatable, employers would get wise to the benefits of automation, and start to shear down the labour force to size by retrenching redundant jobs. Once 7mployyee loses his job, there is not much that a labour legislation would be able to do to help his case. In India, the right to work is not a Fundamental Right to be claimed from the State,[22] meaning he would be resigned to a life of unemployment. Therefore, a minimum wage would be self-defeating, according to economist Daniel Shaviro.[23] On the other hand, despite these downsides, the Code on Wages is an indispensable prophylactic against the economic exploitation of workers.

b) Debugging the wage problem:

In such a case, there are two methods of keeping the Code intact while handling the ensuing side effects of automation and rising labour costs:

(a) A Universal Basic Income.

(b) Easing the burden on employers who hire manual labour through subsidies and taxing capital to slow the spread of automation.

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[17]James Manyika and others, 'A Future that Works: Automation, Employment, and Productivity' (McKinsey & Company 2017) <www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Digital%20Disruption/Harnessing%20automation%20for%20a%20future%20that%20works/MGI-A-future-that-works_Full-report.pdf> accessed 21 March 2022.

[18]The Code on Wages 2019 (29 of 2019) s 2(y).

[19]ibid s 7.

[20]ibid s 5.

[21]ibid s 6.

[22]*Delhi Development Horticulture Employees Union v Delhi Administration and Ors* (1992) 4 SCC 99.

[23]Daniel Shaviro, 'The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy' (1997) 64 University of Chicago Law Review 405, 406.

The idea of a Universal Basic Income or a Negative Income Tax has been a recurring theme amongst developed nations to support their unemployed citizens.[24] Universal Basic Income ("UBI") offers the entire population a standard level of income transfer, and claims back parts of it through taxation, mainly from the wealthy. Negative income tax directly provides more benefits to those with no or low incomes and progressively reduces the amount of benefits as income raises. India already follows a staggered tax structure similar to the negative income tax structure, and while we don't offer a universal basic income, state sponsored social security measures such as subsidised food distribution and free primary healthcare ensure that those around the poverty line meet their primary needs and requirements.

The use of UBI or negative income tax, or any other similar substitute, relieves the pressure on employers to offer greater salaries to each employee. As capitalist as that sounds, it ensures that not only do the existing employees keep their jobs with a minimum guaranteed salary, but it also ensures that there is greater scope for more hiring of manual labour, increasing the number of people who are encompassed within the protective umbrella of labour law, as opposed to being left to fend for themselves as unemployed. In the end, however, the act of paying fair compensation still rests with the management style of the employer.

Secondly, the government can provide stimuli to incentivise the hiring, retaining and good treatment of manual labourers. Providing labour subsidies to corporations that hire and maintain a sizeable workforce in a commendable manner by means of grants, tax relief or any other such measure would definitely see the incentive to keep manual labour increased. If this is the carrot, the stick is to tax investments in capital and assets[25] to ensure that rampant automation does not occur and to check its progress until the economy is better adjusted and prepared to handle its challenges. Many tech visionaries like Bill Gates also propose what they call as a 'robot tax' to regulate the speed of automation, with South Korea implementing the same in a manner of sorts in 2018.[26] These taxes would help implement better social security schemes, the importance of which would be discussed subsequently, and also relieve pressure on employers, allowing them to pay better wages to their workforce. This is of particular importance because of the general attitude towards employees from those who hire.

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[24]Estlund, (n 15) 323.

[25]Joao Guerreiro and others, 'Should Robots be Taxed?' (2017) National Bureau of Economic Research Working Paper 23806/2017 <www.nber.org/system/files/working_papers/w23806/w23806.pdf> accessed 31 October 2021; International Labour Organization, 'The Future of Work We Want: A Global Dialogue' (International Labour Organization 2017) <www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_570282.pdf> accessed 31 October 2021.

[26]Eduardo Porter, 'Don't Fight the Robots. Tax Them.' (*The New York Times*, 23 February 2019) <www.nytimes.com/2019/02/23/sunday-review/tax-artificial-intelligence.html> accessed 31 October 2021.

Robots do not unionise, they do not seek raises in their wage. They do not file or attract litigation upon the employer. They do not go on vacation, do not fall ill, do not have human rights, do not require periodic training before risking redundancy and can be laid off without so much as a pension or a severance package. They can work in highly dangerous conditions without having to spend huge amounts of capital to invest on their safety. This unrelenting efficiency of automation is the reason why it is as important as it is to incentivise the hiring of manual labour. However, the mere payment of wages is not the biggest reason why employers prefer automation. That would be the numerous associated expenses occurred by means of providing for social security of the employee, like pensions, raises and bonuses, healthcare, paid leave, training costs and the like. The ways to overcome these problems have been discussed in the next section.

B. Social security, employer responsibilities and the effects of automation:

Even more than wages themselves, incidental expenses like paid leave, maternity and paternity leave, healthcare, etc. cost a company more over time in its endeavours to manage its human resources. Investment banker Steven Berkenfeld made the point in vivid terms at a conference on the future of work:

"*As I talk to companies, yes, it's about labor savings, but that's just the starting point. It's also about indirect cost savings… It's about health care liabilities, lawsuits [,] and insurance and disabilities benefits.*"

To understand the depth of these expenses, the protection and benefits they afford to employees and the costs that employers end up bearing in the process, let us look at the Indian implementation of social security.

The idea of social security and employee welfare in India springs from Articles 23 and 24 of the Indian Constitution, along with Articles 38, 39, 41, 42 and 43 of the Directive Principles of State Policy. It also holds immense prospects to be read as a part of right to life under Article 21, as stated in *K.S. Puttaswamy v. Union of India (**K.S. Puttaswamy**)*:[27]

"*Social security programmes as an instrument for the removal of global poverty and other economic and social deprivations are at the centre stage in the global discourse. Article 22 of the Universal Declaration of Human Rights expressly recognises that every member of society is entitled to the right to social security and to the realisation of economic, social and cultural rights.*"

[27]*KS Puttaswamy v Union of India* (2019) 1 SCC 1.

The Hon'ble Supreme Court drew from Article 22 of the Universal Declaration of Human Rights to emphasize the government's responsibility to ensure social security coverage for all its citizens and further continued:

"*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*"

With regards to social security, India is soon to be governed by the Code on Social Security. What amounts to social security for the purposes of the Code has been defined as follows:

""*Social security" means the measures of protection afforded to 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, under this Code.*"

Under the same Code, all employees are to be compulsorily insured,[28] with the State Insurance Fund only to be used for the purposes laid out in the Code itself[29] along with the accruing benefits as well.[30] As things stand, the employers shoulder the majority of the responsibility of insuring their employees. It is here that a dichotomous issue regarding social security arises.

a) Employers' insecurities regarding social security:

Social security coverage in India is extremely poor, with only 19% covered by at least one social security program.[31] Even amongst this elite few, the employers end up bearing the expenses of social security schemes. The Government itself spends only 0.6% of its GDP on social security in total, including for unorganised workers and the unemployed.[32] This is bound to cause a sentiment of discontent amongst the employers because not all social security schemes are logically connected to the course of employment. The employers choose to bear them due to the meteoric expansion of rights of an employee, and in the hopes of recruiting and retaining top quality human resources, as the value created by retention more than makes

[28]ibid s 28.
[29]ibid s 26.
[30]ibid s 32.
[31]International Labour Organization, *World Social Protection Report 2017–19: Universal Social Protection to Achieve the Sustainable Development Goals* (International Labour Office 2017) 150 <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_604882.pdf> accessed 21 March 2023.
[32]ibid 26.

up for the expenses incurred by spending on social security. However, the lower one goes down, the easier human labour is to replace or automate, and at that point, social security expenses become expenses rather than investments. In such cases, employers would look to cut costs as much as possible and would loathe to provide any more financial assistance than what is already provided. Should the granting of social security be forced onto them for these jobs at risk of automation, the employers would much likely choose to automate instead.

In order to understand the concept of social security in the due course of employment, let us take the following example. An employee should have the right to paid leave and maternity leave as they are basic rights, the lack of which would make working untenable. Furthermore, the aspects of paid leave are purely between the employer and employee, with no third party being able to cover the same. However, if the employer is also forced to cover all the healthcare expenses of the employee, including those that occur outside of the place of employment, it places an undue strain on the employer to spend on employees, hastening the advent of automation. The more the onus of providing social security for all employees is placed on an employer, the greater are their chances of resorting to automation instead.

b) Shouldering social responsibility:

The solution to the above is simple. Firstly, shift the onus of providing social security at least partially away from the employer and reconfigure the matrix of social security provision.[33] What is being proposed isn't to absolutely absolve the employer and allow him to abdicate all responsibility. Rather, what is proposed is to let the government take a proportionate share of this burden, particularly with respect to basic human rights such as healthcare. The provision of affordable healthcare to all citizens falls squarely within the purview of the functions of the government. In fact, the government providing access to social security measures such as healthcare would ensure greater coverage for those schemes, even amongst workers who are in the unorganized sector and the unemployed. The implementation of allied social security schemes in the lines of a UBI also ease the financial burden on the employer, who can then improve the standards of social security programs that the corporations are obliged to provide to their employees. Finally, a system of negative income tax and capital/asset taxes on automation would not only ensure that automation slows down until the economic polarisation is reduced, but also make sure that the privileged who can afford luxuries such as automation pay for the support of the underprivileged.

[33]Estlund, (n 15) 316.

Statistically, though, the government providing social security causes multiple problems that need to be addressed. Before we proceed however, it must be understood that despite these numerous problems, this system beats any alternate which leaves the workers defenceless. That being said, employees prefer the smooth, efficient corporate systems in place to provide social security than the cumbersome, Kafkaesque bureaucratic red tape associated with public welfare schemes. Secondly, as evinced by statistics earlier,[34] the Government of India is either financially incapable of, or wilfully chooses to spend only a sliver of our GDP on social security, despite the express mandate of Directive Principles of State Policy, as stated earlier. While recent schemes from the Government like the PM Jan Dhan Yojana, the PM Jeevan Jyoti Bima Yojana, the PM Shram Yogi Maan-dhan Yojana, Ayushman Bharat Yojana and the like have taken positive steps towards redressing this issue, a lot of work remains to be done and the Indian bureaucratic system does not seem ready to handle universal schemes to cater to 1.38 billion people. Thirdly, this division of responsibilities may leave room for employers to exploit and cause added burden on the government. This is especially true when their employees are employees for hire or gig workers with no written contracts, for whom, till date, no social security measures have been implemented. In the subsequent section, the increasing trend of working for hire and the problems caused by automation for those workers shall be discussed.

C. Gig work, fissuring and the rights of contract employees:

One of the other side effects of rapid scientific and technological progress is that skills and knowledge tend to become outdated and obsolete much quicker than in earlier times. This means that employees will have to be continuously trained as the job requirements keep changing so that they are competent at the jobs they are hired to do. More often than not, the responsibility to train employees, along with the accruing expenses are a result of the same. The continuous changing and chopping causes significant financial strain on the employers, one they seek to avoid by fissuring, the process of replacing permanent employees with outside contractors,[35] who generally cost less to employ while doing the same job as well as, if not better than, permanent employees.

[34]International Labour Organization, (n 36) 26.
[35]Estlund, (n 15) 262.

a) The trend towards fissuring:

These contract-employees need not be trained, as they are generally hired for the very purpose of their expertise. The employer has no obligation to offer them any more remuneration than per agreement, leaving a very no-strings attached approach to the relationship, with a lot of room for the employer to abdicate as much managerial responsibility as possible. Most of them work without a written contract of employment as well. In India, about 95% of all casual workers work without a written contract of employment, with that number being around 68% among contract workers. Even within the organized sector, amongst salaried employees, the percentage of people working without a contract of employment is a staggering 65%.[36] Despite this, contract labour is clearly on the rise. Unemployed youth are much less choosy about work in the current labour market with jobs hard to come by. This plays into the hands of the employers, who prefer contract labour for its relative cost-effectiveness and lack of social responsibility towards their employees. Naturally, working conditions for these workers for hire are generally worse than those of full-time employees.

b) Safety net for contract employees:

The new Labour Codes, however, promises much change in this regard. Firstly, and most importantly, these Codes recognise workers and employees working under contract as equal to any other workers or employees for the purposes of these Codes. The Code on Industrial Relations mandates that that no employer who has over a hundred employees working under him shall lay off an employee, even one for hire,[37] without the prior permission of the appropriate Government. Furthermore, under Schedule II of the said Code, which lists unfair labour practices, the Code incorporates the following within the definition of an unfair labour practice:

"To employ workers as badli workers, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workers."

Therefore, the employer cannot leave casual workers hanging, and must either grant them the privileges of a permanent employee, or terminate the agreement per law so that the worker may seek better opportunity. The Code on Wages also offers added protection to these workers by

[36]Aditi Nigam, 'Most Indian Employees, even Salaried Ones, have No Written Job Contracts' (*The Hindu Business Line*,1 November 2016) <www.thehindubusinessline.com/economy/most-indian-employees-even-salaried-ones-have-no-written-job-contracts/article21752131.ece1> accessed 24 October 2021.
[37]The Industrial Relations Code,2020 (35 of 2020) s 2(l).

incorporating a minimum wage to be fixed as per time work and piece work as well.[38] The Central Government is also authorised to fix a floor wage taking into account the minimum living standards of the worker to ensure that the employers do not use the minimum wage as a farcical cover to guise subhuman economic exploitation.[39] The Occupational Safety, Health and Working Conditions Code mandates that contract labourers be granted access to the same welfare facilities[40] that are made available to regular employees.[41] Lastly, and most importantly, the Code on Social Security allows the government to frame schemes for provision of social security and other benefits to unorganized workers, gig workers and platform workers,[42] allowing them to avail benefits such as:[43]

(a) life and disability cover;
(b) health and maternity benefits;
(c) old age protection;
(d) education;
(e) provident fund;
(f) employment injury benefit;
(g) housing;
(h) educational schemes for children;
(i) skill upgradation of workers;
(j) funeral assistance; and
(k) old age homes.

As sought earlier, the provision further states with great foresight that these projects are mainly to be funded by appropriate governments, be they at the central or state level,[44] with only a small percentage of it coming from corporations as part of their CSR. Therefore, the legislation ensures that the significant majority of India's working populus have access to adequate social security cover at least on paper. This, combined with the attempts of the Code on Industrial Relations to provide job security and the law laid down in the Code on Wages ensuring no economic exploitation makes sure that both current and prospective employees need not lose undue sleep over the inevitable arrival and integration of automation and AI into the Indian

[38]The Code on Wages 2019 (29 of 2019) s 6(2).
[39]ibid s 9.
[40]The Occupational Safety, Health and Working Conditions Code 2020 (37 of 2020) ss 23-24.
[41]ibid s 53.
[42]The Code on Social Security 2020 (36 of 2020) s 45.
[43]ibid ss 109, 114.
[44]The Code on Social Security 2020 (36 of 2020) s 109(3).

workplace and also ensures that employers do not feel the maintenance of a workforce to be an encumbrance. All that remains now is to realise and implement these laws and translate protection on paper to protection of the pauper.

III. CONCLUSION

Moore's law on transistors states that the processing power of computers doubles every year, while their cost halves correspondingly. Most labour advocates view this as a doomsday proclamation, an edict of the inevitable, that machines will logically end up replacing humans and render us redundant. However, there is little cause for such panic. If harnessed right, the powers of automation and AI can be used to raise the standards of living to hitherto unforeseen heights. The only true concern is that the fruits of development must not be poisonous to some while the others enjoy them.

Automation and AI will be seen as the great multiplier, amplifying both the negatives and the positives of the current labour system. Issues such as income inequality and job security would carry much weight in future. The Indian labour force is in luck, as the young blood within its ranks means that it has an adaptable, re-skill able quality to it, unlike the labour forces of the West. The reskilling schemes of the Indian government have laid down the path to the nation preparing for the advent of the machine. India finds itself in an enviable position because it is one of the few countries that has seen automation up close and has both the time and the capacity to prepare its citizens and its workforce for what is to come. At this time, Dr. Ambedkar's famous call to end socio-economic inequality comes to mind, for automation and AI will further deepen existing divides. Without constant vigilance on the part of legislators and laymen alike, automation shall become a devastating machine of crony capitalism like no other, making the rich richer and leaving the rest to rot.

This is the rise of the machines, and we are here for it. Let us not forget our humanity in the quest to automate.

BCCI, INDIAN CRICKETERS, AND THE INDUSTRIAL RELATIONS CODE: ANALYSIS OF THE DEFINITIONAL ASPECTS[1]

Abstract

In the contemporary context, due to the emergence of social media, the activities of the Indian cricket players are regularly under the scanner. Resultantly, they are bound by the various policies and decisions of the BCCI. However, it is very rarely the case, that they are able to challenge any such decision or policy. With the rise of popularity of game, coupled with the growth of women's cricket, it is likely that the actions of BCCI would have a significant impact on the lives of the players. Consequently, it is necessary to ensure that they are not pushed over by the might of the BCCI. They must be able to approach a redressal forum and seek an effective remedy in case of a grievance or a dispute arising out of policies of BCCI. In this light, with other forums not being conducive to the situation of the players, the Industrial Relations Code comes to the forefront. Although not specifically enacted for sportspersons, being a beneficial legislation, it is pertinent that the ambit of the IRC should not be restricted. Accordingly, this paper analyses the definitional issues in players seeking recourse to the IRC. Essentially, it is argued that the BCCI qualifies as an industry under the IRC by virtue of the wide and generic definition. Furthermore, considering the judicial evolution of the definition of a workman, it is argued that the players can be considered as workers under the IRC. Thereby, bringing them within the jurisdictional ambit of the Industrial Tribunals constituted under IRC. Lastly, the paper concludes by emphasising that even after overcoming the definitional challenges, other practical problems remain unsolved.

KEYWORDS: *BCCI, INDUSTRIAL RELATIONS CODE, WORKERS, INDUSTRY, CRICKETERS*

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I. INTRODUCTION

In India, the popularity and impact of cricket on the lives of the people is such that it is considered a religion in itself. Unsurprisingly, the cricket players are celebrities and are widely recognised throughout the length and breadth of the country. Due to this, every piece of information related to them hogs the limelight and occupies the news headlines.

From bigger issues involving the ban on Sreesanth to smaller issues like paternity leave for Virat Kohli; everything operates in the public domain and is commented upon by experts and critics. In this light, the actions, and decisions of the Board of Control for Cricket in India ("**BCCI**") come under close scrutiny. This is because these decisions directly affect the players. Moreover, it is evident that the decisions taken by the BCCI are characterised by differential treatment for different players. Accordingly, from the perspective of an aggrieved cricket player, it is pertinent to explore effective remedies and solutions for such distressed situations.

In this regard, recourse to the dispute resolution mechanism enshrined under Industrial Relations Code, 2020 ("**IRC**") for disputes against the BCCI or other players, can be a potential alternative. Without delving into the merits of the disputes which may arise, the scope of this paper is restricted to analysing the definitional issues of an industry and a worker with regard to the BCCI and the cricket players. This paper is divided into four parts. The first part delves into the need for and importance of a forum under labour law as to resolve the disputes of Indian cricketers. The second part argues that the BCCI is an industry within the meaning of Section 2(p) of the IRC. The third part further argues that Indian cricketers would be considered as workers under Section 2(zr) of the IRC. The last part concludes by highlighting the practical considerations of Indian cricketers taking recourse to labour laws.

II. IRC: NEED AND IMPORTANCE

In the absence of a specific sports legislation in India, the remedies available to cricketers aggrieved by the decisions of the BCCI are limited. The foremost alternative is to take recourse to the internal independent dispute resolution mechanism of the BCCI.[1] This involves

[1] 'Memorandum of Association and Rules and Regulations' (*The Board of Control for Cricket in India*, 21 August 2018), <https://bcci-static-files.s3.amazonaws.com/bcci/document/2018/12/12/f676ccc4-4eec-4bb5-b89e7afd6730fa82/5b7bfc8a5c2f5-Registered-New-BCCI-Constitution-21-08-2018-.pdf > accessed 19 March 2023.

adjudication of disputes by an Ombudsman, who is appointed at the Annual General Meeting.[2] However, the ambit of the disputes that can be referred to the Ombudsman do not include grievances of the players.[3] The players have an opportunity of making a case only when an action against them has been initiated. Thereby, rendering this mechanism a futile alternative when it comes to dispute resolution. Even if a dispute gets referred, considering the (undue) influence of the BCCI, it is highly unlikely that the internal mechanism would result in an outcome in favour of the aggrieved player(s). Moreover, due to the existence of this remedy, the writ jurisdiction of the courts cannot be directly approached.

Even if the courts are approached by exercising the writ jurisdiction against the decision of the Ombudsman, the extent of judicial intervention is limited; without delving into the merits of the dispute, merely fair procedure and principles of natural justice are considered.[4] The Courts cannot allow reappreciation of evidence and can only deal with errors of law.[5] Even in such situations, the matter is usually referred back to the internal mechanism. For instance, while dealing with the quantum of punishment for Sreesanth, the matter was referred to the BCCI Ombudsman.[6] Similarly, while dealing with sexist remarks made by Hardik Pandya and K.L. Rahul on the popular talk show '*Koffee with Karan',* the Supreme Court referred the matter to the BCCI Ethics Officer for recommendations.[7] This framework essentially puts an aggrieved cricketer in a precarious position wherein an appropriate forum to seek redressal is not available.

In this light, the IRC can be a legal basis to allow the cricket players to invoke the jurisdiction of the industrial tribunals. Under the ambit of the IRC, a plethora of issues ranging from disputes between the BCCI and players, between different players, and challenges to the policies of the BCCI, can be covered under Chapter VII which provides for mechanism for resolution of disputes.[8] Even though the provisions of the IRC are not explicitly framed to deal with such issues, they can be a starting point for judicial activism. In essence, till a

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[2]ibid.
[3]ibid.
[4]S. Sreesanth v The Board of Control for Cricket in India (2019) 4 SCC 660; State of Andhra Pradesh v Chitra Venkata Rao (1975) 2 SCC 557; Union of India v P. Gunasekaran (2015) 2 SCC 610.
[5]ibid.
[6]Santosh Rao, 'BCCI Ombudsman to Decide Quantum of Punishment for S Sreesanth, Says Supreme Court' (*NDTV Sports,* 5 April 2019) <https://sports.ndtv.com/cricket/s-sreesanth-spot-fixing-scandal-bcci-ombudsman-to-decide-quantum-of-punishment-2018416> accessed 19 March 2023.
[7]Kushan Sarkar, 'BCCI Ombudsman issues notice to Hardik Pandya & K.L. Rahul in Koffee with Karan Case' (*The Print,* 1 April 2019) <https://theprint.in/india/bcci-ombudsman-issues-notice-to-hardik-pandya-k-l-rahul-in-koffee-with-karan-case/215172/> accessed 19 March 2023.
[8]The Industrial Relations Code, 2020 (35 of 2020) ("IRC").

comprehensive sports legislation is enacted in India, the IRC can be used as a mechanism to allow the cricket players to approach industrial tribunals instead of leaving them remediless.

III. BCCI: FULFILLING THE TRIPLE TEST OF AN INDUSTRY

Considering the definition of an industry, Section 2(j) of the Industrial Disputes Act, 1947 ("**IDA**") provides a two-limb definition.[9]The first limb is exhaustive as it provides that an industry means "any business, trade, undertaking, manufacture or calling of employers" and hence, denotes the perspective of an employer.[10]However, the second limb, which denotes the perspective of an employee by providing that an industry includes "any calling, service, employment, handicraft, industrial occupation, or avocation or workmen" is inclusive.[11]While interpreting these parts, the Supreme Court, in *Safdarjung Hospital v Kuldeep Singh,*[12] held that the limbs must be considered as a whole. The determination of an industry would depend on the collective enterprise of the employer and the employee.[13] In essence, the employer must be a business, trade, manufacturer, or calling of employers, having employees engaged in calling, service, employment, or avocation.[14] Accordingly, the IDA provides a very broad and generic definition of an industry. In this light, it is pertinent to analyse the judicial evolution of this definition.

At the outset, the Supreme Court, in *D.N. Banerji v P.R. Mukherjee,*[15]held that any undertaking that is *analogous* to trade or industry would be included within the definition. Thereby, interpreting the definition in widest possible terms. Consequently, while determining the scope of activities analogous to trade or industry, the Supreme Court, in *State of Bombay v Hospital Mazdoor Sabha,*[16]held that any systematic activity that provides goods or services with the aim to satisfy the needs of the society at large would be considered as an industry. However, the activity must result from a co-operation between employer and employee.[17] The courts applied this test differently, depending upon the sector. While dealing with a member's club in *Madras*

[9]The Industrial Disputes Act, 1947 (14 of 1947) s 2(j) ("IDA").
[10]Bushan Tilak Kaul, ''Industry', 'Industrial Dispute', And 'Workman': Conceptual Framework and Judicial Activism' (2008) 50(3) JILI , 30-49.
[11]ibid.
[12]Safdarjung Hospital v Kuldeep Singh (1970) 1 SCC 735.
[13]ibid.
[14]cf Kaul (n 10).
[15]D.N. Banerji v P.R. Mukherjee AIR 1953 SC 58.
[16]State of Bombay v Hospital Mazdoor Sabha AIR 1960 SC 610.
[17]ibid.

Gymkhana Club Employees' Union v Madras Gymkhana Club,[18]the Supreme Court held that the club cannot be an industry as the activities are non-proprietary; neither trade or business nor analogous to it. Following this dictum in *Cricket Club of India v Bombay Labour Union,*[19]the Supreme Court held that a cricket club cannot be considered as an industry.

To clarify the confusion in interpretation and settle the position of law, the majority in the seven- judge bench laid down a comprehensive triple test in *Bangalore Water Supply & Sewerage Board v A. Rajappa.*[20] According to the triple test, the elements of an industry are: (i) systematic activity, (ii) co-operation between employer and employees, and (iii) goods or services to satisfy the needs of the society.[21] In essence, the fundamental basis of the test is to determine the functional aspects i.e. the activity performed coupled with the employer-employee relationship.[22]The absence of profit motive cannot be a relevant criterion in classification as an industry.[23]Furthermore, it was held that in case of multifarious activities, the pre-dominant nature of the services would be considered.[24] Accordingly, any activity that satisfies the triple test cannot be excluded from the definition of an industry. Hence, the *Cricket Club of India* case was specifically overruled.[25]

Notably, the definition of an industry under Section 2(p) of the IRC explicitly lays down the triple test.[26] In addition, it provides that institutions engaged in social or charitable service, any domestic service, or any sovereign functions of the Government would be excluded from the ambit of an industry.[27]

Applying the triple test, the BCCI performs a host of functions and activities. However, the prominent activity is to control and improve the quality and standard of cricket in India.[28] The BCCI carries out this activity by selecting teams,[29]formulating policies and procedures,[30]organising international and domestic matches and tournaments,[31]acting as a

[18]Madras Gymkhana Club Employees' Union v Madras Gymkhana Club AIR 1968 SC 554.
[19]Cricket Club of India v Bombay Labour Union AIR 1969 SC 276.
[20]Bangalore Water Supply & Sewerage Board v A. Rajappa (1978) 2 SCC 213.
[21]ibid.
[22]ibid.
[23]ibid.
[24]ibid.
[25]cf Kaul (n 10).
[26]cf IRC (n 8) s 2(p).
[27]ibid.
[28]cf BCCI Constitution (n 1).
[29]ibid.
[30]ibid.
[31]ibid.

representative in ICC,[32]and so on. In essence, it is apparent that BCCI provides a systematic activity of controlling and improving the quality and standard of cricket in India. Thereby, fulfilling the first element of the test. In furtherance, this systematic activity requires co-operation between the BCCI and its various employees viz. cricketers, match officials, support staff, and so on. In the absence of cricketers, it would not be possible to provide this activity. The quality and standard of cricket is controlled and improved by the perpetual co-operation between the players and the BCCI. Thereby, fulfilling the second element of the test. Lastly, this activity results in the supply of cricket services throughout the country, which in turn, satisfies human wants and wishes. This results in a two-fold outcome. *Firstly,* for any person seeking to become a cricketer, this activity directly results in production and supply of cricketing services viz. training facilities, tournaments, etc. *Secondly,* for other persons i.e. spectators, this activity results in the distribution of entertainment services by way of live streaming of matches and tournaments. Such distribution has widespread accessibility as the broadcasting and television sector in India has undergone tremendous growth leading to a substantial increase in market size.[33] Thereby, fulfilling the third element as well.

Accordingly, as all the elements of the triple test are fulfilled, BCCI qualifies as an industry under the IRC. This is consistent with the view taken by the courts, wherein they have resorted to a wide interpretation. Moreover, being a beneficial legislation, the IRC must cater to the needs of sportspersons as well. It cannot be the intent of the legislature to leave out a distressed sportspersons remediless at the complete disposal of BCCI, a powerful private undertaking; as held in *Zee Telefilms Ltd. v Union of India.*[34]

IV. INDIAN CRICKETERS: WORKERS UNDER THE LAW

Considering the definition of a workman under Section 2(s) of the IDA, there are three broad elements: (i) employer-employee relationship, (ii) categories of work, and (iii) exceptions.[35]

[32] bid.

[33]'Competition issues in Television and Broadcasting' (*Organisation for Economic Co-operation and Development*, 28 October 2013), <https://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf> accessed 19 March 2023.

[34]Zee Telefilms Ltd. v Union of India (2005) 4 SCC 649.

[35]cf IDA (n 9) s 2(s).

A. Employer-Employee Relationship

Analysing the first element, an employer-employee relationship is the fundamental basis to invoke the definition of a workman.[36] Traditionally, the control and supervision test was the sole basis to determine the existence of an employer-employee relationship.[37] However, in the contemporary context, instead of relying solely on one test, a multifactorial approach is adopted by the courts.[38] The courts use various tests viz. control and supervision test, the integral business test, and the integration test along with other relevant factors and circumstances. In this light, it is pertinent to apply these tests to the Indian cricketers.

The control and supervision test, propounded in *Dharangadhra Chemical Works Ltd. v State of Saurashtra,*[39]provides that if the employer has a right to control and supervise the work of the employee, then there exists an employer-employee relationship. Furthermore, the court opined that such control and supervision must be considered in light of the nature of work being performed.[40] The integral business test, propounded in *Hussainbhai v The Alath Factory Thezhilali Union,*[41]provides that if the work performed by the employees is integral to the business, then there exists an employer-employee relationship regardless of the presence of any intermediaries. The integration test, propounded in *Ram Singh v Union Territory, Chandigarh,*[42]involves determining whether an employee was fully integrated into the business of the employer or the employee was independent of it. While making such determination, an integrated approach needs to be adopted i.e., all the relevant facts and circumstances must be considered as a whole including the terms and conditions of the contract.[43] Additionally, the Supreme Court, in *Workmen of Nilgiri v State of Tamil Nadu,*[44]laid down certain relevant factors viz. appointing authority, pay master, power of dismissal, nature of job, nature of establishment, and right to reject, to determine the relationship.

Given the situation of Indian cricketers, the BCCI exercises pervasive financial control by determining the annual contract for a player. There are four categories of annual contracts, and

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[36]Mcleod and Co. v Sixth Industrial Tribunal, West Bengal AIR 1958 Cal 273.
[37]Dharangadhra Chemical Works Ltd. v State of Saurashtra AIR 1957 SC 264.
[38]cf Kaul (n 10).
[39]cf (n 37).
[40]ibid.
[41]Hussainbhai v The Alath Factory Thezhilali Union (1978) 4 SCC 257.
[42]Ram Singh v Union Territory, Chandigarh (2004) 1 SCC 126.
[43]ibid.
[44]Workmen of Nilgiri Cooperative Marketing Society v State of Tamil Nadu (2004) 3 SCC 514.

the BCCI classifies the players into these categories.[45] Moreover, it may decide to leave out a player altogether while announcing the annual contracts.[46] In essence, the BCCI is the sole authority to appoint players, decide the rates, and leave out players for annual contracts. In addition to financial control, the BCCI exerts control in various other ways viz. selection of players for tours and tournaments,[47]framing disciplinary policies,[48]providing different rules and regulations for players,[49]and so on. Notably, the control and supervision is not restricted to the contracted players. Rather, even non-contracted players or retired players are bound by the approval of the BCCI. It is a policy that Indian players are not allowed to participate in foreign leagues without prior approval of BCCI.[50]

A lot of retired players have shown dissent towards this policy.[51] Recently, a player was auctioned in the IPL, however, he was denied the opportunity to play as he had participated in a foreign league without getting an approval from the BCCI.[52] There are various other examples where players have been penalised upon failing to abide by the BCCI Rules and Regulations, either during tours or even otherwise as well. Furthermore, despite having retired from international cricket, Yuvraj Singh had to get a No-objection Certificate (NOC) from the BCCI to play in the GT20 Canada League.[53] In other instance, he was denied coming out of retirement and playing for Punjab's domestic team.[54] The above-mentioned instances highlight the control and supervision of BCCI over the players; current as well as retired. Most importantly, it

[45]Media Advisory, 'BCCI announces annual player retainership 2020-21 - Team India (Senior Men)' (*BCCI TV,* 15 April 2021) <https://www.bcci.tv/articles/2021/news/154368/bcci-announces-annual-player-retainership-2020-21-team- india-senior-men-> accessed 19 March 2023.

[46]cf BCCI Constitution (n 1); Devendra Pandey, 'Explained: Why did T Natarajan miss out on a BCCI annual contract?' (*The Indian Express,* 22 April, 2021) <https://indianexpress.com/article/explained/why-did-natarajan-miss- out-on-a-bcci-annual-contract-7276191/> accessed 19 March 2023.

[47]cf BCCI Constitution (n 1).

[48]ibid.

[49]ibid.

[50]ibid.

[51]TN Sports Desk, 'Why BCCI doesn't allow its players to participate in foreign leagues' (*Times Now News,* 22 May 2020) <https://www.timesnownews.com/sports/cricket/article/revealed-why-bcci-doesnt-allow-its-players-to-participate- in-foreign-leagues/595643> accessed 19 March 2023; Anonymous, 'Wish BCCI plans with ICC: Suresh Raina, Irfan Pathan want Indian players to participate in foreign T20 leagues' (*Hindustan Times,* 10 May 2020) <https://www.hindustantimes.com/cricket/wish-bcci-plans-with-icc-suresh-raina-irfan-pathan-indian-players-to-participate-in-foreign-t20-leagues/story- bbrjiAdOfYjgnnLGxD3tHL.html> accessed 19 March 2023.

[52]Shayan Acharya, 'Pravin Tambe disqualified from IPL 2020' (*The Hindu,* 27 February 2020) < https://sportstar.thehindu.com/cricket/pravin-tambe-disqualified-from-ipl-2020-kolkata-knight-riders-bcci-governing-council/article30930013.ece> accessed 19 March 2023.

[53]HT Correspondent, 'Yuvraj Singh to play for Toronto Nationals in Global T20 Canada' (*The Hindustan Times,* 21 June 2019) <https://www.hindustantimes.com/cricket/yuvraj-singh-to-play-for-toronto-nationals-in-global-t20-canada/ story-QJRbB9VcoQRVTF8gDiLuMP.html> accessed 19 March 2023.

[54]Somak Adhikari, 'BCCI Denies Yuvraj Singh Domestic Comeback, Doesn't Allow Him to Play Syed Mushtaq Ali Trophy' (*India Times,* 29 December 2020), <https://www.indiatimes.com/sports/bcci-denies-yuvraj-singh-domestic- comeback-doesnt-allow-him-to-play-syed-mushtaq-ali-trophy-530665.html> accessed 19 March 2023.

showcases that the players are fully integrated into the activities of the BCCI. They cannot be independent by taking part in other leagues (foreign & domestic) without the prior approval of BCCI.

Furthermore, the players are also vital to the BCCI for earning revenue. Firstly, if the players perform well and win games, then BCCI directly earns as a result of the actions of the players. Secondly, due to the immense popularity of the players, the matches are largely followed and watched, both by live audience in stadiums and on-screen audience which includes telecast by satellite televisions, radios, and other means of broadcasts. This allows BCCI to negotiate million-dollar advertising contracts for streaming of the live matches. Recently, Star Sports bought the telecast rights of the IPL from BCCI for more than 16,000 crores.[55] Lastly, the ticketing revenues generate a huge portion of the money for the BCCI. In the absence of players, the BCCI would not be able to generate the revenues as all the sources are directly linked to the game of cricket with the players being an integral and indispensable part.

Although it can be argued that BCCI is merely a regulatory authority, it has already been established above that it qualifies as an industry. Moreover, from a practical perspective, the BCCI generates huge amount of revenues from the actions of the players and exercises sufficient control over their activities. Hence, this argument holds no water. Accordingly, there exists some form of an employer-employee relationship between the BCCI and the Indian cricketers.

B. Categories of work and exceptions

Considering the second element and third element of the definition of a workman viz. categories of work and exceptions together, initially there were just four categories of work. However, after various amendments to the IDA,[56] there are seven categories of work included in the definition and four exceptions provided in the current definition.[57] There have been two different reasonings adopted by the Supreme Court considering these elements. The first reasoning, adopted in *May & Baker (India) Ltd.* case[58], *Western India Match Co. Ltd.* case[59]

[55] Tanuj Lakhina, 'Star Sports bags IPL media rights, in blockbuster deal, but at what cost?' (*The Indian Express*, 06 September 2017) <https://indianexpress.com/article/sports/sport-others/star-sports-ipl-media-rights-what-cost-monopoly-sky- sports-bcci-4829847/> accessed 19 March 2023.

[56] The Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956 (36 of 1956); Industrial Disputes (Amendment) Act, 1982 (46 of 1982).

[57] cf IDA (n 9).

[58] May & Baker (India) Ltd. v Workmen AIR 1967 SC 678.

[59] Western India Match Co. Ltd. v Workmen (1964) 3 SCR 560.

and *Burmah* case[60] provides that in order to qualify as a workman, the work performed by a person must fall within any of the categories in the definition under Section 2(s) of the IDA.[61] *Per contra*, the second reasoning, adopted in *S.K. Verma* case,[62]*Ved Prakash Gupta* case,[63]and *Arkal Govind Raja Rao* case,[64]without considering the previous reasoning, provides that if any person does not fall within the exceptions under the definition, then such person would be considered as a workman. Finally, in *H.R. Adyanthaya v Sandoz (India) Ltd*.,[65]the Supreme Court settled the position of law and reaffirmed the first reasoning (work performed must fall within any of the categories provided under the definition) laid down in the *May & Baker (India) Ltd.* case,[66]the *Western India Match Co. Ltd* case,[67] and the *Burmah* case[68] as the true test to determine whether a person is a workman or not. In essence, if the work performed by a person falls within any of the seven categories and neither of the exception applies, then the person will be considered as a workman.

In this light, considering the seven categories of work viz. manual, unskilled, skilled, technical, operational, clerical, and supervisory provided in the definition of a workman, the work performed by Indian cricketers can be categorised as skilled work. It is highly unlikely that this work can be categorised in any other category due to the peculiar nature of the work. However, before reaching a conclusion, it is pertinent to analyse the judicial stand on skilled work.

Taking recourse to the principle of *ejusdem generis,* the Supreme Court, while dealing with medical representatives in the *Adhyanthaya* case*,* held that skilled work would be construed on the basis of the surrounding words i.e. manual or non-manual. Thereafter, in *Miss A. Sundarambal v State of Goa,*[69] it was held that a teacher cannot be a workman as they impart education, which cannot be considered as skilled work. By relying on this judgment, the Supreme Court, in *Ahmedabad Pvt. Primary Teachers Association v Administrative Officer,*[70] reached the same conclusion. While doing so, the Court applied the rule of *noscitur a sociis* and expressly held that the rule of *ejusdem generis* cannot be applied as the categories of work

[60]Burmah Shell Oil Storage & Distribution Co. of India v Burmah Shell Management Staff Association (1970) 3 SCC 378.
[61]cf The Industrial Disputes Act, 1947 (14 of 1947) (n 9) s 2(s).
[62]S.K. Verma v Mahesh Chandra (1983) 4 SCC 214.
[63]Ved Prakash Gupta v Delton Cable India (P) Ltd. (1984) 2 SCC 569.
[64]Arkal Govind Raj Rao v Ciba Geigy India Ltd. Bombay (1985) 3 SCC 371.
[65]H.R. Adyanthaya v Sandoz (India) Ltd (1994) 4 SCC 164.
[66]cf May & Baker (n 58).
[67]cf Western India Match (n 59).
[68]cf Burmah Shell Oil (n 60).
[69]Miss A. Sundarambal v State of Goa JT 1987 (2) 101.
[70]Ahmedabad Pvt. Primary Teachers Association v Administrative Officer (2004) 1 SCC 755.

did not form the same genus. Despite this judicial perception, the case of cricketers can be differentiated from that of teachers. This is because the main task of cricketers is to play the game of cricket, which requires a very specific skill set that cannot be achieved without receiving adequate training. Although the skills acquired may be applied differently, the existence of the skills is indeed necessary in order to become an international cricketer. Moreover, it is the case with every skilled worker that the manner of applying the skills would be unique.

More importantly, the Supreme Court has erred in its interpretation of the definition. This is because the *Ahemdabad* case blatantly relies on the *Sundarambal* case, which was decided on the basis of the original definition. By virtue of the 1982 Amendment, the categories of *skilled, unskilled,* and *manual* work were included as distinct categories in the definition. Hence, the Court resorted to a narrow interpretation by not considering the intention of the legislature while deciding the *Ahemdabad* and the *Adyanthaya* case. Such an interpretation cannot be warranted, especially while dealing with a beneficial legislation such as the IDA. This is because a narrow interpretation would lead to an absurdity that skilled work would never be construed as a distinct category altogether. Thereby, leading to a situation wherein a plethora of individuals performing purely skilled work would be barred from approaching industrial tribunals for redressal of their grievances merely on the basis of a technical interpretation, which can never be the intention of the legislature while enacting the law. Hence, it is highly likely that a larger bench of the Supreme Court would reach a similar conclusion and deal with matters by considering skilled work as a distinct category.

Furthermore, there is a notion that courts have excluded creative or imaginative work from the purview of the definition of a workman. However, this notion is misconceived with regard to the category of skilled work. This is because *firstly,* majority of the judgments that reached this conclusion were delivered before the definition was amended. Hence, they specifically dealt with skilled or unskilled manual work instead of solely skilled work. Moreover, considering the contemporary context coupled with the fact that every individual acquires certain knowledge and experience throughout their lifetime, it is apparent that every individual performs some level of skilled work, albeit of differing natures.[71] In essence, no individual should be termed as unskilled. *Secondly,* the bar of creativity has been considered only with

[71]Dr Rajesh Tandon, 'Who is Unskilled?' (*The Times of India,* 10 July 2020), < https://timesofindia.indiatimes.com/blogs/voices/who-is-unskilled/> accessed 19 March 2023.

regard to clerical work as the nature of such work does not allow departure from a particular standard of work. Such bar cannot act with regard to skilled work. Therefore, keeping in mind the true intention of the legislature, the cricketers can be considered as performing skilled work.

Coming to the last element of the definition of a workman, Section 2(s) of the IDA provides for four exceptions: (i) individual governed by Air Force Act 1950, Army Act 1950, or Navy Act, 1957, (ii) individual in police service or officer of prison, (iii) individual in managerial or administrative capacity, and (iv) individual in supervisory capacity.[72] From a bare perusal of the nature of skilled work performed by the cricketers, it is evident that none of the exceptions mentioned above are attracted.

Considering the current position of law, even though the IRC has been enacted, it has not been enforced yet. Furthermore, according to Section 104 of the IRC, the provisions of the IDA will stand repealed only from the date the IRC comes into force.[73] This essentially means that the IDA continues to govern the field despite the IRC being enacted. Thereby, leading to a precarious position wherein the IRC is in the public domain but the repeal of the IDA has been delayed. In such a situation wherein the labour laws are in a transitory phase, confusion regarding the applicable legislation is bound to crop up. However, since the definition of a workman under Section 2(s) of the IDA is identical to the definition of a worker under Section 2(zr) of the IRC[74], such confusion would not affect the analysis in this paper. The reason being that the jurisprudence governing the definition would continue to remain the same even after the IRC comes into force. Accordingly, as the cricketers do not fall within any of the exceptions, they would qualify as *workers* under Section 2(zr) of the IRC.

V. CONCLUSION

The analysis above highlights that the definitional issues in categorising the BCCI as an industry and the cricketers as workers under the IRC can be successfully tackled. However, the problem is likely to persist for two reasons. *Firstly,* apart from definitional issues, there are various other legal and practical issues involved in considering these disputes on merit. For example, in dealing with equal pay for women cricketers, it is a fair argument that the revenue generated by men cricketers is far more significant than the women. In such situations, the

[72]cf IDA, (n 9) s 2(s).
[73]cf IRC, (n 8) s 104.
[74]cf IRC, (n 8) s 2(zr).

applicability of the IRC would be hampered. *Secondly,* the extent of influence that the BCCI can exert coupled with the resources available at its disposal make it an unassailable entity. From a practical perspective, the cricketers would not be willing to make a challenge as it may lead to adverse repercussions on the career of the player.

In such situations, the problem can be remedied by the BCCI itself by providing for a comprehensive internal dispute resolution mechanism (which includes player grievances as well) by taking recourse to a neutral third party. In essence, the BCCI can ensure that instead of any dispute or issue being referred to the Ombudsman appointed by it, the dispute gets referred to a neutral third party, for example, an arbitrator designated for BCCI matters but not under the control of the BCCI. Furthermore, both the parties would be bound by the decision of the third party and the framework can provide for appeals as well. This would ensure that the process is transparent and information is available within the public domain. In addition, there is a need to enact a uniform policy for players so that the BCCI does not exercise discretion while dealing with similarly situated players and violating their right to equality and other rights.

However, considering the dominant position that the BCCI enjoys in relation to all cricketing and ancillary activities in India, it is highly unlikely that such reforms would be made by the BCCI on its own accord. To remedy this situation, a possible solution can be to initiate a case for abuse of dominant position under competition law against the BCCI. This argument finds support in the judgments rendered by the Competition Commission of India ("**Commission**") in *Surinder Singh Barmi v BCCI*[75] and *Pan India Infraproject Pvt. Ltd. v BCCI,*[76]wherein the Commission had held that the BCCI had abused its dominant position while restricting the organisation of other cricket leagues such as the Indian Cricket League and also while denying certain organisers to bid for sponsorship rights. However, the BCCI was able to exert its political influence and wriggle out of any negative consequences by getting one ruling set aside[77] and the other one stayed before the Competition Appellate Tribunal.[78] Thereby, highlighting that theoretically a case for abuse of dominant position can be made out against the BCCI but any such effort would practically lead to a futile outcome.

[75]Surinder Singh Barmi v BCCI 2017 SCC OnLine CCI 57.
[76]Pan India Infraprojects Pvt. Ltd. v BCCI 2018 SCC OnLine CCI 43.
[77]BCCI v Competition Commission of India & Anr. 2015 SCC OnLine Comp AT 555.
[78]Pan India Infra Projects Pvt. Ltd. v Competition Commission of India 2015 SCC OnLine Comp AT 312.

Hence, despite these considerations, it is vital to ensure that the labour laws act as a forum for the Indian cricketers to seek redressal. Otherwise, the BCCI would continue to exert its dominance without having any check on its power. This paper explored the possibility of achieving this outcome by addressing the definitional issues. However, this would become a norm only upon effective determination by a court, which would not be the case till any court is faced with these issues. Accordingly, it is for the players to adopt a pro-active approach and take recourse to the industrial tribunals for their grievances. Considering the current situation, wherein Indian cricketers are treated as celebrities and demi-gods, the notion of them as workers under labour laws is far from reality. Therefore, the need of the hour is spark conversation about this notion till it reaches the mainstream. Only then can the grievance redressal mechanism enshrined under the labour laws be brought to the rescue of the players.

THE ROLE OF TRADE UNIONS IN THE SUSTENANCE OF DECENT WORK IN NIGERIA[1]

Abstract

Trade Unions by their nomenclature have remained an integral part of any discourse pertaining to Labour and employment relations across the globe. This is as a result of the influence trade unions exert on issues relating to terms and conditions of employment at the collective bargaining stage, which then crystallizes into an organizational policy and in some cases national policy by virtue of the springboard of collective agreement. For business organizations where profit making is at the epicentre of the life of the organization, it is usually the case for employers to slash several welfare benefits and deny the demands of employees in order to salvage the organization from the cost implications of those demands. However, in a country like Nigeria, it has become the prevalent situation that organizations no longer have to be crafted for profit making purposes before employees are denied the benefits attached to their employment. This paper examines the historical background of trade unions, challenges, and impacts, as well as their legal framework in Nigeria. This paper also posits that Nigeria is yet to achieve decent work and hence cannot sustain what it is yet to achieve. The paper recommends that sustainable decent work will only be achievable through a consensus of the relevant stakeholders in Nigeria.

KEYWORDS: *TRADE UNION, DECENT WORK, SUSTAINABLE DEVELOPMENT GOAL, STRIKE, COLLECTIVE BARGAINING*

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I. INTRODUCTION

In every employment relationship, there exist two extremes in terms of demands and expectations. The first is that of the employer who seeks to preserve the interest of the organization particularly in terms of finances while the second is that of the employee usually trade unions in a unionized environment, who are often times swamped in the euphoria of Oliver Twist for better terms and conditions of employment. These two extremes are best displayed through the platform of collective bargaining which aids in the creation of balance amidst myriads of pressing interests. Trade Unions across the globe have for ages remained the custodian of struggles in the fight against exploitation and extortion by employers. This traditional role of workers protection has lingered over the years which is reflected and aptly posited in the Marxist theory which opines that employers pay to their employees what is deserving of keeping them in perpetual slavery. A world without checks and balances is a world perfectly described in the aphorism which says power corrupts absolute power corrupts absolutely. Hence, an employment relationship where employees are not given the right to seek for better employment conditions is to create an enduring thralldom because the existing reality remains that employers are driven by the financial mindset of being austere in order to sustain the lifespan of the organization. The power tussle in every employment relationship is not balance as the employer retains humongous power in determining who remains in the organization in terms of termination, which also is the first tool of threat from the perspective of the employer. Nevertheless, employees are also not weaponless as they also have the weapons of industrial action in their arsenal. While strike action remains a veritable weapon in the armament of employees,[1] the employer may sometimes invoke the 'no work, no pay' policy entrenched under Section 42 of the Trade Disputes Act. A combination of these factors work together to further strengthen labour and industrial relations for the achievement and sustenance of decent work in Nigeria.

[1]Hilary Ekpo, 'Relevance of No Work, No Pay Rule in Curbing Incessant Labour Unrest in Nigeria's Public Sector' Guardian News (Nigeria, 13 September 2016) https://guardian.ng/features/relevance-of-no-work-no-pay-rule-in-curbing-incessant-labour-unrest-in-nigerias-public-sector/ accessed 27 August, 2021.

II. Historical Background Of Trade Unions In Nigeria

Trade unions and trade unionism in Nigeria are said to be part of the legacy of the colonial masters'[2] as their evolution dates back to late 1800s and early 1900s following their capitalist activities. Trade unions also played a pivotal role in the agitations of the early nationalists quest for independence. The British government set up industries across the African continent and enslaved several of its workers. Across the continent, waged workers who were engaged in place of the forced labour previously used by the colonialists were employed under terrible conditions and for very low wages.[3] The increase in demand for labour brought with it several industrial disputes between the colonial masters and the workers.

The structure of any trade union is further determined by its history of formation, membership and coverage, and its nomenclature.[4]The first industrial action of workers in Nigeria was the Lagos strike of 1897 as skilled European workers, who arrived during the later decades of the nineteenth century to work in the new railways, mines, and factories or as government civil servants seemed to have brought the idea of trade unions. The trade union movement in Nigeria emerged out of this early resistance. However, it appeared that before the outbreak of World War 1, workers unions had become established in the territories of British West Africa, for example, not later than 1905; the civil servants in the Lagos colony and the southern Nigeria Protectorate had organized into unions.[5]

The first formal trade union was established on the 19th of August, 1912 when workers in the then civil service organized themselves into trade unions as was done in Sierra Leone. The major objective of the union was to promote the welfare and interests of Nigerian civil servants. The trade union was initially named Civil Service British Workers Union but later changed to the Nigerian Civil Service Union shortly before independence. In 1931, the Railway workers Union and the Nigerian Union of Teachers were formed. Following the passage of the Nigerian Trade Union Ordinance in 1938, the number of trade unions and membership increased. The

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[2]Olusoji J. George, Oluwakemi Owoyemi, Uche Onokala, ' Trade Unions and Unionism in Nigeria: A Historical Perspective' 3(2) 2012, Research in World Economy Sciedu Press https://doi.org/10.org/10.5430/rwe.v3n2p68 accessed 11 August, 2021.
[3]Trade Union Congress of Nigeria, The Story of Trade Unionism in Nigeria (2019) <https://tucnigeria.org/index.php/publications/technical-reports-and-research/80-the-story-of-trade-unionism-in-nigeria/file> accessed 18 March 2023.
[4]Comrade Hassan A. Sunmonu, 'Trade Unionism in Nigeria: Challenges for the 21st Century' A Keynote Address Delivered at the Conference on Trade Unionism in Nigeria: Challenges for the 21st Century, Held at the Training and Conference Centre, Ogere, Nigeria, 23-24, September, 1996.
[5]Kenneth C. Nwoko, 'Trade Unionism and Governance in Nigeria: A Paradigm Shift from Labour Activism to Political Opposition' 2(2) 2009 Information, Society , and Justice https://core.ac.uk/download/pdf/36771585.pdf accessed 8 October 2021.

passage of the Ordinance robbed the Nigerian Civil Service Union of its premier position to the Railway Workers Union under the leadership of Michael Imodu, the first Labour Union Leader in Nigeria. The advent of the Nigerian Railway Workers Union marked a turning point in Nigeria's Labour history as its emergence heralded a departure from the conservative ideology of union leadership toward a radical approach to labour issues.[6] The Nigerian Railway Workers Union has been described as the 'laboratory for the development of workers consciousness.' For instance, the union protested the retrenchment procedure of workers from the colonial government and led a protest when the colonial government failed to observe some of its demands.[7]

Trade unions in Nigeria witnessed several evolving stages spanning from independence and particularly military reign which was filled with dominant struggles. In 1976, the Federal Government established a commission of inquiry into the activities of the various unions and appointed an administrator to administer the unions in order to come up with a structure for the proper administration of the unions.[8] This became necessary as the unions were polarized into ideological divide which created problems. Towards the end of 1977, these unions were restructured into forty two along industrial line. The government also insisted on the formation of a labour centre as there were various multiple centres. In February 1978, the Nigeria Labor Congress was formed and inaugurated. The then forty two industrial unions became affiliates of the Nigeria Labor Congress with a legal backing of Trade Union (Amendment) Decree 22 of 1978.

Presently, the Nigerian Labour Congress (NLC) is the parent and umbrella organization,[9] for all other affiliates union in the country. The Nigerian Labour Congress has participated in several protests and struggles in order to foster an affordable lifestyle where the basic standards of living for all workers in Nigeria will not appear as a Gordian knot.

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[6]Rotimi Ajayi 'The Politicisation of Trade Unionism: The case of Labour/ NCNC Alliance in Nigeria; 1940-1960'

[7]ibid.

[8]Charles Egwabor, 'Human and Trade Union Rights in Nigeria: Experiences, Challenges, Achievements & Campaigns in the Oil & Gas Sector' (A paper presented on the occasion of the National Consultative forum between members of the Nigerian Labor and Trade Union Parley with Industrial Global Union at the Swiss Spirit Hotel, Stadium Road Port Harcourt).

[9]Ayodamola Owoseye and Azeezat Adedigba 'Nigeria's 10 Most Powerful Trade Unions' *Premium Times News (*Nigeria, 30 September 2017) <https://www.premiumtimesng.com/news/headlines/244650-nigerias-10-powerful-trade-unions.html> accessed 9 October 2021.

III. Trade Unions As A Catalyst For Economic Change In Nigeria

Industrial relations and labour law take their roots from the very old practice of labour hiring or employment. This old employment relations is also backed by an injunction stating that workers who protect their employers' interests should be rewarded. Flowing from this injunction, conflict in industrial relations is almost inevitable because of the divergent interests and aspirations of the parties involved.[10]Trade unions as a pressure group plays gargantuan roles in ensuring the maximal operation of the social machinery existing in any country. Following the advent of the 8th Sustainable Development Goal of the United Nations on Decent work and Economic growth, the pre-existing roles which trade union played has taken a new dimension in achieving the goal on decent work. The outbreak of the corona virus pandemic which is said to serve as a threat for job creation and existence owing to its adverse impact on most economies of the world is sounding a wake-up call for dynamism in most corporate cultures.[11]

Decent work simply means a productive work for women and men in conditions of freedom, equity, security and human dignity.[12] It consists of a fair income, guarantees a secure form of employment and safe working conditions, ensures equal opportunities and treatment for all, social protection for families, offers prospects for personal development and social integration, and workers are free to express their concerns and to organize.[13] Economic change occurs when there is a renaissance in the conventional and traditional mode of doing things economically. It is a shift in the structure of an economic system[14] particularly as it relates to economic policy aspects of transitional and emerging economies.[15] In Nigeria, organized trade unions have over the years lived up to its abecedarian role of changing the status quo through its tools of strikes and lockout.

Politically, the Nigerian Trade Unions were seen to have contributed immensely in influencing the government to denounce its annulment of the June 12, 1993 elections, which in history is

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[10]A.B. Ahmed, 'A Critical Appraisal of the Right to Strike in Nigeria' 2014 4 (11) (1) International Journal of Humanities and Social Science. <http://www.ijhssnet.com/journals/Vol_4_No_11_1_September_2014/32.pdf> accessed 23 August 2021
[11]Similoluwa Daramola, 'Decent Work and Economic Growth under Nigerian Labour and Industrial Relations' (2021) SSRN Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847698>23 August 2021
[12]International Labour Organization definition
[13]'Employment and Decent Work' (European Commission) accessed 9 October 2021 <https://ec.europa.eu/international-partnerships/topics/employment-and-decent-work> accessed 9 October 2021.
[14]John Spacey,' 15 Examples of Economic Change' (Simplicable, April 15, 2018) <https://simplicable.com/new/economic-change> accessed 23 August 2021.
[15]George Hondroyiannis 'Economic Change and Restructuring' Hybrid Transformative Journal 54(3) 2021.

regarded as the freest and fairest election ever conducted in Nigeria.[16] The Nigerian Union of Petroleum and Natural Gas (NUPENG) workers invoked its power in the Nigerian economy, when the military government of the day annulled the election and the NUPENG demanded that the mandate of Chief Moshood Abiola be restored. In the words of the union,

…It was clear to us that we could no longer rely on the central labor organization. That body is now part of the government. It was inevitable that at some point, we had to exploit our importance in the Nigerian economy. Democracy is for everybody. Workers have a historical duty to fight for democracy'[17]

The continuous incarceration of Chief Moshood Abiola despite the court bail granted him sparked off waves of protests. The national petroleum workers union kicked off the strikes which paralyzed the entire petroleum sector as well as lower the export quota of the country's oil export. This followed several industrial actions in the sphere of the country's life. In a display of authoritarian force, the Abacha regime refused negotiation with the labour unions; instead it unleashed the powers of the state instrument of coercion in crushing the protests, mobilizing the army around oil refineries, and arresting and detaining labour leaders and pro-democracy activists, shutting down media houses and rolling out draconian decrees to insulate itself from legal actions.[18] The government of Sanni Abacha, sacked the Nigerian Labour Congress (NLC), the National Union of Petroleum and Natural Gas (NUPENG) workers and the Petroleum and Natural Gas Senior Staff Association (PENGASSAN) leaders at the height of the deadlocked peace talks and appointed a Sole Administrator[19] to run their affairs. These and many more increased the tension in the country and heightened the quest for civilian rule.

Minimum wage in simple parlance is the lowest wage an employer is allowed to pay[20] as it serves as a tool for social inclusion and poverty reduction. Nigeria has however experienced series of protests on increment. Following the recent crash in global oil prices, Nigeria has been plunged into economic recession which increased inflation. The Nigerian Labor Congress after

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[16] IBB: If June 12 Election was not Annulled, there would have been Violent Coup' (Nigeria, August 6 2021) <https://www.thisdaylive.com/index.php/2021/08/06/ibb-if-june-12-election-was-not-annulled-there-would-have-been-violent-coup/> accessed September 17 2021.
[17]Interview, National Union of Petroleum and Natural Gas Workers (NUPENG), Lagos July 1994.
[18]Nwoko, KC ‘Trade Unionism and Governance in Nigeria: A paradigm Shift from Labor Activism to Political Opposition' 2(2) June 2009 Information, Society and Justice Department of Applied Sciences ,London Metropolitan University <https://core.ac.uk/download/pdf/36771585.pdf> accessed 8 October 2021.
[19]Daily Times (Thursday 15 September, 1994).
[20]George N. Root III, (2010) Demand Media.

several demands and days of intense negotiations[21] on minimum wage, finally got the Nigerian government to sign the Minimum Wage bill into law for the increment of minimum wage from N18,000 to N30,000. Disagreement over how the minimum wage law signed by President Muhammadu Buhari in April would be implemented had lingered for months, with the organized labour threatening to strike.[22] Following the failure of some states to implement the payment of the new minimum wage, the President of the Nigerian Labor Congress (NLC), Ayuba Waba during the 2021 Workers day stated that all congress state councils have been directed to down tool if any governor remains adamant about the payment of the minimum wage which provides a minimum income floors to safeguard low income earners.[23]

Consequently, it is evident that trade unions by their intrinsic nature have played germane roles in sustaining good governance in Nigeria. They have played laudable roles in promoting welfare services of its members, acting as a watchdog to the policies of government, check to the abuse of governmental power, link between the government and its members, and advisory role, all working together for the sole purpose of fostering economic stability.[24]

IV. THE ROLE OF TRADE UNIONS IN SUSTAINING DECENT WORK IN NIGERIA

"A cursory of review of labour management relation in contemporary Nigeria will no doubt lead to the conclusion that a significant proportion of employers and workers still reject the idea that, on the one hand, the two sides are engaged in partnership and, on the other, that cooperation on both sides can bring about increased productivity, better wages and living condition and industrial peace in the country"[25]

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[21]Azeezat Adedigba, 'Updated: FG Labor reach agreement on minimum wage implementation' Premium Times News (18 October, 2021) <https://www.premiumtimesng.com/news/358222-jst-in-minimum-wage-fg-labour-reach-agreement.html> accessed 24th August 2021.

[22]ibid.

[23]Agency Report, 'Minimum Wage: Transfer to Concurrent List Won't Work-FG' Premium Times News (Nigeria, May 1, 2021) <https://www.premiumtimesng.com/news/headlines/458909-minimum-wage-transfer-to-concurrent-list-wont-work-fg.html> accessed 24 August 2021.

[24]B. Luca, S. Antonella & S. Giulia, 'Challenges of Political Participation and Intra-Party Democracy: Bittersweet Symphony from Party Membership and Primary Elections in Italy" (2016) <https://www.researchgate.net/publications/297896287_challenges_of_political_participation_and_intraparty_democracy_Bittersweet_Symphony_from_party_membership_and_primary_elections_in_italy> accessed 24th August 2021.

[25] T. Fashoyin, 'Industrial Relations in Nigeria' (1980) Longman Publishers.

A critical look at the above comment reveals that labour management relations are more or less interpersonal. This is because it includes, deliberations, arguments, and haggling between employees and employers. As a result, some features of labour management relations such as unionism, trade disputes, collective bargaining, dispute settlements and communication between employees and employers or their representatives culminates into an agreement.[26]The individual employee possesses limited power when compared to his employer. It is often the case that individual employees may decide to communicate their goals, feelings, complaints and desires to management for appropriate action and management may not want to listen to them. Therefore, unions provide the appropriate mechanism through strikes, which serves as a platform where employee goals can be negotiated with management. Strikes are the commonest form of industrial action by workers. They are the equivalent of lockouts by employers, all of which are only permissible in consequence of a trade dispute.[27] Lord Denning in ***Tram Shipping Corporation v. Greenwich Marine Inc.***[28] (1975) 2 All ER 989 defines strike as "a concerted stoppage of work by workmen done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workers in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.''

Trade Unions can be deemed as a strategic, collaborative, and tactical organization which exerts pressure on its employers in order to succumb to its demands. However, the prevailing reality in any employment is such that employers possess huge determining power and with this, trade unions of employees often devise strategies in the conveyance of its demands to employers. These strategies are inclusive of strikes, lock out actions, demonstrations, campaigns, lobbying and round table negotiations.[29] These strategies have over the years impacted in the formulation of organizational and national policies. The International Labor Organization (ILO) alongside countries have shown efforts to address the health emergency

[26]E. Innocent & O. Andres, 'The Labor and the Demand for a New Minimum Wage in Nigeria: How Realistic is the Demand' (2017) 2(2) Science Arena Publications Specialty Journal of Politics and Law <www.sciarena.com> accessed 24 August 2021.
[27]Hilary Ekpo, 'Relevance of No Work, No Pay Rule in Curbing Incessant Labour Unrest in Nigeria's Public Sector' Guardian News (Nigeria, 13 September, 2016) <https://guardian.ng/features/relevance-of-no-work-no-pay-rule-in-curbing-incessant-labour-unrest-in-nigerias-public-sector/>accessed 27 August, 2021.
[28](1975) 2 All ER 989.
[29]R. Dimang, B. Marcus, & O. Adesuyi, 'The Impact of Pressure Groups and Political Parties on Good Governance with a View to Attaining National Integration in Nigeria' (2021) 5(1) IAR Journal of Humanities and Social Sciences <https://www.iarconsortium.org/journal-info/IARJHSS> accessed 24th August 2021.

brought about by the covid-19 pandemic through the adoption of a vast range of emergency measures aimed at supporting firms' liquidity in the face of mandatory business restrictions, quarantines, and plummeting activities. Among these measures, government-financed short-time work and wage subsidy schemes were adopted in a number of countries to minimize job losses.[30]

Nigerian workers have remained the scapegoats of the devastating effects of the covid-19 pandemic as they constantly suffer one victimization or the other from employers in both public and private sectors of the economy.[31] For Nigerian oil workers, the dominance of oil has been a mixed blessing as oil industry jobs have unlocked the promise of natural resource wealth, but not without struggle. The oil unions' decades-long fight for higher wages, job security, and benefits has occurred while corruption, pollution, and corporate indifference have eroded job growth and living standards in the rest of the region. As a result, Nigerian oil workers are vulnerable to the horrors of industry-wide shift away from regular, full-time work towards forms of cheaper temporary labour and short-term contracting.[32] The trade unions' in the oil industry have often times been in the front burner of issues pertaining to industrial action. This is owing largely to the inhumane ordeals of casualization of labour, mass downsizing, slashing and failure to pay salaries. Despite the decision of the National Industrial Court in the case of ***PENGASSAN V Schlumberger Anadrill Nigeria Limited***[33] that irrespective of the employer's right to hire and fire for any reason, it is no longer globally fashionable to terminate an employment relationship without adducing any valid reason for such a termination. In 2015, the Petroleum and Natural Gas Senior Staff Association of Nigeria picketed following the disengagement of its workers who were assigned to work on the Seme oilfield, offshore the Republic of Benin and the refusal of the company to renegotiate the collective bargaining agreement with the workers.[34] In 2020, the PENGASSAN and NUPENG staged a protest threatening to shut down oil operations following months of unpaid of salaries.

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[30]Victor Ahiuma-Young, 'Our Jobs under Attack, PENGASSAN raises alarm', Vanguard News (Nigeria, 27 May 2021) <https://www.vangardngr.com/2021/05/our-jobs-under-attack-pengassan-raises-alarm> accessed 25 August 2021.

[31] Ibid.

[32]Solidarity Centre, 'Degradation of Work: Oil and Casualization of Labor in the Niger Delta' (2010) <https://www.solidaritycenter.org/degradation-of-work-oil-and-casualization-of-labor-in-the-niger-delta/> accessed 25 August 2021.

[33](2008) 11 NWLR Pt. 29.

[34]Nairaland, 'PENGASSAN Protests as SAPETRO Fires Workers' (Nigeria, 15 September 2015) <https://www.nairaland.com/2601743/pengassan-protests-sapetro-fires-workers>accessed 25 August, 2021.

The National Association of Resident Doctors (NARD) also directed its members across the country to embark on a total strike from Monday August 12th 2021 following the failure of the government to meets its demands. According to the National President of the union, Dr. Okhaihesuyi Uyilawa, the union lost about nineteen of its members to Covid-19 and death in-service insurance was yet to be paid to their next of kin. The president also stated that they were being owed about nineteen months' salaries and the government had persistently neglected to honour the terms of its memorandum of action together with its addendum.[35] Government's indolent attitude towards implementation of the collective agreement has remained the springboard for incessant industrial actions in Nigeria.[36] It is also imperative to state that the nonchalance of the Nigerian government to the medical sector has further increased the brain drain and migration of doctors to other parts of the work in search of greener pastures and relevance.

The Nigerian justice sector also experienced a sour taste of bad governance when the Judicial Staff Union of Nigeria (JUSUN) embarked on a two-month strike owing to failure of the government to ensure financial autonomy which ensures that in line with constitutional provision , the state judiciaries' budget are placed on the first line of charge, a status which enables state judiciaries to receive their funds directly from the federation account as opposed to the current collection of allocation from the state executive. The strike was further triggered following the continuous failure of state government to pay salaries and other allowances for months.[37]

The Nigerian educational sector like other sectors in the country has also experienced a trajectory of industrial action which has been of both academic and non-academic staff members. The major cause of the industrial action has remained failure of payment of salaries by the government, which remains unfair for individuals who having worked to earn their due

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[35]Channels TV, 'Resident Doctors To Begin Nationwide Strike on Monday' (Nigeria, July 31 2021) <https://www.channelstv.com/2021/07/31/resident-doctors-to-begin-nationwide-strike-on-monday/accessed> 25 August, 2021.

[36]S. Ogundipe et al, 'Doctors Adamant as FG Hails Courts Order on Strike' Vanguard News (Nigeria 24 August 2021) <https://www.vanguardnews.com/2021/08/doctors-adamant-as-fg-hails-court-order-on-strike> accessed 25 August, 2021.

[37]Ameh Ejekwonyilo, 'Updated: JSN suspends two-month-old Strike' Premium Times News (Nigeria, 9 June2021) <https://www.premiumtimes.ng.com/news/headlines/466763-breaking-jusn-suspends-two-month-old-strike.html> accessed 25 August, 2021.

are being deprived of their entitlement. The Academic Staff Union of Universities (ASUU) in 2010 and 2013 embarked on a six-month strike respectively before it was called off.[38]

The Nigerian Labour Congress during the celebration of the 2021 World Day for Decent Day implored the Nigerian government to attend to empathetic issues confronting the work atmosphere in Nigeria owing to the fact that most job opportunities in the country were below social protection and inclusion which forms the litmus test for decent work. According to the President of the Nigerian Labour Congress, Comrade Ayuba Waba, decent work should recognize the contribution of workers towards the wealth creation in any country and as such all jobs lacking in human rights protection should be eliminated.[39]

In the private sector, trade unions in unionized environment have also risen against all forms of exploitation and extortion. For instance, Nigerian workers at Chi Limited, subsidiary of Coca-Cola, protested over the non - immediate payment of seven hundred million naira productivity.[40] Similarly, workers in Berger Paints Nigeria Plc protested over the non-payment of gratuities to its employees.[41]

Conspicuoulsy, trade unions have invoked their weapons of industrial actions in alleviating the plights of its members from the hands of shenanigans in disguise of employers who flagrantly choose not to do the right thing. While the industrial actions may appear to serve as a boggle in the ears of employers, the setbacks occasioned by such industrial actions have adversely affected the life of most sectors of the country. Following the sad incidences of the #ENDSARS protests and outbreak of the corona virus, the Nigerian judiciary was thrown into losses when the courts were looted and burnt by angry mob. This arson perpetrated on the courts was followed by the JUSUN industrial action. An accumulation of the arson and industrial action in the judiciary threw a clog in the wheel of progress for justice dispensation as important files

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[38]Pulse.ng, 'All the Times ASUU has gone on Strike since 1999' Pulse News (Nigeria, 5 November, 2018) <https://www.pulse.ng/communities/student/all-the-times-asu-has-gone-on-strike-since-1999/5jtb8cs> accessed 25 August 2021.

[39]'Decent Work: NLC Urges FG to address Precarious Work' *Vanguard News* (Nigeria, 7 October 2021) <https://www.vanguardngr.com/2021/10/decent-work-nlc-urges-fg-to-address-precarious-work/> accessed 8 October 2021.

[40]Sunday Ogwu, 'Nigerian Workers at Beverage Firm Protest Exclusion from N1.6bn Allowances' *Daily Trust* (Nigeria, 22 July 2021). <https://dailytrust.com/Nigerian-workers-at-beverage-firm-protest-exclusion-from-n1-6bn-allowances> accessed 8 October 2021.

[41]Modupe Gbadeyanka, 'Breaking: Berger Paints Workers Protest in Lagos' *Business Post Nigeria* (Nigeria, 12 June 2017). <https://businesspost.ng/economy/breaking-berger-paints-workers-protests-lagos-photos> accessed 12 October 2021.

and pieces of evidences were burnt and the some courts could not sit. This in the long run has hampered the course of speedy justice delivery in Nigeria.

V. LEGAL FRAMEWORK FOR THE ACTIVITIES OF TRADE UNION IN NIGERIA

The Constitution of the Federal Republic of Nigeria is the bedrock from which all other laws derive their validity.[42] Trade union being a group of individuals formed with the purpose of fostering the interests of their members have only been able to go about their activities by virtue of Section 40 of the 1999 Constitution of the Federal Republic of Nigeria.[43] The relevant section provides as follows;

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

Although, while section 40 of the 1999 Constitution of the Federal Republic of Nigeria serves as an omnibus provision, Section 11 of the Trade Union Act prohibits the following categories of employees working in the following organizations from forming Trade Unions except for Joint Consultative Committees.

a. The Nigerian Army, Navy or Air Force;

b. The Nigeria Police Force;

c. The Customs Services, the Immigration Services and the Prison Services;

d. The Customs Preventive Service;

e. The Nigerian Security Printing and Minting Company Limited;

f. The Central Bank of Nigeria;

g. The Nigerian Telecommunications Limited;

h. Every Federal or State government establishment the employees of which are authorized to bear arms

[42]Constitution of the Federal Republic of Nigeria, 1999, s 1(3).
[43]Agbai v Okagbue (1991) LPELR-225 SC.

Trade Union according to Section 1(1) of the Trade Union Act means any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination in question would or would not, apart from this Act, be an unlawful combination by reason of any of its purposes being in restraint of trade, and whether its purposes do or do not include the provision of benefits for its members. Section 43 of the Trade Union Act allows for peaceful picketing by the trade union of the employee during an industrial action.

Furthermore, Section 44 of the same Trade Union Act states that any act done by a person in contemplation or furtherance of a trade dispute[44] shall not be actionable in tort on anyone or more of the following grounds only,

(a) that it induces some other person to break a contract of employment; or

(b) that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wishes; or

(c) that it consists in his threatening that a contract of employment (whether one to which he is a party or not) will be broken; or

(d) that it consists in his threatening that he will induce some other person to break a contract of employment to which that other person is a party.

Section 42(1) (a) of the Trade Dispute Act provides that; notwithstanding anything contained in the Act or any other law, where any worker takes part in a strike, he shall not be entitled to any wages or other remuneration for the period of the strike, and such period shall not count for the purpose of reckoning the period of employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly.

Section 9(6) of the Labour Act states that no contract of employment shall make it a condition for an employees to join or not to join a trade union or shall or shall not relinquish membership of a trade union; or cause the dismissal of, or otherwise prejudice, a worker by reason of trade union membership.

[44]Trade Dispute means any dispute between employers and workers, or between workers and workers, which is connected with the employment or non-employment, or the terms of employment or conditions or work of any person.

Section 12(4) of the Trade Union Act states that membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimised for refusing to join or remain a member.

The National Industrial Court is vested with the exclusive jurisdiction to entertain matters pertaining to the grant of any order restraining any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock out or any industrial action.[45] The court reiterated the position of the law on the court's exclusive jurisdiction on labour related matters in the case of ***National Security and Civil Defence Corps & Anor v Joseph Tur & Ors***[46]

VI. International Human Rights Perspective On Trade Unions

The existence of trade unions is founded on the bedrock of basic human rights which is inclusive of the right to freedom of association and expression and hence must be accorded primacy especially under employment relations. The collective strength trade unions enjoy have over the years afforded them the stories of victories and solidarity through their right to strike and picketing. The existence of the right to strike under international law has been challenged by the International Organization of Employers since the late 1980s.[47] The employer group claims that no such right exists under international law. This claim has increased the quest and attempts by several employers to deunionize their work environment.[48] The right to strike is one of the most important international labour standards as it bolsters and affords the right to freedom of association to find expression and operate freely. In 1952, the Committee on Freedom of Association declared strike action to be a right and not a social act.[49] The Committee reduced the number of categories of workers who may be deprived of the right to strike, as well as, the legal restrictions on its exercise, which should not be excessive. It

[45]Constitution of the Federal Republic of Nigeria, 1999, s 254(C)(1)(b).
[46](2019) LPELR-46883 (CA).
[47]Diane F. Frey, 'Conflict over Conflict: The Right to Strike in International Law' (2017) 8(1) Global Labour Journal <https://www.semanticscholar.org/paper/Conflict-over-Conflict%3A-The-Right-to-Strike-in-Law-Frey/6bb332c6d936bfbe15b97a65ccb581c10840967fhttps://www.semanticscholar.org/paper/Conflict-over-Conflict%3A-The-Right-to-Strike-in-Law-Frey/6bb332c6d936bfbe15b97a65ccb581c10840967f> accessed 8 October 2021.
[48]Ibid.
[49]International Labour Organization Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) Edition.

linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers.[50]

Article 8 of the International Covenant on Economic and Social Rights of Workers states that;

The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.[51]

Article 22 of the International Covenant on Civil and Political Rights states that everyone shall have the right to freedom of association with others, including right to form and join trade unions for the protection of his interests.

The International Trade Union Confederation has provided a platform where workers' rights promoted by the International Labour Organization are universally enforced and respected. Labour standards developed by the International Labour Organization are backed by a supervisory system that helps to ensure that member states implement the conventions they ratify.[52] Convention 87 of the Freedom of Association and Protection of the Right to organize Convention (1948) enables trade unions to organize themselves for the purpose of achieving their objectives in a lawful manner.

[50]Ibid.
[51]Similar provision is on Article 6 of the European Social Charter.
[52]ILO, 'Convention 87 and the Right to Strike Briefing Paper', Adopted at San Francisco, 31st ILC session (09 Jul, 1948).

Article 1 of the Right to Organize and Collective Bargaining Convention 1949 (No. 98) guarantees the protection of employees against acts of anti-union discrimination in respect of their employment.[53]

From the above analysis, it is evident that trade unions have found a fertile soil needed to grow in order to achieve and sustain decent work as it pertains to international best practices.

VII. CHALLENGES CONFRONTING TRADE UNIONS IN NIGERIA

Trade Unions like every organization is prone to face challenges which should be designed as a stepping stone towards achieving their objectives. The Nigerian trade union has undergone several transformational phases particularly during the military regime. Its chequered history of doggedness in the face of tyranny has helped in establishing and restoring some form of decorum in the country. Notwithstanding this, there are a number of challenges impeding the efficacy of trade unions in Nigeria.

Majority of the leaders of trade unions lack knowledge of the nitty gritty of the activities of trade unions. This is evident in terms of the skills needed in negotiating. It is generally presumed that most demands and activities of trade unions should be conducted violently with no option of negotiation being explored. However, the veracity of being resistant in demands is questionable as communication and negotiations will help in sustaining industrial harmony. The lack of commitment in managing the affairs of most trade unions has also resulted in the diminishing and disappointing role of trade unions in Nigeria.[54]

Trade unions as earlier explained are deemed as a nonconformists group. The lack of internal democracy in most Nigerian trade unions is due to the unwillingness of their leaders to acknowledge basic constitutional rights of its individuals and compliance with the due process of law.[55] At the formation of trade unions, most individual trade unions have constitutions and rules guiding their activities such as meetings and voting.[56] The apathy of most members in

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[53]Section 12, Constitution of the Federal Republic of Nigeria, 1999; see also International Labour Organization, 'Convention No. 87: Freedom of Association and Protection of the Right to Organise Convention, 1948' and 'Convention No. 98: Right to Organise and Collective Bargaining Convention, 1949'.

[54]Ugo Chuks Okolie and Sebastine Agbefe 'A Critical Study of the Key challenges of Trade Unionism in Nigeria's Fourth Republic' (2020) 7(11) International Journal of Research in Humanities and Social Sciences <https://www.ijrhss.org/papers/v7-i11/4.pdf> accessed 9 October 2021.

[55]Ibid.

[56]J. O Okojie,'Trade Unions as Organizations: Key Issues and Problems of Internal Democracy in Nigeria' (2011) 5(6) African Research Review <https://www.ajol.info/index.php/afrrev/article/view/72351/61279> accessed 6 October 2021.

attending meetings has impeded the cohesion as trade unions cannot flourish when a tiny fraction of members decide the fate of the organization.[57]The place of union democracy cannot be overemphasized because any organization which provides workers with democratic rights and protection in the workplace should do so internally.[58]

The impact of globalization on trade unions has also affected the matrix in which trade unions adopt in achieving its objectives. Globalization is identified as a process of expeditious cultural, economic as well as institutional integration occurring among countries and usually motivated by liberation of trade, technological advances, capital flows, investment and pressures for the assimilation toward global standards.[59] Globalization leads to dissemination of advance practices of management as well as fewer forms of organization of work which results in the intensity of economic based competition among nations.[60]Globalization has been identified to be responsible for a decline in trade union across the globe. The negative effects of globalization on labour standards cannot be overemphasized, it decreases the bargaining power of labour while the bargaining power of capital is strengthened.[61]Apart from leading to wage losses as well as unemployment of unskilled workers in country already developed, it also has negative effect on general global labour standards. Globalization has great effect on the right of workers globally but the situation of Nigeria has been identified to be one of the worst cases. [62] Organization structures are designed to evolve with technological advancement hence causing labour to be treated as dispensable commodities.[63] This is because the bargaining power of employer has increased vis-à-vis that of employees because employers believe that in a global economy, they will pack their bags and leave hence fostering unfair competition in labour in developing countries with low standard of labour.[64]

Political incursion into the activities of trade unions have over the years taken a toll on the success and outcomes of collective bargaining, which is the fulcrum of any industrial action.

[57]ibid.
[58]J Godard, 'Industrial Relations, the Economy and Society. Canada: Ontario Publishers.
[59]ILO, 'Progress Report on the Country Studies on the Social Impact of Globalization' [1996] accessed 7 October 2021.
[60]ibid.
[61]'The Impact of Globalization on Industrial Relations: A Comparative Study of Korea and Japan' [2001] 7 (1) Seoul Journal of Business;62.
[62]Adanmo G. Omodu, 'Challenges of Collective Bargaining in Nigeria: Lesson from South Africa'(2021) 9(3) International Journal of Innovative Legal and Political Studies.
[63]G. Kabiru Ishola, 'Globalization and Trade Unions Challenges: Nigeria Manufacturing Sector Experience' (2013) 5(17) European Journal of Business and Management https://core.ac.uk/download/pdf/234624862.pdf accessed 6 October 2021.
[64]E Neumayer and I D Soysa, 'Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis' [2006] (34) (1) World Development; 31.

The continuous external inference from the government is deemed to be responsible for the centrifugal tendencies in trade unions in Nigeria.[65]

The success of any trade union is hinged on its ability to achieve its set objectives which has as its core the welfare of its members. The inability of some sectors which do not fall within Section 11 of the Trade Union Act to form trade unions has hampered the improvement of their terms and conditions of employment of the employees. The challenge is evident in the banking sector where unfair labour practices has become the norm hence allowing for megalomania of employers who enjoy the licence of cheap labour turnover who work as slaves disguised as contract staff in corporate attire. This prevalent situation in the country has made the sustenance of decent work and economic growth a chimera in Nigeria since there are no trade unions to fight for better working conditions. The job deficit and absence of trade unions has made the job market an employer's market, leaving workers virtually powerless to negotiate let alone demand better terms.[66]

VIII. Recommendations And Conclusion

The resistance from trade unions is a global trend as even the best companies globally experience trade union agitations. Employers must begin to view industrial dispute as an avenue to promote good corporate governance and industrial harmony. The reality is that the majority of the labour force exists in the informal sector in Nigeria. Therefore, the Labour Act and other laws have no meaning because they are unregulated.[67] The laws and protective measures meant for all workers end up being in practice, for the few who are privileged to be engaged either in the public service or in the organized private sector.[68] Imperatively, sustaining workers welfare is essential and quite vital in employment relations, but unions must understand that the world of work is tripartite in nature and the interests of the other parties-employers and the state slightly differs, therefore workers' rights and welfare may definitely

[65]Robin Cohen, 'Labour and Politics in Nigeria' (1975) 13(2) The Journal of Modern African Studies https://www.jstor.org/stable/160201 accessed 11 October 2021.
[66]Ope Adetayo, 'No Career Path, no raise for Nigeria's Contract Bank Workers' Aljazeera News (Nigeria, 1 July 2021) https://www.aljazeera.com/economy/2021/7/1/no-career-path-no-raise-for-nigerias-contract-bank-workers accessed 8 October 2021.
[67]Chioma K. Agomo, '*Nigerian Employment and Labour Relations Law and Practice'* (1st edn. Concept Publications Limited 2011).
[68]ibid.

not be paramount on the agenda of the employers and the state.[69] Hence, fostering industrial harmony in order to achieve and sustain decent work requires the concerted efforts of the government and every stakeholder in taking deliberate steps to promote an egalitarian and fair workplace environment.

The Nigerian government must as a matter of expediency review its existing legislation governing labour and employment relations. This is due to the fact that the existing labour legislations do not address evolving issues on the realization of decent work. The right to strike existing under Section 18 of the Trade Disputes Act on a literal interpretation points to the fact that the right to strike is guaranteed unless certain conditions are fulfilled. Sadly, the procedures to be exhausted before the right to strike can be exercised is rather cumbersome and almost gagging the right to industrial action. The government must also back its laws with adequate enforcement in order to achieve maximum compliance.[70]The non-justiciability of Chapter 2 of the 1999 Constitution of the Federal Republic of Nigeria[71] which is the major roadmap for decent work has hampered the advancement of employment relations in Nigeria, thus responsible for the overwhelming roles trade unions play on the stage of decent work.

The government is the major stakeholder as it relates to the implementation of collective agreements deduced from series of negotiations in the public sector, which has the largest absorption of staff. Majority of strike actions embarked upon by members of trade union in the public sector has been centred around the failure of the government to fulfill its terms contained in its collective agreement, hence causing the slow pace or halt of activities affecting key human capital development sectors. The government must live up to its expectations by fulfilling its responsibilities as contained in the social contract which is inclusive of guaranteeing the pursuit of happiness by its citizens.

Nigerian trade unions must also ensure that they achieve internal harmony in their activities so as to allow for unity and teamwork. Idiomatically, a lizard can only penetrate a cracked wall with holes. Hence, trade unions must govern their activities by allowing for a feasible and effective dispute resolution mechanism.

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[69]Adebimpe Adenugba and Samuel Omolawal, 'Dislocated Tripartite Relationship in Nigeria's Industrial Relations' (2014) 5(10) Mediterranean Journal of Social Sciences https://www.researchgate.net/publication/329269394_Dislocated_Tripartite_Relationship_in_Nigeria's_Industrial_Relations accessed 12 October 2021.

[70]Labour Act (Chapter L1 LFN 2004), s 7.

[71]Constitution of the Federal Republic of Nigeria 1999 (as amended), ch 2.

Trade Unions in Nigeria should ensure that they invest in themselves through the organization of symposia and seminars in order to keep abreast with emerging trends in employment and industrial relations. Trade unions should also ensure that they keep good relations with other affiliate international trade union organizations in order to sustain the future of green jobs globally.

Employers should adopt good welfare policy for their employees in order to get the best from them; casual workers should not be considered as tools of production rather they should be engrafted as a body or a family in the production process.[72] Most casual workers are economically instrumental and thus employers need to formulate more adequate policies that will equally affect the level of job involvement.[73]

Trade unions have played a vital role in industrial relations across the globe and while year 2030 seems to be lurking around, Nigeria must live beyond the bounds by designing sustainable blueprints needed for achieving and sustaining decent work. The above discourse points to the fact that Nigeria is yet to achieve decent work as employment terms which aligns towards the tenets of decent work have only being temporal or have evolved through the struggles of trade unions. The realization of decent work must be arrived at through a consensus of all stakeholders involved and only then can Nigeria begin to sustain decent work. The world of jobs is green and employment relations in Nigeria should be green. The clock is ticking fast but it is better late than never. Nigeria must rise up beyond its cosmetic approach to decent work and must begin to build sustainable projects and policies that will outlive successive governments. Until then the struggle will continue on the part of trade unions because in the words of Karl Marx,[74] 'wages are determined through the antagonistic struggle between the capitalist and worker, as victory goes necessarily to the capitalist who can live longer without the worker than can the worker without the capitalist'

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[72]Lydia Odiase, 'Casualization of Labour Under the Nigerian Labour Relations' (LL.B thesis, Bowen University 2021).
[73]ibid.
[74]Karl Marx, 'Wages of Labour' Economic and Philosophic Manuscripts of 1844 https://www.marxists.org/archive/marx/works/1844/manuscripts/wages.htm#:~:text=Wages%20are%20determined%20through%20the%20antagonistic%20struggle%20between%20capitalist%20and%20worker.&text=The%20capitalist%20can%20live%20longer,in%20its%20consequences%20for%20them accessed 12 October 2021.

GIG WORKERS AND SOCIAL SECURITY: FALLING BACK ON THE EXISTING FRAMEWORK OR TAILORING THE REGIME?[1]

Abstract

The pandemic heralded a massive change in the labour legal landscape of the country. With remote work and casual employment being on the rise, it became imperative for laws to accustom themselves to these contemporary developments. The shift from collectivization of workforce to individual experience of work created a regulatory grey zone which created a favorable outcome for both employees and employers. It provided flexibility to employees whereas on the other hand, it exempted the employers from a multitude of benefits that they are needed to provide to permanent employees. However, through this paper, we highlight that despite the apparent benefits to both the employees and employers, informal workers in the gig economy face widespread exploitation since government intervention is negligible In this paper, we seek to emphasize on the importance of regulatory protection since the current legal jurisprudence needs to be augmented especially in the specific context of gig workers and highlight the need of including them within the purview of these protection schemes after years of exclusion and marginalization. After extensively evaluating the current regime and providing a high-level intricate critique, we have recommended a model of social security to gig workers which will ensure universality of protection in order to provide adequate and effective access to the workers with adaptation to structural transformation in the labour market and transparency in the administration of these benefits. In order to accentuate our model, we have even borrowed some lessons from a global perspective that have extended social security benefits for gig workers in an informal

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economy. In the end, we propose a regime which fills the hiatus created and provides for an inclusive panacea to this malady.

KEYWORDS: *REMOTE WORK, CASUAL EMPLOYMENT, GIG ECONOMY, SOCIAL SECURITY, REGULATORY PROTECTION*

I. INTRODUCTION: REIMAGINING THE 'FUTURE OF WORK'

"Gig work—represented as a new opportunity with many advantages—is another form of employment ambiguity and insecurity"[1]

The Gig Economy has been heralded to be a 'fourth industrial revolution'[2] since both 'work' and 'workplaces' have undergone a massive transformation and ruptured the idea of conventional employment relationships.[3] There has been a shift from the collective experience of labour to individualization of work marked by the growth of solitary work and freelancing.[4] Moreover, there has been an abrogation of the traditional workplace by the inculcation of technology making the necessity of physical presence redundant.[5] The diversification and informality of non-standard employment through the practice of 'gig work' has led to a discernible change in conceptualizing employment relationships.[6]

While the growth of casual employment has caused a regulatory grey zone it has become extremely prevalent due to the 'win-win' situation it creates for employers and employees alike.[7] For the employees, gig work provides extreme flexibility as it allows them to participate in simultaneous work on different projects allowing them to expand their horizons.[8] The power to self-determine the number of working hours, successfully maintain a work-life balance coupled with the absence of supervisory control seems to be the attractive features of the gig

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[1]Alex De Ruyter and others, 'Gig Work and the Fourth Industrial Revolution' (2019) 72(1) Journal of International Affairs 47.
[2]Ibid; Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28(3) The Economic and Labour Relations Review 382.
[3]Juliet Webster, 'Micro workers of the Gig Economy' (2016) 25(3) New Labour Forum 56.
[4]Juliet Webster and Keith Randle, *Virtual Workers in the Global Labour Market* (2016) 143.
[5]Carla Freeman, 'Respectability and Flexibility in the Neoliberal Service Economy' in Debra Howcroft and Helen Richardson (eds), 'Work and Life in the Global Economy' (Palgrave Macmillan 2010).
[6]Antonio Loffredo and Marco Tufo, 'Digital Work in the Transport Worker: In Search of the Employer' (2018) 12(2) Digital Economy and the Law 24.
[7]Arne L Kallberg and Michael Dunn, 'Good Jobs, Bad Jobs in the Gig Economy' (2016) 20 Perspectives on Work 11.
[8]David Peetz, 'The Realities and Future of Work' (ANU Press 2019) 142.

economy.[9] Moreover, it provides the opportunity for innovation and promotes entrepreneurship by encouraging the adoption of diverse perspectives.[10] Additionally, it allows the accentuation and supplementation of income from different sources by providing a platform for the complete maximization of one's talents.[11] Apart from this, the short terms engagements allow employees to capitalize on the digitalization and technological automation taking place.[12]

Especially, it was highlighted that the majority of women who were unable to work due to household responsibilities could now through the internet, participate in several jobs in different sectors from the confines of their home.[13] Gig work has also proven to be favourable to immigrants who have been unable to secure employment since it involves less discrimination in an online platform set-up.[14] Also, it has allowed employment to people in rural and remote areas where enough job opportunities are absent.[15]

On the other hand, an employer thrives on informality and temporary labour since domestic laws across jurisdictions provide a host of benefits only to permanent employees, resulting in a huge reduction in obligations.[16] Furthermore, it allows the employers potential avenues to exploit the workers by paying low wages, unpredictable working hours, along with sparse allowances.[17] Several scholars have pointed out that gig workers face a loss in 'dignity' i.e. they don't get correct work, 'justice' i.e. their grievances aren't addressed, and 'reward' i.e. they don't get appropriate remuneration.[18] There exists a legal vacuum and uncertainty vis-à-vis the status of gig workers since the facets of control and supervision are different in different workplaces, and a 'one size to fit all' which is to render them 'independent contractors' as per the existing framework makes them subject to abuse and oppression.[19] Various social

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[9]Timoth J Minchin, 'Be Your Own Boss?' (2020) 39(1) Australasian Journal of American Studies 47.
[10]Sara Horowitz, 'Freelancers in the US Workforce' (*US Bureau of Labour Statistics,* October 2015) <https://bit.ly/3mdoKq2> accessed 25 October 2019.
[11]Namir Anani, 'Paving the Way for the Future of Work' (2018) 44(1) Canadian Public Policy 168.
[12]Frank Pasquale, 'Two Narratives of Platform Capitalism' (2016) 35(1) Yale Law and Policy Review 310.
[13]U Rani and M Furrer, 'On Demand Digital Economy: Can experience ensure work and income security for microtask workers?' (2019) 239(3) Journal of Economics and Statistics.
[14]Caroline O'Donovan, 'If Most of your income comes from on–demand work, you are a racial minority' (*Buzzfeed News,* 7 January 2016) <https://bit.ly/3mbJtdO> accessed 1 March 2021.
[15] Kallberg and Dunn (n 7) 12.
[16]Arun Sundararajan, 'The Gig Economy is coming, what will it mean for work?' (*NYU Stern School of Business*, 25 July 2015) <https://bit.ly/3BbIXAO> accessed 1 March 2021.
[17]Steven Hill, '*Raw Deal: How the Uber Economy and Runaway Capitalism are Screwing American Workers'*, (St. Martin's Griffin 2015).
[18]Calum Samuelson, 'Justice, Dignity and Reward: Nurturing Relationships in Gig Economy' (2019) 108 Studies: An Irish Quarterly Review 433.
[19]Declan Owens, 'The Uncertain Future of Labour Law: 'One Step Forward and One Step Back' is not getting workers anywhere' (2019) 82 Socialist Lawyer 30.

protection and security schemes, which were statutorily mandated to prevent this oppression, are also unfortunately premised on the foundations of an employer-employee relationship. Thus, offering no solution to the widespread exploitation taking place as the governmental intervention is negligible.[20] The changing dimensions and evolution of the gig economy warrants a re-look at the existing legal landscape and showcases the need to provide social protection to gig workers.

Through this paper, the authors seek to evaluate the adequacy and effectiveness of the existing legal framework in providing social security to gig workers. The paper will attempt to holistically and critically view the current regime in order to examine the possibility of tailoring the regime to provide for a much more augmented legislative foundation. In Part II of the paper, the authors will provide a contextual background to the issue of exclusion and the contemporary need of including gig workers within the purview of social security schemes. The authors will adopt a critical lens while analyzing the provisions governing the provision of social security and would provide a brief overview in Part III. Furthermore, Part IV, will highlight practices across several jurisdictions and examine their incorporation into our regime. In the end, Part V will seek to provide recommendations based on the hardships faced by gig workers in order to smoothen our skewed jurisprudence.

II. GIG WORKERS AND SOCIAL SECURITY: PROVIDING A CONTEXTUAL UNDERPINNING

In this part, we analyze the conceptual background and objectives of social security in the specific context of gig workers and highlight the need of including them within the purview of these protection schemes after years of exclusion and marginalization.

Social security was historically introduced as a protective measure against socio-economic distress or unfortunate circumstances.[21] However, in the Indian context, social security has to be viewed in a broader context as "pro-poor measures implemented through public means".[22] The objectives of such social initiatives are to augment income, off-set risks, impart financial

[20]Enda Brophy, 'System Error: Labour Precarity and Collective Bargaining at Microsoft' (2006) 31(3) Canadian Journal of Communication 620.
[21]UK Office of Public Sector Information, *Social Insurance and Allied Services* (Cmd 6404, 1942). ['Beveridge Report'].
[22]Amartya Sen and Jean Dreze, 'Hunger and Public Action' (OUP 1989).

reliefs and essentially, ensure that every worker is able to maintain themselves.[23] Moreover, successful enforcement of such measures reduce the vulnerability of workers and provide a 'safety net' to absorb unexpected shocks.[24] In the current backdrop, the Social Security Code 2020 ('Code') defines 'social security' to be measures of protection afforded to gig workers to ensure income security and access to healthcare in specific situations through 'rights conferred on them and schemes framed'.[25] However, unfortunately, till-date, no schemes have been framed or notified.[26] Hence, while the Code has taken one step forward by theoretically extending and expanding the social security provisions, the absence of any welfare schemes takes two steps backwards.[27] In the context of gig workers, social security has been sought to be conceptualized by the International Labour Organization ('ILO') in terms of a 'vertical dimension' i.e. social insurance which is to arrange for contingencies like disability, ill-health, retirement, and a 'horizontal dimension' i.e. social assistance, including cash transfers and entitlements.[28] Thus, in the absence of any conclusive determination in the Indian milieu, the paper will be premised on this wider and inclusive understanding of social security.

The exclusion of gig workers in India is primarily derived from the 'anachronistic notion' of developed countries to presuppose the need for a formal employer-employee relationship for the provision of social security.[29] This was earlier done in order to provide benefits and incentives to drive unorganized workers to more organized sectors since formality was seen to be the panacea to the malady of informality.[30] Furthermore, the exclusion was the unwillingness of the employers to provide these security benefits to employees over whom they had negligible control and supervision.[31] Emphasis on the Coasian theory was also provided, where firms found it more efficient to employ workers since the usage of internal structures

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[23]Ashima Majumdar and Saundarjya Borbora, 'Social Security System and the Informal Sector in India: A Review (2013) 48 (42) Economic and Political Weekly 69.
[24]Siddhartha Sarkar, "'Extending Social Security Coverage to Informal Sector in India' (2004) Social Change 122.
[25]The Code on Social Security 2020, s 2(78).
[26]Nishant Sharma, 'Gig Workers may end up paying for their Social Security' (*Bloomberg Quint,* 6 October 2020) <https://bit.ly/3b5xckE> accessed 4 March 2021; YS Sharma, 'Social Security Schemes 'May' Cover Gig Workers' (*Economic Times,* 6 August 2020) <https://bit.ly/3b5CM6y> accessed 4 March 2021.
[27]Mridusmita Bordoloi and others, 'Social Security for Informal Workers in India' (2020) Centre for Policy Research, 2 <https://bit.ly/3jyzv4v> accessed 25 October 2021.
[28]International Labour Office Geneva, 'Social Security for Social Justice and Fair Globalization', 133 (International Labour Conference, Geneva, 2011) <https://bit.ly/2ZpG5mV> accessed 4 March 2021.
[29]Santosh Mehrotra, 'Building a Social Security Architecture for Informal Workers in India, finally!' (2020) Center for Sustainable Employment Working Paper No. 28, 3 <https://bit.ly/3nohreh> accessed 5 March 2021.
[30] Ibid.
[31]Lawrence Summers, 'Some Simple Economics of Mandated Benefits' (1989) 79(2) American Economic Review Papers and Proceedings 177.

was effective than monitoring the contingencies from a contract.[32] Hence, several employers staunchly believed that employees deserved these benefits if they were an intrinsic part of a single organization. Multiple institutions providing security benefits to a single worker at the same point of time would not only be an onerous financial burden on the employer but also push workers towards lethargy.[33] Hence, gig workers who could participate in other organizations were not eligible to receive these imperative benefits.

However, there has been a progressive realization to provide social security to gig workers so that they are not left vulnerable to the 'vagaries' of the labour market.[34] This shift has ensured that the human rights and the dignity of the workers are not undermined coupled with the non-aggravation of poverty.[35] Also, it guarantees a fair, competitive environment for all economic players and facilitates market mobility.[36] The denial of these benefits had exposed the workers to several economic risks and adverse shocks.[37] In the labour market characterized by frictions, it becomes burdensome on an employer to discharge social security obligations and hence, such costs are borne by the employees in form of low wages.[38] If multiple employers provide these benefits then the burden would be divided and in turn, feasible. The need of social security is being perceived as a prerequisite to economic growth and sustainable development rather than a burden.[39] Moreover, the provision of the incentives has enhanced the efficiency of market economies since social security diminishes uncertainties. Furthermore, social security is now being seen as a catalyst of social justice and economic stabilizers.[40] Additionally, it has been analyzed that the extension to gig workers would lead to employment in social security services which is ultimately a shift towards 'formalization'.[41] This also prevents the creation of a 'vicious cycle' where the façade of 'independent contractors' has allowed employers to arbitrarily categorize several workers, exposing them to risk and forcing them to take multiple

[32]Seth D Harris and Alan B Krueger, 'A Proposal for Modernizing Labour Laws for the Twenty First Century Work: The 'Independent Worker' (2015) The Hamilton Project Discussion Paper No 10, 26 <https://bit.ly/3Bgh22q> accessed 25 October 2021.
[33] Ibid.
[34]OECD, 'Employment Outlook 2019: Future of Work', Paris, (2019).
[35]ILO Geneva (n 28) 10.
[36]Christina Elschener and Robert Schwager (eds), 'The Importance of Social Security' in *The Effective Tax Burden on Highly Qualified Employers: An International Comparison* (Physica-Verlag HD 2005).
[37]ILO Geneva (n 28) 16.
[38]Jonathan Gruber and Alan Krueger, 'The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance' (1991) 5 Tax Policy and the Economy 111.
[39]ILO Geneva (n 28) 22.
[40]Ibid 18.
[41]Ibid 89.

low paying jobs.[42] This has led to the movement towards 'decoupling' social security from employment.[43] The reasons for providing social security benefits to gig workers can thus be largely described to – enhance economic efficiency, strengthen the social compact and reduce legal ambiguity.

Hence, a model of social security to gig workers which will ensure universality of protection in order to provide adequate and effective access to the workers needs to be established. Moreover, appropriate risk-sharing based on a sustainable foundation must be guaranteed. Adaptation to structural transformation in the labour market and transparency in the administration of these benefits must be accounted for. The harsh realities and gender inequality faced by the workers should be considered. In the model posited in Part V, we seek to incorporate all these principles.

III. An Overview Of The Issues Plaguing The Current Framework

The Code has replaced nine laws related to social security, with the stated aim of simplifying and consolidating all existing laws.[44] *Inter alia*, the Code has extended the social security benefits to platform workers, gig workers and unorganized sector workers. However, the ambiguous drafting of the Code and its Draft Rules have raised serious concerns over its implementation. This part discusses the lacunae in the Code and briefly elucidates the issues and its subsequent repercussions over the provision of social security to gig workers.

A. Overlap in definitions

Though the definitions of unorganised workers, gig workers and platform workers have been separated under the Code, there are major overlaps between them. While gig work is a work arrangement that falls outside the 'traditional employer-employee relationship',[45] platform work is gig work arranged through an online platform for the provision of a specific service or activities that are notified by the Central Government.[46] It is to be noted that the definition of 'gig work' does not expressly exclude those arranging work through an online intermediary

[42]Rebecca Smith and Sarah Leberstein, 'Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy' (2015) National Employment Law Project, 1 - 4.
[43]Ibid.
[44]'The Code on Social Security, 2020' (*PRS Legislative Research*) <https://bit.ly/3GkPrkj> accessed 14 March 2021.
[45]The Code on Social Security 2020, s 2 (35).
[46]The Code on Social Security 2020, s 2 (60).

but instead creates an umbrella category of workers falling outside traditional employment. For example, any person working for an app-based aggregator does not receive an appointment letter, does not have fixed working hours, and does not receive employment, work, or social security. In many instances, they even work for a rival app-based platform. Since this arrangement is both non-traditional and platform-based, such a worker can be a gig as well as a platform worker. The lack of an inclusionary definition of gig work has also caused it to overlap with 'self-employed workers',[47] who are included within the fold of "unorganised sector workers".[48]

While Section 109 (2) of the Code places the responsibility of enacting social security schemes for unorganised sector workers with the State Governments, Section 114 mandates the Central Government to frame schemes for platform and gig workers. With major overlaps between the definitions of these three categories of workers as noted above, workers and aggregators alike will face ambiguities with respect to which scheme they should avail of and make contributions to.[49] To resolve this issue, the Standing Committee on Labour had recommended that the definition of 'unorganised workers' be expanded to include gig and platform workers as well.[50] However, their recommendation was not considered.

This overlap is exacerbated by the already fragmented system of delivery of social security benefits, which remains unchanged under the Code. The current structure is a mix and match of different schemes being implemented by different agencies rather than a one-window clearance structure. For example, the provident fund, pensions, deposit-linked insurance, and state insurance schemes are implemented by the Central Government. Schemes for unorganised sector workers are implemented through National and State-level Social Security Board.[51] Streamlining of these structures is necessary to effectuate the consolidation of the erstwhile social security schemes into the current Code.

The exclusionary definition of gig work as a 'non-traditional' work arrangement fails to recognize the diversity of the gig economy, with different sets of workers working under

[47]The Code on Social Security 2020, s 2 (75), *".....means any person who is not employed by an employer, but engages himself in any occupation in the unorganised sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government….".*
[48] The Code on Social Security, 2020, s 2 (85).
[49] Kingshuk Sarkar, 'Under new labour code, an Uber driver can be both gig and platform worker. It's a problem' (*The Print*, 12 October 2020) <https://bit.ly/3b5M3LW> accessed 9 March 2021.
[50]17th Lok Sabha Standing Committee on Labour, 'Report on The Social Security Code 2019' (Report No. 9, 2020) 40.
[51]The Code on Social Security 2020, ss 6(7) and 6(9).

varying degrees of control. For example, app-based drivers who own vehicles have control over their work hours and the number of trips they would want to make. However, drivers who buy vehicles on a loan or are provided the vehicle by the platform aggregator must meet target hours and number of trips to pay for it. The definition of gig work tends to create a 'catch-all' category in which all kinds of work outside the traditional scope are banded together, disregarding the apparent heterogeneity of this sector.[52] This will also lead to misclassifying scores of workers as 'self-employed' without considering their vulnerability and financial dependency on a non-traditional employer. The Code has not been mindful of these differences.

B. Mandatory authentication of registration by Aadhaar

The Draft Rules issued by the Central Government under the Code require gig workers to constantly update their details on a web portal to avail social security benefits.[53] These details include present job, period of engagement with gig firms, skills etc. Non-registration will render a worker ineligible to avail the benefits of a particular scheme.[54] These details would have to be mandatorily authenticated by their Aadhar number.

This mandatory linking violates the judgment of the Supreme Court in *Justice KS Puttuswamy v. Union of India*, where the Court had ruled that linking of the Aadhar Card may only be made mandatory for expenditure on a subsidy, benefit or service incurred from the Consolidated Fund of India.[55] Schemes such as those related to gratuity and provident fund are not funded by the Consolidated Fund of India.[56] Though the Central Government had assured the Standing Committee on Labour that it would review this provision, it did not do so in the final version of the Code.

While the Code imposes numerous obligations on the workers to avail the social security benefits, gig firms have been let off easy. They may be required to make annual contributions to the tune of two percent of their annual turnover for the social security of gig and platform workers.[57] But this contribution will be done through self-assessment by the gig companies.

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[52] Fredman and others, 'Draft (Indian) Code on Social Security, 2019: Comments' (2019) Oxford Human Rights Hub <https://bit.ly/3BeOiae> accessed 13 March 2021.
[53] Somesh Jha, 'Gig workers need to register, update info for social security: Draft rules' (*Business Standard*, 16 November 2019) <https://bit.ly/3pARriI> accessed 15 March 2021.
[54] Ibid.
[55] *Justice KS Puttuswamy v. Union of India* (2015) 8 SCC 735 (SC) para 134.
[56] PRS Legislative Research (n 44).
[57] The Code on Social Security 2020, s 114 (4).

This assessment will have to submit a form stating the number of gig workers associated with it at the start of every financial year and their annual turnover in the preceding year.

C. The costs will be passed on to the workers

Section 114 mandates the gig companies to contribute one to two percent of their annual turnover in a fund for gig workers. These contributions should not be more than five percent of the amount payable to gig workers. These contributions would have to be made to the Social Security Fund set up by the Central Government, to which the State and Central Governments will also contribute.[58] However, it is not clear for which specific schemes would these contributions be made for. Moreover, the Draft Rules under the Code do not mention how these funds would be disbursed.

Many commentators have pointed out that the gig firms will endeavour to pass on these costs to the workers, since these contributions will reduce their profit earnings.[59] Firms will become proactive to safeguard their revenues, which have taken a hit due to the pandemic. These added costs will also lead to selective hiring of gig workers.[60]

Gig employees generally work for more than one firm to supplement their income, switching between the platforms at their ease. However, the pandemic has laid bare the vulnerabilities of the geographically tethered gig-workers, whose income is solely dependent upon unrestricted movement. According to some estimates, big platform aggregators such as Uber, Ola, Swiggy, Zomato etc laid off 13 to 25 percent of their workforce.[61]

Majority of these workers were not provided with any termination benefits. This is due to the tendency of gig companies to fashion the workers as 'self-employed' who use the platform as a tool to further their own businesses; though the earnings of the workers are under the ultimate control of the firms since they do not have the power to negotiate the costs of the services they provide, which are predetermined by such firms. They are, thus, successfully able to recuse themselves from providing any socio-economic support to the gig workers.[62] In such a scenario, imposing deductions from their already meagre earnings threatens to push them to the brink of

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[58]The Code on Social Security 2020, s 141.
[59]Sharma (n 26).
[60]Ibid.
[61]KS Kumar, 'India's food delivery firms hit by Covid-19' (*Asia Times*, 18 May 2020) < https://bit.ly/2ZmpeRH> accessed 10 March 2021.
[62]Shipra and Minaketan Behera, 'Gig Work and Platforms during the Covid-19 Pandemic in India' (2020) 55 Economic and Political Weekly 45.

survival. The entire rationale of extending social security benefits to them will get defeated in the process.

D. A toothless legislation

A careful look at the provisions of the Code will make it clear that it has been drafted less as a statute and more as a recommendation report. The rampant use of phrases such as 'as may be specified' or 'as may be notified' with respect to the mandates of the Central and State Governments show that most of the provisions are not binding. A case in point are the provisions of Sections 109 and 114, which state that the respective governments shall frame and notify schemes with respect to unorganised sector, platform, and gig workers without any specific time frame within which such a legislation should be enacted. It is to be noted that no scheme has been announced yet. In the interim, there is no other scheme that gig workers can avail due to non-coverage of their categories of work. The Central Government has defended this by emphasising on the need of a 'flexible approach' in implementing these provisions.[63]

The Code fails to create a disincentive for the firms to not comply with its provisions. There are no penalties for non-contribution of provident fund dues by the firms. Principal employers are not liable to pay gratuity to contract workers. The Draft Rules issued under the Code have extended more concessions to construction firms.[64] For example, the rate of interest on delayed payment of cess has been reduced from 2 percent to 1 percent every month, the labour assessing officer has been deprived of the power to stop construction work indefinitely and they can visit such sites only after approval from higher authorities.

The Code also as a result, ostensibly fails in guaranteeing protection against sexual harassment at the workplace, especially in gig and platform work. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('Sexual Harassment Act') extends its jurisdiction to any place visited by the "employee" during the course of employment including the transportation.[65] Under this Act, women employees can claim formal accountability against the harasser and a resolution thereby. However, since gig platforms categorise their workers as "*independent contractors*," the Act does not protect them. To

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[63]Divya J Shekhar, 'Why the Code on Social Security, 2020, misses the real issues gig workers face' (*Forbes India*, 15 October 2020) <https://bit.ly/3mbJ7DN> accessed 10 March 2021.
[64]Jha (n 53).
[65]The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, s 2 (o) (v).

protect their workers, digital platforms must not only create a safer network of service providers and users, but also include "workplace harassment" in their dispute categories.

Hence, the above part, clearly depicts the gaps present in the framework and the immediate need to tailor the regime holistically. In pursuance of this objective, the next part seeks to analyze the practices in several jurisdictions and argue for their incorporation.

IV. A GLOBAL ANALYSIS: BORROWING LESSONS FROM OTHER JURISDICTIONS

The rise of gig and platform work and its increasing share in the labour market is a comparatively recent phenomenon. Although many countries do not have specific social security cover for such workers, some jurisdictions have taken cognizance of expanding the coverage of employment benefit schemes. Case in point is the European Union and the US State of California.

*A. The European Union ("**EU**")*

The European Commission does not have a singular definition of 'worker'. Instead, the EU case law on this subject has developed through how Member-States have interpreted it respectively. Three main criteria are used across European jurisdiction to determine the relationship of a worker with a business: the existence of a subordination link, the nature of work and the presence of remuneration.[66] This criterion creates a binary divide between employees and independent contractors. However, the rise of gig work has prompted the rejection of this binary and the establishment of a separate category of workers. Countries such as Germany, Austria and Italy have already forged separate categories of economically dependent workers which include gig workers within their fold.[67]

Some states in Germany extend social security benefits to "*employee-like-persons*" (*tarifvertraggesetz*). These are those workers who are economically dependent on their employer and need social protection.[68] It is not necessary that such an employer should exercise total control over their employees. This third category of workers have secured the right to

[66]Henri Ebelin, 'Social Protection of Platform Workers in the European Union' (2019) European Student Think Tank Policy Brief 19-07 < https://bit.ly/3vVcTjH > accessed 12 March 2021.
[67]Ibid.
[68]Gunther Mävers and Jannis Kamann, 'Germany: Employment & Labour Laws and Regulations 2020' (*ICLG*, 30 March 2020) < https://bit.ly/3Ef55vT> accessed 13 March 2021.

collective bargaining, paid leaves, guaranteed occupational safety and health and come within the ambit of anti-discrimination regulation based on EU law.[69]

Austria recognises a category of workers called "semi-dependent workers" or SDWs. They provide time-related services but not under any service contract.[70] Unlike self-employed persons, they do not have to bear organisational or financial for the services provided.[71] But like employees, they are paid for time contributed to a work and not on a per task basis. They are also entitled to social security benefits.[72] While an employee works for only one organisation, a SDW can provide their services two more than one person and get paid according to the time contributed.[73]

Since the 1990s, Italy has continuously increased social security contributions for para-subordinate workers. They are defined as those workers *"who collaborate with a principal under a continuous, coordinated and predominantly personal relationship, even if not of subordinate character."*[74] The workers had to contribute 1/3rd to these funds, while the rest was covered by the employer. The definition of para-subordinate work was revised to make it a "project-based work managed independently by a worker" rather than a continuous engagement.[75] However, the independent management of a project led to employers entering hybrid contracts of self-employment and subordination, allowing them to avoid paying social security costs. The para-subordination framework was abolished in 2015.

B. State of California, United States of America

Classification of workers as an employee or an independent contractor is important for availing federal and state employment benefits. While employees are eligible for a minimum wage, overtime pay, unemployment insurance, workers' compensation, paid leaves, discrimination and sexual harassment protections, such benefits cannot be availed by independent contractors.[76] However, businesses across the United States have partaken in the rampant malpractice of deliberately misclassifying workers as "independent contractors" to get out of

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[69]Contouris and De Stefano, 'New Trade Union Strategies for New Forms of Employment' (2019) European Trade Union Confederation, 27 <https://bit.ly/3CcxNwM> accessed 11 March 2021.
[70]Ibid 23.
[71]Ibid.
[72]Ibid.
[73]Ibid.
[74]Michele Tiraboschi, "The Italian Labour Market after the Biagi Reform" (2005) 21 International Journal of Comparative Labour Law and Industrial Relations 2.
[75]Ibid.
[76]Celine McNicholas and Margaret Poydock, 'How California's AB5 protects workers from misclassification' (*Economic Policy Institute*, 14 November 2019) <https://bit.ly/3pCpsiy> accessed 8 March 2021.

paying for the workers' employment benefits. A 2000 study commissioned by the U.S. Department of Labour found that between 10% and 30% of audited employers misclassified workers.[77]

When a worker is misclassified as an independent contractor, they lose out on basic protections that are guaranteed to an employee. They are also forced to pay a "self-employment tax" to avail the benefits of federal schemes such as Social Security and Medicare. This misclassification also leads to revenue loss for the State since companies avoid making their fair share of contributions, which must then be covered by the government.

To combat the misclassification of workers, the US State of California introduced a legislation, Assembly Bill (AB5).[78] AB5 uses the 'ABC' test that has been frequently used by courts and government agencies to determine whether a worker is an employee of a firm. This test places the burden on the business to show that a worker is an independent contractor and hence, is ineligible to avail employment benefits. Under this test, a worker is an independent contractor if they are –

a. Are free from control and direction by the hiring company;

b. Perform work outside the usual course of business of the hiring entity; and

c. Are independently established in that trade, occupation, or business.

The legislation also protects businesses that properly classify their workers from unfair competition from companies that undercut their costs by misclassifying workers. This is done by imposing hefty fines on companies that deliberately misclassify their workers. The legislation makes it difficult for companies to avoid making contributions for their employees Social Security, Medicare, unemployment insurance and state workers compensation insurance. A study by the UC Berkeley Centre for Labour and Education estimates that 64% of workers who currently do independent contracting as their main job would be categorized as an employee under the ABC test.[79]

A necessary implication of AB5 was the greater scrutiny that gig employers would have to face with respect to the classification of their workers. Although this legislation has an across-the-

[77]Planmatics Inc., 'Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs' (2000) United States Department of Labour, 63 <https://bit.ly/3B6R8hC> accessed 13 March 2021.
[78]'Governor Newsom signs legislation 9.18.19' (*Office of Governor Gavin Newsom,* 18 September 2019) <https://bit.ly/3CeNofs> accessed 10 March 2021.
[79]Sarah Thomason and others, 'Estimating the Coverage of California's New AB5 Law' (2019) UC Berkeley Labor Center <https://bit.ly/3mjqWMN> accessed 6 March 2021.

board application and makes misclassification of even janitors, construction workers, home health aides, and hotel and hospitality workers difficult,[80] digital aggregators have opposed it vociferously. Companies such as Uber, Lyft, Postmates etc successfully sponsored a referendum to get an exemption from the application of AB5 on their businesses. In November 2020, majority of Californians voted in favour of granting this exemption, allowing these companies to classify the workers providing services through their platforms as independent contractors.[81]

While AB5's implementation might not have come to fruition, it does bid to differentiate between employees and independent contractors. In the context of the Code, the test can help in filling the gaps in the definition of gig work. These tests and yardsticks can be used to assess the level of subordination and control exercised by a platform/employer over its workers in the context of a non-traditional work arrangement. This will help in better identifying the potential and the true beneficiaries of the social security benefits.

V. An Attempt To Bridge The Hiatus: Tailoring The Regime

The above parts depict the need to bridge the ever-widening gap and create a sustainable model of providing social protection to gig workers. In light of this objective, we propose the following suggestions which would aid in the creation of an inclusive framework and effectively address the issues being faced.

The inaccurate legal status of gig workers creates imbroglios that are sought to be reconstructed. The Code has defined gig workers to be outside the purview of the traditional employer-employee relationships, and hence, are excluded from the existing social security benefits until a scheme is notified.[82] Furthered, by the deliberate exclusion of workers through misclassifying the nature of employment despite exercising sufficient control and supervision over the workers by the employers.[83] Such a practice was not foreseen by the Code and fails to provide a remedy. Through this paper, we advocate for the provision of a rebuttable presumption where it would be presumed that all workers are employees and have an inherent

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[80]McNicholas and Poydock (n 76).
[81]Explained Desk, 'Explained: What passage of Proposition 22 means for Uber, Lyft, their workers in California' (*Indian Express*, 12 November 2020) <https://bit.ly/3majFyw> accessed 15 March, 2021.
[82]The Code on Social Security 2020, s 2(35).
[83]Wilma B Liebman, 'Debating the Gig Economy, Crowd work and New Forms of Work' (2017) 7(6) Soziales Recht 222.

right to claim social security. The employers can seek to rebut this assumption by proving the tenets of independence. Thus, through this paradigm, gig workers will not have to face the brunt of being miscategorized and denied benefits. Moreover, for the provision of social security, they need not prove their nature of employment again-and-again and will automatically be enabled to receive incentives, which is warranted considering the living realities. Consequently, we propose the disconnection and the decoupling of social protection from the employment status.

In order to adapt to the very nature of 'gig' work which is engaging with multiple employers simultaneously, the mechanisms must ensure the portability of entitlements and facilitate labour transitions.[84] This can be done through streamlining and simplifying administrative procedures of electronic registration. Labourers in India are largely uneducated and might not be able to understand the nuances of the digital world.[85] Though helplines, toll-free-call-centres have been sought to be established,[86] the promise of inclusivity must not be forgotten. The personnel engaged must be trained in vernacular languages and patiently assist the enrolment. The mandate of 'AADHAR'[87] and the burden of documentation hints at the possible exclusion of several workers since registration is a *sine-qua-non* to receive these benefits.[88] Hence, we propose that other easily available documents like Ration Cards be used instead.

Moreover, 'unified social security numbers' must be sought to be provided so that portability of rights is ensured. Since gig work is dynamic in nature, such numbers would permit a smooth transition amongst jobs. Additionally, concepts akin to 'refillable and rechargeable rights'[89] must be introduced which ensures continued protection during labour transitions. It was showcased that if an unemployed person were to accept another job then they would lose the remaining unemployment insurance and this would be problematic if the new work was for a shorter duration.[90] Hence, these rights allow for the conservation of these entitlements provided the workers have worked for a minimum of 150 hours.[91] It was noted that such rights enable

[84]Christina Behrendt and others, 'Social Protection Systems and the Future of Work: Ensuring Social Security for Digital Platform Workers' (2019) 72(3) International Social Security Review 32.
[85]'Labour Demand and Supply to Digital Platforms Increase: ILO' (*The Hindu Business Line*, 23 February 2021) <https://bit.ly/3jC6wwx> accessed 6 March 2021.
[86]The Code on Social Security 2020, s 112.
[87]The Code on Social Security 2020, s 113(2).
[88]The Code on Social Security 2020, s 113(3).
[89]'The State of Application of the provisions of Social Security of the International Treaties on Social Rights ratified by France' (*International Labour Organization*, 2 September 2016) <https://bit.ly/3maeLS1> accessed 6 March 2021.
[90]Ibid.
[91]Ibid.

the workers to face the realities of the labour market and allowed for easier facilitation vis-à-vis multiple changes of jobs. Since gig work involves the transition from jobs, such measures would provide continued benefits and incentivize employment.

Furthermore, the framework must be developed to traverse towards alternative funding arrangements since we acknowledge that the provision of these benefits might be onerous for an employer. The Workers Welfare Funds primarily devised for the construction industry in India offer an implementable remedy.[92] Here, the construction firms are required to contribute some percentage of their annual turnover for social security for all the workers (including ad-hoc or casual labourers) involved in the project ensuring universal coverage.[93] Similarly, several other industries contribute a share of their earnings if a particular threshold is received. For instance, the social insurance schemes for artists in Germany are provided if the employer's earnings exceed a certain level.[94] The Code has adopted a similar provision for 'platform workers' where the aggregator ought to pay a share of their annual earnings to the Government.[95] While this provision has been criticized to be a shroud of deception, the basic tenets can be meaningfully captured. Hence, such an alternative financing arrangement would not burden the employer as the social security would be in proportion to their turnover.

The context of social security for this paper was both contributory and non-contributory mechanisms. Apart from cash transfers, another popular non-contributory method is tax-financed initiatives. This would mean tax revenues being used to finance social security systems.[96] It has been analyzed that the division of financial burden amongst different groups would ensure economic sustainability. This measure would play a dominant role in bridging the gap and providing a basic social protection floor. Especially, in the case of gig workers who do not reach the minimum threshold of security and are unable to earn adequate entitlements. Through this model of redistributive justice and risk-sharing, a comprehensive framework of universal social security can be guaranteed. The current times warrant a 'public social protection framework' which would be based on an appropriate amalgamation of contributions and taxes since such a system could cater to the constantly growing population of gig workers.

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[92] Abhivyakti Banerjee and Kashyap Raibagi, 'Why Construction Workers missed Government Benefits for 23 Years?' (*IndiaSpend*, 20 April 2019) <https://bit.ly/3BcjIOH> accessed 7 March 2021.
[93] Ibid.
[94] The Social Security program is called as Künstlersozialversicherung.
[95] The Code on Social Security 2020, s 114(4).
[96] ILO Geneva (n 28).

Furthermore, the modalities surrounding contributions must be simplified and streamlined. Administrative procedures such as flexible contribution schedules based on different categories must be incorporated to ensure regular payment.[97] Certain companies have introduced mechanisms where a social security contribution is added to the earning per share by the workers.[98] This ensures that gig workers receive benefits tantamount to the work they do and the wages they earn. Moreover, other organizations share the income data about the workers with the social security institutions and tax authorities, so that direct collection of security benefits could take place.[99] Online automatic transmissions have eased out the inconvenience and facilitated access.[100]

Additionally, the duty of the State as an intermediary must be recognized and active steps must be taken vis-à-vis its involvement in providing social security. The government has been at the forefront while providing and contributing to social security in several insurance schemes and hence, the gig workers must also be a beneficiary to these schemes and provisions.[101] This would even ease the burden on the employers to a great extent leading to a potential coverage for all workers coupled with a much-needed boost to the gig economy. Moreover, the imperative role of the State becomes apparent when social protection is viewed through a 'gendered lens'. It was highlighted that despite the advantages of flexibility offered to women in the gig economy, women were severely disinterested.[102] The major reason is the exclusion from the Sexual Harassment Act since protections are granted only to 'employees' and gig workers fall outside the purview of this legislation.[103] The barriers to accessing redressal mechanisms for sexual harassment must be removed. The gig economy primarily works on the 'feedback model' and hence, women fear that raising disputes would consequentially lead to improper feedback and ratings, leading to unemployment.[104] Thus, there exists the immediate need to establish a transparent facilitative platform without any prejudice associated to a party. It has been argued that while the provision of social security to men has itself been onerous, a

[97]'Comparative Social Security Benefits' (2017) Deloitte <https://bit.ly/3mcFGN7> accessed 6 March 2021.
[98]BPS Uruguay, 'Formalizing enterprises and workers in the Shared Economy: A Case of the Social Insurance Bank', (2017).
[99] Christoph Freudenburg, 'Rising Platform Work: Scope, Insurance Coverage and good practices amongst ISSA Countries', Geneva, (2019).
[100] Ibid.
[101]Behrendt (n 84).
[102]Terri Chapman, Samir Saran, Rakesh Sinha, Suchi Kedia & Sriram Gutta, 'The Future of Work in India', *ORF*, October 2018, <https://www.orfonline.org/wp-content/uploads/2018/10/Futureof-Work-in-India_Report.pdf>, accessed March 9, 2021.
[103]The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, s 2(o)(v).
[104]Ria Kasliwal, 'Gender and the Gig Economy: A Qualitative Study of Gig Platforms for Women Workers' (2020) ORF Issue Brief No. 359 <https://bit.ly/3GgIXmG> accessed 9 March 2021.

further provision to women would disincentivize the employers to employ women.[105] This would make the remedy worse than the disease. Financial costs on women's employers wouldn't lead to equality in today's milieu.[106] Thus, in such situations, the State must step in as contributors, as facilitators, as enablers to the creation of a 'level playing field' which would expand opportunities for women in the gig economy.

Apart from the State, worker organizations and trade unions must be equipped in facilitating social security for gig workers. Particularly, it was showcased that in several jurisdictions, welfare institutions have been successful in negotiating the inclusion of gig workers in social schemes and reducing their shares of contribution.[107] The collective effort taken by all the stakeholders would enable the completion of this enormous task.

VI. CONCLUSION

Gig Economy is predominantly now an intrinsic part of the labour market and hence, steps must be taken in order to provide basic social security measures for the gig workers. The benefits of adopting such a paradigm are innumerable. These advantages act as an impetus in warranting the shift from a paradigm of non-provision of social protection to an environment where a comprehensive system of social security is established to guarantee this imperative right. Unfortunately, in India, the realities are starkly different and warrant a re-look. The Code is marred by lacunae with respect to extending social security benefits to gig workers. Overlaps in definitions, fragmented scheme delivery structures, passing down of costs to the workers and non-availability of tools to ensure that firms make their fair share of contribution has raised questions on the efficacy of this Code. In this regard, some European countries and the AB5 model from California provide alternatives to consider the heterogeneity of the gig economy according to the varying degree of control exercised by the employers over the workers. Through this paper, we aim to propose policy suggestions which if incorporated would accentuate the existing framework to an exceptional and unparalleled regime.

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[105]Soumya Kapoor Mehta and Aparajita Bharati, 'Looking at social protection for gig workers through a gender lens' (*The Hindu Business Line,* 30 October 2020) <https://bit.ly/2ZjFrXE> accessed 9 March 2021.
[106]Ibid.
[107]K Vandaele, 'Will Trade Unions survive in the platform economy? Emerging patterns of platform worker's collective voice and representation in Europe' (2018) ETUI Working Paper No. 2018.05 <https://bit.ly/3Bek1IT> accessed 25 October 2021.

THE TREATMENT OF 'SPECIAL ALLOWANCE' FOR CALCULATION OF GRATUITY: FITTING A SQUARE PEG IN A ROUND HOLE?[1]

Abstract

The Supreme Court of India, in 2019, made a seismic change to the Labour law regime by ruling that 'special allowances' which are paid "uniformly, necessarily and ordinarily" to employees fall within the term 'basic wages' defined under Section 2(b)(ii) read with Section 6 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Regarding the treatment of "special allowance" for the Payment of Gratuity Act, 1972's gratuity calculation, there has, nonetheless, been considerable ambiguity since this verdict. This question warrants an answer also because both the EPF Act and the Gratuity Act are social welfare legislations. Thus, in the present article, the author seeks to critically examine the treatment of special allowance for the calculation of gratuity and examine it in light of the jurisprudence constante in India and the Supreme Court's 2019 ruling in Vidyamandir, in particular.

KEYWORDS: *SPECIAL ALLOWANCE, BASIC WAGES, GRATUITY CALCULATION, EMPLOYEES PROVIDENT FUND, SOCIAL WELFARE*

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I. INTRODUCTION

"*Without labour nothing prospers.*"

(Quote attributed to Sophocles)

The Indian labour law regime is undergoing a paradigm shift with regional blocs in India rethinking the best way to protect workers' rights while facilitating the growth of employment.[1] The significance of the dignity of the human labour, as well as the necessity to safeguard the interest of labour, are incorporated in the Constitution of India. As per the Constitution of India, labour is a subject enshrined in the concurrent list, which means both the Central and State governments can legislate.[2] In fact, besides the existence of fundamental rights for citizens under Chapter III such as equality,[3] Chapter IV entails certain Directive Principles of State Policy as regards labour.[4] These are, *inter alia*:

"(i) Article 39: it provides that "the State shall, in particular, direct its policy towards securing— (a) […] an adequate means of livelihood; […]; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers […] are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength";[5]

(ii) Article 42: it delineates that the State shall make efforts towards ensuring just and humane conditions for its workers;[6]

(iii) Article 43: it states that "the State shall endeavour to secure […] to all workers […] work, living wages and work conditions ensuring a decent standard of life".[7]"

Relatedly, in 2019, the Ministry of Labour and Employment introduced four bills on labour law compliance with an intent to consolidate the existing 29 central laws regulating wages,

[1]See eg Chandrajit Banerjee, 'Labour reforms can help reshape India's growth trajectory', (*The New India Express*, 05 October 2020), < https://www.newindianexpress.com/opinions/2020/oct/05/labour-reforms-can-help-reshape-indias-growth-trajectory-2205888.html> accessed 24 March 2020.
[2]Constitution of India 1950, schedule VII, art 246.
[3]Constitution of India 1950, ch III.
[4]Constitution of India 1950, ch IV.
[5]Constitution of India 1950, art 39.
[6]Constitution of India 1950, art 42.
[7]Constitution of India 1950, art 43.

industrial relations, social security, and occupational safety, health and working conditions.[8] These Codes are: the Code on Wages, 2019 ("**Wages Code**"); the Code on Social Security, 2020 ("**Social Security Code**"); the Industrial Relations Code, 2020; and the Occupational Safety, Health and Working Conditions Code, 2020. As such, seismic changes from a labour law compliance perspective were largely evident from 2019 onwards.

One such shift made by the judiciary is the treatment of 'special allowance' for the calculation of Provident Fund ("**PF**"). In its decision in *The Regional Provident Fund Commissioner (II) West Bengal v Vivekananda Vidyamandir & Ors* ("**Vidyamandir**"),[9] Hon'ble Justices Arun Mishra and Navin Sinha of the Supreme Court of India ruled that 'special allowances' which are paid "uniformly, necessarily and ordinarily" to employees fall within the term 'basic wages' defined under Section 2(b)(ii) read with Section 6 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 ("**EPF Act**").[10] Consequently, an establishment under the EPF Act could be attributed liability in case of non-inclusion of special allowance while the payment of PF.

However, the treatment of 'special allowance' as regards the calculation of payment of gratuity remains far from clear. Similar to the EPF Act, the Payment of Gratuity Act, 1972 ("**Gratuity Act**") is a social welfare legislation, with employees fondly anticipating gratuity amount as their retirement benefit calculated on the gratuity contributed by employers. This, therefore, posits the position of special allowance and gratuity as a spaghetti bowl with few ingredients but several questions, such as, would employers be held liable for the failure to calculate gratuity on basic wages inclusive of special allowance? As such, concerns pertaining to the inclusion of special allowance under the purview of basic wages for gratuity calculation are inevitable.

In this article, we critically examine whether special allowance should be included in basic wages while calculating gratuity, and examine it in light of the *jurisprudence constante* in India and the *Vidyamandir* case, in particular. In order to do so, in Section 2, we will take a look at the legislative and judicial approach towards the non-inclusion of 'special allowance' towards the calculation of gratuity. Then, in Section 3, a comparative reference is made to (i) the EPF

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[8]S.S. Rana & Co. Advocates, 'Changes In New Labour Codes' (*Mondaq*, 6 July 2021) <https://www.mondaq.com/india/employee-benefits-compensation/1087764/changes-in-new-labour-codes> accessed 3 October 2021.
[9]*The Regional Provident Fund Commissioner (II) West Bengal v Vivekananda Vidyamandir & Ors* AIR 2019 SC 1240.
[10]Employees Provident Fund and Miscellaneous Provisions Act 1952 (EPF 1952), s 2(b)(ii) and s 6.

Act; and (ii) the Code on Wages, 2019 and the Social Security Code, 2020 for determining whether special allowance be considered as a constituent of wages for gratuity payment. We will end with a conclusion in Section 4.

II. THE LEGISLATIVE AND JUDICIAL NARRATIVE: NON-INCLUSION OF 'SPECIAL ALLOWANCE' FOR CALCULATION OF GRATUITY

The Gratuity Act – similar to the EPF Act, the Employee State Insurance Act, 1948, etc. – stipulates certain minimum benefits that must be conferred to the employees. Carving a strict liability on the employer/establishment to contribute towards gratuity, it is a welfare promising legislation that ensures that workers maintain a reasonable living standard post-retirement.[11] Under the Gratuity Act, the establishments which employ 10 or more persons are obligated to contribute towards the gratuity amount.[12] This article explains the present position of the non-inclusion of special allowance under the purview of wages for gratuity amount in a three-prong manner: (i) legislative approach; (ii) judicial approach; and (iii) rules of interpretation.

A. Legislative Approach

The gratuity is payable to persons covered within the purview of the term 'employee' under Section 2(e) of the Gratuity Act, albeit contingent upon the conditions entailed in Section 4 of the Act.[13] An 'employee' is defined as "any person (other than an apprentice) ***employed on wages***, in any establishment, factory […] and is governed by any other Act or by any rules providing for payment of gratuity".[14] Section 4 provides that gratuity applies where an employee has extended continuous services for at least five years.[15] It further specifies that the employer shall calculate gratuity "at the rate of fifteen days wages based on the rate of wages last drawn by the employee".[16] To clarify, it provides an explanation that the computation is made in the following manner: Last Drawn Monthly Wages × 15/26 × Number of Years of Service. The term 'wages' means:[17]

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[11]Roopa Somasundaran and Garima Mehra, 'Key Amendments In Payment Of Gratuity Act' (*Mondaq* 2 January 2019) <https://www.mondaq.com/india/employee-benefits-compensation/768716/key-amendments-in-payment-of-gratuity-act> accessed 4 October 2021.
[12]The Payment of Gratuity Act 1972, s 3(b).
[13]The Payment of Gratuity Act 1972, s 4 and s 2(e).
[14]ibid, s 2(e).
[15]The Payment of Gratuity Act 1972, s 4.
[16]The Payment of Gratuity Act 1972, s 4(2).
[17]The Payment of Gratuity Act 1972, s 2(s).

"[A]ll emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance ***but does not include*** any bonus, commission, house rent allowance, overtime wages and ***any other allowance***." (emphasis supplied)

Thus, legislatively, gratuity shall be calculated on all emoluments payable to an employee in cash, including dearness allowance ("**DA**"), excluding "any other allowance" from its realm. Thus, unlike dearness allowance, special allowance has not been accorded an express mention by the drafters. Largely, this would evidence that it would fall under the phrase "any other allowance", evidencing an exclusion.

B. Judicial Approach

In the recent past, the question as to whether an establishment was liable under the Gratuity Act in the context of special allowance/any other allowance paid to its employees had arisen. In 1977, the Supreme Court in *Straw Board Manufacturing Co. Ltd. v. Its Workmen* ("**Straw Board v. Workmen**"),[18] has held that gross wages inclusive of DA would be considered while calculating gratuity amount. Specifically, it clarified that the term 'wages' herein means that it merely includes basic wages and DA (including variable DA) and nothing else.[19] Then, in 2011, the Karnataka High Court, in *Manipal University v. Vasantha Kotian*,[20] was confronted with this issue. Herein, the Controlling Authority had ordered the inclusion of 'special allowance' in wages, which means that gratuity would be calculated on both basic pay and special allowance. With respect to the inclusion of special allowance, the Court did not address its tenability. The Court did remark, however, that variable allowance, when paid to all employees universally, comes under the purview of 'any other allowance' and as such, cannot be included within the term wages.[21]

Furthermore, the Bombay High Court, in *State Bank of India, Panaji-Goa and Laxmikant Vithal Palekar and others*,[22] considered whether special compensatory allowances, payable universally to all employees, would formulate part wages for the purpose of calculation of gratuity. It found that since such allowance would come under the purview of 'other allowances' as held in *Straw Board v. Workmen*, it would not constitute a part of the wages for

[18] *Straw Board Manufacturing Co Ltd v Its Workmen* AIR 1977 SC 941.
[19] ibid.
[20] *Manipal University v Vasantha Kotian* 2012 (4) KARLJ 429.
[21] ibid.
[22] *State Bank of India v Shri Laxmikant Vithal Palekar and others* (2011) 2 LLJ 844.

the purpose of gratuity calculation.[23] Analogously, it is safe to deduce that special allowance is not included within wages for gratuity amount.

C. An Interpretative Approach

Apart from the above, in order to understand the meaning of 'wages' under the Gratuity Act, as it exists today, the doctrine of *noscitur a sociis* may be relied upon for comprehending a term whose meaning is not entirely ascertainable or is doubtful.[24] Precisely because the scope of wages has been the topic of legal discussion overtime, one of the instances being the inclusion of a "variable allowance" in wages, as shown above. An examination of the word 'wages' as defined under the Act would show that it has two components: (i) inclusive and (ii) exclusive.[25] As regards the inclusive component, it encompasses all emoluments per the terms and conditions of his employment and would also include DA. However, as regards the exclusive component, bonus, commission, HRA, and 'any other allowance' are excluded.

Applying the said doctrine, a similar conclusion to the one shown in the preceding sections is present. Had the intention of the legislature been to include allowances, not specifically enumerated, it would have provided for any other allowance in the inclusive component of the definition of wages.

In fact, the Supreme Court has clarified in *Union of India v. Harbhajan Singh Dhillon*[26] that 'any other matter' (*akin* to any other allowance) cannot be interpreted to mean a subject matter included by way of exclusion, and only those explicitly enumerated in the provision would come under the purview of the subject matter.

Thus, it can be construed that any and every allowance, except for the ones explicitly enumerated therein, i.e., in the definition of wages under the Gratuity Act, which follow "bonus, commission, house rent allowance, overtime wages" would come under the definition of the term 'any other allowance' and shall not be included for the purpose of calculation of gratuity. However, it is pertinent to observe that post the recent transposition of the labour laws such as under the EPF Act, where special allowances are now deemed constituent of basic

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[23]ibid.

[24]*Rohith Pulp & Paper Mills Ltd v Collector of Central Excise* AIR 1991 SC 754 ('Associated words take their meaning from one another under the doctrine of nosciture a sociis, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it' and 'This principle has been applied in a number of contexts in judicial decisions where the Court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used.').

[25]The Wages Code 2019, s 2(y).

[26]*Union of India v Harbhajan Singh Dhillon* AIR 1972 SC 1061.

wages for calculating provident fund (as will be discussed in Section III(1) in length), neither the Supreme Court nor the legislature has conclusively settled the position of law on the inclusion of special allowance for calculation of gratuity, yet. As a result, establishments/employers are more concerned about whether they will be held accountable in the future if they fail to include special allowance while calculating gratuity.

III. RIDING THE NEW PRO-WORKERS' RIGHTS CONTOURS: INCLUSION OF 'SPECIAL ALLOWANCE' FOR CALCULATION OF GRATUITY

Oft-times, establishments are willing to comply with the legal requirements in terms of contribution to gratuity, bonus, PF, and employee state insurance, among others. However, in the absence of a rigid framework for calculating the amount to be paid, establishments encounter issues regarding the correct approach of calculation.

A. A Comparative Reference to the Regime under the EPF Act

Under the EPF Act, employers contribute towards the PF account of their employees defined under Section 2(f) of the Act. Nearly identical to the definition under the Gratuity Act, an 'employee' under the EPF Act is defined as "any person who is ***employed on wages*** in any kind of work, manual or otherwise, in or in connection the work of an establishment […]".[27] Section 6 provides that the contribution made by an employer to the Fund shall be "twelve percent of the **basic wages**, dearness allowance and retaining allowance".[28] The term 'basic wages' means:[29]

"All emoluments […] in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but ***does not include*** –

i. the cash value of any food concession;

ii. any ***dearness allowance***, that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living, house-rent allowance, overtime allowance, bonus, commission or ***any other similar allowance payable*** to the employee in respect of his employment or of work done in such employment;

[27] EPF 1952, s 2(f).
[28] EPF Act, s 6; EPF Scheme, 1952, para 6.
[29] EPF 1952, s 2(b).

[…].” (emphasis supplied)

A perusal of the legislative scheme suggests that basic wages do not include ‘any other similar allowance’ under its purview, and in fact, Section 6 restricts that PF is contributed merely on “basic wages, dearness allowance and retaining allowance”. However, in the recent past, the question as to whether an establishment was liable under the EPF Act in the context of special allowance paid to its employees had arisen repeatedly.

The Supreme Court clarified the position in *Bridge and Roof Co. (India) Ltd. v Union of India* (“**Bridge and Roof**”) in 1962, based on an interpretation of Sections 2(b) and 6 of the EPF Act. The Court held that where the wage is being paid “universally, necessarily and ordinarily” to all employees without prejudice, such emoluments would be termed as ‘basic wages’.[30] However, if those wages are specifically available to a certain class or those who avail of an opportunity, they are not basic wages.[31] For instance, overtime allowances, as the name suggests, might be earned as per the contractual terms agreed to by the parties or on specific occasions, but generally is not provided to all employees, unless otherwise. Resultantly, basic wages exclude overtime allowances. Conversely, a special allowance paid for a particular work to certain employees could not be a component of basic wages. The question came up for adjudication again before the Madras High Court in *Reynolds Pens India Pvt. Ltd. v RPFC and others*,[32] and Madhya Pradesh High Court in *Montage Enterprises Pvt. Ltd. v. Employees Provident Fund Commissioner, Indore, and another*,[33] wherein the Courts, placing reliance on the decision of *Bridge and Roof*, further upheld the principle of treatment of special allowance as a part of basic wages for the purpose of PF liabilities.

Whereas, in cases such as *R. Ramanathan Chettair Jewellers Madurai v. Regional Commissioner, EPF*,[34] it was held that special allowance paid to the employees shall not be taken into consideration for the purpose of calculating the contribution payable, since such special allowance would not fall under the definition of ‘basic wage’ as per the provisions of the EPF Act [Sections 2(b) and 6 of the EPF Act].

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[30] *Bridge and Roof Co (India) Ltd v Union of India* (1963) 3 SCR 978.
[31] ibid.
[32] *Reynolds Pens India Pvt Ltd v RPFC and others* 2011 (131) FLR 690.
[33] *Montage Enterprises Pvt Ltd v Employees Provident Fund Commissioner and Anr* 2011 SCC OnLine MP 2285.
[34] *R. Ramanathan Chettair Jewellers Madurai v Regional Commissioner, Employees Provident Fund, Madurai* 1998 LLR 1145; See also *The Regional Commissioner, Employees' Provident Fund, Pondicherry v The Management, Alloy Foundries (P) Ltd* 93 L.W. 797.

Separately, in *Harihar Polyfibres v. Regional Director, ESI Corporation* ("**Harihar v ESI**"),[35] the Supreme Court has held that the social welfare legislation should receive liberal and beneficent construction. Relying on that, even if two views are possible, one in favour of the employees should be upheld.

In this context, vide judgment—the *Vidyamandir* decision—the Supreme Court clarified the longstanding question of the treatment of special allowance and held that such allowance constitutes a component of basic wages for the purpose of PF calculation. In so doing, it reiterated the principles laid down in *Bridge and Roof* case. Thus, if the payment of a special allowance does not satisfy the test of universality, it would stand excluded from basic wages. As such, the test for exclusion from the realm of basic wages is as follows: the allowance is (i) variable; (ii) connected to an employee in terms of performance incentives; (iii) paid to certain employees who utilize an opportunity; and (iv) not paid to all employees.[36]

In fact, vide a circular dated 20 March 2019, the EPF Organisation has enjoined Central and Regional PF authorities to have due regard to the *Vidyamandir* case and take necessary actions. Thus, the satisfaction of the test of universality would advocate for a special allowance to be a part of basic wages.

B. A Comparative Reference to the Definition and Jurisprudence under the Code on Wages, 2019 and the Social Security Code, 2020

Reference may be made to the definition of 'wages' under the Wages Code, which is yet to be implemented and seeks to consolidate the definition of 'wages' across different legislations, such as the Payment of Wages Act, 1948 and the Minimum Wages Act, 1948.[37] The above analysis will be relevant as the employees earning the prescribed minimum wage are likely to fall within the various thresholds prescribed by various employment laws such as the EPF Act, the Employees' State Insurance Act and the Gratuity Act. Consequently, the treatment of

[35] *Harihar Polyfibres v Regional Director, ESI Corporation* (1984) 4 SCC 324.
[36] Anshul Prakash, Jeevan Ballav Panda, Meher Tandon, and Abhishek Choudhury, 'Supreme Court on Employees' Provident Fund Contributions: Universality is the Test to Consider Allowances as 'Basic Wages'' (*Mondaq*, 12 March 2019) <https://www.mondaq.com/india/employment-litigation-tribunals/788998/supreme-court-on-employees39-provident-fund-contributions-universality-is-the-test-to-consider-allowances-as-basic-wages39> accessed 5 October 2021.
[37] PDS Legal, 'Code on Wages, 2019 – Key Features And Highlights' (*Mondaq* 23 October 2019) <https://www.mondaq.com/india/employee-benefits-compensation/856716/code-on-wages-2019-key-features-and-highlights> accessed on 5 October 2021.

special allowance within wages for the purpose of gratuity contribution is pertinent as it may have an effect on the company's liabilities and employees' benefits.

The Wages Code defines 'wages' under Section 2(y) to mean "***all*** remuneration whether by way of ***salaries, allowances or otherwise***, […], if the terms of employment (express or implied) were fulfilled […] and ***includes***, — (i) basic pay; (ii) dearness allowance; and (iii) retaining allowance, if any".[38] However, it shall *inter alia* not include any housing accommodation; house rent allowance, conveyance allowance and travelling concession; and sums paid to the employee to defray special expenses.[39] As such, it provides for an exhaustive list of the inclusive and exclusive components, and more specifically, does not exclude special allowance from its purview.

Precisely, 'wages' does not refer to all the payments made to employees and featuring in the cost-to-company ("**CTC**") structure. Rather, over the years, the judiciary has carved a framework of what would and would not constitute wages. As seen, above, the remuneration which would constitute wages must have a direct nexus with the fulfillment by the employee of the terms of the concerned contract. Thus, as noted in *Balaram Abaji Patil v MC Ragojiwalla*,[40] on the satisfaction of the terms of the contract, the employer is liable to pay, and the employee is entitled to receive the requisite remuneration. However, wages would typically not include the following, at the least:

a. *Discretionary remuneration*: where an employer has the right to withdraw or modify the payment.[41]
b. *Contingent remuneration*: where the payment is contingent upon satisfaction of certain condition(s). For instance, a night shift allowance is contingent upon the employee actually working in a night shift and consequently, would not be a wage.[42]
c. *Incentive remuneration*: where the payment is subject to meeting certain performance targets. These payments are not payable as a matter of right.[43]
d. *Remuneration not made in the ordinary course*: The expression used in the definition of 'wages' is "whether by way of salaries, allowances or otherwise". A payment falling under

[38]The Code on Wages 2019, s 2(y).
[39]ibid.
[40]*Balaram Abaji Patil v MC Ragojiwalla* (1960) IILLJ 491 (Bom).
[41]See eg *ESIC Hyderabad v Andhra Pradesh Paper Mills Limited* (1978) 1 LLJ 469.
[42]See eg *Bharat Electronics Limited v Industrial Tribunal* AIR 1990 SC 1080.
[43]See eg *National Engineering Industries v The Employees' State Insurance Corporation* (1991) 63 FLR 277; *Pandian Roadways Corporation Limited v Principal Labour Court, Madurai* (2002) 1 LLJ 111.

'or otherwise' should have the same characteristics as are inherent in salaries and allowances, by virtue of the rules of statutory interpretation.[44]

In view of the preceding definition of wages read with the aforesaid judicial precedents, when a special allowance is not discretionary, contingent, incentive, or otherwise, and is instead generally distributed to all employees, it should be deemed a component of the basic wages. This is further corroborated by the fact that in the exhaustive list provided by the Wages Code,[45] no specific exclusion *vis-à-vis* special allowance has been made. Moreover, a bare perusal of the clause[46] would evidence that wages include salaries and 'allowances', not otherwise excluded.

At this juncture, reference may further be made to the Social Security Code, which is yet to be implemented and seeks to consolidate eight laws subsuming the Gratuity Act.[47] We identified above that the definition of 'wages' under the Wages Code ought to include a special allowance. Identically worded under the Social Security Code,[48] the term 'wages' would analogously include special allowance within its amplitude.

C. An Analogous Understanding: So, What's Next?

While it is clear that the term 'wages' should ideally be inclusive of 'special allowance', the validity of this argument for gratuity contribution remains debatable. Our assessment is that the answer is probably 'yes' to the inclusion of special allowance for gratuity contribution, as will be seen, below.

Holding that the EPF Act is a benevolent and social security legislation, i.e., for the benefit of employees and to thereby vindicate this purpose, the Supreme Court in *Vidyamandir* concluded that special allowance is included for a contribution towards the PF. Similar is the intention underlying the Gratuity Act. In the decision of *P. Selvraj v The Management of Shardlow, India*, the Madras High Court emphasized that the Gratuity Act is a "beneficial piece of legislation and it should receive an interpretation consistent with the principles of equity and fair play".[49] It further held that the term 'wages' should not be accorded an artificial

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[44]See eg *Sulabh International Social Service Organisation v Prem Chandra Jha and Another* (2008) 5 ADJ 562.
[45]The Wages Code 2019, s 2(y).
[46]ibid.
[47]Ashima Obhan and Akanksha Dua, 'The Social Security Code, 2020' (*Mondaq*, 28 October 2020) <https://www.mondaq.com/india/employee-benefits-compensation/998964/the-social-security-code-2020> accessed on 6 October 2021. ("Obhan and Dua")
[48]The Social Security Code 2020, s 2(88).
[49]*P. Selvraj v The Management of Shardlow, India* (2006) 4 MLJ 1728.

interpretation, rather it should be just and must include what is payable and not only what is being paid presently.[50] In order to not impart an artificial interpretation to the term 'wages' under the Gratuity Act, which is verbatim to the one tendered under the EPF Act, an interpretation inclined towards the employees' benefits ought to be adopted. By and of itself, therefore, the interpretation taken by the Supreme Court, as a whole, in the *Vidyamandir* decision for the EPF Act should be considered.

It has also been held in *Harihar v ESI* that social welfare legislation should obtain a liberal construction.[51] In this context, the Gratuity Act should receive an interpretation that prefers the approach of including special allowances for gratuity calculation. This would provide employees with a large retirement corpus, ensuring a high standard of living post-retirement as well.

More specifically, there exists a possibility that employers may conveniently term a major part of their salary structure as a special allowance to circumvent statutory payments like gratuity, taking advantage of the definition of 'wages' under the Gratuity Act, thereby restricting/depriving the enhanced monetary benefits due to employees arising out of the provisions of the Gratuity Act by taking shelter under the definition of wages. In such a case, a controlling authority may contest for the exclusion of special allowance for the purpose of calculation of gratuity. This reasoning emanates from the decision in *Vivekananda Vidyamandir*, where Justice Sinha held that "the wage structure and the components of salary […] were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the PF account of the employees".[52] In view of the said decision, it becomes imperative to construe the term 'wages' in a purposive and liberal manner.

Furthermore, if the special allowance is uniformly paid across the board to all employees, in a particular category, i.e., without any contingency attached to the payment, it is liable to be included as a component of the wage on which the gratuity liability is determined. Akin to the PF contribution, the gratuity contribution is liable to be paid on all wage components including special allowance that falls within the ambit as per the principle of universality, giving due regard to the components entailed in the definition of 'wages' under the Wages Code/Social

[50]ibid.
[51]*Harihar v ESI* (n 33).
[52]*Vidyamandir* (n 8).

Security Code. Since the Social Security Code, in particular, subsumes the Gratuity Act[53] and does not exclude special allowance from its purview, special allowance should be considered as a part of wages for the purpose of calculation of gratuity in order to ensure labour law compliance.

To further clarify, let us consider a hypothetical contribution to the gratuity under the CTC of a Company 'A'. It is as follows [please note that the illustration does not take into account any other allowance that constitutes a component of the wage structure for contribution to gratuity]:

Position prior to the Vidyamandir decision: before this judgment, if Mr. X's basic wage was Rs. 10,000 and the special allowance he received was Rs. 15,000, then 12% used to be deducted merely from basic wages for PF contribution. This amounts to Rs. 1,200 [Rs. 10,000 * 12/100 = Rs. 1,200]. The gratuity contribution, at this juncture, would be 4.81% of the basic salary, i.e., Rs. 481 [10,000 * 4.81/100 = 481].

(Advocated) Position post the decision and the present analysis: However, in view of the aforesaid analysis, we suggest that the amount contributed towards PF would be 12% of the emoluments [basic wage + special allowance], i.e., 12%/100 of 10,000 + 15,000 = Rs. 3,000. Similarly, the gratuity contribution would amount to 4.81%/100 of 25,000 = Rs. 1202.5.

As can be seen, the gratuity contribution has increased magnanimously, which deciphers that the employees will be entitled to a big retirement corpus for rendering services in a just manner to the organization. For the benefits of the employees, thus, special allowance should be considered as a part of wages in terms of gratuity contribution per se.

IV. CONCLUSION

Is an attempt being made to fit a square peg in a round hole? Does the purpose of the Gratuity Act differ significantly from the intent underlying the EPF Act? The answer to both the questions, in our opinion, is 'no'. A cursory examination of the legislative intent and the language of the clauses under the Gratuity Act provides that 'special allowance' is not a square peg trying to fit into a round hole concerning 'basic wages'. Rather, the benevolent nature of the legislation hints towards the inclusion of special allowance for the calculation of gratuity. An analogous interpretation from the EPF Act, the Wages Code and the Social Security Code

[53] Obhan and Dua (n 46).

is indeed necessary and relevant in order to strengthen the labour law regime and to redress this major challenge in today's day and age. Overall, such clarification on the proposition concerned in this article needs to be warranted as gratuity is an incentive provided to an employee for his/her/their service and commitment to the firm. This would, in turn, provide the employee with a post-retirement plan.

Thus, we opine that special allowance ought to be considered as a component of the wage structure for calculation of gratuity amount, similar to the consideration under the EPF Act. Yet tailwinds abide, how the legislature and the judiciary cure the 'restrictive' interpretation of the term 'wages' and 'special allowance' for calculation of the gratuity amount, thereby striking a balance between the intent of the legislation, parties' interests, and simultaneously improve the labour law efficacy in India.

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