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FOREWORD

I am delighted to introduce Volume III of the NLIU Journal for Labour and Employment Law. This edition features a range of articles on critical topics such as workers' rights, enforcement challenges, and global perspectives, offering valuable insights into contemporary issues in labour and employment law.

The NLIU Journal continues to be a significant platform for legal professionals, students, and academicians to engage with and contribute to important legal discussions. By rigorously evaluating submissions for their contribution to knowledge and relevance, the journal fosters rigorous research and critical analysis.

I extend my sincere thanks to the Board of Advisors and the Peer Review Board for their guidance and support throughout the publication process. I deeply appreciate the valuable support of Mr. Mahendra Soni, Chairperson of the Centre for Labour Laws, whose leadership and coordination were instrumental in bringing this volume to completion. His efforts, in collaboration with the student editors and the peer review board, have been crucial to the successful publication of this volume.

Furthermore, I commend the Editorial Team for their meticulous and dedicated work. Their commitment ensures that the journal remains a high-quality resource. We look forward to continued feedback, as it is vital for enhancing the journal's quality and impact in future editions.

Prof. (Dr.) S. Surya Prakash
Vice-Chancellor
National Law Institute University, Bhopal

MESSAGE FROM CHAIRPERSON

In the ever-evolving landscape of labor laws, the need for insightful analyses that address both foundational principles and contemporary issues is more pressing than ever. Volume III of the Journal for Labour and Employment Law is a collective endeavor to provide legal practitioners, scholars, policymakers, and students with a comprehensive understanding of the modern Labour and Employment Law regime.

Labour and Employment Laws are fundamental in shaping employer-employee relationships, balancing the rights and responsibilities of both parties. Each article in this volume delves into specific areas of interest, including new labour codes, salary withholding in corporations, the gig economy, paternity leave laws, privacy concerns, workplace surveillance, the status of street workers, the unorganized sector, biohacking vulnerabilities, dynamics of workmen, and collective bargaining, with practical examples that illustrate these laws in action.

Our contributors bring diverse perspectives and expertise through a multidisciplinary approach, navigating novel concepts and offering a holistic view of labour law dynamics. By addressing both traditional and emerging issues, they provide a comprehensive analysis of the challenges and opportunities in this field.

This journal aims not only to inform but also to inspire thoughtful dialogue and innovation in labour law practices. As globalization and technological advancements continue to reshape employment landscapes, understanding these laws becomes increasingly crucial. We hope this volume serves as a valuable reference and a stimulating read for anyone interested in the field of Labour and Employment Laws.

With Best Regards,
Mahendra Soni
Assistant Professor, NLIU Bhopal
Chairperson, Centre for Labour Laws

EDITORIAL NOTE

Labour and Employment Laws continue to be of paramount importance in a labour-intensive society like India. The Journal for Labour and Employment Law is proud to present Volume III, a carefully curated collection of articles that reflect the breadth and dynamism of this field. This volume offers valuable insights into contemporary issues and evolving trends in Labour, Employment, and Service Law.

We begin this volume with 'Social Security: A Survival Kit For The Workmen,' which explores the critical role of social security systems in safeguarding workers amidst changing economic conditions. The authors delve into ways to enhance these mechanisms to better support the workforce.

In 'Challenging The Threshold Limits In Labour Laws On The Basis Of Welfare State Concept,' the discussion turns to the adequacy of current labour law thresholds, arguing for a re-evaluation in light of welfare state principles to improve worker protection.

'Beyond The Binary' addresses the pressing issue of gender diversity and inclusion in the workplace. This article proposes new frameworks to foster a more inclusive environment that goes beyond traditional gender binaries.

'Demystifying Indian Labour Law's Trysts With ILO's Occupational Safety And Health Fundamental Conventions' provides a thorough analysis of how Indian labour laws align with international safety and health standards, highlighting both consistencies and gaps.

In 'Double Cross Or Fidelity: Legal And Ethical Positing Of Moonlighting In India,' the complexities of moonlighting are examined from both legal and ethical perspectives, offering insights into the implications of holding multiple jobs within the Indian context.

Salus Populi Suprema Lex: A Legal Analysis Of Social Security Code And Its
Implications On Gig Workers' scrutinizes the new Social Security Code and its impact on gig workers, assessing whether it adequately addresses the unique needs of those in the gig economy.

"The Future Of Work In India: Contemporary Trends And Challenges Of The Gig
Economy' offers a forward-looking perspective on how the gig economy is reshaping the Indian labour market and the associated challenges for employment laws.

EDITORIAL NOTE

Labour Laws On AI & Robotics: A Spectrum Of Unaddressed Troubles And The Way Forward' examines the regulatory challenges posed by AI and robotics, proposing solutions to address the gaps in current labour laws.

In 'Analysis Of The Recent Labour Codes Through The Lens Of Development Theories,' the article evaluates recent labour code reforms from a development theory perspective, providing insights into their potential impact on economic and social development.

Finally, 'Competition Law As Antidiscrimination: Labour Markets And Dominance Of The Employers' explores how competition law can address discrimination in labour markets, particularly in cases of employer dominance.

We trust that Volume III of the Journal for Labour and Employment Law will provide readers with valuable insights and provoke thoughtful discussion. The Centre for Labour Laws remains dedicated to advancing the field, and this journal is a testament to that commitment. We extend our sincere thanks to the authors for their contributions and welcome feedback to continually improve the quality of our publication.

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SOCIAL SECURITY: A SURVIVAL KIT FOR THE WORKMEN

by Khusbhoo Verma and Shreya Jhingren

Abstract

In common parlance, Social Security is the protection that employers offer to their employees through several governmental initiatives against the economic and social hardship that might otherwise result from a significant loss or low income. It also refers to the government's initiatives designed to advance its citizens' welfare. The current work is supported by empirical investigation. It is made up of a scientific research framework. It begins with the identification of the research question following a literature evaluation. The study's main contribution is the collection of legal information specific to the area and the testing of the cause-and-effect hypothesis. It uses the convenient sampling method. Lastly, this article aims to reflect upon the various Social Security Schemes implemented by the Government of India and at the global level.

KEYWORDS:***Social security, empirical investigation, governmental initiatives, employers, Social Security Scheme.***

I. INTRODUCTION

Over time, the idea of social security has become more significant in industrialized nations. According to Bhattacharya (1970), it is generally understood to refer to policies that safeguard members of the working class against unforeseen events such as death, disability, pregnancy, old age, unemployment, and other similar circumstances. According to the Indian Constitution[1], includes Articles 15(3) and 39(d)[2], which empower the state to establish special provisions for women and children, and to ensure equal pay for equal work. Additionally, the Constitution contains articles that advocate for justice based on equal opportunity and instruct the state to

[1] The Constitution (One Hundredth Amendments) Act, 2015.
[2] The Constitution of India, 1950 art 15(3) and 39(d).

provide for maternity relief and fair working conditions. Constitution[3], the state must offer social security to its inhabitants. By implementing numerous measures to guarantee that women have equal chances in the job market, social security programs also support gender equality.

Social security is an investment in the development of a just and compassionate society. Social security is an investment in human capital that can give a person comprehensive security in their family, job, and society. Everybody should have access to social security, which includes programs to guarantee that they can meet their fundamental needs for food, shelter, education, healthcare, clean water, sanitization, and a dignified existence. It was quickly realized that society should be held accountable for the chances of its citizens chances in terms of equal opportunity in educator, job security and equitable distribution of scarce resources available to a common individual. Additionally, poverty relief only addressed a need issue to a certain extent, but, in Sir William Beveridge's words, "want" is only one of the five giants on the road to rebuilding and is, in some respects, the best to combat. Others include sickness, ignorance, filth, and idleness. Social insurance and social welfare programs were created as a result. These contingencies also include old age, widowhood, unemployment, disease, disability, and accidents. Depending on the setting in which they are used, social security measures might mean different things. Economic insecurity is a problem in industrialized nations that is fueled by global poverty. Most rural and unorganized sector employees worldwide lack social security protections. Most of the population is found in the rural and informal sectors in most developing nations.

Social security is the protection provided by society, in particular the state and employer, through appropriate organizations against the hazards that a person with limited resources cannot currently overcome on his own or possibly in private cooperation with his fellow citizens. Therefore, social security policies are important from two perspectives for every developing nation. Firstly, by enhancing living and working conditions and secondly, by providing individuals with protection against long-term uncertainty, they represent a key step towards the aim of a state. They lack security, insurance, and any kind of advocate who could support them in the quest for these advantages. Therefore, the government implemented and put into effect social security measures to safeguard these types of workers. The state authorities are vested with the power to extend the application of this Act to additional groups of people or diseases not now covered by the Act. For

[3] Constitution (n 1).

the resolution of contentious matters, the State Governments have appointed labor compensation commissioners. According to this Act[4], the employer may be required to provide compensation in the event of sudden private harm arising out of or related to employment. However, no compensation is due if the incapacity does not continue for more than three days or if it was the employee's fault and did not result in death. Compensation is also available in cases of specific occupational disorders listed in Schedule III, in addition to bodily injuries. The type of harm and, thus, the amount of compensation that must be paid is the average monthly pay for the involved employee.

Social Security is mostly approached in two ways, i.e. by way of social insurance and aid programs. Social assistance is a way to distribute rights-based benefits to those with limited means in quantities to maintain a minimal quality of living. It is a non-contributory benefit for the upkeep of vulnerable populations including kids, moms, the elderly, the disabled, etc. It is very important to the efficient operation of the economic system. These mechanisms developed from providing financial aid and charitable acts on an individual basis to include formal and informal mutual benefit schemes.

State participation and assistance came next, eventually leading to the current pattern where social insurance measures form a large component of governmental policy in many countries. Workers sought protection early on through meager savings, employer responsibility, or private insurance against the risks they were exposed to. Later, it was believed that employers who initiated a work environment that could lead to employee injuries should be held responsible for the victim's losses, leading to the widespread adoption of protective legislation.

Social insurance, on the other hand, is a way to give benefits to people with low incomes as a matter of right, in amounts that mix the beneficiary's payments with government and employer subsidies. The development of a common pool from which benefits are given to members in the case of any contingency is a distinguishing feature of this. Contributions are made by the beneficiaries, employers, and the government. However, most unorganized workers suffer from a lack of knowledge regarding social security and other advantages the government provides to its citizens.

[4] Constitution (n 1).

Every advanced nation in the world views social security as a vital component of its national strategy to combat poverty, unemployment, and sickness. Social security is a dynamic notion. Social security is a form of protection that society provides for its members through effective organization against specific hazards. These risks are simply contingencies that a worker or person with limited resources cannot adequately guard against.

II. SOCIAL SECURITY IN INDIA

The Indian Constitution provides for Social Security reflecting the country's commitment to social justice and welfare of its citizens. These provisions are given under the Directive Principle of State Policy and laws enacted by the legislature. The Indian Constitution provides for Social Security since 1927, when the draft Convention on Social Insurance was considered at the International Labor Conference, significant steps have been taken toward establishing sickness insurance. In 1931, the Royal Commission on Labor recommended implementing a sickness insurance program, and in 1943, a social insurance expert was appointed to study sickness insurance for industrial workers. The history of Social Security can also be traced back and divided into the pre-independence and post-independence era.

India has implemented various schemes for the protection of unorganized workers which provides them with certain benefits including coverage of insurance under the Employees State Insurance Corporation which provides certain benefits to workers and the recently brought Code on Social Security Act, 2020 ("**Code**") also serves the same purpose which includes social security benefits during sickness, maternity, disablement, etc. The Code on Social Security Act, 2020 ("**Code**") has amalgamated nine existing labor laws into one which includes-

- **The Employees Compensation Act,1923**
- **The Employees State Insurance Act,1948**
- **The Employees Provident Fund and Miscellaneous Provision Act,1952**
- **The Maternity Benefit Act,1961**
- **The Employment Exchanges Act,1959**
- **The Cine Workers Welfare Act,1981**
- **The Building and Other Construction Workers Welfare Act,1996**

- **Unorganized Worker Social Security Act,2008**

Besides this, the Indian Constitution[5] itself promotes the idea of social security.

- **Article 38(1)** ensures that the State promotes the welfare of the people to protect a social order in which justice social, political, and economic shall inform all institutions of national life.
- **Article 38 (2) -** Ensures to minimize the gap of income for the individual and aims to promote equal opportunities for all.
- **Article 39-** Aims to provide and ensure adequate means of livelihood and protection of women and children and protect them against exploitation at the hands of their employers.
- **Article 41-** Talks about securing the rights of the worker and aiding in case of old age, sickness, and disablement which are also covered under the Social Security Code of 2020 as benefits under ESI Schemes set up by the government.
- Most importantly **Article 42** covers the aspect of maternity benefits and lastly, Article 42 provides for a living wage for workers, for which the Code on Wages,2019 is already in existence for the protection of wages of workers especially in the unorganized sector.[6]

III. PRE-INDEPENDENCE-ERA

In 1920 the International Labor Organization brought in certain reforms regarding social security. After the First World War, the British Colonial masters brought in certain acts for the protection of their employees which included-

- The Workmen Compensation Act of 1920
- The Payment of Wages Act,1936
- The Minimum Wages Act of 1948 and the Maternity Benefits Act of 1961

In 1940 the First Labor Ministers' Conference was held which highlighted the need for sickness benefits fund, Thus, a commission was appointed under the chairmanship of BR Ambedkar for the same.

[5] Constitution (n 1).
[6] The Constitution of India, 1950 Part IV.

The Commission recommended and divided the age of employment into permanent, temporary, and casual. The employer was made to pay contributions to schemes that provided benefits to the employees.

In 1947 The Industrial Dispute Act was also an eagle to settle industrial disputes and avoid the situation of conflict between employees and employers.

IV. POST-INDEPENDENCE-ERA

Since gaining independence, the Indian government has bolstered social security measures and labor policies. The Employees' Provident Funds and Miscellaneous Provisions Act of 1952 and the Employees State Insurance Act of 1948 cater to the organized sector. Additionally, the Unorganized Workers' Social Security Act was enacted to establish a framework for social security for unorganized workers. Social security legislation in 1954 and 1956 expanded coverage to include self-employed farmers, certain professional self-employed individuals, uniformed service members, and state and local government employees.

Furthermore, Article 21[7] of the Indian Constitution[8]recognizes the right to life as a fundamental right, encompassing the right to live with human dignity, which includes health security and the provision of basic human needs such as food, clothing, and shelter.

When India gained independence certain legislations and labor laws were enacted for the protection of workers. In 1948 The Factories Act was enacted to prevent workers from exploitation and fair payment of wages

In 1952 The Employees' Provident Funds and Miscellaneous Provision Act was brought in with specific measures that allowed employers to make certain deductions from wages and mandatory required to give some money in the Provident Fund setup for employees

The acts that were enacted are:

(i) “The Assam tea plantations provident fund act 1995.” The Personal Injuries (Compensation Insurance) Act, 1963.

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[7] The Constitution of India, 1950 art 21.
[8] Constitution (n 1).

(ii) The Seamen's Provident Fund Act 1966

(iii) The plantation labor Act 1951

(iv) The(central) maternity benefit Act, 1961

Were enacted to provide social security to weaker sections of society who are unable to voice their opinions and whose rights can easily be exploited.[9]

V. THE SOCIAL SECURITY CODE

India's social security system has changed in response to the influence of the 'West' and the development of the modern urban industrial sector. Although the non-industrial classes also have a pressing need for social security, their requirements have become less important with the 19th century's introduction of industrialization. Social reformers, labor welfare organizations, and numerous progressive companies convinced the government to implement social security provisions so that employees would be protected, at the very least, from some unforeseen events. Social security is a crucial component of public policy today, and the degree to which it is prevalent is a gauge of how far a nation has come toward the concept of a welfare state.

In Article 43[10] of the Indian Constitution[11], it is stated that the state must offer social security to its inhabitants.

The following are some of India's social security plans:

- Social insurance combines risks and resources with beneficiary engagement.
- Social assistance is supported by general tax revenues and disbursing benefits following a means test.
- Employers' liability plans in cases where the employer may be identified and were doing so is feasible financially, National Provident Funds.
- All-encompassing social security programs.

[9] 'Evolution of Social Security Code in India' <http://www.mbaexamnotes.com/evolution-of-social-security.html> accessed 21 April 2023.
[10] The Constitution of India, 1950 art 43.
[11] Constitution (n 1).

The Government of India has adopted the following few legislative steps to support social security programs for industrial workers.

- Workmen’s Compensation Act, 1923.
- Employees’ State Insurance Act, 1948.
- One-man Committee by Professor, by B.P. Adarkar, 1943.

VI. THE EMPLOYEES’ STATE INSURANCE ACT

The Employee’s State Insurance Act was passed in April 1943, and while it offered monetary benefits in cases of sickness, maternity, and work-related injuries, it did not offer security in cases of unemployment or old age. Dependents of employees who passed away because of a job injury received pension payments as compensation.

On February 24, 1952, the 1.20 lakh industrial workers in Kanpur and Delhi were covered by the E.S.I. The scheme went into effect. It has advanced during all these years. By the end of March 1976, this program had 388 centers serving around 22 million beneficiaries. From 1995-1996 the system had a total of 66.13 employees and 73.03 lakh insured individuals, respectively.[12]

Both direct and indirect medical treatment is provided through the ESI Scheme. The "Service System" refers to the direct method by which the ESI Corporation offers medical treatment, either through its own Employees' State Insurance Hospital or by reserving beds in State Government hospitals. The "Panel System" is the name of the indirect approach, in which private physicians chosen by the State Government with the consent of the ESI Corporation offer medical care.

The benefits provided by the ESI Act include the following:

- Maternity Benefits.
- Medical Benefit.
- Funeral Benefit.
- Sickness Benefit.
- Disablement Benefits.
- Dependence Benefit.

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[12] ‘Employees’ State Insurance Corporation’ <https://www.esic.gov.in/about-us> accessed 21 May 2024.

This scheme covers all employees who make less than Rs. 21,00 per month and operate in factories (including factories belonging to the Government) and any other establishment(s) to which an appropriate government may, after giving one month's notice by notification, extend the provisions of the Act. Several States have extended the ESI Act to establishments employing 20 or more persons while States such as Delhi and Karnataka have extended the applicability to establishments employing 10n or more persons. The Workmen's Compensation Act and the Maternity Benefits Act do not apply to a covered person under the ESI Scheme.

In the case of, ***Mr. A. Tehan V/S M/S. Associated Electrical Agencies &Anr. (1996)***[13], The appellant was employed by Respondent No.1 to carry out repairs of television sets. On July 17, 1987, while he was repairing a television set a component of it burst, and that caused an injury to his face. As a result, he lost vision in his left eye. The appellant, being an employee and insured person under the Employment State Insurance Act, 1948, and as the injury sustained by him was an employment injury, became entitled to the benefit of Section 46(c) of the ESI Act. Therefore, **he approached the ESI Corporation, and the Corporation granted the benefit available to him under the ESI Act.** Thereafter, in September 1991 he served a notice on Respondent No.1 demanding Rs. 7 lakhs as compensation. This was followed by an Application in 1992 before the Commissioner for Workmen's Compensation, Bombay under the Workmen's Compensation Act[14], 1923 wherein he claimed compensation of Rs.1,06,785 with penalty, penal interest, and costs.

It was held that the **Appellant cannot claim the benefit under the Workmen Compensation Act as S. 53 created a bar** that if an employee is insured under the ESI Act, he cannot claim benefits under any law and the Workmen Compensation Act shall not apply.

Observation of court: A comparison of the relevant provisions of the two Acts makes it clear that both the Acts provide for compensation to a workman/employee for personal injury caused to him by accident arising out of and in the course of his employment; The ESI is a later Act and has a wider coverage; It is more comprehensive; It also provides for more compensation than what a workman would get under the Workmen's Compensation Act[15]. While enacting the ESI Act the intention of the Legislature **could not have been to create another remedy and a forum** for claiming compensation for an injury received by the employee by accident arising out of and in

[13] *Mr. A. Tehan v M/S. Associated Electrical Agencies*1996 AIR SC 1990.
[14] The Workmen's Compensation Act, 1923.
[15] Ibid.

the course of his employment. Bar is against receiving or recovering any compensation or damages under the Workmen's Compensation Act[16] or any other law for the time being in force or otherwise in respect of an employment injury. **The bar is absolute** as can be seen from the use of the words shall not be entitled to receive or recover, "whether from the employer of the insured person or any other person", "any compensation or damages" and "under the Workmen's Compensation Act[17], 1923 (8 of 1923), or any other law for the time being in force or otherwise".

In the case of, ***Kerala CBSE School Management vs State Of Kerala*[18]*,*** The point that arises for decision in these cases is whether the notification dated 8.10.2007, issued by the Kerala Government under Section 1(5) of the Employees State Insurance Act, 1948[19], extending the provisions of the said Act WPC No.5986/08 and connected cases to educational institutions, is valid or not. The petitioners in these cases represent the managements of schools affiliated with CBSE, ICSE, and unaided but recognized schools under the Kerala Education Rules. Notification excluded public and aided schools. A writ petition was filed before Kerela HC.

It was held that the contention of the petitioner, was that **the word 'establishment' must have some relation with the factory, and educational institution is not even remotely connected with the activity, that is carried out in factories. This argument is not acceptable.** The purpose of the Act is to confer certain benefits upon the employees and employees of any establishment may deserve such benefits. The **extension of the provisions of the ESI Act to educational institutions** and the interpretation given to the words "**or otherwise**" by the Bombay High Court in an earlier decision lay down the correct legal position. We hold that the **notification under Section 1(5) of the ESI Act can cover an educational institution because**, **educational institutions like schools are industrial establishments,** because of the decision of the Apex Court in Bangalore Water Supply and Sewerage Board's case. Because of the binding precedent laid down by Apex Court in Bangalore Water Supply and Sewerage Board's case, we cannot accept that contention. Further, the interpretation of the **definition of "industry" in Section 2(j)**[20] **of the**

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[16] Ibid(n.14).
[17] Ibid(n.14).
[18] *Kerala CBSE School Management v State of Kerala* WP(C). No. 5986 of 2008(Kerala).
[19] The Employees' State Insurance Act, 1948 (34 of 1948) s 1(5).
[20] The Industrial Disputes Act, 1947 (14 of 1947) s 2(j).

Industrial Disputes Act[21] **applies to the interpretation of the word "industrial"** in Section 1(5) of the E.S.I. Act, as a result, the writ petitions fail and they are accordingly dismissed.

This scheme covers all employees who make less than Rs. 3000 per month and operate in factories powered by electricity that employ at least 20 people. It does not, however, apply to employees of temporary factories. The Workmen's Compensation Act and State Acts about maternity benefits do not apply to a covered person under the ESI Scheme.

VII. SOCIAL SECURITY SCHEMES IN INDIA

For Old age

i. **Rastriya Matoshri Yojana** - This scheme provides living assistance such has (railway quarters, old age homes) to those senior citizens who come below the poverty such as walking sticks and other assisted living devices that help them to overcome age related physical disabilities. It is a centered administered scheme.
ii. **Indira Gandhi National Old Age Pension Schemes** – This scheme applies toindividuals above the age of 60 (sixty) and below the poverty line. It is a part of the National Social Assistance program which is a center-sponsored scheme that provides financial assistance to the elderly, widows, and persons with disabilities.
iii. **Pradhan Mantri Vaya Vandana Scheme** - This scheme is for those individuals above the age of 60 (sixty) and is implemented by LIC (Life Insurance Corporation of India)
iv. **Senior Citizen Welfare Fund** – This scheme was established under the Finance Act of 2015 and aims to protect the welfare of senior citizens. Primally focuses on providing financial; support to elder individuals below the poverty line who lack means of income
v. **Integrated Program for Older Person -** This scheme is to ensure the improvement of the lives of the elderly. It was implemented by the Government of India in 1192 which covers facilities related to providing shelter, medicine, and food. The government through this scheme provides financial aid to NGOs that take care of the elderly.

[21] The Industrial Disputes Act, 1947 (14 of 1947).

For Unorganized Sector Workers

i. **Atal Pension Yojana –** Thia scheme launched in 2015, targets unorganized workers which includes small scale workers, agricultural laborers, and any citizen aged between 18 and 40 years can avail this scheme which guaranteed a minimum pension ranging from Rs 1000- Rs. 5000 depending on the contribution made by the subscriber, it is administered under the Pension Fund Regulatory and Development Authority.

ii. **Unorganized Workers Social Security Act 2008 -** It provides security benefits to unorganized sector workers but now its provisions are covered under the Social Security Code of 2020.

iii. **Rastriya Sathya Bima Yojana -** To provide health assistance to the workers in the unorganized sector, who are below the poverty line.

iv. **Aam Admi Bima Yojana -** These schemes provide for coverage of accidental death and mainly concern seasonal factory workers.

v. **The Contract Labor (Regulation and Abolition Act)** - It provides for the betterment of working conditions for workers, but its provisions are also covered under the Occupational Health and Safety Code 2020, however, unless the Occupational Code is implemented, CLRA (Contract Labor Regulation and Abolition Act) would apply.

For Women

i. **SwadharGrah Scheme** - It deals with providing basic life amenities and essentials to those who work to meet the needs of their daily lives. It is implemented by the Ministry of Women and Child Development.

ii. **The Maternity Benefit Act** – Women who are covered under the ESI Act would be covered under the ESI Act and not the Maternity Act. So, there is a capping of INR 21,00. If a woman makes more than that then the ESI Act would not apply and rather benefits under the Maternity Benefit Act would apply.

iii. **Janani Suraksha Yojana** - This aims to promote the delivery of children in the presence of the doctor for the protection and health of both the mother and the child, the government takes care of all the medical expenses to protest these schemes for women who cannot afford proper medical care during pregnancy. [22]

VIII. EMPLOYEE PROVIDENT FUND

- The various Central Acts on Social security have examined by the 2nd National Commission on Labor. Recent amendment has been made to review Employee Provident Fund and Milano's Act. Initiatives have been made to tailor the Employees Provident Fund Organization and the Employees State Insurance Corporation. The EPFO extends to the entire country covering over more than thirty-nine thousand establishments. At present over 11.80 covers EPF member and their families gets benefits under social security schemes ad mistered by the EPFO.
- Recently the Unique Identification Number – the Social Security number has been considering to be assisted to EPF subscribers. These numbers would actively carry out in smaller phase for effective data collection.
- Moreover, The Employees State Insurance Schemes proved for comprehensive medical care in the form, of medical attendance, hospitalization to insured persons. AS od 24 Jan, 2024 the ESI scheme provides medical benefit, sickness benefit as well as maternity benefit.[23]
  - **Penalties for Employers Violating Social Security Acts-**

➢ **The Occupational Safety, Heal and Working Condition Code** provided for general penalty for offences under section 94 imply a penalty of 2laksh which may extend to 3 lakhs. Section 95 provides for punishment for causing obstruction to Chief Inspector cum Facilitator with imprisonment of 6 months and penalty not less than 21 lakh rupees.

➢ **Employees Provident Funds and Miscellaneous provision Act**- Failing to deduct or pay employee contribution can lead to an imprisonment up to 3 years and fine u [p to Rs 1 lakh.

➢ **Employees States Insurance Act-** Sec 85 (a) to (g) Basically contains compliances which employers must carry out, maximum imprisonment is of 3teaes and fine worth Rs 5000.

[22] 'Social Security Welfare Schemes' <https://eshram.gov.in/social-security-welfare-schemes>accessed 21 April 2023.
[23] Ministry of Labor and Employment, 'Why do we need social security' <https://labour.gov.in/general-overview#:~:text=The%20organized%20sector%20is%20already,Employees%20State%20Insurance%20Act%2C%201948>accessed 20 May 2023.

Furthermore, section 85A provides for punishment or repeating g s subsequent offenses which leads us to imprisonment up to 2 years and fine of Rs 5000.

- **Workmen Compensation Act**-Employers who fails to ensure workers or provide compensation for accidental risk may be impose with a fine not less than 50,000 and which may extend to 1 lakh rupees.
- **Maternity Benefit Act-** Denying maternity leave or benefit can lead to imprisonment which may extent oi three months and fi3n which extend to five hundred rupees or both.

IX. SOCIAL SECURITY AT THE GLOBAL LEVEL

Irrespective of being a developed country or a developing country many nations have formulated and implemented social security schemes in their respective countries.

USA

In the USA social security schemes were brought in the late 1930s to prevent the exploitation of collar workers and to provide protection to their family members. Throughout the years the US has emerged as an example to be followed for how to implement the social security schemes

i. The Old Age and Survivors Insurance (OASI), provides for cash benefits after retirement or death of an employee.

ii. Disability Insurance (DI) pays cash benefits for disablement that occurred during employment, especially to seasonal workers.

iii. Hospital insurance (HI or Medicare Part A) covers medical expenses for a permanent form of disablement that occurred during employment.

iv. In the U.S.A. there is unemployment insurance- a program that provides cash benefits as a right to every unemployed person after meeting certain conditions and provides a weekly benefit ranging from $40 to$450 per week.

v. All these schemes are being financed by Federal Tax through Federal treasury by the federal government.

Besides this other known program provided under the Social Security Act of the US are-

- Temporary Assistance for Needy Families TANF.

- Grants to States for Medical Assistance for low-income citizens, Medical.
- Supplementary Security Income, SSI provides cash payments for disabled children adults, and individuals above the age of 65 (sixty-five).[24]

UK

In Great Britain, social security schemes were implemented when the UK witnessed the catastrophic World War II and realized the need for the protection of the common masses.The Department for Work and Pensions has overall responsibility for much of the benefits system in the country. The National Insurance system was first introduced in 1912.Employment and support allowance (contributory and means-tested)-Employed and self-employed persons are ineligible for sick pay, it is only for ESA.Besides this other act legislated in the UK are-

- In 1946 National Insurance (Industrial Injuries) Act was passed.
- In 1971, a "new family Income supplement" was introduced.
- In 1975 the Social Security Pension Act was passed.
- In 1982 Social Security and Housing Benefits Act was introduced.[25]

FRANCE

Social Security in France is extended in different regimes for the government, locals, and employees.

- In 1947 social security was extended to government employees.
- In 1952 *MutualiteSocialeAgricole(MSA)* was implemented as an insurance program for farmers.
- In 1966 maternity health insurance for women was introduced,2000 onwards the policy of Universal Health Coverage was brought in place. so that no individual is deprived of the right to medical health insurance.Accidental Insurance and Occupational; benefits are also provided in France.

[24] USA GOV, 'Social Security in USA' <https://www.usa.gov/benefits> accessed 22 April 2023.
[25] Ibid.

Lastly, it also provided benefits for families through programs like-

- Special Education Allowance - For the elderly, the schemes of Solidarity allowance for elderly are provided also known as *Allocation de Solidarite aux PersonnesAgees (ASAP).*[26]

X. CONCLUSION

Thus, social security is a crucial element in every situation involving employment. Any social security measure's goal is to give people and families the assurance that a social or economic calamity will not lower their standard of living and quality of life. A worker works not only for financial gain but also for a sense of security and belonging at his/her place of employment. Therefore, it is the employer's obligation under the law to give his employees the psychological gratification that comes from knowing that the employees' lives and the lives of their family members are taken care of and socially secure. Indian legislative bodies have done much to advance this cause through various initiatives and programs through the recent implementation of Code on Wages Act, 2019 which inculcates the acts superseding in the realm of employment, with the combined interests and satisfaction of both parties receiving most of the attention, this way the legislative bodies have advanced the cause of equalising employee and employer interest. These laws and reforms ensure both the parties are treated fairly, fostering a balanced and industrial approach. The workplace will surely transform into a kind of home if these requirements are met with cooperation and contribution from both the employer and the employee.

[26] CLEISS, 'Introduction to Social Security in France' <https://www.cleiss.fr/docs/regimes/regime_france/an_0.html>accessed 22 April 2023.

CHALLENGING THE THRESHOLD LIMITS IN LABOUR LAWS ON THE BASIS OF WELFARE STATE CONCEPT

by Shreya Maloo

Abstract

India is a welfare state. It has Directive Principles of State Policy, expanded interpretation of the right to life and other judicial pronouncements to ensure that individual's rights are protected. In the case of labour laws, issues of retrenchment, lay-off, safety officer, welfare officer etc. are considered only if the establishment has a certain number of minimum employees. These thresholds are misused by employers to bypass the laws, which leaves labourers in a merciless condition.

This paper challenges the concept of threshold limits in labour laws and proposes to have legislation without any limits to ensure the welfare of labourers. As basic human rights, dignity cannot be limited by the number of labourers working in an establishment.

KEYWORDS:*labour laws, welfare, threshold, labour welfare*

I. INTRODUCTION WITH THE ISSUE

The majority of labour laws in India have thresholds or a minimum number of workmen to avail of the benefits in any industry. It has been a colonial hangover and continues to be there in Indian laws even after 75 years of independence. The matter of threshold was started by Britishers with the enactment of The Factories Act, 1881, which means that provisions of the statute do not apply to industries having employees less than 100 individuals.[1]

[1] K R Shyam Sunder, 'Labour Codes and The Game of Thresholds' *The Hindu- Business Line* (20 October 2020) <https://www.thehindubusinessline.com/opinion/labour-codes-and-the-game-of-thresholds/article32902949.ece,> accessed 16 April 2022.

Even after India gained independence, this convention of providing thresholds continued in different forms such as safety officers (1,000+),[2] welfare officers (500+),[3] creches (30+).[4] This has been throughout irrespective of the political party in office. Even somewhere, thresholds have been increased from 100 to 300 workers in case of retrenchment.[5] Recently, in The Industrial Relations Code, 2020 the threshold has increased for working conditions, termination and strikes.[6]

Business and economic growth have been rooted in the Indian mindset to the extent that the Minister of Labour and Employment has cited a report in Parliamentary proceedings that the state of Rajasthan has increased retrenchment limit and it has actually generated employment and reduced retrenchment.[7] This paper has been written to reduce the gap between the legislative provision of minimum employees required and the benefits encashed. The researcher argues that benefits need not be limited to some employees an establishment has, as justice should be provided on the basis of humans, exploitation done by the employer, and working conditions and not based upon just numbers.

II. UNDERSTANDING THE THRESHOLD

In India, labour laws are based on certain threshold criteria i.e. either employment of workers, capital or turnover. As the private sector complains majorly of excessive regulations which hinder their economic and profit motive, coupled with bureaucracy and corruption. Very few laws such as the Minimum Wages Act, 1948 apply to all sizes of enterprises. The implementation of these threshold-based laws has always been in question.

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[2] Management Of Occupational Safety And Health At Unit Level, Directorate General Factory Advice Service &Labour Institutes, Ministry of Labour& Employment, Govt. Of India.

[3] The Factories Act, 1948 (63 of 1948) s 49.

[4] S S Ranan, 'Creche Facility Under Maternity Benefit Amendment Act, 2017' <https://www.mondaq.com/india/employee-benefits-compensation/668308/creche-facility-under-maternity-benefit-amendment-act-2017> accessed 16 April 2022.

[5] Aanchal, 'Firms with up to 300 workers can hire and fire without Govt nod: Bill in Lok Sabha' *Indian Express* (20 September 2020) <https://indianexpress.com/article/india/firms-with-up-to-300-workers-can-hire-and-fire-without-govt-nod-bill-in-lok-sabha-6602928/> accessed 17 April 2022.

[6] Nishtha Narang, Kaamya Ramanan, 'Employment and Labour Laws Regulation in India' <https://www.globallegalinsights.com/practice-areas/employment-and-labour-laws-and-regulations/india> accessed 16April 2022.

[7] 'Govt. paves way for companies with more than 300 workers to fire staff without its nod' <https://thewire.in/government/govt-paves-way-for-companies-with-more-than-300-workers-to-fire-staff-without-its-nod> accessed 16 April 2022.

There has been considerable debate regarding the application of the labour code in India. Interesting features of labour laws in the South-Asian countries are:

a) the lack of a single labour code;
b) the fact that various pieces of legislation apply to enterprises of various sizes (i.e., the labour law thresholds); and
c) the lack of protection for workers in enterprises with less than ten workers (India and Nepal).[8]

A recent comparative study of manufacturing enterprises in Asia observes that the size group of 6-49 workers accounted for more than 55 per cent of total non-household manufacturing in 2005.[9] The share of large factories with more than 500 workers was close to 20% and the remaining 25% is the share of size group with 50-499 workers in the same year.

Most labour laws apply to establishments over a certain size. However, one could argue that basic protections related to wages, social security, and working conditions should apply to all establishments.[10]

The challenge to labour regulation is to provide rights to workers and simultaneously create an enabling environment which ensures the economic, employment and industrial growth of the country. The 6th Economic Census (2013-14) reported that there were 5.9 crore establishments in India employing 13.1 crore people.[11] For firms, it is required that they can easily adapt to changing business environment and increase productivity in tough competition. Whereas, workers look forward to social security, minimum wages, health and safety hazards, better bargaining rights and ensuring a mechanism for the enforcement of rights.

The firm sizes in India have remained small due to:

(i) labour rigidity arising from the fear of having to take prior permission for retrenchment/closure even if businesses are not viable (lack of an easy exit option), and

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[8] ILO, 'Labour Laws and Growth of Micro and Small Enterprises (International LabourOrganisation 2014).

[9] D Mazumdar, S Sarkar, 'Manufacturing Enterprise in Asia: Size Structure and Economic Growth' (2012) Institute for Human Development.

[10] 'Overview of Labour Law Reform' (*PRS Legislative)* <https://prsindia.org/billtrack/overview-of-labour-law-reforms> accessed 16April 2022.

[11] National Statistics Commission, 'Highlights of the Sixth Economic Census' <https://www.mospi.gov.in/sites/default/files/economiccensus/sixth_economic_census/all_india/5_Highlights_6ecRep.pdf>.

(ii) high administrative burden since the multiplicity of labour laws has resulted in multiple inspections, returns and registers.[12]

Argument to set limits - an establishment of a smaller size can in no manner of speaking be described as 'organised'.[13] These organisations lack production plan, access to institutional credit, and the necessary economic size to look after all the multifarious responsibilities relating to production, finance, accounts, human resource management, law and so on. Small organisations are themselves vulnerable to various financial, social and governmental regulations and it would be harsher for them. Another substantial reason for keeping the limit high is that it will generate employment and skills in the sector provided.

Government three grounds for threshold –

- the stage of economic development of the Country
- the economic capacity of the employers to have special facilities, and
- the administrative capacity to implement the laws

Whatever the reasons are, the group has recommended that every worker, irrespective of the employment size of the establishment, must be assured minimum social security, protection, maternity benefits, child care, workmen's compensation and medical benefits.

The Labour Code has enabled governments to make laws on essential aspects such as:

- increasing the threshold for the lay-offs, retrenchments, and closure
- Setting a threshold for the applicability of various social security schemes
- Specify safety and health standards of establishment
- Norms for fixation of minimum wages

[12] India Budget, 'Structural Changes in India's labour markets' Chapter 10, Economic Survey 2015-16 <https://www.indiabudget.gov.in/budget2016-2017/es2015-16/echapvol1-10.pdf>.
[13] Ministry of Labour, *Report of National Commission on Labour Vol. I* (2002).

III. SOCIAL EVILS

Stratification of Workers – Labour aristocrats

Workers who are below a particular threshold are not secured by job securities but those who are above the threshold have greater political and economic rights. Having these, employees above thresholds are considered as "labour aristocrats."[14]

This creation of class gives rise to a gulf between better off workers with social security and non-securable workers. Not only management, but large trade unions try to ensure that organisations employing a good number of employees do not get employed, which implies that laws can be easily side-stepped making workers both vulnerable and pliant.[15]

The Industrial Disputes Act, 1947 has various thresholds for removal/ dismissal of workers more than 100 workers are required, need to have continuous service of 240 days, provident funds do not apply to industries employing less than 20 workers and dispute exchange mechanism where 100 or more workers are employed.

These limits are the tip of the iceberg in labour legislation in Indian laws. Thresholds provide a way to escape regulations and incentivize employers to keep numbers below the legally required. There exists a saying, grow big and you invite a slew of legal requirements which, by staying small and keeping impermanent workers, you can easily circumvent.[16] It unofficially promotes the growth of informal labour. The first choice of company promoters is not to transgress labour limits, as this ensures not only labour but other environmental relaxations, audit scrutiny etc.

Two flawed assumptions for establishing the thresholds –

- That bigger entrepreneurs are self-seeking
- Those units with fewer employees are labour-friendly and act as paternalistic employers.

Both the large as well as small enterprises have the greed to increase profits by side-lining rules & regulations. Instead of going for training and trust building in large enterprises, big firms look to hire contract labourers and sub-dividing units to evade limits of thresholds.

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[14] H Pelling, 'The Concept of the Labour Aristocracy. In: Popular Politics and Society in Late Victorian Britain' <https://doi.org/10.1007/978-1-349-86113-2_3>.
[15] Dipankar Gupta, 'Against Thresholds: Raising Capacity and Formalizing the Economy' (2019) 62(25) The Indian Journal of Labour Economics <https://doi.org/10.1007/s41027-019-00154-z>.
[16] Ibid.

Two issues, which are vital for management-labour relations, are generally **overlooked**:

1. It is not just financial capital, but intellectual capital too multiplies more rapidly in larger units than in smaller ones.
2. Both management and labour can benefit from the advantages large units provide, but the presence of thresholds obscures this from view

IV. TWO-TIER WORKFORCE

In order to evade threshold effects, firms create two classes of employees- regular and non-permanent workforce. The regular workforce includes those having names on the muster roll and enjoy job security. Whereas, contract labourers are employed through an intermediary and do not enjoy security benefits. Further, within the formal sector, the number of contract workers who are not subject to legislation has risen as threshold limits in the Industrial Disputes Act require regular workers.

A conclusion has been reached by K. V. Ramaswamy for the contract workers:

(1) contract-worker intensity is higher in the size class 50–99 relative to other employment size groups;
(2) average contract-worker intensity is relatively higher in labour-intensive industries and in inflexible states; and
(3) the relationship between contract-worker intensity and firm size is non-linear[17]

The study of K. V. Ramaswamy provides that employers are doing everything, in the provided case, contract labour to bypass legislative provisions.

V. DOING AWAY WITH THE THRESHOLDS

In order to ensure the growth and real development of the country and its individuals, it is better to remove the thresholds for providing benefits. It is clearly unfair to protect one group on the basis of mere numbers and the rest, which form the majority, are left at the mercy of employers. It is

[17] KV Ramaswamy, 'Employment Protection Legislation and Threshold Effects: How Firms are Staying below the Legal Size Threshold in Indian Manufacturing, Labour, Employment and Economic Growth in India' (2015) Cambridge University Press.

even against the basic concept of citizenship.[18] This could be easily done away by negating the difference in the size of units and uniform norms for all the industrial units.[19]

Providing provident fund, dismissal, removal and closing down on account of bankruptcy is essentially required to be size-neutral. This provision is also required for dispute resolution mechanisms irrespective of the firm, small or big. Though it is hard to manage industries with less than 20 workers, a check could be established and facilitated by managing and regulating committees at the local level.

Its impact on the entrepreneurs and the industry would be positive. In-house training, specialization and efforts to bring loyalty are always beneficial for firms with respect to marketing – word of mouth. Instead of considering workers as cheaters, it is employers who cheat them. Faith and loyalty of workers could be proved by the efforts of Tata, Infosys who care for its employees and gets good returns, enjoy market reputation.

It will remove the classification of labourers such as aristocrats and below-threshold workers. It will bring unity and harmony among themselves and act as class-less working for one another, which will pay long-term dividend to trade unionism themselves. Labour aristocrats need to leave their individual political interests and positions to achieve the goal of greater solidarity and involvement of local employees at the grassroots level.

These discussions look good in theory but are we really ready to embrace the change? In the present scenario, we are not. But it does not imply that the labour law threshold could never be done away with. With the introduction of four labour codes, it has to an extent widened the application but the government has lost an opportunity to do away with the thresholds and provide a map for universal coverage.

[18] T H Marshall, *Citizenship and Social Class and Other Essays* (Syndics of the Cambridge University Press 1950)...
[19] Dipankar Gupta, 'Against Thresholds: Raising Capacity and Formalizing the Economy' (2019) The Indian Journal of Labour Economics 62:15–30.

BEYOND THE BINARY

by Ragini Shekhawat and Banni Chhibber

Abstract

Transgender people in India have traditionally faced severe prejudice and marginalization in various areas of life such as employment, healthcare, social acceptance and education. However, there have been some positive developments in recent years aimed at improving the rights and welfare of transgender individuals. In 2014, the Supreme Court of India recognized transgender people as a third gender, granting them legal recognition and protections under the law[1]*. This landmark decision challenged the social stigma and discrimination that trans people have long faced in India.*

Additionally, in 2019, the Indian government passed the Transgender Persons (Protection of Rights) Act, which provides for the protection of the rights of transgender people and prohibits discrimination against them in education, employment, and healthcare. Additionally, the Act recognizes the right of transgender persons to pursue a vocation or occupation of their choice and to work in any profession or trade that they are qualified for, without discrimination. In addition to the specific protections provided by the Transgender Persons (Protection of Rights) Act, transgender individuals in India are also covered by general labour laws, such as the Minimum Wages Act, the Payment of Wages Act, the Industrial Disputes Act, and the Maternity Benefit Act.

Despite these legal protections, transgender people in India still face significant challenges in accessing and enjoying their labour rights. Discrimination, harassment, and violence against transgender individuals remain prevalent in the workplace, and many trans people are forced to engage in sex work or begging due to discrimination in the job market. Many trans people are forced to engage in sex work or begging due to

[1] *National Legal Services Authority (NALSA) v UoI* AIR 2014 SC 1863.

discrimination in the job market, and they often face harassment and violence from both the police and the public. The objective of this research paper is to explore the reception of labour laws in India and gain a comprehensive understanding of their impact on the public.

I. STATEMENT OF PROBLEM

Transgender individuals in India have historically faced significant discrimination in the employment sector and the workplace making it challenging for them to access and enjoy their labour rights. Although The Transgender Persons (Protection of Rights) Act, 2019 provides protection for transgender people in the workplace there is still a lack of understanding of how these laws have been received by the public and whether they have been effective in promoting equal employment opportunities for trans people and eliminating the discrimination. This research paper aims to explore the various legislations in our country present for trans labours, the reception of labour laws for the trans individuals in India and to assess the impact of promoting inclusive workspaces and protecting their labour rights of transgender.

II. OBJECTIVE OF STUDY

- *To explore the current legislations, present in our country protecting the rights of transgender people particularly in the employment*
- *To understand how well people are actually aware of the laws and how impactful the laws have been*
- *To provide for some recommendations to the employers to ease the employment for trans people and create a more inclusive society*

III. RESEARCH METHODOLOGY

A mixed method approach combining qualitative research and survey research to gather both primary and secondary data has been used for this research paper.

IV. INTRODUCTION

Historically, workplaces have been a challenging and often a hostile environment for transgender individuals. Discrimination and harassment in hiring, promotion, and other job-related things have led to the creation of significant barriers to employment and career advancement for this marginalized community. Many trans individuals have achieved success in their chosen careers; however, these barriers still prevail in most areas. Discrimination, harassment, and a lack of legal protection are just a few of the barriers that hinders their success and career advancement.Creating a more inclusive and supportive work environment for trans individuals requires a concerted effort on the part of employers, colleagues, and society. This effort can include implementing policies and practices that promote diversity and inclusion, providing training on trans issues for employees, and supporting trans individuals in their career development.

The National Human Rights Commission conducted a study in 2018, which revealed that a shocking 96% of transgender individuals are denied employment opportunities and forced to resort to low-paying or undignified work to make a living, such as *badhais*, *sex work*, and *begging*[2]. The study found that among the respondents, a staggering 89% of qualified transgender individuals had no job prospects[3]. Furthermore, the report noted that 50-60% of the respondents had never attended school, and those who did were subject to severe discrimination. The study also revealed that 52% of transgender individuals had experienced harassment from their classmates, and 15% had been harassed by their teachers, ultimately resulting in the discontinuation of their studies[4]. These findings illustrate the systemic discrimination and barriers faced by transgender individuals in accessing education and employment opportunities, perpetuating their economic vulnerability and social exclusion. However, on a brighter note, the increasing awareness and sensitivity towards protecting the rights of transgender individuals is gradually closing the divide.

In the past few years, there has been a growing recognition among organizations that a trans-inclusive workplace not only supports a socially and economically marginalized community but

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[2] Study on Human Rights of Transgender as a ThirdGender:<https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf > accessed 16th April 2022.
[3] Ibid.
[4] Ibid (n.2).

also promotes innovation and expands access to a diverse talent pool. This understanding has led many organizations to prioritize creating a welcoming and supportive environment for transgender employees. Major corporations such as *Godrej*[5], *Infosys*, and *Amazon*[6] have adopted non-discriminatory policies and established employee resource groups for their LGBTQ+ staff. Organizations are recognizing that a trans-inclusive workplace not only supports a socially and economically marginalized community, but also promotes innovation and expands access to a diverse talent pool.

V. RELEVANT LEGISLATIONS FOR TRANSGENDER EMPLOYMENT RIGHTS

Transgender Persons (Protection of Rights Act) 2019

The landmark case of NALSA v. UoI provided a strong foundation for the Transgender Persons (Protection of Rights) Act, which was enacted by the Indian Parliament in **2019**. The act aims to acknowledge the identity of transgender individuals and eliminate discrimination in various domains, including education, employment, healthcare, property rights, public and private office, and access to public services and benefits. This act reflects on India's progress towards a more inclusive and progressive society, where opportunities are not restricted based on their gender. The act aims at protecting the rights of trans people and ensures their participation in the society. The legislation includes a range of definitions, such as **transgender persons**, which encompasses trans men and trans women, *irrespective of whether they have undergone hormone therapy or sex reassignment surgery*[7]. The act also promotes inclusive education to prevent discrimination, neglect, harassment, and intimidation of transgender persons in educational institutions[8]. This act provides that no establishment shall discriminate against any transgender person in any matter relating to employment, recruitment or promotion[9] and thatvery establishment shall ensure

[5] Nayanika Nambiar and Parmesh Shahani, 'A Manifesto For Trans Inclusion In The Indian Workplace' (*Godrej India Culture Lab*, 2018) <https://indiaculturelab.org/assets/Uploads/Godrej-India-Culture-Lab-Trans-Inclusion-Manifesto-Paper2.pdf> accessed 16 April 2022.
[6] Saroj Sachdeva, 'Trans-Inclusivity at Amazon India: A progressive next step' (*Amazon*, 27 August 2020) <https://www.aboutamazon.in/news/operations/trans-inclusivity-at-amazon-india-a-progressive-next-step> accessed 16 April 2022.
[7] The Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) s 2(k).
[8] The Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) s 2(d).
[9] The Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) s 9.

compliance with the provisions of the act and provide facilities to transgender persons as prescribed.[10]

Not so later after this act was passed, in 2020, the Noida Metro Rail Corporation (NMRC) renamed one of its stations, previously known as Sector 50, to **Pride Station** in honour of the trans community[11]. As a gesture of inclusivity, NMRC recruited six members from the transgender community for various services as well. The very next year, in a landmark move, Karnataka set an unprecedented example of inclusivity by becoming the first state to reserve **1%** of jobs in **public employment** for transgender individuals. This historic decision was made possible by amending the ***Karnataka Civil Services (General Recruitment) Rules, 1977*** to provide for a horizontal reservation for transgenders[12]. The government took this significant step to address the systemic discrimination faced by the transgender community, which has often been excluded from access to employment opportunities and subjected to various forms of social stigma and marginalization.

The legislation also introduced a fresh set of obligations that all professional institutions, including private employers, must comply with. These requirements necessitate that employers revise their HR policies and make an effort to sensitize and train their staff to foster a welcoming atmosphere for transgender individuals.

Section 11 of the act aims to prohibit discrimination and create a work environment that ensure safety and growth for all. Employers are expected to publish policies that promote equal opportunities for transgender people and establish infrastructural amenities and facilities, such as unisex toilets, hygiene facilities, confidentiality, transportation, and more. In addition, every establishment must designate a complaint officer to handle any grievances that may arise.[13] Similarly, **section 14** of the legislation imposes a responsibility on the government to develop welfare schemes and programs that facilitate vocational and self-employment training for transgender individuals, enabling them to earn a livelihood and **section 18(d)** of the act stipulates penalties and punishments in the event of any threat to the life, safety, or health of a transgender

[10] The Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) s10.
[11] Mallika Soni, "Pride Station': North India's First Metro Station Dedicated To Transgenders In Noida' *Hindustan Times* (27 October 2020) https://www.hindustantimes.com/india-news/pride-station-north-india-s-first-metro-station-dedicated-to-transgenders-in-noida/story-syucwrutbv8vsuhvepyhbj.html> accessed 25 April 2023.
[12] V Venkatesan, 'Karnataka becomes the first state to reserve jobs for transgender persons' *The Wire* (22 July 2021) <https://thewire.in/lgbtqia/karnataka-first-state-reserve-jobs-transgender-persons> accessed 16 April 2022.
[13] The Transgender Persons (Protection of Rights) Act, 2019 (40 of 2019) s 11.

person. It also includes verbal, sexual and physical abuse. These penalties include imprisonment for a period of ***not less than six months and up to two years***, ***or a fine or both***. The section also criminalizes sexual, physical, verbal, economic, and emotional abuse, with offenders being subject to punishment.

The concern regarding the legislation is that it discriminates when it comes to penalizing offenders who commit serious criminal offenses against transgender individuals. For example, the punishment for sexual offenses or abuse against a transgender person carries a minimum sentence of **six months** and a maximum of **two years**. However, if the victim were a female, the punishment for a similar offense would be more severe, with a minimum sentence of **two years** up to a maximum of **seven years**.[14]

1) Occupational Safety, Health and Working Conditions Code, 2020

As per **Section 23** of The Occupational Safety, Health, and Working Conditions Code, 2020, it is the employer's duty to ensure that the working environment is safe and healthy for their employees, as prescribed by the central government. Additionally, **Clause 2 (viii)** of the same section mandates that appropriate facilities for separate urinal accommodations must be provided for male, female, and transgender employees, with hygiene being maintained without any bias or discrimination[15].

Through the ***#PureLove*** campaign, The Lalit Hotels challenged traditional gender norms. The company introduced all-inclusive washrooms in all their hotels, including both front-of-house and back-of-house facilities.

Section 24 (ii) of the OSHW Code, 2020 requires that the employer is responsible for ensuring the provision and maintenance of welfare facilities for employees within their establishment which includes separate bathing places and locker rooms for male, female, and transgender employees.[16]

Section 94 of the code outlines the penalties that will apply in the event of a breach of the provisions. In such cases, the employer or principal employer of the establishment will be liable to a penalty of **no less than two lakh rupees**, and **up to three lakh rupees**. If the contravention

[14] The Indian Penal Code, 1860 (45 of 1860) s 354(A) and 354(B).
[15] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020) s 23.
[16] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020) s 24(ii).

persists after conviction, a further penalty may be imposed, which could amount to **two thousand rupees for each day until the contravention ceases**.[17]

VI. EVALUATING THE IMPACT OF THE LAWS

To understand whether the laws have had an impact on the society or not, we conducted research. A form comprising of a few questions was circulated among 100 working professionals. The purpose of this study was to gauge the extent to which laws have been effective in shaping societal attitudes and behaviours towards trans individuals. The research aimed at providing insights into the effectiveness of laws in bringing about change in societal attitudes.

The results are as follows:

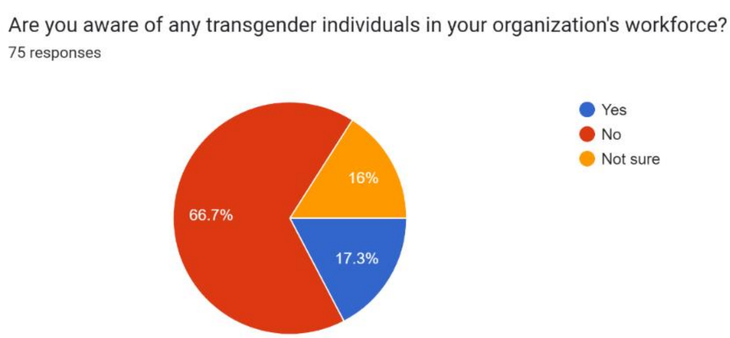

Fig 1

FIGURE 1: From the pie chart, the majority (**66.7%**) of participants are not aware of any transgender persons in their workplace. Only **17.3%** of the total participants are unsure followed by a meagre **16%** that are fully aware of the existence of trans persons in their workplace. This shows us that there may be a lack of representation of trans people in the workforce, or that they are still not comfortable disclosing their identity fearing the discrimination or the negative reactions from their colleagues.

[17] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020) s 94.

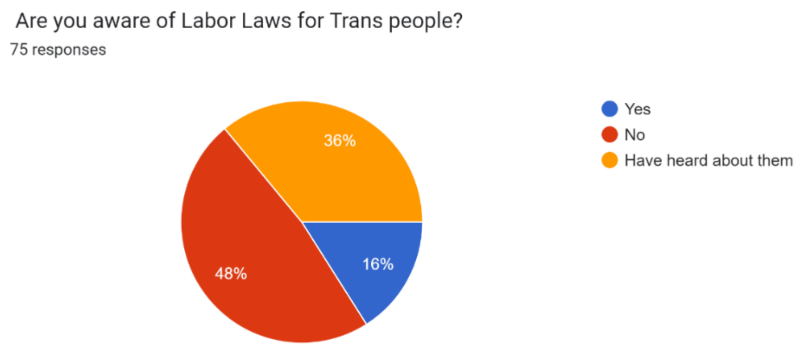

Fig 2

FIGURE 2: As the pie chart suggests, a staggering **48%** of people surveyed reported having no knowledge of the laws in place for trans workforce. This lack of awareness is problematic as it leaves many trans workers vulnerable to exploitation, discrimination, and other forms of mistreatment. While it is still encouraging to see that **36%** of the participants reported having some knowledge of these laws, it is still a relatively low percentage. The fact that only **16%** of participants reported having concrete knowledge of these laws is particularly concerning.

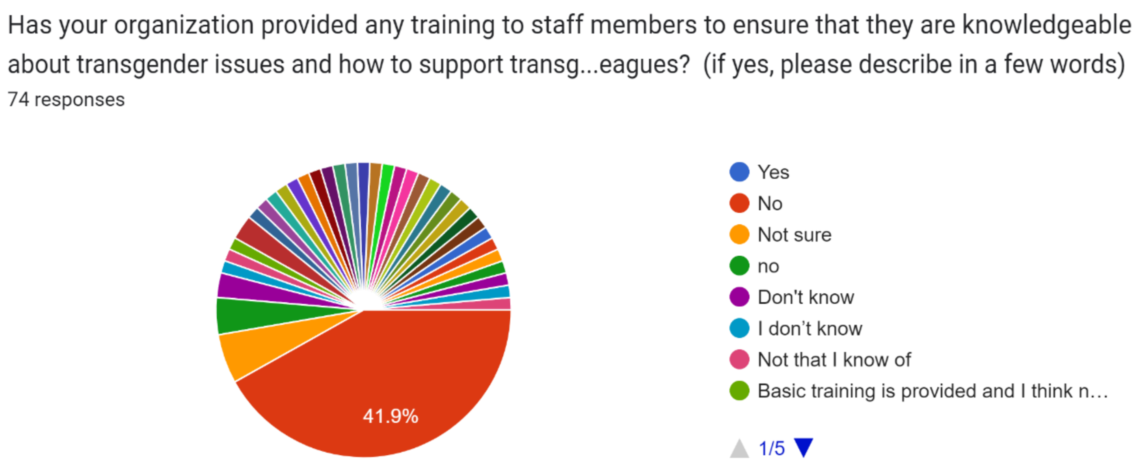

Fig. 3

FIGURE 3: The pie chart shows how a major chunk of the organisations/workplaces have either not provided any sort of training to their employees to sensitize them and educate them about transgender issues or have just restricted themselves to providing a basic training when it comes to this topic. Even though a lot of organizations do have polices in place, a lot of work still needs to be done. Providing basic training is a step towards being more inclusive however, bigger steps are needed to be taken.

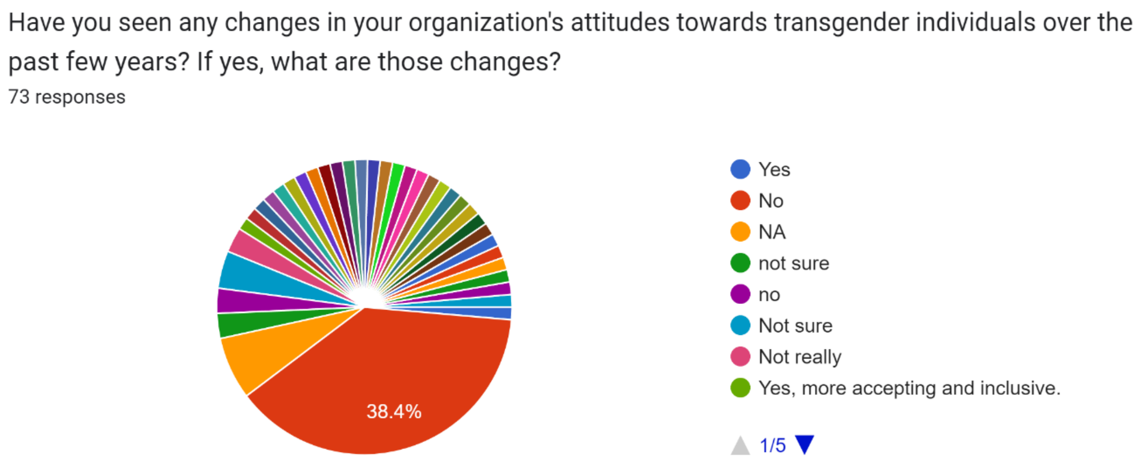

Fig. 4

FIGURE 4: This pie chart illustrates the attitudes towards transgender employees and depicts a concerning picture. The data shows that only an excruciatingly small portion of participants voted "Yes" to support transgender employees in the workplace. Most of the employees voted for “No” when asked whether their organizations have provided the shift in the attitude towards trans people is visible or not. This implies that the vast majority of participants either have no opinion on the matter or do not support transgender employees in the workplace.

The above research reveals that although laws have been implemented to address the issues faced by trans people, there is still much progress to be made. The fight for trans rights and equality is a crucial aspect of creating an inclusive society and as allies and advocates, it is our duty to recognize our privilege and use it wisely to amplify the voices of those who are marginalized and oppressed.

VII. RECOMMENDATIONS FOR THE EMPLOYEES

Creating an inclusive and welcoming workplace for all workers is essential and helps provide a feeling all of them are valued and supported. Trans people often have to face discrimination, harassment, and lack of access to appropriate facilities at the workplace so, it is important for employees to take an active role in creating a positive environment for transgender colleagues. Here are some recommendations for the employees to ensure a more inclusive workplace for their trans employees:

1) Anti-Discrimination Policy:

- A company must update its rules as the first and most important step in creating a workplace that is trans inclusive. Transphobic discrimination must be condemned in the policies, which must also be thorough and simple to comprehend. What would be considered grounds for gender discrimination should be outlined in the anti-discrimination regulations. Examples of transphobic discrimination may also be addressed in the policy.
- The policies must to be revised often. Anti-discrimination rules should not just be on paper; they should also be regularly reviewed and monitored while they are being put into practice. To handle grievances or violations of these policies, a suitable grievance redressal procedure must be established.

2) Hiring Trans Persons Through Human Resource:

- People who identify as transgender must be encouraged by organizations to seek for jobs there. By posting job openings as open to everyone regardless of gender identity, it must demonstrate its support for the community.
- Organizations can indicate their support by refraining from using the pronouns "he/she" in their marketing or job postings, among other methods. Given that the usage of gendered pronouns reveals an ingrained prejudice.
- The employment applications must not be biased against any one gender; applicants can choose to state their gender identification, including the third gender, or, if practical, the application must include a question requesting their gender.

- In order to avoid unintentionally upsetting or humiliating the applicant, the human resource department of the company has to be instructed on how to be sympathetic and communicate with the individual identifying as the third gender.
- The dress code regulations should be set up so that transgender people can select their preferred attire based on their gender expression or gender identity.

3) Sensitization and Education of Employees:

- It is critical for a business to ensure that its existing personnel are informed of the changes that are taking place and it is critical that existing staff are responsive to new hires. Organizing conferences and seminars helps to educate personnel.
- Talks and conversations about trans role models, as well as personal success stories of trans people working in other workplaces, serve to sensitize staff. Sessions with local trans people that are interactive can be one way to sensitize the staff.
- Conducting educational training to educate workers about the transition process, dispelling myths, and educating them on what constitutes inappropriate and transphobic conduct.

4) Advocating Trans Policies:

- External dialogues regarding a trans-inclusive work environment are just as crucial as internal conversations. Using pride colours on the organization's website or social media accounts demonstrates the organization's support for the transgender community.
- The firm website must also disclose the organization's policies and objectives addressing equal opportunity, regardless of gender expression.

5) Provisions for Erasing Gender Transition at the Workplace:

   It is not required for a company to constantly recruit a trans individual who has totally transitioned. There will be cases when workers have not totally transitioned, are transitioning, or wish to transition in the future. Transition may be a profoundly personal and life-changing experience for an individual. It should be addressed seriously, and appropriate procedures should be put in place to assist and support the individual inside the business in making the transition as smooth as possible.

6) Gender-neutral Restroom Infrastructure:

- Aside from policy implementation and staff awareness, several physical infrastructure adjustments are required. The organization must provide gender-neutral restrooms. Many transgender people feel insecure or are denied access to restrooms because of their sexual orientation. As a result, gender-neutral bathrooms are required. Adding a third gender restroom would also create a schism and may make a transgender person uncomfortable.
- Also, trans people who are still in the closet would not want to use a third-gender restroom. Another method that the corporation can take is that since the washrooms are already gendered, there can be one gender-neutral washroom in the building.

7) Insurance and Medical Benefits:

Because the goal of a trans-inclusive work environment is to give equal opportunities to the transgender population, they should be entitled to the same medical and insurance coverage as any other employee. They should have access to the same policies for adoption, maternity, and paternity leave. Their cohabiting partners should be treated similarly to a spouse when it comes to health insurance advantages.

8) Being considerate about other Issues Faced by Trans Employees**:**

Because of the societal stigma, landlords frequently reject homes to the transgender population. Due to the high expense of hormone therapies, trans people are sometimes unable to pay their rent. In such cases, businesses should be alert and strive to assist the employee in finding acceptable accommodation. Organizations must also prioritize skill sets above certifications. If necessary, they can strive to give intensive training before hiring the trans person to compensate for the little lack of certification.

Creating a trans-inclusive workplace will also have a positive impact on the overall company culture. By promoting inclusivity, organizations can create an environment that fosters trust, respect, and a sense of belonging among all employees. Creating a trans-inclusive workplace also sends a message to customers, clients, partners and society that the organization values diversity and is committed to creating a more just and equitable society. This can help build brand reputation and loyalty among consumers who prioritize social responsibility and inclusivity.

VIII. CONCLUSION

Martin Luther King Jr. once said *"Injustice anywhere is a threat to justice everywhere",* no matter where it occurs and to whom it occurs, injustice holds the power to destroy society as a whole. It attacks the basic principles of justice and equality. Despite the legal recognition of transgender individuals as a third gender and the recent passage of the Transgender Persons (Protection of Rights) Act, many challenges remain in ensuring the full realization of trans rights in employment. Despite the development, the implementation and enforcement of trans laws continue to be insufficient. Transgender individuals in India hold to face several depressing situations like discrimination, violence, not getting adequate healthcare, schooling, and employment possibilities. Discrimination and prejudice against transgender individuals lead to harassment, violence, and even death. This highlights the importance of promoting awareness and understanding of transgender issues and elevating the voices of transgender individuals. This fight in our country is intertwined with ingrained societal problems and to gain meaningful development, it's long vital to address the elements and work closer to building an inclusive and equitable society. This would require constant communication, training, and advocacy in society, along with political, social, and cultural changes. The fight for trans rights in India is still not over, but with sustained efforts and collective action, we can strive towards an inclusive, comprehensive and more loving society for all. The struggle for justice and equality is a shared responsibility and requires constant effort and by working together we can build a fair and just society for all.

DEMYSTIFYING INDIAN LABOUR LAW'S TRYSTS WITH ILO'S OCCUPATIONAL SAFETY AND HEALTH FUNDAMENTAL CONVENTIONS

by Tushar Krishna and Sushovan Patnaik

Abstract

About a year ago, in June 2022, the International LabourOrganisation adopted a human-rights centric declaration to include "a safe and healthy working environment" as the fifth principle of the Fundamental Principles of the Right to Work. Two ILO conventions relating to this, the Occupational Safety and Health (OSH) Convention, 1981 (No. 155) and Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), were accordingly conferred fundamental status. Traditional international labour law dictates that fundamental conventions, by their very nature, carry implementational weightage for member states at a domestic level. However, in India, reflecting upon the particular treatment by the legislature towards labour conventions generally and core or fundamental conventions specifically, as well as the tendencies of Indian higher courts with respect to these conventions and their behaviour in OSH decisions in the one-year that has followed the FPRW elevation, sheds some practical prediction on the implications of this elevation on Indian labour law. Indian labour law on occupational safety and health continues to be deficient on several aspects, and in these matters, the Indian judiciary has sometimes played a crucial role as an OSH gap-filling institution. While the legislature's role remains definitive, the tendencies of Indian courts on labour conventions and occupational safety and health, as two separate subjects, seemingly complicate a realistic assessment of the policy implications of OSH's FPRW status elevation upon India. One year after ILO's historic declaration, introspecting deeply on India's standing on the ILO and OSH is crucial to *decrypt the possibilities of an enriched framework for the right to work and human rights in the workplace in the Indian subcontinent.*

<u>KEYWORDS:</u>*ILO, Occupational Safety and Health (OSH), Convention No. 155 and 187, Labour Laws, Fundamental Principle and Right at Work*

I. INTRODUCTION

In light of a large number of work-related afflictions and fatalities,[1] the International LabourOrganisation ('ILO') has recognised occupational health and safety ('OSH') as the fundamental principle and right at work ('FPRW').[2] This monumental declaration has established the Convention on Occupational Safety and Health ('C-155') and the Convention on the Promotional Framework for Occupational Safety and Health ('C-187') as the Core ILO conventions.[3] Its impact will be far-reaching and extensive for all member states,[4] including India, a long-standing ILO member with pressing concerns regarding work-related sickness and fatalities. Considering the same, this paper seeks to examine the implications of this historic event on Indian legislators and the judiciary by drawing from past experiences with other fundamental principles and core conventions. Since C-155 and C-187 entail certain revolutionary reforms that necessitate a significant overhaul of India's OSH laws, this paper significantly scrutinises the critical differences between C-155 and C-187's ambitions and India's traditional OSH legislations but are also stretched into new, unnotified labour codes. Furthermore, it is striking to observe the Indian courts' reaction to the changing OSH priorities in the world, despite their cautious approach towards the "fundamental" nature of the ILO core conventions. Finally, this paper analyses the recent attempts to elevate India's OSH standards to meet the basic international normative position, providing a roadmap for the future.

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[1] International Labour Organization, 'World Statistic' <https://www.ilo.org/moscow/areas-of-work/occupational-safety-and-health/WCMS_249278/lang--en/index.htm/> accessed 5 May 2023.

[2] ILO, 'Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work' ILC 110/Resolution I.

[3] Ibid.

[4] Tushar Krishna, 'Is ILO's Recognition of the Fundamental Right to a Safe and Healthy Working Environment Enough?' (*BJIL*, 21 November 2022) <https://www.berkeleyjournalofinternationallaw.com/post/is-ilo-s-recognition-of-the-fundamental-right-to-a-safe-and-healthy-working-environment-enough> accessed 5 May 2023.

II. SCRUTINISING THE COMPORTMENT OF INDIAN LEGISLATORS AND JUDICIARY ON OSH CORE CONVENTIONS IN REFERENCE TO PRIOR INSTANCES

Tracing the legislator's approach

The Ministry of Labour& Employment (Government of India) has elucidated its stance on ILO, emphasising that the legal obligation is only imposed upon ratification of an ILO Convention, rendering these conventions a mere point of reference in the absence of ratification.[5] However, the Ministry failed to differentiate between core and other non-core ILO conventions, which has cast doubt upon the significance of core conventions like C-155 and C-187, stripping away their "fundamental" nature. Consequently, even after acknowledging C-155 and C-187 as core conventions, no discernible change can be observed in the Indian legislator's position due to their treatment being on par with any other (non-core) ILO convention. Indian legislators have ignored the fact that by virtue of being a member state, India is obligated to abide by these fundamental conventions.[6] It is interesting to note that India has already a signatory[7] of a non-core convention related to OSH,[8] i.e. the Radiation Protection Convention (C-115), but not of core conventions (C-155 and C-187) which leads to a peculiar situation where India is considering itself obligated towards this non-core convention (C-115) over core conventions (C-155 and C-187).

The Ministry adheres that "India ratifies an ILO Convention when it is fully satisfied that its laws and practices conform to the relevant ILO Convention."[9] However, the issue arises while determining the threshold for measuring "*full satisfaction*" as there seems to be no standardised threshold in place. To illustrate, despite India's decision to ratify the Core Conventions on Child Labor, child labour remains a significant problem in India even to this day.[10] Therefore, it begs the question, is ratification only feasible when the situation on the ground is practical, or is it merely

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[5] Ministry of Labour and Employment, Government of India, 'India and ILO' <https://labour.gov.in/lcandilasdivision/india-ilo> accessed 5 May 2023.

[6] ILO, 'Conventions and Recommendations' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm/> accessed 5 May 2023.

[7] India and ILO (n 5).

[8] Conventions and Recommendations (n 6).

[9] India and ILO (n 5).

[10] Vijayalakshmi Balakrishnan, 'Theres' still time for india to take its child labour problem seriously' (*The Wire*, 10 November 2022) <https://thewire.in/rights/theres-still-time-for-india-to-take-its-child-labour-problem-seriously> accessed 5 May 2023.

due to international pressure from various stakeholders[11] that the government decides to ratify a Convention to appease them? Additionally, the Court has explicitly stated that it is at the State's discretion to ratify a convention or not, and the Court can only serve a recommendatory role.[12]

In order to unravel the reality behind the ratification of Core Conventions, it is imperative to scrutinise the timeline of ratification for other core conventions of the ILO. India has currently ratified six out of ten core conventions, with three of them being ratified even prior to their recognition as core conventions in the 1998 Declaration on FPRW.[13] There was only one core convention ratified immediately (that is also two years) after its recognition as a core convention in 2000,[14] while the remaining two were only ratified in 2017, nearly two decades after much pressure was exerted on India.[15] Hence, it appears that the recognition of a convention as a fundamental convention does not necessarily guarantee its immediate ratification by Indian legislators. To put it another way, ratification is predicated on social, economic or political feasibility rather than the fact of recognition as a core or fundamental convention. For instance, the provision of complete forbiddance of the freedom of association for employees in security services has frequently been cited as one of the important reasons why core conventions on collective bargaining have not been ratified.[16] Similarly, other limitations, exclusions, and titrations based on some social, economic, and political causes curtail the extensive scope of FPRWs and their core conventions, making it difficult for legislators to go along with such broader scope. Therefore, this discussion shows that it is improbable that India will ratify C-155 and C-187 based on the mere recognition as "a fundamental convention"; however, in the recent time, there is a likelihood to see partial adoption in terms of certain progressive steps towards new fundamental conventions rather than their straight ratification which would require broad and rigid compliance.[17]

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[11] 'Do human rights treaties matter heres the story on child labor agreements' (*Washington Post*, 7 July 2016) <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/07/do-human-rights-treaties-matter-heres-the-story-on-child-labor-agreements/> accessed 5 May 2023.
[12] *G Hema Gowri v Union of India* WP (C) 2953/2012.
[13] India and ILO (n 5).
[14] Ibid.
[15] Ibid; The story on child labor agreements (n 11).
[16] International Labour Conference (67th Session) Statement for Parliament, Action taken or proposed to be taken on the Conventions and Recommendations (Geneva, June 1981), LT 5630/82.
[17] One of the major constrain for the straight compliance with the C-155 and C-187 is the huge legislative gaps in the labour law legislations. See Part III.1 and III.2.

Tracing the Judicial Approach

The Indian Courts have a long history of relying on the ILO conventions. The Indian Courts, in many instances, made a great attempt to bring progressive changes in the labour law regime in India by relying on ILO Conventions. However, the problem arises from the fact that whenever a question comes on the liability or obligation based on the ILO Conventions, the primary factors which the Court scrutinises are: whether India is a signatory to the relevant convention in question,[18] and whether it is consistent with Indian domestic laws.[19] These two considerations have been generally treated as inclusive of each other.[20] In *K. Umadevi v. Headmaster*,[21] the Court reaffirmed that the obligation to adhere to an ILO Convention arises only after it has been ratified.[22] Moreover, in the cases involving the core conventions, the Court has not entertained the notion that, as a member state, India is beholden to the core conventions even if it has not been ratified.[23] Instead, their focus has centred on the requirement of ratification. The Court has merely alluded to the fundamental principles and core conventions of the ILO without delving into their practical implications for India as a member state.[24] Moreover, there have been cases where the Court has carved out exceptions from the obligations arising out of non-ratified core conventions, thereby disregarding compliance with them.[25] So, by and large, the Court appears to be disinclined to subscribe to any special status to the core conventions, except where there is explicit commitment.[26]

In some instances, however, the Courts, as part of their judicial activism, have acknowledged even non-ratified ILO conventions in their observations[27] and tried to draw (guiding) principles from

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[18] *State Of Kerala v Peoples Union for Civil Liberties* (2009) 8 SCC 46; *M Mohan Kumar v P NallaThampy Thera* CA No-007079-007079 / 2001.
[19] *Vasantha R v Union of India* (2001) II LLJ 843 Mad 1 [26]; *Triveni KS v Union of India* 2002 (5) ALT 223.
[20] *Dhanyamol CJ v State Of Kerala* WP (C) No 3450 of 2014; *Mahila Utkarsh Trust v Union of India*, SLP No 2984 of 2012 with 11532 and 11533 of 2013; *Jolly George Varghese v The Bank of Cochin* AIR 1980 SC 470; *Apparel Export Promotion Council v AK Chopra* AIR 1999 SC 625; *Kubic Dariusz v Union of India* AIR 1990 SC 605.
[21] *K. Umadevi v Headmaster* WP No 22075 of 2021.
[22] Ibid.
[23] *MRF United Workers Union v Government Of Tamil Nadu* 2009 (4) LLJ 685 (Mad) [21], [48].
[24] *Tamil Nadu Spinning Mills Association v The State of Tamil Nadu* WP Nos 28741, 28749, 28782, 28783 & 28805 of 2008 & M P Nos 1, 2, 1, 2, 1, 2, 1 & 2 of 2008; *MRF United Workers Union v Government of Tamil Nadu* 2009 (4) LLJ 685 (Mad).
[25] *PWD Employees Union v State of Gujarat* (1987) 2 GLR 1070.
[26] *MRF United Workers Union v Government Of Tamil Nadu* 2009 (4) LLJ 685 (Mad).
[27] *Orissa Mining Corporation Ltd v Ministry of Environment & Forest* [2013] 6 SCR 881; *K Guruprasad Rao v State of Karnataka* 2013 (6) SCJ 677; *Neetu Bala v Union of India* 2016 SCC OnLine P&H 602; *The Management TPS Plantation v The Plantation Officer* (2012) WP No 8859 of 2009; *Dr Deepa Sharma v State of Uttarakhand* (2016) Writ Petition (S/B) No 54 of 2015.

them,[28] but no consideration has been given to whether they are of fundamental/core nature or not. Therefore, in the cases of the C-155 and C-187, which are yet to be ratified, it might be possible for the Courts to acknowledge them in future cases as part of their judicial activism, but it would not be due to their "fundamental" nature.

More importantly, it is important to note that it has been several months since the OSH has been recognised as FPRW; however, there is a dearth of recognition of OSH as a Fundamental Principle by the Indian Courts. It should be emphasised that during this period, the Indian judiciary has had opportunities to examine OSH-related issues[29] and reinforce other beneficial legislations using the core C-155 and C-187, but it has chosen not to delve into the same. However, considering the history of judicial activism of the Indian judiciary in the matters of OSH (unlike the courts' position in terms of recognising core conventions), as highlighted subsequently in Part III.3, it seems to be only a matter of time since we see the Courts' progressive attempt in recognising C-155 and C-187. But again, in that case, the Courts, on the real questions pertaining to enforceability, liability or straight obligations arising out of C-155 and C-187, would look for the legislator's ratification and consistency with the labour laws dealing with OSH. In the current scenario, this would mean that with the standing labour laws on OSH, which are lagging behind to a great extent, and non-ratification of C-155 and C-187, the Indian judiciary will not be able to make a big difference in terms of enforcing or attaining the objectives of C-155 and C-187 without the support of the legislators. Nonetheless, it is high time for the Indian Courts to start acknowledging the C-155 and C-187, and asking the legislators to bring necessary changes in the standing laws to make it conform with C-155 and C-187. This would ease the path of enforcing these conventions in the future, as and when they attain ratification.

[28] *The Management TPS Plantation v The Plantation Officer* (2012) WP No 8859 of 2009; *UCO Bank Employees' Association v UCO Bank* (2014) WP 464 of 2013.

[29] *R Arumugam v Hindustan Unilever Limited* WP No 498 of 2022; *Occupational Health Safety v The Principal Secretary Ministry* (2022) 4 PIL 115.

III. DISTANCES OF AMBITION: CONTEMPLATING THE GAPS BETWEEN ILO'S C155 AND C187 AND INDIA'S CURRENT OSH REGULATORY FRAMEWORK

Even as the International Labour Conference elevated C-155 and C-187 to the supreme status of fundamental principles,[30] which in very essence, implied that these conventions should have compulsory applicability in India, commentators back in India were aware of why exactly India was not going to immediately ratify the conventions (and as already noted, Indian legislative behaviour has suggested that without ratification, conventions even when elevated to FPRW or Core status lack an implementation framework in India), which in effect would mean that India would not be immediately comfortable with implementing the objectives of the conventions, just yet.[31]

C-155 and C-187 contain propositions that require certain game-changing labour reforms in India that have radical implications on labour force behaviour in certain sectors, how labour policy views the idea of occupational safety and health and the State's competency to uphold these obligations. India's OSH regulatory framework broadly consists of its long-standing traditional legislations as well as its new, highly contested and unnotified labour codes. Substantive gaps exist not only between C-155 and C-187's ambitions and the traditional legislation but also with respect to the Codes. India's higher courts, although they have historically disavowed the actual status of ILO conventions and adhered reverently to the Legislature's ratification standing on particular conventions while calculating its adherence to specific ILO Conventions, have nonetheless attempted to make sense of the growing gap between the changing world's occupational safety and health priorities and India's legislative amnesia on the subject – at many times bemoaning this gap and at other times, actively attempting to fill this gap as this section showcases (albeit sometimes unsuccessfully so). Immense is to be learned from a study of this regulatory gap and the courts struggling with this gap to ascertain the approach of policy institutions in the immediate years.

30 ILO, '110th International Labour Conference Adds Safety and Health to Fundamental Principles and Rights at Work' (10 June 2022) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_848132/lang--en/index.htm> accessed May 7, 2023.

31 Dr KR Shyam Sunder, 'Occupational Safety and Health: Why India should endorse the ILO's Fundamental Principles and Rights at Work' (*The Leaflet*, 21 July 2022) <https://theleaflet.in/occupational-safety-and-health-why-india-should-endorse-the-fundamental-principles-and-rights-at-work/> accessed 5 May 2023.

Gaps in Traditional Legislations

The Indian OSH regulatory framework consists of 16 dispersed legislations regulating different sectors, ranging from manufacturing and mining to ports and construction.[32] Very hazard-specific, sector-specific legislations like the Insecticides Act ('IA') have also been important OSH legislations, even if not comprehensive to the sector itself. A broad duty is conferred upon the employers to provide safe and secure work premises to their employees that pose no risks to their health and their well-being through the Employee's Compensation Act, 1923 ('ECA'). Through the ECA and Factories Act, 1948 ('FA'), employers are under the obligation to provide medical care, specialised care for women and children workers, and ventilated and non-crowded workspaces to all their workers.[33] Through such a framework of legislation, a broad arena of workplaces is attempted to be covered by the Indian OSH regulations scheme.

The ILO in 2013 recorded the precise OSH regulatory standing of India, highlighting a series of partial or complete deficiencies,[34] and in the years that have followed until the passing of the new codes from 2019 onwards, no substantive progress has happened on these deficiencies. Primary among them, and Dr Shyam Sunder notes this as a driving reason for India's non-implementation of C-155 and C-187, has been the OSH regulatory deficiencies in the agricultural sector.[35]

Nearly 52 per cent of the Indian workforce depends on agriculture,[36] and nearly 263 million agricultural workers,[37] consisting of 37 per cent of women, engage in it.[38] It is also a deeply

[32] The Factories Act, 1948, The Dock Workers (Safety, Health and Welfare) Act, 1986, The Building and other Construction Workers (Regulation and the Employment and Conditions of Service) Act, 1996, The Child Labour (Prohibition and Regulation) Act, 1986, The Mines Act, 1952.

[33] The Employee's Compensation Act, 1923, The Factories Act, 1948.

[34] ILO, 'Occupational Health and Safety, India 2013' <https://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_YEAR:IND,2013> accessed 5 May 2023.

[35] Dr KR Shyam Sunder, 'Occupational Safety and Health: Why India should endorse the ILO's Fundamental Principles and Rights at Work' (*The Leaflet*, 21 July 2022) <https://theleaflet.in/occupational-safety-and-health-why-india-should-endorse-the-fundamental-principles-and-rights-at-work/> accessed 5 May 2023.

[36] R Pal and J Singh, 'Workforce Changes and Employment | Some Findings from PLFS Data Series' (*Niti Ayog*, 2022) <https://www.niti.gov.in/sites/default/files/2022-04/Discussion_Paper_on_Workforce_05042022.pdf> accessed 7 May 2023.

[37] S Tewari, '*India's Real Skills Challenge: 263 Million Farm Workers*' (*Indiaspend*, 3 August 2015) <https://www.indiaspend.com/indias-real-skills-challenge-263-million-farm-workers-13165/> accessed 7 May 2023.

[38] Ibid.

hazardous[39] sector.[40] Women in agriculture face another layer of occupational safety concerns like undernutrition and work patterns – owing to illiteracy, women tend to be most employed in the informal sector.[41] There are somelegislative protections in agriculture – the Plantations Labour Act ('PLA') confers a duty on the employer of plantations to ensure the health and safety of workers through proper sanitation,[42] the IA requires that employers reveal the location of insecticides and the health harms of being exposed to the chemicals to the workers,[43] and the Dangerous Machines Act, 1983, mandates that the manufacturer ensure that the machinery used in agriculture complies with established safety standards.[44] But that is the complete extent of it.

The problem with the agricultural sector should be understood in the context of the broader problem of India's OSH legal framework excluding the entire informal workforce essentially. Again, limited, dispersed protections do exist, like some protections extended to domestic workers or manual labourers but the broader legislation for the sector, the Unorganised Workers Social Security Act, 2008 ('UWSSA'), which covers migrant workers, home workers and self-employed persons, has deeply flawed approaches[45] that have rendered it majorly dysfunctional.[46]

In C-155, Art. 2(1), read with Art. 3(1), (2) and (3) make it clear that *all* workers in *all* branches of economic activity need to be brought under a national OHS policy.[47] Art. 2(2) *does* provide some leeway to member states by allowing them to exclude some workforces of their choice, but requires that such member states give an explanation and a blueprint for future implementation.[48]But it appears India's policy calculations for the informal workforce's inclusion

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[39] Each year for every 100,000 workers, 334 workers encounter accidents and nearly six percent are fatal, caused by farm machinery, hand tools or miscellaneous reasons like snake bites and heat strokes.
[40] Dr LP Gite, '*Agricultural sector in India - OSH Perspective*' (Central Institute of Agricultural Engineering) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/presentation/wcms_446074.pdf> accessed 5 May 2023.
[41] Meenakshi Jr and Panneer S, 'Occupational *Health of Agricultural Women Workers in India'* (2020) 45 Indian Journal of Community Medicine 545 <http://dx.doi.org/10.4103/ijcm.ijcm_397_19> accessed 5 May 2023.
[42] The Plantation Labour Act, 1951.
[43] The Insecticides Act 1968.
[44] The Dangerous Machines Act 1983.
[45] Paromita Goswami, '*A Critique of the Unorganised Workers' Social Security Act'* (*Economic and Political Weekly*, March 2009) <https://www.epw.in/journal/2009/11/commentary/critique-unorganised-workers-social-security-act.html> accessed 5 May 2023.
[46] Kathyayini Chamaraj, 'A *Dysfunctional Social Security Law for Unorganised Workers*' (*CIVIC Bangalore*, October 2010) <https://civicspace.in/wp-content/uploads/2019/10/Revised-A-Dysfunctional-Social-Security-Law-for-Unorganised-Workers-Analysis-and-Recommendations-22.1.16-1.pdf> accessed 5 May 2023.
[47] ILO, Occupational Safety and Health Convention 1981 (No 155) (C 155).
[48] Ibid.

into its OSH legal regime remains so underthought that it is incapable of promising anything through Art. 2(2).

Similarly, Art. 3(e) of C-155 envisions the inclusion of mental health as an OSH concern.[49] Some psychosocial protection laws are indeed there, like the UWSSA or Employees State Insurance Act ('ESIA') which requires employers to provide alleviating mechanisms for workplace-related stress, or the IDA and Prevention of Sexual Harassment at Workplace Act, 2013, which obligate employers to provide the framework to resolve occupational violence, but the mental health concerns relating to workplaces can be somewhat broader (Jain et al., for instance, highlight how workplace psycho-sociality is determined by various aspects of work organisation, design and management, which include work demands, rewards and interpersonal relationships in the workplace, that have not yet been captured within existing OSH laws).[50] India's lack of broad legislative coverage of mental health across sectors exhibits its complete inability to comply with Art. 3(e). A connected, bigger issue here is how the Indian OSH regulatory framework simply does not have a coherent definition of 'occupational disease' – only listings under schedules of the ECA and ESIA.[51]

While Art. 5(c) and Art 12(c) of C-155 necessitate OSH training,[52] that is again very restrictively obligated under the ECA, FA, Dock Workers Act and the Public Liability Insurance Rules, 1991, and the much bigger issue remains the shortage of trained and skilled OSH professionals on the ground.[53] Art. 16 of C-155 notes the exhaustive duties of the employer to actively invest in workplace safety through various measures, like ensuring that employees are provided with adequate protective clothing and safety equipment.[54] But the Indian legislative framework gravely fails at it – painful evidence is to be noted in the 2013 manual scavenging law that has been widely critiqued for its unimplementability.[55] There is also a grave issue of non-availability of data on

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[49] Ibid(n.47).

[50] Jain A and others, 'The Role of Occupational Health Services in Psychosocial Risk Management and the Promotion of Mental Health and Well-Being at Work' (2021) 18 International Journal of Environmental Research and Public Health 3632 <http://dx.doi.org/10.3390/ijerph18073632> accessed 5 May 2023.

[51] The Employees State Insurance Act 1948, s 52A; Employees Compensation Act 1923, s 3(2).

[52] C 155, art 5(c), 12(c).

[53] Shyam Pingle, 'Occupational Safety and Health in India: Now and future' (2017) 50 Industrial Health 167-171.

[54] C 155, art 16.

[55] Ayush Mehta and Navya Bhandari, 'Manual Scavenging: An Endless Cycle of False Promises & Failed Policies' (*Law School Policy Review and Kautilya Society*, 13 April 2020) <https://lawschoolpolicyreview.com/2020/04/13/manual-scavenging-an-endless-cycle-of-false-promises-failed-policies/> accessed 5 May 2023.

OSH incidents in India, something that Art. 4(3)(f) of C-187 really emphasises,[56] and a basic immunity or protection of the workman who has left the harmful workplace and raised legal claims against the employer, as provided under Art. 13 of C-155, has not been guaranteed substantially in the Indian regime.[57]

C-155 and C-187 function in a complementarity regime- the first supplies the substantive fodder while the latter provides the model policy framework for member states to efficaciously implement C-155's substantive mandates. Indian OSH law lags duly behind many of C-155's goals - the gap at the Indian level begins at the very image of substantive OSH law; framing implementational structures in line with C-187, in such a condition, could only follow or compliment the framing of our substantive laws.

But as India gears for a new era of labour law regime, it becomes further pertinent to assess how these gaps may be characterised in terms of India's OSH concerns in the immediate years to come.

Gaps in the New Codes

A codification exercise was undertaken with enforcement beginning from 2019 onwards to consolidate many traditional legislations under four labour codes. Three of these codes, the Occupational Safety, Health and Working Conditions Code, 2020 ('OSHC'), the Code on Social Security, 2020 ('SSC') and the Code on Wages, 2019 ('COW'), will formulate the social security regulatory scenario for at least certain years to come. The codes have not yet been notified owing to a large number of concerns raised by worker lobbies and political groups[58] – most to do with the basic argument that they do not truly reform the traditional legislative standing of India.[59] Hence most gaps between the codes and C-155 and C-187 would replicate those with traditional legislation.

The new concerns raised have been that the OSHC does not account for plantation workers properly – even as the PLA is getting consolidated under the OSHC, which means that PLA itself will become null upon OSHC's notification, serious concerns have been raised about whether the

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[56] C 155, art 4(3)(f).
[57] C 155, art 13.
[58] Preetha Nair, 'RSS wing opposes labour codes, awaits govt response' (*The New Indian Express*, 17 October 2022) <https://www.newindianexpress.com/nation/2022/oct/17/rss-wing-opposes-labour-codes-awaits-govt-response-2508983.html> accessed 5 May 2023.
[59] Rashmi Venkatesan, 'Labour Laws Perform a Redistributive Function. Diluting Them Has Serious Consequences' (*The Wire*, 29 September 2020) <https://thewire.in/labour/labour-law-dilution-consequences> accessed 5 May 2023.

OSH protections of PLA will be properly accounted for (particularly, since the OSHWC on the subject of plantation workers supplies no central framework, leaving great scope for state governmental discretion and thus varying implications in different regions of the country).[60] The vision of Art. 13 of C-155, which protects workers from "imminent serious danger" after they leave the risky workplace, has still not been included in OSHC. Further, because s. 10 of OSHC restricts coverage to only certain industrial accidents, the mandate of Art. 14 of C-155, which requires a publication of "occupational accidents",[61] means that the mandate of s. 10 of OSHC must be expanded.

A glaring problem with the SSC has been that it promises application upon the unorganised workforce but provides no real protection to the informal workers.[62] The COW also has problematic implications on the OSH scenario – its provisions on work hours are problematic because they mandate a 9-hour work model, as opposed to the globally accepted and post-labour movement norm of 8 hours.[63] The proposed Rules in COW regarding the weekly day of rest have several issues that pose occupational safety and health concerns. The Rule states that workers should be paid overtime rates for working on their rest day and that if a substitute rest day is provided within the next three days, no overtime wages are applicable. However, this approach does not consider the importance of rest days for the physical and mental well-being of workers. Rest days are essential for workers to recover from the physical and mental strain of their jobs.[64] The proposed Rule's requirement for workers to work on their rest day or receive a substitute rest day with no extra compensation fails to recognise the importance of rest in maintaining worker health and safety. Additionally, the proposed maximum of 12 hours of work per day is concerning as it may lead to fatigue and decreased productivity, which could compromise occupational safety and health. Thus, evidently, within the schema of the new labour codes as well, definitive OSH regulatory gaps are teasingly visible.

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60 Kingshuk Sarkar and Vinit Ghosh, '*Plantation Workers and the OSHWC Code, 2020*' (2021) 56(38) EPW <www.epw.in/journal/2021/38/commentary/plantation-workers-and-oshwc-code-2020.html> accessed 5 May 2023.

61 C 155, art 10.

62 Santosh Behera and JajatiKeshariMehera, 'Social *Security For All of India's Informal Workers is Possible Here's How*' (*The Wire*, 10 February 2022) <https://thewire.in/economy/social-security-informal-workers-code-welfare> accessed 5 May 2023.

63 Kingshuk Sarkar, 'Here *Are All the Issues that Remain Unresolved in the Draft Code on Wages Rules*' (*The Wire*, 8 July 2020) <https://thewire.in/labour/draft-code-on-wages-rules-issues> accessed 5 May 2023.

64 Jenna Fletcher, '*When and how to spend a rest day'* (*Medical News Today*, 28 January 2021) <https://www.medicalnewstoday.com/articles/rest-day> accessed 5 May 2023.

Indian Courts' Trysts with India's OSH Regulatory Gaps

Since the adoption of C-155 and C-187 to FPRW status, Indian higher courts, till writing, have not explicitly engaged with the gaps between these two conventions and India's OSH regulatory status. They have not, in fact, as noted in Part II.2, recognised OSH as a Fundamental Principle of the ILO or acknowledged or relied on C-155 and C-187 after their elevation, even as multiple opportunities to do the same have arisen. However, a brief historical assessment of Indian judicial engagement with the very concept of OSH, and with the regulatory gap between India and ILO's OSH ambitions provides important observations.

For instance, courts have strongly tried to engage with the Indian legislative problem with working hours. In 2018, in *Arun Kumar Bhadoria*v. *State and Ors*, in a case dealing with long working hours of police personnel, the Court heavily relied on ILO instruments like the Hours of Work (Commerce and Offices) Convention, 1930 and the Holidays and Pay Convention, 1970 to hammer that on a global standard, reasonable work hours are a significant OSH policy priority and bemoaned the fact that India simply lacked a comprehensive policy standing on working hours.[65] The Court particularly saw working hours as an OSH concern highlighting how long work hours correlate to serious occupational hazards.[66] This entire assessment was substantively reiterated in *Hardam Singh* v. *State of Punjab* a year later.[67] Much earlier in 2003, Kerala HC in *Seenath Beevi* v. *State of Kerala* had similarly reformed the working hours of nurses according to the ILO's standard.[68] Interestingly, in that case, the Court had also emphasised*mental health* as a serious OSH consideration by pointing to the mental health fallouts on nurses – a gap that has become more prominent with C-155 and C-187's FPRW elevation. In all these cases, the Court itself became an OSH gap-filling institution trying to bridge the work-hour deficiency in a certain sector because the legislative structure was unresponsive to it.[69]

One of the earliest exercises in such OSH gap-filling by the courts was done in 1995 in *Consumer Education & Research Centre* v. *Union of India* ('Consumer Education').[70] The Court, while

[65] Arun Kumar Bhadoria v State of Uttarakhand And Others, Writ Petition (PIL) No 48 of 2017.
[66] Ibid.
[67] Hardam Singh v State ofPunjab, CRA D 109 DB of 2014.
[68] Seenath Beevi v State of Kerala, 2003 (3) KLT 788.
[69] However, it is noteworthy that this position of the Courts in the matters of OSH is *in toto* different from what we have seen for the recognitionrecognition towards "fundamental" nature of core conventions earlier.
[70] Consumer Education & Research v Union of India & Others, 1995 AIR 922, 1995 SCC (3) 42.

dealing with the occupational health concerns in industries involving asbestos, heavily relied on the ILO's Asbestos Convention and some related Rules to lay down comprehensive OSH guidelines for asbestos industries, like a mandate for employers to maintain the health records of all employees and mandating all industries, whether covered by ECA and ESIA or not, to compulsorily insure health coverage to workers. As revolutionary as Consumer Education was, its guidelines were never broadly implemented – majorly because the Indian OSH legislative framework continued to ignore the health issues with asbestos, and India never ratified the Asbestos Convention. In 2011, in *Kalyaneshwari*v. *Union of India*, the Supreme Court bemoaned how Consumer Education's guidelines were still not being implemented and why it should be, but once again did not raise any pressure on the ratification of the Asbestos Convention, even when it had the opportunity to do so.[71] Meanwhile, India's trade position on asbestos remains unchanged.[72] Thus, even where courts have become activists on OSH reform, the lack of regulatory prioritising by the legislature, and their own unwillingness to criticise the legislature's standing on particular conventions has failed their efforts.

In other judgements, courts have recognised an updated ILO standing on an OSH issue and attempted to bring national law up to date with it. Consider *R. Vasantha* v. *Union of India*, which brought some amendments to the FA to allow women to work night shifts on the grounding that an ILO convention on the issue had recently been revised.[73]

In yet other judgements, the Court has regulated the OSH unregulated sectors that are *now* being discussed because India is disjunct with C-155 and C-187 – like agriculture. In 2017, the National Green Tribunal in*Kasalla Mala Reddy* v. *State of Andhra Pradesh*, while dealing with health hazardous situation created in certain communities in Andhra Pradesh by some industrial units in a zone, highlighted how farmers in the region had been *occupationally* affected because of chemical exposure in the region and directed compensation to be paid to the occupationally affected farmers.[74]

[71] Kalyaneshwari v UOI &Ors, WP (C) No 260 of 2004.
[72] Shankar P, '*Why Does India Still Use and Trade Asbestos?*' (*Al Jazeera*, 12 December 2022) <https://www.aljazeera.com/news/2022/12/12/why-does-india-continue-trading-asbestos> accessed 5 May 2023.
[73] Vasantha R v Union of India And Ors (2001) IILLJ 843 Mad.
[74] Kasalla Mala Reddy v State of Andhra Pradesh, NGT Southern Zone, OA No. 69 of 2013.

Thus, even though Indian courts have historically fared poorly on the subject of appropriately recognising ILO conventions, their status and weightage in international law and taking a stance on ratification opposed to the legislature, they have nonetheless sometimes acknowledged the OSH regulatory gaps and have attempted to bridge it by importing ILO's OSH standards into the Indian regime even without the legislative backing.

But because of a lack of this structural backing, despite strong efforts, a lot of times, such judicial activism has not translated into impact. It is too early to assess what the judicial fallouts of the OSH FPRW elevation exactly will be, but judicial history narrates that, on the one hand, courts have routinely avoided relying on non-ratified convention, but on the other hand, on the subject of OSH specifically, have been important agents and whenever the acuteness of this gap has peaked, courts have radically or desperately attempted rescues. It is essentially this bifurcated approach on the subject that will play out in the coming times after the FPRW elevation of C-155 and C-187.

IV. WAY FORWARD

From the above discussions, it is evident that the Indian legislature's position towards the ILO core Conventions has been traditionally dictated by a disposition of indifference and largely, Indian higher courts also have remained inassertive on the subject that India, by virtue of a member state of ILO is bound by the ILO core conventions. But as this paper explores, Indian judicial behaviour on this subject cannot be so simply articulated - in matters particularly of OSH, the courts have not shied from using ILO Conventions, Core or otherwise, to fill pertinent regulatory gaps. Again, the nature and extent of this judicial activism have been rather limited, in the sense that courts, while passionate about using ILO's Conventions for OHS progress in India, seem to be not enthusiastic about ruling on the fundamentality of the Conventions themselves. This format of judicial activism has also failed in the absence of legitimate legislative backing (which is not only in terms of a lack of ratification but also in filling *prima facie* gaps in the legislation).

A practical inference, then, would be that C-155 and C-187's FPRW elevation is perhaps unlikely to cause any immediate transitions in India, even though they should be given their 'fundamental' or 'core' status. Even if the Courts attempt to acknowledge these conventions in the future, it is deeply difficult to promulgate their enforceability without formal ratification processes, and ratification is only possible when the legislators find these conventions feasible to the social, economic and legal scenario in the country. It is rather interesting that in such a scenario, it is the role of other stakeholders like trade unions, social institutions, international labour institutions, employers, et al. that has become crucial - particularly when it comes to policy lobbying and organised discussions at both micro and macro levels. Such would serve a two-fold purpose essentially: first, to make OSH a reality on a ground-level basis, and second, it (along with the potential judicial activism in future) will accelerate the process of attaining "full satisfaction" by the legislators, which would subsequently lead to the ratification.

Here, it is noteworthy that the ILO and some other unions have already kickstarted certain projects preparing India for C-155 and C-187's very prospective ratification. In February 2022, ILO organised a consultative meeting on OSH implementation with small tea plantation workers to understand their OSH conditions and concerns.[75] Per the concept note, the outcome is to be used to develop a roadmap with small tea growers' associations on regulatorily tackling their OSH issues. This project is ongoing. In June 2022, only a few days after the International Labour Conference 2022, a 3-day workshop and strategy meeting was organised with central trade unions to build leadership around OSH lobbying to enable regulatory ratification. Subsequently, ILO has organised a situational assessment of sanitation work in India and the preparation of an action plan which plans to resolve the OSH issues with the manual scavenging law per ILO's standards. Moreover, some federations like IndustriALL, a global union federation, also conducted roundtables with trade unions on the appalling OSH situation in India.[76] These active collective policy discussions showcase a form of heightened interest and anxiety surrounding India's OSH regulatory gap and its rise as a prominent discourse, which attempts to lead towards something significant. So, in the coming future, it would be interesting to see how the legislature reacts to these multifarious pressures as it has the potential to shape India's C-155 and C-187 ratification and broader the OSH regulatory considerations.

[75] ILO, 'Consultative Meeting with the Small Tea Growers on Promoting Occupational Safety and Health in the Workplace' (18 January 2022) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/meetingdocument/wcms_837327.pdf> accessed 7 May 2023.

[76] ILO, 'Terms of Reference for appointment of an External Collaborator: Situational Assessment of Sanitation Sector and Sanitation Workers in India and Preparation of Action Plan' <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_851801.pdf> accessed 5 May 2023.

DOUBLE CROSS OR FIDELITY: LEGAL AND ETHICAL POSITING OF MOONLIGHTING IN INDIA

by Sharadindu Shekhar and Kumar Aditya

Abstract

Moonlighting, or engaging in a second job in addition to one's primary employment, has become increasingly common in India. While some argue that moonlighting can provide additional income and professional development opportunities, others believe that it can lead to conflicts of interest, decreased productivity, and ethical violations. This paper explores the legal and ethical implications of moonlighting in India. From a legal perspective, moonlighting is not expressly prohibited under Indian law. However, some employers may include clauses in their employment contracts prohibiting employees from engaging in outside employment without prior approval. Violating such a clause can lead to termination of employment. From an ethical perspective, moonlighting raises questions about loyalty and commitment to one's primary employer, as well as conflicts of interest. For example, an employee who works for a company during the day and for a competitor at night may be privy to confidential information that could be used for the benefit of the competitor. Additionally, moonlighting can lead to fatigue and decreased productivity, which can ultimately harm the employer. In conclusion, while moonlighting is not explicitly prohibited under Indian law, employees must consider the legal and ethical implications before taking on a second job. Employers should also carefully consider the potential impact of moonlighting on their business and include appropriate clauses in employment contracts to protect their interests.

KEYWORDS: ***Moonlighting, Legal implications, Ethical implications, Loyalty, Conflicts of interest***

I. INTRODUCTION

Moonlighting is ubiquitous in labour markets worldwide, yet it has largely been overlooked despite its apparent prevalence. Moonlighting refers to the simultaneous employment of an individual in multiple jobs, with their primary job being termed as the sunlighting or prime job and any additional jobs being referred to as moonlighting or secondary jobs.[1] Workers who hold more than one job are known as moonlighters.

Moonlighting can take many forms, such as part-time work in addition to full-time employment or emotional attachment to a secondary job. Traditional occupational groups, including teachers, doctors, lawyers, and artists, tend to have a high incidence of moonlighting. For example, doctors may work in private nursing homes or public hospitals, while public school teachers may offer private tutoring services. Politicians and university professors may also hold additional jobs in the private sector.

The term “moonlighting” dates back half a century, originating from the practice of individuals carrying out part-time work at night before the advent of modern complex industrial economies.[2] While the reasons for moonlighting have evolved, the common feature is the simultaneity of employment in multiple jobs.

Moonlighting is becoming more prevalent due to the trend toward flexible working conditions resulting from globalization and privatization.[3] While moonlighting has not been an attractive research agenda for labour economists in the past, it has become increasingly relevant in the analysis of modern labour markets.

Moonlighting has both positive and negative effects. It can lead to value addition[4] and skill accumulation, but it can also promote shadow and underground activities[5] and distort the labour

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[1] “Moonlighting” (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/moonlighting> accessed 25 March,2023,

[2] Paula, S. (2007), “Many Employees Moonlight”, National Impact.

[3] Baines, J. and Newell, J. (2004), “Multiple Job Holding in New Zealand: A Growing Presence in New Zealand’s Labour Markets, 20-Year Trends”, Paper presented at the Eleventh Labour Employment and Work (LEW) conference, Wellington, 22-23 November 2004,;Combos, C., McKay, A. and Wright, P. (2007)), “A New Labour Force: An econometric analysis of multiple jobholding”, Discussion Paper No. 07/02, University of Nottingham.

[4] Casacuberta, C., Gandelman N., (2006) “Multiple jobholding : the artist’s labor supply approach”, Document No. 19/06, Departamento de Economía, Facultad de CienciasSociales, Universidad de la República, Uruguay.

[5] Frey, B. S., Schneider, F., (2002), The shadow Economy: An International Survey, Cambridge University Press; Frey, B.S., Schneider, F., (2000). “Informal and Underground Economy”. Orley Ashenfelter: International Encyclopedia of

market's performance and productivity.[6] Therefore, moonlighting is a complex research agenda that requires careful consideration.

II. CONCEPTUAL CONTOURS OF MOONLIGHTING

In the realm of economics, the term "moonlighting" holds paramount significance, for it encapsulates the concept of simultaneous employment in multiple jobs. However, it is essential to note that the definition of this term assumes great importance, as it encompasses various features of multiple job holding contingent on the nature of the primary and secondary jobs.

Various sources have attempted to define moonlighting, and one such definition is provided by Webster's New World Dictionary (2007), which defines moonlighting as the "*practice of holding a second regular job in addition to one's main job*." The Cambridge Dictionary (2010) similarly defines it as "*paid work that you do in addition to your normal job, especially without telling your employer*."[7]

Guariglia and Kim (1999, 2001) explicate that secondary jobs or activities are generally part of the informal economy, and thus, they consider moonlighting as holding an informal job in addition to a formal job.[8] The definition of the formal or informal labour market determines whether moonlighting jobs belong to the formal or informal sector of the economy. However, if such subsidiary jobs bolster the informal sector, there can be undesirable consequences such as a suboptimal level of effort in performing the required services. Hence, holding multiple formal jobs simultaneously cannot be considered moonlighting from this perspective.

Social and Behavioral Science, Bd. 12 Economics, Amsterdam, Elsevier Science Publishing Company; Barth, E. and Ognedal, T., (2005), "Unreported Labor", Discussion Paper, IZA, No. 1893.

[6] Biglaiser, G., and Ma, Ching-to Albert (2007)), "Moonlighting: public service and private practice". RAND Journal of Economics Vol. 38, No. 4. pp. 1113–1133.

[7] Webster's New World Dictionary (4th edn, Webster's New World 2007); Cambridge Dictionary (Cambridge University Press 2010).

[8] Guariglia, A. and Kim, B.Y., (1999), "Unemployment Risk, Pre-cautionary Savings and moonlighting in Russia", Working Paper No. 232, William Davidson Institute; Guariglia, A. and Kim, B.Y., (2001), "Dynamics of Moonlighting: What is Happening in the Russian Informal Economy", Discussion Paper 5, Bank of Finland, Institute for Economies in Transition, Bofit.

Sennholz[9] (1984), Frey and Schneider[10] (2000), and Schneider and Enste[11](2002) believe that multiple job holding can be considered moonlighting if incomes from secondary jobs are not reported to the income tax authority, indicating tax evasion. This view is related to social fraud, illegal employment, and extensive tax evasion, which are detrimental to the economy. Schneider and Enste[12](2002) elucidate that a significant portion of the labour force engages in illicit or informal activities in addition to formal white-collar activities. Moonlighting, in this context, signifies the special characteristic of multiple job holding, where the secondary activities are attached to some illicit/informal aspects.

Betts (2006) defines moonlighting as holding a part-time job in addition to a primary full-time job.[13] In contrast, Shisko and Rostker[14] (1976), Ritter[15] (1998), Renna and Oaxaca[16] (2006), O'Connell[17] (1979), and Krishnan[18] (1990) hold the view that any form of contemporaneous employment in multiple jobs can be classified as moonlighting, irrespective of the nature of the secondary jobs. The definition provided by Shisko and Rostker and the likes is broad and encompasses all types of simultaneous employment in various jobs under the common umbrella term of moonlighting.

III. CATEGORIZATION/ CLASSIFICATION OF VOCATIONS

In delving into the intricacies of the economics of moonlighting, a fundamental comprehension of the classification of primary and secondary vocations is of utmost importance. At the outset, it was commonly held that a main or primary job, also known as "sunlighting", was one which was undertaken during the daytime, whereas an additional or secondary job - also known as

[9] Sennholz, Hans F. (1984), The Underground Economy, Ludwig von Mises Institute.
[10] Frey (n 148).
[11] Frey (n 148).
[12] Frey (n 148).
[13] Betts, S. C., (2006), "*TheDecision to Moonlight or Quit: Incorporating Multiple Jobholding into a Model of Turnover*", Journal of Organizational Culture, Communications and Conflict, Volume 10, No. 1, 2006.
[14] Shishko, R. and Rostker, B. (1976). '*The Economics of Multiple Job Holding'*, American Economic Review, vol.66, no.3, pp.298-308.
[15] Ritter, J. A. (1998), "*Moonlighting*", National Economic Trends.
[16] Renna and Oaxaca (2006). "*The Economics of Dual Job Holding: A Job Portfolio Model of Labor Supply*" IZA Discussion Paper No. 1915.
[17] O'Connell, J.F. (1979), "*Multiple Job Holding and Marginal Tax Rates*". National Tax Journal, 32(1), 73-76.
[18] Krishnan, P. (1990). "The Economics of Moonlighting: A Double Self-Selection Model," Review of Economics and Statistics, vol. 72(2), pp. 361-367.

"moonlighting" - was performed during the night-time or weekends. However, as the world's economy becomes more complex, the notion that an individual who holds multiple jobs is necessarily engaged in moonlighting activities during night-time hours is no longer a logically sound assumption.

In their study on the dynamics of moonlighting in Russia, Guariglia, and Kim (2001) posited that a main or prime job can be defined as an economic activity that is recorded in an individual's labour book and is often associated with medical and pension benefits, making it a formal job.[19]Conversely, secondary jobs or moonlighting activities are additional economic endeavours that are often unreported or conducted off the record. For the researchers, moonlighting represents the primary focus of informal economic activity for Russian households. However, this classification system falls short when attempting to categorize the jobs of individuals who hold more than one formal job. To address this, Foley (1997) introduced the concept of both formal and informal moonlighting, whereby the main job is always formal, but any additional moonlighting job may be either formal or informal.[20]

In the realm of underground and shadow economy, scholars such as Sennholz, Frey, Schneider, Barth, and Ognedal have contended that individuals engaged in moonlighting tend to underreport or conceal earnings from secondary activities as a means of evading national income taxes. As per their perspective, the primary job is a lawful and legitimate "white" job, and employees undertake secondary jobs or moonlighting activities (which are unreported to tax authorities) after the conclusion of their regular workday. Shisko and Rostker[21], on the other hand, define moonlighting as the simultaneous holding of any secondary jobs in addition to a primary job, where the latter denotes steady, full-time employment and the former entails any additional jobs. They substantiate their argument through both theoretical and empirical explanations, wherein the hour's constraint notion of moonlighting posits that if a worker is confined to supplying the desired level of work hours at their optimal utility, they will tend to allocate any 'unused' hours into another job(s).

Moonlighting, as posited by Paxson and Sicherman, is the selection of different jobs in a portfolio, where the primary job provides a stable yet low income, and the additional (secondary) jobs offer

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[19] Guariglia (n 151).
[20] Foley, M. C. (1997). "Multiple Job Holding in Russia During Economic Transition", Center Discussion Paper No. 781. Economic Growth Center, Yale University.
[21] Shisko (n 157).

higher income on average but are more variable in nature.[22] However, categorizing jobs as primary or secondary is not entirely helpful in the case of moonlighting by artists or musicians. These individuals often seek employment in regular non-artistic jobs during usual working hours and engage in artistic performances during non-working hours. This type of moonlighting necessitates not only an emotional attachment to the artistic or musical job but also requires specific labour quality.[23] According to Alper and Wassail, the term "Moonlighting Artist" implies that the job of art is the primary job of an artist, but more often than not, artistic performances are deemed secondary activities of moonlighting artists according to the job classification based on time criterion.[24] Typically, moonlighting artists and musicians perform their artistic work during non-working hours, and such work is considered secondary activity.

In numerous democratic nations, elected parliamentarians engage in additional gainful activities in private sectors alongside their political duties.[25] This practice, commonly known as political moonlighting, involves holding private jobs in the production sector while fulfilling their political obligations. While incumbent party members typically enjoy positive support to carry on their private activities, opposition parliamentarians may face negative externalities in their secondary jobs.

Traditionally, the classification of jobs into primary and secondary is based on the time criterion, with full-time employment being the primary job and part-time work being the secondary. However, this approach does not apply to those who moonlight with two full-time jobs. Additionally, some individuals may work part-time on their primary job while working full-time on their secondary job.

In India, the National Sample Survey Organisation follows a two-stage dichotomous classification based on the major time criterion. The usual principal status (PS) is determined by the time spent on an activity during the 365 days preceding the survey. If a person pursues some economic activity for a shorter time or minor period, not less than 30 days, during the reference year, it is considered

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[22] Paxson, C.andSicherman, N. (1996). "The Dynamics of Job Mobility and Dual-job Holding," Journal of Labour Economics, vol.14, no.3, pp.357-393.

[23] Lundberg, P., (1995), "*Job Amenity and the Incidence of Double Work*", Journal of Economic Behavior and Organization, Vol. 26, pp 273-287

[24] Alper, N.O., and Wassail, G. H. (2000), "*More Than Once in a Blue Moon: Multiple Jobholdings by American Artists*", Research Division Report 40, National Endowment for the Arts Seven Locks Press Santa Ana, California.

[25] Gagliarducci, S., T. Nannicini and P. Naticchioni (2008). "*Outside Income and Moral Hazard: The Elusive Quest for Good Politicians*". IZA Discussion Paper No. 3295.

as the usual subsidiary status (SS). Those employed in both PS and SS are categorized as moonlighters.

In an ideal scenario, a moonlighter should be asked to leave their extra jobs to categorize their primary and secondary job. The job that the moonlighter wishes to leave may be considered as their secondary job. In such compulsion, the moonlighter would leave the casual, part-time, illegal, and informal jobs and keep only the steady, legal, full-time regular job as their primary job.

IV. THE *STATUS QUO* OF MOONLIGHTING IN INDIA- INSTANCE OF THE IT SECTOR

In recent times, the IT job market has become more flexible, leading to reduced employee-employer loyalty, increased risk of unemployment, and shorter job tenure. Consequently, individuals must adopt alternative strategies to ensure job security and a steady income stream. Occupational mobility has become crucial in modern job markets due to rapid technological advancements and the need for continuous skill enhancement. The volatility has compelled a significant number of workers to adopt an active approach of holding multiple jobs or moonlighting to cope with the situation. Besides addressing financial constraints, multiple jobs can guarantee uninterrupted employment spells and offer an opportunity for further career advancement by accumulating job-specific expertise. Moonlighting has emerged as a popular trend in the Indian IT market, where people supplement their primary job with a side job or a side hustle. While some individuals take on side jobs out of necessity, others do so to earn additional income. Moonlighting involves working a side job after regular working hours, and it's possible to keep more than one side job simultaneously, such as a full-time job, part-time contract, or freelance work. The practice of taking on side jobs is gaining popularity in India due to stagnant wages and low wage growth, leaving nearly a third of people with side jobs struggling to make ends meet. When an individual’s primary job only provides income to pursue a side job of their choice, it's typically referred to as a “day job.” Recent research has shown that by this year, around 30% of India's workforce will have to work remotely, and the number of telecommuters is on the rise.[26] Telecommuters can double their wages thanks to multitasking, which is highly recommended for

[26] George, A. Shaji& George, A.s. (2022). A Review of Moonlighting in the IT Sector And its Impact. 01. 64-73. 10.5281/zenodo.7114049.

moonlighters.[27] Working as an IT professional has not only doubled employees' salaries but also provided them with valuable experience. It's worth noting that moonlighters trust their employers and fulfil their end of the deal if it doesn't conflict with their actions. Many professionals now have two corporate IDs, two email addresses, and two bosses in WFH mode.[28] This concept is not new in America, where people work for two different employers on different shifts to earn more money, such as working as a waiter in both restaurants in the morning and evening. With everything working remotely, and results coming out, today's employees have more free time, allowing them to work more. However, it's not possible in the service sector. Despite being a new trend, there has been a lateral shift in India, such as independent project consultants and mentoring teachers outside the school. Successful startups have also been created when founders made extra money. Moonlighters are good managers, and it all depends on time management.[29] Not everyone can freelance or moonlight and only 20% of professionals can manage multiple projects simultaneously.ven so, moonlighting offers professionals a host of benefits, such as learning new skills or retraining, which can help them compete with their counterparts worldwide. Additionally, they gain experience that helps them find better-paying jobs, enabling them to make more money.

V. THE DIVERSE STIMULI BEHIND MOONLIGHTING

The decision to engage in moonlighting is influenced by a variety of economic and non-economic factors, which can be categorized into different groups. In terms of economic reasons, various studies have identified several factors that impact a worker's decision to moonlight, drawing from the microeconomic theory of labour-leisure choices. This theory suggests that workers have a fixed amount of time, which they allocate among different jobs in order to maximize their utility.

VI. ECONOMIC STIMULUS FOR MOONLIGHTING

One economic factor that influences moonlighting is the "hours constraint". This occurs when a worker is unable to supply as many hours of work in their primary job as they desire to reach their optimal level of utility. As a result, they may invest their "unutilized" hours into a secondary job

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[27] Ibid.
[28] Ibid.
[29] Ibid.

that offers a wage rate between their reservation wage and the wage rate of their primary job. Studies by Guthrie[30], Shisko and Rostker[31], O'Connell[32], and Krishnan[33]support this motivation for moonlighting.

Another economic factor is the "heterogeneous job motive". This suggests that an individual may choose to moonlight because they derive different sources of satisfaction from their primary and secondary jobs. This is especially true for jobs with imperfect labour substitutability, where the wages and leisure lost in the moonlighting job are not directly comparable to those of the primary job. Studies by Lilja[34], Conway, and Kimmell, as well as Kimmel and Conway and Boheim and Taylor[35], confirm the existence of this motive, with the hour's constraint being the most common.

A third economic factor is the "liquidity constraint," which occurs when a worker has a low current income relative to their educational attainment and struggles to manage liquid funds to maintain their desired lifestyle. Abdukadir found evidence of this motive in Florida.[36]

Finally, the "negative financial shock" factor occurs when a worker faces a sudden negative financial event that changes their labour supply preferences. This may lead them to increase their optimal labour supply decision and decide to moonlight if they cannot supply the desired work hours in their primary job. Boheim and Taylor found evidence of this factor in shaping the moonlighting decisions of British workers.The looming dread of losing one's primary means of employment can instigate a search for secondary job opportunities, as individuals seek to hedge against the precariousness of their primary position. In instances where the primary job is vulnerable to termination, workers may seek out secondary jobs as a form of insurance against the possibility of losing their primary source of income. The notion of moonlighting as a protective measure is not unfounded, as research conducted by Bell, Hart, and Wright (1997) has uncovered.[37] Moreover, the imposition of regulations that limit or restrict overtime pay in the primary job can

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[30] Guthrie, H. W., (1969), "Teachers in the Moonlighting", Monthly Labour Review, 92, 28 – 31.
[31] Shisko (n 157).
[32] O'Connell (n 160).
[33] Krishnan (n 161).
[34] Lilja, R, (1991), "The Problematic and Unproblematic Second Job," Discussion Paper No.107, Labour Institute for Economic Research, Helsinki.
[35] Böheim, R. and Taylor, M. P. (2004). "And in the Evening She's a Singer with the Band – Second Jobs, Plight or Pleasure?, IZA Discussion Paper 1081.
[36] Abdukadir, G. (1992), "Liquidity Constraints as a Cause of Moonlighting", Applied Economics, 24(12), 1307-1310.
[37] Bell, D.N., Hart, R.A. and Wright, R.E. (1997) "Multiple Job-Holding as a 'hedge' against Unemployment". CEPR Discussion Paper No. 1626.

incentivize workers to engage in moonlighting. Friesen (2001) has noted some evidence of this phenomenon.[38]

Paxson and Sicherman[39](1996) contend that moonlighting is merely a portfolio selection of different jobs and is intrinsically linked to job mobility. They argue that individuals utilize moonlighting as a mechanism for adjusting their work hours, citing two bases for this adjustment. Firstly, if the two jobs complement each other, individuals can "portfolio diversify" their available work hours, with the primary job serving as the primary source of income, while the secondary job provides opportunities for training, contacts, and prestige. Secondly, moonlighting allows for the selection of different jobs that can function as a portfolio, with the primary job providing a low but steady income, while additional (secondary) jobs yield higher income, albeit with greater variability.

Another compelling reason for moonlighting is the low or insufficient income derived from the primary job. In such instances, workers are more likely to seek out additional jobs to sustain their daily livelihood expenses. Kimmel and Conway (2001) have uncovered some evidence of this motive. Additionally, Schaffner and Cooper (1991) have posited that a self-employed person may engage in moonlighting when faced with declining marginal returns to labor in their primary job.[40]

VII. SOCIOLOGICAL STIMULUS FOR MOONLIGHTING

The economic impetus behind the decision to engage in moonlighting is derived from the microeconomic theories of labour-leisure choice, which prioritize the individual as a labourer and accentuate the monetary determinants of decision-making. However, in reality, several pertinent paradigms exist that elucidate moonlighting behaviour, without accord to financial motivations. The following list comprises sociological factors that influence an individual's decision to moonlight.

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[38] Friesen, Jane (2001) "Overtime Pay Regulation and Weekly Hours of Work in Canada" Labour Economics, 8(6), pp. 691-720.

[39] Paxson (n 165).

[40] Schaffner, J. A. and Cooper, J. R. (1991); "Multiple Job Holdings in Developing Countries: The Case of Malaysia", Northeast Universities Development Consortium Conference at Harvard University, Cambridge.

Firstly, as posited by Lundberg[41] (1995), emotional attachment to the secondary job suggests that workers may be inclined to devote some work hours to additional (moonlighting) jobs due to a certain emotional attachment, or net non-pecuniary benefit, derived from that job. In this context, if a moonlighter possesses emotional or other attachments to a specific secondary job, they may refuse offers of employment in higher-paying jobs. In situations where the moonlighter experiences a decrease in earnings from their current job or receives an offer for a better-paid job but with less preference, they are unlikely to relinquish their secondary job. Essentially, a moonlighter will continue working in a second job with low income if the net non-pecuniary benefit is positive and vacate the job if it is negative.

Furthermore, Ferman, Henry, and Hoyman (1987) argue that the decision to moonlight primarily stems from an individual's perception of their low socio-economic status, and moonlighting serves as a safety net for the impoverished.[42] In line with Wilensky's (1963) assertion, moonlighting is a consequence of workers' relative deprivation in society.[43]

Additionally, Jamal (1986) offers an alternative explanation of moonlighting through the Relative Aspiration Hypothesis, which proposes that moonlighters are extraordinary individuals with abundant energy and a desire for higher aspirations.[44] This perspective contradicts Wilensky's (1963) viewpoint on moonlighting.

VIII. EXTANT LEGAL POSITION ON MOONLIGHTING IN INDIA

In India, the term 'moonlighting' does not have a specific legal definition, but it is generally considered to be a form of double employment. Various labour law statutes, such as the Factories Act, of 1948, the Delhi Shops and Establishments Act, 1954, and the Industrial Employment (Standing Orders) Act, of 1946, have provisions that impose restrictions on double employment.[45]

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[41] Lundberg (n 166).
[42] Ferman, L.A., Henry, S., Hoyman, M., (1987). "*Issues and prospects for the study of informal economies: concepts, research strategies, and policy*", Annals of the American Academy of Political and Social science 493: 154-172.
[43] Wilensky, H. L. (1963). "*The Moonlighter: A Product of Relative Deprivation*" Industrial Relations, 3, 105-124.
[44] Jamal, M. (1986). "Moonlighting: Personal, Social, and Organizational Consequences", Human Relations, 39(11), 977-990.
[45] Himanshu Ojha, Sheena Ogra & Prashant Malaviya, The Legality of Moonlighting, <https://www.ahlawatassociates.com/blog/the-legality-of-moonlighting/>accessed on 4 April 2023.

Section 60 of the Factories Act, of 1948 prohibits an adult worker from working in any factory on a day on which he has already been working in any other factory. Section 9 of the Delhi Shops and Establishments Act, 1954 states that a person cannot work for two or more establishments or an establishment and a factory for a period exceeding the limit set by the Act. Clause 8 of Schedule I-B of the Industrial Employment (Standing Orders) Central Rules, 1946 prohibits a workman from working against the interest of the industrial establishment in which he is employed and from taking up any employment in addition to his job in the establishment that may harm the interests of the employer.[46]

The Industrial Relations Code, of 2020, which is yet to be enforced, also contains provisions related to “exclusive service”. The Draft Rules published by the Ministry of Labour and Employment for the Service Sector, 2020, contain a provision prohibiting workers from taking up any additional employment that may adversely affect the interests of the employer. However, workers can obtain prior permission from the employer to take up additional employment.[47]

In addition to these statutory provisions, Indian courts have recognized the validity of restrictive covenants in employment agreements that protect an employer’s business interests and prevent employees from breaching their obligations to their employer.[48] Therefore, while the term ‘moonlighting’ may not have a specific legal definition in India, various statutes and judicial pronouncements make it clear that double employment is not permitted and can lead to legal consequences.

IX. ENFORCEABILITY OF CONTRACTUAL OBLIGATIONS UNDER EMPLOYMENT CONTRACTS

Whilst labour laws include clauses that prohibit dual employment, there may be cases where certain establishments or industries are exempt from such legislation. Moreover, it is possible for employees, particularly those holding managerial or supervisory positions, to be excluded from the scope of these laws. As a result, the terms of the employment contract between the employee

[46] Ibid.
[47] Ibid.
[48] Niranjan Shankar Golikariv The Century Spinning and Manufacturing Company Ltd, 1967 SCR (2) 378.

and the employer are of utmost importance when it comes to resolving disputes between the two parties. These terms hold significant value in the event of any legal proceedings.

X. JUDICIAL VIEW ON DOUBLE EMPLOYMENT AND NEGATIVE COVENANTS

Esteemed courts of India, including the Supreme Court and various High Courts, have provided extensive guidance on the subject of double employment and negative covenants ingrained by employers in the contracts of employment of their employees. In the celebrated case of ***Niranjan ShankerGolikari*** vs. ***Century Spinning & Manufacturing Company Limited***[49], the Supreme Court opined that negative covenants, which operate during the duration of the contract of employment, when the employee is bound to serve the employer exclusively, are generally not deemed to be a restraint of trade, and hence, do not fall under Section 27 of the Contract Act.

Similarly, the Bombay High Court, in ***V.N. Deshpande*** vs. ***Arvind Mills***[50], held that an agreement to serve exclusively for any period, be it a week, a day, or even an hour, necessarily precludes the individual from working during that time for any other person or organization. Such an agreement cannot be argued to be void.

Moreover, the Punjab and Haryana High Court, in the case of ***Gulbar*** vs. ***Presiding Officer***[51], upheld the termination of a driver who had engaged in double employment, after examining the pay slips submitted by the defendant company as evidence.

In ***Wipro Limited*** vs. ***Beckman Coulter International S.A***[52], the Delhi High Court recognized that negative covenants tied with positive covenants during the existence of a contract, whether of employment, partnership, commerce, agency, or the like, would not typically be regarded as being in restraint of trade, business, or profession unless such covenants are unconscionable or entirely one-sided.

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[49] Ibid

[50] V.N. Deshpande vs. Arvind Mills (1946) 48 BOMLR 90.

[51] Gulbar vs. Presiding Officer CWP No.15088 of 2015.

[52] Wipro Limited vs. Beckman Coulter International S.A 2006 (131) DLT 681.

XI. ANALYSIS OF JUDICIAL PRONOUNCEMENTS

Based on these judicial pronouncements, employers have the authority to safeguard their business interests by imposing negative covenants such as exclusive service, non-compete, and non-solicitation clauses in the employment contract, which are valid during the tenure of the employment. In addition, employers can enforce confidentiality and trade secrets obligations on employees during and after their employment.

In light of judicial precedents, employers possess the authority to protect their business interests by incorporating negative covenants such as exclusive service, non-compete, and non-solicitation clauses within employment contracts. These restrictions remain valid throughout the duration of employment. Furthermore, employers may enforce confidentiality and trade secrets obligations on employees both during and after their employment. Courts have adopted a balanced approach, acknowledging the employer's perspective in imposing stringent restrictions and enforcing negative covenants to supervise and regulate employee conduct during their tenure. It is evident, based on established principles by Indian courts, that 'moonlighting' constitutes a conflict-of-interest issue and a clear violation of covenants related to exclusive service, non-compete, and non-solicitation. However, a deeper analysis reveals that many employees resort to moonlighting due to financial pressures, the rising cost of living, the need for additional income to support their families, and opportunities for skill development and career advancement that may not be available in their primary job. Therefore, while securing employers' interests is important, the justification for such restrictive negative covenants must be critically examined to ensure they do not impose unreasonable hardships on employees or stifle their economic and professional growth. The challenge lies in finding a balance where businesses can protect their interests without unduly hindering the financial and personal development of their workforce.

XII. THE ETHICS OF MOONLIGHTING IN THE INFORMATION TECHNOLOGY INDUSTRY

The phrase "moonlighting" has only lately gained popularity in India. Following the pandemic, employees in the IT sector have started taking on second jobs, which is reducing their productivity at their main jobs and worrying Indian IT companies.[53] A warning against moonlighting has also been given by businesses due to the possibility of sensitive corporate information being revealed to the competitor.[54] The most advantageous industry for working from home (WFH) is the IT sector, where most of the population works remotely. In order to earn more money, IT professionals are increasingly taking on additional assignments outside of their main position.

Moonlighting is an additional cause for concern for IT companies, which are already struggling with elevated attrition levels. With hybrid work here to stay and managers not being able to look over employees' shoulders anymore, there may be concerns about productivity.[55] Experts say the type of moonlighting where the industry and functions of the jobs the employee is working on are different is comparatively harmless. However, when it is the same industry function, there is a risk of confidential information being shared.

A survey by Kotak Institutional Equities of 400 IT/ITeS employees revealed that 65 percent of respondents said they either were engaged in part-time opportunities during work-from-home (WFH) or knew a colleague who was[56] and interestingly 42 percent of the participants preferred to change their jobs or even quit if they were not allowed to WFH.[57]

According to a Moneycontrol report, TCS Chief Human Resources Officer Milind Lakkad stated during a recent media interview that employees have been informed of the company's views on moonlighting. Lakkad added that no legal action has been done against anyone engaging in such behaviour so far.[58] Additionally, Chief Executive Officer Rajesh Gopinathan said that all job contracts stipulate that workers aren't permitted to work for any other companies.

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[53] Sounak Mukhopadhyay, Moonlighting: Why do people take up a second job anyway? *Mint*, 14 September 2022, <https://www.livemint.com/news/india/why-moonlighting-why-do-people-take-up-a-second-job-anyway-11661918379778.html>accessed on 13 March 2023.

[54] Mahesh Bhatt, Moonlighting- The open secret in the tech industry*, Business Insider India*, 27 September 2022<https://www.businessinsider.in/careers/news/moonlighting-the-open-secret-in-the-tech-industry/articleshow/94478085.cms>accessed on 12 March 2023.

[55] Romita Majumdar, Is moonlighting ethical? IT industry veterans have divided opinions, *The Economic Times| tech*, 31 March 2023,:<https://economictimes.indiatimes.com/tech/information-tech/is-moonlighting-ethical-it-industry-veterans-have-divided-opinions/articleshow/94722970.cms?from=mdr>accessed on 31 March 2023.

[56] *Kotak Institutional Equities Survey*, 21 July 2022, https://www.kotaksecurities.com/pdf/indiadaily/indiadaily21072022jb.pdf.>accessed on 15 March 2023.

[57] Ibid.

[58] Shivani Shinde, Talent Cloud will address moonlighting, says TCS CHRO Milind Lakkad, *Business Standard*, 16 October 2022, <https://www.business-standard.com/article/companies/talent-cloud-will-address-moonlighting-says-tcs-chro-milind-lakkad-122101600898_1.html.>accessed on 19 March 2023.

While TCS hasn’t yet taken action against workers who moonlight, competitor firms like Wipro and Infosys have already warned such employees.[59] Recently, Wipro Chairman Rishad Premji claimed that the company fired 300 individuals who were working for rival companies, while Infosys sent a warning email to employees who were moonlighting.[60]

XIII. INDIAN IT MINISTER’S STAND ON MOONLIGHTING:

In light of the quickly changing startup culture, Rajeev Chandrasekhar, Minister of State for Electronics and IT and Skill Development, supports moonlighting. He asserted that businesses must now recognise that the youthful Indian tech workforce's mindset and attitude have undergone a structural change.[61] The young people of today are fully committed to maximising the worth of their abilities. They want to profit from his or her abilities.

While working for their company, workers are expected to be entrepreneurial.[62] The same individuals can apply it to themselves personally, he said. However, it was also said that the moonlighting in its true nature and spirit must not stand against or violate the contractual obligation between an employer and the employee.

XIV. WHY ARE MANY IT FIRMS STANDING AGAINST THE MOONLIGHTING PHENOMENON?

Different businesses have varying perspectives on this issue, some business observers anticipate employers will take extra precautions to protect proprietary information and operating models now that the contentious issue is in the public eye, particularly where employees are working remotely. Analysts claim that employers could become stricter with employment contracts' exclusivity

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[59] Sneha Saha, TCS on moonlighting: It is an ethical issue and against company’s core values and culture, India Today, 11 October 2022, <https://www.indiatoday.in/technology/news/story/tcs-moonlighting-ethical-issue-against-core-values-and-culture-wipro-infosys-employees-2283750-2022-10-11> accessed on 19 March 2023.

[60] Ibid.

[61] Abhik Sengupta, Minister Rajiv Chandrasekhar says moonlighting by IT employees okay if no breach in contract, *India Today*, 13 October 2022,<:https://www.indiatoday.in/technology/news/story/union-it-minister-rajeev-chandrasekhar-india-tech-sector-moonlight-okay-contract-5g-rollout-2284869-2022-10-13>accessed on 15 March 2023.

[62] Ibid.

provisions.[63] The following constitute a few of the potential risk factors that these businesses highlight for workers who moonlight:

(i) Conflict of Interest:

Concerns centre on potential conflicts of interest caused by an employee working for a rival company or disclosing private or sensitive information. The multinational technology company IBM has notified its staff that it is against company policy for them to work a second job or gig in any capacity.[64] A warning issued by IBM to its employees says that a second job could be full-time, part-time, or contractual in nature but at its core is a failure to comply with employment obligations and a potential conflict of interest with IBM's interest.[65]

(ii) Doubts regarding the job performance of employees & fatigue:

Companies are concerned that if a person overworks himself, it may affect productivity or performance at the main job. And that is why it can be observed that many employers including those in the IT Sector discourage the practice of moonlighting *in toto* as the same could potentially and probably cause uncalled fatigue amongst the workers which will have an impact on the overall productivity of an organization.[66] Employees who double up may become physically and mentally exhausted, which can cause concentration issues, lethargy, and other health issues. This gradually has an effect on the company's growth where they operate.[67]

(iii) Misuse of employer's resources:

There are high chance that the employee uses the resources like laptops, and software is given by the employer of the primary job to indulge in moonlighting by using the same resources for one's own monetary benefit at his or her part-time job.[68] This action might not be legally impermissible though it necessarily falls under the category of unethical practices, and the fact that the nature of

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[63] Moonlighting polarises IT industry opinion; experts say return to workplace may ease concerns, *The Economic Times|tech*, 22 September 2022

[64] Devina Sengupta, Moonlighting is a conflict of interest: IBM to employees, *mint*, 27 October 2022<https://www.livemint.com/companies/news/ibm-says-moonlighting-is-conflict-of-interest 11666778290261.html> accessed on 19 March 2023.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Pooja Yadav, Explained: What Is Moonlighting And Why Companies Are Against It,*India Times*, 26 August 2022,<https://www.indiatimes.com/explainers/news/what-is-moonlighting-and-why-companies-are-against-it-577997.html>accessed on 20 March 2023.

a job in an IT sector requires the use of software, laptop, and some allied technologies as an intrinsic part of anyone's job, in such a scenario, IT industry becomes more vulnerable in case employee indulges in moonlighting as the same could result in deterioration of company's resources without company's consent.

(iv) Absenteeism:

Taking leave from the primary job for side gigs can also become rampant in the long run because of many reasons that involve dealing with the nature of the job and hours of work that one require to put in for his or her chosen side gig.[69] Thus, in any industry, not necessarily with respect to the IT industry, such absenteeism could potentially result in loss of productivity as well as wastage of business' resources on those employees who are not at all committed to the company's aim and objective.[70]

Thus, it can be said that the trend of moonlighting will continue to be present in some form or the other, as it's a way for some individuals to pursue their goals and aspirations. However, it's also possible that companies and organizations may take more steps to address the practice and mitigate its risks, because of this very reason, it will be safe for us to assume that whether moonlighting is here to stay, or end depends on the specific context, culture, and regulations of a company and its sector.

XV. THE IMPACT OF MOONLIGHTING ON HUMAN RESOURCES

Typically, many organizations have no concern about employees who take on extra jobs, while others may forbid it because it can impair an employee's performance. While many individuals work additional jobs to supplement their money,[71] some do so to develop their skills in various fields, while others do it to escape boredom. Moonlighting may be done for a variety of causes, but it wears one out.

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[69] Moonlighting – Good or Bad? Why are IT companies against it?, *Nintriva*, 03 February 2023,<https://nintriva.com/blog/what-is-moonlighting/#:~:text=Moonlighting%20can%20benefit%20some%20people,conflicts%20with%20the%20primary%20employer.> accessed on 19 March 2023.

[70] Ibid.

[71] Reetika Arora, Moonlighting & What it means for the industry, *The Times of India*, 14 October 2022,:<https://timesofindia.indiatimes.com/blogs/voices/moonlighting-what-it-means-for-the-industry/>accessed on 19 March 2023.

Employee discontent with current pay leads to moonlighting in the workplace. Employees believe their boss is taking advantage of the higher profits and feel demoralized by their employer. Employees' side jobs have an impact on all aspects of HR administration.[72] A problem for the personnel manager is that moonlighting frequently has a negative impact. Due to misaligned expectations, moonlighting additionally has a negative impact on the relationship between staff members and their supervisors.[73] As non-moonlighting employees start observing the detachment of moonlighting employees with work and the potential advantages, they may be receiving out of their second jobs, it may prove to be very difficult to keep them motivated.

Some of the reasons which are essentially responsible for moonlighting include- Monetary Needs, non-appreciation by the employers of the efforts made by an employee in terms of productivity, utilizing extra time for one's own benefit, upgrading their capabilities for different job profiles, etc.[74] However, it is important to note that these are not exhaustive reasons which ultimately force the employee to resort to activities such as moonlighting.

XVI. RECENT INSTANCES OF EMPLOYEES INVOLVED IN MOONLIGHTING

Moonlighting has been a hot topic in the news recently, it is imperative for us to know that big IT Companies like Wipro, IBM, etc. all are becoming subject such instances of moonlighting at the hands of their employees and there is mixed stance from the side of the industry as one view that emerges from these activities are that the employers have no problem with any such instances. However, there exists other side also which considers the practice of moonlighting as ethically wrong and therefore they are determined to take disciplinary action against such moonlighters.

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[72] Amit Jaju, Dealing with employee moonlighting in the times of remote working, *The Economics Times | Rise*, 22 January 2022, <https://economictimes.indiatimes.com/small-biz/hr-leadership/people/dealing-with-employee-moonlighting-in-the-times-of-remote-working/articleshow/89054095.cms?from=mdr> accessed on 17 March 2023.

[73] Ibid.

[74] Can employee moonlighting be prevented? *The Economic Times HR World*, 16 November 2022, <https://hr.economictimes.indiatimes.com/news/trends/can-employee-moonlighting-be-prevented/95544116>accessed on 20 March 2023.

Story 1- Wipro fired 300 employees who moonlighted for its top competitors- According to Rishad Premji, anyone who works for Wipro while moonlighting for a competitor cannot be part of Wipro.[75]

Story 2- Infosys warns its employees against moonlighting and says it could result in termination- In the contract, all new Infosys staff must sign, they acknowledge that they will not engage in moonlighting or other outside employment as it will be a clear violation of company employees' code of conduct.[76] New staff must also confirm that they have no outstanding commitments or obligations to any other employer who would interfere with their work at Infosys.

Story 3- Tech Mahindra CEO CP Gurnani said that if the employees are meeting efficiency and productivity standards and are not committing fraud or doing anything that harms the company's ethics or values, I have no problem with them making an extra buck through moonlighting.[77]

Story 4- Despite the ongoing debate about moonlighting in India, technology giant IBM has clarified that moonlighting is ethically wrong and the firm does not tolerate this practice from the employees.[78]

Although moonlighting is popular in America, many companies in India are framing strict policies to refrain workers from working elsewhere. Especially in the IT industry, employers try to bind their workers with strict clauses regarding dual employment in their joining letters or through clear-cut company policies.[79] For example, top IT companies like IBM and Infosys have "warned" their employees for moonlighting and find it "cheating- plain and simple."[80]

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[75] Aashish Aryan, Wipro Fires 300 staff members found to be moonlighting for competitors, *TheEconomic Times*, 22 September 2022, <https://economictimes.indiatimes.com/tech/information-tech/wipro-fires-300-staff-members-found-to-be-moonlighting-for-competitors/articleshow/94349603.cms?from=mdr>accessed on 19 March 2023.

[76] Infosys warns employees against moonlighting, *The Hindu Business Line*, 14 September 2022, <https://www.thehindubusinessline.com/info-tech/infosys-warns-employees-against-moonlighting/article65885536.ece>accessed on 19 March 2023.

[77] Tech Mahindra CEO Gurnani unfazed by moonlighting; others disagree, *The Economic Times*, 29 August 2022, <https://economictimes.indiatimes.com/tech/information-tech/tech-mahindra-ceo-gurnani-unfazed-by-moonlighting-others-disagree/articleshow/93840478.cms?from=mdr>accessed on 19 March 2023.

[78] Meghna Sen, IBM India opposes moonlighting, says not ethically right for full-time employees, *Live Mint*, 14 September 2022, <https://www.livemint.com/companies/news/after-wipro-and-infosys-ibm-india-opposes-moonlighting-says-not-ethically-right-for-full-time-employees-11663145350550.html>accessed on 19 March 2023.

[79] Vidur Gupta, Is India ready for the concept of moonlighting?, *The Times of India*, 10 February 2023, Available at: <https://timesofindia.indiatimes.com/blogs/voices/is-india-ready-for-the-concept-of-moonlighting/>accessed on 19 March 2023.

[80] Ibid.

XVII. HOW TO TACKLE THE ISSUE OF MOONLIGHTING FROM THE PERSPECTIVE OF AN HR MANAGER?

When confronted about this issue, HR managers may want to create policies to protect against the drawbacks of moonlighting while making use of the few benefits. The policies should be designed in such a manner that it set forth certain parameters which might include but surely must not be limited to the following:

- Make it clear to employees what you anticipate of them in terms of giving their primary job top priority. Employees are free to pursue other possibilities; however, you may make it evident that you're expecting them to prioritize their current position.[81]
- A conflict-of-interest strategy should be laid out. According to this policy, the second job cannot entail concurrent employment with rival companies.
- Specify your approval of any extra employment policies. You can specify in the contract that an employee needs permission before taking on any additional job. However, keep in mind that it must be applied consistently to all employees; if the circumstances are comparable, don't permit a specific worker to work at another job while forbidding another from doing so.[82]
- Support staff with pay and perks commensurate with their level of contributions to reduce the likelihood that they will consider moonlighting as a possibility.[83]

An effective policy can potentially help the employer foster a collaborative environment and stop staff members from hiding their real motivations. In conclusion, it is important for HR managers to understand the concept of moonlighting, the reasons behind employees' propensity to pursue it, its impact on employees and the organization, and what HR should do to prevent negative consequences of moonlighting in their organizations.[84]

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81 Moonlighting: What Is The Best Way For Organisations to Handle This Phenomenon, *BW Business World*, 17 January 2023, <https://bwpeople.businessworld.in/article/Moonlighting-What-Is-The-Best-Way-For-Organisations-To-Handle-This-Phenomenon-/17-01-2023-462131/>accessed on 20 March 2023.

82 Lin Grensing-Pophal, What to Do About Moonlighting Workers, *Society for Human Resource Management*, 02 March 2009, Available at: https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/moonlightingworkers.aspx>accessed on 20 March 2023.

83 Ibid.

84 Cherry Gupta, The Culture of Moonlighting: What can we do about it?.*The Economic Times*, 22 September 2022, <https://hrme.economictimes.indiatimes.com/news/industry/moonlighting-are-you-betraying-your-employer/94330317>accessed on 20 March 2023.

XVIII. MOONLIGHTING: THE IMPACT ON WORK-LIFE BALANCE

Following the spread of Covid, moonlighting among workers has increased significantly. Due to the pandemic's impact on reduced pay, lost jobs, and income, the tendency of working a second job has suddenly increased. Employees choose to work two jobs to make more money.

Moreover, it has been noted that in almost all circumstances lack of sleep can potentially result in a detrimental impact on our emotional state, impair our judgment, and erode our immune systems.[85] Such people are more likely to experience negative health issues, such as pain in the neck region, back, or chest pain, stroke, coronary heart disease, type 2 diabetes, and anxiety because they struggle in establishing a sound work-life balance. According to research on long workdays, people who put in more than 11 hours a day are 2.5 times more likely to experience depression than people who put in regular working hours.[86]

According to a study, in terms of stress levels, 23 percent of employees working between 31 and 40 hours per week responded that they felt a lot of stress, 30.3 percent of those working between 41 and 50 hours, 39.8 percent of those working between 51 to 60 hours, and 42.4 percent of those working more than 60 hours per week reported stress.[87] Therefore, the proportion of workers who felt a lot of stress increased with increasing working hours.

Furthermore, through different studies and research, it has been proven that prolonged hours at work contribute to psychological stress and work stress, as well as working over 10 or more hours in a day, 40 or more hours of overtime per month, and 60 or more hours per week tends to make people feel stressed, as per the study published in National Library of Medicine.[88]

Giving employees enough time to relax and recover doesn't seem to be an unreasonable request. Increase pays to discourage the desire to work second jobs. A worker must receive investment

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[85] Shalini Saksena, Moonlighting can lead to depression; work-life balance inherent to quality life, *News Nine*, 03 October 2022, <https://www.news9live.com/health/mental-health/moonlighting-can-lead-to-depression-work-life-balance-inherent-to-quality-life-199837>accessed on 20 March 2023.

[86] Ibid.

[87] Park, S., Kook, H., Seok, H., Lee, J. H., Lim, D., Cho, H., & Oh, K. (2020). The negative impact of long working hours on mental health in young Korean workers. *PLOS ONE*, *15*(8), e0236931. https://doi.org/10.1371/journal.pone.0236931>accessed on 24 March 2023.

[88] Parmita Uniyal, Ways moonlighting can affect mental health; experts offer insights, *Hindustan Times*, 02 October 2022, <https://www.hindustantimes.com/lifestyle/health/ways-moonlighting-can-affect-mental-health-experts-offer-insights-101664681843575.html>accessed on 24 March 2023.

from the employer in order to perform at the highest level for the business. The leading cause of death in the modern world is stress. Additionally, stress-related morbidity and absence can cost a business millions of dollars. It is essential to establish a setting where employees can live a healthy, stress-free existence.

Thus, a person's mental health can inevitably be impacted by moonlighting, which will reduce his or her productivity.[89] Although there isn't any concrete evidence of this kind, treating workers fairly with the right kind of compensation along with job satisfaction will significantly lower the likelihood of workers indulging in moonlighting and ensure that they stay committed to the business and to their own well-being.

XIX. ADVANTAGES AND DISADVANTAGES OF MOONLIGHTING FOR EMPLOYERS

As described above, it is usually not viewed positively by employers because of the following reasons:

- **Fatigue**: It is a mental state of being tired and weak. Often, mental and physical fatigue exists together - if a person is physically exhausted for long periods of time, she might also feel mentally tired. Moonlighting can have adverse effects on an employee's performance.[90]
- **Transportation Hurdles:** Transportation can become a hurdle for moonlighters, and it can become quite hard for them to be on time at work. Transportation glitches can lead to subpar performance which may be a loss to one or both of the workplaces.[91]
- **Lack of sleep:** The hectic lifestyle of moonlighting employees may create health hazards in the long run for them and huge drops in productivity for the employer.

[89] Felix Torres, What is Depression? *American Psychiatric Association*, October 2020, Available at: <https://www.psychiatry.org/patients-families/depression/what-is-depression>accessed on 24 March 2023.
[90] Moonlighting: What Is The Best Way For Organisations To Handle This Phenomenon?,*BW people*, 17 January 2023,<https://bwpeople.businessworld.in/article/Moonlighting-What-Is-The-Best-Way-For-Organisations-To-Handle-This-Phenomenon-/17-01-2023-462131/#:~:text=Moonlighting%20can%20be%20very%20negative,company%20and%20ruins%20its%20culture.> accessed on 18 March 2023.
[91] Ibid.

- **Poor attentiveness:** One person has to perform various activities because of multiple jobs which can result in short attention spans and easy distraction. It can also lead to memory lapse and weak recollection of events which ultimately impacts performance.[92]
- **Data Breaches:** Data breaches have become more common than ever and can be expensive for both companies and people. Employees (and their devices) may be more likely to be the target of cyberattacks even if they do not voluntarily divulge sensitive information because they may present vulnerability for this kind of attack.[93]
- **Moonlighting employees may withhold their best ideas:** Some employers worry that their employees will withhold their best ideas if they work in a similar position.[94] Employees may not want to share their best ideas in their primary place of employment and would want to experiment and be more creative in their side gig.[95]

In nutshell, from the employer's point of view, moonlighters are not present, not prompt, and not prepared for the challenges of day-to-day work.[96]

On the other hand, some employers may view moonlighting positively because of the following reasons:

- **Employees learn new skills:** Moonlighters perform multiple jobs in different environments and thus, they learn new skills and are able to think unconventionally or from a new perspective which can create advantages for the organization.
- **Retaining employees:** When an employer accepts their second job wholeheartedly, an employee may feel comfortable in the organization and also feel satisfied due to the extra earning from the second job. In this way, it might be easier to retain talented employees.[97]

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[92] What Is Moonlighting? Here's Why Wipro Fired 300 Employees For Doing It, *Outlook India*, 22 September 2022, <https://www.outlookindia.com/business/what-is-moonlighting-here-s-why-wipro-fired-300-employees-for-doing-it-news-225205> accessed on 19 March 2023.

[93] Anshul Prakasht, Kruthu N. Murthy, et al., Moonlighting- Breach of Loyalty or a Restriction on Freedom, 2023 *SCC OnLine*Blog Exp 6,<https://www.scconline.com/blog/post/2023/01/24/moonlighting-breach-of-loyalty-or-a-restriction-on-freedom/>accessed on 19 March 2023.

[94] Ibid.

[95] Ibid.

[96] Sounak Mukhopadhyay, Explained: What is moonlighting? Is it ethical if you do more than one job in India? *Mint*, 14 September 2022, <https://www.livemint.com/news/india/explained-what-is-moonlighting-is-it-ethical-to-do-more-than-one-job-in-india-11661748291458.html>accessed on 13 March 2023

[97] Zarafshan Shiraz, Is moonlighting (side job/side hustle) having a positive or adverse effect on employees' mental health?,*Hindustan Times*, 11 December 2022,<https://www.hindustantimes.com/lifestyle/health/is-moonlighting-

- **Affordable:** Hiring a moonlighter might be more affordable as they may be ready to work part-time or contractual jobs that don't require an employer to also provide a plethora of benefits.[98]

- **To meet seasonal requirements:** As moonlighters are affordable for short-term and unusual projects, they can help meet seasonal requirements.

- **A chance to break out of a rut:** You will have the opportunity to try out various jobs as an employee in order to identify a career that you truly appreciate. Before committing yourself full-time, you may not have been able to manage a few months or years off of work so you could try out novel endeavours[99] or learn more about different sectors; however, moonlighting eliminates the need for such extreme measures.

Although moonlighting is an effective way to supplement your income and advance your career, you must be aware of its drawbacks. Like any other aspect of your life, you must determine whether it is appropriate for you and whether the advantages exceed the drawbacks. The rules of your present employer as well as how much time and effort it requires will determine your ability to moonlight.

XX. CONCLUSION

The Indian legal system forbids non-compete clauses, which imply that moonlighting is against job contracts. However, law scholars have always believed that this is unjustified. This is true because doing so implies that the government is interfering with people's ability to contract freely, which has an impact on trade. In addition, the Law Commission of India stated in its 13th report (1958)[100] that reasonable restrictions should be added to section 27 to put a reasonable check on potential conflicts of interest in such a situation.

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side-job-side-hustle-having-a-positive-or-adverse-effect-on-employees-mental-health-101670726458919.html>accessed on 12 March 2023.

[98] Kaukab Ara, Aisha Akbar, A Study of Impact of Moonlighting Practices on Job Satisfaction of the University Teachers, *Bulletin of Education and Research*, June 2016, Vol. 38, No. 1 pp. 101-116.

[99] Ibid.

[100] 13th Report: Contract Act, 1872, *Ministry of Law & Justice*, New Delhi, (1958)<https://indianculture.gov.in/reports-proceedings/thirteenth-report-contract-act-1872>accessed on 24 March 2023).

Therefore, when there is a clear policy regarding the kinds of agreements that employees can engage in during and after employment, moonlighting is allowable. Though the concept is controversial and stirring debate among employers and workers, there's no defined law against moonlighting in the Indian constitutional framework.

In India, there is a growing concern about moonlighting, which tempts 73% of the workforce to work in more than one job at a time for financial gain. Companies will eventually experience poor productivity, revenue loss, employee disengagement, and confidentiality violations.[101] Therefore, establishing a clear moonlighting policy, providing employees with the appropriate job responsibilities and pay, and collaborating with highly qualified talent acquisition agencies for employment are all urgently needed. Such measures will enable companies to monitor dual employment for effective people management and assist in closing the skills gap.

The issue of employees moonlighting is delicate and difficult for businesses to handle. From the perspective of the general population, this appears to be appropriate and fair. However, businesses or organizations don't operate under the principles of right and wrong. It is governed by laws, rules, and treaties. Which if absent can result in a chaotic, poorly managed scenario.

This may even endanger the business. In order to make it simpler to control and rule while taking into account the needs of the people and thereby safeguarding their basic rights, the court or the government can develop an effective law to deal with "dual employment" or "moonlighting."

In conclusion, the concept of moonlighting, or having a second job, is usually permitted in India, but it is governed by a number of laws and rules, such as those pertaining to working hours, the permitted types of work, and tax repercussions. To learn more about the particular rules and laws governing moonlighting in India, a person should consult their primary employer and obtain professional advice. If a moonlighting provision is present in an employment contract, violating it could result in disciplinary action, legal action, or financial penalties for the employee. The exact repercussions will vary based on the employment contract's terms, the laws and regulations in the country where the employer is headquartered, and other factors.

[101] Vidur Gupta, Is India ready for the concept of moonlighting? *The Times of India*, <https://timesofindia.indiatimes.com/blogs/voices/is-india-ready-for-the-concept-of-moonlighting/>accessed on 24 March 2023.

SALUS POPULI SUPREMA LEX: A LEGAL ANALYSIS OF SOCIAL SECURITY CODE AND ITS IMPLICATIONS ON GIG WORKERS

by Manu Dutta and Sistla Naveen Teja

Abstract

Indian perception regarding earning had drastically changed after the advent of new term technologies, providing a varied perception over the medium to earn. Traditionally Indian people were looking forward to working in an organized sector where they could earn decent salaries for which individuals used to have compulsory education; this very phenomenon is unique in India. Due to technological flexibility and convenience, gig workers have transformed the economic structure of India, creating a multi-million-dollar empire parallel to traditional working conditions. Online cab services such as Uber, Ola, Rapido, and food delivery services like Swiggy and Zomato are just a few examples. Gig workers bring a fresh choice of working conditions. All they have to do is complete the scheduled and listed tasks at their convenience.

Along with the flexibility of the new wave of employment, it also brings in severe limitations; Firstly, people in the gig work cycle are not technically considered employees per the prevailing legislative condition. This lack of employer-employee relationship creates a gap that the new social security code 2020 is partly trying to address. Furthermore, the issues like lack of social security in case of any accident or mishap and job and income insecurity also tend to bother the billion-dollar empire.

This paper will give a broad understanding of the gig economy and curate the gaps in the system that the new labor code fails to address.

KEYWORDS: ***Economy, Gig Work, Traditional System, Organized Sector, Gig economy, Income Insecurity.***

I. INTRODUCTION

Over time, human beings have undergone a significant shift in attitude. After centuries of gradual progress, we finally understood that we are more than mere beings. The landmark case[1] decided by the Supreme Court of India affirmed that life does not merely denote animal existence. The concept of life, as enshrined in the Indian Constitution[2], encompasses a life in which individuals feel safe, secure, and empowered. This transformed human attitude underscored a crucial fact: individuals must do more than merely exist as creatures at the top of the food chain[3]. Under this philosophy, they established civilized societies with an established social order. The first step towards a flourishing social order is to provide social and economic security to individuals. The state must ensure that all individuals, regardless of their social or economic status, have access to necessities like food, shelter, and healthcare. This is a moral imperative and a legal obligation under international human rights law, including the Universal Declaration of Human Rights[4] and the International Covenant on Economic, Social, and Cultural Rights[5]. With this mindset, people began to work and earn their living, forming a traditional learning, earning, and flourishing system. This traditional system has thrived for many years in various economies.

Numerous laws have been implemented to safeguard various segments of society engaged in the traditional working pattern, preventing their unjust exploitation.

The advent of technology has brought a new wave of nourishment to the economy of India, known as the Gig economy. "*Gig worker*" refers to a contractual or relationship-based arrangement between workers and the individual or company that pays them. Standard workers typically have a long-term employer-employee relationship, in which they are paid by the hour or year, earning a wage or salary. However, in the case of gig workers, the association is short-term[6].

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[1] *Olga Tellis v Bombay Municipal Corporation* [1985] INSC 256.
[2] The Constitution of India, 1950 art 21.
[3] Ryan Lambie, 'The Predator: What We Know and What We'd Like to See' (*Den of Geek*, 3 March 2016) <https://www.denofgeek.com/movies/the-predator-what-we-know-and-what-wed-like-to-see/> accessed 25 March 2023.
[4] Universal Declaration of Human Rights (adopted 10 Dec 1948), UNGA Res 217 A(III).
[5] International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI), UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3.
[6] Austin Zwick, 'Welcome to the Gig Economy: neoliberal industrial relations and the case of Uber' (2018) 83 GeoJournal 679.

Overall, the shift in human attitude and the emergence of the Gig economy have brought significant changes to the economic landscape of India. We must recognize and adapt to these changes as we evolve to foster continued growth and prosperity.

It is to be duly noted that the idea of being an earning member of the gig economy is easy, and losing the same job by being replaced by another sect of individuals is easier, as the digital platforms are looking for people who can complete the task at reasonably less time and cost. The International Labour Organization has noted that the terms and conditions of these Digi platforms create a restrictive environment excluding people from working flexibly outside the platform[7]. Over time, the digital platform workers observe that they secure the job as ready go but fail to earn a fair amount because of the layer charges imposed and therefore, the final cut that the agent receives is less.

The gig economy has emerged as a significant force in the global labor market, with an estimated 20-30% of the workforce in developed countries now engaged in gig work[8]. However, despite the growing popularity of gig work, there are serious concerns about the conditions under which gig workers are employed[9]. The International Labour Organization has pointed out that the terms and conditions offered by digital platforms for gig work often leave workers without social protections or labor rights, creating a vulnerable workforce prone to exploitation.

Moreover, a recent study has found that gig workers on digital platforms earn significantly less than traditional employees and face greater income volatility. On average, digital platform workers earn 50% less than traditional employees, and this income is often unpredictable and subject to sudden fluctuations[10]. These statistics underscore the urgent need for regulatory frameworks that protect gig workers' rights and ensure fair service compensation. Such frameworks must address the challenges that gig workers face, including the lack of social protections and the precarious nature of gig work, and establish standards for minimum wages, benefits, and working conditions that apply to all types of workers, regardless of their employment status. By doing so, we can

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[7] ILO, 'World Employment and Social Outlook 2021' (International LabourOrganisation 2019).
[8] Ibid.
[9] Suresh Chand Aggarwal, ‘Gig workers in India: An Overview’ (20203) Research Gate <https://www.researchgate.net/publication/372518684_'Gig'_workers_in_India_An_Overview> accessed 25 March 2023.
[10] Joint Research Centre of the European Commission, 'Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World' (Publications Office of the European Union, 2016).

ensure that the gig economy works for everyone and that gig workers can earn a decent living and enjoy the same protections as other workers in the labor market.

The essential character of law demands it to be adaptable and responsive to the evolving needs of society. The predicament of platform workers has garnered the attention of the legal community, as it has been widely observed that these workers are deprived of social security and are susceptible to exploitation, which raises significant legal concerns regarding the compatibility of constitutional law and the safeguarding of fundamental human rights.

II. DIGITAL PLATFORM & WORKERS

Why did the independent contractor refuse to work with the digital platform? Because they did not want to be "independent" without social protections or job security!

It is worth noting that the relationship between gig workers and digital platforms is unique. While these workers may seem as independent contractors, their algorithms and digital tools enable platforms to control their work significantly[11]. A recent study found that over 90% of Uber drivers, for example, feel they have no control over their work, despite being labeled "partners" by the company. This lack of control can severely affect workers, including low pay and lack of social protections[12]. As legal practitioners and academicians, we know that interpreting contractual terms is crucial to ensure that both parties receive maximum benefits. However, digital platforms often use carefully worded contracts and ambiguous terms, such as "partner" instead of "employee," to avoid legal obligations and potential lawsuits[13]. This puts gig workers at a disadvantage and makes it difficult to secure fair wages and benefits. The invocation of beneficial provisions of labour legislation in India requires the existence of employer and employee relationship in the respective statutes. In case of gig workers, platforms seldom recognise the existence of employer employee relationships. Gig workers are often euphemistically termed as “Partners” with whom revenue is

[11] M Wiener, W. A. Cram and A. Benlian, ‘Algorithmic control and gig workers: a legitimacy perspective of Uber drivers’ (2021) 32(3) European Journal of Information Systems 485.

[12] International Labour Organization, ‘Poor Working Conditions are Main Global Employment Challenge, ILO Newsroom’ (*International Labour Organisation News,* September 13, 2018) < https://www.ilo.org/resource/news/poor-working-conditions-are-main-global-employment-challenge> accessed 4 June 2024.

[13] Carl Pacini, Christine Andrews, and William Hillison, ‘To Agree or Not to Agree: Legal Issues in Online Contracting’ (2002) 45(1) Business Horizons 43.

shared. Thus, existing labour legislation does not extend substantive rights contained therein to gig workers. This includes the provision for compensation in case of injury. Unless special statutory protection is provided to gig workers the platforms can easily deny compensation and courts will not be able to fix their responsibility even though an accident or injury took place in the course of employment. Similarly, gig workers are currently outside the scope of Prevention of Women from Sexual Harassment Act, 2013. The exclusion from the safety net provided to female workers may exclude women from participating in an important segment of economic activity and further reduce their financial capabilities. Despite the fact that the Gig Economy has emerged as a major segment of the workforce in the 21st Century, there is no mention of Gig Workers in three of four newly enacted codes in India. It is submitted that exclusion of an important segment of workers from welfare statutes exhibits the dilemma and indecision of policy makers. Upon analysis of the nature of Gig workers, it is evident that they undertake work beyond the statutory limit of 8 hours, notwithstanding the overall incentive scheme. However, sustaining such incentives throughout the year is exceedingly difficult, as the remuneration is proportional to the time expended on accomplishing the assigned tasks. In a gig economy, the juridical relationship is already tripartite, consisting of three separate parties: the platform, the gig worker, and the consumer. In this triangular relationship, like a tunnel, bright lights emphasize that gig workers have two sets of masters, so to speak: they have to respond to and please the demand of the platform as well as the end consumer. Gig workers are commonly called independent contractors or freelancers. They are engaged by online platforms to provide specific services to consumers. Or, for example, consider a food delivery service such as Uber Eats. Here, in this scenario, the platform—that is, Uber Eats—functions as an intermediary between the food delivery driver (the gig worker) and, of course, the person ordering food. The driver, on his/her side, has to deliver ordered food to the consignee expeditiously and courteously, but not only the latter will be called upon to do so, but the former as well to impeccable Uber Eats standards and requirements. The driver, therefore, will be required to follow certain delivery protocols, maintain a certain rating, and adhere to the policies of the platform. Notably, the algorithm assigns tasks to the employees based on data of the employees and customers, which the algorithm manipulates to benefit the platform[14].

[14] ZsoltZodi and Bernatt Torok, 'Constitutional Values in the Gig-Economy? Why Labor Law Fails at Platform Work, and What Can We Do about It?' (2021) 11 Societies

The concept of monopoly is quite evident in the current scenario where each platform player attempts to organize their segment of monopoly. The language and wordplay used in the contracts and agreements of these companies are complex and beyond the workers' comprehension. The clever use of legal terminology and jargon makes it extremely difficult for the workers to understand the intricacies of the contracts, thereby making the companies immune to scrutiny or legal action. For instance, the drivers of cab aggregators must apply through an app and agree to all the terms and conditions simply by clicking on the given option. However, the terms and conditions are often buried in fine print, and the workers may need to realize their agreement. This places the workers in a vulnerable position,[15] as they are effectively bound by the contract terms, even if they are unfair or exploitative.

It is, essential for regulatory bodies to step in and ensure that the interests of the workers are protected and that the companies are held accountable for their actions. Any attempt to manipulate or monopolize a particular market segment must be met with strict legal action to ensure the gig economy remains a fair and equitable space for all its participants.

2.1 CONSTITUTIONAL FRAMEWORK FOR GIG WORK: UNDERSTANDING THE LEGAL LANDSCAPE

Gig workers are not unfamiliar with the Indian Constitution. Even before the emergence of technology and the advent of the gig economy, it was a well-established and accepted principle that social and economic justice should prevail under all circumstances[16]. The weaker segments of society (weaker in terms of social and economic status) must be protected, and the sharp sword of fundamental rights would thwart any attempt to exploit them. For instance, Article 24 prohibits discrimination and other exploitative practices such as forced labor, Article 43 (Directive Principles of State Policy) calls for a living wage, and Article 21 emphasizes the need for a dignified life free from exploitation.

<https://lib.manaraa.com/books/Constitutional%20Values%20in%20the%20Gig-Economy%20Why%20Labor%20Law%20Fails%20at%20Platform%20Work%20and%20What%20Can%20We%20Do%20about%20It.pdf> accessed 4 June 2024.

[15] M. Tran and RK Sokas, 'Health and Safety Protections for Workers in the Gig Economy' (2017) 59(4) Journal of Occupational and Environmental Medicine e63-e66.

[16] The Constitution of India, 1950 art 39.

The Supreme Court has also emphasized this principle in several landmark judgments, such as *Bijoy Cotton Mills v. Their Workmen,*[17] where it was stated that the overall well-being of individuals is essential to maintain societal balance. The concept of vicarious liability is a well-established principle in the legal world whereby an employer is held responsible for the actions of their employees while performing work-related tasks[18]. This includes taking active responsibility in the case of occupational hazards, as the employer has a duty of care towards their employees. Unfortunately, this legal principle is missing in the case of gig workers, creating a legal vacuum that leaves gig workers vulnerable to exploitation and injury. The absence of a clear employer-employee relationship in the gig economy, and the reliance on independent contractors, allows platforms to escape liability for the actions of their gig workers. This not only violates the fundamental principles of social and economic justice enshrined in the Indian Constitution but also infringes upon the human rights of gig workers. The government must take necessary steps to provide legal protection for gig workers and establish accountability for the companies that engage in their services, including the liability for occupational hazards like;

I. Inclusion of the term "Gig Worker", under the official meaning of Labour.
II. Ensuring minimum wage policy for gig workers
III. Extended Employee's state insurance and Employee Provident Fund which is specifically designed for gig workers.
IV. Mandating safety training and compliances.
V. Establishing special mediation services or a dedicated wing at labour court to deal with issues pertaining to contractual obligations with regard to gig workers.
VI. Special forum for negotiations backed up by government to support gig workers.

2020 was a transformative experience for humanity, as the pandemic made horror a tangible reality and altered individuals' perceptions of life. While the traditional earning system took a step back, the parallel gig economy provided substantial assistance during the pandemic by supplying necessities. In India, e-commerce established a robust gig system where e-platform workers quickly replaced sick workers, granting clients access to an ample supply of workers. Despite the imminent danger, gig workers worked diligently to complete their tasks and earn a living.

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[17] *Bijoy Cotton Mills v Their Workmen* AIR 1960 SC 692

[18] Paula Giliker 'What is vicarious liability?' in *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press 2010) 1.

However, a report[19] revealed that most of these workers lacked access to health insurance, even during the pandemic; it violates ethical principles and constitutes a blatant disregard for the fundamental tenets enshrined within the Constitution.

III. AN ANALYSIS OF THE FORTUNES OF LABOUR VIS-À-VIS GIG WORKERS AND LEGAL FRAMEWORKS IN INDIA:

Labour Welfare Est Verbum Supremum

The colors of post-independent India painted a severe art of social inclusivity and protectionism. The same art had voiced the opinion of the masses, stating that the hard labor segment of India should be protected at any cost, and class legislation was bought in to maintain the harmony. Post-independence mindset had already determined that the horrors of old age in India must not be repeated, and the only way out of it is to protect the rights of individuals. The International Labour Organization (ILO) has underscored the necessity of a coherent approach by governments towards the gig economy. To safeguard the interests and well-being of workers, the ILO prescribes several measures, including[20]:

1. Government agencies should correctly classify gig workers as employees to protect their rights and welfare.
2. Governments should increase transparency in the algorithm’s businesses use to benefit workers, as this can help ensure fair treatment and prevent exploitation.
3. The right of gig workers to engage in collective bargaining should be upheld, giving them greater power to negotiate fair wages and working conditions.
4. Governments should provide social security benefits to all workers, including those in the gig economy, to ensure they have access to necessary support and protections.
5. Gig workers should have access to courts to resolve grievances, crucial for ensuring their rights are respected and protected.

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[19] Alex J. Wood, Mark Graham and others, 'Networked but Commodified: The (Dis)Embeddedness of Digital Labour in the Gig Economy' (2019) 53(5) Sociology 931 <https://journals.sagepub.com/doi/pdf/10.1177/0038038519828906> accessed 25 March,2023.

[20] International Labour Organization, ‘Rapid growth of digital economy calls for coherent policy response’ (*International LabourOrganisation, 23 Feb 2021)* <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_771909/lang--en/index.htm.> accessed 25 March,2023.

If these five points are adequately implemented, it will guide the gig workers positively, encouraging them to be more prompt to work with less or no occupational stress. The labor segment of India requires protection at various levels, be it at the Industrial relation level or the Social Security level. The legislations are also keenly designed to cater to these needs. Legislation related to industrial relations resolves the issues of employee-employer conflict, and wage legislation ensures fair and timely payment of wages without any disparities. The law relating to social security ensures trust in the employee over the employer, creating a positive perception stating that the compensation claims of employees would be met without any delay.

For the first time, the redesigned labor code, i.e., The Code of Social Security 2020, had given the term 'gig worker' recognition. The code[21] defines a gig worker as someone working outside a traditional employer-employee relationship and earning from such a relationship.

It was further stated that gig workers are like any other workers, and they must be protected by giving all the benefits, including; Health Care and Income security, as dictated by section 70 of the code[22]. Even the code[23] recommends that the government develop beneficial schemes for the benefit of gig workers. Furthermore, the provisions also provide a way for the unorganized workforce and gig workers to register themselves for entitlement to future beneficial schemes[24].

Furthermore, the Code of Social Security 2020 only permits the government to frame specific welfare schemes for gig and platform-based workers without affording them any enforceable rights. While gig workers may be eligible for certain benefits, they cannot assert them as legally enforceable rights in a court of law. Consequently, gig workers are left without substantial rights and vulnerable to exploitation.

IV. FINAL REMARKS

One of the most prominent philosophers of ancient Greece, Plato, recognized the importance of labor welfare and stated that laborers should be provided with adequate compensation and working

[21] The Code of Social Security, 2020 (36 of 2020) s 2(35).
[22] The Code of Social Security, 2020 (36 of 2020) s 70.
[23] The Code of Social Security, 2020 (36 of 2020) s 45.
[24] The Code of Social Security, 2020 (36 of 2020) s 113.

conditions[25]. This view is reflected in modern labor jurisprudence, which recognizes that workers' welfare and rights are fundamental to the functioning of any society. Every workman has the right to aspire for decent work conditions. Decent working conditions can be ensured only if dignity of workers is not compromised. Workmen cannot be expected to work with dignity unless labour legislation vests substantive rights to them. The notion that gig workers are independent self-employed workers is a myth and deserves to be shunned by policymakers. The employer employee relationship should be defined in changed arena of work and the burden to prove that a person working through platform is not an employee should be shifted upon platform. Platforms should be made liable to provide social security and other benefits to employees should have a record of sufficient engagement with them. In order to deal with the post globalization and liberalization phenomenon, several regulatory agencies have been brought into existence by the legislature. It is submitted that platform and workman relations should be under supervision of such quasi-judicial regulatory agencies that have sufficient powers to redress the grievances of Gig Workers.

V. CONCLUSION

Labour laws must be designed to promote an egalitarian society that protects the rights and welfare of all workers, including those in the gig economy. This necessitates a clear and consistent legal definition of gig workers grounded in constitutional and human values, preventing platforms from adopting arbitrary definitions and circumventing their obligations. Moreover, it is essential to recognize that algorithms only form a small part of gig work and that human intervention can only understand and implement the remaining aspects. In conclusion, it is essential to acknowledge that the gig economy presents novel and challenging issues that require a comprehensive legal approach. The current labor codes in India do not provide significant rights to gig workers, leaving them ineligible to claim benefits as guaranteed rights in a court of law. This contradicts the principles of labor jurisprudence that emphasize the need for adequate protection of workers' rights and welfare. It is submitted that labour jurisprudence has to evolve and keep its pace with changing nature of work and workforce., In a welfare state, one segment of society cannot reap the benefit of technology at the cost of another. There is an urgent need to treat platforms at par with traditional

[25] J.R. Boatright, 'Executive Compensation: Unjust or Just Right?' in G.G. Brenkert& T. L. Beauchamp (eds.), *Oxford Handbook of Business Ethics* (Oxford University Press 2010) 161.

employers as regard responsibility towards gig workers is concerned. Access to justice is an important aspect of Rule of Law and there is no justification to deny the same to Gig Workers. The gig economy presents unique challenges that require a comprehensive legal approach, and labor laws must be designed with a focus on the welfare of workers. By doing so, we can create a legal framework that provides adequate protections for gig workers and ensures that they can fully realize the benefits of the gig economy.

THE FUTURE OF WORK IN INDIA: CONTEMPORARY TRENDS AND CHALLENGES OF THE GIG ECONOMY

by Sanya Shrivastava and Vasu Pandey

Abstract

In recent years, the gig economy in India has grown substantially due to technological advancements, the rise of e-commerce platforms, and the changing character of work. An increase in the demand for flexible work makes the gig economy particularly attractive to workers that enable them to maintain a healthy balance between their personal and professional lives. However, there are certain drawbacks due to the lack of regulations which makes the gig workers susceptible to exploitation and maltreatment. This gives rise to the purpose of this article, which is to examine the Gig economy in India as a modern concept exposing multiple gaps in the country's labour laws. The author has discussed various case law which are relevant in establishing the labour jurisprudence. The article also highlights the role of International LabourOrganisation and the European Union in promoting the decent working environment to these workers. The article also highlights how the development of the gig economy is taking place globally and it also covers the latest challenges that the countries have to deal with outside the legal sphere. In the end the author has given meaningful suggestions that can be implemented to tackle the problems faced by the gig economy.

KEYWORDS:*gig economy, exploitation, minimum wage, discrimination, technology, etc.*

I. INTRODUCTION

"***The gig economy is not just a trend; it's a fundamental transformation of the way we work. Embracing it will be key to staying competitive in the future***."

- Reid Hoffman, Co-founder of LinkedIn.

The realm of work is undergoing a radical upheaval, driven by technological developments, shifting employment ideologies, and shifting economic conditions. The gig economy, a phenomenon that has upended conventional employment structures and has created new opportunities for both workers and corporations, is at the vanguard of this shift. Understanding the gig economy is crucial in this era of rapid innovation and change because it has the potential to influence how people will work in the future.

The gig economy refers to a labour market characterized by the prevalence of short-term contracts, freelance work, and independent contracting. It is a flexible, on-demand system where individuals, often referred to as "gig workers," provide services or complete tasks for clients or companies on a project-by-project basis. The advent of digital platforms and mobile technologies has enabled the gig economy to flourish, connecting workers with consumers in a seamless and efficient manner.

According to NITI Aayog's estimations, there are 7.7 million people currently employed in the gig economy in India. However, this number is expected to grow to 23.5 million by 2029-30. Indian start-ups have another claim to fame in the form of the emergence of a new sort of gig economy. This is in addition to the fact that they have been responsible for the infusion of billions of dollars of capital and the imaginative solution of challenging challenges.[1]

For businesses, the gig economy presents a multitude of benefits. Companies can tap into a vast pool of talent from around the world, accessing specialized skills and expertise on a project basis. This flexibility allows businesses to scale up or down rapidly in response to market demands, reducing fixed labour costs and enhancing operational agility. Moreover, the gig economy fosters innovation and fosters a culture of collaboration, as businesses collaborate with diverse individuals possessing diverse perspectives and experiences.

However, the gig economy is not without its challenges. Gig workers often face issues such as income volatility, lack of job security, limited access to benefits and social protections, and difficulty in establishing long-term financial stability. Furthermore, the evolving legal and

[1] Business Today, 'How India's gig economy is shaping up, thanks to startups' (*Business Today*, 11February 2023) <https://www.businesstoday.in/latest/economy/story/how-indias-gig-economy-is-shaping-up-thanks-to-startups-369840-2023-02-11> accessed 4 June 2024.

regulatory frameworks struggle to keep pace with the rapidly changing nature of work, raising questions about employment rights and the responsibilities of platform companies.

As the gig economy continues to expand its reach across industries and geographies, it is imperative to explore its implications, potentials, and pitfalls. This Article aims to delve into the multifaceted aspects of the gig economy, examining its impact on individuals, businesses, and society. From the gig economy's influence on economic growth to its effects on traditional employment structures, we will uncover the dynamics that shape this transformative phenomenon and strive to foster a deeper understanding of the future of work.

II. DEVELOPMENT OF GIG ECONOMY VIS A VIS NATIONAL ECONOMY

India possesses a unique advantage in harnessing the potential of the gig economy, thanks to its large population and relatively high youth unemployment rates. This is also the era of **generation Z**, who, unlike their predecessors, have their lives linked with technology, have vastly different perspectives on work culture and life, and do not consider full-time jobs to be a need. They are also in constant contact with global happenings and developments, and thus willing to experiment with global fads and trends. To satisfy their economic objectives, they are willing to try out new forms of work engagement, such as taking on gigs that provide them independence in their job and the ability to select what to do, when to do, and how much their skills are worth based on demand and supply. The economic liberalisation measures that have been implemented by the Indian government has resulted in higher levels of competition and a more open market, both of which have additionally contributed to the expansion of the gig economy. E-commerce's quick development has led to a major increase in demand for delivery and logistics services, which in turn has aided in the emergence of the gig economy in these sectors.

The rapidly emerging gig economy has had a positive impact on **India's national economy** by boosting employment, productivity, and revenue. One of the primary advantages of the gig economy in India is its ability to create employment opportunities. With its flexible nature, the gig economy accommodates a diverse range of individuals, offering avenues for work to those who may struggle to secure traditional full-time employment. This is particularly beneficial for students, freelancers, stay-at-home parents, and individuals seeking additional income. By providing temporary, project-based, or part-time work, the gig economy has absorbed a significant number of unemployed individuals and extended opportunities to segments of the population that were previously excluded from the labour market.

Moreover, the gig economy has played a vital role in driving *economic growth* in India. As gig workers engage in various economic activities, they contribute to the expansion of multiple sectors, including e-commerce, transportation, hospitality, and online marketplaces. This heightened economic activity fuels demand, stimulates investment, and leads to the creation of new businesses. The gig economy complements the country's initiatives such as Make in India and Digital India, fostering innovation, entrepreneurship, and technological advancements that contribute to overall economic progress.

In addition to driving economic growth, the gig economy *enhances productivity* in India. Gig workers operate as independent contractors, motivated to deliver high-quality work to maintain their reputation and secure future opportunities. Their flexibility to choose projects and tasks that align with their skills and interests allows them to maximize their productivity. This increased productivity not only benefits individual gig workers but also enables businesses to leverage a more agile and adaptable workforce. The gig economy's emphasis on efficiency and productivity has a positive spill over effect on the overall economy.

Furthermore, the gig economy *nurtures a culture of entrepreneurship* and innovation. It provides a platform for individuals to leverage their unique skills, talents, and passions, transforming them into marketable services or products. This encourages creativity, risk-taking, and the development of new business models. The gig economy has witnessed the rise of startups and micro-entrepreneurs, enabling them to offer specialized services, tap into niche markets, and drive economic innovation. This surge of entrepreneurial activity contributes to job creation, fosters competition, and injects dynamism into the economy.

The gig economy also *expands revenue streams* for both individuals and businesses in India. Gig workers have the opportunity to earn income from multiple gigs and projects, diversifying their sources of revenue. This income potential is particularly significant for individuals who may have been underemployed or struggled to find traditional employment. For businesses, engaging gig workers offers cost-effective solutions as they can hire talent for specific tasks or projects, reducing fixed labour costs. The flexibility of the gig economy allows businesses to adapt to market demands efficiently, potentially increasing their revenue and profitability.

Beyond its economic impact, the gig economy contributes to *the development of an inclusive workforce in India*. It provides opportunities for marginalized groups, including women, individuals from rural areas, and people with disabilities, who may face barriers to traditional employment. The gig economy's flexibility allows individuals to overcome geographical limitations, connect with job opportunities remotely, and participate in the workforce on their terms. This inclusivity helps reduce economic disparities, promotes diversity, and creates a more equitable society.

However, while the gig economy offers certain benefits, there are also several drawbacks to this model of work. These include a lack of benefits, income instability, limited job security, no legal protection, no career growth, and increased competition. These drawbacks can leave gig workers vulnerable to ***exploitation*** and mistreatment, making it important to consider the implications of the gig economy for the broader labour market.

With recent nationwide demonstrations by Blinkit employees working for the ecommerce an d rapid delivery platform, these problems with the gig economy have once again come to light[2]. Blinkit recently rolled out its new pay out structure for its delivery executives as per which the minimum pay out per delivery was reduced from Rs 25 to Rs 15. The revised structure also bases incentives on the distance travelled to execute the order, a policy commonly referred to as "effort-based pay." Consequently, Blinkit delivery executives will now earn between Rs 600 and Rs 700 per day, down from Rs 1,200 previously[3]. This incident reflects certain pre-existing lacunas in Indian Labour Laws which adversely affect the gig workers across the nation. Corporates have found "gigsters" to be a cheaper alternative and more critically cut off their payrolls.

In India, as in the rest of the globe, there are certain requirements for workers to be covered by labour laws. For instance, there must be an "**employment relationship**" between the employer and employee. Factories served as a paradigm for the development of this concept in the 20th century. It required, for instance, regularity of labour, work for a single employer, at a particular location,

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[2] Bhaumik A, 'Explained: Blinkit Protests and the Legal Remedies Available to Gig Workers' *The Hindu* (May 1, 2023) <https://www.thehindu.com/news/national/explained-blinkit-protests-and-the-legal-remedies-available-to-gig-workers/article66784224.ece> accessed May 7, 2023.

[3] 'Blinkit Delivery Workers Protest in Delhi-NCR over Changes in Pay Structure' *The Economic Times* (12 April 2023) <https://economictimes.indiatimes.com/tech/startups/blinkit-delivery-workers-protest-in-delhi-ncr-over-changes-in-pay-structure/articleshow/99439758.cms> accessed May 7, 2023

with specific equipment, etc[4]. However, this is no longer the predominant model of labour in the 21st century. In gig work, for instance, workers frequently switch between various companies, are required to use their own equipment (or borrow it from the company), and — quite dishonestly — are referred to as partners rather than employees by the company in order to circumvent the protections that labour law provides. The primary reason why platform firms are hesitant to give gig workers the status of employees is the fear that if gig workers are considered employees, platform firms would be obligated to provide various benefits, such as healthcare coverage, paid time off, retirement contributions, and unemployment insurance. These additional costs could significantly impact the financial viability of platform companies that heavily rely on a large and flexible gig workforce.

Secondly, the legal and regulatory complexity involved in treating gig workers as employees is a significant concern for platform firms. Designating workers as employees would subject the companies to a host of legal obligations and regulations. This includes compliance with labour laws, minimum wage requirements, overtime pay, workers' compensation, and various other employee protections. Adhering to these regulations can be administratively burdensome, especially for platforms operating on a global scale with varying labour laws in different jurisdictions.

Furthermore, the very nature of the gig economy relies on the flexibility and independent contractor status of gig workers. Granting them employee status could potentially undermine the flexible and on-demand nature of the platform business model. Gig workers value the freedom to choose when and where to work, as well as the ability to select from a range of available gigs. Shifting to an employee-employer relationship could restrict this flexibility and impede the functioning of the gig economy.

Lastly, the evolving nature of the gig economy and its workforce presents a challenge in defining a clear employment status for gig workers. The traditional employment framework may not adequately capture the nuances and unique characteristics of gig work, which often involves short-

[4] 'A New Deal to Protect India's Gig Workers?' *Hindustan Times* (18 March, 2023) <https://www.hindustantimes.com/opinion/a-new-deal-to-protect-india-s-gig-workers-101679143442849.html> accessed May 7, 2023.

term engagements and project-based assignments. This complexity further contributes to the hesitation of platform firms in categorizing gig workers as employees[5].

The absence of an employee status for gig workers within platform firms is considered the root cause of the problems and challenges faced by these individuals. Without the recognition and benefits that come with employee status, gig workers often encounter various issues. One of the key issues faced by these gig workers is low pay. The company pays its delivery executives on a per-delivery basis, which means that they do not receive a fixed salary or any other benefits such as ***health insurance, paid leave, or pension benefits***. Another issue faced by these ***gig workers is lack of job security and working conditions***[6]. Delivery executives often have to work long hours and deal with difficult working conditions, such as traffic congestion and inclement weather. There have also been reports of delivery executives being ***harassed or assaulted*** by customers or facing other safety risks while on the job which led to protests and strikes by these gig workers. Overall, the controversy surrounding these highlights the challenges faced by gig workers in India and the need for better protections and rights under Indian labour laws.

Equal treatment of employees is mandated by International Labour Organization regulation, which prohibits unfair ***discrimination***. There is no law that requires employers to pay non-standard workers a ***minimum wage***. Fair remuneration is a human right according to the International LabourOrganisation. It is blatant ***exploitation*** when a worker is not paid the ***minimum wage*** for his or her services. Consequently, the legislature should approve a law to eliminate this form of ***exploitation***[7]. There is also no provision for the right to establish a union or engage in collective bargaining for gig workers in the current Indian legislation. The International LabourOrganisation considers the ability to form an association and collective bargaining to be basic human rights[8].

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[5] Mini Tejaswi and K. V. Aditya Bharadwaj, 'Are Gig Workers Nobody's Employees?' (*The Hindu,* 16 December 2022) <https://www.thehindu.com/news/national/karnataka/workers-of-gig-economy-nobodys-employees/article66263786. ece> accessed 7 May 2023.

[6] Anwesha Ganguly and RahatTouhid 'Gig Work Seen as Economic Revolution, but 8 Million Indian Gig Workers Are Not Considered Employees, Denied Social Security' (*Article 14,* 29 March 2023) <https://article-14.com/post/gig-work-seen-as-economic-revolution-but-8-million-indian-gig-workers-are-not-considered-employees-denied-social-security-64239dd0060b5> accessed 7 May 2023.

[7] International LabourOrganisation, 'Coherent and coordinated international effort is required to protect gig economy workers and businesses' (*International LabourOrganisation* March 9, 2022) <https://www.ilo.org/newdelhi/info/public/sp/WCMS_839490/lang--en/index.htm> accessed May 7, 2023.

[8] International LabourOrganisation, 'Freedom of Association and Collective Bargaining (Decent Work for Sustainable Development (DW4SD) Resource Platform' (*International LabourOrganisation* March 9, 2022) <https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm> accessed May 7, 2023.

When an organisation violates the rights of its employees, a trade union will represent those employees. Additionally, collective bargaining grants employees the right to initiate negotiations with management. The management will exploit their authority if these rights are not recognised. Consequently, these are essential liberties that need to be acknowledged for gig workers.

The European Union has struggled to resolve the challenges posed by the gig economy while maintaining fair working conditions[9]. Several EU member states have taken measures to regulate platforms for the gig economy and safeguard worker rights. In 2020, Spain, for instance, enacted a law recognising delivery riders as employees and granting them social security benefits and collective bargaining rights[10]. The UK government has also released guidelines to outline the rights that gig economy workers are entitled to, including the national minimum wage and paid leave, while also granting them the same level of flexibility to take on additional work to supplement their income[11]. There have been discussions and initiatives at the EU level intended at addressing the impact of the gig economy on labour rights. In 2021, the European Commission proposed a directive on adequate minimum wages that included provisions to ensure that employees in the gig economy are paid fairly[12]. The directive seeks to establish a minimum wage framework that takes into consideration the unique characteristics of various forms of employment, including gig work. The EU has also prioritised providing social protection for workers in the freelance economy. The 2020 launch of the European Pillar of Social Rights Action Plan by the European Commission aims to ensure equitable working conditions and social protection for all workers, including those in non-standard employment such as gig workers[13].

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[9] Antonio Aloisi and Despoina Georgiou, 'Two Steps Forward, One Step Back: The EU's Plans for Improving Gig Working Conditions' (*Ada Lovelace Institute,* 7 April 2022)<https://www.adalovelaceinstitute.org/blog/eu-gig-economy/> accessed 7 May 2023.

[10] Leonie Cater, 'Spain approvedalaw protecting delivery workers' (*Politico,* 11 May 2021) <https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/> accessed 7 May 2023.

[11] Danny Romero, 'UK provides guidance to clarify gig workers' rights' (*Contingent Workforce Strategies 3.0,* 3 August 2022) <https://cwstrategies.staffingindustry.com/uk-provides-guidance-to-clarify-gig-workers-rights/#:~:text=The%20UK%20government%20last%20week,to%20top%20up%20their%20income.> accessed 7 May 2023.

[12] Natasha Lomas, 'Europe lays out a plan to flip the odds on gig economy exploitation' (*TechCrunch,* 9 December 2021) <https://techcrunch.com/2021/12/09/eu-gig-economy-proposal/>accessed 7 May 2023.

[13] Pascal, Alexandra and Wolfgang, "Employment, Social Affairs & Inclusion" (*The European Pillar of Social Rights Action Plan - Employment, Social Affairs & Inclusion - European Commission*) <https://ec.europa.eu/social/main.jsp?catId=1607&langId=en> accessed May 7, 2023.

It is essential to note, however, that the regulation of the gig economy remains a contentious issue, and that there are differing opinions within the EU regarding how to achieve the right balance between flexibility and worker protection. Others emphasise the need for stronger labour protections and social security for gig workers, while some argue that excessive regulation could stifle innovation and economic development.

III. CONSTITUTIONALITY OF GIG WORK UNDER LABOUR LAWS

The Union budget for 2021 pledged ***minimum wages*** and insurance coverage for "all worker categories." To fulfil this pledge, the labour ministry, in consultation with businesses and industries, is attempting to develop a suitable social security scheme for gig-workers, but without success[14]. The Constitutional principle that goes beyond the definition of forced labour and emphasises the importance of social order and under which employees are promised meaningful participation. This is also reflected in the concepts outlined in the DPSP, which governs government policy in the pursuit of social welfare objectives.

Article 16[15] prohibits employment ***discrimination*** based on religion, ethnicity, caste, gender, or place of birth. It ensures equal employment opportunities for all citizens in the public sector. **Article 19(1) (g)**[16]ensures the right to engage in any occupation, business, or vocation. It entails the ability to enter employment contracts.

Regarding the objectives outlined in **Article 39**[17]**,** the emphasis has been placed on the state's responsibility to ensure that all individuals have access to adequate means of subsistence, so that no forced labour can have a detrimental effect on the health of the worker. Aside from that, **Article 42**[18] requires the state to ensure just and humane working conditions and provide maternity leave. **Article 43A**[19] requires the State to ensure that employees receive a living wage, that working conditions are safe and humane, and that social security measures are provided for workers'

[14] Aquilur Rahman, 'Budget 2021 will streamline gig economy, create inclusive workforce: Industry Experts' (*Economic Times,* 2 February 2021) <https://hr.economictimes.indiatimes.com/news/industry/budget-2021-will-streamline-gig-economy-create-inclusive-workforce-industry-experts/80641924> accessed 7 May 2023.

[15] The Constitution of India, 1950 art 16.

[16] The Constitution of India, 1950 art 19(1)(g).

[17] The Constitution of India, 1950 art 39.

[18] The Constitution of India, 1950 art 42.

[19] The Constitution of India, 1950 art 43.

benefit.These two articles provide direction to the government so that beneficial legislation can be enacted to promote just and humane working conditions to maintain the standard of living and provide equal access to opportunities[20].

Article 23 of the Constitution[21] mandates that measures be taken against any form of "forced labour." And article 23 of the Universal Declaration of Human Rights and the International LabourOrganisation advocates for decent work, which includes all aspects of working such as fair wages, decent working hours, occupational safety, and the provision of social security benefits. [22]

Additionally, India has ratified **ILO's Abolition of Forced Labour Convention**, **1957**, which makes prohibition the State's responsibility. Thus, the Indian State's legal fiction that prevents the application of employment rights conferred to gig and platform workers is indicative of the ***exploitation*** of labour for their economic development and is contrary to international commitments.[23] In this way, the application of ***minimum wage*** laws cannot be used to diminish the rights of contract and platform workers. They should be held legally liable for providing them with secure working conditions and social security benefits, which can serve as the basis for a normal life cycle. Government has a responsibility to identify and prevent exploitative practises that can lead to compelled labour in this context.

In **Bandhua Mukti Morcha v. Union of India**,[24] the Supreme court ruled that the government cannot deny its responsibility to ensure safe working conditions simply because there is no court order on the ***exploitation*** of workers. It is responsible for actively recognising incidents involving *exploitation* and implementing measures to maintain a secure working environment.

IV. A CRITICAL ANALYSIS OF THE EXISTING LEGAL REGIMES

Until recently, local state administrations were responsible for developing and implementing social security programmes for employees in the unorganised sector. The federal government has assumed this role in the new Social Security Code, 2020[25]. The Central Government should devise

[20] Ibid(n.19).
[21] The Constitution of India, 1950 art 23.
[22] ILO, 'Decent work indicators' (International LabourOrganisation, December 2012).
[23] Abolition of Forced Labour Convention, International LabourOrganisation (adopted 25 June 1957, entered intoforce17 January 1959) No. 105.
[24] *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 549.
[25] The Code on Social Security, 2020 (36 of 2020).

and publicise acceptable welfare systems for unorganised workers, including life and disability insurance, health and maternity benefits, old-age security, education, and any other benefits established by the Central Government. It should also develop and publicise acceptable welfare plans for unorganised workers, such as provident funds, employment injury benefits, housing, educational schemes for children, worker skill upgradation, funeral assistance, and old age homes.

According to the code, both the Central and State Governments would design programmes for employees in the unorganised sector in different locations.[26] As a result, from the standpoint of a contractual worker in the private unorganised sector, there would be conflicting authority, potentially leading to conflicts. Furthermore, the requirements for independent contractors and platform workers are a little hazy and overlapping. The code defines gig workers as persons who do not have a traditional employer-employee relationship and platform workers as those who work outside of the traditional employer-employee relationship to provide services to organisations or individuals for a charge through a digital platform.

In the case of **Dhrangadhara Chemical Works Ltd. v. the State of Saurashtra**[27], the highest court in the land came up with a pair of tests known as the supervision and control tests. In accordance with this philosophy, it is stated that an employer-employee relationship will be established in which the employer will exert supervision and control over any work that is performed by the employee as well as the manner in which labour has been completed. Using the current situation as an illustration, platform workers such as Uber and Swiggy were determining the compensation that would be received by the drivers, the routes that they would undertake, supervising all of the online transactions, and laying down criteria for penalising them for the violation of their terms by deducting from their payment. This was being done in the context of the current situation. As a result, we can deduce that the scope of their involvement does not consist solely of serving as a neutral party facilitator.

The Supreme Court of India, while hearing the case of the **Indian Federation of App Based Transport Workers v. Union of India**[28] was asked to recognise the condition of gig and platform

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[26] Anannya Gupta & Kajal Chandra, 'Concept of Social Security: An Analysis of Code on Social Security, 2020' (2021) 2(1) Indian Journal of Law and Legal Research <https://www.ijllr.com/post/concept-of-social-security-an-analysis-of-code-on-social-security-2020> accessed on 4 June 2024.
[27] *Dhrangadhara Chemical Works Ltd v the State of Saurashtra* 1957 AIR SC 264.
[28] *Indian Federation of App Based Transport Workers v Union of India* (2021) WP (C) 1068.

workers as that of unorganised workers. This was done so that the necessary steps could be taken to make an obligation towards these platform workers in order to provide them with all of the necessary benefits. The court is currently deciding whether or not to grant this request.

The recent case of **Uber BV v. Aslam & Others**[29] is a landmark case in the UK which clarified the employment status of Uber drivers. The case was brought by a group of Uber drivers who argued that they were workers rather than self-employed contractors, and were therefore entitled to certain employment benefits, such as ***minimum wage*** and holiday pay. The case went through several levels of the UK court system before being appealed to the Supreme Court, which ultimately ruled in favour of the drivers.

In its analysis, the Supreme Court examined the relationship between Uber and its drivers to determine whether it was one of self-employment or employment. The court looked at the contractual documentation between the parties, but also considered the actual working arrangements between them, which involved Uber setting the fare, the route, and the terms of the service. The court found that the contractual documentation did not accurately reflect the reality of the relationship between the parties.

The court also noted that Uber exercised a significant degree of control over its drivers, which was indicative of an employment relationship. Uber monitored the drivers' performance and had the power to terminate the relationship at will. The court also found that the drivers were in a position of subordination and dependency with Uber, which was another hallmark of an employment relationship. The court further noted that the drivers had little autonomy in the performance of their work and were unable to negotiate the terms of their service with passengers.

The court further applied the legal test for determining employment status, which involves considering the degree of control exercised by the employer over the worker, the degree of independence of the worker, and the degree of mutuality of obligation between the parties. The court found that the degree of control exercised by Uber over its drivers was so significant that the drivers could not be considered to be self-employed. The court also found that there was a sufficient degree of mutuality of obligation between the parties to establish an employment relationship.

[29] *Uber BV v Aslam* (2021) UKSC 5.

Overall, the court's analysis in this case was based on the principles of employment law, which are designed to protect workers from ***exploitation*** and to ensure that they receive certain basic employment rights. The court found that the contractual documentation between Uber and its drivers did not accurately reflect the reality of the relationship between them, and that the drivers were in fact in a position of subordination and dependency with Uber. The court therefore concluded that the drivers were workers entitled to certain employment benefits, such as ***minimum wage*** and holiday pay.

This decision set a legal precedent in the UK, which may have implications for other gig economy workers who are currently classified as self-employed contractors. The decision may also lead to further legal challenges to the employment status of gig economy workers in other jurisdictions and may prompt policymakers to consider reforms to employment law to better protect workers in the gig economy.

V. REVIEW OF NITI AAYOG REPORT ON GIG ECONOMY

The NITI Aayog Report titled "India's Booming Gig and Platform Economy" did research on the gig economy from the perspective of gig workers and made several recommendations as a result of its findings[30]. To begin, the report made many recommendations, the first of which was to expand access to institutional finance by developing financial products suited to the needs of platform workers and those interested in launching their own platforms. If platform enterprises and FinTech organisations are leveraged, workers may be able to obtain loans based on their cash flow. Second, the findings suggest that platform-led types of skilling and job development should be fostered in the gig and platform sectors. These models are required to help with job creation. Platforms may collaborate with the Ministry of Skill Development and Entrepreneurship and the National Skill Development Corporation (NSDC) to encourage skilled personnel and micro entrepreneurship.

Furthermore, the research analyses the likelihood of appropriate platformisation being applied. It is conceivable to begin the development of a platform similar to Start-up India. Handholding and streamlined processes, financial support and incentives, skill development, and social and financial

[30] National Institution for Transforming India Aayog *India's Booming Gig and Platform Economy: Perspectives and Recommendations on the Future of Work* (June 2022).

inclusion can all help to achieve this. Platforms' reach may be broadened; for example, self-employed individuals who run enterprises supplying regional and rural cuisine, street food, and the like may be linked to platforms. One of the primary recommendations in the report is to increase social inclusion.

Gender Sensitization and Accessibility Awareness Programmes must also be implemented for both workers and their families. And it is possible if platform companies form partnerships with Civil Society Organisations (CSOs) to help different types of employees, such as women workers and people with disabilities, take advantage of employment opportunities in the platform sector by providing skill development, access to funding, and assets.

Modifications to the workspace layout and the availability of auxiliary aids in the office have the potential to improve working conditions for individuals with disabilities and women. The research suggests that social security be expanded further. There are various platforms that can offer paid time off, insurance, pension and retirement benefits, and even retirement.

Finally, the paper proposes that gig economy and platform organisations consider the idea of giving workers with financial assistance. This will help to provide guaranteed minimum incomes and social protection against income loss due to work uncertainty or irregularity.

VI. CHALLENEGES FACED BY THE INDUSTRY OUTSIDE LEGAL SPHERE

Personal issues experienced by Gig workers due to the legal uncertainty in labour laws

Traditional labour laws in India provide mechanisms for collective bargaining and unionization, which are crucial for protecting workers' rights. However, gig workers lack these rights, making it difficult for them to negotiate better terms and conditions of work. The absence of a collective voice leaves them in a weaker position compared to their employers.Gig workers face challenges related to fair wages and working conditions. The competitive nature of gig platforms drives down wages, leaving workers with earnings that are insufficient to meet basic living expenses.

Additionally, the gig workers are not getting the required social security benefits which are available to the traditional workers. The companies that are engaging these workers are not required to pay them any benefits under any legislation which is in force in the country. This works to the disadvantage of the workers who are being exploited and they do not have any remedial measures. In traditional employment, workers often receive benefits like health insurance, retirement plans, and paid leave as part of their compensation package. These programs are designed to bridge the gap and offer a degree of financial security in a world where traditional employment structures are evolving.

However, gig workers typically don't have access to these benefits. This creates a vulnerability, as they may face financial hardship in the absence of a steady income or safety net.

Gig work in India presents significant dangers. A review of local news across the country reveals at least twelve incidents of such attacks in recent months. WIRED interviewed 50 individuals employed in ride-hailing and food delivery services, with approximately half reporting that they have been assaulted while on the job. Some attacks were due to customers refusing to pay, while others were based on caste or religion. These figures indicate an alarming increase in violence against platform workers in India. A survey conducted by the Centre for Internet and Society (CIS), a think tank, found that out of 1,500 gig workers, one in three expressed fear of theft or physical assault while at work.[31] Aayush Rathi, the research lead at CIS, emphasized the severity of this issue, noting that it is highly concerning for one-third of workers to fear being robbed or physically attacked on their way to work.[32]

Workers and workers' groups say that the platforms have gotten worse at dealing with complaints and concerns on the ground, which some put down to deep job cuts at tech firms.

In order to tackle these problems, India has introduced four labour codes to benefit workers in the unorganized sector, including gig and platform workers. The Social Security Code (2020) consolidates nine laws, such as the Employees' Provident Fund Act and the Maternity Benefit Act, to extend benefits like minimum wages, maternity leave, EPF funds, and insurance to gig workers.[33] The Industrial Relations Code (2020) unifies three labour regulations to simplify terms of employment, dismissals, strikes, collective bargaining, and dispute resolution.[34]Although it covers gig workers, it does not grant them the same rights as traditional employees. The Code on

[31] Varsha Bansal, 'Gig Workers Are Being Stabbed, Stoned, and Abused in India' (*WIRED*, April 12, 2023) <https://www.wired.com/story/india-gig-workers-violence-deadly-attacks/> accessed 25 May 2023.
[32] 'Gig Workers Are Being Stabbed, Beaten, and Abused in India' (The Centre for Internet Society) <https://cis-india.org/raw/wired-uk-april-12-2023-varsha-bansal-gig-workers-are-being-stabbed-beaten-and-abused-india> accessed 25 May 2023.
[33] The Code on Social Security, 2020 (36 of 2020).
[34] The Industrial Relations Code, 2020 (35 of 2020).

Wages (2019) standardizes wage and bonus payments across both organized and unorganized sectors, ensuring equal pay for similar work.[35] The Code on Occupational Safety, Health & Working Conditions (2020) sets standards for working conditions in hazardous workplaces with 10 or more employees.[36]

These codes aim to provide a comprehensive legal framework for gig workers but are not yet fully enacted or implemented. Challenges in interpretation and application remain, highlighting the need for greater clarity and consistency to protect gig workers effectively in India.

Gender Disparity in the Indian Gig Economy

According to a recent industry analysis, around 15 million gig workers in India are on active contracts, with less than 10% being women.37 One of the key reasons for the low number of women in this industry is the lack of legislation to protect them in any way, shape, or form.One major reason for this disparity is the existing gender bias in society, which often limits the opportunities available to women. Women are often expected to prioritize domestic responsibilities over their careers, which makes it difficult for them to commit to full-time jobs. This often leads them to seek alternative employment options, such as the gig economy, which offers more flexible working hours.

However, even within the gig economy, women face various challenges. Firstly, women are often confined to certain sectors such as beauty, fashion, and food, which are considered more suitable for women. This limits their ability to explore other sectors where their skills and expertise might be more valuable. Secondly, women often face ***discrimination*** in terms of pay. A study conducted by the Indian Institute of Technology (IIT) found that women freelancers in India earn 25% less than men for the same job.[38]

Further, the gig economy often lacks the necessary infrastructure to ensure the safety and security of women workers. Women are often forced to work in isolated and unsafe environments, such as at home or at odd hours, which increases their vulnerability to harassment and violence. This not

[35] The Code on Wages, 2019 (29 of 2019).
[36] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020).
[37] Varsha Torgalkar, 'India's gig economy is failing women workers' (*Equal Times,* 19 April 2022)<https://www.equaltimes.org/india-s-gig-economy-is-failing#.ZFfF5nZBy5c> accessed 25 May 2023.
[38] Ria Kasliwal, 'Gender and the Gig Economy: A qualitative study of Gig platforms for women workers' (2020) (359) Observer Research Foundation (ORF)<https://www.orfonline.org/research/gender-and-the-gig-economy-a-qualitative-study-of-gig-platforms-for-women-workers-65948> accessed 25 May 2023.

only affects their physical and mental well-being but also limits their ability to work and earn a livelihood.[39] In addition, the gig economy often lacks formal contracts and social security benefits, which puts women at a disadvantage. Women are often denied maternity leave, health insurance, and other benefits that are essential for their well-being. This not only affects their ability to earn a livelihood but also limits their ability to save for the future and plan for their families.[40] To address these issues, it is important to create a more gender-inclusive gig economy. This can be achieved by increasing awareness about the existing gender biases and creating policies that promote gender equality in the gig economy. This includes providing training and education to women to help them develop the necessary skills to excel in different sectors of the gig economy.

Moreover, it is important to create a safe and secure working environment for women in the gig economy. This can be achieved by providing adequate infrastructure, such as co-working spaces and transportation facilities, to ensure that women are not forced to work in isolated and unsafe environments. In addition, it is important to create formal contracts and social security benefits that provide women with the necessary support to work and earn a livelihood. Another important step is to promote entrepreneurship among women in the gig economy. Women entrepreneurs can not only create employment opportunities for themselves but also for other women. This can be achieved by providing women with access to capital, training, and mentorship to help them start and grow their own businesses.

VII. CYBERSECURITY – AN EMERGING THREAT FOR GIG WORKERS

The rise of the gig economy has brought about numerous benefits for workers and companies alike. However, it has also led to a significant increase in cybersecurity concerns, particularly on the dark web.[41] The dark web, also known as the darknet, is a part of the internet that is not indexed by traditional search engines and can only be accessed using specialized software such as Tor. It is

[39] Abigail Hunt and others, 'Women in the gig economy: paid work, care and flexibility in Kenya and South Africa' (*ODI*, 12 November 2019) <https://odi.org/en/publications/women-in-the-gig-economy-paid-work-care-and-flexibility-in-kenya-and-south-africa/> accessed 25 May 2023.
[40] Suresh Chand Aggarwal, '*The Status of Self-employed, Contract, and Gig Workers in India: Some Recent Changes'* (2022) International Association for Research in Income and Wealth (IARIW) General Conference.
[41] Rajat Kathuria, Mansi Kedia, Gangesh Varma, KaushambiBagchi and Saumitra Khullar, 'Future of Work In a Digital Era' (2017) Indian Council For Research On International Economic Relations (ICRIER).

often associated with illegal activities such as drug trafficking and weapons trading, but it is also a hotspot for cybercrime.

One of the biggest cybersecurity concerns associated with the gig economy is the rise of phishing scams. Phishing is a technique used by hackers to trick individuals into divulging their personal information, such as usernames and passwords, by posing as a legitimate company or service. With the gig economy, many workers are employed by multiple companies and may not be familiar with all the different platforms they are using, making them more vulnerable to phishing attacks. Another concern is the potential for data breaches. Gig economy companies often store large amounts of personal information about their workers, such as their social security numbers, addresses, and payment details. If this information falls into the wrong hands, it can lead to identity theft, financial fraud, and other serious consequences. The dark web is a prime location for cybercriminals to buy and sell stolen data, including data from gig economy companies. [42]

In recent years, there have been several high-profile data breaches involving gig economy companies, including Uber and Lyft. These breaches not only put workers at risk but also erode consumer trust in the companies. In addition to data breaches, the dark web is also a source of malware and other malicious software. Hackers can use malware to gain access to a worker's computer or device, allowing them to steal sensitive information or even take control of the device.[43] With the gig economy, workers often use their own devices for work purposes, which can make it more difficult for companies to monitor and protect against malware. The rise of the gig economy has also led to an increase in the use of remote access tools, such as virtual private networks and remote desktop protocols. While these tools are essential for remote work, they can also be exploited by hackers if not properly secured. For example, if a worker uses a weak password or shares their login credentials, a hacker can easily gain access to the company's network and steal sensitive data.

To combat these cybersecurity concerns, gig economy companies need to prioritize security and take steps to protect their workers and customers. This includes implementing strong

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[42] Martha A Chen, 'Technology, informal workers and cities: insights from Ahmedabad (India), Durban (South Africa) and Lima (Peru)' (2016) 28(2) Environment and Urbanization <https://journals.sagepub.com/doi/full/10.1177/0956247816655986> accessed 25 May 2023.

[43] Forbes, Dark Web of Cybersecurity Concerns Rising With Gig Economy (*Forbes*, September 2022) <https://www.forbes.com/sites/emilsayegh/2022/09/01/dark-web-of-cybersecurity-concerns-rising-with-gig-economy/?sh=265f3dca3aac> accessed 25 May 2023.

authentication measures, such as two-factor authentication, and regularly training workers on how to identify and prevent phishing scams. Companies should also invest in robust security software, such as anti-malware and anti-virus software, and regularly update their systems to patch vulnerabilities. Additionally, companies should monitor the dark web for signs of data breaches and take swift action to mitigate any damage. Workers can also take steps to protect themselves and their devices. This includes using strong passwords and regularly changing them, avoiding public Wi-Fi networks, and keeping their devices up to date with the latest security patches.

VIII. CONCLUSIVE THOUGHTS AND RECOMMENDATIONS

To tackle this snowballing impact on gig workers by virtue of lacunas in Indian labour laws, there are certain remedial measures to be taken by the government on various levels. The Indian government should set clear regulations and standards for the gig economy to safeguard gig workers and hold firms accountable. Gig workers should have the same labour rights as regular employees, including the ability to organise and create unions. To achieve these objectives, the legislature should alter the existing legislation and introduce the term gig workers to avoid discriminatory interpretations. Furthermore, the legislature should establish new legislation that exclusively mentions the rights of non-standard workers to avoid future ambiguity, which would increase the load on the courts. Several international accords that safeguard the rights and interests of gig workers have been recognised by India. The government can adopt approved international law till there is no municipal law in the country. For example, the ILO has repeatedly pushed state members to enact legislation to protect the rights and interests of gig workers.

In addition to stronger social policy, the government might implement a security blanket to ensure that gig workers have access to social security programmes like as pension schemes and health insurance to ensure financial security for older workers. The government should also invest in education and training programmes for gig workers to help them improve their skills and earn more money. Upskilling gig workers can be accomplished through free vocational training programmes that provide information and awareness about in-depth knowledge of the field. The programme should also familiarise employees with hazards such as data leaks of their personal information and how to avoid them. So, according to Sheryl Sandberg, former CEO of Meta

Platforms, "upskilling is the key to staying ahead in the gig economy." And this is truer now than ever before. [44]

And as far as cyber security for gig workers is concerned, choose a low-cost ed-tech platform that gives more than just technical content. Instead, ambitious freelancers want a training provider that focuses on industry-supported curriculum, hands-on practise, and real-world capstone projects. As a result, turnaround times will be critical, because learning better abilities in the shortest period will result in greater income potential, and as the saying goes, time is money.

Lastly, the government should promote innovation in the gig economy by offering tax breaks, subsidies, and other benefits to enterprises that develop new business models and technologies. Recently an initiative has been taken by the Rajasthan government to achieve this goal. A welfare cess of 1% on the whole value of the service or delivery (such as a cab ride or a meal order) has been proposed in the draught of a new law by the Rajasthan government. Consumers can use this service to ensure that gig workers have better rights and amenities. The bill also includes a fine of up to 1 crore for errant aggregators. [45]

To conclude, a large portion of India's population is still engaged in unskilled labour, highlighting the precarious position of online platform workers in a rapidly growing country. As a result, we demand a person's designation on these internet sites, as well as legislation to defend their rights. As more jobs are performed by technology, the role of customer behaviour in classifying these employees and protecting their rights becomes increasingly important.

[44] JPS Kohli, 'Why skilling up the gig workforce is the need of the hour' (*Financial Express,* 18 March2023) <https://www.financialexpress.com/jobs-career/education-why-skilling-up-the-gig-workforce-is-the-need-of-the-hour-3013622/> accessed 25 May 2023.

[45] Sachin Saini, 'Rajasthan outlines plan for gig workers' welfare' The Hindustan Times (*India 27 April 2023*)<https://www.hindustantimes.com/india-news/rajasthan-plans-welfare-cess-for-gig-workers-proposes-fine-up-to-1-crore-on-errant-aggregators-101682534795170.html>accessed 25 May 2023.

LABOUR LAWS ON AI & ROBOTICS: A SPECTRUM OF UNADDRESSED TROUBLES AND THE WAY FORWARD

by Shardool Shaurya and Siddhi Rupa

Abstract

Labour law has evolved over the years in response to the changing employment landscape. With the increasing use of AI and automation, companies are investing in technology to maximize profits and gain a competitive edge, leading to concerns about job loss, privacy, dehumanization, and algorithmic discrimination. India's technology industry is rapidly adopting AI and robotics, but the government has yet to implement specific labour laws related to their use.

Digitalized supervision systems are being used to manage the workforce, raising privacy concerns. AI algorithms are built to learn from big data and can improve decision-making processes but also perpetuate bias and discrimination. The development of robots as against legal rights and obligations can have dehumanizing effects and commodify labour, while the rapid growth and introduction of technology may lead to mass unemployment and poverty.

Legislative amendments with a futuristic approach are needed to address issues such as job loss, privacy, algorithmic discrimination, and dehumanization of workers and ensure preparedness for tackling transitions into AI-enabled workplaces. Copyright law should protect individual works against any violation. Companies need to upskill and reskill their workers by introducing technology which helps them keep up with AI and automation, and governments must implement specific labour laws related to AI and robotics. Organizations should also ensure that AI algorithms are trained among diverse data to avoid bias and discrimination, while laws should ensure the same. Finally, it is essential

to strike a balance between technological advancement and the protection of workers' rights, privacy, and dignity.

<u>KEYWORDS:</u>*AI, labour, workers, laws,data*

I. INTRODUCTION

The roots of labour law can be found in ancient times in many different parts of the world. From the guilds and apprenticeship systems of the medieval world to the rules for labour-management relations in the Laws of Manu. Labour law evolved into what we know today as a result of successive industrial revolutions from the 18th century onward, when with the new forms of mining and manufacture on a rapidly increasing scale, the customary restraints and the intimacy of employment relationships in small communities ceased to provide adequate protection against the abuse of labour.[1] Hence, the development of labour laws with changes in Industrial conditions was necessary to protect labour from exploitation, and any subsequent changes in circumstances call for updating them to protect the workers' interest.

Artificial Intelligence is the simulation of human intelligence processes using various machines by means of creating intelligent software and hardware capable of replicating Human Behavior, such as learning and problem-solving.[2] With the beginning of what is being called the 4th Industrial Revolution, Artificial Intelligence (AI) and Automation are increasingly becoming a part of the industry. The Global Artificial Intelligence market was valued at USD 428 billion in 2022.[3] The importance of AI is shown by the number of investments of Tech Giants in AI technology. Recently, Microsoft invested $10 Billion in OpenAI, the developer of ChatGPT, after investing $2 Billion in 2021 and $ 1 Billion in 2019.[4] Corporations like Apple, Google and Amazon, are investing heavily in AI.[5] These huge investments indicate that these companies, which are major

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1 Johannes Schregle and C. Wilfred Jenks, 'Labour Law' (*Encyclopedia Britannica*, 16 December 2022) <https://www.britannica.com/topic/labour-law> accessed 11 May 2023.
2 'The global artificial intelligence market size was valued at $428.00 billion in 2022 & is projected to grow from $515.31 billion in 2023 to $2,025.12 billion by 2030', Fortune Business Insights, 'Artificial Intelligence (AI) (Fortune Business Insights May 27 2024) <https://www.fortunebusinessinsights.com/industry-reports/artificial-intelligence-market-100114#companiesstudies> accessed 11 May, 2023.
3 Ibid
4 Jeremy Kahn, 'Who's getting the better deal in Microsoft's $10 billion tie-up with ChatGPT creator OpenAI?' (*Fortune* 25 January 2023)<https://fortune.com/2023/01/24/whos-getting-the-better-deal-in-microsofts-10-billion-tie-up-with-chatgpt-creator-openai/> accessed 2 May 2023
5 Ibid.

employers, are trying to get the first-mover advantage by becoming the first ones to harness this technology, and consequently, they will intend to reap the fruits of their investments by using these technologies to the fullest in maximizing their profits. As per a report by Bloomberg, IBM CEO Arvind Krishna says the company expects to pause hiring for roles it thinks could be replaced by AI in the coming years.[6] That leaves 7,800 jobs at the tech giant vulnerable to being eradicated.[7] The products of research in AI, such as programs like Chat GPT, and technologies like self-driving cars make us question the future of many jobs which may be replaced by AI and automation. They also make us question our preparedness to adapt to the changes brought by them.

Apart from the issue of job loss, some other issues also come up with the increasing use of AI in industries, such as the practice of large-scale monitoring of workers using AI raises the issue of privacy; the use of robots in industries raises the issue of dehumanization of workers; the existence of Algorithmic Discrimination, which is when automated systems contribute to unjustified different treatment or impacts disfavouring people based on their personal characteristics (race, colour, ethnicity, sex etc.);[8] and the responsibility for the actions of an AI operated machine.

This again poses a question, whether the steps we are taking are enough, or whether we should take steps to introduce laws which address multiple issues, as pointed out above, that are associated with the introduction of AI and Automation in the industry.

II. STATUS QUO OF INDIAN LABOUR LAWS

The term 'labour' means the physical or mental work done by workers for any financial gain.[9] The labour laws are legal rights and rules provided to the working people to have a smooth relationship between employees and employers. If any conflict or dispute arises, the solution can be derived

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6 Brody Ford, 'IBM to Pause Hiring for Jobs That AI Could Do'(*Bloomberg*, 2 May 2023) <https://www.bloomberg.com/news/articles/2023-05-01/ibm-to-pause-hiring-for-back-office-jobs-that-ai-could-kill> accessed 2 May 2023

7 Hasan Chowdhury, 'CEOs are getting closer to finally saying it — AI will wipe out more jobs than they can count' (*Business Insider*, 2 May 2023) <https://www.google.com/amp/s/www.businessinsider.com/ai-tech-jobs-layoffs-ceos-chatgpt-ibm-2023-5%3famp> accessed 1 May 2023.

8 Office of Science and Technology Policy, 'The Blueprint for an AI Bill of Rights' (Office of Science and Technology Policy April 2023) <https://www.whitehouse.gov/ostp/ai-bill-of-rights/algorithmic-discrimination-protections-2/> accessed 5 May 2023.

9 Bensha C Shaji and Angel Shaji, 'Artificial Intelligence and its Impacts on Indian Employment' (2021) 4(1) International Journal of Law Management and Humanities <https://ijlmh.com/artificial-intelligence-and-its-impacts-on-indian-employment/> accessed 1 May 20203.

from the laws given for the labour.[10] India's rapidly growing technology industry is increasingly adopting AI and robotics in various sectors, including manufacturing, healthcare, finance, and transportation. As these technologies expand, it is likely to impact the Indian labour market significantly.

At present, the Indian government has not yet implemented any specific labour laws related to the use of AI and robotics. There were no specific provisions in Indian labour laws to tackle the use of AI and robotics in the workforce. However, the Indian government has recognized the importance of addressing this issue. It has taken certain steps to address the challenges that may arise from the increasing use of these technologies. The first step was the creation of a strategy for the upcoming AI revolution. NITI Aayog came up with the report on the National Strategy for Artificial Intelligence (with the hashtag #AIFORALL) in 2018 itself, identifying the areas of focus, key challenges and the way forward to harness AI.[11]

The Ministry of Labour and Employment has set up a National Policy on Skill Development and Entrepreneurship, which includes training programs for workers to adapt to the changing technology landscape, among various other things.[12]

Yet, the use of AI and robotics in the workforce raises concerns about job displacement and the need for upskilling and reskilling workers to adapt to the new emerging roles. Therefore, there is a growing need for policymakers to consider the implications of these technologies on the Indian labour market and to ensure that the legal framework is in place to address any potential challenges. Another need is to eradicate the social milieu that might result from job loss and to achieve additional economic potentiality, which is most important for the nation in order to lead to future success or usefulness.

There are many provisions and laws which violate the aim of Artificial intelligence. A work done by a person with his own creativity has a bundle of rights against any other third party in Copyright law. Every individual work done should be protected against any violation. In the case of 'Eastern Book Company and Ors. v.s D.B. Modak and Anr',[13]It was held that the derivative work should

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[10] Ibid.

[11] National Institution for Transforming India Aayog *National Strategy for Artificial Intelligence* (June 2018).

[12] Ministry of Skill Development and Entrepreneurship *National Policy for Skill Development and Entrepreneurship* (2015).

[13] *Eastern Book Company v D.B. Modak*(2008) 1 SCC 1.

be more than just a copy of the original work and involve individual skill, labour, capital and a minimal level of creativity. The use of AI and Robotics poses a threat in this regard as they extract data from a variety of sources, and they may cause an infringement of intellectual property rights by claiming others' work simply by refurbishing it.[14]

Also, other problems include answering the question which is who is responsible for the acts done by AI? Additionally, on whom will the burden of proof lie in case a wrong is committed by AI? Even when such responsibilities are recognized; compensation, liability, and punishments relating to the act done by a robot or AI and an act done by a human are not the same. No legislation exists to address the blame or complaint against autonomous robots and machines, and the punishment for improper conduct and injuries caused by robots is also not mentioned anywhere.

There were three Labour Codes introduced in 2020 that contain very few provisions that employees can effectively utilize as safeguards against displacement by AI systems.

1)The Industrial Relations Code, 2020[15]

2) The Code on Social Security, 2020[16] and

3) The Occupational Safety, Health and Working Conditions Code, 2020.[17]

It is unfortunate that the new labour codes do not incorporate provisions relevant to India's transition to an automated economy in the near future, where the employment of robots will have severe implications on the many facets of labour rights. Legislative amendments with a futuristic approach shall ensure preparedness by the regulatory framework in tackling transitions into AI-enabled workplaces, which presently seems to be missing from the current Labour and Employment Laws in India.[18]

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[14] Bensha C Shaji and Angel Shaji, 'Artificial Intelligence and its Impacts on Indian Employment' (2021) 4(1) International Journal of Law Management and Humanities <https://ijlmh.com/artificial-intelligence-and-its-impacts-on-indian-employment/> accessed 1 May 20203.
[15] The Industrial Relations Code, 2020 (35 of 2020).
[16] The Code on Social Security, 2020 (36 of 2020).
[17] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020).
[18] Ishani Mishra, 'Rethinking Indian Labour Law and Policy in the Age of Artificial Intelligence: A Futuristic Analysis' (2021) 3(6) IJLSI 24.

There are certain issues with the rapid introduction of AI and Automation in Industries which the Indian labour laws fail to acknowledge, specifically unemployment; privacy; algorithmic discrimination; and dehumanization.

III. JOB LOSS, UNEMPLOYMENT AND DIGITALIZATION

AI is typically discussed in terms of the far future. However, the truth is that AI, or at least its foundation, has already entered our daily lives. The rapid growth of technology has had a detrimental effect on the work market. Mass unemployment, which increases poverty, will be a significant issue in the future. Certain specialized professional tasks will undoubtedly be carried out by machines, but they won't necessarily replace all types of occupations.

In the future, robotics or intelligent software will be able to accomplish one-third of the current bachelor's degree-required employment. New employment categories will emerge, while certain ones will vanish altogether. According to the World Economic Forum's Future of Jobs Report 2023, clerical jobs like Bank tellers postal, service clerks, cashiers, data entry clerks are expected to decline due to AI while jobs such as data analyst, machine learning specialist, fintech engineer, robotics engineer are expected to grow.[19] However, it should be stressed that no employment will be lost suddenly in this respect. Instead, a gradual shift will happen; and it has already started and varies from business to business and from sector to industry.[20]

In response to this, Indian labour laws need to be updated to protect workers' rights in the face of automation and AI.[21] Regulation of working hours is one possible area for improvement. Employers can be tempted to extend working hours or cut back on breaks as computers and robots grow increasingly capable of doing jobs.[22] With the introduction of automation, competing with such AI and Robotics will require others to increase their working hours to match market requirements. Under the new wage code, the companies are allowed to increase the working hours

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[19] Ian Shine and Kate Whiting, 'These are the jobs most likely to be lost – and created – because of AI' (*World Economic Forum,* 4 May 2023) <https://www.weforum.org/agenda/2023/05/jobs-lost-created-ai-gpt/#:~:text=Many%20clerical%20or%20secretarial%20roles%20are%20seen%20as,are%20expected%20to%20grow%20rapidly%2C%20the%20report%20adds.> accessed 25 March 2023.

[20] Brzeski and Burk, *DieRoboterkommen, Folgen der Automatisierungfür den deutschenArbeitsmark*t (ING DiBa 2015) 1.

[21] Yashvardhan Ghosh, 'Impact of Automation on Indian Labor Laws' (*Tax Guru*, 23 April, 2023) <https://taxguru.in/corporate-law/impact-automation-indian-labor-laws.html> accessed 6 May 2023.

[22] Ibid.

for the employees from 9 hours to 12 hours; however, they have to provide one extra day off.[23] This normalizes a 12-hour work day, which can have detrimental health effects on workers.

Another area of worry is how automation and AI may affect salaries.[24] As computers grow more proficient at doing jobs, employers would be able to hire fewer people, which might lead to pay stagnation or even a decline in compensation and remuneration. To guarantee that people are compensated properly for their labour, regardless of whether they utilize machines to perform it, labour laws may need to be updated.

It's also likely that automation and AI may alter the types of employment that are available. While certain occupations may become outdated, others may need individuals to possess new training and certifications. The needs of future employees will change as a result of the vast array of interdisciplinary support options that artificial intelligence and technology are creating.[25]

There won't be much demand for those who do straightforward or repetitive tasks. As the manufacturing process is becoming more automated, the number of manufacturing workers is already steadily declining, and machines are increasingly being used by various industries.To prevent unemployment the workers will need training and education to provide them with new skills required for the changes induced by AI and automation in their respective industries.

IV. CONCERNS ABOUT PRIVACY

The monitoring of workers at the workplace is nothing new, but with the development of technology, digitalized supervision systems are increasingly being used to manage the workforce. As artificial intelligence evolves, it magnifies the ability to use personal information in ways that can intrude on privacy interests by raising the analysis of personal information to new levels of power and speed.[26] Big Data refers to huge quantities of varied data, which is received and (perhaps) acted on at a fast rate.[27] Big data and AI have a synergistic relationship. Big data analytics leverages AI for better data analysis. In turn, AI requires a massive scale of data to learn

[23] The Code on Wages, 2019 (29 of 2019).
[24] Ibid.
[25] Ibid(n.23).
[26] Cameron F. Kerry, 'Protecting privacy in an AI-driven world' (*Brookings*, 10 February, 2020) <https://www.brookings.edu/research/protecting-privacy-in-an-ai-driven-world/> accessed 6 May 2023.
[27] Sherry Tiao, 'What is Big Data?' (*Oracle,* 11 March 2024) <https://www.oracle.com/big-data/what-is-big-data/> accessed 6 May 2023.

and improve decision-making processes.[28]AI, together with Big Data, is used to maximize Operational Efficiency,[29] which includes analyzing workers' efficiency. For this, technological tools are being used to monitor workers and gather and process large amounts of data regarding their activities. This is called employee performance monitoring (EPM)[30] For example, workers use wearable instruments (smart watches etc.) which monitor their movements and location, measure how fast they work and how often they take breaks, and assess their productivity and fitness for particular tasks. GPS systems monitor the position and speed of trucks, vans, delivery riders, and ride-sharing drivers, verifying their locations to prevent or react to collective action. Platform workers (like food delivery agents and cab drivers) are assigned tasks by app algorithms, which also measure their speed, diligence, and customer ratings, with poor scores leading to dismissal. Wearable devices like sociometric badges ('a wearable electronic device capable of automatically measuring the amount of face-to-face interaction, conversational time, physical proximity to other people, and physical activity levels'[31]) are also being used to monitor workers' location, movements, and mood. Additionally, artificial intelligence is being used to monitor workers in telework arrangements, with tools like Worksmart Productivity Tool (a software used to track, record and rank employees' productivity by measuring time of activity and inactivity)[32] and web filtering software like Interguard ('an employee monitoring software that features the ability to track employee time and productivity.... by providing remote monitoring capabilities that ensure full visibility of how employees use their time and if they worked their full shift'[33]) collecting data on employees' computer usage and web history. The monitoring of employees is not limited to on-duty hours. Companies use technology such as Fitbit (a wearable wristband aimed

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[28] Qlik, 'How Do Big Data and AI Work Together?'<https://www.qlik.com/us/augmented-analytics/big-data-ai> accessed 6 May 2023.
[29] Sherry Tiao, 'What is Big Data?' (*Oracle,* 11 March 2024) <https://www.oracle.com/big-data/what-is-big-data/> accessed 6 May 2023.
[30] Cisco, 'What is Employee Monitoring?' (*Cisco* June 2011) <https://www.cisco.com/c/en/us/solutions/hybrid-work/what-is-employee-monitoring.html#:~:text=Employee%20monitoring%20uses%20technology%20to%20help%20companies%20track,for%20things%20like%20product%2C%20data%2C%20and%20information%20theft. >accessed 25 March 2023.
[31] Massachusetts Institute of Technology Media Laboratory, 'Sociometric Badges' (Massachusetts Institute of Technology June 2011) <https://hd.media.mit.edu/badges/> accessed 25 March 2023.
[32] Jodi Kantor and Arya Sundaram, 'The Rise of the Worker Productivity Score' (*The New York Times*, 14 August 2022) <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html > accessed 25 March 2023.
[33] Compare Camp, 'InterGuard Review: Pricing, Pros, Cons & Features' <https://comparecamp.com/interguard-review-pricing-pros-cons-features/#:~:text=InterGuard%20is%20an%20employee%20monitoring%20software%20that%20features,time%20and%20if%20they%20worked%20their%20full%20shift.> accessed 25 March 2023.

at health monitoring) and social media to monitor employees' off-duty activities as well.[34] While these practices can have some benefits, such as improving productivity and preventing fraud, they can also lead to excessive surveillance and cause stress and decreased productivity.[35]

Laws that focus on regulating such data collection can help with the concerns of privacy. 'The Digital Personal Data Protection Bill, 2022' addresses the issue of collection of personal data. Although the consent of the Data Principle (the person to whom the personal data relates) for personal data sharing seems to be at the centre of the Bill, there are provisions for strict penalties to prevent non-compliance, a close reading of the Bill reveals its lacunas. The Bill provides wide exemptions in its application. This makes the data protection provisions weak. Section 8 provides exemptions in the name of Deemed Consent. Notably, section 8(7) gives an employer freehand at collection of data of his employees 'for the purposes of employment'. Further, section 16 imposes duties on the data principle. Notably, Section 16(1) imposes a duty to comply 'with the provisions of all applicable laws for the time being in force while exercising rights under the provisions of this Act'. This means even slight non-compliance under any of the applicable laws may be considered a breach of duty and may disentitle one from exercising rights under this act. These provisions don't inspire confidence as to the effectiveness of the law.

Monitoring of workers needs to be limited, especially when off-duty. Laws should determine the reasonability of such surveillance and prohibit any unnecessary monitoring of workers' activity.

V. CONCERNS WITH ALGORITHMIC DISCRIMINATION:

Technologies are not neutral; they are only as good or bad as the people who create them, and due to this, human bias can be transferred to robots. This bias can lead to prejudices, injustices and inequality in organizations.[36]This is called Algorithmic Bias, although the basis of such bias is not in algorithms. It is in the data. It is the data that is biased. Algorithms learn the recurrent patterns

[34] Valerio De Stefano, 'Negotiating the algorithm: Automation, artificial intelligence and labour protection' (2018) International Labour Organisation Employment Working Paper No. 246.
[35] Ibid.
[36] Agbolade Omoyele, 'Research shows AI is often biased. Here's how to make algorithms work for all of us' (*World Economic Forum*, 19 July 2021) <https://www.weforum.org/agenda/2021/07/ai-machine-learning-bias-discrimination/> accessed 5 May 2023.

found in the training data.[37] Multiple characteristics of training data may bias an AI model.[38] One of them is bias in the underlying data (decisions) utilized to train the AI algorithm.[39] Using algorithms and artificial intelligence for HR practices can perpetuate biases and discrimination. The lack of diversity in the tech industry can lead to cultural and gender biases being embedded in AI, resulting in discriminatory practices.[40]

A possible remedy can be training AI algorithms with varied data. This can help in mitigating the biases which may exist in limited data and help in avoiding discrimination. Also, mechanisms to determine whether an AI program is biased and provisions for the redressal of grievances regarding discrimination by AI can help.

VI. DEHUMANIZATION

With the development of AI and Robotics, robots are getting closer and closer to mimicking humans. Some humanoid robots these days are capable of talking and giving different complex facial expressions, much like a human. The debates on the possibility of robots having rights and duties as human beings were raised when Sophia, a humanoid robot made by Hanson Robotics, was awarded citizenship by Saudi Arabia.[41]

It is unclear whether assigning legal rights and obligations to robots could lead to them being equated with human beings in the future, however, it remains a possibility, particularly if artificial intelligence continues to develop human-like features. This possibility is a cause of concern.

Assigning legal rights and obligations to robots can lead to abuses in the use of these rights to allow individuals to evade liabilities and accountability, leaving parties exposed to risks with no meaningful redressal in case of damage. Suppose a case where a robot commits a wrong, for instance (since robots like Sophia can talk like a human) let's assume the robot made defamatory remarks. With the virtue of the robot's intelligence and the rights assigned to it, it can be argued

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[37] Damini Gupta and T S Krishnan, 'Algorithmic Bias: Why Bother?' (*California Management Review,* 17 November 2020) < https://cmr.berkeley.edu/2020/11/algorithmic-bias/ > accessed 25 March 2023.
[38] Ibid.
[39] Damini Gupta and T S Krishnan, 'Algorithmic Bias: Why Bother?' (*California Management Review,* 17 November 2020) < https://cmr.berkeley.edu/2020/11/algorithmic-bias/ > accessed 25 March 2023.
[40] Valerio (n 34).
[41] Gali Katznelson, 'AI Citizen Sophia and Legal Status' (*Harvard Law Petrie Flom Centre blog* 9 November 2017) <https://blog.petrieflom.law.harvard.edu/2017/11/09/ai-citizen-sophia-and-legal-status/> accessed 25 March 2023.

by the makers or the owner of the robot that the robot itself was responsible and not them. Now, how do we address a wrong committed by 'a machine'? Do we punish the robot? Claim damages from it? How bizarre is that? Hence, before giving rights to robots, a careful examination of the question 'Who will be responsible for their acts?' is needed.

Additionally, awarding legal rights to robots can have unforeseen consequences for human dignity, especially in a work environment where humans work with robots; working side by side with robots with legal rights can have unintended dehumanizing effects and result in the commodification of labour, where automation is already responsible for the rise in feelings of alienation of work. These factors should be kept in mind while forming laws and regulations regarding the duties of entities using AI and robots for profit, to prevent them from evading their responsibilities.

VII. CONCLUSION AND SUGGESTED CHANGES TO THE LABOUR LAWS TO SAFEGUARD WORKER RIGHTS IN LIEU OF AUTOMATION

AI and automation are becoming a part of the industry at a rapid rate. As big corporations invest in AI in hopes of making a profit from it, it naturally follows that the first move in this regard, as seen in IBM's case, would be substituting workers with AI and Robots. This poses a risk of mass unemployment as these big companies are also big employers. Apart from unemployment, there are also concerns for the employees that as AI and robots become capable of doing jobs previously done by humans, increased working hours and less pay to the workers may become the norm. Apart from the issue of unemployment, there are issues such as large-scale monitoring of workers using these technologies, which raises the issue of privacy and stress on employees; then there is the issue of Algorithmic Discrimination with the use of AI and the issue of Dehumanization and the responsibility for the actions of a machine. The current laws, including the New Labour Laws, do not include provisions pertinent to India's upcoming transition to an automated economy and are insufficient in providing adequate protection to the labour. In the changing landscape of the industry, where the use of AI and automation is increasing rapidly, the introduction of laws with provisions to tackle such problems is needed urgently, as AI and Robotics replace workers and as their numbers reduce, their negotiation powers will also reduce in the future as companies become less and less dependent on them. Some of the measures to deal with these issues can be:

i. Launching New Skill Development Programmes: Launching new skill development programs is one of the best strategies to protect workers' jobs. Automation is probably going to open up new positions that call for specialized knowledge. To determine the skills needed and provide training programs to help people obtain these abilities, the government can cooperate with businesses. Combining inexperienced employees with "AI-literate" workers in the "new" employment market.

There is a growing need for personnel who can work in complicated and strategic sectors. These individuals should be able to conduct a critical analysis of equipment and software, i.e., technical know-how.[42] Coordinating the overlaps in duty among the more adaptable humans and the interfaces between humans and robots is also necessary. 'There is, thus, likewise an increasing demand for future executive staff with social and interdisciplinary competence'.[43]

ii. Redefining the notion of labour: As automation replaces many manual jobs, the conventional notion of labour is evolving. The definition of labour has to be expanded to encompass non-traditional kinds of employment like a gig and freelance work in order to protect workers' rights.

iii. Gradual implementation of new systems: Employers should implement new systems gradually and with tact. They should set clear guidelines for using the machines and lay out the pertinent hierarchy, such as that the machine only serves an assisting role and not one of replacement and that the decision-making authority still rests with the human being as it always has and not the other way around. 'Employees should be involved in the development and the process of change at an early stage in order to grow accustomed to the new technology themselves'.[44]

iv. Establish Working Hours Regulations: Automation has the potential to muddle the distinction between work and personal leisure. Regulations on working hours must be implemented and upheld in order to protect workers' rights. The government has the power to enact laws that restrict the number of hours that may be worked in a day and mandate rest intervals for employees. A relook at the new wage code should be considered.

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[42] Aída Ponce Del Castillo, 'Labour in the age of AI: why regulation is needed to protect workers'(2020) ETUI 12.

[43] Gerlind Wisskirchen and others, 'Artificial Intelligence and Robotics and Their Impact on the Workplace' (IBA Global Employment Institute April 2017) <https://www.academia.edu/42946424/IBA_Global_Employment_Institute_Artificial_Intelligence_and_Robotics_and_Their_Impact_on_the_Workplace> accessed 25 March 2023.

[44] Ibid.

v. Before awarding rights to machines, determine who is responsible for their acts: Without a clear determination of responsibility for the acts of Robots and AI, the rights of people would be jeopardized. One cannot sue a machine or claim damages from it, some person would have to be held responsible for its actions; the manufacturing company, the developers, the owner to name a few.

vi. Protect workers' privacy through legislation: Labour laws should include provisions that prohibit unnecessary monitoring and surveillance of workers and personal data collection. This will discourage unjustified invasion of workers' privacy by employers.

vii. Strengthen Anti-Discrimination Laws: Automation may lead to the emergence of new types of discrimination based on characteristics like age, gender, or educational attainment. The government must make rules which recognize discrimination done by AI and make laws that mandate taking measures to make the AI programs unbiased by training them with diverse data. There should also be a mechanism to determine which AI is biased along with a mechanism for grievance redressal.

viii. Increasing worker autonomy in interactions with machines: This implies that employees use input from a machine to inform their final choice. When collaborative (human/machine) problem-solving is used, this is very crucial. Enhancing worker autonomy also entails protecting tacit knowledge held by the workforce and facilitating its transfer to the machine, whether it be a cooperative robot or a piece of software (something that is especially important in processes requiring testing, quality control, or diagnosis).

ANALYSIS OF THE RECENT LABOUR CODES THROUGH THE LENS OF DEVELOPMENT THEORIES

by Manas Rohilla and Manit Sharma

Abstract

In India, the Labour Codes introduced in 2020 are viewed as a major shift in the country's labour legislation that aims to simplify compliance and reduce disputes. However, the application of these codes has been criticized for failing to adhere to contemporary development theories such as inclusive development and the capability approach, particularly regarding the unorganized sector, gender parity, and occupational safety. Therefore, the present study aims to explore the relevance and practicality of these codes, highlighting the importance of adopting a holistic approach to inclusive and sustainable development. The research utilizes a descriptive and analytical approach, analyzing the codes through the lens of various development theories such as inclusive development, human capabilities, and gender development theories. The study critically assesses the gaps in the respective legislations, such as the absence of basic needs paradigm, lack of comprehensive social security coverage, and inadequate provisions for occupational safety. The paper concludes by providing recommendations for improvement and policy solutions to promote a more efficient and equitable labour sector that is inclusive and contributes to sustainable development in India.

KEYWORDS: ***Labour Codes, Inclusive Development, Human Capability Approach, Gender and Development, Sustainable Development***

I. INTRODUCTION

Brief Background

Before the enactment of the new labour codes in India, the country's labour laws were a complex and fragmented patchwork of laws, regulations, and judicial decisions. India had over 40 central laws and over 100 state laws governing various aspects of labour, including wages, social security, industrial relations, occupational safety and health, and working conditions. This complex regulatory framework has created significant compliance burdens for employers, resulting in uncertainty and legal disputes.

Moreover, the previous labour laws in India were often criticized for being outdated and insufficient in providing adequate protection to workers, especially those in the informal sector. In addition to these challenges, India's labour laws were seen as a deterrent to investment and economic growth. They were often perceived as too rigid and inflexible, making it difficult for businesses to adapt to changing market conditions.

Purpose behind introducing the codes

In recent years, numerous labour laws have undergone massive changes by the Parliament and various State Legislatures. In furtherance of the long-felt need of the industry as well as the workers working in different sectors and sub-sectors of the economy, the current government at the centre undertook a comprehensive process of labour law reforms by codifying a considerable number of existing labour laws in 4 major Labour Codes by virtue of amalgamating and rationalizing the key elements of the various labour legislations.[45]These four Labour Codes are – ***the Code on Wages, 2019; the Industrial Relations Code, 2020; the Code on Social Security, 2020; and the Occupational Safety, Health and Working Conditions Code, 2020***.[46] This paper briefly discusses the salient features of the four new labour codes that were brought about during the pandemic and makes an analytical assessment of the same. It also tries to assess their viability as per various principles and theories of development studies.

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[45] Atul Sood, 'The Silent Takeover of Labour Rights' (*The India Forum*, 20 November 2020) <https://www.theindiaforum.in/article/silent-takeover-labour-rights> accessed 25 March 2023.

[46] Ibid.

II. LITERATURE REVIEW

This section presents the literature review surrounding the changes in labour laws brought about during the global pandemic. This review draws from the sphere of labour legislation, focusing essentially on the ramifications of the labour reform initiatives on the working class (or the so-called beneficiaries). The literature is primarily sourced from research papers, textbooks, academic journals and periodicals, which have been discussed below.

Labour Law Reforms[47]

This book is a collection of research articles and essays by several distinguished experts, focusing on the pandemic's impact on both the organized and unorganized workforce. It examines some of the most critical issues pertaining to labour laws, amendments that should be included in future legislation, and the key provisions of the new labour codes. It also discusses the policies that address the requirements of emerging forms of labour, for instance, gig workers. It is an essential contribution to the discipline of labour laws when the legislature is considering codifying and reforming several labour laws. However, a significant limitation of the research papers in this book is that while the authors touched upon the lacunae in the new labour laws, they failed to construct or suggest possible solutions catering to the needs of the workers.

Labour Law Changes: Innocuous Mistakes or Sleight of Hand?[48]

In this research paper, the authors seek to critically analyze the labour law reforms announced during the lockdown period. This article focuses mainly on the modifications suggested in the current labour legislation. The paper further questions the inadequacies of the rationale provided by the government for adopting labour reforms. The authors attempt to analyze the motivation of the government to implement these reforms during a global pandemic. While questioning the government's stance is essential for understanding its goals, the article confines itself to discerning the motive behind the introduction of the new labour law changes. Given the transformative impact of labour laws on labour relations and the need for simplified, well-structured labour legislation,

[47] Jeet Singh Mann, *Labour Law Reform* (2021) 147-184.
[48] Atul Sood and Paaritosh Nath, 'Labour Law Changes: Innocuous Mistakes or Sleight of Hand?' (Economic and Political Weekly 2020) <https://www.epw.in/journal/2020/22/commentary/labour-law-changes.html> accessed 25 March 2023.

the paper neglects the possibility of amendments to the existing provisions, catering to the needs of organized and unorganized workers.

New Labour Codes and Their Loopholes[49]

The author of this paper discusses how the labour codes have undermined the meagre protections offered to workers under the labour legislation by giving employers more leeway to shut down industries and lay off employees without prior notice. The paper criticizes the provisions of the labour codes, which grant considerable autonomy to the government in enforcing these new laws. It also criticizes the labour laws for conferring significant advantages to employers at the expense of the employees. It contextualizes that despite the government's assertions that the new legislation will streamline the elaborate procedures, facilitate compliance with the law, increase accountability, and benefit both employers and employees, the actual benefits to workers remain disputed. In this regard, the author simply identifies the loopholes in the new Codes and provides a brief overview of their implications for the workers in general. However, the author does not consider the differential impact of the codes on the various divisions within the workforce, such as the informal, women and marginalized workers.

Labour Law Reforms and Women's Work in India: Assessing the New Labour Codes from a Gender Lens[50]

In this paper, the author summarises the changes introduced by the Codes that affect women workers. The study examines the conditions surrounding women's work in India and the relationship between labour laws and women's work, including paid and unpaid work.It also references the reports from the National Commission for Enterprises in the Unorganized Sector (NCEUS), which has put forth several recommendations for managing the informal economy. Additionally, it considers the proposals from the Second National Labour Commission (SNCL), which laid the groundwork for the labour reforms, in order to evaluate the impact of the Codes on women workers. The paper, however, fails to provide a comprehensive, fine-grained evaluation of the Codes from the perspective of their impact on women workers, engaged in the informal economy.

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[49] Atul Sood (n 1).

[50] Shraddha Chigateri, 'Labour Law Reforms and Women's Work In India: Assessing the New Labour Codes from a Gender Lens' (2021) SSRN <https://ssrn.com/abstract=3947175> accessed 25 March 2023.

III. OBJECTIVES

S No.	Objectives
1.	The paper briefly introduces and analyses the recently introduced Labour Codes that aim to compile more than 40 similar laws by various states across the country.
2.	The study explores the relevance and application of contemporary development theories, such as inclusive development and the human capability approach to these labour codes, to assess their viability and efficiency.
3.	The study also assesses the implications of these changes in labour legislation on the women's workforce through the lens of relevant gender development theories.
4.	The paper also strives to provide recommendations and policy solutions to make the codes more efficient and bolster the development paradigm in the concerned field.

IV. METHODOLOGY

The present study is **DESCRIPTIVE AND ANALYTICAL**. The research utilizes commonly available secondary sources such as government reports and websites, prominent journals and research articles, international reports, and other relevant resources to analyze the viability of labour codes recently introduced by the central government to alleviate workers' conditions in India. The paper utilizes a theoretical approach towards examining the relevance and practicality of the codes, assessing the same through the lens of various growth and development theories. The paper further criticizes the lacunae in the respective legislations and provides recommendations for improvement, followed by a conclusion.

V. INTRODUCTION TO THE NEW LABOUR CODES

The central government launched several extensive reforms at the central level by virtue of "consolidation and simplification" of 44 central legislation into 4 labour Codes on Wages, Industrial Relations, Social Security, and Occupational Safety, Health, and Working Conditions.[51] It enacted 4 labour codes by amalgamating and consolidating more than 40 existing legislations in furtherance of its claims that the new laws will minimize complexities, make compliance easier, enhance accountability, and benefit both employers and employees. The key highlights of the new codes are as follows:

Code on Wages Act, 2019

The Code on Wages, 2019 rationalizes and amalgamates four labour laws - Payment of Wages Act, 1936;[52] Minimum Wages Act, 1948;[53] Payment of Bonus Act, 1965[54] and Equal Remuneration Act, 1976.[55] The new wage law eliminated the variation in wage definitions, which were ambiguous, thereby lowering the cost of compliance and litigation for employers. The new Act tied the national minimum wage to an employee's skills and the occupation they are engaged in. It aimed to make all employees, regardless of industry or wage cap, subject to the provisions of minimum wages and regular payment of wages. Furthermore, it aimed to enhance legislative protection of the minimum wage and ensure the ***"Right to Sustenance"*** for all workers. The Centre has also introduced a ***National Floor Level Minimum Wage***, to be reviewed every five years, with states setting their own minimum wages that cannot fall below this floor wage.

The Industrial Relations Code, 2020

The Industrial Relations Code subsumed the Industrial Disputes Act, 1974,[56] the Trade Unions Act, 1926,[57] and the Industrial Employment (Standing Orders) Act, 1946.[58] One of the code's key provisions made hiring and firing employees simpler for businesses.[59] Companies with less than

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[51] Upadhyaya, S., 'Labour Law Amendments, Reforms and Codification in India: Recent Initiatives' in Jeet Singh Mann (ed), *Labour Law Reforms* (2021) 148.
[52] The Payment of Wages Act, 1936 (4 of 1936).
[53] The Minimum Wages Act, 1948 (11 of 1948).
[54] The Payment of Bonus Act, 1965 (21 of 1965).
[55] The Equal Remuneration Act, 1976 (25 of 1976).
[56] The Industrial Disputes Act, 1974 (14 of 1947).
[57] The Trade Unions Act, 1926 (16 of 1926).
[58] The Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).
[59] 'Analyses of Industrial Relations Code 2020' (*King Stubb&Kasiva*, 7 April 2023) <https://ksandk.com/litigation/analyses-of-industrial-relations-code-2020/> accessed 28 May 2023.

300 employees are exempt from the requirement to create guidelines of conduct for workers in industrial establishments. Currently, businesses with up to 100 employees are mandated to comply with the same. It recommended that if factory workers intend to go on strike, they must notify employers at least 14 days in advance. Additionally, one or more Grievance Redressal Committees are required in every industrial setting with 20 or more employees in order to settle conflicts related to employee grievances. It has introduced a ***"Re-skilling Fund"*** for upskilling retrenched workers with support from the employer, of an amount equivalent to 30 days' wages in case of laying off employees.

The Code on Social Security, 2020

The Code on Social Security, 2020 subsumed nine legislation on social security, including the Employees' Provident Fund Act, 1952,[60] and the Maternity Benefit Act, 1961.[61] The unorganized sector, fixed-term employees, gig workers, platform workers, interstate migrant workers, etc. are now included in the Code's expanded scope of application. All the workers would be registered on an internet portal using a straightforward process based on self-certification to create a national database for workers in the unorganized sector. All the records as well as returns must be kept electronically. A social security fund will be created to implement social security programmes. Specific exclusions with ceilings have been made available to prevent wages from being inappropriately structured to diminish social security benefits. It has prompted the government to take a more accommodating stance. The Code offered an improved inspector-cum-facilitator role where enterprises can ask for assistance and guidance to improve compliance. Any failure to deposit employee contributions is subject to a Rs. 1,00,000 fine as well as a sentence of one to three years in prison. Repeat offences are subject to harsh punishments and criminal prosecution, and no compounding is allowed demonstrating increasing accountability through deterrence.[62]

Occupational Safety, Health and Working Conditions Code, 2020

The code outlined the responsibilities of employers and employees, planned safety requirements for various industries, and emphasized the importance of worker's health and working conditions, hours of work, leave, etc. The code also acknowledged the rights of contractual employees. The

[60] The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).
[61] The Maternity Benefit Act, 1961 (53 of 1961).
[62] Daniel S. Nagin, 'Deterrence in the Twenty-First Century' (2013 42) Crime and Justice in America 1975-2025.

code allowed firms to hire people on a fixed-term basis, based on need, and without limitations in any industry. More significantly, it ensured that fixed-term employees receive legal benefits like social security and pay at par with their permanent counterparts. Accordingly, no employee would be permitted to work in any establishment for more than 8 hours per day or more than six days per week.[63]Employees working overtime should be paid at twice their regular rate. This rule applies even to small businesses with fewer than ten employees.

Besides the exhaustive exercise of codifying numerous central labour laws by Parliament detailed above, a few state governments have also made significant changes to several labour laws and enacted other reform measures.

VI. ANALYSIS THROUGH THE LENS OF DEVELOPMENT THEORIES

The various changes introduced in the labour laws are analyzed below to determine if the provisions of these Codes are beneficial to workers and how they align with different theories of growth and development.

Inclusive Development and Human Capability Approach

Inclusive development refers to a development process that ensures the participation of all members of society, especially the most vulnerable and marginalized groups, in decision-making processes and the benefits of development. Further, the human capabilities approach, developed by economist Amartya Sen, emphasizes the importance of enhancing people's capabilities and freedoms to achieve development goals. This approach highlights the need to focus on people's capabilities, rather than just economic growth, as a measure of development.

Inclusion and exclusion through wages

The Code on Wages Act, 2019 can be related to the theory of inclusive development, which emphasizes the need to ensure that economic growth is accompanied by social and political inclusion of all individuals and groups. This theory argues that development should focus on increasing economic output, enhancing human capabilities, and expanding opportunities for all

[63] 'Occupational Safety, Health and Working Conditions Code, 2020 - an Overview' (*Lexology*, 2 October 2020) <https://www.lexology.com/library/detail.aspx?g=b3ba50cd-c9a7-467b-962b-51d8949b636b> accessed 28 May 2023.

members of society, especially those marginalized or excluded. The notion that these codes do not have an inclusive ambit endures for several reasons. This is because, aside from the specific instances of discrimination and the creation of Boards under the Act, the Code does not reference informal or unorganized labour or women workers. This stands in sharp contrast to the Code on Social Security which, although maintaining the exact definition of employee and differentiating the implementation of the Code on this basis, refers explicitly to unorganized-sector workers including domestic workers in the category of waged workers. Moreover, an understanding of establishment is necessary to comprehend how the Code on Wages defines employees and workers owing to the huge share of informal workers in total employment in India. **Figure 1.1** depicts the scenario of informal employment in the country.

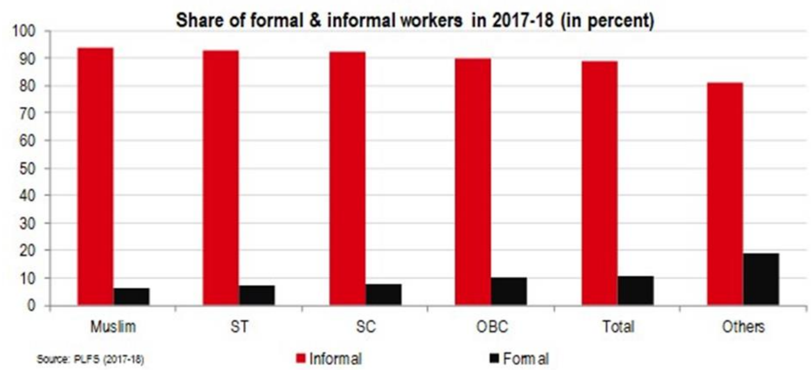

Fig 1.1: Share of formal and informal workers in different sections of society

This is related to industry, trade, business, manufacturing, or occupation categories. Further, categories like establishment and industry have been applied to exempt domestic workers from the purview of labour laws, not to mention the protracted challenges that labour law has had in governing households. The new labour codes in India, however, seem to fall short of the principles of inclusive development as has been propounded by Amartya Sen, who in n his book "Development as Freedom," has argued that "the central idea of development is the expansion of human capabilities" and that development should be "seen as a process of expanding the real freedoms that people enjoy".[64]Mahbub ul Haq, another prominent scholar of inclusive development, has argued that development should be assessed in terms of its impact on human

[64] Amartya Sen, *Development as Freedom* (1stedn, knopf 1991) 3.

well-being and that it should prioritize the needs and aspirations of marginalized groups.[65] A key advantage of inclusive development is that it promotes social inclusion and reduces inequality. By ensuring that all members of society can participate in the development process, inclusive development helps to reduce social exclusion and discrimination. This, in turn, can help to build more cohesive and stable societies.

The broadening of the Code's applicability to all employer-employee relationships without a clear threshold limitation is a positive step. Still, the Code nowhere refers to informal or unorganized labour or women workers, suggesting that these groups may be excluded from its protections. This demonstrates the exclusion of marginalized and subjugated sections and not providing them with equal opportunities when it comes to the distribution of resources and societal welfare.

A salient feature of the Code is to establish a national floor wage below which no state government may set its minimum wage. However, some have also criticized this for being badly conceptualized. The concept of ***"floor wages"*** could perpetuate ***"starvation wages"*** currently set at just Rs 178 per day, potentially leading to forced labour.[66] The Apex Court of India emphasized this in its ruling in the ***U. Unichoyi and Others vs. The State of Kerala*** case, which noted that in a developing nation with a severe unemployment crisis, it is possible that labour may offer to work for salaries that would leave most people starving.[67] According to the **deduction of wages clause** in the Code, payments can be arbitrarily deducted (up to 50% of the monthly salary) depending on performance, damage or loss, advances, etc. The deduction provision has been criticized as it will weaken workers' rights to collective bargaining and association. For fear of losing wages, the workers cannot demand even the most basic workplace rights. Due to caste and greater social standing, informal sector employers predominate in India, hence the above rule may have the potential to be used to exploit these individuals. The institutional structure and governance for the "labour inspection system" are not made clear in the guidelines. The Code suggests an ad hoc, ambiguous procedure known as an "**inspection scheme**." The plan calls for the appointment of an inspector-cum-facilitator through notice from the relevant authority. This could result in the re-

[65] Mahbub Ul Haq, *Reflections on Human Development: How the focus of Development shifted form National Incommes Accounting to People Centred Policies* (Oxford University Press Inc. 1996) 5.
[66] Chandan Kumar and Raghunath Kuchik, 'The broken promise of decent and fair wages' (The Hindu, 25 November 2019) <https://www.thehindu.com/opinion/op-ed/the-broken-promise-of-decent-and-fair-ages/article30070255.ece> accessed 25 March 2023.
[67] *U. Unichoyi v The State of Kerala* AIR 1962 SC 12.

emergence of the inspector-raj system in the labour market. India has ratified the **INTERNATIONAL LABOUR ORGANIZATION'S LABOUR INSPECTION CONVENTION OF 1947**, which establishes a well-funded, independent inspectorate with provisions for extensive inspections and unfettered access to workplaces.[68] However, the convention's stipulations were disregarded while drafting the new law. Thus, it is evident that the Code on Wages, 2019 lacks inclusivity as it does not provide a clear threshold for applicability to all employees. According to Amartya Sen's capability approach, development should focus on enhancing people's capabilities to participate in the economy, society, and politics. However, the Code's ambiguous applicability could exclude a significant number of workers, limiting their capabilities and hindering their participation in development.

VII. THE TRADE UNION ISSUE AND IMPOSSIBLE STRIKES

While the Industrial Relations Code, 2020 aims to streamline and simplify labour regulations and improve industrial relations in India, it could be criticized for not conforming to the principles of inclusive development theory and the human capabilities approach. This Code has generated intense debate in public discourse as it addresses the rights of collective bargaining and industrial relations. Its provisions will weaken workers' rights in small businesses with less than 300 employees and give employers the power to impose arbitrary service standards on their workforce.[69] It will offer employers a great deal of flexibility with regardto hiring and firing, and it will make it conceivable for all industrial firms with fewer than 300 workers to retrench for economic reasons and fire employees for alleged misconduct, thereby eliminating employment security.

While the code provides for social security benefits for workers, some critics argue that these provisions are inadequate and do not go far enough in promoting workers' welfare. This is particularly problematic in the context of the human capabilities approach, which emphasizes the importance of ensuring that workers have access to resources and opportunities to develop their

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[68] International Labour Organization (ILO), Convention Concerning Labour Inspection in Industry and Commerce (11 July 1947) C081<https://www.refworld.org/docid/5c77a03c7.html> accessed 25 March 2023.

[69] Prerona Sil, 'Prospective: Employment Laws in India-Challenges, Changes and the Way Forward' (*Lexology*, 20 October 2022) <https://www.lexology.com/library/detail.aspx?g=4beef791-e0c9-4ee8-9acf-2bc743d029a7> accessed 25 March 2023.

capabilities. Additionally, **Section 23** of the Code imposes limitations on the number of outsiders who can hold office in trade unions in the unorganized sector.[70] The rule **interferes with the autonomy of trade unions** by depriving them of the knowledge and skills of outsiders, which might make the activities of trade unions in the unorganized sectors less effective. This goes contrary to the idea of inclusive development and individual choice as these provisions restrict people from forming groups according to their choice and thus render a non-inclusive environment hindering development.

Further, the human capabilities approach argues that development should focus on enhancing people's capabilities in order to promote their well-being and enable them to participate fully in society. When workers are prevented from joining trade unions, their access to resources and opportunities may be restricted, which can limit their ability to develop their capabilities and achieve their full potential. Moreover, interference with the autonomy to join trade unions can have broader negative consequences for society as a whole. When workers are unable to advocate for their rights and interests, there may be greater inequality and social exclusion, which can undermine social cohesion and stability.

Moreover, **Section 62** of the Code limits the ability of trade unions to engage in collective bargaining by essentially prohibiting the right to strike.[71] This is accomplished by extending to all industrial establishments that, under the original Act, solely applied to public utilities. Since employers might demand conciliation or adjudication for dispute resolution, which could drag out for weeks or months, these restrictions render strike action nearly impossible. In essence, workers would be prohibited from striking while dispute resolution processes were ongoing.

This restriction on the right to strike can have negative implications for both inclusive development and the human capabilities approach which emphasizes the importance of enhancing people's capabilities and freedoms to achieve development goals. By limiting workers' ability to strike, the code may restrict their capabilities and freedoms, which can hinder their ability to negotiate fair wages and working conditions. This, in turn, can limit their ability to develop their capabilities and lead fulfilling lives.

[70] The Industrial Relations Code, 2020 (35 of 2020) s 23.

[71] Ibid (n.70), s 62.

Inclusive development requires that all individuals have access to opportunities and resources to improve their well-being. By limiting the ability of workers to engage in collective action, the code may restrict their ability to advocate for their rights and interests. This can be particularly problematic for marginalized and vulnerable workers, who may have limited bargaining power in the labour market. The code may also limit their ability to participate in democratic processes and advocate for their rights and interests. As discussed above, the code sets out provisions that make it difficult for labour organizations to engage in collective bargaining and represent workers' interests. This can limit the effectiveness of labour organizations in advocating for workers' rights and interests, which can have negative implications for both inclusive development and the human capabilities approach.

Furthermore, the definition of "strike" in **Section 2(zk)** of the Code is expanded to encompass situations in which 50% of employees take casual leave simultaneously.[72] This restricts workers' freedom of association by barring them from participating in meetings, protests, marches, etc. The stipulation of "**other sources**" of financing for the re-skilling fund is also ambiguous. The framework is arbitrary because the Code is unclear about where the money for the same will come from, aside from employer payments. These ambiguities are left to the bureaucrats and the rule-making procedures, and there are also questions about who will reskill the workforce and how sufficient the money will be. This represents a lack of transparency and accountability that would most likely result in the deprivation of rights and freedom of people, thus resulting in the exclusion of a section of subjugated and marginalized communities.

VIII. SOCIAL EXCLUSION DUE TO DIGITAL ILLITERACY AND THE CENTRE-STATE CONUNDRUM

One of the major drawbacks of this Code is that much has been left to delegated legislation without enough legislative oversight.[73]This holds true for donations (**Sections 109 and 110**),[74] establishment and management of funds (**Section 141**),[75] and entitlements for unorganized

[72] Ibid, s 2(zk).
[73] Upadhyaya, S., 'Labour Law Amendments, Reforms and Codification in India: Recent Initiatives' in Jeet Singh Mann (ed), *Labour Law Reforms* (2021) 148.
[74] The Code on Social Security, 2020, s 109,110 and 111.
[75] Ibid, s141.

workers (**Section 109**).[76]The online registration process places the onus of registration as beneficiaries on informal workers who do not have digital literacy and connectivity. Digital illiteracy can lead to **social exclusion**, which can significantly impact inclusive development. Social exclusion refers to the process by which certain individuals or groups are marginalized and excluded from social, economic, and political participation. Socially excluded individuals may be unable to access important services or resources, experience increased poverty and isolation, and be unable to participate fully in social, economic, and political life. The prevalence of digital illiteracy among the marginalized sections of society can lead to social exclusion and can render some selected communities unaddressed by the policies, as can be witnessed in this case.

Further, there is a paucity of knowledge about social security programmes among unorganized-sector workers. Additionally, mandating Aadhaar registration in order to get social security benefits whose costs are not covered by the Consolidated Fund of India also poses an obstruction to the efficient distribution of the resources, and that could be a violation of the Supreme Court's ruling in **Justice K.S. Puttaswamy (Retd.) v Union of India**while stipulating the idea of personal liberty.[77] Moreover, registration and the verification of identification documents are complicated and fraught with problems. This could lead to limited access to services owing to the cumbersome process and exclusion of marginalized communities. Many individuals may lack the necessary documentation or may face additional barriers to obtaining documentation, leading to social exclusion and limited access to services.

The portability of entitlements further complicates the multitude of registrations and identity documents needed to obtain national benefits for citizens and workers. In the case of informal women workers and unorganized-sector workers, who constitute a significant majority of workers and the most vulnerable workers, the Social Security Code stipulates various schemes to be provided by either the centre or the state. However, there is no proper system in place to guarantee their registration and coverage under any scheme. India's unorganized workforce is scattered throughout the country. Owing to the lack of inter-state arrangement and cooperation, the impact of this Code would vary too much across States for it to be implemented. The Centre-State procedural complexities and jurisdictional overlap make it difficult to provide comprehensive

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[76] Ibid, s 109.

[77] *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

social security coverage for unorganized labour efficiently and simply. It further does not grant access to the employees' provident fund to workers in the informal sector. Even though the new Code expanded the payment of gratuities, most unorganized workers do not have access to it.

The difficulties in providing comprehensive social security coverage for unorganized labour and the lack of access to the employees' provident fund and gratuity payments can significantly impact inclusive development. Social security coverage is essential to inclusive development as it can help protect vulnerable workers and reduce poverty. However, the complexity of the Centre-State procedures and jurisdictional overlap can make it difficult to provide comprehensive coverage to unorganized workers. This can lead to social exclusion and limited access to essential services, negatively affecting inclusive development.

The lack of access to the employees' provident fund and gratuity payments can also have significant implications for inclusive development. These benefits can help ensure that workers can save for retirement and are protected in the event of job loss or other financial hardships. Without access to these benefits, unorganized workers may be more vulnerable to poverty and economic instability.

Overall, the current system's limitations for providing social security coverage and benefits to unorganized workers can have negative implications for inclusive development. Addressing these issues and ensuring that all workers have access to essential protections and benefits is essential for promoting inclusive and sustainable development.

IX. LACK OF BASIC NEED APPROACH AND INCLUSIVITY

This Occupational Safety is a shining example of the problems with the legal reform process because it aims to combine many different laws with different objectives, such as those that address industry-specific concerns about occupational safety and health, those that govern working conditions, and those that address specific worker categories like contract workers and interstate migrants. Moreover, the threshold for the application of the Code has been raised for contract workers and interstate migrants as it applies to institutions that hire 50 or more contract workers and those that employ ten or more interstate migrants, albeit the definition of an interstate migrant being expanded to incorporate individuals who relocate on their own to another state and find employment in an institution there.[78]The Code covers only establishments with ten or more workers, leaving out a significant portion of the informal sector. This limits the reach of the Code and may leave vulnerable workers without adequate protection and security.

The Code has not considered some of the policy-level work on workplace occupational health and safety that has been done in recent years, particularly concerning unorganized workers. With the exception of a handful of pilot surveys and studies, there is a general lack of understanding of the nature of dangers and occupation-related ailments in different informal economy sectors.[79] It is, therefore, difficult to plan for the welfare of employees in the absence of specialized data and sufficient knowledge of the scope and type of occupational health and safety. According to epidemiological research, workers in the waste management industry are at a greater risk of developing respiratory tract infections, gastrointestinal disorders, worms, and other diseases.[80] Further, studies on home-based employees like textile workers and embroiderers demonstrate that prolonged working hours lead to symptoms including back discomfort, limb pain, shoulder and neck pain, and eye strain. Additionally, both male and female fish workers have been reported to suffer from musculoskeletal conditions such as back and neck injuries, with these conditions being more prevalent among female workers.[81]

The absence of data on workers' work conditions and health ailments can be seen as violating workers' basic needs. Without this information, it is challenging to address workplace safety, health, and well-being issues, which are essential for workers' survival and dignity. The same can limit their capabilities and opportunities to pursue their goals and aspirations. Workers exposed to poor work conditions and health hazards may experience physical and psychological limitations that hinder their ability to function and achieve their potential.

Moreover, poor work conditions and health ailments in workers can lead to absenteeism, low productivity, and reduced economic growth, which further hampers inclusive development. It is, therefore, essential to collect and analyze data on workers' work conditions and health ailments,

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[78] The Occupational Safety, Health and Working Conditions Code, 2020(No. 37 of 2020)Chapter XI.
[79] Perona Sil, ‘Prospective: Employment Laws in India-Challenges, Changes and the Way Forward' (*Lexology*, 20 October 2022) <https://www.lexology.com/library/detail.aspx?g=4beef791-e0c9-4ee8-9acf-2bc743d029a7> accessed 25 March 2023.
[80] Upadhyaya, S., 'Labour Law Amendments, Reforms and Codification in India: Recent Initiatives' in Jeet Singh Mann (ed), *Labour Law Reforms* (2021) 148.
[81] Ibid.

develop policies and interventions that promote workplace safety and well-being, and ensure that workers have access to adequate health care and social protection.

X. GENDER DEVELOPMENT THEORIES

The new labour laws have maintained the spotty and piecemeal recognition and protection of female workers' rights that prevailed before the labour reforms while eroding the labour rights for even those working in the formal economy. This has made it more challenging to secure the rights of women workers, the majority of whom are engaged in the informal economy.

A laudable feature of the **Code on Wages** is that it eliminates the employment schedule, which had previously served as an impediment to the inclusion of various employment sectors, particularly those involving women such as domestic work. However, the pressing issue of gendered employment has not been addressed by the Code as it does not attempt to integrate home-based workers, who disproportionately consist of women, within its jurisdiction. The pervasive problem of gendered employment has been statistically explained below.

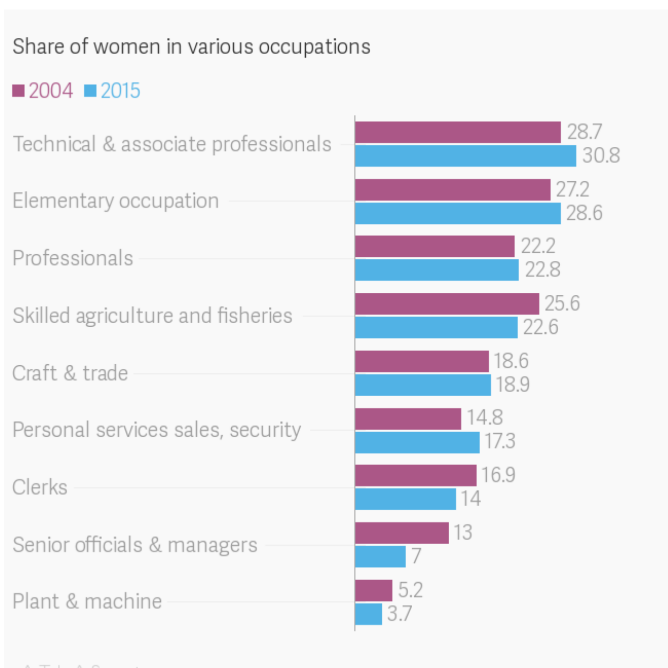

Fig 1.2: Gendered employment of women in India over the years

Additionally, it excludes "honorary and scheme workers" such as ASHA and Anganwadi workers who are not considered to be employees by the government, but who should be entitled to all employment benefits, including minimum pay.[82] The specific exclusion of apprentices from the scope of the Code has major repercussions on entitlement to minimum wages for "sumangali workers" who are deputed as apprentices.[83] The uncertainty and exclusion from applicability is a major blow to the numerous segments of unorganized women employees who have campaigned for years to be recognized as workers and to receive minimum wages.

Further, the regulations stipulated in the **CODE ON INDUSTRIAL RELATIONS** have made it more challenging for women in the informal sector, like domestic work and home-based work, to register trade unions.

Maternity benefits are covered under **CHAPTER VI OF THE SOCIAL SECURITY CODE**, which is only applicable to enterprises with ten or more employees. It lays down a variety of schemes, to be offered by either the centre or the state, for informal women workers, who make up the overwhelming majority of workers along with the most vulnerable of workers.[84] Nevertheless, there is no system to ensure that they are enrolled under each programme and are protected when they relocate to another state as migrant workers. Only women who are expecting either their first or second child will continue to be eligible for the 26-week expansion of the maternity benefits. Under the previous version of the **MATERNITY BENEFITS ACT, 1961**a woman with two or more living children is eligible for only 12 weeks of maternity benefits, which also applies to adoptive or commissioning mothers.[85] As a result, the conditions of maternity benefits have been censured on moral and health grounds, which also applies to the Social Security Code. Further, there are no rules for framing the maternity benefits programme in the Code for unorganized workers.[86]

Gender and development theories argue that true empowerment of women requires a shift in societal norms and power structures rather than simply providing benefits or addressing immediate needs. In this sense, the expanded maternity benefits under the new labour codes may be seen as a

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82 Ibid(n.80).
83 Ibid.
84 The Code on Social Security, 2020 (35 of 2020) Chapter VI.
85 The Maternity Benefit Act, 1961 (No. 53 of 1961).
86 Shraddha Chigater, 'Labour Law Reforms and Women's Work in India: Assessing the New Labour Codes from a Gender Lens' (2021) <https://ssrn.com/abstract=3947175> accessed 25 March 2023.

band-aid solution that fails to address the root causes of gender inequality in the workplace. As Sen notes, "Women's empowerment is not reducible to instrumental benefits, or to the satisfaction of basic needs. It involves removing obstacles to choice and participation and strengthening women's agency."[87]

Furthermore, the expanded maternity benefits may not be accessible to all women, particularly those in the informal sector who are not covered by the new provisions. This highlights the need for a more comprehensive approach to gender and development that considers the unique challenges women face in different sectors of the economy.

The **OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE** does not apply to most women who work in the informal sector. This is due to the requirement of enterprises that it can only employ ten or more people in accordance with **Section 2(u)** of the Code.[88] Informal women workers are exempt from all the benefits of the Code pertaining to safe working conditions such as access to clean water, ventilation, adequate lighting, latrine arrangements, weekly and compensatory holidays, overtime pay, paid annual leave, provisions for childcare centres, and other concerns. It is important to note that agricultural hand tools and implements, farm machinery, chemical agents, climatic agents, animal/snake bites, etc. are the leading causes of risks and accidents in the agriculture industry, where the vast majority of women are employed. Additionally, hazardous compounds that have the potential to cause major occupational ailments like asbestosis, silicosis, lead poisoning, etc. are exposed to workers on a regular basis.[89] The Code, however, fails to address workplace health and safety concerns and unique working conditions for women working in the informal sector.

It is pertinent to address the omission of the **SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013**[90]from the labour reform process. This legislation is a historic law covering unorganized women workers, including domestic workers. Furthermore, by defining homes as workplaces, it has completely transformed the way individuals perceive workplaces. The exclusion of the Act from the labour codes highlights the challenges the labour law framework has faced in incorporating this statute as a law that controls the conditions

[87] Amartya (n 20).
[88] The Occupational Safety, Health and Working Conditions Code, 2020 (No. 37 of 2020) s 2(u).
[89] Atul Sood (n 1).
[90] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (No. 14 of 2013).

under which women work. This has contributed to the persistent exclusion of gender perspectives from labour laws and the denial of workers' rights to a sizable number of female employees. The unorganized sector in India comprises a vast majority of women workers, who are often deprived of fundamental labour rights, social security, and other benefits. The situation is notably worse for women working in the informal sector, such as domestic workers, home-based workers, and street vendors. The recently introduced labour codes have been criticized for their limited scope and inadequate protection for these vulnerable workers, especially women.

Gender and development theory emphasizes recognizing gender inequalities and incorporating them into development policies and programs. The labour codes must address the specific needs and challenges women workers face in the unorganized sector. This includes provisions for maternity benefits, childcare facilities, and protection against sexual harassment and violence in the workplace.[91]

Intersectionality theory adds a layer of complexity by highlighting the multiple identities and experiences of discrimination that women in the unorganized sector face. Women from marginalized communities, such as Dalits, Adivasis, and religious minorities, face compounded discrimination due to their gender, caste, ethnicity, and religion. The labour codes must recognize these intersections and provide targeted support to these women.

Critics have argued that the labour codes fall short in addressing these issues, with limited provisions for maternity benefits and no mention of childcare facilities. The codes also do not adequately address the issue of sexual harassment and violence in the workplace, a pervasive problem faced by women workers in the unorganized sector.

To truly achieve inclusive development, it is essential to address the specific needs and challenges women face in the unorganized sector. The labour codes need to be strengthened with provisions that provide for maternity benefits, childcare facilities, and protection against sexual harassment and violence in the workplace.[92] Additionally, intersectionality theory should be incorporated into the policy-making process to ensure that the needs of women from marginalized communities are not overlooked.

[91] Chandra, M., 'Explained: What India's New Labour Codes Mean for Women and Persons with Disabilities' (*Ungender*2020) <https://www.ungender.in/india-new-labour-codes-for-women-explained> accessed 25 March 2023.
[92] Ibid.

In the words of feminist economist Naila Kabeer, "Economic policies and practices that ignore or downplay the gender dimensions of poverty and vulnerability may prove ineffective, counterproductive, or even harmful." Therefore, the labor codes should be evaluated using gender and development theory as well as intersectionality theory to ensure they promote the goal of inclusive development for everyone.

XI. RECOMMENDATIONS AND WAY FORWARD

The following recommendations can be incorporated intothe new labour codes to cater to the needs of workers, especially unorganized sector workers and women workers –

I. ***Need Based Minimum Wage:*** The government should promulgate a "**Need Based Minimum Wage**" that includes allowances for old age, housing, healthcare, and education.[93] As a result, every Indian citizen should be considered to have a fundamental constitutional right to a guaranteed minimum wage. As per the Code on Wages, a revised minimum wage must be adopted every five years, which is a considerable amount of time given the market volatility.

II. ***National Commission for Labours:***To simplify the obstacles in the labour market and address inconsistencies in the calculation of the minimum wage at the national level, the **NATIONAL COMMISSION FOR LABOURS** should be established.[94]

III. ***Gendered Norms for Women:*** Given the undervaluation of women's work and widespread gendered occupational segregation leading to the preponderance of women in the unorganized sector such as domestic work and homebased work, it is incumbent on appropriate governments when animating the criteria for **setting minimum wages - to consider the gendered norms associated with work**.

IV. ***Member-based Organizations:***Although the Industrial Relations Code provides for the application of trade unions to informal women workers, it fails to recognize the challenges workers face in registering trade unions for unorganized sector workers. It is thus, important to recognize the

[93] Ministry of Labour and Employment *Report of the Working Group on Occupational Safety and Health for the Twelfth Five Year Plan* (2012 - 2017).
[94] Ministry of Labour and Employment Second National Commission on Labour, Labour Law, *Report of the Second National Commission on Labour*(Vol. I, 2002).

importance of member-based organizations by encouraging the states to enable the registration of member-based organizations and promote cooperatives in their respective regions.[95]

V. ***State Responsibility:*** **Social security** must be recognized as a **fundamental right,** and a system must be formulated whereby the state is responsible for supplying and ensuring a fundamental level of security for all workers, including those in the unorganized sector while allowing for partially or wholly contributory plans.[96] Further, it is also crucial to encourage public awareness about preventing dangerous work-related accidents and occupational ailments, thereby promoting safe working environments.

XII. CONCLUSION

The introduction of the new Labour Codes in India has been a step towards simplifying the complex web of labour laws that existed in the country. However, it is essential to analyze the viability of these codes from the perspective of contemporary development theories such as inclusive development and the human capability approach. The study has highlighted the lacunae in the legislation, which must be addressed to make the codes more efficient and align them with the broader development paradigm in the concerned field.

One of the significant issues highlighted in the study is the lack of attention to gender-specific concerns in the labour codes. While the codes have provisions for women's welfare, they do not adequately address the gendered nature of work and the specific challenges women face in the informal sector. As the International Labour Organization (ILO) notes, "Women still face occupational segregation, lower wages and weaker social protection coverage compared to men." Therefore, it is necessary to incorporate gender development theories and recommendations in the codes to ensure gender parity and inclusivity.

Moreover, the codes' lack of adherence to the basic needs approach and social security is a significant cause for concern. The study found that the codes do not provide comprehensive social security coverage for unorganized labour and restrict access to the employees' provident fund for

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[95] Ibid(n.94).

[96] Ministry of Micro, Small and Medium Enterprises, National Commission for Enterprises in the Unorganised Sector *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (2007).

workers in the informal sector. Inclusive development requires addressing these basic needs and ensuring social security for all workers, including those in the informal sector.

The study also highlights the importance of addressing digital illiteracy and the centre-state conundrum in the codes. The absence of data and poor working conditions in the informal sector have been identified as major obstacles to achieving inclusive development. As Amartya Sen has noted, the capability to access information and knowledge is central to human development. Therefore, it is necessary to ensure that workers have access to information and knowledge to improve their living conditions and overall well-being.

In conclusion, while the new Labour Codes represent a step towards simplifying labour laws in India, they must be examined critically to ensure that they align with the broader development paradigm. The codes need to address gender-specific concerns, adhere to the basic needs approach, and ensure social security for all workers. Furthermore, they mustaccommodate the issues related to digital illiteracy and the centre-state complexities to enable inclusive development and ascend towards a sustainable, happy and developed society.

COMPETITION LAW AS ANTIDISCRIMINATION: LABOUR MARKETS AND DOMINANCE OF THE EMPLOYERS

by Prakriti Singh

Abstract

The Competition Act, 2002 has become the basis of regulating fair competition and promoting free trade in markets in India. However, the antitrust enforcement regime in India has been nascent towards the rampant unfair labour practices. This exclusion of labour markets from Competition Law in India is devoid of a rational and legal basis. Although the New Labour Codes regulate industrial establishments, bringing the labour markets under the scrutiny of the Competition Act is exigent to establish a competitive labour market in India and safeguard the employees from the abuse of dominant positions by employers. This article aims to analyze the Competition Act, 2002 as a remedy for discrimination in labour markets and aspires to propose suggestions to supplement the Recommendations of the Competition Law Review Committee, 2019, to make the Competition Act more inclusive and effective in achieving its objectives. This Article is divided into three parts. Part I examines the Committee's observations and draws a parallel between Competition enforcement and Corporate Governance. Part II discusses the underenforcement of the arm of merger control in antitrust enforcement. Part III elucidates upon the gaps present in the New Labour Codes and how the Competition Act can fill these gaps. This Article also discusses the competition concerns faced by gig workers and platform workers. This Article concludes that although the issue of labour discrimination in India is analysed from a constitutional lens, the issues in the labour market come within the ambit of antitrust enforcement. The author also elucidates upon the limitations of juxtaposing labour policy with antitrust enforcement.

KEYWORDS:*fair competition, labour markets, antitrust enforcement, labour policy*

I. INTRODUCTION

The Competition Act, 2002 introduced a robust antitrust enforcement regime in India.[1] Its predecessor, the MRTP Act, 1969, had a narrow vision and sought to curb unfair trade practices as anti-competitive practices.[2] The Competition Act was enacted to promote fairness and freedom of trade in India by curbing practices adversely affecting competition or likely to adversely affect competition and safeguarding consumer interests.[3] This Act brought to India cartel enforcement, merger control, competition advocacy and a Commission to achieve the objectives set by the novel antitrust enforcement regime.[4]

The Act has been active in promoting competition in product markets. However, actions aimed at safeguarding the labour force from deteriorating working conditions and the control and dominance of the employers are missing from the Indian antitrust enforcement regime. The Act even brought in Competition Advocacy, obliging the Competition Commission of India to advise the Central Government in policy making by scrutinizing the impact of the proposed policy on competition in markets across India. Although the Competition Act mentions the word "markets", enforcement and regulatory measures have remained restricted to product markets

The labour market is 'precisely as the name indicates: a market'[5] where employees sell their talent to employers, and is therefore a 'mirror image of the product market'.[6] The author argues that the Competition Act, 2002 has been nascent towards the labour markets in India, which is a result of the failure to implement the objectives of the Act in unison. The Competition (Amendment) Bill, 2022 brought in several progressive changes in the Competition Act, including the recognition of hub and spoke cartels.[7] The Amendment seeks to address the risks faced by the digital markets and

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[1] The Competition Act, 2002 (12 of 2003).
[2] The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).
[3] Abir Roy and Jayant Kumar, *Competition Law in India*, (2nd Edition, Eastern Law House 2019) 24.
[4] Mehta, Pradeep, Competition Law Regime in India: Evolution, Experience and Challenges (November 20, 2006). Pradeep S. Mehta, Competition Law Regime in India: Evolution, Experience and Challenges, December 2006, Concurrences N° 4-2006, Art. N° 12587, pp. 150-156.
[5] Orly Lobel, 'Gentlemen prefer bonds: How employers fix the talent market' (2020)59 Santa Clara Law Review 663.
[6] Suresh Naidu, Eric Posner and Glen Weyl, 'Antitrust Remedies for Labor Market Power' (2018)132(2) Harvard Law Review 536,538.
[7] The Competition (Amendment) Bill, 2022.

bring the same under rigorous antitrust scrutiny. However, the Amendment failed to provide any remedy to the labour force against the abusive practices being conducted by the employer.

The Competition Act, 2002 has largely centred around the interest of consumers. The objective of safeguarding consumer welfare is consistent with the arguments of Richard Steuer, who argues that competition law should protect individuals from bullying and ganging up.[8] The labour force of India has suffered abuse at the hands of employers in multiple ways.[9] Preventing anti-competitive practices in labour markets is challenging for any competition regime.[10] The fundamental reason is that in the labour market, employees are the sellers and the employers are the consumers.[11]

Safeguarding the interests, either of the consumer or any other market participant is the end goal to be achieved through the means of competition advocacy, merger control and antitrust enforcement. Bringing the labour market under the ambit of competition enforcement, recognizing the abuse of dominant position by employers and punishing any practice causing or likely to cause an Appreciable Adverse Effect on Competition in the labour market can efficiently supplement the Constitutional framework of labour rights and the New Labour Codes.

Four new Labour Codes have consolidated the prior existing framework of labour laws in India, to address the concerns of equity in labour markets. The Code on Social Security, 2020, provides a single law dealing with several social security benefits to employees.[12] Through this Code, gig workers, for the first time, are formally recognized under the labour law framework in India. However, there is a vacuum in terms of empowering the gig workers. Regulating the labour markets merely through labour codes and the Constitutional framework can reduce the Indian labour law and the policy framework to a mere paper tiger, which lacks any teeth.[13] The Competition Act provides a potential remedy to effectively fill this gap.

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[8] Steuer, Richard, 'The Simplicity of Antitrust Law' (2012).14(2) University of Pennsylvania Journal of Business Law543.
[9] Bhattacharjea, A..'India's Competition Policy: An Assessment'(2003) 38(34) Economic and Political Weekly3561–3574.
[10] Boris Hirsch, Elke J. John & Claus Schnabel, Do Employers Have More Monopsony Power in Slack Labor Markets' (2018) 71 ILR Rev: J Work &Pol'y 676.
[11] Azar, José and Marinescu, Ioana Elena and Steinbaum, Marshall, 'Labor Market Concentration' 2018)University of Pennsylvania - School of Social Policy & Practice.
[12] The Code on Social Security, 2020 (36 of 2020).
[13] REPORT OF THE WORKING GROUP ON LABOUR LAWS & OTHER LABOUR REGULATIONS FOR THE TWELFTH FIVE YEAR PLAN (2007-12).

These Codes have extended the working hour shift of the employees. This has the potential for misuse by employers. Competition law cannot be perceived in isolation, from the labour market.[14] Is there any legal basis for the exclusion of labour market concerns from competition scrutiny?

Competition Law is an instrument not merely to achieve economic goals, but social goals also. The juxtaposition of labour policy with the scrutiny of anti-competitive practice can provide an effective remedy. The merger control regime has failed to take cognizance of the impact of M&A activity on the labour force. The labour law does provide remedies to the employees. However, the active merger control regime could complement these remedies and curb anti-competitive practices.[15]

This article delves into the analysis of antitrust as an anti-discriminatory legislative instrument. Firstly, it establishes a link between labour policy and the Competition Act. Secondly, it analyzes the vacuum existing within the currently existing merger control regime in India. Thirdly, the author analyzes the vacuum in the New Labour Codes and how the Competition Act can go in tandem with labour policy.

II. THE COMPETITION ACT, 2002- REMEDY FOR LABOUR MARKETS?

A. The necessity of expanding the Competition Act from the product market to labour market

Competition can be defined as "*a process by which cost efficient production is achieved in a structure where entry and exit are easy, a reasonable number of players (producers and consumers are present) and close substitution between products of different players in a given industry exists*". The genesis of The Competition Act, 2002 is in the function of the Government to prevent commercial and industrial monopolies.[16] Article 19(1)(g) of the Indian Constitution guarantees

[14] Ewing Ky., 'Competition Rules for the 21st Century: Principles from America's experience' (2007) 30(4) Kluwer Law International, The Hague.
[15] Report Of the Working Group on Competition Policy, (*Planning Commission Government of India February*,2007).
[16] Kabir, A.,'Competition Laws and the Indian Economy'(2011) 23(1)National Law School of India Review.

freedom of trade.[17] The objectives of the Competition Act are derived from this constitutional guarantee.[18]

In India, the organized sector employs a minuscule proportion of the labour force. A highly competitive market would be flexible, with the participants enjoying a high degree of flexibility. However, in the Indian labour market, the reality is the exact opposite. In the labour market, the labour force faces exit barriers.[19] These exit barriers are the reason behind the spurt in the growth of the informal sector in India. Although the new Labour Codes envision to bring the informal labour force within the safeguards of industrial policy, the enforcement of these remedies in the informal sector remains a daunting task. The abusive practices and exit barriers existing in the labour market are antithetical to the objectives of the Competition Act.

B. Observation of the Competition Law Review Committee, 2019[20]

One notable feature of the 2002 Act is the incorporation of a scientific and rational approach. Large and dominant firms are not inherently a threat to sustainable competition in markets. Anti-competitive agreements and abuse of dominant position are some of the key factors to be established in order to hold an entity liable under the Act. The Competition Law Review Committee, 2019 was constituted to review the efficacy of the implementation of the Competition Act, 2002. The Committee analysed the competition enforcement framework in the international arena, in order to align the competition regime with global practices and to cure the existing mischiefs.

Section 19(3) lays down certain factors to establish whether the concerned practice is causing an Appreciable Adverse Effect on Competition (AAEC) in India.[21] In order to ensure the efficacy of the competition regime in the rapidly changing business environment, this list of factors needs to be exhaustive. The Committee deliberated upon including factors such as labour policy within this list. Bringing this entry into Section 19(3) would mean that the practices in the labour market would be analysed from an antitrust lens.

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[17] The Constitution of India, 1950 art 19(1)(g).

[18] Palacios Lleras, Andrés, 'Constitutional Traditions and Competition Law Regimes: A Primer' (2013) Global Antitrust Review.

[19] Vinod Dhall, *Competition Law Today* (OXFORD 2007) 499.

[20] Report of the Competition Law Review Committee, (*Ministry of Corporate Affairs*, 2019).

[21] The Competition Act, 2002 (12 of 2003) s 19(3).

Certainty is a key feature of an efficient competition enforcement regime. The cartel enforcement arm of the Indian competition regime suffers from the mischief of uncertainty, reflecting a lack of guidance and expertise. According to the Committee, if the concerns of the labour market are included under the Act, it would lead to uncertainty. The objective of competition law is to promote efficiency in trade and business. Bringing an uncertain factor within Section 19(3) would be antithetical to the business environment.

Rules of interpretation would play a key role in the incorporation of labour policy within the competition framework. It is the duty of CCI to specify labour policy as a factor to ascertain AAEC. The rule of *ejusdem generis* will serve as an effective safeguard against the mischief of uncertainty. According to this rule, when general words follow specific words in a statute, the interpretation of the general word would be derived from the specific word. The judiciary has applied this rule on several occasions. This recommendation by the Review Committee has certain pitfalls.

The Committee believed that the rule of *ejusdem generis* would ensure a seamless incorporation of labour policy within the competition law. This rule has proved to be worthless.[22] The application of this rule is replete with inconsistencies. The general words must be construed harmoniously with the specific word. In some cases, the general and specific words were interpreted harmoniously. In other cases, the general words were given a general and wide interpretation.

Thus, the Committee, by recommending the Competition Act to be made inclusive, provided a roadmap to juxtapose labour policy with AAEC. However, the Competition Act lacks jurisprudence and guidance on this front.[23] Labour policy, as a factor to examine AAEC, cannot be easily defined in relation to antitrust enforcement.[24] Hence, the implementation of labour policy as one of the factors in determining AAEC is a tricky terrain.[25] In this paper, the author aims to analyse that the guidance mechanism provided to the CCI to bring this change is a worthless rule of interpretation. The author analyzes the new labour Codes and some mischiefs existing in the labour law framework.

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[22] Vepa P. Sarthi, *Interpretation of Statutes* (5thedn, EBC 2013) 144.
[23] SM Dugar, *Guide to Competition Law* (5thedn, LexisNexis 2010) 656.
[24] Angerhofer, Tirza and Blair, Roger D., 'Collusion in the Labor Market: Intended and Unintended Consequences' inMonopsony in Labor Markets: Theory, Evidence, and Public Policy(Competition Policy International, Antitrust Chronicle, 2020).
[25] Ioana Marinescu & Eric A. Posner, 'Why Has Antitrust Law Failed Workers?' (2020) 105 Cornell L Rev 1343.

C. Antitrust as a tool for labour markets- Taking the right lessons from the Corporate Governance Regime

In the recent past, Corporate Regulations regimes across the world have transitioned from merely focussing on the profitability of business entities. Even the investors have become more conscious of investing in not just profitable, but profitable and long-term sustainable business entities.

As the very nomenclature suggests, ESG Regime envisions to regulate the environmental, social and governance factors in the corporate world. Under the Business Responsibility and Sustainability Reporting (BRSR) framework, the top 1000 listed companies are mandated to make three-fold disclosures in the prescribed format.[26] The Social Factor in the ESG Regulations is based on the stakeholder theory.[27] A corporate entity should not be merely accountable to the shareholders but to the employees as well as the society. According to Section 166 of the Companies Act, 2013, Directors are obliged not to merely protect the interests of the shareholders, but also the interests of the stakeholders.[28] Under the BRSR disclosures, the Top 1000 listed companies need to make detailed disclosures with respect to the working conditions of employees.

There is a direct relation between competitive market and Corporate Governance Regulations.[29] If a concerned relevant market is competitive, the securities regulator can enforce securities regulations in the concerned market more effectively. Good corporate governance curbs anti-competitive practices across markets. ESG Regulations, a part of corporate governance is a step towards ensuring ethical conduct by corporate entities. Compliance with the Competition Regulations is similar to this fairness and transparency in conducting the corporate functions of the entity.

The BRSR Reporting makes reference to Labour Codes, ensuring recognition and protection of employees. Bringing the business entities under the purview of competition scrutiny would be a step in the right direction in ensuring that Corporate Governance Regime in India becomes “law

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[26] SEBI, BRSR Reporting Format (2021)<https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure1_p.PDF>accessed Feb 7, 2023.

[27] ‘The ‘S’ in ESG and Social Factors Become More Important’ (*Wolters Kluwer*, 10 March 2021) <https://www.wolterskluwer.com/en/expert-insights/the-s-in-esg-and-social-factors-become-more-important> accessed 7 February 2023.

[28] The Companies Act, 2013 (18 of 2013) s 166.

[29] Suresh Naidu, Eric Posner & E. Glen Weyl, ‘Antitrust Remedies for Labor Market Power’(2018) 132 Harvard Law Review 537.

in action".[30] The protection of the labour force merely through the labour law framework and policy is replete with nebulousness. If there is a blatant violation of labour law framework by the employer, the same should be within the ambit of the Competition Act.

The Competition Regulator should consider regulating the working conditions of the labour force through appropriate regulations. Under the Combination Regulation framework, the CCI has mandated antitrust disclosures in a transaction beyond the concerned thresholds, to ensure that the concerned combination does not lead to concentration of resources in the relevant market.[31] In the labour market, the consumers are abusing their dominant position. CCI can come up with Regulations including labour policy as a factor to determine AAEC for safeguarding the labour force from deterioration of employment and abuse of dominance by their employer.

III. MERGER CONTROL IN LABOUR MARKETS- REGULATING COMBINATIONS FROM THE STANDARD OF WORKER WELFARE

A. Competition issues arising out of mergers and acquisitions

The Competition Act covers within its ambit combinations, which include a merger or any amalgamation between enterprises. Factors like control acquired by an enterprise subsequent to such a combination and the asset value of the resultant entity of such a combination are well-established in the Competition Act. The objective is to prevent any AAEC emanating from the combination in the relevant market. The Act lays down a form filing mechanism for such combinations, exempting certain combinations, confidentiality obligations and penalties for non-compliance.

The 2022 Amendment has brought salient additions to the merger control regime, such as Deal Value Threshold (DVT). This DVT, once implemented, will take into account combinations which come under "substantial business operations". However, the merger control arm of the Competition Act is restricted to product markets, being ignorant of the concerns of workers arising

[30] Varottil Umakanth, 'The Legal and Regulatory Impetus Towards ESG in India: Developments and Challenges' (2023) NUS Law Working Paper No. 2023/003, Forthcoming chapter in Thilo Kuntz (ed.), *Research Handbook on Environmental, Social, and Corporate Governance* (Edward Elgar, 2023).
[31] Azar, José and Marinescu, Ioana Elena and Steinbaum, 'Marshall, Labor Market Concentration' (2018) 57 Journal of Human Resources.

out of such combinations.[32] This arm of the antitrust enforcement regime should be morphed to protect the employees affected by such combinations from powerful and dominant employers.[33] Just like the value of assets is affected and can lead to AAEC, the exploitative abuse by employers can subject the employees to discrimination.[34]

The Industrial Disputes Act, 1947 contained a section to protect the employees in case of M&A activity taking place.[35] Although the Act stands repealed by the Industrial Relations Code, 2020, the legal protection available to the employees is still there in the 2020 Code.[36] However, isolating the antitrust enforcement from labour markets carries the risk of underenforcement of merger control in India.[37] The merger control regime in India has never witnessed a challenge to a combination due to an AAEC or a potential AAEC on labour markets.

B. Employees' Rights in case of Mergers and Acquisitions

If the product market is ignored from antitrust scrutiny, it can lead to concentration in the relevant market. Judging a combination from the standards of labour welfare may not fit within Section 3 and Section 4 of the Competition Act. However, in such combinations, employers are able to increase efficiency by destroying jobs. Under the existing merger control regime, this resultant increase in efficiency can be sufficient ground to excuse the combination.

Any merger or amalgamation activity entails change in the management and ownership of an establishment. The Industrial Disputes Act, 1947 envisions the settlement of disputes arising out of any industrial undertaking. Disputes arising out of M&A are included under the ambit of this act. Section 25FF of the Act was a safeguard available to employees in case of transfer of the establishment.[38]

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32 Avaantika Kakkar and Vijay Pratap Singh Chauhan,'India: Merger Control' (*GCR*, 25 March 2022)<https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-merger-control > accessed Feb 7, 2023.

33 Shauree Gaikwad,'Employees' Rights Arising Out of Mergers & Acquisitions: The Indian Judiciary's Perspective' (*The HNLU CCLS Blog*, 4 September 2020)<https://hnluccls.in/2020/09/04/employees-rights-arising-out-of-mergers-acquisitions-the-indian-judiciarys-perspective/ >.

34 C. Scott Hemphill & Nancy L. Rose, 'Mergers That Harm Sellers' (2018) 127 Yale L J 2078.

35 The Industrial Disputes Act, 1947 (14 of 1947).

36 The Industrial Relations Code, 2020 (35 of 2020).

37 Ashenfelter, O. C., Farber, H., & Ransom, M. R.,'Labor Market Monopsony'(2010) 28(2)Journal of Labor Economics 203–210.

38 The Industrial Disputes Act, 1947 (14 of 1947) s 25.

Although the impugned section is a provision of labour law, it mirrors the approach of antitrust enforcement.[39] It recognizes the fact that labour markets can suffer harm due to an M&A transaction.[40] Although the employer would naturally be the dominant party, the employer cannot abuse the dominant position by retrenching the worker without adequate notice and compensation.[41] The employer cannot subject a worker to unfavourable and deteriorating working conditions. Although there is no reference to anti-competitive effects, such practices lead to AAEC in the labour market.

As held in *Gurmail Singh vs State of Punjab*[42], the retrenchment of workers in case of transfer of the establishment is the subject of judicial review. Following the M&A transaction, the employees cannot be subject to unfair action by employers. Thus, promoting fairness and competition in markets throughout India includes labour markets within its ambit. Hence, worker standards have a strong nexus with antitrust enforcement.

In *Sunil Kr. Ghosh vs. K. Ram Chandran*[43], the Apex Court reiterated the restriction on the misuse or abuse of dominant position by the management in case of an M&A transaction taking place. If the workers refuse to consent to the transaction, they are entitled to compensation. The employers cannot engage in unfair or discriminatory conduct towards the labourers.

Although the incorporation of labour markets under Section 6 can have unexpected ramifications, The Competition Act, 2002, as a commercial legislation requires revision and experimentation from time to time. In a developing nation like India, experimentation is of paramount importance for any commercial statute.

C. Bringing labour welfare under the scrutiny of regulation of combinations: Expanding the scope of New Labour Code

Section 73 of the Industrial Relations Code, 2020 has incorporated the safeguards laid down under the erstwhile Section 25FF of the Industrial Disputes Act, 1947.[44] In case of transfer of

[39] Volpin, Cristina and Eric A. Posner,'Labor Monopsony and European Competition Law' (Concurrences,1 November 2020)..
[40] Bhaduri, Anik and Dhonchak, Anupriya, Antitrust as Anti-Discrimination: Labour Markets and the Gender Wage Gap (February 2, 2023).
[41] Khan, Lina and Vaheesan, Sandeep, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents' (2016) 11 Harvard Law & Policy Review 235.
[42] *Gurmail Singh v State of Punjab* (1991) 1 SCC 189.
[43] *Sunil Kr. Ghosh v K. Ram Chandran*(2011) 14 SCC 320.
[44] The Industrial Relations Code, 2020 (35 of 2020) s 73.

establishment, workers are entitled to compensation and notice. The Legislature, while bringing the new Labour Codes, has been conscious of preserving the protectionist measures for labour.

Section 2(m) of the Competition Act, 2002 recognizes all kinds of practices, related with any kind of trade under the ambit of practice.[45] The Industrial Relations Code, 2020 has mentioned a term which would enable the juxtaposition of the labour market and merger control arm of the Competition Act.

Under the Second Schedule, Entry 7 of the Industrial Relations Code, 2020, the Legislature has recognized "unfair labour practice" against the worker. It is an unfair labour practice to- "*To transfer a worker mala fide from one place to another, under the guise of following management policy*". Thus, any arbitrary or mala fide transfer made to justify a management decision undertaken in case of the transfer of an undertaking, would not only be discriminatory, but is explicitly an unfair labour practice. Thus, in order to prevent practice causing AAEC and promote freedom of all the participants, it is time to recognize the labour market in the Regulation of Combinations.

IV. UNWRAPPING CONUNDRUM AROUND NEW LABOUR CODES: THE SAGA OF DISCRIMINATION AGAINST THE LABOUR FORCE

A. Democratic Government: Preventing unfair trade practices

The Central Government has taken an active step in consolidating the two branches of worker welfare, viz, labour law and employment law. The Code on Social Security, 2020 has consolidated and streamlined the erstwhile scattered social security legislation. The Code on Wages is a legislative instrument to prevent any arbitrary deduction from wages. It prohibits discrimination in wage payment on the grounds of gender and codifies a list of grounds on which wage deduction is permissible by the employees. Thus, it is an instrument to prevent discrimination in the labour market and regulate the misuse of the dominant position of employers in such industrial establishments. The Occupational Safety, Health and Working Conditions Code, 2020 is a legislative tool to safeguard and enhance working conditions. Deterioration in safety and working

[45] The Competition Act, 2002 (13 of 2003) s 2(m).

standards can be a potential risk to the employees in such undertakings.[46] Although cost-cutting to prevent expenditure on providing safe working conditions can increase the efficiency of a firm, the Code has prohibited the same. Although the employees are subject to the control of the employers, they cannot be subject to unfair and unethical safety standards in the workplace.

Thus, the consolidated framework is a medium of legal certainty for the workers and safeguards them from financial precarity. Although the new Codes do not explicitly recognize anti-competitive practices, they do recognize the necessity to uproot the mischief of unfair and discriminatory trade practices against the workers. This Legislative framework would go in tandem with the factors that need to be examined for establishing abuse of dominance. Whether the impugned trade practice impacts the competition in an adverse manner? Whether the impugned practice deter entry within the concerned enterprise? Is the practice providing a medium for aggressive competition within the industrial sector or is it a medium to corner the labour resources?

The new labour codes do serve as a verbiage of rights for workers employed in industrial establishments. However, there are implementational roadblocks. The voluminous labour codes are accompanied by a high compliance monetary burden. The new codes provide a streamlined Dispute Resolution Mechanism. However, the process is cumbersome. Most importantly, the Codes only possess the capability of regulating labour concerns in an industrial undertaking. Industrial undertakings and enterprises are drastically different in terms of scope and operations.

As these labour concerns do have an interface with antitrust enforcement, bringing labour policy under Section 19(3) can have material outcomes. The CCI has the requisite expertise and composition to deal with labour issues. It is the function of the CCI to deal with cases relating to AAEC being caused by large-scale enterprises. CCI has been proactive in promoting a strong competitive environment in the economy by releasing Reports on different sectors such as the Pharmaceutical Sector, the E-Commerce sector, the Telecom Sector, etc. Similar steps within the labour market can establish an economy where the employers are not in a position to abuse their dominant position by exploiting loopholes in labour codes.

[46] The Occupational Safety, Health and Working Conditions Code, 2020 (37 of 2020).

B. Gig Worker: Opportunities and Challenges

Through the Code on Social Security, India has provided explicit legal recognition and protection to gig workers. Chapter IX lays down an exhaustive social security framework for the gig workers as well as the platform workers, which fall outside the purview of traditional employer-employee relationship. However, certain concerns faced by this sector remain unaddressed.[47]

Business entities engage in the use of algorithms. These algorithms can lead to collusions in the market.[48] In India, regulation of algorithmic collusion has been a challenge due to the legislative vacuum and a lax approach by CCI.[49] In *Samir Agrawal v ANI Technologies and Others*[50], the CCI was reluctant to recognize the AAEC arising out of algorithmically determined prices by Uber and Ola. These companies are crucial players within the gig economy of India.[51] The non-recognition of labour markets within the Competition Act will lead to similar mischief in the future. In *Shikha Roy v Jet Airways*[52], the CCI developed substantial antitrust jurisprudence against algorithmic collusion.

Platform workers operate within the booming digital market.[53] The recent Amendment to the Competition Act in India has been consciously drafted to address the issues within the digital economy. Algorithmic collusion is one such concern being addressed. Platform workers also face threats from such algorithmic collusion. As the labour markets remain ignored, the dignity of platform workers suffers due to algorithmic collusion within the platform economy.

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[47] Marshall Steinbaum, 'Antitrust, the Gig Economy, and Labor Market Power' (2019) 82 Law &Contemp Probs 45.

[48] Guest, 'Algorithmic Collusion: Can the Competition Act Protect against Self-Learning Algorithms?' (*IndiaCorpLaw*, 2022) <https://indiacorplaw.in/2022/01/algorithmic-collusion-can-the-competition-act-protect-against-self-learning-algorithms.html> accessed March 25, 2023.

[49] Afif Khan & Shifa Qureshi, 'Shikha Roy v. Jet Airways: A New Approach to Algorithmic Collusion' *(2022)* 5 De Lege Ferenda 84.

[50] *Samir Agrawal v CCI & Others*(2020) SCC OnLine NCLAT 81.

[51] Schmidt-Kessen, Maria José and Bergqvist, Christian and Jacqueson, Catherine and Lind, Yvette and Huffman, Max, 'I'll call my Union', said the driver - Collective bargaining of Gig Workers under EU Competition Rules' Copenhagen Business School (2020) CBS LAW Research Paper No. 20-43.

[52] *Shikha Roy v Jet Airways (India) Limited and Others* CCI, Case No. 32 of 2016 (3 June 2021).

[53] 'India's Booming Gig and Platform Economy: Perspectives and Recommendations on the Future of Work' (*NITI Aayog*, June, 2022).

V. CONCLUSION

The issue of labour discrimination is frequently discussed in India, but the legal and policy debates on reducing discrimination are predominantly centred on labour statutes and constitutional frameworks. When viewed from an economic lens, discrimination is simply because of an abuse of the dominant position by employers in the labour market and falls within the scope of competition law. The issue of ignorance of labour markets under the Competition Act, 2002 has deprived the workers of the remedies arising out of the developmental Competition Act. It is not an exaggeration to say that labour policy and unfair trade practices against the labour force is a relevant factor to determine the presence or potential of an anti-competitive practice in the economy.

Although the Competition Law Review Committee has given a recommendation to juxtapose labour law and competition law, in this article, the author notes that the recommendation of the CLRC does not provide sufficient robustness for this juxtaposition. Thus, it is imperative to summarize the conclusions derived from the above-drawn analysis. Firstly, it is exigent to synchronize the Competition Act with the Corporate Governance Regime. The "Social" factor in ESG and unfair trade practices against the workers have a strong commonality. If a firm or a business entity is facing competition in the market, it will have no other option than to ensure compliance with the requisite standards of corporate governance. Secondly, there is a glaring need for competition scrutiny of labour issues arising out of M&A activity. The Industrial Relations Code has brought in progressive changes. Subjecting these changes to voluminous debates and discussions between competition lawyers and the legislature can bring requisite reforms within labour markets. Thirdly, it is imperative to fill the vacuum existing within the New Labour Codes in order to safeguard the gig workers and platform workers from anti-competitive practices. Overall, it is concluded that in order to make the Competition Act more inclusive, a legislative overhaul is necessary to scrutinize the labour market.

The competition remedies discussed above can control the abuse of dominance and discrimination faced by the workers.[54] However, certain practical considerations bring the ability of competition remedies under question. Discrimination faced by the employees is a consequence of a larger socio-political reality in India, which makes it difficult for the workers to effectively exercise their

[54] Frauke Henning- Bodewig, *International Handbook on Unfair Competition*(Beck/Hart 2013) 306.

right to equality and freedom of trade at the workplace. A competitive labour market cannot by itself eliminate discrimination in the workplace. Implementation of the Competition Act on the labour market will have certain practical difficulties. Delineation of the relevant market is a crucial step in antitrust enforcement. Arriving at a uniform standard to delineate the relevant job market would require legislative attention as well as expertise in competition law. The Labour market is a hitherto unexplored territory for the CCI.