

Background Note: Developing Legislative Interventions for On-demand Platform Work in India

Introduction

In 2020-21, it was estimated that there were 77 lakh gig workers in India.¹ They constitute 1.5% of the total workforce in the country, with the figure expected to expand to 2.35 crore by 2029-30. In spite of their contribution, platform workers lack basic labour protections and job security, health and safety protection, protection from sexual harassment, social protections such as social security, maternity benefit among other rights guaranteed in labour laws to workers in India.

While platform workers have always been working in highly precarious conditions with strained financial returns, the Covid-19 pandemic laid bare the inherent inequities of the current socio-economic system. Deemed “essential” during the pandemic, the past few years saw a devastating impact on those working for on-demand apps or platforms engaged in work such as ride-hailing, home-based work, beauty services, food delivery services among others. Several platform companies engaging workers in India claim that they are not employees and instead term such workers ‘independent contractors,’ despite exercising significant control over them akin to traditional employment contracts. There is fierce debate about whether such workers are truly independent or are merely misclassified, in disguised employment relationships.

As noted by the ILO, the platform economy cannot be seen as a separate silo of the economy, but as a part of broader phenomena² such as casualisation of work, informalisation of the formal economy and de-mutualisation of risk, with dire implications for labour rights. It is essential to protect platform workers through robust legislative interventions, to ensure that they are not perceived as a low-cost substitute for employment. The present note outlines the need and means to regulate the platform economy through legislative interventions to secure labour rights of platform workers in the backdrop of emerging areas of the future of work, algorithmic management and changing nature of employment in India.

Defining the Problem: What is Platform Work?

¹ India's Booming Gig and Platform Economy: Perspectives and Recommendations on the Future of Work, NITI Aayog, https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf.

² Valerio De Stefano, The rise of the just-in-time workforce: On-demand work, crowdwork and labour protection in the gig economy, ILO, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf.

In this note, the focus is on the labour dimensions of ‘on-demand platform work’ which is on-demand work mediated through applications or digital platforms. This entails forms of work (such as transport, delivery, cleaning, running errands) offered and assigned through mobile apps or platforms, to be undertaken either immediately or at a pre-scheduled time slot, executed locally. While the terms ‘gig’ and ‘platform work’ are used interchangeably, this note uses the term ‘platform work’ for the sake of clarity and uniformity.

The Code on Social Security is one of the legislations that attempts to define gig work, platform work and other allied terms. It provides ambiguous and overlapping definitions for various terms such as ‘aggregators,’ ‘platforms,’ ‘gig workers’ which need to be examined carefully. The Code defines³ a gig worker as a person who performs work and earns from such activities outside of traditional employer-employer relationship. This kind of uncritical definition can serve to conceal the nature of work, creating an impression that it is a category of work where labour and employment laws do not apply, by default. While platform work can encompass genuine self-employment, it is pervaded by disguised employment relationships⁴ and requires careful assessment to determine the nature of employment in question, to categorise it appropriately.

Work in the platform economy is facilitated through only a terms of service agreement signed between the worker and the digital intermediary/platform service provider, unlike an employment agreement.⁵ This often leaves the worker highly exposed to market risks associated with the job, leading to their income instability. Furthermore, on-demand companies exercise considerable control over workers that are similar to traditional employment arrangements.⁶ Platforms exercise greater control over fixing prices and setting wages, set minimum standards of service, select and manage the workforce, supervise their work closely, and their pay is directed through the specific app or digital platform.

Issues for Consideration in Protecting Labour Rights in the Platform Economy

³ Section 35, Code on Social Security, 2020.

⁴ Valerio De Stefano, The rise of the just-in-time workforce: On-demand work, crowdwork and labour protection in the gig economy, ILO, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf.

⁵ Deepika M G, Madhusoodhan M, Labour Laws for Gig Workers in the Context of Labour Law Reforms, 57(30) EPW, <https://www.epw.in/journal/2022/30/perspectives/labour-laws-gig-workers-context-labour-law-reforms.html>.

⁶ Aayush Rathi, Amruta Mahuli, Ambika Tandon, Comments to the Code on Social Security, 2019, CIS (Oct 25, 2019), <https://cis-india.org/internet-governance/files/comments-to-the-code-on-social-security-2019>.

Examining existing laws and the gaps within

The Union government recently overhauled India's labour law regime, subsuming 44 central labour laws through the formulation of four labour codes: Code on Wages 2019, Industrial Relations Code 2020, Social Security Code 2020, and the Occupational Safety, Health and Working Conditions Code 2020. None of the aforementioned codes recognise the existence of the platform economy or regulate the same, with the exception of the Code on Social Security 2020. The recent Code on Social Security, 2020 is the first labour code to address gig work in any capacity, in the limited context of social security. However, even this code falls short on several counts in doing so.

The emerging point of contention is whether platform workers must enjoy the existing labour protections, considering the contractual, on-demand nature of their work. This begs the question of how inclusive the existing laws truly are when it comes to tying together several aspects affecting platform workers across various sectors. Furthermore, the lack of 'employee' status to gig workers renders them unable to form unions to best represent their collective concerns.⁷ The determination of whether something constitutes an employment relationship or "gig work" must be made based on the actual performance of work and the conditions it is subject to, not merely by how it is framed by the parties involved.⁸ Misclassification of work in an effort to avoid the application of the labour law regime is detrimental to workers and needs to be curtailed.

Need to Regulate 'Big Tech' Platform Companies

A recent exposé by The Guardian⁹ and the International Consortium of Investigative Journalists (ICIJ), documented the ways in which tech giant Uber, one of the biggest ride-sharing companies in the world, tried to bypass regulators and navigated loopholes in law, exploited violence against drivers and secretly lobbied governments during its aggressive global expansion. In India, in the aftermath of a rape incident by an Uber driver in New Delhi in December 2014, it was reported that Uber executives tried to shift the blame to government officials that they had carried out 'faulty background checks' on drivers, illegally obtained the rape victim's private medical

⁷ Aniruddh Nigam, Covid19 Crisis Calls for Increased Legal Protections for Our 'Gig Workers', Vidhi Centre for Legal Policy (Apr 6, 2020),

<https://vidhilegalpolicy.in/blog/covid19-crisis-calls-for-increased-legal-protections-for-our-gig-workers/>.

⁸ Sneha Visakha, Covid-19 Calls for Re-Thinking Social Security for India's Platform Workers <<https://vidhilegalpolicy.in/blog/covid-19-calls-for-re-thinking-social-security-for-indias-platform-workers/>>.

⁹ The Guardian <<https://www.theguardian.com/news/series/uber-files>>.

records¹⁰ and “critical elements of the new safety features” that were meant to be put in place had still not been implemented by Uber.¹¹ The investigation also found that Uber worked to evade regulatory probes by leveraging a technological edge, deploying a ‘kill switch,’ a blocking software used to remotely cut off access to Uber’s internal systems during raids by authorities.¹² The Uber Files case has only made startlingly clear the urgent need to regulate Big Tech, plugging the gaps in regulation and developing nimble regulation that adapts to the pace of technological change.

Working Conditions under the Platform Economy

It is evident that the unregulated nature of the platform economy has significant adverse impacts on platform workers. Regarded as universally applicable to all workers, the ILO recognises¹³ five categories of Fundamental Principles and Rights at Work viz. freedom of association and the effective recognition of the right of collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation and a safe and healthy working environment.¹⁴ Applying these principles to platform economy practices reveals several gaps and contradictions. The freedom of association, as discussed previously, is not available to platform workers due to the lack of an employer-employee status. Additionally, in a system where ratings and customer reviews play a major role in determining job continuation, many workers prefer not to exercise collective rights for fear of losing income.¹⁵ Platform workers are also extremely susceptible to discrimination. Explicit and implicit customer bias could create skewed results in reviewing performance. Since customer reviews play an important role in retaining platform workers, a biased review could be detrimental to the worker’s ability to continue to access paid work through the platform.¹⁶

¹⁰ Ritu Sarin, Anand Mohan J, Uber obtained Delhi rape victim’s medical records ‘illegally’, prompting lawsuits in US, The Indian Express (July 14, 2022) <<https://indianexpress.com/article/express-exclusive/uber-delhi-rape-victim-medical-records-illegal-lawsuits-us-8027462/>>.

¹¹ Shyamlal Yadav, Ritu Sarin, Explained: What is Uber’s profile in India, and what do the Files say about its operations in the country? The Indian Express, (July 17, 2022) <<https://indianexpress.com/article/explained/uber-in-india-uber-files-express-investigation-8021356/>>.

¹² Ritu Sarin, Uber’s crisis SOP: hit ‘kill switch’ meaning shut down to deny info, The Indian Express (July 11, 2022) <<https://indianexpress.com/article/express-exclusive/uber-kill-switch-sop-india-8021187/>>.

¹³ ILO Declaration on Fundamental Principles and Rights at Work, 1998, as amended in 2022.

¹⁴ Valerio De Stefano, The rise of the just-in-time workforce: On-demand work, crowdwork and labour protection in the gig economy, ILO, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf.

¹⁵ *ibid.*

¹⁶ *ibid.*

A recent survey on gig workers in India found that most workers had a hand-to-mouth existence.¹⁷ Their expenses were dominantly allocated to their recurring expenses (rent, education, household and medical expenses), and a significant portion going to work-related expenses (fuel, mobile recharge were recurring, while vehicle repair and maintenance was a non-recurring expense). In India, 2 in 10 gig workers are primary earners and are employed in the platform economy as their core livelihood.¹⁸ It was found that, in a given month, over 15% of workers faced a financial deficit of Rs 5,000 on average.¹⁹ Based on the survey, over 80% of gig workers do not own a credit card facility, 6.6% have current or outstanding loans, 11.5% have active EMIs, and 26.3% borrow from the peers they work with.²⁰ Furthermore, in addition to the ongoing risk of contracting COVID, there are significant health and safety risks for platform workers. Safety was a major concern for women platform workers, who had to frequently experience unfamiliar places or people and odd timings alone, resulting in uncertainties and fears associated with safety and security.²¹ Furthermore, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, does not mandate platforms to address sexual harassment in the workplace and nor does it include 'independent contractors' or platform workers in its purview, leaving a large number of women workers in a highly vulnerable position.²² Regulating the platform economy is critical to secure labour and social protections for workers across the spectrum, involved in various sectors of platform work.

Global Developments in Regulating Platform Work

Over the past decade, several countries have begun to update or introduce regulations in response to the gig / platform economy.²³ In March 2021 in the United Kingdom, in a case filed by two former Uber drivers, the UK Supreme Court upheld a decision to classify ride-hire drivers as employees, entitling them to a minimum wage, pension and holiday pay.²⁴ In the USA, the situation varies state-wise, with California, New York,

¹⁷ Mihika, Gig Work Is On Rise, But Most Gig Workers Live A Hand-To-Mouth Existence, Reveals Survey, Outlook India (Jul 13, 2022), <https://www.outlookindia.com/business/gig-work-is-on-rise-but-most-gig-workers-live-a-hand-to-mouth-existence-reveals-survey-news-208757>.

¹⁸ Brinda Sarkar, Over 15% of gig workers face a financial deficit of Rs 5,000 on average: Survey, The Economic Times (Jul 1, 2022), <https://economictimes.indiatimes.com/jobs/over-15-of-gig-workers-face-a-financial-deficit-of-rs-5000-on-average-survey/articleshow/92590916.cms>.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Institute of Social Studies Trust, Women Workers in the Gig Economy in India, An Exploratory Study <https://www.isstindia.org/publications/1623413826_pub_Women_Workers_in_the_gig_economy_in_India_-_An_Exploratory_Study.pdf>.

²² *ibid.*

²³ Timeline: Changing Regulation In The Gig Economy, Dec 1, 2021, Blogpost on Nium.com.

²⁴ Costas Pitas, Uber to give UK drivers workers' rights after court defeat, Reuters (March 17, 2021) <<https://www.reuters.com/world/uk/uber-give-uk-drivers-workers-rights-after-court-defeat-2021-03-17/>>.

New Jersey and Illinois moving to re-classify some gig workers as employees, while there is little federal regulation in the works. In the European Union, in 2019, the European Parliament approved²⁵ new rules setting minimum rights for 'on-demand' gig workers, to ensure more predictable hours, compensation for cancelled work, and an end to "abusive practices" around casual contracts. At a national level, Spain introduced new legislation recognising food-delivery riders from digital platforms as employees and also mandating algorithmic transparency for digital platforms, who need to inform workers on how their algorithms & AI affect working conditions, hiring decisions and layoffs.²⁶ Malaysia is also mulling legislation to protect the needs of those working in the gig economy.²⁷

Pathways for Legislative Interventions for Protecting On-demand Platform Workers in India

Legislative Interventions at the State level - A Critical Opportunity for Regulation

Myriad issues affecting labour rights fall²⁸ under the Concurrent List of the Constitution of India, ranging from 'economic and social planning; trade unions; industrial and labour disputes; social security and social insurance; employment and unemployment; welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits' among others. This enables states to make appropriate legislative interventions at the state-level based on the specific needs and aspirations of platform workers, based on the specific challenges they are facing in their respective social, economic and geographic contexts.

The rise of platform work is predominantly seen in urban centres, providing a critical opportunity for states in India to make legislative and policy interventions to protect the rights and interests of platform workers in their respective states. Therefore, States are uniquely placed to play a pivotal role in modelling how to regulate platform work and protect platform workers in India.

Conclusion

There is a critical need for regulating the platform economy and protecting the rights of workers engaged in on-demand, app-based platform work. The Code on Social

²⁵ EU law fixes minimum rights for 'gig economy' workers, BBC News, (April 16, 2019) <<https://www.bbc.com/news/world-europe-47947220>>.

²⁶ Gorka R. Pérez, Spain approves landmark law recognizing food-delivery riders as employees, El Pais (May 12, 2021) <https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html>.

²⁷ Claire Lee, Malaysia mulls legislation to protect gig workers' needs, hrmasia, (May 5, 2022) <<https://hrmasia.com/malaysia-mulls-legislation-to-protect-gig-workers-needs/>>.

²⁸ List III, Seventh Schedule, Constitution of India.

Security recognises gig and platform workers under the broad umbrella of the labour force in the context of social security, but it fails to capture the complexities of the gig economy, and interprets concepts ambiguously. The working conditions and social protections for workers, meanwhile, remain abysmal, with no income security, non-existent social security, lack of collective bargaining rights and representation of their grievances and concerns among others. States have a unique opportunity to pave the way for regulation of the platform economy and protecting platform workers in India.