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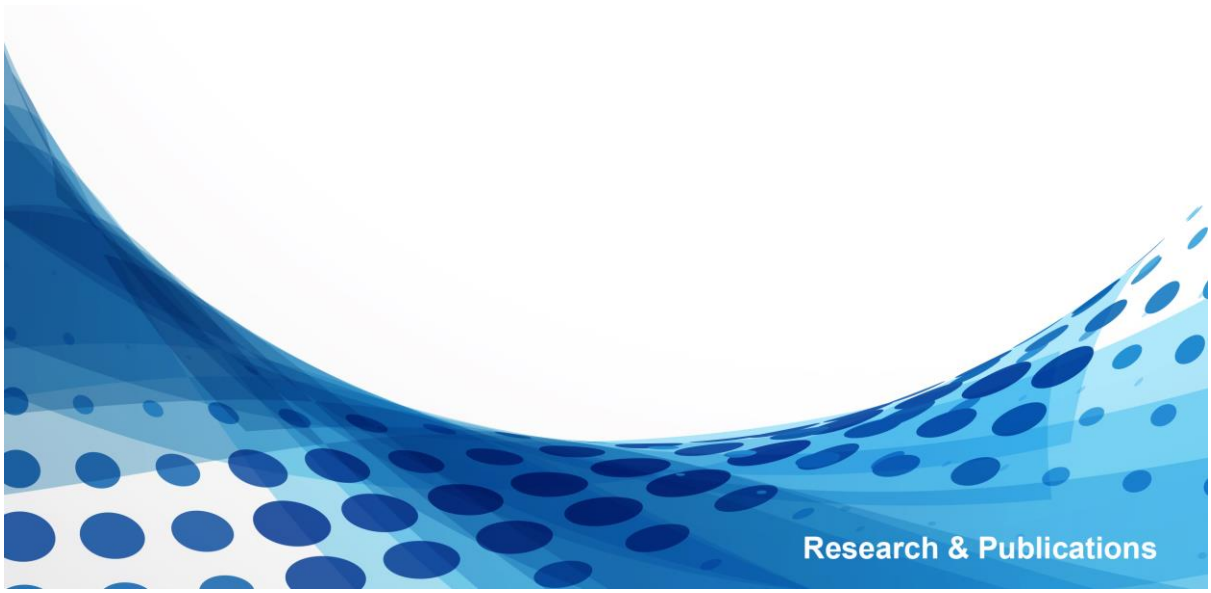

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Tests to Determine Employer-Employee Relationships in India: Looking towards the Future?

M P Ram Mohan* & Sai Muralidhar K[Ψ]

Abstract

The underpinning of an employee's social security benefits is an employer-employee relationship. Workers are traditionally classified as employees (contract of service) or independent contractors (contract for service). Over the years, Indian courts relied on the control, integration and multifactor tests to determine the correct nature of employment contracts. The paper explores the evolution of these tests and examines whether the standards of the burden of proof in classification disputes require modification. The authors then dissect the efficacy of the current multifactor tests in emerging platforms and gig economies by looking at standard form contracts signed by a popular food delivery platform in India. Finally, the ability of newly enacted labour codes, particularly the Code on Social Security 2020, to address the classification conundrum and its consistency with precedents is explored.

Keywords: Employer-Employee Relationships, Independent Contractor, Control Test, Integration Test, Multifactor Test, Gig Economy, Social Security

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Introduction

The labour law's primary objective is protecting labourers' rights and maintaining industrial peace.[1]The level and extent of these rights and protections vary depending on the classification of workers. A critical factor in understanding the degree of rights provided to the workers and the employer's liability lies in the terms of the contract between the hirer and the worker.[2] Workers are broadly classified as employees and independent contractors.[3] While there exist, several non-traditional workers who do not strictly fall within these two categories, the scope of this paper is limited to the employer-employee, Independent Contractors and platform and gig workers. Under common law, the categorisation of workers as employees is traced to the master-servant relationship under the U.K Statute of Artificers, 1563.[4] This was strengthened through a series of master-servant Acts in the mid-18th century.[5] The sole distinguishing factor between servants and independent contractors in the 18th century was the exclusivity between the servant and master. The master-servant relation evolved to facilitate wage payments and better supervise the performance of assigned work. This classification developed through common law and U.K legislation gradually seeped into Indian Labour law and policy in pre- and post-independent India.[6] The post-independent constitutional phase is characterised by beneficial interpretation of legislations and constitutional provisions to enhance the rights of the labourers.[7] This promise of social and economic justice in the preamble of the Indian Constitution calls for efficient redressal mechanisms and welfare measures for labourers.[8]

Over the years, the line drawn to classify workers as employees or independent contractors has gotten progressively blurred with new forms of workforces, particularly the gig economy.[9]

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[1]Richard Mitchell, Petra Mahy and Peter Gahan, 'The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development' (2014) 1 Asian Journal of Law and Society 413.
[2]Ingrid Landau, Petra Mahy and Richard Mitchell, 'The Regulation of Non-Standard Forms of Employment in India, Indonesia and Viet Nam' 74 <https://primarysources.brillonline.com/browse/human-rights-documents-online/the-regulation-of-nonstandard-forms-of-employment-in-india-indonesia-and-viet-nam;hrdhrd40222015053> accessed 22 November 2022.
[3]Nicholas J McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson Education Limited). 854
[4] Simon Deakin, 'The Contract of Employment: A Study in Legal Evolution' [2001] ESRC Centre for Business Research, University of Cambridge.
[5]ibid., Regulation of Servants and Apprentices Act, 1746 (20 Geo. II c. 19, preamble), Apprentices (Settlement) Act 1757 (31 Geo. II c. 11, s. 3), Regulation of Apprentices Act 1766 (6 Geo. III c. 25, s. 4).
[6]Mitchell, Mahy and Gahan (n 1).
[7]Karthik Shiva, 'The Unkindest Cut of All - Labour Law and the Covid-19 Crisis' (2020) 5 UPES LR 116.
[8]ibid. at 127
[9]Vikram Shroff, 'Employee Misclassification - The New World Order?' https://www.nishithdesai.com/Content/document/pdf/Articles/180802_A_Employee-Misclassification.pdf

Traditionally, employees are hired under a *contract of service*, and the hirer, i.e., the employer, has complete control over the work and manner in which it is done.[10] Independent contractors are hired under a *contract for service* to perform specific tasks in a manner they deem fit with minimal supervision.[11] And the term employee has been used and defined in several labour legislations in India.[12]

The elements required to constitute an employer-employee relationship have been applied similarly across the legislation.[13] This is evidenced by courts referring to precedents regarding this relationship in particular labour legislation while adjudicating disputes under other labour legislations. [14] The elements used to make this determination has evolved from a single element of control to a multifactor test looking at control, integration, mode of remuneration, nature of work, ownership of tools, economic control etc. Classifying workers as employees or independent contractors is vital in determining whether they qualify for various wage and social security benefits since only employees and not all workers receive these benefits. While every legislation has unique definitions of the term employee/worker/workman, a commonality under all these definitions is the existence of an employer-employee relationship. Each legislation has particular requirements to satisfy beyond being an employee to avail of benefits.

In 2020, India consolidated 29 labour legislations and enacted four new labour codes. They are Wage Code, 2019[15]; Social Security Code, 2020[16]; Occupational Safety, Health and Working Conditions Code, 2020[17]; and Industrial Relations Code, 2020[18]. One of the objectives of the

[10]Bhushan Kaul, 'Industry,' "Industrial Dispute," and "Workman": Conceptual Framework and Judicial Activism' 50 JILI 3.
[11]Shantimal Jain, 'Contract of Service and Contract For Service' (2003) 8 SCC J.
[12]The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, S. 2(f); Payment of Gratuity Act 1936, S. 2(e); The Employees' State Insurance Act 1948, S. 2(9).
[13]*Sushilaben Indravadan Gandhi v The New India Assurance Company Limited* (2021) 7 SCC 151 (Supreme Court).
[14] ibid; *Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments* (1974) 3 SCC 498 (Supreme Court).
[15] The Code on Wages 2019; See also - 'Forty-Third Report on "The Code on Wages Bill, 2017"' (Standing Committee on Labour 2018) <https://eparlib.nic.in/bitstream/123456789/783394/1/16_Labour_43.pdf> accessed 10 February 2023.
[16] The Code on Social Security 2020; See also - 'Ninth Report on "The Code on Social Security, 2019"' (Standing Committee on Labour 2019) <https://prsindia.org/files/bills_acts/bills_parliament/2019/SCR-Code%20on%20Social%20Security,%202019.pdf> accessed 10 February 2023.
[17] Occupational Safety, Health and Working Conditions Code 2020; See also - 'Fourth Report on "The Occupational Safety, Health and Working Conditions Code, 2019"' (Standing Committee on Labour 2019) <https://eparlib.nic.in/bitstream/123456789/788208/1/17_Labour_4.pdf> accessed 10 February 2023.
[18] The Industrial Relations Code 2020; See also -'Eighth Report on "The Industrial Relations Code, 2019"' (Standing Committee on Labour 2019) <https://eparlib.nic.in/bitstream/123456789/790791/1/17_Labour_8.pdf> accessed 10 February 2023.

recently enacted labour codes is to address the disparity of protections and benefits under the old legislation and extend benefits to organised and unorganised labour force sectors. Although these codes have been gazetted, they have not come into force yet as it requires States to pass legislation and schemes before it comes into force. Till then, the existing 29 labour legislations continue to be in force.

For instance, the Social Security Code 2020 (the Code) aims to extend various social security benefits and protections (health and life insurance, disability, maternity benefits, crèche etc.) to workers in organised and unorganised sectors.[19] Since labour law is a concurrent subject in the Constitution,[20]implementing these new benefits would commence when state legislatures lay down rules regarding the same.[21] The code, for the first time, defines gig and platform workers. This definitional understanding is examined in the context of judicial tests towards determining employer-employee relationships.

This paper is structured as follows: Part I analyses the evolution of tests employed by the Supreme Court of India in determining employer-employee relationships, from the earliest control test to the current multifactor test. Part II discusses whether the existing scope of employer-employee relationships determined by various courts and the new labour codes are sufficient for the modern workforce. We specifically look at the sufficiency in relation to the growing gig economy and gig workers and draw comparisons to their classification in U.K. and U.S.A. The paper concludes by looking at the future of this classification conundrum.

1. Scope of Employer-Employee relationship in India

The scope of employer-employee relationships in India has been guided by various tests employed in judicial precedents. This can be attributed to the term *employee* not being explicitly defined in legislations such as Industrial Disputes Act 1947 or Factories Act 1948. Even legislation defining the term "employee", such as Employee Provident Fund Act 1952, does not guide distinguishing an employee from an independent contractor. While these legislations fail to define the term "employee", an employer-employee relationship is a sine qua non for workers to avail the benefits provided under various legislations such as Industrial Disputes Act and Factories Act 1948. Benefits under these legislations extend only to

[19]Ministry of Labour and Employment, 'New Labour Code For New India' <https://labour.gov.in/sites/default/files/Labour_Code_Eng.pdf> accessed 21 November 2022.
[20] Item 22-24 of Concurrent List, 7th Schedule, Constitution of India
[21]The Code on Social Security 2020, S. 109(2).

workers/workmen, and to qualify as a workman, a prerequisite is being an employee under either legislation.[22] Although legislations have defined workmen/employees differently, courts have relied on the control and multifactor tests to distinguish employer-employee relationships from independent contractors. For example, in *Sushilaben Indravadan Gandhi v The New India Assurance Company Limited,*[23] the court referred to cases decided under the Factories Act, Industrial Disputes Act, Telangana Shops and Establishment Act etc., to understand the chronological evolution of this relationship.

Further, since most labour legislations are beneficial, they have consistently been interpreted to benefit the workers. The tests to determine the nature of the relationship have been used uniformly, irrespective of the primary labour legislation under which the dispute arose. This is despite slightly varying definitions of employees/workman across legislations. The earliest test applied to test the relationship was the control test.[24]

Before analysing the various tests, it is essential to note that the burden of proof in most claims lies on the party claiming an employer-employee relationship.[25] This means that parties seeking relief must have satisfied the tests in force at the time, espoused by the Supreme Court.

1.1 Control Test

The control test postulates that when the hirer has control over the work assigned and the manner in which it is to be done, an employer-employee relationship is established.[26] The control test is derived from common law application in vicarious liability claims.[27]

The earliest instance of applying the control test in India is in *Shivanandan Sharma v. Punjab National Bank Ltd.*[28] Here, a claim under Industrial Disputes Act arose as to whether a head cashier was the bank's employee. The bank had an agreement with a contracted treasurer who nominated people to work for discharging function of the bank under the agreement, including the cashier in question. The court established that although the treasurer chose the nominees

[22]The Factories Act 1948., S. 2(l) & (m) The Industrial Disputes Act 1947. S. 2(s)
[23] *Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited* (n 13).
[24]*Shivanandan Sharma v Punjab National Bank Ltd* AIR 1955 SC 404 (Supreme Court).
[25]Swapan Das Gupta v. First Labour Court of West Bengal, 1975 SCC OnLine Cal 295
[26]Rahul Satyan and Krithika Ramesh, 'Strikes and Industrial Action — Constitutional Freedom or Antitrust Violations?' (2016) 3 RSRR 89; *Dharangadhara Chemical Works Ltd v State of Saurashtra* (1957) 1 LLJ 477 (Supreme Court).
[27]Deakin (n 4), 29.
[28]*Shivanandan Sharma v. Punjab National Bank Ltd* (n 24).

who discharged the functions, [29] the bank had complete control over the nominee's disciplinary matters, leave of absence, how the nominees discharged their functions, and, importantly, their salaries were paid by the treasurer from funds provided by the bank.[30] It was determined that the bank manager had the same degree of control over the nominees as he did over numerous other employees, and thus an employer-employee relationship existed.[31] The bank also had the right to select bank personnel who would have the authority to supervise how the cash department conducted its work.[32] The court concluded the cashier was an employee of the bank. The scope of indirect employment was expounded[33] -

> "If a master employs a servant and authorises him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be equally with the employer, servants of the master."

While *Shivanandan Sharma* was the first instance of the control test being applied, an important step in the test's evolution was in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra.*[34] The dispute was whether agarias (salt workers) were employees and whether the claim under Industrial Disputes Act 1947 was maintainable. To prove the hirer had control over the hired person, it was ruled that control must exist in two aspects. Firstly, control over the nature of work performed and, secondly, the manner in which work is conducted.[35] It was argued that since agarias assisted several persons in performing work, they were independent contractors.

For the court, the true difference between workers and independent contractors was whether the work was being committed for oneself or a third party. The existence of external help would not rule out an employer-employee relationship. The court opined that the greater the degree of control, the more likely the hired person would be an employee.[36]Accordingly, the

[29]ibid. ¶9
[30]ibid.¶9
[31]ibid. ¶9
[32]ibid.¶11
[33]ibid.¶14
[34]*Dharangadhara Chemical Works Ltd. v. State of Saurashtra* (n 26).
[35]ibid.¶13
[36]ibid. ¶15relying on *Simmons v Health Laundry Company* [1910] 1 KB 543 (Court of Appeal)

agarias were held as employees and eligible for benefits under the Industrial Disputes Act 1947.

The court enunciates the manner to make this distinction as[37]-

> "The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was **due control** and **supervision** by the employer" (emphasis added)

Thus, the control test was expanded to mean *due control* and *supervision*. In numerous cases, the control test adopted in Dharangadhara remained the sole factor determining employer-employee relationships.[38]The degree and level of control required depended on the facts and circumstances.[39]

Applying the control tests espoused in Dharangadhara created difficulties in an evolving workforce. In *Birdhichand Sharma* v. *Civil Judge, Nagpur,*[40] a question was posed whether workers rolling beedis were employees. The court hinted that the task of beedi rolling was so simplistic that the employer would not provide any directions or exercise control over how the beedis were rolled.[41]

A direct application of the *Dharangadhara* test meant control and supervision was not exercised over the manner of work being performed. Therefore, a broad interpretation of the control test was applied. This was done by interpreting control over the manner in which work was done to have been exercised by the employer having the right to reject the final product. On this basis, the beedi workers were held as employees.

The difficulties in *Birdhichand* arose again in *Punjab National Bank* v. *Ghulam Dastagir.*[42] The question here was if a driver hired by a bank manager and paid from an allowance provided to the manager by the bank was an employee of the bank. Relying on the Dharangadhara control test, it was viewed that the bank had no control or supervision over the driver and, therefore, the driver was not an employee. The judgement lacked reasoning as to

[37]ibid.¶ 15
[38]Kaul (n 10) at 36.
[39]*V.P. Gopala Rao* v. *Public Prosecutor* (1969)
[40]*Birdhichand Sharma v Civil Judge, Nagpur* AIR 1961 SC 644 (Supreme Court).
[41]ibid. ¶ 8
[42]*Punjab National Bank v Ghulam Dastagir* (1978) 2 SCC 358 (Supreme Court).

why the principles relating to indirect employment laid down in *Shivanandan Sharma* would be inapplicable in this case. Further, the court strangely suggested the bank hire such drivers directly in the interest of "employment morality" and "institutional property" preservation.[43] In the interest of social justice, the court's suggestion to provide some monetary compensation was accepted by the bank

The reliance on principles of social justice in the *Punjab National Bank* judgement to ensure a just outcome shows the inefficiency of the control test as an exclusive factor in determining employer-employee relationships. Such occurrences led to the control test no longer being the sole determinative test. Over time, other tests, such as the organisation/integration tests, emerged.

1.2 Organisation/Integration Test

The first instance of the shift from the control test as a sole determinative factor was in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments.*[44] The Supreme Court observed the earlier reliance on the control test was attributed to the agrarian economy, where masters often exercised control over workers.[45] This occurred due to masters having more knowledge, skill and experience. The shift to a multifactor test is due to modern work being conducted by professionals where masters lack the technical expertise to direct the manner in which work is undertaken.[46] The court arrived at these conclusions relying on judgements in the U.K.[47] In *Silver Jubilee*, reliance was placed on a combination of the organisation test (also known as the integration test) as interpreted in the U.K. and the control test used in India.

The organisation test looks at the degree of integration in work committed in the hirer's primary business with the understanding that the higher the level of integration, the more likely the worker is to be an employee. A combination of control and integration tests allows professional workers to be classified as employees, notwithstanding a lack of control over the manner of

[43]ibid. ¶5
[44]*Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (n 14).
[45]ibid.
[46]ibid; relying on *Market Investigations Ltd v Minister of Social Security* (1969) 2 WLR 1 (Queen's Bench Division).
[47] *Market Investigations Ltd. v Minister of Social Security* (n 46); *Cassidy v Ministry of Health* [1951] 1951 2 KB 343 (Court of Appeal); *Montreal v Montreal Locomotive Works Ltd* 19471 DLR 161 (Pirvy Council).

work. Furthermore, the existence and potential use of factors beyond the control and integration in future cases was also recognised. This opened the path for the multifactor test.

The Supreme Court adjudicated whether the tailors working in a particular tailoring shop being paid on a piece rate basis were employees. The rejection of the finished product and the workers conducting work on the employer's premises using his machines were viewed as an exercise of control. The lack of exclusivity of the workers was disregarded as they were only required to be principally employed with the establishment, and multiple employers would not exclude them from the legislation. Ownership and provision of equipment by the employer were used to establish a contract of service since independent contractors usually bring their equipment. The tailors were accordingly recognised as employees under the Andhra Pradesh (Telangana Area) Shops and Establishment Act, 1951.[48]

The use of the control and integration tests in tandem was again seen in *Hussainbhai v. Alath Factory Thezhilali Union.*[49] The question arose whether workers in a rope factory hired by contractors who, in turn, had contracts with the petitioner were employees of the petitioner. The petitioner argued that the contractors hired the workers and were, therefore, under the contractors' employ. Applying the control and integration test, the Supreme Court observed that the work done by the workers was integral to the petitioner's business. Thus the workers should be considered employees. The ruling went one step further and stated even in the absence of traditional factors of control and integration, the workers may be regarded as employees by looking at the "economic realty" in the factual matrix. This was explained as:[50]

> "Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked

[48] Andhra Pradesh (Telangana Area) Shops and Establishments Act, 1951
[49] *Hussainbhai v Alath Factory Thezhilali Union* (1978) 4 SCC 257 (Supreme Court).
[50] ibid. ¶5

> truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor."

This decision created a safeguard against complicated employment arrangements designed to subvert the control and integration tests. As we can see, the judiciary predominantly used the control and integration tests but gradually provided an impetus to other factors. One of the earliest instances of articulating this shift was in *Ram Singh v. U.T. of Chandigarh.*[51] The court explained the need to go beyond the integration test[52]–

> "Integration' test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. **The other factors which may be relevant are - who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the 'mutual obligations' between them**." (Emphasis added)

The Control and Integration tests began to be applied with various other tests and factors in varying weightage based on the facts and circumstances.[53] This gave rise to a multifactor test which evolved to include numerous factors beyond control and integration.

1.3 Multiple Factor test

The control and integration tests continue to play a pivotal role in determining the true nature of the relationship. While this is ordinarily the case, there are several instances where a shift from the exclusive use of these two tests to a broader multifactor test in which control and integration are weighed alongside other factors is seen. For instance, while dealing with an appeal in relation to the classification of the workers, the Kerala High Court in *New Street Textiles Ltd v Union of India* remanded the case back to the trial court as they solely relied on the control test. [54] The court relied on the Supreme Court judgement in *Silver Jubilee* and

[51]*Ram Singh v UT of Chandigarh* (2004) 1 SCC 126 (Supreme Court).
[52]ibid. ¶15
[53]*Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited* (n 13).
[54]*New Street Textiles Ltd v Union of India* 1974 SCC Online Ker 120 (Kerala High Court). ¶ 16-18 relying on *Montreal v Montreal Locomotive Works Ltd* 19471 DLR 161 (Privy Council)at p. 169 &*Short v J.and W Henderson Ltd*(1946) 62 TLR 427 (House of Lords).

precedents in the U.K. while arriving at this conclusion. The verdict listed several factors to consider when hearing the case afresh. They were -

a) Control
b) Ownership of the tools
c) Integration/Organisation
d) Chance of profit
e) Risk of loss
f) the master's power of selecting his servant
g) the payment of wages or other remuneration
h) The master's right to control the method of doing the work, and
i) The master's right of suspension or dismissal

Using multiple factors to arrive at a proper and just determination of the nature of the relationship between workers and hirers often requires piercing the veil of the contract to look at true working conditions.[55] The worker's contractual terms frequently vary from the actual working conditions. These are mainly seen in contract labour hired under *The Contract Labour (Regulation and Abolition) Act, 1970* (CLRA).[56] The CLRA provides for three parties, i.e., the principal employer, contractor and contract labourer.[57] The contract labourers are hired by the contractors who enter into contracts for service with the principal employer. The primary responsibility of fulfilling the social security obligations under the Act and other labour legislations lies on the contractor. Suppose he fails to provide the same, the onus shifts to the principal employer.[58] Often, labourers appear to be in legitimate contract labour arrangements but, in reality, are *sham arrangements* designed to ensure the principal employer avoids providing the various benefits a regular employee receives.[59] Numerous judgements have noted the need to pierce the veil in sham arrangements. Most notably, in *Steel Authority of India Limited v. National Union Waterfront Workers,*[60] it was opined that where sham arrangements exist, the CLRA would not apply, and workers would be deemed employees and have the right to raise an industrial dispute in the same manner as an employee.

[55]Kaul (n 10); *Hussainbhai v. Alath Factory Thezhilali Union* (n 49).
[56]The Contract Labour (Regulation and Abolition) Act 1970.
[57]ibid. Section 2(b), (c), (g).
[58]ibid. Section 20
[59]Manishi Pathak, 'An Overview of Contract Labour Related Laws in India' [2017] NLS Bus. L. Rev. 20.
[60]*Steel Authority of India Limited v National Union Waterfront Workers* 2001 7 SCC 1 (Supreme Court).

To identify whether sham arrangements exist, the Supreme Court in *Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N.*[61] ruled that piercing the veil was necessary. Whether the arrangement was a sham was not considered a question of law. Such a determination must be adjudicated based on evidence provided in court by either party and not merely by referring to provisions. The relevance of factors other than control and integration to determine whether the workers are employees or independent contractors was brought out. The court examined the following factors -

a) who is appointing authority
b) who is the paymaster
c) who can dismiss
d) how long alternative service lasts
e) the extent of control and supervision
f) the nature of the job, e.g. whether it is professional or skilled work
g) nature of establishment
h) the right to reject

The court advocated using numerous factors while making such a determination based on prior judgements, ruling that there was no apriori fixed test to determine the nature of the relationship. In contract labour disputes, courts must decide if workers are employees or independent contractors and who is the true employer. A worker employed by a contractor will receive fewer benefits than if he is directly employed by the principal employer. The Supreme Court in *Bengal Nagpur Cotton Mills v. Bharat Lal*[62] laid down two factors to be considered to determine the true nature of the hiring entity, i.e., whether it is the principal employer or contractor:[63]

(i) Whether the principal employer pays the salary instead of the contractor; and

(ii) Whether the principal employer controls and supervises the work of the employee

[61] *Workmen of Nilgiri Coop Mktg Society Ltd v State of TN* 2004 5 SCC 514 (Supreme Court).
[62] *Bengal Nagpur Cotton Mills v Bharat Lal* 2011 1 SCC 635 (Supreme Court).
[63] ibid.¶10

Further, the mere provision of some directions to workers by the principal employer was not viewed as an exercise of control and supervision. Therefore, applying the multifactor test is effective only if the true employer is ascertained correctly.

1.3.1. Refinement of the multifactor test

The courts, over the years, have refined the scope of the multifactor test by adding various factors based on the facts and circumstances. The Supreme Court itself, in different cases, uses multiple sets of factors while deciding cases. This can be seen in different sets of factors being laid down in *Sushilaben, Balwant Saluja,*[64] *Silver Jubilee* etc. An example of this can be seen by comparing *Silver Jubilee (*1974*), Balwant Saluja (2014)* and *Sushilaben (2020),* where the cases used different factors. Curiously, the Supreme court in *Sushilaben* did not reference *Balwant Saluja* while analysing the chronological evolution of the employer-employee relationship. For instance, in *Balwant Rai Saluja v. Air India Ltd*,[65] the factors that were considered are, who appoints workers; who pays salary/remuneration; who has the authority to dismiss; who can take disciplinary action; whether there is continuity of service, and the extent of control and supervision, i.e., whether there exists complete control and supervision.

The ruling required *effective and absolute control* over the workers by the employer for an employer-employee relationship to exist. Sufficient control would not be enough.[66] The court found a lack of effective and absolute control and ruled that they were not employees except under the Factories Act since it deems all canteen workers of an establishment as employees. This deviated from prior rulings where the degree of control required depended on facts and circumstances.[67]

More recently, there have been attempts to bring consistency in applying the multifactor test. In *Sushilaben Indravadan Gandhi v The New India Assurance Company Limited*,[68] the Supreme Court revisited the distinction between a *contract of service* and a *contract for service.* After analysing a plethora of cases both in India and the U.K., the multifactor test was reiterated, consisting of the following factors -

[64] *Balwant Rai Saluja v Air India Ltd* 2014 9 SCC 407 (Supreme Court).
[65] ibid.
[66] ibid. ¶ 14, 80.
[67] *Birdhichand Sharma v. Civil Judge, Nagpur* (n 40).
[68] *Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited* (n 13).

a) Control over the work and manner in which it is conducted
b) Level of integration into employers' business
c) Manner in which remuneration is disbursed to workers
d) Economic control over workers
e) Whether work being conducted is for oneself or a third party

In *Sushilaben*, priority was given to factors of control and mode of remuneration, noting these would ordinarily suffice to identify the true nature of the relationship unless other contractual terms indicated otherwise. Such a conclusion was made based on existing precedents in U.K.[69] Apart from this, the ownership of tools required to perform the worker's tasks was considered relevant to distinguish independent contractors from piece rate workers, particularly in cases such as *Silver Jubilee*. In *Sushilaben*, the articulation of the control test is important as it varies from that in *Balwant Sahuja*. This was elucidated[70]:

> "The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a **sufficient degree of control** by the employer and **other factors** would be a test elastic enough to apply to a large variety of cases." (Emphasis added)

The use of the term *"sufficient degree of control"* is in stark contrast to the *"effective and absolute control"* ruling in *Balwant Sahuja*. Surprisingly, no reference to *Balwant Sahuja* was made while discussing the evolution of the various tests. Presently, two contrasting standards of control are laid down by the Supreme Court. Although the cases dealt with are under different legislations, the courts have applied this three-tier test (Control, Mode of Payment & other factors of the multifactor test) in varying degrees to determine an employer-employee relationships. To claim benefits under the legislation, workers must prove that they are employees and fulfil the other criterion set out by particular legislation. While the manner of remuneration as espoused under the three-tier test holds relevance, an analysis of precedents[71] shows a greater reliance on integration/organisation tests by Indian courts.

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[69]*Short v. J.and W. Henderson. Ltd* (n 54); *Montreal v. Montreal Locomotive Works Ltd* (n 47); *E v English Province of Our Lady of Charity* (2012) 7 WLUK 395 (Court of Appeal); *Stevenson Jordan & Harrison v MacDonald & Evans* (1952) 1 WLUK 425 (Court of Appeal); *Lee Ting Sang Appellant v Chung Chi-Keung and Another* (1990) 2 WLR 1173 (Privy Council).
[70]*Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited* (n 13).
[71]*Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (n 14); *Ram Singh v. UT of Chandigarh* (n 51).

The tests for determining employer-employee relationships evolved from a singular test of control to a dual test of control and integration and finally to the multifactor test. The relevant question is whether the multifactor test sufficiently safeguards the labourers interests or requires further evolution to meet the social justice targets of labour law.

2. Sufficiency of the current test of Contract of Service in a modern workforce

A common theme and trend in the cases discussed is a concerted attempt by employers to mask the relationship between themselves and workers by disguising them as independent contractors.[72] The Supreme Court noted that this is to subvert the legislative mandate and avoid responsibility for providing social security benefits.[73] Further, labour disputes before various tribunals take years to be resolved, and a prerequisite in such cases is establishing employer-employee relationships. The long pendency[74] has adverse effects on workers who require immediate benefits on a day-to-day basis.[75]An important question, therefore, is the sufficiency of the multifactor test for determining employer-employee relationships in a modern workforce.

This section looks at two aspects of the test. First, whether the burden of proof in establishing employer-employee relationships should remain with the workers or shift to employers. Second, the nature of classification of a host of new labour forms, such as gig and platform workers, under the Supreme Court's multifactor test.

2.1 Burden of Proof in Labour Disputes

The burden of proof in labour disputes ordinarily lies on the person making claims under evidence law. The Supreme Court and High Courts have reiterated that the burden of proof of

[72]*Bhilwara Dugdh Utpadak Sahakari Samiti Ltd v Vinod Kumar Sharma* 2011 15 SCC 209 (Supreme Court); Deb Kusum Das, Homagni Choudhury and Jaivir Singh, 'Contract Labour (Regulation and Abolition) Act 1970 and Labour Market Flexibility: An Exploratory Assessment of Contract Labour Use in India's Formal Manufacturing' Indian Council for Research on International Economic Relations <https://think-asia.org/bitstream/handle/11540/11010/Working_Paper_300.pdf?sequence=1> accessed 11 January 2023; Subir Bikas Mitra and Piyali Ghosh, 'Engaging Contract Labour: Learnings from Landmark Judgements' (2022) 47 Management and Labour Studies 97.

[73]*Steel Authority of India Limited v. National Union Waterfront Workers* (n 60).

[74]Special Correspondent, '8,000 Cases Pending for over 5 Years in Labour Courts, Tribunals' *The Hindu* (21 September 2020) <https://www.thehindu.com/news/national/8000-cases-pending-for-over-5-years-in-labour-courts-tribunals/article32661996.ece> accessed 1 December 2022.

[75]'80 per Cent Indian Employees Run out of Salary before Month Ends: Survey' (*The New Indian Express*) <https://www.newindianexpress.com/business/2021/nov/18/80-per-cent-indian-employees-run-out-of-salary-before-month-ends-survey-2384961.html> accessed 7 December 2022.

establishing an employer-employee relationship to avail the benefits of various legislations lies on workers claiming such benefits as per the principles of evidence law.[76] The Supreme Court held:[77]

> "It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him."

The only exception to this general evidentiary standard is in cases dealing with references made under legislations such as the Industrial Disputes Act.[78] Here, a presumption of an Industrial Dispute exists.[79] A dispute can exist under the Industrial Disputes Act only when an employer-employee relationship exists.[80] Therefore, the reference of a dispute presupposes the existence of an employer-employee relationship. Hence, a reverse burden of proof lies on the employer to prove there was no employer-employee relationship. Unless the employer adduces sufficient evidence to prove non-fulfilment of the multifactor test, the presumption of an employer-employee relationship stands.[81]

The labour force in India mainly consists of marginalised and economically backward people.[82] Understanding whether the burden of proof lying on them is consistent with the legislative objectives and constitutional principles of protecting labourers' rights and improving their welfare is essential.[83] There is a profound disparity in the bargaining power of workers and hirers in India; the workers often have no choice but to enter into sham arrangements.[84] Sham arrangements refer to artificial arrangements created by employers to reduce their legal obligations towards providing social security and other benefits that employees ordinarily receive. Article 39(e) of the Constitution of India summarises the broad approach of labour law:[85]

[76] *Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N* (n 61).
[77] ibid.
[78] The Industrial Disputes Act., 1947, Section 10
[79] *Rallis India Ltd v State of West Bengal* 1983 1 LLJ 293 (Calcutta High Court).
[80] The Industrial Disputes Act., S. 2(k)
[81] *Electronics Corporation of India Limited a Service Engineers Union v Electronics Corporation of India Limited* 2004 4 Mah LJ 151 (High Court of Bombay).
[82] 'Survival of the Richest:The India Story' (Oxfam India 2022).
[83] *Bhilwara Dugdh Utpadak Sahakari Samiti Ltd .v . Vinod Kumar Sharma* (n 62).
[84] Das, Choudhury and Singh (n 72). Page 26
[85] Art. 39(e), Constitution of India

> "That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;."

The Indian judiciary has taken an expansive approach in classifying labourers as employees through beneficial construction of labour laws and piercing the veil of sham arrangements.[86] However, the same is a reactive approach to the predatory tactics of numerous industries.[87]A more proactive approach would be to change the standard of the burden of proof required through legislative amendments, similar to the AB5 legislation in California, detailed in the next paragraph and later sections. Such a move may help reduce the problems associated with sham arrangements. This would occur as employers would have to prove the non-existence of an employer-employee relationship which would be difficult when structured as sham arrangements.

The State of California incorporated the A.B.C. test laid down in the *Dynamex* case earlier through the AB5 legislation[88] passed in 2019. Here, there exists a presumption of an employer-employee relationship, and the onus falls upon the hiring entity to prove the relationship is not one of an employer-employee.[89] A rebuttable presumption of employment leads to decreased attempts by employers to misclassify employees (wrongful classification) of an employee as independent contractors or vice versa.[90] A rebuttable presumption of employment may help reduce the harm caused by sham arrangements in India.[91]

2.2 Classification of Gig & Platform Workers in India

The tests to classify workers have only recently shifted from agrarian roots to reflect the impact of industrialisation and consumer-driven economies. In *Silver Jubilee*, a changing workforce justified a modification in the test to determine the true nature of the relationship.[92] With the

[86]Shiva (n 7).
[87]ibid.
[88]'Bill Text AB-5 Worker Status: Employees and Independent Contractors.' <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5> accessed 6 December 2022.
[89]Davidov, Guy and Alon-Shenker, Pnina, The ABC Test: A New Model for Employment Status Determination? (July 28, 2022). 51 Industrial Law Journal 235-276 (2022), Hebrew University of Jerusalem Legal Research Paper No. 22-14, Available at SSRN: https://ssrn.com/abstract=4175171
[90]Anna Deknatel and Lauren Hoff-Downing, 'ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes' (2015) 18 U. Pa. J.L. & Soc. Change 53.
[91]*Steel Authority of India Limited v. National Union Waterfront Workers* (n 60).
[92]*Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (n 14).

growth of the digital economy, a new type of workforce has emerged. The rise of digital labour platforms is a significant component of the digital economy. The International Labour Organisation (I.L.O) explains:[93]

> "An important component of the platform economy is digital labour platforms which includes both web-based platforms, where work is outsourced through an open call to a geographically dispersed crowd ("crowdwork"), and location-based applications (apps) which allocate work to individuals in a specific geographical area, typically to perform local, service-oriented tasks such as driving, running errands or cleaning houses."

In its report, the National Institution for Transforming India (NITI) Aayog categorises gig workers into platform and non-platform gig workers.[94] It also estimates the number of gig workers to nearly triple by 2029-2030.[95] The report acknowledged the need to restructure existing labour legislation to ensure social security benefits reach workers outside traditional employer-employee relationships.[96] The report states –

> "The consequent platformization of work has given rise to a new classification of labour platform labour — **falling outside of the purview of the traditional dichotomy of formal and informal labour**." (Emphasis provided)

The following section explores whether categorising gig and platform workers as independent contractors would stand scrutiny if analysed against the multifactor test. Further, it is necessary to examine how the new labour codes classify these workers and test them against the multifactor criteria.

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[93]Inclusive Labour Markets and Labour Relations, 'Digital Labour Platforms (Non-Standard Forms of Employment)' <https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm> accessed 3 December 2022.

[94] NITI Aayog, 'India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work' (2022) <https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf> accessed 3 December 2022.

[95]NITI Aayog NITI Aayog, 'India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work Policy Brief' (2022) <https://www.niti.gov.in/sites/default/files/2022-06/Policy_Brief_India%27s_Booming_Gig_and_Platform_Economy_27062022.pdf> accessed 3 December 2022.

[96]NITI Aayog (n 94). 72-73, 'Fairwork India Ratings 2022: Labour Standards in the Platform Economy' (Fairwork 2022).

2.2.1 Application of Multifactor test to Gig and Platform Workers

The application of the multifactor test to digital labour platforms would vary based on the exact nature of the work being conducted and the employment structure within the organisation. A good example to analyse is India's food delivery industry, which is presently dominated by two companies, i.e., Swiggy and Zomato. The labour legislation in force does not formally classify gig and platform workers. Therefore, an analysis of the terms of the contract is required to understand whether they are employees or independent contractors.

Zomato's terms of the agreement have already been studied.[97] Cab aggregator unions had filed petitions seeking to be considered employees (discussed later). The present study looks at the terms of the agreement between Swiggy and its delivery partners[98] since this has not been analysed yet. The terms and conditions Swiggy delivery partners are required to consent when registering describes the relationship as "Non-Exclusive and Principal-to-Principal". The Pick-up and Delivery Partner (PDP) relationship with Swiggy is explained in Clauses 3 and 6 of the agreement. Clause 6(i) describes the relationship as follows [99]-

> "It is expressly understood that the PDP is an independent entity and Swiggy has no control or supervision over the PDP with respect to the amount of time for which, and the manner in which he/she carries out his/her obligations under this Agreement."

A number of other terms and conditions of the agreement paint a different picture from that depicted under Clause 6(i) of the agreement regarding the true nature of the relationship. Within the framework of existing tests, employer-employee relations can be proved through several factors, including the right to take disciplinary action and termination.[100] The agreement gives Swiggy authority to suspend and dismiss the worker for 15 days for breach of any of the terms of the agreement they sign. During this time, the worker must rectify any contract violation or guidelines to Swiggy's satisfaction. When superimposing the various tests discussed above, Swiggy fulfils the control test conditions by insisting that delivery drivers commit the pick-up and drop-offs themselves and are barred from assigning it to others.[101]Although the agreement

[97] Mohan Mani and Sachin Tiwari, 'Platform Employment During Covid-19 - A Study of Workers in Food Delivery Sector in Bengaluru' (Institute of Public Policy National Law School of India University (NLSIU) Bangalore).
[98] Pick Up and Delivery Partner Agreement, Swiggy
[99] ibid, Clause 6(i)
[100] *Ram Singh v. UT of Chandigarh* (n 51); *Balwant Rai Saluja v. Air India Ltd* (n 64).
[101] Pick Up and Delivery Partner Agreement, Swiggy Clause 8

stipulates Swiggy will not mandate working hours[102] to the delivery persons, the guidelines in some cities require the part-time and full-time drivers to pick up 60 and 180 orders per week, respectively.[103] Other factors, such as the mode of payment,[104] are fulfilled by Swiggy's Payout Scheme. Even when customers pay Cash, the delivery personnel must deposit the money with Swiggy per their guidelines.[105]

Swiggy advertises itself on Google Play Store as a food and grocery delivery application.[106] Therefore, going with the tests, the delivery partners would most definitely form an integral part of the core business. Without delivery partners, the software application by itself would be unable to fulfil its stated objective. Therefore, the organisation/integration factor is also fulfilled.

Some argue that the lack of exclusivity of the delivery personnel to a particular delivery provider and the ownership of the delivery vehicles indicates the delivery personnel are independent contractors.[107] In *Silver Jubilee*, the lack of exclusivity was concluded to be immaterial in determining the nature of the relationship. Further, the primary tool used to conduct the delivery is the Swiggy delivery application on Play Store, which Swiggy owns. The lack of exclusivity is, therefore, immaterial to ascertaining the nature of the relationship.

The array of factors laid down by the Supreme Court in cases such as *Balwant Sahuja*[108] *or Sushilben*[109] is largely fulfilled when examining the terms of the agreement and its enforcement. Other studies have similarly shown delivery services such as Zomato resort to similar arrangements to ensure delivery partners are treated as independent contractors. [110]

[102] ibid, Clause 3(2)
[103]Dt Next Bureau, 'Swiggy Delivery Partners Protest against New Rules in Chennai' (*DT next*) <https://www.dtnext.in/city/2022/09/20/swiggy-delivery-partners-protest-against-new-rules-in-chennai> accessed 5 December 2022.
[104]Pick Up and Delivery Partner Agreement, Swiggy Clause 2.1
[105] Pick Up and Delivery Partner Agreement, Swiggy Clause 1.1
[106]'Swiggy Food & Grocery Delivery – Apps on Google Play' <https://play.google.com/store/apps/details?id=in.swiggy.android&hl=en_IN&gl=US> accessed 5 December 2022.
[107]Sahaj Mathur, 'Labour Law and the Gig Economy: Towards a Hybrid Model of Employment' (*India Corp Law*, 25 December 2022) <https://indiacorplaw.in/2022/12/labour-law-and-the-gig-economy-towards-a-hybrid-model-of-employment.html> accessed 30 December 2022.
[108]*Balwant Rai Saluja v. Air India Ltd* (n 64).
[109]*Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited* (n 13).
[110]Mani and Tiwari (n 97)., 28

In 2017, the Delhi Commercial Driver Union filed a writ petition before the Delhi High Court[111] arguing for Ola and Uber Drivers to be considered employees under various labour legislations. The petition was withdrawn as the Drivers Union decided to attempt to solve this problem through dialogue with the appropriate government under the Industrial Disputes Act.[112] Recently, in 2021 a petition was filed in the Supreme Court by The Indian Federation of App Based Transport Workers (IFAT), arguing against the constitutionality of contracts between delivery partners and service aggregators.[113] IFAT argues gig and platform workers not being recognised as employees under labour legislations or unorganised workers under the Unorganised Workers' Social Security Act, 2008[114] violates Article 14 of the Constitution.[115] They argue that similarly situated workers performing similar tasks and working outside the gig economy are recognised as employees and, therefore, gig workers are unfairly discriminated against due to misclassification, and that violates Article 14.

IFAT relied on judgements relating to gig workers' rights in the U.S.A. and U.K. The State of California, for the longest time, followed the Borello test laid down in *S. G. Borello& Sons, Inc. v. Department of Industrial Relations*,[116] which looks at an array of factors and is similar to the multifactor test followed in India. However, recently through judicial and legislative change, the A.B.C. test has instead been adopted. Under the A.B.C. test, the onus of proving that the worker is an independent contractor lies on the employer. It postulates that the employer must prove[117] –

> "(a) That the worker is free from control and direction over performance of the work, both under the contract and in fact;
> (b) That the work provided is outside the usual course of the business for which the work is performed; *and*

[111] Delhi Commercial Driver Union v Union of India & Ors, W.P.(C) 3933/2017
[112] Order dated 12.12.2017 in W.P.(C) 3933/2017 (Delhi Commercial Driver Union v Union of India & Ors.)
[113]The Indian Federation Of App Based Transport Workers (IFAT) v Union of India, WP (C) 1068/2021. The introduction of the Social Security Code partially satisfies some of the concerns raised in the petition and therefore, it will be interesting to see how the Supreme Court approaches the same. Further, the case has not been listed for an over a year and the governments reply and stance on the petition is yet to be made official.
[114]The Unorganized Workers' Social Security Act, 2008, S. 2(m).
[115] Article 14 of the Constitution of India guarantees equality before the law and equal protection of the laws to any person in India.
[116]*S G Borello& Sons, Inc v Department of Industrial Relations* (1989) 48 Cal 3d 342 (Supreme Court of California).
[117]*Dynamex Operations West, Inc v Superior Court* (2018) 4 Cal 5th (Supreme Court of California). page 57

(c) That the worker is customarily engaged in an independently established trade, occupation or business"

If any of the three factors are not fulfilled, the presumption of an employer-employee relationship stands. The Supreme Court of California in *People v. Uber Techs., Inc*[118] applied the A.B.C. test while hearing an appeal against a preliminary injunction barring Uber and Lyft from classifying drivers as independent contractors. Uber and Lyft contented they were multi-side platforms connecting customers and drivers. Disregarding this, their core business was ruled as providing pick-up and drop-off services.[119] Further, since Uber and Lyft control fares and set minimum driver rating standards, they were held to have considerable control over workers.[120] The Supreme Court, therefore, opined that prima facie, the claim is likely to succeed and upheld the preliminary injunction. To undo the implications of the California Supreme Court judgements, a ballot initiative called Proposition 22 was passed by popular vote, which classified App-Based Transportation and Delivery Companies workers as independent contractors. However, a ruling in the Superior Court of California, County of Alameda, rendered the ballot initiative unconstitutional.[121] The California Court of Appeal on 13th March 2023 overruled the ruling of the lower courts and upheld the portion of Proposition 22 that allowed for App-Based Transportation and Delivery Companies to be deemed as independent contractors. However, certain portions of the proposition that created barriers towards unionisation still remain unconstitutional.[122] The judgement is likely to be appealed before the California Supreme Court.[123]

In the U.K., the Supreme Court, in 2021, in an appeal, decided the classification of Uber drivers in *Uber BV and others v Aslam and Others.*[124] The Court of Appeal granted Uber drivers worker status under the Employment Rights Act 1996 Pt XIV.[125] Pertinently, the "worker" status differs from that of "employee" in the U.K., and workers receive fewer benefits than employees under

[118]*People v Uber Techs, Inc* 56 Cal App 5th 266 (Court of Appeal, California).
[119]ibid.
[120]ibid.
[121] *Castellanos v State of California* Case No RG21088725 (Superior Court of California, County of Alameda).
[122] *Castellanos et al v State of California et al* (Court of Appeal of the State of California First Appellate District Division Four).
[123] The Associated Press, 'California Court Says Uber, Lyft Can Treat State Drivers as Independent Contractors' *NPR* (14 March 2023) <https://www.npr.org/2023/03/14/1163301631/california-court-says-uber-lyft-can-treat-state-drivers-as-independent-contracto> accessed 24 March 2023.
[124]*Uber BV and others v Aslam and others* 2021 UKSC 5 (Supreme Court of UK).
[125]Employment Rights Act 1996 Pt XIV, S. 230(3)

the law.[126] While analysing whether the drivers came within the definition of "worker", it was opined that the only agreement between Uber and the drivers was a service agreement laying down the terms of their work. Therefore, the nature of the relationship was determined based on the manner in which the work was committed. The court observed that Uber fixed the remuneration, constantly monitored the drivers through the app and logged them out when their cancellation rate exceeded a particular level. Further, it was noted the app ultimately aimed to provide standardised services to the customers. Accordingly, the drivers were ruled as workers under the Act and could avail of associated benefits.

In India, IFAT relying on these judgements sought gig workers to be recognised as employees or unorganised workers. The case is still pending before the Supreme Court of India. The outcome of the same would have far-reaching consequences for the future of gig and platform workers.

2.2.2 Impact of New Labour Codes on Gig and Platform Workers

While the labour legislation in force presently, such as the Industrial Disputes Act, Factories Act, and Employees Provident Fund Act, 1952 (E.P.F.), do not classify gig or platform workers, the recently enacted labour codes by the Parliament attempt to address the classification of gig and platform workers. In particular, the Code for Social Security, 2020,[127] defines gig and platform workers. Since labour is part of the concurrent list of the 7th Schedule of the Constitution,[128] though the code has been gazetted, it requires various state legislatures and governments to enact legislation and rules at a state level. Section 2(35) of the Code defines gig workers as [129]-

> "Gig worker" means a person who performs work or participates in a work arrangement and **earns from such activities outside of traditional employer-employee relationship**;" (emphasis added)

Section 2(60) defines platform work as [130]-

[126]NITI Aayog (n 94).
[127]The Code on Social Security, 2020.
[128] Item 22-24 of Concurrent List
[129]The Code on Social Security, 2020.
[130]ibid.

> **"Platform work" means a work arrangement outside of a traditional employer-employee relationship** in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment;" (emphasis added)

This legislative mandate explicitly brings gig and platform workers outside the traditional employer-employee relationship. The multifactor test, when applied, proves the existence of an employer-employee relationship between gig and platform workers and their employers. This creates a conflicting position between existing tests and the new legislative mandate. This conflict could be rationalised by arguing that the new legislation creates a third form of workers alongside employees and independent contractors. Historically, independent contractors acted as an umbrella term encompassing all workers who were not employees.[131] However, since Independent contractors do not receive an array of social security benefits as envisaged under the code, the conflict can be rationalised only by creating a third broad category of workers called non-traditional workers, which would encompass gig workers and a host of other workers. Providing some of the social security benefits received by employees to gig workers is consistent with them being considered a separate category of workers.[132] The NITI Aayog report on the gig economy stated that gig workers constitute a new category outside the traditional formal and informal economy.[133] This approach is consistent with the U.K., where the term "worker" is a separate category distinct from employees and independent contractors/self-employed persons.

The Social Security code requires the Central Government to extend certain social security benefits to gig and platform workers through welfare schemes. They presently include,[134] life and disability cover; accident insurance; health and maternity benefits; old age protection; crèche.

Suggestions to classify gig and platform workers as a distinct category of workers, known as hybrid workers,[135] to cover them under labour legislation still raises questions about the metrics by which they are categorised as hybrid workers instead of employees or independent

[131] Glanville Williams, 'Liability for Independent Contractors' (1956) 14 The Cambridge Law Journal 20.
[132]Mathur (n 107).
[133]NITI Aayog (n 94).
[134]The Code on Social Security., S. 114
[135] Mathur (n 107).

contractors. How the Supreme Court deals with this apparent conflict will determine the rights of these workers.

The legislative mandate under S. 114 of the Social Security Code states the Central Government "may frame" such social security benefits, indicating a non-mandatory approach for gig and platform workers. Section 109 of the Social Security Code, however, uses the term “shall frame and notify” in reference to the above five schemes for unorganised workers.[136] While Sections 109 and 114 apply to different categories of workers, there is no explanation as to why the provision of these benefits is not mandatory for gig workers in the code or the Parliamentary reports on the Code. Further, the definitions of gig and platform workers under the Social Security Code are ambiguous.[137] The ambiguity of the definitions and the implementational issues of the Code are discussed below.

Firstly, the schemes envisaged under the Code require clarity regarding their application to gig and platform workers working for multiple platforms or employers. The degree of necessary contributions by platforms and aggregators when individuals are registered simultaneously on multiple platforms is unclear. A legislative brief of the Code explains this possible overlap by showing how a driver working for an app-based aggregator may fulfil the criterion of the gig and unorganised workers. In such situations, the code lacks clarity on how the benefits would be distributed as both workers can avail of benefits under separate schemes. [138]-

Secondly, the funding of the social security schemes may be done by either,[139] wholly or partially by the Central or State Governments or a combination of government funds and a cess of 1-2 % of the annual turnover of the aggregator

The contribution to social security benefits by the aggregators is capped at 5% of the earnings of the delivery partners.[140] A report on the platform economy has shown that based on the present earnings of the delivery partners, the contributions of aggregators would amount to around INR 200-300.[141] In comparison, employers having employees earning minimum wage in the formal sector provide contributions under the Employee State Insurance (E.S.I.) and

[136]The Code on Social Security. S. 109
[137] ‘Ninth Report on “The Code on Social Security, 2019’ (n 16), 20.
[138]‘Legislative Brief - Code on Social Security’ <https://prsindia.org/billtrack/prs-products/prs-legislative-brief-3412> accessed 5 December 2022.
[139]The Code on Social Security, 2020 S. 114.
[140]ibid., S. 114
[141]Mani and Tiwari (n 97).

Employee Provident Fund Schemes (E.P.F.) amounting to INR 1525.[142] This means employers' contribution to gig workers would be a fifth of what they contribute towards regular employees. The contributions by the employers would be minimal, and any meaningful social security coverage would require substantial contributions by the central and state governments.

Third, the benefits provided to the gig and platform workers are limited to those available under the Social Security Code. The Occupational Safety, Health and Working Conditions Code, 2020 and the Industrial Relations Code, 2020, still do not define and recognise gig or platform workers as employees and do not provide them with any benefits despite the recommendation for the same by the Standing Committee on Labour in its reports on these codes.[143] The question then arises whether a worker who is a gig worker under the Social Security Code could be recognised as an employee under other codes through the use of the multifactor test. This would also affect the ability to use the multifactor test uniformly across the legislation. Therefore, without recognition as employees by the Supreme Court, they cannot avail of benefits under the codes.

Lastly, while the Union government has promised to extend E.S.I. benefits to gig workers[144], there has been no progress to date. The Social Security Code, to be effective, requires the Central government to establish strict timelines within which these schemes are to be enrolled.[145]

While the new labour codes address the conundrum of the employer-employee relationships and provide some benefits to the gig and platform workers, much legislative and judicial work remains to ensure benefits accrue to the workforce.

3. **Conclusion**

The employer-employee relationship in India is exceptionally complex, and socio-economic and technological changes have deeply impacted its legal evolution. Classifying workers as employees or independent contractors is of great importance as it determines the nature of

[142]ibid.

[143] 'Eighth Report on "The Industrial Relations Code, 2019' (n 18), 16. Interestingly, the Standing Committee recommended gig workers to be classified within the umbrella term of employee/worker unlike the Social Security Code where they are distinguished.

[144]Prabhudatta Mishra, 'NITI Aayog Suggests Social Security for Gig Workers' (27 June 2022) <https://www.thehindubusinessline.com/economy/niti-aayog-suggests-social-security-for-gig-workers/article65573459.ece> accessed 6 December 2022.

benefits and social welfare available to them and the degree of the employer's liability. The nature of the employer-employee relationship is constantly changing in an ever evolving workforce - agrarian to industrial to a digital economy. Concerted attempts to misclassify workers as independent contractors led to courts piercing the veil of employment contracts and looking at the true nature of working conditions. A rise in gig and platform workers poses new challenges to the classification conundrum. Applying the current multifactor tests shows that gig and platform workers could be treated as employees. While one of the policy objectives of the new labour codes is to solve these challenges, the definitional terms of the code require greater clarity, and schemes must be implemented in a strict timeline for them to be effective. While other countries such as the U.S. and the U.K. have classified gig workers as employees and workers, the legislative mandate in India treats them distinct from employees and independent contractors. The apparent conflict between new legislation and the existing precedents poses an interesting challenge to the Supreme Court, and its ruling will likely dictate this relationship's evolution in the future.