

# Apps: Driven Uncertainty of Welfare of Gig Workers

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**Abstract** - Most of the people have had to reluctantly engage in the gig economy through apps upended because of either the unemployment or layoff from their full-time jobs in the new normal. On the other hand, Covid-19 has impacted the gig workers' lives either by loss of gigs or the need to work in unsafe work conditions with low income. This research identified whether the welfare of gig workers can be protected under the domestic labour legislations in Sri Lanka. The aim of this study is to discuss whether the app based gig workers can be classified either under contract of service or contract for service to examine the legal position of app based gig workers under the UK, U.S.A. and Canadian jurisdictions in comparison to Sri Lanka and to propose suitable recommendations to uphold the welfare of the app based gig workers. The methodology of this research is a combination of black letter methodology and comparative research methodology with Sri Lanka, U.K., U.S.A and Canada. These different jurisdictions were analysed to provide a descriptive legal analysis related to the said area. Furthermore, this research employs a qualitative analysis of primary data such as constitutional provisions, labour legislations and judicial decisions and secondary data such as books and web articles. The study indicates the importance of recognizing the employment status of gig workers as employees with necessary amendments to the existing domestic legal framework to effectively address the issues of their welfare. Finally, the study concludes by providing effective recommendations to address the said issue while upholding the relevant human rights and the fundamental rights such as right to equality, freedom to engage in any lawful occupation while also upholding the principles of Natural Justice.

**Keywords—** *welfare of app based gig worker, status of employment, labour rights*

## I. INTRODUCTION

The emergence of the global pandemic affects loss of present and future employment opportunities due to the immediate aftermath of curfew-levels and lockdowns. Yet at the same time, it has created a demand for some opportunities through the gig economy. Gig economy can be defined as a free market system where organizations (clients) and independent service providers/ workers engage in short term work arrangements (Duszynski, 2020) instead of full-time employment with low income stability and job security. Delivery, retail, modality, IT, education, data processing are some of the industries where the gig economy model is practiced. However, in some instances it is hard to classify gig workers as independent contractors, because sometimes they are defined as either casual employees or temporary employees. According to the opinion of Scholars, the confusion with regard to the classification of gig workers is not new. (Jennifer Pinsof, 2016)

With the years of technological revolution, digital platforms such as apps and websites are the connector of the clients and the gig workers. Since the outbreak of the pandemic, the app based gigs have become more significant in the new normal than before due to the increased reliance on gig workers to deliver the daily essentials to consumers who live in areas where travel restrictions are imposed to minimize crowded gatherings. Furthermore, Rebecca Henderson (2020) emphasized that the crisis has upended the traditional 9-5 working world and caused many blue- and white-collar employees to pursue gig work for additional – or even primary – income during these unprecedented times (Forbes, 2020).

Even though it offers various demanding opportunities in the prevailing situation, at the same time it also poses threats to a decent working environment, income stability, social security and fair working conditions. For instance; failure to pay minimum wage, lack of breaks for meal and rest, illegal deductions from pay and routine violations of

law designed to protect workers' health and safety. Such exploitative conditions raise app based works that evolve through lack of control, transparency and stability for gig workers, even app based gig companies have considered them as their independent contractors, not the employees of their companies.

On the other hand, app based gig workers have no safeguard from labour legislations because of their uncertain employment status, even though both gig workers and traditional employees perform the same task in the same strength. Therefore, they are subjected to unequal treatment for equal work.

Since the issues of app based gig workers are common to all jurisdictions in the world, it is necessary to analyse the legal strategies adopted by other jurisdictions and how can it be adopted to the Sri Lankan context within a just and equitable framework to uphold the social justice theory and welfare of the gig workers.

## II. METHODOLOGY AND EXPERIMENTAL DESIGN

A combination of Black Letter Methodology and comparative research methodology using geographically different Uber case decisions have been analysed in this research to distinguish the different concepts in law. Furthermore, the research would employ a qualitative analysis of primary data such as constitutional provisions, statutory provisions and judicial decisions whereas secondary data of journal articles, books, research papers and online sources. The limitations of this research would be selection of only three foreign jurisdictions and solely based on the black letter approach and absence of judicial decisions as well as lack of references in this regard.

## III. RESULTS AND DISCUSSION

### A. *Contract of Employment vs. Contract for Employment.*

The nature of employment can be classified as contract for service and contract of service. The contracts created between employer and employee are known as the contract of employment. These contracts consist of a *sui-generis* nature which promotes the ideas of the theory of social justice through domestic labour legislations, because it is needed to balance the unequal bargaining power between employer and employee relationship in the contract to create a safe working environment without being subjected to exploitation.

Contract for service refers to an independent contractor who is contracted to perform a service to another business as a non-employee and has direction over the work to be done where the employer does not have the control as to how it should be done. Unlike the employees, they are not subjected to labour legislation. If any dispute arises between an independent contractor and client, they have to go through a litigation process as in an instance where a breach of contract occurred.

In the modern labour market, the app based gig workers are considered to be independent contractors, but no relationship exists between the clients and the workers: they execute the task and is paid by the platform, which then provides the result to the client or the platform acts more as a facilitator of the relationship between clients and workers (Risak and Warter, 2015). In other words, apps unilaterally control the workers' choice to work, payment rates through its algorithm as well as the terms and conditions between clients and the gig workers have been executed by the app based gig companies according to their wills. Such control of the working autonomy by the app as well as the lack of transparency between client and the gig worker are creating confusion about the status of employment as to whether they are considered as independent contractors, even though they are subjected to the control and non-negotiable terms and conditions of the gig companies.

During this ongoing pandemic, app-based gig workers are affected differently based on the service they provide for their clients. Therefore, expansion of earning opportunities generated through apps have not been uniformed. For example, because of the curfew and lockdown situations, the demand for daily essentials delivery to the doorstep increased whereas it affects decreased gig work for taxi drivers. However, regulatory protection from labour legislation for employees are not applied for the app based gig workers because of the consideration of the employment status as the independent contractor or the self-employer. Therefore, they are unable to access the minimum wage, health and safety and decent working hours, job security as normal employees who are protected from labour legislations in the event of lay off or unemployment or during unsafe situations in the employment similar to the new normal.

Therefore, it has led to exploitation of the rights of gig workers as human beings which are specifically recognized under Article 23 of UDHR and Article 7 ICESCR. These rights include the right to free choice of employment, protection against unemployment, enjoyment of just and favourable conditions of work such as minimum remuneration, fair wages and equal remuneration of work of equal value, safe and healthy working conditions, rest, leisure, working hours and holidays.

In addition, International Labour Organization (ILO) recognizes fundamental principles and rights at work such as elimination of forced labour, abolition of child labour, elimination of discrimination in respect of employment and occupation as universal labour principles to ensure decent work, equity, social progress to achieve both welfare of worker and the economic growth at the same time.

#### B. Domestic Legal Framework

As a welfare State, the Sri Lankan Constitution has recognized the obligation of the State to ensure the social security and welfare of the people by securing and protecting the social order under Article 27. And it also enacted legislations at the domestic level incorporating international standards with regard to Labour laws. Therefore, the State intervenes in the contract of employment as an invisible third party to protect the interest of employees from unlawful exploitation because of their unequal bargaining power compared to the dominant employers and for the reason that dispute between employer-employee relationship will affect the development, economy, stability as well as the future generation of the country.

Moreover, most of the domestic labour legislations itself define the term “workman” to determine whether a specific individual is an employee or not by minimizing ambiguities. For instance; Section 48 of the Industrial Dispute Act define “workman” as an individual who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing and whether it is a contract of service or of apprenticeship or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated. Likewise, other legislations which include the definition of workman defines it in the same scope as aforesaid. However,

such legislations cover only contracts of employment within the meaning of traditional employer-employee relationships. It does not cover the app based gig workers who are under the virtual control of the app based gig companies.

However, Article 14(g) of the Sri Lankan Constitution grants every citizen the right to engage in lawful occupation and thus the same right should be applied to gig workers and under Article 12, the gig workers should also be treated equally on the basis that equal remuneration should be paid for equal work irrespective of the mode of the platform: specifically this means that gig workers should be treated equally, even though they are outsourced through crowd work or location-based application (apps).

#### C. Contract Relationship between Apps and Gig Workers

1) *Position of the United Kingdom:* Section 230(3) of The Employment Relations Act, section 54 of the National Minimum Wage Act and regulation 2(1) the Working Time Regulations contain similar definitions with regard to the “worker” and it is defined as such an individual has required to enter into or works under implied or express contract by way of either in written or oral to perform any work or service for another party to the contract whose is not classified as client or customer of any profession or business. The virtue of such interpretation grants statutory protections to the employees by means of protecting the universal labour rights such as minimum wage, a set working hour as well as health and safety. However, the workers under the app based gig economy model are not covered under the said definition.

Nevertheless, judicial activism upheld the need for just and equitable decisions for the expansion of application of labour legislation for app based gig workers. The case of *Uber BV and others (Appellants) v Aslam and others (Respondents)* is a *locus classicus* as a recent landmark case in the U.K. where the rights of workers were awarded the same status as rights of employers. In this case the main issue that was raised was whether the drivers of private hire vehicles who provide services through the UberApp can be considered as employees. Here, the Supreme Court confirmed that the reality of the relationship of parties to the agreement must be determined by examining all circumstances by not relying only upon the written documentation as held in the case of *Autoclenz Ltd v. Belcher*.

Further, the court had applied the “integration test” and the “economic reality test”. The integration test has been applied in instances where the business renders a service and earns profits and drivers provide their skilled labour. In addition, the court applied the economic reality test and highlighted that the Uber Company provides opportunities for small scale businesses and that many Uber drivers employ in individual capacity. But they are unable to enhance their businesses because they do not have the opportunity to directly negotiate with customers and decide the price rates. However, at the end, court analysed the facts and circumstances of the case by applying the control test and decided that Uber drivers should be considered not as self-employed but as workers who should be entitled to a minimum wage, paid holidays etc. based on following five yardsticks:

1. Uber sets the terms and conditions of its service.
2. Uber has significant control over the manner in which Uber drivers should work since they have a rating system. If the Uber driver fails to complete the daily targets they have to either pay a penalty or terminate the contract.
3. Uber has taken steps to ensure that drivers and passengers do not enter into agreements outside the UberApp.
4. Uber sets the fares for each ride, not allowing the drivers to set their own prices.
5. Drivers face penalties for cancelling and not accepting the rides.

2) *Position of The USA - California:* In the USA, the “ABC test” is the most commonly used test to ascertain the status of employee and independent contractor. This is a threefold test where a worker is only considered to be an independent contractor, if they satisfy all the three fold of the test and the burden of proof lies on the employers. The three folds include,

1. Individuals are free from control and direction of the employer relating to the performance of the service, both under the contract and in fact.
2. Service is performed outside the usual course of the business of the employer.
3. Individuals are customarily engaged in an independently established trade,

occupation, profession, or business of the same nature as that involved in the service performed.

Therefore, a worker will be classified as an employee for the purpose of wage and hour protection, if the employer fails to establish the aforesaid three limbs.

In the case of *Dynamex Operations West, Inc. v Superior Court* clarified that “ABC test” should be used to determine whether a worker is an employee or independent contractor, where it was held that the drivers were misclassified as independent workers. Court further emphasized that in order to determine the division between employees and independent contractors the ‘suffer or permit to work’ under the wage orders of California is in need of a hiring entity to contend with the position of independent contractor to establish the ABC test. This portrays that there is an increasement of the app based gig work at present. Thus, in order to be classified as an independent contractor, workers' labour should be free from the company's control, outside the span of its business and should be a common part of workers business. If not, the worker should be classified as an employee.

As a further step, the State of California codified the “ABC test” through the Bill of the California Assembly Bill 5 (AB 5) which is generally known as gig workers’ law. It creates a certain extent of clear classification for app based gig workers as employees instead of independent contractors to halt against deprivation of basic labour rights by the app based gig companies. For example; it makes it harder to misclassify home health janitors, truck drivers, construction workers, home health aides, and hotel and hospitality workers etc as independent contractors. Specifically, this AB 5 helps to ensure the purposes of federal government wage and hour protection, but it does not ensure the right to join the unions as well as certain categories of jobs are not covered by it.

Despite the AB 5, policy of Proposition 22 which was passed by the voters of California according to the Section 8 of Article II of the California Constitution for a purpose of carrying out the status of independent contractor for the app based drivers. Nevertheless, if such gig companies apply this model, they have to guarantee certain benefits and develop policies against workplace discrimination and sexual-harassment for their app drivers.

3) *Position of Canada:* In the case of *Uber Technologies Inc. v. Heller*, the claimant, brought a class action and argued that under the Ontario’s Employment

Standards Act 2000, they are entitled to a minimum wage with vacation pay and overtime because of the mandatory Arbitration Clause included in their contract which states that mediation and arbitration should be conducted according to the law of the Netherlands. Accordingly, they do not have a chance to challenge the said mandatory arbitration clause as an independent contractor. Based on this argument, the claimant further argued that mandatory arbitration clause is unconscionable based on the unequal bargaining power between Uber drivers and Uber Company.

Here, the Court adopted the “two-part test” to determine whether an agreement is ‘unconscionable’ and it consist as follows;

1. inequality of bargaining power; and
2. an improvident bargain.

Moreover, the majority was of the view that there was a clear inequality of bargaining power between Uber and Uber drivers, because they have to either accept or reject the contract for service of Uber without negotiating any terms of it and there was no reference regarding the costs of mediation and arbitration in the Netherlands. Finally, the Court concluded the case on the basis that the arbitration agreement was invalid and unconscionable.

#### IV. OBSERVATION AND RECOMMENDATIONS

When analysing the UK jurisdiction it can be observed that individuals within the meaning of the Employment Relations Act are offered employment rights when compared to independent contractors. However, in the case of *Uber BV and others (Appellants) v Aslam and others (Respondents)* court confirmed that it is necessary to scrutinize the substance of the relationship with using the “control test” rather than considering the mere label of independent contractor has been given to the app based gig workers.

With comparison to the UK approach, the California State categorizes the independent contractors in a broader sense without limiting the application of “test developed by the court” to distinguish the app based gig worker employment status, either employee or independent contractor based on the facts and circumstance of each case. In other words, they apply the codified laws, policy initiatives as well as “tests” to make the position of each worker crystal clear as much as possible to minimize the misclassification of the employment status. Normally, an individual who enters into or works

under the contract for employment does not have protection against exploitative conditions from legislation. In Proposition 22, app based drivers have certain labour legislative protection along with anti-discrimination and protection from sexual-harassment, even though it considers such workers as independent contractors, whereas AB 5 considers them as employees of the app based company and allow them to possess minimum wage and favourable working hours for well-being of the app based gig workers. In contrast, there are three categories of independent contractors which allow the court to determine the emerging status of employment namely persons covered under Proposition 22, workers covered under AB 5 and the remaining workers who qualify as independent contractors under the AB 5 and ABC test.

However, the Canadian Supreme Court had only considered the non-negotiable mandatory arbitration clause in their contract which deviated the status of independent contractor to employee and held that such contract is invalid, because of the unconscionable characteristic of the contract without examining the status of Employment. Whereby, the Canadian Court decided their Uber case against the confirmed fact in the decision of the U.K. Uber case which emphasized the fact that the reality of the relationship of parties to the agreement must be determined by examining all circumstances using the test developed by the court, not relying only upon the written documentation.

While there is no standard of practice to define the app based gig workers, the Sri Lankan legal system does not specifically identify app based gig workers and how to continue their classification in the regulatory framework too. Further, Sri Lanka has interpreted the term “workman” as similar to the UK jurisdiction. However, Sri Lanka has not applied the “control test” to determine the employment status of the gig workers and therefore, there are no authoritative judicial decisions to be applied to decide on the welfare of app based gig workers. Hence, there is a prompt need to identify recommendations to address this issue promptly and effectively in order to fill the existing gaps in the Sri Lankan law.

Since the end of the pandemic is unpredictable, the world has started to embrace new ways of working in the new normal. And as a result, app based platforms have created jobs for gig workers to cater to this situation. However, it is evident that

exploitation of rights of gig workers have become inevitable. Thus, effective recommendations should be introduced to secure the welfare and working conditions of the gig workers to uphold the fundamental right to equality enshrined in Article 12 of the Constitution. The proposed recommendations are as follows.

- A regulatory framework should be established in a manner where labour legislations cover independent contractors in order to facilitate welfare and working conditions of such workers. And it should be created in a manner which ensures the Fundamental right to lawful occupation.
- A clear, well defined and unambiguous definition for the term “independent contractor” should be incorporated into the existing labour legislations.
- It could be recommended that a separate ad hoc tribunal be established to ensure the right to fair hearing and to uphold the principles of Natural Justice. At present, aggrieved parties can only seek a remedy for a breach of contract from the District Court because independent contractors are not recognized under the labour legislations and hence are not entitled to get a just and equitable award from the Labour Tribunal because they are not protected under the labour legislations. In addition, it is better to establish a Mediation Board to review the contracts of app based gig workers since most of them are unskilled workforce.

## V. CONCLUSION

The study reveals that in Sri Lanka, only the individuals who are subjected to the contract of employment are protected under the labour legislations. However, such legislations do not provide at least minimum protection to the app based gig workers even though they are subjected to the non-negotiable control of the app based gig companies. As a result of that, it has led to exploitation of human rights of the app based gig workers in this new normal. Therefore, there is a prompt need to recognize the rights of gig workers to at least provide them with minimum wage benefits and health and safety benefits.

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## ACKNOWLEDGMENT

We would like to extend our sincere gratitude to our parents and everyone who assisted us in successful completion of this research.

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