CONSTITUTIONALIZING LABOUR RELATIONS IN THE GIG ECONOMY

A CRITICAL COMPARATIVE OF LABOUR LAW ON A GLOBAL SCALE

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ABSTRACT

This thesis is an invitation to "constitutionalize" labour relations in the gig economy through a comparative constitutional law perspective in order to respond to the present-day labour crises of constantly emerging, novel labour relations within the neo-liberal, globalized economy. The process of constitutionalization is a methodological tool that can be used to respond to this crisis, in order to establish sustainable labour rights for these emerging relations. "Constitutionalization" here is an expansive way of thinking about constitutional rights with pertinence to labour rights – it is not only referring to constitutional principles, text, values and jurisprudence but calls to an older idea of "labour constitution" – which allows for collective bargaining rights to balance the power between the "capital" and the "labour", irrespective of the forms that these two sides can take. The aim here is to transcend the traditional binary of employer-employee relationships that confines itself to classical labour law and use the process of constitutionalization in order to afford rights to gig workers as well. Since the gig economy is an inherently global issue, there is intrinsic value in using a comparative constitutional methodology to locate gig workers' rights on a global scale. Using India and the European Union as the two polities of comparison – this thesis seeks to defend that the establishment of a socio-democratic constitutionalism is essential to ensure that an "economic constitution" is viable – both in the Global North and the Global South.

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I. INTRODUCTION

1.1. An intent of slow comparison

This introductory chapter is about methodology – of writing, reading and comparison. The methodology of writing is ideally preceded, and arguably incomplete, without first establishing a methodology of reading. For this, there is no better legal theorist to turn to than Peter Goodrich who penned the method of 'Slow Reading'.[1] He suggests that the "slow reader is irreverent, not intimidated by law", and the first quality of the slow reader is that she makes time, and the ability to listen and reflect.[2] The second quality is that she does not interpose her own personality and "special culture" while reading[3] – a notion that inherently calls to *comparative* reading and reflection. Any hint of interposition would be "clamorous, digressive, and oppressive" which is also "exactly what lawyers do"[4] – a tendency that I intend to be self-reflective of. The final quality that Goodrich suggests is that the slow reader does not search for shortcuts. She does not search for the summary of a judgement, or for "easy" outcomes that can incongruously be selected as a solution that can then immediately be reflected in practice.[5] As Goodrich explains: "slow eating, slow reading; the former extends the lifespan, the latter extends the lifespan of texts".[6] This analogy is what I was reminded of when I read Thiruvengadam and Dann's call for "slow comparison", like "slow food", which "emphasizes

[1] Peter Goodrich, 'Slow Reading' in Peter Goodrich and Mariana Valverde, *Nietzsche and legal theory: Half-Written Laws* (Routledge 2005).
[2] Ibid, 194.
[3] Ibid, 195.
[4] Ibid.
[5] Ibid, 197.
[6] Ibid, 196.

the process through which comparative knowledge emerges".[7] In making a case for an "unusual" but necessary comparison of India and the European Union in the context of Democratic Constitutionalism,[8] they endorse this method of slow comparison in which they took the efforts to repeatedly, and reiteratively, collaborate with scholars from India and the EU over four years as a "slow" journey – the ingredients were carefully chosen, and the flavours emerged powerfully, ensuring that the final taste was nurtured to the maximum extent.[9] In additions to lessons from their chapter, I wish to undertake this method of slow reading and slow comparison for the purpose of "slow writing" this thesis, informed by my ten-month experience in a comparative constitutional law classroom with rich stories, scholars and learnings from different regions. This slow comparison promises to not succumb to "legal orientalism" or the reification of the superiority of Western principles,[10] and shall focus on "contextualized functionalism": which combines functionalist, contextual and critical approaches.[11] Taking from Goodrich's caution against super-imposition as a lawyer, I shall rely on inter-disciplinary methods to keep reflecting on legal positions.[12]

1.2. The research propositions

With this intent, I shall deal with two primary research propositions, both of which are conceptual in nature. The first research question is how the process of "constitutionalization" can aid in broadening the traditional understanding of labour relations in order to sustain newer and forming relations, and for the purpose of the thesis – specifically within the gig and platform

[7] Philip Dann and Arun K. Thiruvengadam 'Comparing constitutional democracy in the European Union and India: an introduction' in Philip Dann and Arun K. Thiruvengadam (eds.) *Democratic Constitutionalism in India and the European Union: Comparing the Law of Democracy in Continental Polities* (Edward Elgar Publishing) 8.
[8] This is especially relevant to this thesis as India and the EU are the primary comparators here as well; and Thiruvengadam and Dann's work also specifically discusses another vital concept utilized in this thesis, i.e., the "economic constitution and social democracy" in this comparative context.
[9] Dann (n 7)
[10] Ibid, 7.
[11] Ibid
[12] Or rather, legal impositions.

economy. Labour law – and labour rights within labour law – has been framed within the traditional binary of "employer" and "employee", and has often been thought of within these confines. With newer and broader labour relations constantly being formed outside this binary in the context of the present neo-liberal, globalized economy[13], there is a need to find a sustainable framework in order to sustain the recognition and rights of labourers in these emerging relations. The following chapter will elucidate on what comprises this process of "constitutionalization" that will enable it to be a sustainable form of intervention in responding to the ever-expanding demands of labour law.

The second research question is how comparative constitutional law can be used as a methodological and conceptual tool in recognizing gig and platform work as a global issue within the realm of law, and to establish a case for necessary framing of gig workers' rights as having to be connected and available on a global scale – constitutionally. The disciplines of labour history and labour theory in sociology have long recognized that labour relations are inter-twined by both global and local dynamics. Historians have argued that a "global" labour history is essential to make sense of the "dizzying array and transmutations of labour relations beyond the North Atlantic region and the industrial world"[14], and that a careful study of labour relations would require that we place "all historical processes in a larger context, no matter how geographically 'small' these places are".[15] Further, global labour struggle has always been connected across local and global organization for workers' rights, on a range of individual to

[13] To clarify, there has long been precarious work relations which have existed outside the bounds of the traditional employer-employee binary. However, the precarity that exists within the neo-liberal economy is different from what has existed in the past. I shall clarify this further later in this chapter. See: Steven Vallas and Juliet B. Schor, 'What do Platforms Do? Understanding the Gig Economy' (2020) 46 Annual Reviews of Sociology, 280 <https://doi.org/10.1146/annurev-soc-121919-054857> accessed 10 March 2024.

[14] Willem van Schendel, 'Beyond Labor History's Comfort Zone? Labor Regimes in Northeast India, from the Nineteenth to the Twenty-First Century', in Ulbe Bosma and Karin Hofmeester (eds*) The Lifework of a Labor Historian: Essays in Honor of Marcel van der Linden* (Brill, 2018) 174–208.

[15] Marcel van der Linden, *Workers of the World: Essays toward a Global Labor History* (Brill 2008), 3–10.

community levels[16] – and it is therefore necessary to gauge their demands in that capacity. With increasing migration and modes of travel which keep contributing to new connections in the world of work, this thesis is a *slow* endeavour to use comparative constitutional law as a methodological tool to view labour relations as being connected in global chains. By comparing – and connecting the impact of – broader constitutional theories as well as the application of constitutional provisions in different jurisdictions, I aim to show that it is necessary that labour relations are seen on a comparative, in addition to, an "international" scale – accounting for domestic constitutional rights and duties along with international standards and norms – in order to address the rights of labourers through a three-prong approach – statutory, constitutional and international. While the International Labour Organization's Conventions have always played an integral role in laying out norms and standards, the implementation of the same on a domestic level as a constitutional duty is imperative,[17] and therefore – it is important to view these social rights on a global scale not only through international law, but also through constitutional law. The (new and emerging) form of labour relation(s) that I will be focusing on will specifically be gig and platform work more closely in the context of India and the European Union.

1.3. The framework of Critical Labour Law

Before elaborating on the reasons behind choosing my primary comparators as India and the European Union, I shall explain the 'critical labour law' framework that will underline this comparative work in engaging with all the labour law concepts. This framework demands that we historicize labour relations and rights, through an inter-disciplinary lens, and look at labour regulation expansively as being a concern of multiple fields of law, and not restricted to labour

[16] See generally: Marcel van der Linden, *The World Wide Web of Work. A History in the Making* (UCL Press 2023), 4 – 5.
[17] Kamala Sankaran, 'Emerging Perspectives in Labour Regulation in the Wake of COVID-19' (2020) 63 (Suppl 1) Ind. J. Labour Econ < https://doi.org/10.1007/s41027-020-00262-1> accessed 10 March 2024.

law – such as competition law, in the case of gig economy.[18] Such a theoretical framework would demand that we view labour law, critically, through and along with the process of 'constitutionalization'. The legal complex[19] tends to marginalize critical legal studies. As a student of labour law, I aim to consciously centre this critical legal framework by respecting that labour law's mainstream tradition and foundations are, and have always been, critical.[20] Labour law was *conceived* to "right the imbalance of power in the worker/employer relation and to address the subordination of the working class to the capitalist class, and to protect the otherwise vulnerable worker from unfair treatment".[21] As an extension, in addition to dealing with how the process(es) of constitutionalization can impact the expansion of labour relations and labour rights in the gig economy, an equally central endeavour in this thesis shall be to use an established, fundamental framework of critical labour law while analysing social, economic and legal concepts pertaining to it. Taking from Ruth Dukes' collation of the four key-points framing these critical traditions, I will be using her framework which suggests that every concept should be dealt with in four parts, through the aid of a few illustrations.[22] First, there must be a rejection of a public-private divide. For example, the idea of "democracy" is not one that should be restricted to the "public" realm but must also extend to the "private" realm which is demonstrated through processes such as the constitutional right to strike and through the

[18] In the following chapter, I will also expand on the all-encompassing role that constitutional law can play in bringing together other legal regimes than labour law – such as immigration law, private law, family law, et al – while contemplating labour regulation. See: Dukes Ruth 'The politics of method in the field of labour law' in Marija Bartl and Jessica C. Lawrence (eds.) *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022) 13.

[19] For an understanding of the meaning of "legal complex", see generally: Deepika Udagama, 'The Sri Lankan Legal Complex and Liberal Project: Only Thus Far and No More' in Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (eds) *Fates of Political Liberalism in the British Post-colony: The Politics of the Legal Complex (Cambridge University Press 2012),* 219-244. The "legal complex" is a concept she uses to combinedly view and discuss the operation of legal professionals, the judiciary, the law-makers, law-officers and a broad perspective on all "legal" actors.

[20] Karl Krake 'Horizons of Transformative Labour Law and Employment Law' in Joanne Conaghan, Richard Michael Fischl, Karl Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford 2002), 2-29.

[21] Hugh Collins, 'Labour Law as a Vocation' (1989) 105 Law Quarterly Review 468.

[22] Ruth Dukes, 'Critical Labour Law: Then and Now' in Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds.) *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

institution of collective bargaining. Second, there must be a commitment to legal pluralism which would then indicate that it is not only the formal or written contract that sets the terms of the work relations but also the norms of the trade traditionally, mainly as established by the demands of the workers both through their oral histories and any demand charters they may propose; and the measures they have struggled for and obtained through collective bargaining. Third, there must be a degree of legal scepticism. This involves a recognition that labour law is constantly in *crisis*[23] and that due to changing labour and social relations, labour rights must necessarily be shaped primarily through workers' demands and through a bottom-up approach, and there must not be a heavy reliance or an attitude of expectation that the judiciary can become an all-encompassing mediator to pronounce rights or that the laws and norms are set only by the legislature necessarily (precluding consultation from labourers, at least). Fourth, lastly and perhaps most importantly, there must be an adoption of socio-legal methods involving an inter-disciplinary approach. This ensures that labour relations are reconciled in terms of power struggles and the "law-in-context" approach is taken. To expand on this final point, Dukes' proposition of the "Economic Sociology of Labour Law" (ESLL) theory is useful.[24] The theory draws on the sociology of law, economic sociology and political economy, to seek to understand the economic, social and legal aspects of contracting behaviour and of the different dimensions of the specific contexts within which contracting takes place. In ESLL, the focus shifts to the contract for work as the primary source of legal norms in the field of working relations. This brings us back to the point where the scope is then widened to include not only labour law, but also other fields of law which together determine the possibility of contracting for work, such as immigration law, social security law, family law, private law, corporate governance and financial regulation.

[23] This indicates the fissures that labour law experiences with changing socio-economic forces, globally.
[24] Ruth Dukes 'The politics of method in the field of labour law' in Marija Bartl and Jessica Lawrence, (eds.) *The Politics of European Legal Research: Behind the Method* (Elgar Publishing 2022) 11 – 14.

My aim is to incorporate, consolidate, inculcate and build on to the rich scholarship and history of labour law being a critical legal tradition that considers other fields of law holistically, and view how this broad process of constitutionalization – both theoretically and practically – can be used to not only expand labour rights to gig workers. This is also a proposition to treat gig workers in their own right, as a newly forming niche, and respecting that labour rights need to accommodate labour relations, and that changing labour relations cannot subsume themselves into already existing rigid and static legal labour structures.

1.4. Defining fundamental theories and categories: neoliberalism and gig/platform economy

(i) Neo-liberalism – an approach to government and a political movement

Against this background, it is necessary to define the context and meanings of the present day "neo-liberal" and globalized economy as they shall be recurring terms in this thesis. As Johanna Bockman correctly describes, neo-liberalism is "both an approach to government and defining political movement today".[25] I shall be using Bockman's concise sociological summary and observations on how "neoliberalism" is used to recognize changes around the world that might be connected. This approach and movement works on the premise that only "private" entities will be able to generate economic growth and social welfare, and the state shall have low-interference in these matters – with a minimalist state (often being a powerful state), which is able to deregulate industrialization enough for there to be massive private control. The phenomenon of neo-liberalism, with the varying perspectives it is seen through,[26] overall views

[25] Joanna Bockman, 'Neoliberalism' (2013) 12 (3) Context, 14-15 <10.1177/1536504213499873> accessed 12 March 2024.

[26] Neoliberalism could be seen from the perspective of a national regime, or a global disciplinary regime, or a (trans)local technology of rule. Recently, it has been suggested that a conceptualization of a "variegated" form of

the economic, political, social and cultural phenomena as being connected to "larger transformations on a global scale".[27] Sociologists have acknowledged that neoliberalism can manifest differently institutionally in different parts of the world, and this is a framework that is used to analyse such global changes. Marxist scholars such as David Harvey have recognized it as policies that are used as a capitalist response to regain and maintain capitalist power. Michel Foucault has famously added on that neoliberal states are those that use the market logic of efficiency, competitiveness and profitability to maintain their power and gain benefits. It is pertinent to note the work of sociologist Ulrich Beck for the purpose of thinking about gig-work in the neo-liberal context – who analyses that citizens are forced to become "entrepreneurs in their own lives" – a concept that is directly attributed to gig-workers being referred to as "solo-entrepreneurs" or "self-employed" persons across the world. He observes that this happens in a highly volatile world, which is specific to the present moment, where these individuals are then forced to carry individual burden for structural issues. They are forced to rely on other actors such as religious organizations, non-governmental organizations, corporations, banks, and others who work hand-in-hand with the state as neo-liberal actors. This limits national governance and state reliance, and instead focuses on "entrepreneurial citizenship" and "public-private" governance. This makes it more important to inculcate and analyse democracy and democratic avenues in private realms, and reject the public-private divide as critical labour law scholarship has called for. The very idea of entrepreneurial *citizenship* demands a constitutional understanding of how social rights are curtailed, or can be bargained for, within this context. As Bockman also notes – which resonates with a comparative constitutional law lens wherein domestic contextualization is important but must be viewed with the tangent of global impact

neo liberalization might be able to view all three of these approaches in a connected manner while acknowledging the broadness of the concept itself. See: Neil Brenner, Jamie Peck, Nik Theodore 'Variegated Neoliberalization: Geographies, modalities, pathways' (2010) 10 (2), 182–222 <https://doi.org/10.1111/j.1471-0374.2009.00277.x > accessed 12 March 2024.

[27] Bockman (n 25).

– "neoliberalism often fuses genuine citizen input with the devastating effects of capitalism such as widespread unemployment, newly excluded populations, superficial democracy, increasing inequalities, **creating different, though often connected**, neo-liberal phenomenal worldwide".[28] This *connection within difference* is the focus of this thesis, and this is the sociological framework that will be used to analyse what is required from legal policy and what is lacking in social rights given by the law.

(ii) Images of the platform economy within neo-liberal structures

The gig economy has been defined as "labour markets that are characterized by independent contracting that happens through and via, and on digital platforms."[29] It is usually casual, and non-permanent work with little job security on a piece-work basis, without options for career development.[30] Within the phenomenon of neo-liberalism, we have seen the advent and emergence of the platform and gig economy in the past decade.[31] Coinciding with the Great Recession, platform-based companies such as Airbnb and Uber initially boomed with a large supply of people (primarily recent graduates) looking for work. As outlined by Vallas and Schor, platform work can be understood in five categories: the first being high-skilled employees and independent contractors such as architects, the second being cloud-based consultants or freelancers who provide services through freelancing platforms, the third being gig workers who do a lot of offline-work such as cab drivers, food deliverers, care workers and repair service professionals, the fourth being entirely online platform work otherwise referred to as "micro-tasking", and the final being influencers and content creators who produce work

[28] Ibid.
[29] Mark Graham and Jamie Woodcock, 'Towards a Fairer Platform Economy: Introducing the Fairwork Foundation' (2018) 29 Alternate Routes, 242-253 <https://alternateroutes.ca/index.php/ar/article/view/22455> accessed 13 March 2024.
[30] International Labour Organization, 'Expansion of the Gig and Platform Economic in India' (ILO, 2024) 4.
[31] Vallas and Schor (n 13)

across social media platforms.[32] It is important to recognise such workforce heterogeneity as this will determine the actual responses required for each type of category, and showcase that a diverse set of responses are required based on the nature of the (ever-changing) work. The focus of this paper will be limited mainly to the third category of workers who face increased physical precarity, and often have the lowest bargaining power with corporate enterprises who strongly distance themselves from referring to themselves as the employers. They are also referred to as "geographically-tethered" workers doing work that pre-dates the emergence of the platform economy, but is now increasingly being infused within it.[33] This could either be visible work such as food delivery and cab drivers, or "hidden behind closed doors" such as home cleaning services.[34] In India, much of this labour-force tends to coincide with the informal sector which comprises more than eighty percent of the country's work-force already.[35] As the ILO has noted, platform work is mostly attractive to workers in the informal economy and due to the absence of a structured legal recognition of platform work in India, the gig economy is currently further embedding informalization of work.[36] This mostly coincides with location-based work which allots work to individuals in a specific geographical area to carry out "local, services oriented tasks such as driving, running errands or cleaning houses".[37] The treatment of these geographically-tethered gig-workers is also exceedingly caste-targeted and oppressive in India, and racialized especially against migrants in the European Union.[38] For these reasons and due to these interests, I shall focus specifically on gig work which disseminates services through platforms in a location-based, geographically-tethered manner and the concerns that arise therein. While there are several possible ways of characterisation of gig work,[39] for the

[32] Ibid.
[33] International Labour Organization (n 30) 4.
[34] Jamie Woodcock and Mark Graham, *The gig economy. A critical introduction* (Polity 2019).
[35] International Labour Organization (n 30) 15.
[36] Ibid.
[37] Ibid, 4.
[38] Damn Kain, 'Caste out: How social hierarchy and exclusion affect gig workers in India' (2024) The Sociological Review Magazine <10.51428/tsr.fqte1515> accessed 14 March 2024.
[39] Vallas and Schor (n 13)

purpose of analysing this chosen category – the image of platform economy as being an "accelerant of precarity" is an important one in understanding how these gig-workers are in a specifically precarious position in this moment of time within the context of a neo-liberal economy.[40] This image of platform work notes that the digital aspect of a platform economy and the inequities that exist within it is a structural continuation of the inequities that existed even before its advent. It recognises that the "flexibilisation" of employment relations and sub-contracting of work has been part of the world of work since the Fordist organisations have done so for decades. With the coming of platform mediated work, what becomes easier in this pre-existing process of outsourcing risks that corporate enterprises do not want to carry, is that now platforms provide the perfect infrastructure to limit the enterprises' obligation towards the workforce. This calls to David Harvey's concept of "accumulation through dispossession" which is when legal and financial mechanisms are used to peel away at socio-economic rights of workers.[41] Therefore, this image of platform economy recognises that the problem goes beyond just the "digital revolution", and is actually a shift in the manner that labour protections are being diluted.

A newer, even more complex image that Vallas and Schor offer that accounts for the limitations of the other four images they outline is what they refer to as the "permissive potentates" – which recognizes that while there are several characteristics of older economic structures that the platform economy instils – the approach to governance that it undertakes is also distinctively

Vallas and Schor provide us with four methods of characterising gig work which illuminates the broader ways of thinking about gig work. While I have chosen to use the "accelerants of precarity" framework to specifically analyse the category of gig workers that I am focusing on, it is useful to consider briefly the other frameworks as well. They refer to the first one as platform work being seen as "incubators of entrepreneurialism" which recognises that platforms offer flexibility and benefits that traditional corporate firms may not and allow for people with disabilities, care-givers and women to be able to participate in labour-force with less barriers. The second is the "digital cage" which sees platform work from the other side of the spectrum as being "starkly dystopian" and being controlled by the algorithm to the extent that it is entirely dangerous to operate labour relations through platforms. The third one is "institutional chameleons" which suggests that platforms are entities which tend to shape-shift based on their institutional environment. This means that their economic forms are influenced by their surrounding institutions even more than the digital algorithms.

[40] Ibid, 279 – 281.

[41] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).

new.[42] In addition to just being an "accelerant of precarity", the image of platform work we have must recognize that – "in contrast to hierarchies which centralize power, markets which disperse it, or networks which parcel it out to trusted collaborators – platforms exercise power over economic transactions by delegating control among the participants"[43]. They conveniently delegate modalities of control to the other two parties (worker and customer) "permissively" such as work schedules, work methods and performance evaluation; but retain authority over beneficial factors for itself such as pricing, collection of revenue and allocation of tasks. This means they are able to "govern labour from a distance", and transfer employment relations in this manner.[44]

1.5. Why these primary comparators? A case for India and the European Union

Having pinpointed to the intent and scope of this thesis, I aim to specifically undertake the "unusual" endeavour of comparing the EU and India, inspired by the proposition and work that Dann and Thiruvengadam's book has put forward, especially concerning their elements on economic constitution and social democracy [45] - concepts that shall be integral in "constitutionalizing" labour relations. This comparison of a nation-state in the Global South and a pan-regional organization in the Global North do share the strong common thread of upholding democratic constitutional principles on a continental scale despite continental challenges, and they use a constitutional framework that is able to balance collective autonomy and individual dignity.[46] Dann and Thiruvengadam invite us to conceptually view India and the

[42] Vallas and Schor (n 13) 281 – 284.
[43] Ibid, 282.
[44] Ibid, 283.
[45] Dann and Thiruvengadam (n 7).
[46] Ibid, 2.

EU to also challenge our own views of what a nation-state constitutes, and also the operation of constitutional regimes as being limited to only functioning within such entities. The largely populated and richly diverse India has never fit into the idea of a homogeneous state, and the EU has established itself from its conception till the present day as a trans- or post-national project. Despite this, and if we move past the limitations of the nation-state possibility, both have established constitutional regimes that have sustained.[47] This "continental politics" perspective also allows us to transcend the usual exchange of the Global South taking lessons from the Global North and allows us to "provincialize Europe" in a true sense,[48] because here – the EU as a developing and "tentative" democracy has several lessons and perspectives to take from the long-standing, rich, established and experienced constitutional democratic regime that India has. While critically acknowledging their heterogeneity and not attempting to look over the differences that the two entities have,[49] we also observe the common problem that they face: the confrontation with a globalized economy and its pressures.[50] As Dann and Thiruvengadam also point out, for these reasons, it is important to also study the relationship between democratic constitutionalism and the economic sphere in these two federal structures as the common market and 'development' are both key concepts in these policies. However, since laws and regulations on gig economy are extremely novel, barely formed and in the phase of collective discussion across the legal complexes in both polities. Another important factor in seeing the gig economy on a global scale, and on viewing labour relations and rights through a broader regulatory framework including immigration policy and law is to note that most gig workers are migrants. Across the EU, and in other big urban centres, the largest share of labour

[47] For principles of a constitutional regime in the EU, with the framework of the EU treaties, See Armin von Bogdandy and Jurgen Bast, 'Constitutional approach to EU Law' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn Hart 2009).
[48] Dipesh Chakrabarty, *Provincializing Europe* (Princeton University Press 2007); Dann and Thiruvengadam (n 7) 3.
[49] Gunter Frankenberg, *Comparative Law as Critique* (Elgar 2016).
[50] Dann and Thiruvengadam (n 7) 3.

power in the platform economy are migrants – many of them being Indian.[51] Even within India which has huge labour force supply, domestic migrants are the ones primarily carrying out the labour.[52] . The globalized presence of the gig economy means that it cannot be seen in isolation within one country.[53]

These two comparators are useful in establishing global connections within the gig economy – and also to acknowledge and deal with the issue of gig workers from the "Global South" and the precarity they face in the "Global North" – or the influence of policies within these polities itself with respect to migration.

1.6 Focus concerns

This thesis shall concern itself with three primary issues while considering the two broader research propositions. The first concern is to break through the binary of the classical "employer-employee" relationship that labour law has traditionally been defined by, by "constitutionalizing" labour relations. With the changing landscape within the gig economy, the definition of who an "employee" is must necessarily expand to ensure that gig workers are not unfairly excluded as proper workers despite being exploited as such. As examined earlier, and as Janaki Nair has also pointed out, this phenomenon of "self-employment" has resulted in a moment of "self-exploitation" which the gig workers are being forced into.[54] At least within

[51] Niels van Doorn, Fabian Ferrari, and Mark Graham, 'Migration and Migrant Labour in the Gig Economy: An Intervention' 37 (4) Work, Employment and Society, 1099-1111 < https://doi.org/10.1177/09500170221096581 > accessed 14 March 2024.
[52] Ibid.
[53] Haritima Kavia, 'The gig is up: international jurisprudence and the looming Supreme Court decision for Indian gig workers' (The Leaflet Oct 5, 2021) < https://theleaflet.in/the-gig-is-up-international-jurisprudence-and-the-looming-supreme-court-decision-for-indian-gig-workers/ > accessed 15 March 2024.

[54] The Qamra Archival Project and Center for Labour Studies, 'Working Lives: Documenting Labour Histories, Discussing the forgotten records of the Indian labour movement with: Prof. Janaki Nair, Prof. Kamala Sankaran and Prof. Babu Mathew' (*The Qamra Archival Project and Center for Labour Studies, National Law School of India University*, 2 May 2023) < https://qamra.in/2023/06/06/working-lives-labour-histories/ > accessed 16 March 2024.

the Indian context, she further points out that this is reminiscent of the 17th and 18th centuries when workers had to expend physical labour simply in order to feed their families.[55] The second concern is identifying constitutional arguments (or rather, duties) which will allow for gig workers to be granted social security benefits as an immediate response, and as an urgent prelude to further substantive labour rights. The third and final concern will be a turn to more substantive labour rights concerning gig workers. However, since there is a broad spectrum of rights such as the right to fair remuneration, the right to collectivize and unionize, and the right against wrongful termination – I will be limiting my focus on the right to collective bargaining alone. Both taking from the discussion on democracy from Dann and Thiruvengadam's book and their focus on collectivization and social rights while considering economic constitutionalism, as well as the discussions we shall see on "constitutionalization" in the following chapter which aligns with long-standing critical traditions within labour law – it is this right to collective bargaining which will ultimately be able to respond in a sustainable manner to the *crisis* of emerging labour relations. The third focus concern will be the over-arching one that shall also be the key to negotiating the first two focus concerns.

With these frameworks, theories and context as the background, I shall proceed to examine what this process of "constitutionalization" entails and how it can aid in this expansionary response to labour crises.

[55] Ibid.

II. REVISITING IDEAS CONSTITUTING THE "CONSTITUTIONALIZATION" OF LABOUR RELATIONS – AN EXPANSIVE MODEL

2.1. "Revisiting" constitutionalization of labour relations

This chapter begins with the word "revisiting" because the idea of "constitutionalizing" labour relations is not a novel one. There have been arguments for and critique against using the concept of "constitutionalization" in labour law, by seminal constitutional theorists and labour law scholars from different jurisdictions. However, the focus of this thesis is on examining and establishing the merit of extending this process of "constitutionalizing" labour rights specifically toward gig workers' rights. While "constitutionalization" of labour law has more recently been used in the sense of including labour and social rights into the bare texts of Constitutions to derive a stronger constitutional legitimacy for them; there has been a historically recognized meaning in the labour law regime that holds even greater value.[56] Within this older meaning, it has been observed as an action or a "verbal noun", as opposed to a static text – sometimes referred to as an "act" of "constituting".[57] Foundational labour law texts have referred to it as the act of unionization and collectivization of labourers in order to strengthen their bargaining power.[58] This method of emancipation has even been referred to as a "Magna Carta" of labour rights constitutionalism, especially playing on how a constitution does not have to be tangentially visible in the conventional lens for it to be fundamental and applicable.[59] This would entail a holistic understanding of the political economy within which labour law

[56] Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 (3) Journal of Law and Society, 342 < http://www.jstor.org/stable/40206852 > accessed 18 March 2024.
[57] Hanna Pitkin, 'The Idea of a Constitution' (1987) 37 (2) Journal of Legal Education, 3 <https://www.jstor.org/stable/42892886 > accessed 18 March 2024.
[58] Dukes (n 56) 342.
[59] Ibid.

exists, and necessarily centre the "labourers" as the central collective while imagining labour rights. Such an idea would demand that the consultation of labourers in making labour laws, tied in with the fundamental rights they are owed by the constitutional text (where there is one; and where there is not, the equivalent of constitutional principles through other legal texts, principles, or values) must "constitute" their broader rights as workers. This means that these rights will emancipate the labourers in recognition and response to their growing needs and growing classes of labourers as the economy itself transitions. The effort to think of constitutional law through labour law, and of labour law through constitutional law in these ways is also a comparative constitutional law effort to fill in the gaps of those jurisdictions which lack the methods to effectively do so.

2.2. Two broad meanings of "constitutionalization" – and the response to labour crises

Within the scope of this thesis, "constitutionalization" shall be used in two senses. The first is a theoretical method of understanding "constitutionalizing" which draws from classical texts in labour law with reference to democratizing labour relations by consulting labourers as equal parties in regulating the same. More commonly, this is referred to as an "economic" constitution,[60] a concept that was developed by Hugo Sinzheimer who suggested that such a constitution was required to correct the imbalance of power between the labour and capital relations which was inherent to the capitalist mode of production. He suggested that the state should enable and allow workers' collectives such as trade unions to be equal participants on par with their employers in the "autonomous" regulation of the economy. The overall idea of "constitutionalization" here, comes from seminal works in labour law by both Hugo Sinzheimer

[60] Ibid.

and his student, Otto Kahn-Freund both of whom essentially argue for the participation of collectivized labour in the regulation of employment relations – although with some divergences in their argument.[61] Here, the use of the word "constitution" referred to this workplace democracy, as well as the substantive grant of constitutional and legal rights by the state which would enable workers to ensure their equal bargaining power.

The second manner in which I use "constitution" is precisely in reference to this "substantive grant" of legal rights. To expand on this classical theory by Sinzheimer with a socio-democratic lens – "constitutional" in this manner can mean three different forms of legislative and administrative designs.[62] The first would be enumerated rights and powers written in the constitutional text; the second would include the statutory objectives of the acts and legislations that are based on and oblige these enumerated constitutional principles and reconstitute social relations in line with the same; and the third would be the fundamental constitutional values of "equality, freedom and democracy" – values that are not necessarily enumerated in the constitutional text, but are nevertheless fundamental to the upkeeping of these constitutional principles.[63]

The combination of these two broader methods of understanding the process of "constitutionalizing" is imperative in reconsidering or expanding labour relations in newer schemes of labour rights that recognize structural changes in the global economy. With the two afore-mentioned methods of "constitutionalization" as a framework, this thesis seeks to defend that "constitutionalization" is a process of expansion that must be used as a method of engagement with the constant *crisis* of labour law and labour relations. With globalization, newer forms of economies and labour relations – the "crisis" of changing labour relations and

[61] Ibid.
[62] Blake Emerson, 'The Constitution of Social Progress' (*LPE Project*, 30 May 2020) <https://lpeproject.org/blog/the-constitution-of-social-progress/> accessed 19 March 2024.
[63] Ibid.

the need for a change in labour laws is being often being spoken about as a "novel problem".[64] However, as the experience and labour history works of and from especially post-colonial countries have always insisted,[65] labour law is in *constant crisis*. These are the moments of crisis that result in demands from labourers' and, consequently, an upheaval of labour law to respond to the rights and needs that are owed to the labourers' – through a bottom-up approach. Scholars such as Ruth Dukes, who has otherwise made some of the most compelling arguments in critical labour law and *for* the constitutionalization of labour law have argued that this crisis needs to be resolved and that a solution must be found to end it.[66] However, what is more compelling is the argument that scholars like Harry Arthurs have made consistently – that the crisis of labour law is an inevitable one, and subsequently leads to a process of transformation in labour relations which must necessary de-settle and settle itself time and again.[67] Therefore, this thesis will be more focused on the equitable and sustainable methods of engaging with the ongoing crises in pertinence to gig and platform workers, rather than succumbing to the notion that this crisis has an *end*.

2.3. Constitutionalization through Comparative Constitutional Law – a six-step method to constitutionalise labour relations

Constitutional law can act as an all-encompassing "superior" legal framework that helps to make sense of "rights" by considering these fields together. Comparative Constitutional law inherently puts them together – for example, in the case of immigration laws or the criteria of "citizenship" for collective bargaining rights and formation of trade unions, there is a necessity

[64] Ruth Dukes, 'The Economic Sociology of Labour Law' (2019) 46 (3) Journal of Law and Society <10.1111/jols.12168 > accessed 19 March 2024.
[65] Chitra Joshi, 'Histories of Indian Labour: Predicaments and Possibilities' (2008) 6 (2) History Compass, <https://doi.org/10.1111/j.1478-0542.2007.00503.x. > accessed 20 March 2024.
[66] Dukes (n 64).
[67] Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 (4) Social & Legal Studies" < https://doi.org/10.1177/0964663910376339 > accessed 21 March 2024.

to view constitutional rights in two (or more) polities comparatively. This thesis is a theoretical and conceptual invitation and an initial proposition to view labour law critically through comparative constitutional law and continue using it as a tool to deal with future, emerging labour relations. Inculcating the concepts and propositions from both meanings of constitutionalization – I shall use a six-step method in the following chapter to apply the method concretely and comparatively to analyse the ways in which we can expand our purview of gig workers' labour relations in the context of India and the EU. The first three steps are more attributable to the second method of constitutionalization, while the latter three are more aligned with the first method of constitutionalization deriving from the concept of economic constitutions.

The first step is to examine the constitutional provisions from constitutional texts or documents that are not necessarily codified as a "constitution" but play the same role as one. This would include The Constitution of India, 1950, and the EU's constitutional framework would include foundational treaties such as the Treaty on European Union, Treaty on the Functioning of the European Union when read along with the Charter of Fundamental Rights of the EU which includes the fundamental rights and freedoms, the Lisbon Treaty and the relevant regulations and directives including and especially the latest EU Platform Workers' Directive. The second step is the constitutional jurisprudence from the Supreme Court of India which shapes the judicial precedents, and the Court of Justice of the European Union which forms a constitutional framework governing constitutional practices in the EU. Pertinently, this would include the interpretation of acts and statutes mentioned in the next step – the third one, which deals with the relevant statutes that have to be critically read in line with the established constitutional principles and constitutional values espoused through the first two steps. In the case of India, this analysis would primarily include the latest attempt to consolidate rich labour law legislation and jurisprudence that was fought for over several years into the latest simplified, diluted four

labour codes that are expected to be implemented this year. Taking these "domestic" steps into the global realm, the fourth step would be the comparison on the basis of implementation of international norms and standards – especially those set by the ILO Conventions, and with respect to how these standards are implemented in line with the constitution (understood in the broadest sense, keeping in line with the process of constitutionalization) domestically. This is especially useful to see how these continental polities differ in contributing, signing or implementing these standards differently (or similarly). The next two steps take this to the expansionary level. The fifth step is the examination of demand charters by trade unions across both the polities, the protest movements which focus on the demands made by the gig workers (including specific categories of rights such as gender-based rights or migrant workers' rights) and rejecting the public/private divide of understanding "democracy" as proposed by the critical labour law framework. This is a more radical step that directly calls for academic and political confrontation by the legal complex to real-time demands by workers, which is in fact principally in line with the ILO Convention No. 144[68] which states that a country wide labour conference is required in order to consult with labourers before the passing of any labour legislation. In India, the afore-mentioned new labour codes were drafted in violation of this convention. This step forces us to recognise demands which are shunned formally, in the world of work which conveniently side-lines masses of workers to the informal sector to make higher capital gains. The sixth step is an extension of the fifth step and considers pending petitions filed by the workers' unions, collectives and even individuals. In the conservative legal field, the legal complex strongly disallows any opinion or document that has not been "ruled" upon or formally legislated to be considered as valid. However, from a critical legal framework, it is pertinent to recognise this as an important part of conceptualising labour rights especially when the

[68] ILO Convention No. 144.

proposition is that we constitutionalize labour relations by accounting for employee inputs on par with the capitals.

Using this framework of constitutionalization and the six-step process that is based on it – I shall apply this process to introduce an expansionary view of labour relations that can allow for gig workers to make their constitutional claims in a sustainable manner.

III. A COMPARATIVE APPLICATION OF "CONSTITUTIONALIZATION" – TOWARDS *EXPANDING* LABOUR RELATIONS AND *INCLUDING* GIG WORKERS

3.1. Method of Application of the Six-Step Method

The core question that this thesis proposes to explore is how the labour rights regime can respond to provide socio-democratic rights to, specifically, gig and platform workers in a growing neo-liberal economic crisis,[69] through the process of constitutionalization. This chapter shall seek to apply this process of constitutionalization through the afore-explained six-step method in order to expansively view labour relations. In turn, this can support the inclusion of gig workers to be constitutionally entitled to social security benefits on an immediate basis, and keep demanding for further substantive rights in their own terms through a strong, democratic right to collective bargaining. The fundamental idea behind this is to break traditional binaries in labour law, make space for emerging relations by affording them equal social protection as with traditionally recognized employment while not flattening the flexibilities and novelties they may provide to the gig workers.

As part of this process, I shall begin with a brief history of democratic constitutionalism in India and the European Union. Following that, I shall specifically trace the social rights under both constitutional regimes surrounding the right to work, and its linkage with democracy – once again, centering the right to collective bargaining of workers. The third section of this chapter shall discuss the "interrupted constitutionalization"[70] of these rights in India and the EU from a

[69] Alessandro Niccolò Tirapani and Hugh Willmott, 'Revisiting conflict: Neoliberalism at work in the gig economy' (2021) 76 Human Relations 53 < https://doi.org/10.1177/00187267211064596 > accessed 22 March 2024.

[70] Gautam Bhatia and Emilios Christodoulidis, 'Social Rights' in Arun Thiruvengadam and Philipp Dann (eds), *Democratic Constitutionalism in India and the European Union: Comparing the Law of Democracy in Continental Polities* (Edward Elgar Publishing 2021).

critical perspective to pinpoint to the gaps in the existing (or upcoming) laws. The fourth section of this chapter shall then delve deeper into these rights with the status quo on gig workers' rights in India and the EU. These first four sections will cover the first four steps of the six-step method by sufficiently analysing – (i) constitutional provisions, (ii) constitutional jurisprudence, (iii) statutory obligations and (iv) international norms and standards. The fifth section of this chapter shall focus on the fifth and sixth steps to complete this analysis – (v) demands by labourers through demand charters, protests, demonstrations and so on, and, (vi) pending petitions filed by workers' unions before the Courts. Each of these five sections shall inculcate a comparative element between India and the EU – then leading to the final, concluding chapter which shall discuss the way forward with constitutionalization of gig workers' labour relations, using the lessons from these two polities.

3.2. Brief history of democratic constitutionalism in India and the EU[71]

This section will focus especially on the economic aspects of democratic constitutionalism for the purpose of this thesis. It lays down the context of these two polities in order to better understand further constitutional concepts within their respective regimes as well as comparatively.

In their chapter, Bhatia and Christodoulidis elucidate succinctly on the trajectory of labour jurisprudence in India and the European Union from a comparative constitutional perspective which is directly connected to my analysis as inspired by Thiruvengadam and Dann's edited collection on comparative democratic constitutionalism. The purpose of this chapter, which is richly informed by their analysis, is to continue and add on to it with a specific focus on gig workers' rights and the major developments in India and the EU since this book was published – including a critique on the newly drafted Indian labour codes impending implementation, and the EU Platform Workers' Directive. Further, this chapter will critically broaden their meaning of "constitutionalization" to include the fifth and sixth expansionary steps of the six-step method.

[71] Dann and Thiruvengadam (n 7) 9 – 19.

3.2.A. India

Within the Global South, India has one of the longest standing tenures of constitutionalism since its independence in 1947 – barring the infamous internal emergency period between 1975 – 77.[72] Its experience with long and brutal colonial rule has heavily influenced the concepts of democracy and constitutionalism it has inculcated, and forms part of the cornerstone of its constitutional values.[73] In its founding moments as an independent country, there was a major concern about social rights and issues concerning poverty, illiteracy, and economic development as Uday Mehta has noted.[74] Importantly, as Benjamin Zachariah has analysed with respect to intellectual ideas of the elite that were dominant around the years leading to independence as well as the ideas that were dominant during the framing of the Constitution – there was an emphasis on 'development' which vaguely confounded and confused goals that were "common" to imperialists, capitalists and socialists all at once.[75] Across more than the past 75 years of independence, India has economically transitioned from a state-led redistributive model of economic 'development' to one based on policies of economic liberalization which is deeply inclined towards globalization.[76] Through these transitions, it has come under critique constantly for failing to upkeep its own constitutionally written goals of social justice and economic development – also specifically for failing to outreach social security to most of its population.[77] Since 1991, this situation has worsened under the strongholds of neoliberalism where despite the enactment of welfare laws, there was minimal progress towards welfare.[78] This trajectory directly affects the emphasis on the welfare and rights of labourers in the country.

[72] Ibid, 9.
[73] Ibid, 10.
[74] Ibid, 11; See also Uday Mehta, 'Indian Constitutionalism' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 16.
[75] Ibid, 11; See also Benjamin Zachariah, *Developing India* (OUP 2012).
[76] Ibid, 13.
[77] Ibid, 13.
[78] Ibid, 13; Jayna Kothari, 'A Social Rights Model for Social Security: Learnings from India' (2014) 47 (1) Verfassung in Recht und Übersee 5 < https://www.jstor.org/stable/43239719 > accessed 22 March 2024.

3.2.B. The European Union

I have chosen this comparator with the full awareness that this polity is not a nation-state, and I do not refer to the member-states while speaking about the EU – but the trans-national entity as a whole. It began with two international organizations – the European Community of Coal and Steel (1952) and European Economic Community (1957) – collaborating on a process of constitutionalization in the 1960s.[79] Soon after, the Court of Justice of the EU (CJEU) slowly evolved the founding treaties into a quasi-constitutional regime[80] - including landmark decisions to give EU law supremacy over national member-state (and their constitutional) laws, and to give direct effect to EU regulations.[81] The starting point of much of this integration was economic in nature – with the idea of the common market being the epi-centre of relations between not only member states of the EU but also the individuals across the polity, not confined by their borders.[82] The democratic legitimacy would initially come from the member states through the European Commission partnering with the Council of Europe which would then drive this common market ideal and focus on the EU idea of 'development'.[83] Now, there is increased and stable legitimacy of the European Parliament which became a directly elected organ in 1979 and has gained a typical characteristic of federal systems through a "mixed constitutional and institutional system of democratic input".[84] Now, the EU is a powerful organization that has expanded its areas of regulatory reach to include monetary policy and migration law (again, important regulatory regimes for the overall purpose of labour

[79] Ibid, 14.
[80] Ibid, 14. See also generally: Bogdandy and Bast(n 47); Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 (1) America Journal of International Law 1 < https://doi.org/10.2307/2201413 > accessed 23 March 2024.; Karen Alter, *The European Court's Political Power* (OUP 2009).
[81] Ibid, pg. 14; Case C-26/62 *Van Gen den Loos v Nederlanse Administratie der Belastingen* [1963] ECR 1; Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585.
[82] Ibid, 15.
[83] Ibid; Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 17.
[84] Ibid, 17.

regulation).[85] With the treaties acting as constitutions with fundamental rights and as a supreme authority, with a democratic parliament and an effective court that reviews any violation of these fundamental rights – the EU is essentially a federal, constitutional polity in its own right.[86]

3.2.C. Comparison

While there are several important and more glaring differences between India and the EU – certain similarities, and common objectives, are clear. Both of them, in their essence, are federal structures. They are unusual polities in their own right – in that the EU operates almost like a nation in its constitutional operation although there is no unified sense of homogenous nationalism, and although India has a post-colonial identity of nationalism – there is massive diversity and regionalism packed into it. These are key observations in which levels make ultimate decisions in either of the polities – but most importantly, makes a strong case for comparison between them both.

From the keen perspective of economic constitution and social democracy – the operation of democracy as an "organization of power" has to be seen both from public and private organizations of power.[87] As observed in the brief contextualization, the ideas of economy and development have played a key role in both India and the EU – it being an important establishment for a post-colonial, new nation-state such as India and the very basis of integration for the EU. On the first look, the EU seems to take a constitutional approach towards a "minimalist model of liberalism" which marks a low-interference polity that refuses to intervene in welfare measures, and a high tolerance for free trade, and propagating economic freedoms.[88] The common market still stands as a superior ideal that creates barriers against

[85] Ibid, 18.
[86] Ibid, 18.
[87] Ibid, 29.
[88] Ibid, 29.

redistributive policies.[89] On the other hand, the Constitution of India is a document that is extremely rich in laying down ideals of social justice and fundamental duties, especially through its Directive Principles of State Policy. They visualize the active intervention of states at any turn where there is a need for welfare or towards the social rights of all citizens.

However, in both cases, the reality is more complex and layered. The EU has developed more highly regulated markets over time such as in the agricultural markets, and it has emphasized on social justice and redistributive measures as being obligations of the member states.[90] Meanwhile, India has been increasingly de-regulating its market over time. Therefore, it is important to account for constitutional processes that may not merely be written and static, and the actual socio-economic and political processes that reality reflects as well.

3.3. The right to work as a social right in India and the EU

The above context is reflected well while attempting to place the "right to work" as a socio-constitutional right in the landscape of these two democracies. In order to understand this aspect, an analysis of the trajectory of the decline of labour laws is essential while noting similarities among the two polities – despite their distinct differences on a structural level – showcasing neo-liberal trends on a global scale. This includes primarily three points. First, the constitutional courts have consistently been declining in their role to protect the right to work. Second, both the legislature and judiciary have been hand-in-hand in this decline. Third, as Bhatia and Christodoulidis have argued, that these trends only further emphasize the need for collective self-determination, ideas of solidarity and the right to collective bargaining as an essential way to interact with recurrent work sanctions in a context where workers' rights are

[89] Ibid.
[90] Ibid, 30.

being undercut.[91] As they point out – "social rights are the more obvious casualties, however 'regrettable', of the seemingly inexorable process of globalization".[92] Once again bringing back the rejection of the public/private divide from the critical labour law framework – it is social constitutionalism which will bring together democratic institutions within the structures of the economy as a central aspect of controlling market forces. This results in "institutionalized forms of solidarity as an organizing principle of the constitutional imaginary" which expands our purview of the social right as merely the production of value towards the market through labour and more as actual protection against collective vulnerability that we confront in a globalized, neo-liberal economy.[93]

Thomas Marshall's idea of industrial citizenship closely calls to this idea that we have discussed as part of the mainstream traditions and roles of labour law entering to correct the imbalance of power that is created by market forces.[94] He saw social rights as a mechanism to create political power for those who had less bargaining power to ensure that values other than those propagated by market forces can centralize in the operations of an economic system. According to him, this was the only way to reconcile the inherent contradictions between democracy and capitalism. While Bhatia and Christodoulidis argue that social constitutionalism may remain toothless through most stages of globalization and can only be effectively exercised towards the end of "social devastation" caused by it,[95] I believe that we ought to go a step further here – social constitutionalism can be far more effective and unfold through various stages prior to "the end" if it is implemented with a strong basis of collective bargaining powers granting collective autonomy and decision making power to the more vulnerable players in the market.

[91] Gautam Bhatia and Emilios Christodoulidis, 'Social Rights' in Arun Thiruvengadam and Philipp Dann (eds), *Democratic Constitutionalism in India and the European Union: Comparing the Law of Democracy in Continental Polities* (Edward Elgar Publishing 2021).
[92] Ibid, 223.
[93] Ibid, 224.
[94] T.H. Marshall, *Citizenship and Social Class* (Cambridge University Press 1950).
[95] Bhatia and Christodoulidis (n 91) 225.

This has been seen in several labour movements across different periods of time in labour history while workers struggles had to deal with diverse fissures, challenges and new market forces – including and especially when capital forces threaten to relocate to cheaper sites resulting in a loss of economic prosperity for the nation state and the loss of jobs for a mass number of labourers (a pressure point which Bhatia and Christodoulidis caution us against).

A brief interlude into global labour history

To establish this point, we must briefly embark on a comparative labour history endeavour before returning to our comparative constitutional law endeavour – an inter-disciplinary effort that the legal complex must essentially undertake in order to arrive at answers for the present-day labour crises.

For this, I have undertaken the challenging task of juxtaposing colonial India's anti-indentured labour movement and the political subjectivity of the "worker" used to mobilize a broader social movement – which Mrinalini Sinha examines;[96] and, the labour movements that globally occurred and transformed (or did not transform) from the 1930s to the late 1990s/early 2000s across the world within the automobile industry – which Beverly Silver examines.[97] . On the face of it, and indeed practically in many ways, there are no obvious reasons to compare and contrast these two sets of movements – one concerning capitalist factories across time and space, and one concerning a specific time period seeking abolition of a specific type of labour (indentured labour in colonial India). However, from a broader global history perspective, there is some value in examining how overall workers' struggles, resistance and power has been mobilized at different moments and locations. The "amazingly similar" continuities,[98] as well as the stark contrasts are both emphatic of the blueprint that workers' struggles have always

[96] Mrinalini Sinha, 'Anatomy of a Politics of the People', in Manu Goswami and Mrinalini Sinha (eds), *Political Imaginaries in Twentieth-Century India* (Bloomsbury Academic 2022) 31-49.
[97] Beverly J. Silver, *Forces of Labor. Workers' Movements and Globalization since 1870* (Cambridge University Press 2003), 41-74.
[98] Ibid, 45.

used, regardless of the context or time-period, as well as symbolic of the changing global economic structures, and the resulting change in global labour struggles. The usage of repertoires and tools of organization in these two different settings, helps to trace both of these components.

Sinha's primary argument is that there was a democratic, inclusive dimension of the anti-colonial, anti-indentured labour movement that constructed a "new, collective political subject" of the "the demos" instead of the "ethnos". She shows us how the anti-indenture movement was characterized as the cause of the "nation as a whole", irrespective of class. A major repertoire used during this time were real-life accounts of indentured labourers, communicated in vernacular language, and through daily newspapers – each of these three components making them accessible to the larger "demos". To personalize the account, one indentured labourer Kunti herself wrote a letter recounting her escape from sexual assault by a white supervisor on a plantation while indentured. This story spread across other vernacular as well as English newspapers, through poetry, theatre and songs in different narratives. Kunti, who was an oppressed caste, Muslim woman, indentured labourer had stood in as the representation and voice of the national identity, with her story in the centre. This "demos" construction resulted cross-class and cross-caste solidarities. Importantly, in the legal context, another major repertoire was the publishing of affidavits from former indentured workers returning to India in vernacular newspapers. The implication of the "legal" affidavit being used in the "public" circulation was to give power to the voices of the actual subjects of the indentured labour. This moved away from a more common elitist nationalist narrative that was paternalistic, and would often see labour rights as something "given" to the workers, and not something that they fought for.

One of the major continuities that can be traced to Silver's piece is the success in organizing labour struggles where the worker's identity or organization has been contingent on creating a

political subject who is more than just the "worker". This invocation was contingent on a larger national-level struggle and broader political struggles of the region and time being connected to workers' struggles. Silver suggests that there was a circular motion through which the cycle of workers' exploitation and struggles kept repeating itself. She examines the automobile industry across a long period of time, and travelling from North America to Western Europe, to Brazil, then South Africa and then to South Korea. Through all of this, the conflict travelled with the capital and the same story would repeat itself. Where there was mass production (resulting also in mass labour strength) without promised job security, and poor working conditions, a militant minority would emerge and use the tools of sit-down strikes and occupation of the shop floor. Since the Fordist methodology was contingent on the "line" production, the result of one worker stopping would mean the stoppage of the entire factory itself. As seen in the film, 'Made in Dagenham'[99], which was also set in Ford's factories – the stoppage of workers producing the car seat material could result in the entire stoppage of production of cars itself. The capital reaction would be to resort to automation to render the strikes of the workers' as meaningless, and eventually, there would be an appeal to "responsible unionism" that would only undermine the bargaining power of workers. However, this further alienation of workers would only cause their agitation to increase, and for their collective action to grow stronger. The capital reaction is to then target a different location with oppressive government policies or unstable states which did not guarantee any labour protection, and to invest the main operations of the multi-national automative industry over there (this is the caution pressure point that Bhatia and Christodoulidis pinpoint to). The cycle would repeat itself until the locational shift went right back to the beginning: in North America. While this pattern is undeniable, the strike movements died down much faster in North America than they did progressively in the other nations that it travelled to. This brings us to the continuity with

[99] Nigel Cole, *Made in Dagenham* (United Kingdom, Paramount Pictures 2010).

Sinha's piece, where the repertoires used for the strikes in Spain, Italy and Brazil contained an element of nationalist politics, and in the case of South Africa – anti-apartheid (reminiscent of the anti-colonial) politics. As Silver points out, there was a "broad political significance for the nation beyond the particular industry and its workers". This demos construction was an essential basis that gave larger implications to the labour movements to the nation as a whole. Even the capital reactions were contingent on this – as can be seen by how the multinational corporations were not motivated to enter South Africa when its national liberation movements were peaking across the continent, and there was massive anti-apartheid agitation. In these countries, the "militants" were not a minority – but a majority.

While there is a similar appeal to the demos that has withstood the test of time and differential goals, the repertoires used in this process (as far as it is traced in these two pieces) are starkly different. The anti-indenture movement in colonial India appeals to the massive national audience to mobilize, regardless of whether they are workers, through vernacular language and newspapers. The auto-workers are contained within themselves in terms of their repertoires – they organize sit-down strikes and mobilize occupation all set within the shop floor itself. **However, while the "legal form" affidavits are used by the indentured labourers to appeal to the demos in Sinha's piece, we see how there is an appeal to legal, democratic rights in the other countries by the auto-workers to establish their cause. In Brazil, the impact of the movement was so large, and so national that they partook in drafting labour rights within the constitution itself.**

Taking from this conclusion, the "demos" seems to transcend the simple idea of a nation and extends to a larger, inclusive social movement and the methods by which labour struggles' have always appealed to them. This is the perspective that has to be applied towards understanding the power of collective bargaining rights within, using and outside the legal complex. All of this hinge on the idea of "solidarity" which is a technique to hold co-responsible in equal parts

all parties involved in a certain risk.[100] This requires that we move away from market logics which define labour as "services" and instead apply the approach adopted by the ILO which has famously declared that "labour is not a commodity".[101] Bhatia and Christodoulidis have taken this a step further in identifying solidarity as a constitutional value on its own[102] – deriving from existing fundamental rights and constitutional duties entrenched in both the constitutional regimes. All of this shall help to re-cast the idea that democracy is only a public function – and in turn, provide an effective mechanism to respond to changing labour relations. With this lesson, we return to our comparative constitutional law endeavour – with a brief description of the social rights available under the Indian Constitution and the EU Social Charter.

3.3.A. India

Part III of the Indian Constitution lays down the fundamental rights which if violated would be declared void by the courts.[103] Specifically in pertinence to labour and work rights, Part III contains Article 19(1)(c) which provides the right to form associations or unions.[104] Article 23 protects against human trafficking, beggar (referring to bonded labour)[105] and other "similar forms of forced labour".[106] However, a large part of envisioning equitable labour rights is under Part IV which forms the Directive Principles of State Policy which are judicially unenforceable in their conception unlike Part III – but nevertheless a fundamental part of the constitutional fabric.[107] This Part includes directives such as prerogative of the state to ensure social and

[100] Alain Supiot, 'Grandeur and Misery of the Social State' (2013) 82 NLR, 99 <https://newleftreview.org/issues/ii82/articles/alain-supiot-grandeur-and-misery-of-the-social-state.pdf> accessed 23 March 2024.
[101] Bhatia and Christodoulidis (n 91) 227.
[102] Ibid.
[103] The Constitution of India, Articles 13 & 32.
[104] Ibid, Article 19(1)(c).
[105] Ibid, Article 24.
[106] Ibid, Article 23.
[107] Ibid, Article 37.

economic justice,[108] adequate means of livelihood to all citizens,[109] equal pay for men and women,[110] the right to work,[111] just and humane conditions of work,[112] a living wage[113] and economic democracy.[114] Since the 1960s, the Supreme Court of India began to actively use Part IV Directive Principles as "interpretive aids" in determining the substantive content of rights under Part III where there was any statutory ambiguity, in furtherance of public interest – including within the labour law regime.[115] This has since afforded these principles, which primarily contain the social rights (whereas Part III contains the civil-political rights), the status of being "semi-binding"[116] – allowing for them to contribute to the social constitutionalization of newer, and further rights which have not yet been carved.

3.3.B. The European Union

Initially, while the EU itself was focused and tied together because of economic integration and with common market ideals – through the principle of subsidiarity, the element of social protection including labour protection and collective bargaining were relegated to member states instead, with the judicial body of appeal being the European Court of Human Rights (ECHR).[117] However, while social protection was entrusted with member states, the decisions arising from the ECHR with pertinence to economic integration would however have to still be implemented on a member-state level – through other regional and national courts in Europe.[118] Following this logic, in its founding moments, the foundational treaties of Rome only contained

[108] Ibid, Article 38(1).
[109] Ibid, Article 39(a).
[110] Ibid, Article 39(d).
[111] Ibid, Article 41.
[112] Ibid, Article 42.
[113] Ibid, Article 43.
[114] Ibid, Article 43A.
[115] *UPSEB v Hari Shankar* (1980) AIR SC 65.
[116] Bhatia and Christodoulidis (n 91) 231.
[117] Ibid, 232.
[118] Ibid.

economic rights such as to free movement for goods, services and capital.[119] Labour rights were barely included within this scheme. It was between the mid-1960s and 1970s that there was a stronger inclination to protect labour rights. In 1994, the EEC adopted the Social Action Programme which furthered interests of increased employment of workers, and even the participation of workers in decision making.[120] The most significant change was the constitutionalization of 'Social Dialogue' in the Treaty of Maastricht of 1992. While this was not equivalent to an EU-wide effective mechanism of collective bargaining and did not entirely account for the asymmetries in bargaining power and it was plagued with the inability of the state bodies to intervene to resolve lack of agreement between the parties – it is the most concrete constitutionalization of social rights in text that the EU has seen.[121] Here too, the lack of binding effect is a stark factor.

3.3.C. Comparison

Bhatia and Christodoulidis have pinpointed that there has been a devaluation of the right to work as a social right in the informal economy which is extremely large in India and expanding each day in Europe. They have correctly laid emphasis on how the re-orientation of public law principles will shift the debate on the quasi and under employment in the gig economy whether protection given to workers in disproportionately stripped back in contrast to the exploitation that it burgeons – away from the emphasis on market forces and closer towards public-collective perspectives.[122] With all the differences between the two comparators, what has remained similar and constant is that since both their constitutional conceptions – social and specifically, labour rights have been unenforceable in nature and although they exist in the text, they have not been granted the status of "complete" rights on their own. This has been referred to as

[119] Ibid, 233.
[120] Ibid, 233 – 234.
[121] Ibid, 234.
[122] Ibid, 228; See generally: Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014).

"imperfect constitutionalisation" where there is some recognition of these rights but they have not gained equal status to civil and political rights.[123] One additional factor within the EU is that over time, the ILO conventions and standards came to play a big role in setting terms for the fundamental right to association and other such rights as well.[124] On even a preliminary level, this calls for a comprehensive framework of social rights that can actually be effectuated.

3.4. Critical Perspective on "interrupted constitutionalization" of the right to work in India and the EU

In this section, I shall directly deal with the third and main focus concern of this thesis which is the freedom of association and collective bargaining powers as a constitutional right for workers – and this is what actually encompasses the "right to work". This issue brings us closer to the issue of gig workers' rights as – in India's case, while the right to work itself has been largely settled and acknowledged as an available constitutional right, the main concern has been who has access to this right and who is excluded by definition from it; whereas, in the case of the EU, there have been fundamental issues pertaining to the very substance of the freedom of association.

3.4.A. India

Given the semi-binding nature of the Directive Principles as noted in the previous section – most labour rights have conceptualized constitutionally through judicial evolution in India. Over time, the Indian Supreme Court has moved from favouring social rights to later pushing it to the back-burner. Most of this has been underlined by hierarchizing economic freedoms over social rights. Much of this work has been done by the Indian Supreme Court which has

[123] Bhatia and Christodoulidis (n 91) 234 – 235.
[124] Ibid, 236.

increasingly couched the language of social protection and labour law in the language of economic freedoms and the dominant economic sensibility in the given period. The first phase[125] of this was based on the statutory regime without its foundations being within constitutional law given that the Directive Principles had not yet gained their semi-binding character. This period between 1950 and 1975 did in fact see many cases which favoured the protection of workers. However, the logic they were based on was one that emphasized on industrial peace and security to ensure the continued functioning of the industry without much hindrance. The other logic they were based on which can hurt the case of emerging labour relations is that they were contingent on a traditional employment relationship assuming a binary relationship where the employer has an axis of control over the employee and can exercise "ultimate authority".[126] The second phase[127] was one of the landmark phases where the labour protection regime saw a boom. While the right to work and labour protection gained more traction,[128] it still did not expand constitutionally in the way that it should have. Most of the judgements which espoused these principles only did so with a mild nod to the Directive Principles. This is surprising as generally this phase saw an incremental usage of the Part IV of the Constitution. The final phase was the complete rollback of social rights.[129] This period was the complete take-over of neo-liberal policies under the 'New Economic Policy' whereby the principle of socialism was completely abandoned and there was complete domination of liberalization, disinvestment and privatization. Landmark judgement which had expanded labour protection were called for review by the Supreme Court[130] - wherein the logic of the court entirely operated on neo-liberal logic falsely claiming that decisions had been made from the perspective of workers alone and that they had to be reviewed for the benefit of the

[125] Ibid, 238 – 240.
[126] *Silver Jubilee Tailoring House v Chief Inspector of Shops and Establishments* (1974) 3 SCC 498.
[127] Bhatia and Christodoulidis (n 91) 240 – 242.
[128] *Bangalore Water Supply and Sewage Board v Rajappa* (1978) AIR SC 548.
[129] Bhatia and Christodoulidis (n 91) 242 – 245.
[130] *State of U.P. v. Jai Bir Singh* (2005) 5 SCC 1.

employers/industry as well.[131] The tracing of these phases shows that the mere semi-binding nature of Directive Principles was insufficient to upkeep social protection through the raging advent of neo-liberalism.

3.4.B. The European Union

The EU's judicial protection of the right to work has not undergone such massive transitions – instead, it has almost consistently remained neo-liberal in its logic barring a few glimmers of hope that have not proven to be sustainable. The CJEU adopted a completely 'liberalizing' ideal and found in landmark cases pertaining to the right to collective bargaining that the EU law did not in fact apply to those cases at all.[132] It clearly found that collective action as a right by itself is in stark contrast to fundamental (economic) freedoms, and therefore, were lawful on the face of it unless it can proportionately be proved otherwise. However, here there is a conflict by the CJEU against the ECtHR/Strasbourg Court which, as we saw earlier, has made a commitment to social rights.[133] The ECtHR has made a strong commitment towards the maintenance of the right to collective bargaining as an essential element of the right to freedom of association in Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and has clearly stated that the jurisprudence of the ILO and the European Social Charter shall be instrumental in the maintenance of that right.[134] As per the European Union's Charter of Fundamental Rights binding since 2009, when there is a collision between the CJEU and the ECtHR – the ECtHR's jurisprudence shall stand.[135] However, when it came to the actual application of this, the Court did not decide in strong favour of right to collective bargaining and instead took a vague position that the interests of the labour and management "need to be

[131] Bhatia and Christodoulidis (n 91) 243.
[132] Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007: 809, [2007] ECR I-11767; Case C-438/05 *International Transport Workers' Union v Viking* ECLI:EU:C:2007:772, [2007] ECR I-10779.
[133] Bhatia and Christodoulidis (n 91) 247.
[134] *Demir and Baykara v Turkey* App No 34503/97 (ECHR, 12 November 2008), para 19.
[135] Bhatia and Christodoulidis (n 91) 247.

balanced" with a wide margin of appreciation between public interest rights and the applicant's competing rights under Article 11 of the Convention.[136]

3.4.C. Comparison

The comparative element here is largely a continuation of the previous comparison that we saw – the interrupted process of constitutionalization with respect to labour law in these cases is a feature of imperfect constitutionalism. The fact that social rights are not enforceable in either of these polities has resulted in them being unsustainable and inconsistent across both political backdrops. While India has diluted labour laws and the right to work, and narrowed down the category of workers who can access this labour protection; the EU has consistently favour economic rights – with both favouring neo-liberal tendencies.

3.5. Status quo of gig workers' rights in India and the EU

With this constitutional and labour contextualization of both the polities having been done with the +perspective of the first four steps of the six-step method – I shall now briefly analyse the current status of legal and social rights in both these polities specifically for gig workers.

3.5.A. India

The definition of a gig worker under the latest Indian 'Social Security Code' is dangerous and codifies the exclusion of gig workers by referring to them as "persons who perform work outside of traditional employee-employer relationships".[137] While there is a guise of providing certain benefits to gig workers having recognized their existence, this is not a bona-fide measure

[136] *Unite the Union v United Kingdom* App No 65397/13 (ECHR 26 May 2016).
[137] The Code on Social Security (No. 36 of 2020), Section 2(35).

– their recognition is more attuned to exclusion from benefits that traditional "employees" have the right to, and less useful for carving out specific rights for them.[138]

Social security benefits are vital in an economy like India's which primarily and largely consists of the informal sector with unorganized workers. These unorganized workers themselves only receive welfare schemes for social security, instead of proper statutory benefits. There is a clear discrimination between them and the organized, formal sector wherein the employees can seek all social security benefits as laid down under ILO Convention Number 102.[139] Gig workers do not even fall within the scope of "unorganized workers" leaving them in a complete void, without any social security benefits. More importantly, social security benefits is only an immediate part of labour rights, consisting of a few substantive benefits such as provident funds, employees' state insurance or maternity benefits.[140] These do not consist of labour rights more broadly – such as the right to collective bargaining, and can be considered only as a stepping stone.

Overall, India – like much of the rest of the world currently – suffers from a lack of established policy, legislation and regulatory frameworks with respect to gig work and the biggest challenge will be the inaccessibility of the new Codes such as the Code of Social Security 2020 to migrant workers and gig workers.[141] Even with all the drawbacks and fluctuations of the previous statutes, the richly developed jurisprudence under them is being replaced by completely diluted labour laws – meaning that there is a loss of the protections on a multi-faceted level which was available under nine social security laws - : the Employees' Provident Funds and Miscellaneous Provisions Act, 1952; the Employees' State Insurance Act, 1948; the Employees' Compensation Act, 1923; the Employment Exchanges (Compulsory Notification of Vacancies)

[138] Ayushi Saraogi & Malavika Parthasarathy, 'SCO Explains: Gig Workers' Claim for Social Security' *Supreme Court Observer* (Apr 11th 2022) <https://www.scobserver.in/journal/sco-explains-gig-workers-claim-for-labour-rights/> accessed 04 April 2024.
[139] Ibid.
[140] Ibid.
[141] ILO (n 30) 6 – 7.

Act, 1959; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Cineworkers Welfare Fund Act, 1981; the Building and Other Construction Workers' Welfare Cess Act, 1996 and the Unorganised Workers Social Security Act, 2008.[142] Another concerning factor is that it does not consider the question of working hours and wages which are extremely important for the geographically-tethered gig workers.[143] The most concerning factor shall remain that they lack actual employment status which means the applicability of certain laws such as the Contract Labour (Regulation and Abolition) Act, 1970 (which regulates engagement of contract labour in India, including work done through third-party contractors), and the Employment Compensation Act, 1923 (which mandates that the employers pay compensation for accidents arising out of and in the course of employment) are yet to decided.[144] However, the very fact that the development of these laws are in the nascent stage indicates that consultation of labourers is still possible and it can be developed in a sustainable manner.

3.5.B. The European Union

The biggest development in the status quo of gig workers' rights in the EU is the green flag that the EU Parliament has given to implement the Platform Workers' Directive – and the same has been adopted.[145] It is now pending formal implementation by the Council and the member states shall then have two years to incorporate the provisions of the directive into their national legislation.[146] European Commission analysis has found that about 5.5 million people have

[142] V.V. Giri National Labour Institute, FAQ on the Code of Social Security, 2020 <https://vvgnli.gov.in/en/code-social-security-2020> accessed 07 March 2024.
[143] Sneha Vishakha, 'Covid-19 Calls for Re-Thinking Social Security for India's Platform Workers' (Vidhi Centre for Legal Policy, 2020) <https://vidhilegalpolicy.in/blog/covid-19-calls-for-re-thinking-social-security-for-indias-platform-workers/> accessed 06 May 2024.
[144] Malavika Rajkumar, 'The Law for Gig-Workers in India' *Nyaaya*, (21 March 2022) <https://nyaaya.org/guest-blog/the-law-for-gig-workers-in-india/> accessed 15 April 2024.
[145] 'Parliament adopts Platform Work Directive' (News European Parliament 2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20584/parliament-adopts-platform-work-directive> accessed 29 April 2024.
[146] Ibid.

been wrongly classified as self-employed within the EU as it stands now.[147] The new law essentially changes two important factors as the text stands – (i) With respect to the employment status, the burden of proof shifted on the platform instead of the employed persons, (ii) there is an added requirement of human intervention in final decisions arbitering between the platform and the platform workers to ensure that decision making systems are not entirely based on the algorithm. Although this development is welcome, it has been well-noted by several labour law and constitutional law scholars that this Directive is overall insufficient in addressing the holistic concerns of platform workers calling it an "unfinished task".[148] The biggest neglect, that coincides with the same neglect as the new codes in India, is that the Directive does not inculcate collective bargaining rights for gig workers or the regulation of working time.

3.5.C. Comparison

In both scenarios, new and impending labour laws on gig workers are incoming implementation. However, in both of these scenarios, a stark feature is that of the democratic right to collective bargaining which is missing – an essential part to carefully develop rights and responding to this nascent development of laws on gig workers. This gap that is missing, which we have now well-established is a constitutional right owed to these workers, can only be filled by actually responding to the demands of the workers which they have made through already formed unions and through their petitions.

[147] Ibid.
[148] Antonio Aloisi, Silvia Rainone, and Nicola Countouris, 'An unfinished task? Matching the Platform Work Directive with the EU and international "social acquis"' (International Labour Organisation Working Paper 101, 2023) <https://doi.org/10.54394/ZSAX6857> accessed 15 May 2024.

3.6. Applying the expansionary step – demands of, for and by the gig workers

In this section, after having studied the constitutional and labour rights trajectories in India and the EU, we return to the outlined core question at the beginning of this chapter – with all of this context, how can these constitutional regimes respond to the social right demands while dealing with constantly changing labour relations? Applying the process of formally considering (atleast academically, and in this sense – inviting the legal complex to do so as well) what labourers are collectively demanding, this section shall analyse present day demands of gig workers in line with constitutional arguments. This section brings together democratization in the public and private sphere – and paves the way to conceptualize what needs to be considered in the way forward. Here, I directly centre the demands of the labourers as the fundamental part of constituting their rights.

3.6.A. India

The most important aspect is that despite the challenges that gig workers face in unionizing, there have still been highly visible gig workers unions that have emerged including the All India Gig Workers Unions affiliated to the well-established Centre of Indian Trade Unions. It was importantly founded during the protests of Swiggy (food delivery) workers against a pay reduction during the course of the pandemic.[149] In 2019, a trade union named 'Indian Federation of App-based Transport Workers' ('IFAT') was formed by app-based transport and delivery workers who worked for aggregator companies such as Swiggy, Zomato, Ola and Uber. On September 2021, they filed a petition before the Supreme Court of India with the claim that the contracts between the aggregators and the workers violated fundamental rights as guaranteed under Articles 14, 21 and 23 of the Constitution of India.[150] They argue that their right to

[149] ILO pg. no. 18.
[150] *The Indian Federation Of App Based Transport Workers (IFAT) v Union of India*, W.P. (C.) 1068/2021.

equality under Article 14 has been violated because the failure to recognize gig workers as "employees" or "workmen" has deprived them of being able to avail social security benefits which similarly situated employees and workmen can. Further, they argued that their pay structures were extremely low especially during the pandemic – taking advantage of their vulnerability during the time of crisis, despite there being a consistent, if not growing, demand of work then. This amounts to a violation of their right to work and livelihood with decent conditions as guaranteed under Article 21 and results in exploitation through forced labour which is prohibited under Article 23 of the Constitution. Their primary appeal to the Supreme Court was to at least recognize them as 'unorganized workers' or as "workmen" so that they may be entitled to certain social security benefits and welfare schemes covered under different statutes.

As it stands, this petition remains pending before the Indian Supreme Court. However, the impact of the final decision will be monumental in both Indian labour law jurisprudence. To address the core question of the thesis, both the "past" and the "future" must be considered along with the present (petition). We have already observed the "past" jurisprudence in detail. That "journey of labour regulation"[151] highlighted the richness of labour rights history in India (that has been hard-earned and fought for over several decades), and finally bring us to the most recent amalgamation of the whole breadth of Indian labour law into four operational codes. In 2020, during the peak of the pandemic, the government chose to compress twenty-nine central labour laws and "simplified" them into "unified" labour codes.[152] This part is the "future"

[151] Kavya Bharadkar & Babu Mathew, 'The journey of labour regulation, Seminar #738' (Feb. 2021) <https://india-seminar.com/2021/738/738_kavya_and_babu.htm> accessed 12 May 2024.

[152] Mani Mohan, Babu Mathew, Sony Pellissery, Kavya Bharadkar, 'Ushering thin welfare regimes at the cost of thick labour jurisprudence: A tale of new labour codes in India' 4 Revue de Droit Compare du Travail et de la Securite Sociale 38 <https://journals.openedition.org/rdctss/2633?lang=es> accessed 25 May 2024.

because while presidential assent has been given and the Parliament has passed these codes, they are yet to be notified and formally effectuated.[153]

The other reason that it shall be referred to as the "future", considering that they have been stalled, is the hope that this provides that they can still be recalled and reconsidered after consultation of the labourers, unions and all stakeholders – and not merely corporate entities.[154] The very attempt to "simplify" a strong labour regime tackling multi-faceted concerns and different sections of workers warns of watering down of socio-democratic rights of labourers.[155] The four codes have correctly been identified as anti-worker[156] as they restrict strikes, prevent collective bargaining, and rely on expensive dispute resolution mechanisms such as arbitration which most gig workers cannot access.[157] They remain unclear on who is included as a "proper worker". These four codes were passed during the pandemic with barely any debates even within the Parliament, leave alone consultation from workers. The passing of these laws without calling an Indian Labour Conference is a violation under Convention 144 of the ILO Standards – an organization which India was a founding part of.[158] Article 43 of the Directive Principles of State Policy as stated in the Indian Constitution promises that the state shall "endeavour" to "secure all workers a living wage".[159] The violation of this is a direct violation of constitutional

[153] Zia Haq, Implementation of 4 labour codes stalled, *Hindustan Times* (7 May 2023) <https://www.hindustantimes.com/india-news/indias-sweeping-labour-code-implementation-stalled-until-2024-elections-101683485041321.html> accessed 19 May 2024.
[154] Babu Mathew, 'From Labour and Capital to Labour for Capital' *Economic & Political Weekly* (25 September 2021) <https://www.epw.in/engage/article/occupational-safety-continues-be-ignored-right> accessed 13 April 2024.
[155] Babu Mathew, 'From Labour and Capital to Labour for Capital' *Economic & Political Weekly* (25 September 2021) <https://www.epw.in/engage/article/occupational-safety-continues-be-ignored-right> accessed 13 April 2024; Shreehari Paliath, 'Three deaths every day: India's labour safety laws have been diluted in the name of reforms', *Scroll* (26 January 2023) <https://scroll.in/article/1042338/three-deaths-every-day-indias-labour-safety-laws-have-been-diluted-in-the-name-of-reforms> accessed 12 April 2024.
[156] Babu Mathew, 'New Labour Codes are anti-worker' *United News of India* (25 June 2021) <https://www.uniindia.com/-new-labour-codes-are-anti-worker-prof-babu-mathew/business-economy/news/2458405.html> accessed 13 April 2024.
[157] Mathew (n 18).
[158] C144– Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).
[159] The Constitution of India, Article 43.

morality.[160] To weigh these factors in the further creation of labour laws would be to weigh the rule of law within labour jurisprudence, and to ensure fundamental rights to labourers.

3.6.B. The European Union

Unlike India, the unionization of gig workers across geographic member states has proven to be more difficult in the EU. This makes the requirement of redefining the space for the exercise of collective labour rights even more essential while contemplating how these workers can make their own decisions and counter-balance employer's stronger economic power. There are certain provisions of the new directive that already attempt to do this. Article 9 of the Directive Proposal requires the platform to inform and consult workers' representatives or workers themselves on any major changes in the decision-making systems even where they concern the algorithm or decision-making systems.[161] Article 15 demands that the member states ensure that "digital labour platforms create the possibility for persons performing platform work to contact and communicate with each other, and to be contacted by representatives of persons performing platform work, through the digital labour platforms' digital infrastructure or similarly effective means". While these are important articles, what is missing is the actual effective exercise of these rights. In practice, it will be very difficult to identify who the workers' representative shall be, especially when they are in a vulnerable position. The spatial organization of these relations cannot be viewed in the same way as they were in traditional employment relationships. The very fact of what the "establishment" means, and how many people constitute an establishment for someone to be considered as a recognized worker is a contentious issue.[162]

[160] Mathew (n 20)
[161] Aloisi. Rainone, and Countouris (n 12) 21.
[162] Ibid.

3.6.C. Comparison

While this final section highlights the challenges that are impending and being faced by the gig workers – especially in their collectivization – they also highlight the portal through which they have already staked their claims or will be able to stake their claims. On a comparative level, we can see that the EU has moved one step further in actually conceptualizing a specific law for the gig workers which is a big development wherein it is in its nascent stages across the rest of the world. In India, the impending implementation and final notification of the final codes means that these codes can still be recalled and there can be consultation with the workers before it is enacted. The same applies before the application of the Directive by the EU member states. What has become clear across this comparative however is that the only way to maintain social rights is to integrate this very labour law understanding with a concrete constitutional understanding which recognizes these social rights as being completely enforceable in its own right. This overall calls for the constitutionalization of labour relations and labour law in order to achieve long term labour and social rights.

CONCLUSION

The "impact of constitutions on labour law" is a well-established field of study,[163] and the primary invitation of this thesis was to invite exploration into how this impact can be translated into concrete social protection for gig workers. Since the gig economy is emerging in a more wide-spread fashion only recently and especially after the pandemic, and the legal acumen is still being developed world-wide, it is pertinent to consistently look at global comparators to reject the exploitation of aggregators. The Dutch High Court has held that Uber and its drivers have a valid employment contract, which is currently being challenged by Uber.[164] The Madrid High Court of Justice has also consolidated criteria and declared Glovo riders as employees,[165] and Italian courts have also taken similar steps.[166] Various measures that seemed to be positive in 2020 are also at the risk of or are being overturned now,[167] but this only highlights the pressing need to "constitutionalize" labour rights for gig workers while centering their voices and demanding that their consultation is non-negotiable along with formal, statutory labour benefits that aligns with constitutional principles. This thesis has sought to highlight the importance of linking arguments from constitutional law to strengthen contemporary labour

[163] Otto Kahn-Freund, 'The Impact of Constitutions on Labour Law' (1976) 35 (2) The Cambridge Law Journal <http://www.jstor.org/stable/4505935 > accessed 13 April 2024.
[164] April Roach, Uber's Clash Over Drivers' Job Status Kicked to Top Dutch Court, Bloomberg (*Bloomberg*, October 3 2023) < https://www.bloomberg.com/news/articles/2023-10-03/uber-s-clash-over-drivers-status-shunted-to-top-dutch-court > accessed 13 April 2024.
[165] Escalona & De Fuentes, 'The Supreme Court decides that delivery riders have been wrongly described as self-employed workers' (*Edfabogados*, Oct 2020) < https://edfabogados.com/en/the-supreme-court-decides-that-delivery-riders-have-been-wrongly-described-as-self-employed-workers/ > accessed 13 April 2024.
[166] Reuters, 'Italian watchdog takes aim at delivery firm's gig-worker algorithms' (*Reuters*, July 5 2021) <https://www.reuters.com/technology/italian-watchdog-takes-aim-delivery-firms-gig-worker-algorithms-2021-07-05/ > accessed 13 April 2024.
[167] Susan V. Hamilton, 'California Workers' Compensation Appeals Board, Castellanos: Rethinking the California Legislature's Plenary PowerVis-a-vis Workers' Compensation' (*LexisNexis*, March 26, 2023) <https://www.lexisnexis.com/community/insights/legal/workers-compensation/b/recent-cases-news-trends-developments/posts/castellanos-rethinking-the-california-legislature-s-plenary-power-vis-a-vis-workers-compensation > accessed 13 April 2024.

law[168], while being cautious to not compromise the importance of statutory reliance. Having marked our lessons from the European Union and India – and having noted that at a global level, economic freedom and market regulation have become the primary tone-setters – at a very normal rate, the observation that the process of constitutionalization has given us and what I have constantly sought to argue is that the only way in which we can respond to this crisis of labour law is by ensuring the right to collective bargaining of gig workers. Socio-democratic constitutionalization and the constant response to their demands which is effectively considered on a constitutional level is the appropriate response to keep interacting with the crisis – without the objective being merely one of "ending" the crisis.

I shall conclude with certain recommendations that a renowned scholar, Kamala Sankaran, who has long sought for the comparative amalgamation of labour, constitutional and international law has made with respect to the way forward.[169] This is also an endeavor to finish this comparative constitutional lesson by taking lessons that the Global South has long followed and extending it to the Global North. The following are the recommendations:

(i) There must be active transition to formalization of workers and not merely of enterprises.

(ii) There must be universal access to social security and social assistance.

(iii) The financing of social security cannot be based on the social solidarity of the industry alone – this has to be broadened from most earlier models which are employer liability centric or social insurance based. The model needs to be industry based (in this case, gig economy based) and draw from the value chains of the industry concerned instead. This broadening is important in the emerging gig economy where clear-cut employer-employee relations are not visible.

[168] Ződi Zsolt and Bernát Török, 'Constitutional Values in the Gig-Economy? Why Labor Law Fails at Platform Work, and What Can We Do about It? '(2021) 11 (3) *Societies* < https://doi.org/10.3390/soc11030086 > accessed 18 May 2024.
[169] Sankaran (n13)

(iv) The usage of constitutional law helps in this broadening to also consider industry-specific needs. For example, constitutional law will help in seeing that occupational safety and conditions of work is not merely a labour regulation matter, but also possibly a municipal authority issue where there is concern regarding access to spaces in urban areas.

(v) There must be a usage of constitutional frameworks comparatively which makes larger constitutional duties clear including that:

a. Deregulation is not a choice that the States can or should make (such as the dilution of labour laws) because constitutional principles such as dignity, non-discrimination and non-exploitation preemptively prohibit such choices. For example, in India, larger choices such as having regulations over decent working hours have already been taken by the Constitution (Articles 41 – 43A of the Constitution) – and this cannot be overridden or waived through newer labour codes. These are not choices to be made by the "government" of the day.

b. Minimum conditions of universal protection ought to be provided by the regulatory framework and are a constitutional duty, and must form the core of labour regulation across economies.

c. Meeting with the requirements of the ILO is also an extension and necessity of fulfilling this constitutional duty.

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