

A BRAVE NEW FRONTIER IN THE DICHOTOMOUS INDONESIAN LABOUR LAW: GIG ECONOMY, PLATFORM PARADOX AND WORKERS WITHOUT EMPLOYERS

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Abstract

Historical records have admitted the labour law as a curative mechanism for the disparity of bargaining power in the labour market, with contemporary theories concentrating on essential rights protection and fixing inefficiencies. The emergence of the gig economy brings turmoil despite its beneficial nature. The methodology in this study utilizes a normative juridical method. The study reveals that the gig economy is not a new phenomenon but within the context of precarious work. Recommendations were put forward as the justified necessity for a new personalized labour regulation in Indonesia based on the two general principles of statutory efficiency.

Keywords: *labour law, gig economy, gig worker, Indonesia.*

Intisari

Catatan sejarah telah mengakui hukum ketenagakerjaan sebagai suatu mekanisme kuratif untuk mengatasi masalah disparitas daya tawar di bursa tenaga kerja dengan teori kontemporer saat ini yang berkonsentrasi pada perlindungan hak-hak esensial serta memperbaiki inefisiensi. Munculnya gig economy membawa gejala hukum meskipun sejatinya tetap bersifat sangat menguntungkan. Metodologi dalam penelitian ini menggunakan metode yuridis normatif. Studi ini mengungkapkan bahwa gig economy bukanlah fenomena baru, melainkan masih tergolong ke dalam konteks pekerjaan tidak tetap. Rekomendasi juga diajukan sebagai suatu kebutuhan yang dijustifikasi untuk memperbarui peraturan ketenagakerjaan yang lebih dipersonalisasi di Indonesia berdasarkan dua prinsip umum efisiensi hukum.

Kata Kunci: hukum ketenagakerjaan, gig economy, gig worker, Indonesia.

A. Introduction

The application of technology prevalently is one of the characteristics of modernization and globalization that cannot be denied. It is a brave new frontier that changes the way our society works. A visible example is the birth of sharing economy as the new business trend that stimulates the Indonesian economy by creating new business models, thus revolutionizing the way we live and interact. The sharing economy is the peer-to-peer-based exercise of obtaining, giving, or sharing access to goods and services coordinated by community-based online services.¹

In the past ten years, the sharing/platform economy has grown to be a subject of exceptional enthusiasm in Europe. It has been praised as a driver for economic growth and innovation, lower-cost goods and services and low-barrier work possibilities. At the same time, platforms have been scrutinized for potentially inflating the number of workers in precarious (temporary/uncertain) works. Online platforms possess the potential to transform the economy and the world of work drastically. In some sectors, such as transportation, they already have had a disruptive effect on existing businesses and workers.²

The gig economy (especially the sharing economy) confronts the established notions of private ownership in conducting business. By 2015, the sharing economy's existence can indeed be felt across the country. One concrete and obvious example is the parturition of multi-service tech start-up companies in Indonesia, with prominent examples such as Gojek, Grab, Uber and Maxim. These companies' operation transformed the transportation industry and many other sectors (such as payments, courier service, logistics, food delivery and many more), while in their ripples, problems related to work relations occur. Their drivers are working based on consumers' demand. Thus, no permanent and definite work guaranteed. This phenomenon is better known as the gig economy. The gig economy has been quite prominent abroad, and this notion is also not considered new in Indonesia.

1 Juho Hamari, Mimmi Sjöklint and Antti Ukkonen, "The Sharing Economy: Why People Participate in Collaborative Consumption", *Journal of the Association for Information Science and Technology* 67, no. 9 (2015): 2047-59.

2 Willem Pieter De Groen et al., "The Impact of the Platform Economy on Job Creation", *Intereconomics* 52, no. 6 (2017): 345-51.

Everyone will agree that work is essential, both for our survival and for our well-being. The rights to work and decent living are guaranteed by the 1945 Constitution of the Republic of Indonesia, which are regulated in Article 27 subsection (2) that reads, “Every citizen has the right to work and decent living.” Also, Article 28D subsection (1) of the 1945 Constitution of the Republic of Indonesia reads, “Everyone has the right to work and to receive fair and just remuneration and treatment in a working relationship.” Therefore, the state, according to the constitution, must guarantee that everyone has the right to earn a decent living by working, provided that the work must also provide fair and just remuneration and treatment. However, a dilemma of law concerning labour across the globe is that while ‘everyone’ has the common human right to social security, fair pay, unions, equality and leisure, these rights need to be enforced.³ Moreover, the lack of enforcement has been a constant issue in labour law’s scope since 1983.⁴

The presence of these multi-service tech start-up companies brings excellent benefits in providing work opportunities for many people. These multi-service tech start-up companies can potentially decrease unemployment by proposing flexible working arrangements, quick recruitment,⁵ and attractive novel job types. This kind of employment is pretty arousing for a new generation⁶ of workers, generally known as digital gig workers. Despite its good attributes, regrettably, the Indonesian government still has insufficient statistical data concerning the number of Indonesian gig workers.⁷ Without

3 Ewan McGaughey, “Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status”, *Industrial Law Journal* 48, no. 2 (2019): 180-98.

4 *Ibid.*, 185.

5 Quick recruitment suggests that it can aid in rapid and more suitable matches between work providers and seekers, displacing traditional methods by connecting the right people with the right work and developing the workforce’s overall productivity.

6 Research shows that jobs in the digital and technology sectors are very popular with the younger generation of workers. Although, many of the research findings also found that this type of work in the digital sector made it difficult for young workers to move on to a new and better employment opportunity because during the process of working as gig workers, they did not learn many new skills and there were not many opportunities for career mobility/development. This phenomenon is also known as deskilling or skill trap. Dian Fatmawati, M. Falikul Isbah and Amelinda Pandu Kusumaningtyas, “Pekerja Muda dan Ancaman Deskilling-Skill Trap di Sektor Transportasi Berbasis Daring”, *Jurnal Studi Pemuda* 8, no. 1 (2019): 29-45.

7 Mapping the gig economy’s size is challenging because the work is mostly obscure and not recorded by the current labour statistics and economic indicators.

sufficient statistics, the Government cannot form suitable and proper strategic policies and specific regulations to boost the economy.⁸ Nevertheless, a recent study from data aggregation and classification found that the gig economy has contributed and now provides jobs for over a million drivers in Indonesia.⁹ Furthermore, these gigs paid approximately 1 million to 3.4 million rupiahs every month, which indicated that these gig economy indeed could offer a competitive alternative for people to earn money other than working in a fixed-employment arrangement.¹⁰

On the contrary, another recent research shows that there is anxiety among workers in the gig economy sector, especially those related to their status as partners or independent contractors.¹¹ This phenomenon may look uncommon given the concerns that the gig economy's appearance would further fissurate, restructure and deformalize the workforce and work engagement as we know it.¹² The diversification of work aided by gig economy business patterns that reduce labour expenses regarding workers as 'independent contractors' (whereby circumventing employment-related obligations) has fallen under intense scrutiny throughout the world. It has been argued that such diversification exhibits a trend, now perceived as the 'fissuring' of work.¹³ Despite its increasing attractiveness, the gig economy is tormented by a series of judicial complications. The appearance and atomic growth of the sharing economy and the gig economy have triggered intense debate concerning its

8 A. Labib Fardany Faisal, et al., "Discovering Indonesian Digital Workers in Online Gig Economy Platforms", Conference Paper, 7th International Conference on Information and Communications Technology, Kuala Lumpur, Malaysia, July 2019, 554-59.

9 Michele Ford and Vivian Honan, "The Limits of Mutual Aid: Emerging Forms of Collectivity among App-based Transport Workers in Indonesia", *Journal of Industrial Relations* 61, no. 4 (2019): 528-48.

10 Faisal, et al., "Discovering Indonesian Digital Workers in Online Gig Economy Platforms", 554-59.

11 M. Kharis Mawanda and Adam Muhshi, "Perlindungan Hukum Mitra Ojek Daring di Indonesia", *Lentera Hukum* 6, no. 1 (2019): 33-52; and Rahandy Rizki Prananda and Zil Aidi, "Tinjauan Yuridis Kedudukan Pengemudi Transportasi Online dalam Perjanjian Kemitraan dengan Perusahaan Penyedia Aplikasi Transportasi Online", *Law, Development and Justice Review* 2, no. 2 (2019): 135-62.

12 Valerio De Stefano, "The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labour Protection in the "Gig-Economy"", *Comparative Labor Law & Policy Journal* 37, no. 3 (2016): 1-51.

13 Sarah Kaine and Emmanuel Josserand, "The Organisation and Experience of Work in the Gig Economy", *Journal of Industrial Relations* 61, no. 4 (2019): 479-501.

workers' status.

The change in Indonesian labour relationships and the flight from the old models of employment is part of a global trend that has begun due to recent technology-enabled business models. This trend is epitomized in the digital economy and the shrinkage in full-time long-term employment over the last decade.¹⁴ Moreover, the growth of gig workers is expanding exponentially from time to time. On the supply side, numerous people who admire the autonomy and versatility of gig work prefer to shift to gig working. Millennials had an exceptional interest in flexibility at work, which was an essential factor in maintaining their fitness, well-being and happiness. On the demand side, firms have been more conscious that using gig workers or freelancers intelligently can make the firms more proactive in managing transitions and uncertainties.¹⁵

The methodology used in this study uses a normative juridical approach by utilizing the study of literature as the main reference. This study strives to analyze whether these new phenomena of workers are, in fact, employees or self-employed (individual contractors) and whether there is a justified necessity for a new personalized labour regulation for protecting such workers. I will also examine the dynamic dimension of the gig economy and recommend approaches that legal policy can adapt to accommodate the work engagement in the gig economy vis-à-vis their protection and well-being. In support of these policy courtesies, this paper summarises the gig economy and distinguishes legal and policy issues pertinent to its workforce.

B. Discussion

To better understand the concept of the gig economy and its regulation in the constellation of labour law in Indonesia, the following elaboration will provide some relevant concepts related to the gig economy, platform work and labour law in Indonesia.

14 Joshua Healy, Daniel Nicholson and Andreas Pekarek, "Should We Take the Gig Economy Seriously?", *Labour and Industry* 27, no. 3 (2017): 1-17.

15 Teresa Shuk-Ching Poon, "Independent Workers: Growth Trends, Categories, and Employee Relations Implications in the Emerging Gig Economy", *Employee Responsibilities and Rights Journal* 31, no. 1 (2019): 63-9.

1. Gig Economy, Sharing Economy and Platform Paradox as Its Repercussion

In the 1930s, the music industry minted the term “gig” to indicate “an engagement to perform at a party for only one evening.” Ultimately, the word’s application evolved to accommodate any temporary work engagement. The comprehensive scope of the “gig economy” refers to a working subset in which entrepreneurs (or workers) obtain work through an internet-based program that matches the consumers’ who are inquiring about their services.¹⁶ The gig economy results from the digital economy described as the manner of working by utilizing a digital platform provided by the company, accessed through applications or sites to get temporary (short-term) work.¹⁷ In the gig economy, the digital intermediation apparatuses serve as tools that facilitate the reconfiguration of the structure of labour, not in the spirit of the emancipation of individuals. In contrast, it is the service of tried and tested capitalist logic.¹⁸

Meanwhile, the sharing economy mainly consists of several marketplaces that bring together individuals to partake or exchange their assets. This economy promotes community ownership of services and goods by linking people. The sharing process enables members to obtain access to goods without obtaining the rights to the goods through purchase. This method forms a more affordable option for consumers to enjoy the benefits while spending less. The sharing economy in the gig economy also changes the working structures and enables workers to compose their working schedule.¹⁹

The gig economy is ubiquitous. It has become a cliché to perceive the astonishing success of third-party digital platform companies on an unbelievable scale. The digital economy is the answer to the problem of unemployment in Indonesia.²⁰ One way to overcome these problems is by having

16 Jaclyn Kurin, “A Third-way for Applying U.S. Labor Laws to the Online Gig Economy: Using the Franchise Business Model to Regulate Gig Workers”, *Journal of Business & Technology Law* 12, no. 2 (2017): 193-226.

17 James Ainsworth, *Gig Economy: Introduction* (London: House of Lords, 2017), 8.

18 Vincent Rouzé, *Cultural Crowdfunding: Platform Capitalism, Labour and Globalization* (London: University of Westminster Press, 2019), 58.

19 Yasaman Moazami, “UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers’ Classification?”, *University of Miami International and Comparative Law Review* 24, no. 2 (2017): 609-59.

20 A research by Huang et al. (2020) shows why gig economy is vital for tackling social problems

on-demand work and social platforms to bring together the unproductive and partially productive portions of the population to the market,²¹ thus forming a reciprocally beneficial economic relationship.²² Lower entry requirements, coupled with the appeal of a technologically innovative platform, have led to a massive surge of people enrolling as gig workers. When people undergo a job loss or other career difficulty, they can swiftly change to the gig economy – an environment that provides instant entry and participation in a work market as a freelancer, self-employed or independent contractor.²³ There was no distinct method to determine which works were part of the gig economy, yet one distinctive characteristic is the use of third-party digital platforms. Firms give these platforms to facilitate linking those selling their services with customers wanting to acquire those services.²⁴

Platforms describe themselves as rendering a kind of electronic brokerage service, linking independent businesses providing services such as transportation, completing various works, delivery of food, lodging or even dog walking with customers yearning for such services. Many firms deny acting as a party to the transactions they facilitate (they are not selling the

concerning unemployment rate, especially for developing countries like Indonesia. One common explanation is that the jobs created by these gig economy companies usually have a relatively low barriers of entry. Meaning that people can easily enroll into these jobs without having a certain level of education, qualification and/or experience. Secondly, these digital platforms provide workers with flexible working hours. Enabling workers to work whenever and from wherever they like. Furthermore, gig economy companies utilise online platforms to match and recruit workers – meaning lower recruitment cost for both company and the workers and faster recruitment process for potential workers. In addition, given the relatively low barriers of entry and participation in online digital work markets, faced with the lack of traditional/conventional employment, many are aroused to seek work online (or at least in short term). Ni Huang et al., “Unemployment and Worker Participation in the Gig Economy: Evidence from an Online Labor Market”, *Information Systems Research* 31, no. 2 (2020): 1-18.

- 21 The second tenet of human resource theory is that employment is not a social responsibility: an individual has the responsibility to invest their own ‘human resources’ to enhance their opportunity of a job. The government’s purpose is not to generate full employment through fiscal, monetary, and trade policy, but instead to ‘stimulate’ unemployed people to ‘seek’ more effectively for jobs. See Ewan McGaughey, “A Human is not a Resource”, *King’s Law Journal* 31, no. 2 (2020): 215-35.
- 22 Kaushik Das, et al., *Unlocking Indonesia’s Digital Opportunity* (Jakarta: McKinsey Indonesia, 2016), 5-8.
- 23 Stan Malos, Gretchen Vogelgesang Lester and Meghna Virick, “Uber Drivers and Employment Status in the Gig Economy: Should Corporate Social Responsibility Tip the Scales?”, *Employee Responsibilities and Rights Journal* 30, no. 4 (2018): 239-51.
- 24 Malcolm Sargeant, “The Gig Economy and the Future of Work”, *E-Journal of International and Comparative Labour Studies* 6, no. 2 (2017): 1-12.

product and services). Instead, they sell access to the platform, the matching algorithms and a system of reputation, reliability and trust among their users.²⁵

The typical business and economical article praise the so-called technologically advanced “gig economy” as a win-win for firms and workers alike – it presents freedom and flexibility for both. Workers can become detached and manage their schedules – and employers no longer need to prepare overheads and benefits. A study reveals that gig workers disproportionately receive less annually; nevertheless, most workforces are also divided among those who have full-time employment, doing additional gigs on the top and lack full-time jobs who are struggling to live off of their gigs. Notwithstanding, technology has aided in destigmatizing gig-work through the platform because of their impression with highly-educated individuals based on branding and early utilization by particular communities.²⁶

The gig economy markets humans as a service and disregard traditional employment law protection because numerous platforms are conclusively devised to disguise the reality behind their business model. Scrupulously worded terms and conditions distinguish platforms as matchmakers and workers as self-employed/independent contractors (entrepreneurs), surpassing the scope of legal regulations. Work is revitalized, as entrepreneurship and labour marketed as a technology.²⁷ Indeed, technology is at the core of this novel and rapidly expanding industry; however, it does not allow gig economy transaction; it also fashions our perception of whatever is going behind the scenes. The gig economy platforms, in other words, make labour less apparent, despite the part of physical human interaction remains. Obscure as it may be, labour is fundamental to the gig economy. Without access to a vast pool of on-demand workers, platforms and apps would be incapable of carrying out the business model that they offer.²⁸

25 Martin H. Malin, “Protecting Platform Workers in the Gig Economy: Look to the FTC”, *Indiana Law Review* 51, no. 2 (2018): 377-411.

26 Beverly Yuen Thompson, “Digital Nomads: Employment in the Online Gig Economy”, *Glocalism: Journal of Culture, Politics and Innovation*, no. 1 (2018): 1-26.

27 Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (New York: Oxford University Press, 2018), 350.

28 *Ibid.*, 5-6.

Most platforms' business model is to provide robust software application created to meet the consumers who demand a task performed with entrepreneurs to hunt for their next 'gig'. The main quest is to eliminate as much 'friction' as possible in their transaction. Upon closer examination, nevertheless, it rapidly appears that numerous platforms provide much more than just 'matchmaking' assistance. They are in the market of digital work/task intermediation. This is the "platform paradox": gig-economy firms confer themselves as a matchmaker, yet, in fact, they often behave similarly to traditional employers.²⁹ In doing so, the gig economy signals a growing trend to recast workers as self-employed contractors and their work for a firm or consumer alike as episodic rather than indeterminate.³⁰

Some even considered that the platforms' practices are deemed as regulatory arbitrage by "manipulating the arrangement of a deal to exploit the gap between the economic essence of a transaction and its regulatory treatment." In other words, firms may restructure their business to obscure what is truly going on from regulators and elude the law. Victor Fleischer illustrates the arbitrage method as firing employee and rehiring them as independent contractors to evade employment regulation.³¹ Firms in Silicon Valley have started displacing workers to independent contractors, subcontractors, and temporary workers to decrease expenses and legal obligations.

29 Ibid., 5.

30 This is relevant for Human Resource Management theorist as the self-employed represent a challenge to prevailing orthodoxies because they fall through regulatory and conceptual gaps created by system based on the notion of traditional employment. Traditional employment is conceptualised as the managerial activities for maintaining employment relationship, while in a gig economy, an identifiable employer-employee relationship is absent. Intermediary platform firms do not employ gig workers per se, a fact that has sparked legal challenges to the working status of gig workers around the world. Again, despite the absence of an identifiable employment relationship, intermediary platform firms nevertheless design and implement a variety of policies and working models with somewhat prescribed ways to work like an employer-employee relationship. This apparent contradiction raises the paradox in the platform, that gig economy firms practice a level of authority over the workers while simultaneously gig economy firms seeking to avoid establishing an employment relationship with gig workers. Jeroen Meijerink and Anne Keegan, "Conceptualizing Human Resource Management in the Gig Economy: Toward a Platform Ecosystem Perspective", *Journal of Managerial Psychology* 34, no. 4 (2019): 214-32.

31 Ibid., 20.

2. Legal Tests for Employment: Straddling the Fine Line Between the Status Dichotomy of Employee versus Independent Contractor

The judicial notion of an employee is rooted even before the dawn of the Internet era. The digital era's appearance has changed work relationships drastically, causing a considerable gap regarding legal uncertainty about which rules shall apply. These businesses conduct their core enterprise building and running an online platform where prospective customers can find workers to perform the demanded job.³² They rely entirely upon workers categorized as self-employed or individual contractors. These new opportunities, made possible by technology, might be the culmination of a process started some years ago, called "the escape from employment law."³³ Surpassing the realm of self-employed/independent contractor, the other and last viable classification is that of employees, a status that unlocks access to all labour benefits for employees and the corresponding liabilities for employers.

These modern firms' labour methods have ignited extreme litigation. These debates concentrate more on a fundamental doctrinal issue – whether these workers have the status of employees or independent contractors. Whether a worker is an employee or an independent contractor/self-employed is defined through various multifactored tests reliant on the work arrangement's facts. Factors determining employee status are whether the employer may lead how the work is accomplished, arrange the hours required and render the employee with guidance. On the other hand, factors that lean toward independent contractor classification involve high-skilled work, workers procuring their equipment by themselves, workers determining their schedules, and receiving payment per work done, not on a periodical basis. In an alternative test, courts analyze the economic facts of the work arrangement to decide whether the worker is displaying entrepreneurial practice or whether the worker is financially reliant upon the employer.³⁴

32 Adrián Todolí-Signes, "The 'Gig Economy': Employee, Self-Employed or the Need for a Special Employment Regulation?", *Transfer: European Review of Labour and Research* 23, no. 2 (2017): 1-13.

33 *Ibid.*

34 Miriam A. Cherry, "Are Uber and Transportation Network Companies the Future of Transportation (Law) and Employment (Law)?", *Texas A&M Law Review* 4, no. 2 (2017): 173-95.

For many individuals working as self-employed/ independent contractors, the main interest is autonomy (independence). Independent contractors/self-employed workers are commonly responsible for setting their hours and may work as much as they want. A recent study also showed that independent contractors possess a more considerable measure of work satisfaction than regular employees.³⁵ Nevertheless, with the freedom of being an independent contractor appears the burden of not being an employee. Working as gig economy workers implies that they are self-employed/independent contractors, and they remain liable for various legal and financial obligations that conventional employees need not consider.³⁶ Independent contractors must also bear the burden to assure their job safety and sustainable livelihood.³⁷ This classification also restricts these workers' admittance to standard employment privileges such as overtime pay, minimum wage and social security. Designating between an employee and a self-employed/independent contractor is based on employment classification tests outlined at the time of the Industrial Revolution with the traditional worker in mind.³⁸

A book titled the Fissured Workplace by David Weil defines a critical element of the deterioration in labour's bargaining power, which is the progressive dissolution of the old and statutory employment relationship. By reclassifying workers as either independent contractors or as employees of their contractors, firms can elude from the liabilities stipulated in the employment law.³⁹ With all of these legal rights sitting on a worker's employment status, we cannot underestimate the significance of a clear and consistent means to distinguish between employees and contractors representing the current

35 Andrew G. Malik, "Worker Classification and the Gig-Economy", *Rutgers University Law Review* 69, no. 5 (2017): 1729-67.

36 Amongst others (but not limited to) is their tax obligation. Because the firm does not withhold income tax, independent contractors are responsible for paying for their tax and filing their annual tax report.

37 Jennifer Pinsof, "A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy", *Michigan Telecommunications and Technology Law Review* 22, no. 2 (2016): 341-73.

38 Emily C. Atmore, "Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy", *Minnesota Law Review* 102, no. 2 (2018): 887-922.

39 Marshall Steinbaum, "Antitrust, the Gig Economy, and Labor Market Power", *Law and Contemporary Problems* 82, no. 3 (2019): 45-64.

modern economy.⁴⁰

Whether an individual is an employee or self-employed/independent contractor is frequently a threshold issue that needs to be clarified by appropriating the legal test to ascertain their classification. Amongst the factors, the legal tests to analyze and determine the employee status are:⁴¹

- a. the nature and scope of the alleged firm's power over the worker;
- b. the workers' chance for profit or loss;
- c. the workers' expenditure on equipment or materials needed for accomplishing his duty;
- d. whether the service performed by the worker demands a particular skill set;
- e. the level of permanency and the continuation of the working relationship;
- f. the degree to which the service provided is an elemental component of the alleged firm's business;
- g. the workers' obligation to work only for the employer;⁴² and
- h. stipulations as to working hours.

Based on the legal tests, the status of the gig workers in Indonesia is, in fact, self-employed/independent contractors. First of all, the nature and scope of the alleged firm's power that it can exert over the gig workers are merely in the form of rating, uniform and safety regulation. In some instances, even the enforcement of these regulations is not implemented by the firm. The gig workers also stand to earn a profit or suffer a loss that leads to no employment relationship. Moreover, the gig workers provide their means of transport and fuel indicate no employment even when the firm offers uniforms and helmet (in some cases, drivers also bought their custom-made uniform. The gig workers in Indonesia have no permanency since customer's demands drive jobs providence, thus no guarantee of continuation. The services provided

40 Pinsof, "A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy", 347.

41 Sarah A. Donovan, David H. Bradley and Jon O. Shimabukuro, *What Does the Gig Economy Mean for Workers?* (Washington, DC: Congressional Research Service, 2016), 58-88

42 Ravi Chandran, *Introduction to Business Law in Singapore* (Singapore: McGraw-Hill Education Asia, 2006), 189.

by the gig workers are also not an essential component of the alleged firm's business, which is an intermediary/platform, which aids at linking customers' demand with the drivers. Gig workers are also free to work for other employers in an employment relationship or gig for their competitors (commonly known as 'multi-platform'). Last but not least, there are no stipulations as to working hours from the alleged firm.

The partnership⁴³ between the gig workers and their firms also means that no employment relationship was formed; therefore, firms are not obliged to comply with the provisions regarding maximum working hours, rest periods, annual leave, paid sick leave, along with other rights such as overtime, social security and severance pay if the relationship between them ends. Gig workers will not get any protection from Law No. 13 of 2003 regarding Employment – since our existing employment law does not stipulate any obligations, rights and protections for this new kind of semi-informal working relationship in our existing online transportation industry. Still, the Indonesian government has not regulated any clear legal framework that regulates the relationship between gig workers and their firms. Their regulatory reach now is only up to the regulation regarding private hire means of transportation for motorbikes used by the general public (Decree of the Minister of Transportation Number KP 348 of 2019).⁴⁴

If we look at the facts that exist juridically based on our positive law, the relationship between gig workers and their firms falls into the scope of civil law. Perhaps, this kind of cooperation and partnership is a phenomenon that the legislators wanted to explain as the development of legal relations following the times and development – that the law will always be late in keeping up with the development (*het recht hink achter de feiten*). Looking

43 According to Jafar Hafsa, partnership is a business strategy carried out by two or more parties to gain mutual benefits within a certain period of time by applying the principle of mutual need and mutual encouragement. Partnership is indeed a cooperation in business linkages, either directly or indirectly, on the basis of mutual need, trust, mutual strengthening and mutual benefit principles. Ananda Amalia Tasya and Hilda Yunita Sabrie, "Implementasi Sifat Hukum Pengangkutan dalam Pelaksanaan Ojek Online", *Jurnal Perspektif* 24, no. 3 (2019): 156-67.

44 Hanifah Sartika Putri and Amalia Diamantina, "Perlindungan Hukum terhadap Keselamatan dan Keamanan Pengemudi Ojek Online untuk Kepentingan Masyarakat", *Jurnal Pembangunan Hukum Indonesia* 1, no. 3 (2019): 392-403.

from the civil law perspective, this kind of cooperation and partnership is a form of relationship that has generally existed for a very long time; however, specifically, this kind of partnership, through the help of application and technology, is a development and extension of the prevailing partnership relationship in civil law that we have known so far. It can be seen here that the contract law (or rather the law of obligations/*verbintenissenrecht*) in civil law plays a role in filling the legal vacuum due to the phenomenon of the changes of law using its open system (default rule/*aanvullend recht*) and the context of unnamed agreements.

There is still no legal provision that regulates in detail the working relationship between the gig workers in Indonesia and their firms. In general, the relationship between them is still based on and regulated in the Indonesian Code of Civil Law (*Kitab Undang-Undang Hukum Perdata*). Table 1 below will provide an overview and comparison between the partnership relationship regulated in the Indonesian Code of Civil Law and the working relationship regulated in Law No. 13 of 2003 regarding Employment.

Table 1.
Comparison Between Partnership Relationship and Employment Relationship

The Distinguishing Indicator	Partnership Relationship	Employment Relationship
Legal basis	The Indonesian Code of Civil Law	The Law No. 13 of 2003 regarding Employment
The positions of the parties	Seen as equal parties	Seen as superior and subordinate
Minimum provisions to be stipulated in the agreement	The consensus, the business activities, the agreed rights and obligations of each party, the object of the agreement, timeframe and dispute resolution methods	The name and address of the firm and type of business; the name, gender, age and address of the employee; position or type of employment; place of work;

		the employment period; the place and date the employment agreement was made; and signatures of the parties in the employment agreement.
Remuneration and supervisory orders	and None mentioned, except agreed by the parties.	Clearly regulated
Rights and protection	None mentioned, except agreed by the parties.	Clearly regulated

Source: Nola, 2018⁴⁵ and modified by the author.

The fundamental traits of an employment relationship are that a person performs his duties for and below the command (control) of another person or entity for a defined period. In exchange, they obtain compensation in the form of remuneration.⁴⁶ One fundamental viewpoint of gig work that obscures the duty of labour regulation is the triangular relationship between the gig worker providing or performing the service, the customer (end-user) of the service, and the digital intermediary/platform which aids the entire process. A civil contract rules the relationship between the gig worker and the intermediary (platform). On the other hand, the relationship between the gig worker and the ultimate user of their services is even more equivocal (ambiguous).⁴⁷

Table 2.
Tests and Indicators for Identifying Employment Status

Test	Factor
Control	duty to obey orders
	discretion on hours of work
	supervision of mode of working

45 Luthvi Febryka Nola, "Perjanjian Kemitraan vs Perjanjian Kerja bagi Pengemudi Ojek Online", *Info Singkat* 10, no. 7 (2018): 1-6.

46 Georgios Petropoulos, "Collaborative Economy: Market Design and Basic Regulatory Principles", *Intereconomics* 52, no. 6 (2017): 340-5.

47 Andrew Stewart and Jim Stanford, "Regulating Work in the Gig Economy: What are the Options?", *The Economic and Labour Relations Review* 28, no. 3 (2017): 1-18.

Integration	disciplinary/grievance procedure
	inclusion in occupational benefit schemes
Economic reality	method of payment
	providing own equipment
	investing in own business
	coverage of sick pay, holiday pay
Mutuality of obligation	duration of employment
	regularity of employment
	right to refuse work
	custom in the trade

Source: Deakin, 2020⁴⁸

In Indonesia, the employment relationship is strictly regulated into two forms: a permanent employment relationship and a temporary employment relationship. In determining whether a working relationship falls into the category of employment relationship or partnership, judges in Indonesia also apply several legal tests to determine a definite relationship. This can be observed from several considerations of judges in Indonesia in deciding cases similar to the gig economy working scheme. Below are some of the judges' considerations that are often used to determine cases regarding the status or working relationship in the Indonesian context:

- a. in addition to an employment relationship, a partnership agreement can also be held by the parties, as long as it does not conflict with the provisions in prevailing laws and regulations and must be agreed upon in an agreement by the parties which bind themselves to work together;
- b. workers are not bound by disciplinary regulations with the firms; on the other hand, firms do not have absolute authority in terms of work discipline of the workers;
- c. there is no element of wages. The income received by workers is not in the form of wages but from profit-sharing based on orders – which in terms of time and amount, cannot be ascertained. The

48 Simon Deakin, "Decoding Employment Status", *King's Law Journal* 31, no. 2 (2020): 180-93.

- income received under this profit-sharing scheme may differ from the previous disbursement of income. This kind of scheme is not regulated in Law No. 13 of 2003 regarding Employment; therefore, this kind of partnership agreement is generally classified as a civil agreement and not an employment relationship (this element is met if the worker receives compensation in the form of a certain amount of money as a wage which is fixed within a certain period);
- d. workers are not tied to firms like an employment relationship;
 - e. In this element of authority and order, this element will only be fulfilled if firms have the authority to give orders to carry out specific work that is not done on the workers' initiative and free will.

The present economy's digital sector poses some extra obstacles. Their workers have sued many Indonesian firms in the past (with a somewhat similar business model with companies in the gig industry now) regarding their status as self-employment/individual contractors. These firms (taxi,⁴⁹ logistics,⁵⁰ and ready-mix industry⁵¹) have resisted aggressively in court to determine their workers as independent contractors rather than employees, in the absence of actual employment status dictated by Law No. 13 of 2003 regarding Employment.⁵²

The rationale of why the author took several cases of the Indonesian Court rulings in the past is that the gig economy is not a new thing. A vital characteristic of the vast majority of work in this context is the payment mechanism: working people are compensated for each task they accomplish. This is one of the core ideas captured by the 'gig' label. Being paid by task⁵³

49 Supreme Court of the Republic of Indonesia's Ruling No. 841 K/Pdt.Sus/2009 in regard to the appeal for cassation of Arifin Adnan and Opik Taufik v PT Blue Bird Group, 13th April 2010.

50 Supreme Court of the Republic of Indonesia's Ruling No. 276 K/Pdt.Sus-PHI/2013 in regard to the appeal for cassation of PT Puninar Jaya v Hendrawan, 18th July 2013.

51 Industrial Relations Court at Tanjungpinang District Court's Ruling No. 68/Pdt.Sus-PHI/2014/PN Tpg in regard to the civil lawsuit of Cecep Sutarno & Ors v PT Remicon Widyaprima, 21st May 2015.

52 Article 1 paragraph 15 Law Number 13 of 2003 regarding Employment (State Gazette Number 39 Year 2003, Supplement to the State Gazette Number 4279).

53 Another way of thinking about work paid by the task is as 'output work.' This applies where the employer calculates payment by reference to the number of pieces produced by the worker

is, of course, nothing new. Employers have long used piece rates to drive workers into performing monotonous tasks. However, in the case of the gig economy, it is evident that technology facilitates this approach.⁵⁴

A previous study in the UK considers that working in the gig economy as within the context of uncertain/temporary work and is not a novel phenomenon. However, this is merely a modification and compromises made to adapt to the increased flexibility of the labour market. This problem is not a new one and is not an impact on the gig economy. This sets a new controversy when the firms insist not to be employers but as technology companies. The problem with misclassification of employment status has occurred for years, and the gig economy firms are just an additional slight dilemma in the whole process.⁵⁵

Until today, neither Indonesian nor traditional American court has yet ruled the rideshare business drivers to be employees.⁵⁶ However, in October 2020, a California appellate court orders rideshare drivers in the state to be reclassified as employees – threatening to upend the very foundation of the gig economy business model that offers flexibility and freedom to workers and businesses alike.⁵⁷ Furthermore, in 2016, a British employment tribunal recently asserted a tribunal ruling that Uber drivers are not self-employed but regular workers (employees).⁵⁸ The ruling was also supported in 2017 and 2018 by the Employment Appeal Tribunal⁵⁹ and the Court of Appeal.⁶⁰ Other courts in Brazil and Switzerland have also produced comparable judgments.⁶¹

regardless of the time taken to produce them.

54 A.C.L. Davies, “Wages and Working Time in the ‘Gig Economy’”, *King’s Law Journal* 31, no. 2 (2020): 250-9.

55 Sargeant, “The Gig Economy and the Future of Work”, 2.

56 Marina Lao, “Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption”, *UC Davis Law Review* (University of California) 51, no. 4 (2018): 1543-87.

57 The orders affirmed a preliminary injunction orders by a state court judge in San Francisco. The appellate court presumes workers are employees unless an employer can prove and establish the three factors: a) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; b) that the worker performs work that is outside the usual course of the hiring entity’s business; and c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

58 *Aslam & Ors v Uber BV & Ors* (2016) ET 2202550/2015.

59 *Aslam & Ors v Uber BV & Ors* (2017) UKEAT 0056/17/DA.

60 *Uber BV & Ors v Aslam & Ors* (2018) EWCA Civ 2748.

61 Lao, “Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption”, 1543-87.

Working for the gig economy suggest that they are self-employed working (perhaps) for several firms. In that situation, they are to be paid for each specific task or tasks, rather than getting a fixed salary periodically. Workers also procure their equipment and free to determine their working schedules. Thus, it is a futile attempt to classify platform workers (gig economy workers) as employees.⁶² Furthermore, the outfits (or uniforms) that many workers dress nowadays do not certainly symbolize the identities of their actual employers, nor do they indicate that they are an employee of that particular firm.⁶³ Thomas even added that the gig workers are business owners; they do not realize it yet.⁶⁴ After all, technology disruption often places prevailing legal rules to the test. Courts should not undoubtedly succumb to one's interpretations solely because a trial includes some technology the court has not dealt with previously. Hence, new is not always disruptive.⁶⁵

In such a setting, it is worth remarking that a group of people seem to be presenting their "individual assets" as part-time workers or entrepreneurs (despite micro) and workers as a commodity so that "sharing" could be perceived as a euphemism for "selling." Indeed, firms frequently recruit workers with no entitlement to a determined number of working hours, paid sick or yearly leave, and notice in the event of termination.⁶⁶ Hence, the gig workers enter into a civil contract to perform a particular work, which can be described as a non-employment work arrangement, thus forming no rights and obligations as stipulated in the Indonesian Employment Law. This phenomenon is known as workers without employers.⁶⁷

62 Miriam A. Cherry and Antonio Aloisi, "Dependent Contractors" In the Gig Economy: A Comparative Approach", *American University Law Review* 66, no. 3 (2017): 635-89.

63 Keith Cunningham-Parmeter, "From Amazon to Uber: Defining Employment in the Modern Economy", *Boston University Law Review* 96, no. 5 (2016): 1673-728.

64 Kathleen Delaney Thomas, "Taxing the Gig Economy", *University of Pennsylvania Law Review* 166, no. 6 (2018): 1415-73.

65 William Sowers, "Note: How Do You Solve a Problem Like Law-Disruptive Technology?", *Law and Contemporary Problems* 82, no. 3 (2019): 193-214.

66 Antonio Aloisi, "Commoditized Workers: Case Study Research on Labour Law Issues Arising from a Set of 'On-Demand/Gig Economy' Platforms", *Comparative Labor Law & Policy Journal* 37, no. 3 (2016): 653-90.

67 To be distinguished with the 'disguise employment' as elaborated by the International Labour Organization (ILO). Disguise employment is discussing about the ambiguous reality in the binary divide between employment and self-employment in the vast majority of legal systems across the world. Benefitting from the grey area uncovered by the employment law, the disguised

3. Rectification Efforts: New Kind of Protection for the New Breed of Workers

Amidst regulators worldwide seeking to find ways to fit the gig economy into their current legal structures, many assumptions divide our standing. At its most rudimentary, should government leave alone this completely novel and disruptive business model in order for them to flourish, or we should, in fact, act and prevent these exploitative business practices entirely? Neither assumption is appropriate.⁶⁸ While the judiciary and the law (or even the public's perception) worldwide still cope with whether these gig economy workers should be treated as employees or self-employed/independent contractors, one issue remains in flux – their protection. It appears plausible that this technology will spill over into more 'traditional' employment over time as employers perceive the benefits of the gig economy, such as monitoring workers' movements more closely and paying them only for work accomplished. Alternatively, work paid by the task accomplished (in the gig economy) could be treated as 'unmeasured.'⁶⁹ The Indonesian law and courts' classification of these workers as independent contractors has had a tremendous effect on those workers. Apart from the conflicted remuneration and lesser benefits that most firms provide, the independent-contractor classification additionally signifies that labour and employment laws do not apply to these workers.⁷⁰

Historically, the labour law has been conceded as a curative mechanism for the imbalance/disparity of bargaining power in the labour market, with numerous modern theories appending essential rights protection and fixing inefficiencies.⁷¹ As a civilized community, we have acknowledged that several notions are more prominent than corporate profit. A minimum wage and a safe

employment lends an appearance that is different from the underlying reality with the intention of nullifying or attenuating the protection afforded to workers by the law. On the other hand, 'workers without employers' is describing about the reality of self-employment relationship that differs from the employment relationship as stipulated by the Indonesian employment law.

68 Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, 10.

69 Davies, "Wages and Working Time in the 'Gig Economy'", 253.

70 Geraint Johnes, "The Gig Economy in the UK: A Regional Perspective", *Journal of Global Responsibility* 10, no. 3 (2019): 197-210.

71 Abi Adams, Judith Freedman and Jeremias Prassl, "Rethinking Legal Taxonomies for the Gig Economy", *Oxford Review of Economic Policy* 34, no. 3 (2018): 475-94.

working environment are some instances. Permitting firms to dodge employee protections by utterly renaming their employees as self-employed/independent contractors would incentivize and propel firms to abolish the well-established protections granted by the law.⁷²

We need to recognize the ‘dependent’ nature of gig workers on the platform instead of portraying that gig workers and end-users (customers) anyhow begin their relationship on an equal footing.⁷³ Workers, whatever their status may be, have rights, and rights should not be discriminated against. However, there may be some challenges to overcome the pernicious effects for workers of the task-based approach in the absence of statutory regulation.⁷⁴ A study even shows that for workers with little employment opportunities that come with benefits, the gig economy’s working possibilities display a comparatively lucrative job for the “economically vulnerable.”⁷⁵ However, compelling law-disruptive technology and platform inside the prevailing statutory regulation could likely close down the new technology entirely. It might modify or kill the unique feature that drove customers to utilize the platform in the first place.⁷⁶ Ascertaining the proper employment status is vital as differing employment protections pertain to each category. The self-employed, nevertheless, must benefit from some stipulations on health, safety, well-being and protection from discrimination.⁷⁷

We need to recalibrate the Indonesian labour law (or at least several related laws). If the worker’s status depicts the heart of labour law, it is essential to interpret that labour law has always been developing the relationship of the workers’ status vis-à-vis disrupting phenomena; ‘gig economy’ is just the last example. All of the measures below are established on the spirits and tenets of the principle of *inderogabilità* (inderogability) known to the Italian

72 Ben Z. Steinberger, “Redefining ‘Employee’ in the Gig Economy: Shielding Workers from the Uber Model”, *Fordham Journal of Corporate & Financial Law* 23, no. 2 (2018): 577-96.

73 Kate Minter, “Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales”, *The Economic and Labour Relations Review* 28, no. 3 (2017): 438-54.

74 Davies, “Wages and Working Time in the ‘Gig Economy’”, 259.

75 Austin Zwick, “Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber”, *GeoJournal* 83, no. 4 (2017): 679-91.

76 Sowers, “Note: How Do You Solve a Problem Like Law-Disruptive Technology?”, 197.

77 Sargeant, “The Gig Economy and the Future of Work”, 12.

labour law, that all statutory provision, individual contract, and the collective agreement – as well as guarantees established in the collective agreement vis-à-vis the individual employment contract – cannot be derogated to the detriment of the worker.⁷⁸

As a framework for a solution to this predicament, the writer advocates a novel method based on two general principles of statutory efficiency: 1) preventing regulatory arbitrage and 2) allotting legal responsibility to the most economical cost avoider. By passing protective legislation and regulation, the legislative and executive branches have determined to allot rights or obligations in the working relationship based on broader public policy. Influenced by Michael Ford's reasoning, the normative starting point is that workers should not be constrained to lower working standards solely because they provide their effort through the gig economy.⁷⁹ Consequently, the first principle in determining protective laws and regulations is to prevent regulatory arbitrage. Henceforth, work should not be omitted from the protection coverage of the laws simply because of the unique production system, except it is apparent that the legislature intended that specific matter to be excluded.⁸⁰ The second principle is that legal responsibility should be allocated to the most economical cost avoider in the production system so that the laws can be cheaply and effectively administered. The large, dominant firms that run production in the information era should be the ones who carry the liability for assuring that the statutory rights of workers associated with their work are being fulfilled. These two principles of preventing regulatory arbitrage and choosing for regulatory efficiency might be enacted through legislative or executive action.⁸¹

*a. Union and Guild to Unite the Scattered: A More Grassroots-Fashioned*⁸²

78 Vincenzo Pietrogiovanni, "Between Sein and Sollen of Labour Law: Civil (and Constitutional) Law Perspectives on Platform Workers", *King's Law Journal* 31, no. 2 (2020): 313-23.

79 Michael Ford, "The Fissured Worker: Personal Service Companies and Employment Rights", *Industrial Law Journal* 49, no. 1 (2020): 35-85.

80 The notion of regulatory arbitrage, or formulating transactions or relationships to prevent legal costs and liabilities has been around for some time.

81 Kenneth G. Dau-Schmidt, "The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law", *University of Chicago Legal Forum*, no. 1 (2018): 63-94.

82 A grassroots fashion employs the individuals in a given resemblance to participate by taking

Approach

We should not anticipate gigs to displace traditional employments arrangement. Nevertheless, the surge of the gig economy offers us a new opportunity to rethink social policy. Working in the gig economy can form isolated individuals⁸³ making a living from job to job, with no permanent financial or social connections to employers or other workers.⁸⁴ The diversification of the ‘workplace’ in both ‘crowd work and on-demand gig work is massive as it is more likely to form a separated and individualized work experience. It is making gig workers more vulnerable by themselves.⁸⁵ The starting tip for potential improvement is utilizing the concept of a conventional labour union. Despite their nuance to be traditional, private-sector unionization remains the most significant, best organized and well-funded employee-side organization in the United States.⁸⁶ Therefore, it is still our best hope.

Hence, there must be no indication of freedom of association and freedom of assembly being limited or prevented by the firms/platforms to achieve fair representation. As a human right guaranteed by the 1945 Indonesian Constitution, gig workers should not be subject to detriment or discrimination to organize and associate with one another. Firms/platforms must also openly acknowledge an independent, collective body of gig workers and not have declined to participate in collective representation or bargaining.⁸⁷

Soliciting more collaborative approaches will be the most feasible alternative to enhance workers’ aspiration and representation. Self-employed workers unions or guilds⁸⁸ possess considerable expertise in representing

responsibility and action for their community.

83 There are various obstacles to the collective organization for gig workers/platform workers. Not only do workers often work individually, but they are constantly in competition with each other for scarce work.

84 Gerald Friedman, “Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy”, *Review of Keynesian Economics* 2, no. 2 (2014): 171-88.

85 Kaine et al., “The Organisation and Experience of Work in the Gig Economy”, 480.

86 Jeffrey M. Hirsch and Joseph A. Seiner, “A Modern Union for the Modern Economy”, *Fordham Law Review* 86, no. 4 (2018): 1727-83.

87 Sandra Fredman et al., “Thinking Out of the Box: Fair Work for Platform Workers”, *King’s Law Journal* 31, no. 2 (2020): 236-49.

88 Examples of such unions abroad are including but not limited to: Independent Workers Union of Great Britain (IWGB), Freelancers Union in the New York State, founded in 1995 and the

workers, which would presumably be of great importance to workers in the gig economy. Hence, the fundamental inquiry would be what unions nowadays can do to adapt to the prevailing dynamic? Eventually, no model will be flawless, but non-conventional unionization efforts are necessary if workers in the digital sector fancy any collective aspiration semblance. After all, the freedom and liberty of union and association is a right guaranteed by the 1945 Constitution of the Republic of Indonesia.⁸⁹ Accordingly, gig workers should form and unite into a union or guild to better represent their voice and aspiration.

b. Mandatory Social Security as Catalyst

Workers in the gig economy denote that the workers are not receiving salaries periodically. Instead, they are getting compensated per gig or a “project rate.” A study reveals that people who utilize their vehicles to deliver food or parcels or render taxi services perceived that the work was intrinsically pressured (stressed), and this frequently led to risk-taking and infringement of road and safety regulations. This practice was endemic amongst gig workers since the quicker they work, the more they earn.⁹⁰ Most gig workers stated that they were self-regulated and took pauses or signed off if they were fatigued. However, They confessed that they could work long hours without pauses, and there was no regulation on hours worked. Some also hinted that long hours might add to tiredness and, thus, road mishaps.⁹¹

Every worker should be entitled to obtain a specific fundamental and essential set of protection as a person, regardless of wherever they source income opportunities. Every worker should have protection to a necessary assortment of benefits, notwithstanding of employment status. The characteristics of gig work caused its workers to encounter impairment induced by fatigue and stress to infringe traffic rules and use their mobile phones while driving or riding. Plenty of these workers are at tremendous risk in terms of road mishaps.

Uber Guild (the Independent Drivers Guild), which runs in New York City. These unique organizations are tailored to suit the distinct matters raised by the unique arrangement of the working relationship of the firms with its drivers.

89 Article 28 of 1945 Constitution of the Republic of Indonesia.

90 Nicola Christie and Heather Ward, “The Health and Safety Risks for People Who Drive for Work in the Gig Economy”, *Journal of Transport & Health* 13, no. 1 (2019): 115-27.

91 *Ibid.*, 125.

The appearance of the gig workers to fulfil the public's desire for quick and convenient could present an unignorable risk harming the health and safety of the gig workers and other road users.⁹²

A standard yet pertinent problem is the registration with the social security scheme. According to the National Social Security Law, when a person holds the status of an employee, the employer is obliged to enrol their employees with the National Employment Social Security Scheme.⁹³ In this circumstance, besides the entanglements to labour law in terms of employee benefits, the noteworthy consequence is that the employer is perpetually compelled to pay the employee's social security premiums. This will cause a notable increase in labour expenses for the employer, which could demonstrate – although not justify, the employer's 'tendency' to conceal the employment relationship.⁹⁴

The case of the self-employed is even more complex. While we have already witnessed, the workers classified as self-employed/independent contractors signify that they are independent workers and not employees. Therefore, they are unable to register with the national employee social security system. The effort of the Indonesian Government to provide a scheme for protecting the gig workers through the Independent Workers' Social Security Scheme (BPJS Mandiri) is much appreciated.⁹⁵ Notwithstanding in such circumstances, there is no obligation to enrol with the scheme.⁹⁶

As one of the two general principles of statutory efficiency is allotting legal responsibility to the most economical cost avoider so that the laws can be cheaply and effectively administered, the platforms (firms) that intermediate

92 *Ibid.*, 127.

93 Article 15 (1) Law Number 24 of 2011 regarding National Social Security Administrator (State Gazette Number 116 Year 2011, Supplement to the State Gazette Number 5256).

94 Borja Suárez Corujo, "The 'Gig' Economy and its Impact on Social Security: The Spanish Example", *European Journal of Social Security* 19, no. 4 (2017): 293-312.

95 BPJS Ketenagakerjaan, "BPJS Ketenagakerjaan Hadir Lindungi Pengemudi Transportasi Online", <https://www.bpjsketenagakerjaan.go.id/berita/26036/BPJS-Ketenagakerjaan-Hadir-Lindungi-Pengemudi-Transportasi-Online> (accessed on 21 July 2020).

96 Not to be confused that, in fact, despite the Indonesian Government's effort by issuing the Regulation of the Minister of Transportation Number PM 12 Year 2019. However, in its substance, particularly in the provision of Article 16 paragraph (3) letter i, the regulation never requires gig workers to register with the Independent Workers' Social Security Scheme. It is merely a guarantee of the government that drivers will obtain certainty in terms of their protection under social security according to the provisions of the applicable laws and the regulations.

the transaction must ensure that the drivers who wish to enrol with their platform must be registered with the independent Workers' Social Security Scheme (BPJS Mandiri). However, platforms (or firms) are not required to pay for an even check whether the gig workers are paying their social security premium – as they are not an employee to the firm.

Admittance to (and funding of) mental health assistance for self-employed workers by the Government and/or firms should also be developed, giving particular regard to stress and anxiety management. This initiative might serve as a benchmark that might draw inspiration, especially those with comparatively lacking union membership, which embodies many workers in the gig economy.⁹⁷

c. Fit and Proper Test for Gig Workers

With such a high number of workers in the gig economy, firms/platforms must ensure that everyone working is the right person for the task. This enshrines a broad principle of 'fitness' and 'propriety' of private gig workers, the particular content of which is to be determined by firms/platforms. Firms/platforms have to demonstrate their workers' 'fitness' and 'propriety' before being granted to perform tasks. The so-called 'fit and proper' test encouraged some degree of self-assessment of the workers to convince firms/platforms that they are indeed the right person to do the task. As promising as it may sounds, there is a particular caveat that proponents such approaches in practice. These approaches make particular assumptions about the actors who participate in it. By and large, the assumption is that firms/platforms and the workers are 'rational' and 'moral' agents who understand very well the behaviour of one another and can collaborate effectively without conflict of interests.⁹⁸

d. Training and Safety

Defining this for platform workers is complex since firms/platforms commonly shift the cost of acquiring and maintaining a safe 'workplace'. While all contractors are accountable for their training, there is an expectation

97 Sally-Anne Gross, George Musgrave and Laima Janciute, *The Gig Economy: Policy Perspectives on Precarity* (London: University of Westminster Press, 2018), 88-9.

98 Margarita Amaxopoulou, "Sticks and Carrots: Lessons from Regulating Uber as a Private Hire Operator in England", *King's Law Journal* 31, no. 2 (2020): 260-74.

that training and instruction will be given in the matter of employees. Firms should be permitted to examine and manage protection despite the worker classification they utilize.⁹⁹ The firm/platform should identify the task-specific risks that arise for the worker and prove that policies or procedures protect workers from these risks. In Indonesia, a significant risk is from crime and road mishaps. Firms/platforms should go beyond necessary risk mitigation and take proactive measures to protect and promote workers' health and safety. This must be evidenced through a documented policy.¹⁰⁰

The idea, while mesmerizing, does not respond to where the funding for this protection net will be acquired. Again, basic training and safety education to fortify the gig workers understanding of the safe working procedure is imminent. Moreover, gig workers are expected to hit the road at their own risk.

e. Protection Against Unfair Tariff to Shield Against Gig Workers Financial Predicament

Rather than savouring the plunder of successful entrepreneurship (as self-employed/independent contractor), a notable proportion of gig workers discover themselves caught in the precarious (uncertain) low-paid gig.¹⁰¹ Sadly for the gig workers, the success of their platform is primarily hinged on their capability to trim out the competition by dropping prices. This is a prescription for pay reduction and uncertainty of pay for gig workers.¹⁰² The approach to treat gig workers as employees risks dismantling the business design of numerous gig economy firms by drastically raising their cost structure, possibly heading towards a reduction in consumer welfare as those costs are transferred on to the platforms' users (customer). Far more importantly, it would probably be a pyrrhic victory for gig workers because it would also threaten the very flexibility that has attracted countless of them to

99 Arun Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (Massachusetts: The MIT Press, 2016), 79.

100 Fredman et al., "Thinking Out of the Box: Fair Work for Platform Workers", 243.

101 Jason Heyes et al., "Living with Uncertain Work", *Industrial Relations Journal* 49, no. 5-6 (2018): 420-37.

102 Jillian Kaltner, "Employment Status of Uber and Lyft Drivers: Unsettlingly Settled", *Hastings Women's Law Journal* 29, no. 1 (2018): 29-54.

the gig economy, to begin with.¹⁰³

Fair compensation is the key to better living standards. The starting point is to extend the statutory minimum compensation to gig workers/platform workers, irrespective of the worker's employment status. The need for fair compensation is specifically responsive to the reality that gig workers/platform workers are mostly responsible for their costs. Everyone who is working deserves fair compensation, and it is affirmed in Article 27 subsection (2) of the 1945 Constitution of the Republic of Indonesia Indonesian Constitution. As a result, the Indonesian government has issued the Decree of the Minister of Transportation Number KP 348 of 2019 concerning Guidelines for Calculation of Fees for Motorcycle User Services Used for Public Interest Performed with an Application. The government designed this effort to tackle unfair tariffs for gig workers. However, the minister's decree only applies especially to gig workers who work using two-wheeled motor vehicles (motorbikes). Hence, it does not apply to other gig workers. The government's regulation should balance and not discriminate, and thus, the Indonesian Government should issue a regulation for all kinds of gig work available in the market now. This notion is based on the first principle of statutory efficiency: preventing regulatory arbitrage by maximizing protective laws and regulations.

f. Fair Dealings

Eventually, we must recognize that the imbalance of bargaining power can impair the consensual grounds of the contract.¹⁰⁴ For platform workers, merely negotiating a fair contract continues to be a problem. Even more challenging is the reality that the digitally-mediated nature of the work in the gig economy makes it too prone to changes in the working terms. Gig workers may be shown updated terms and conditions and must signify their consent before logging on to commence work. The terms and conditions are usually lengthy and complicated, and given the trade-off between working and spending time reading the terms, the decision is habitually to simply agree.

103 Michael L. Nadler, "Independent Employees: A New Category of Workers for the Gig Economy", North Carolina Journal of Law & Technology 19, no. 3 (2018): 443-96.

104 Sandra Fredman and Darcy Du Toit, "One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal", Industrial Law Journal 48, no. 2 (2019): 260-77.

Consequently, the firms/platforms must prove that their terms and conditions are transparent, concise and presented to gig workers in an accessible form.¹⁰⁵ Secondly, a fair and transparent contract attempts to address the widespread misclassification of workers as self-employed. In order to achieve this, a firm/platform must accurately distinguish the nature of the worker's relationship and formulate it in the contract, judged using legal tests taken from the Indonesian definition of employee.

g. Knowledge is Key: A Rather Quaint Approach

Assuring a more comprehensive awareness of the hurdles facing those working in the gig economy is essential. Overall, the rise of “on-demand” platform work displaces several of the risks off from firms and places undue stress on gig workers who face severe scepticism about their future incomes and employment continuity.¹⁰⁶ Hence, protection efforts from the government are vital to maintain and preserve the gig workers who are also taking part in developing our national economy.

The Indonesian government ought to socialize all related laws and regulations to gig workers – or even unions/guilds, to familiarise the laws, regulations, the government's policy and social security scheme accustomed to gig workers. With adequate knowledge and understanding, the gig workers will also be more aware of their rights and obligations. Thus, the principal vision of the labour law is still achieved, namely: as a curative mechanism for the imbalance/disparity of bargaining power in the labour market (despite gig workers in Indonesia are not classified as employees under the Indonesian labour law).

C. Conclusion

We should not speculate that gigs would displace conventional employments relationship.¹⁰⁷ A recent study also suggests that there is no concrete evidence that gig works replace traditional/conventional full-time

105 Fredman et al., “Thinking Out of the Box: Fair Work for Platform Workers”, 243.

106 Jan Drahoukoupil and Agnieszka Piasna, “Work in the Platform Economy: Beyond Lower Transaction Costs”, *Intereconomics* 52, no. 6(2017): 335-40.

107 Friedman, “Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy”, 171-88.

jobs.¹⁰⁸ Nevertheless, people are more inclined to have supplemental income from gig work (even if the amounts are small).¹⁰⁹ The gig economy is not a new thing at all. At this point, we have extensively cautioned upon concentrating overmuch on the novelty, or disruptive nature, of labour relations in the platform and gig economy. Many of the matters addressed here are currently equally connected to very ‘traditional’ modes of work, especially those requiring precarious labour conditions.¹¹⁰ Several Indonesian firms in the past have been sued regarding the status of their workers. These firms have resisted aggressively in court to determine their workers as independent contractors rather than employees and strengthened by court rulings that support the notion that these workers are independent contractors rather than employees. Legal tests also show that gig workers in Indonesia are classified as self-employed/independent workers, hence entrepreneurs.

If Indonesia is to recover to a growth trajectory of 7 per cent a year, there is no other option except to utilize Indonesian workforce participation and productivity. This endeavour might require an unconventional breakthrough – one that is unlikely to succeed without the help of digital leverage. In order to finish with an optimistic viewpoint, the platform-based gig economy is a unique chance to unite unproductive portions of the population with the demand, hence contributing to our economic welfare. Consequently, we must embrace it. The significance of over a million workers in Indonesia working in the gig economy sector – is too large a prize to neglect. The vast number of workers is a justified necessity for a new personalized labour regulation

108 Automation and technology are not synonymous with job loss and job redundancy. In other words, the jobs themselves would not entirely vanish; rather, they are exposed to automation and technology – thus, will be redefined. Jobs that are most at risk are those which are on some level share the traits of either routine, repetitive and predictable. Jobs that are more resilient to technology and automation are usually jobs that involve: 1) genuine creativity (such as artist, authors, etc.); 2) building complex relationship with people (such as nurses, lawyers, lecturers, teachers, etc.); and 3) jobs that are highly unpredictable (such as plumber and firefighter who may be called to emergencies in various locations). Martin Ford, *Rise of the Robots: Technology and the Threat of a Jobless Future* (New York: Basic Books, 2015), 88.

109 B. Collins et al., “Has the Gig Economy Replaced Traditional Jobs Over the Last Two Decades? Evidence from Tax Returns”, Conference Paper, 3rd IZA Labor Statistics Workshop: Contract Work, MI, U.S.A., July 2019, 1-72.

110 Michael Doherty and Valentina Franca, “Solving the ‘Gig-saw’? Collective Rights and Platform Work”, *Industrial Law Journal* 49, no. 3 (2020): 352-76.

to protect gig workers. After all, economic innovation brought about by technological ingenuity is undoubtedly a common good, but if it cultivates legal uncertainty, proper scrutiny would be needed.

Although it may seem like a spectre, the government's intervention in the gig economy by new forms of regulation is crucial.¹¹¹ Implementing a holistic policy, strategy, and regulation will help Indonesia triumph in the digital economy and boost Indonesia's economic growth to a higher level. Approaches that legal policy can adapt to accommodate gig workers vis-à-vis their protection and well-being are union or guilds as the grassroots approach, mandatory social security enlistment, fit and proper test, adequate training and safety by the gig firms, regulation to combat unfair tariff, promoting fair dealings and education to fortify insight and understanding amongst the gig workers. The efforts and measures presented in this paper also assist in accommodating the basis for the legal regulation of platform work, answering the specific needs and characteristics of working in the gig economy. It is now time to take the following steps and induce these efforts and measures in binding legal regulations. After all, to announce that the notion of working status carries a conceptual element is not to downplay its normative. If conceptual reasoning matters, statutory drafting can be crucial to concluding a legislative initiative's success or failure.

Finally, the usual disclaimer must be made. This article does not aim to render the ultimate path to take. However, it contributes in light of the significance of these platform companies' survival and the gig workers' protection.

111 The controversial new legislation in Indonesia, namely the Job Creation Law (Undang-Undang Cipta Kerja) or better known as the Omnibus Law also does not provide a concrete answer and solution to the protection of workers in the gig economy industry because it only changes several provisions related to the type and nature of work pertaining to traditional and conventional employment relationship. Workers who are classified as self-employed/independent workers are still oscillated in the realm of civil law which is very broad and general in nature. Gig workers are only protected based on contracts and agreements between the parties that are oftentimes unbalanced and unfair.

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