

9. The regulation of influencer labour in India: Situating a novel form of labour amidst colonial continuities of informality

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1 INTRODUCTION

India boasts the world's second-highest number of internet users, with its population comprising the largest user base of popular social media platforms such as Instagram, YouTube, Facebook, and WhatsApp.¹ The burgeoning of social media platforms has occurred against the backdrop of a concerted governmental effort to globally position India as a digital power, with an emphasis on fostering the growth of the platform economy.² This phenomenon was accentuated, in no small part, by the availability of inexpensive 4G internet owing to the launch of the mobile network JIO by Reliance Industries Ltd, a company headed by billionaire Mukesh Ambani, with the promise of cheap mobile data attracting several million individuals online for the first time.³

The proliferation of social media has witnessed the “orchestrated commercialization of mundane sociability”, with social interactions between users,

¹ Rahul Mukherjee and Fathima Nizaruddin, ‘Digital Platforms in Contemporary India: The Transformation of Quotidian Life Worlds’ (2022) 9 *Asiascape: Digital Asia* 5, 6.

² Adrian Athique and Vibodh Parthasarathi, ‘Platform Economy and Platformization’ in Adrian Athique and Vibodh Parthasarathi (eds), *Platform Capitalism in India* (Palgrave Macmillan 2020) 1, 2.

³ ‘India’s Internet Explosion: A Manifestation of Network Effects’ (*Cornell Networks Blog*, 13 December 2020) <<https://blogs.cornell.edu/info2040/2020/12/13/indias-internet-explosion-a-manifestation-of-network-effects/>> accessed 23 June 2024.

including strangers, being commodified.⁴ This commodification has led, in turn, to the emergence of influencer marketing, which entails the monetisation of reviews and endorsements of products on social media networks by an influencer, i.e., “a person behind a social media account who creates monetized media content with the goal of exercising commercial or non-commercial persuasion, and that has an impact on a given follower base”.⁵ While official figures on the Indian influencer marketing industry are unavailable, market research reports by private agencies value the influencer industry at approximately \$150 million, with a projected value of \$350 million by 2026. This burgeoning growth is projected to be led mostly by the rise of nano-influencers and micro-influencers.⁶ The regulation of influencers implicates a range of legal issues and has generated a nascent body of literature touching upon aspects such as constitutional protection of free speech by social media influencers, the regulation of child influencers or “kidfluencers”,⁷ the issues arising out of workers operating as social media influencers for their employers,⁸ and

⁴ Adrian Athique, ‘Integrated Commodities in the Digital Economy’ (2020) 42(4) *Media, Culture & Society* 554, 556.

⁵ Catalina Goanta and Giovanni de Gregorio, ‘Content Creator/Influencer’, in Luca Belli, Nicolo Zingales and Yasmin Curzi (eds), *Glossary of Platform Law and Policy Terms* (FGV Direito Rio 2021) 69–71.

⁶ Jones Mathew, ‘The rise of micro-influencers and how they can help brands connect with target audience’ (*Financial Express*, 24 February 2024) <<https://www.financialexpress.com/business/brandwagon-the-rise-of-micro-influencers-and-how-they-can-help-brands-connect-with-target-audience-3404021/>> accessed 23 June 2024; Naini Thaker and Kunal Sawant, ‘Digital stars 2023: Rise of the influencer’ (*Forbes India*, 26 October 2023) <<https://www.forbesindia.com/article/digital-stars-2023/digital-stars-2023-rise-of-the-influencers/89235/1>> accessed 23 June 2024, for a list of top Indian content creators in different categories.

⁷ Gavin Fellers and Benjamin Burroughs, ‘Branding Kidfluencers: Regulating Content and Advertising on YouTube’ (2022) 23(6) *Television & New Media* 575; Simone van der Hof and others, ‘The Child’s Right to Protection against Economic Exploitation in the Digital World’ (2020) 28 *International Journal of Children’s Rights* 833; Erin E. O’Neill, ‘Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing’ (2019) 72 *Stanford Law Review Online* <<https://www.stanfordlawreview.org/online/influencing-the-future/>> accessed 23 June 2024.

⁸ David Mangan, ‘Influencer Marketing as Labour: Between the Public and Private Divide’, in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 185.

disclosures regarding advertising and sponsorship, particularly in the context of unfair trade practices and consumer protection law.⁹

Much of the aforementioned literature focuses on the Global North, with an analysis of the regulation of influencer labour in India constituting a considerable gap in the extant literature. The limited emerging scholarly work primarily deals with the regulation of financial influencers or “finfluencers”, concerning disclosures and disclaimers for bolstering investor protection,¹⁰ mirroring the existing regulatory approach in India. The heightened regulatory attention that the obligations of influencers, concerning issues of consumer protection and unfair commercial practices arising from influencer marketing, have begun to receive stands in sharp contrast to the treatment of their rights and the conceptualisation of influencer marketing as work. For instance, in 2020, the Indian government banned TikTok, in the wake of military clashes between India and China¹¹ – a move that has come under criticism for depriving numerous working-class influencers of their livelihood.¹²

Arguably, the failure to meaningfully regulate influencer labour, in a manner that accounts for its precarity and the power dynamics that exist between influencers and social media platforms, could, at first blush, be brushed off as a mere failure to grapple with novel forms of work. The phenomenon of influencer marketing has been situated within the broader framework of peer-to-peer services and the platform economy,¹³ with courts and policy-makers attempting to address policy gaps and legal loopholes after “years of

⁹ Rossana Ducato, ‘One hashtag to rule them all? Mandated disclosures and design duties in influencer marketing practices’ in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 232. For an overview of the emerging literature on the regulation of influencers, see Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020).

¹⁰ See, Kirthana Singh Khurana, ‘Finfluencers as Investment Advisors – Time to Rein Them In?’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 109.

¹¹ Anilesh Kumar and Daya Thussu, ‘Media, Digital Sovereignty and Geopolitics: The Case of the TikTok Ban in India’ (2023) 45(8) *Media, Culture, & Society* 1583.

¹² Nitish Pahwa, ‘What Indians Lost When the Government Banned TikTok’ (*The Wire*, 18 August 2020) <<https://thewire.in/tech/india-tiktok-ban-government>> accessed 23 June 2024.

¹³ Catalina Goanta and Sofia Ranchordás, ‘The Regulation of Social Media Influencers: An Introduction’, in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 1, 3.

perilous doublespeak and uncertain litigation”.¹⁴ However, it has been argued that although the technology utilised by the platforms is certainly novel, the same cannot be said insofar as work is concerned, with the defining features of the platform economy, i.e., the presence of a large workforce subjected to poor working conditions and the control of powerful intermediaries, being emblematic of practices that have been entrenched in the labour market for centuries.¹⁵ In India, the State’s approach towards influencer labour needs to be seen in the context of pervasive informality that characterises the nature of work. While more than 90 per cent of India’s workforce comprises informal workers, it is the formal sector that has generally enjoyed the protection of labour law.¹⁶ The size of the formal sector is arguably attributable to the Indian labour law framework, which does not account for forms of work beyond the standard employment relationship – a phenomenon whose roots lie in the colonial history of Indian labour law.¹⁷ Labour law in independent India, thus, is marked by a “colonial continuity”,¹⁸ despite an explicit constitutional mandate for socioeconomic justice.

This chapter seeks to situate the regulation of influencer labour in India within this colonial continuity. To that end, section 2 of the chapter traces the evolution of labour law in India, providing an overview of the history of exclusions that has shaped it from the colonial era up to the present day. In particular, it highlights the non-realisation of the rights identified in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work (DFPRW), which are considered universally applicable regardless of employment status, despite the explicit constitutional commitment towards socioeconomic justice.¹⁹ Section 3 goes on to map the

¹⁴ Antonio Aloisi, ‘Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead’ (2022) 13(1) *European Labour Law Journal* 4, 25.

¹⁵ Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018) 72–73.

¹⁶ Kamala Sankaran, ‘Labour Laws in South Asia: The Need for an Inclusive Approach’ (2007) ILO Discussion Paper No. 176, 4 <https://www.ilo.org/public/libdoc/ilo/2007/107B09_170_engl.pdf> accessed 23 June 2024.

¹⁷ Simon Deakin, Shelley Marshall and Sanjay Pinto, ‘Labour Laws, Informality, and Development: Comparing India and China’ (2020) Centre for Business Research, University of Cambridge Working Paper No. 518, 15.

¹⁸ Kamala Sankaran, ‘Transition from the Informal to the Formal Economy: The Need for a Multi-faceted Approach’ (2022) 65 *Indian Journal of Labour Economics* 625, 631.

¹⁹ Kamala Sankaran, ‘Fundamental Principles and Rights at Work: India and the ILO’ (201) 46(10) *Economic and Political Weekly* 68, 73.

existing regulatory landscape for influencers in India, concerning the recent regulations and proposals as well as the applicability of Indian labour law to influencers. It argues that the approach towards influencer labour is emblematic of the informality of India's workforce, rather than merely constituting a failure to fully grapple with a novel form of work. Section 4 provides some concluding remarks.

2 A BRIEF HISTORY OF EXCLUSIONS

India's existing labour law framework is highly complex and fragmented, with over 40 central legislations and 160 state legislations.²⁰ However, as mentioned earlier, the vast majority of its workforce remains outside the purview of the protection of these laws. The emergence of labour law in India was concurrent with industrialisation,²¹ with the principle animating the evolution of labour law in the colonial era being "rationalisation" of the law to fulfil the capitalistic "need for unity, order and consistency".²² The earliest 19th-century British legislations, such as the Factories Acts – which ostensibly constituted interventions seeking to assuage concerns about exploitative working conditions²³ – arguably continued the process of rationalisation in pursuit of creating an efficient working-class population.²⁴

²⁰ Trilok Singh Papola, 'Role of Labour Regulation and Reforms in India: Country Case Study on Labour Market Segmentation' (2013) International Labour Office, Employment Sector, Employment Working Paper No. 147, 10 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_232497.pdf> accessed 23 June 2024. Although Papola notes that there are 54 legislations at the central level, the Ministry of Labour and Employment cites the current number as 40 legislations. See 'List of Enactments in the Ministry' (*Ministry of Labour and Employment*) <<https://labour.gov.in/list-enactments-ministry>> accessed 23 June 2024.

²¹ Sankaran (n 18), 630.

²² Valerian DeSouza, 'Modernizing the Colonial Labour Subject in India' (2010) 12(2) CLC Web: Comparative Literature and Culture 4 <<http://docs.lib.purdue.edu/clcweb/vol12/iss2/3>> accessed 23 June 2024.

²³ Adwitiya Mishra and Aasheerwad Dwivedi, 'Labour Laws in India: History, Evolution and Critical Analysis' (2023) Labor History 3 <<https://doi.org/10.1080/0023656X.2023.2280051>> accessed 23 June 2024. See also, the Factories Act 1881, which was subsequently amended by the Factories Act 1891. Both of these statutes were repealed by the Factories Act 1911.

²⁴ Richard Mitchell, Petra Mahy and Peter Gahan, 'The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development' (2014) 1 Asian Journal of Law and Society 413, 415.

After the First World War, in the 1920s, the regulatory landscape was shaped by the growing momentum of the Indian nationalist movement, the rapid growth of trade unions, especially the establishment of the All-India Trade Union Congress (AITUC) in 1920, the increasing communist influence on the labour movement, and the establishment of the ILO.²⁵ For instance, the Trade Unions Act in 1926 provided legal recognition to trade unions for the first time.²⁶ While this was considered a welcome move, subsequent acts concerning unions, such as the Trade Disputes Act in 1929, came under particularly heavy criticism from the trade union movement for stifling the right to strike and collective bargaining.²⁷ In 1929, in the wake of growing economic depression, and resultant unemployment and industrial agitation, the colonial government appointed the Royal Commission on Labour in India.²⁸ Despite the Commission being effectively boycotted by the Indian labour movement,²⁹ 19 of the 25 legislative enactments about labour between 1932 and 1937 were based on its recommendations.³⁰ The bulk of these were protective enactments concerning workers in mines and factories.³¹ Thus, the colonial regime only regarded certain forms of industrial work as constituting labour, and agriculture, household-based establishment and other forms of self-employment remained outside the purview of labour law,³² and, thereby, came to constitute India's sizeable informal sector.

This conflation of labour and industrial law continued after the Second World War, and even after India gained its independence in 1947. During the Second World War period, regulation at both the central and provincial levels aimed at quelling industrial unrest and ensuring the cooperation of labour in the war effort.³³ Yet, even after the Second World War, the Bombay Industrial Relations Act in 1946 continued this restrictive approach, and went on to

²⁵ Deakin, Marshall and Pinto (n 17) 11.

²⁶ Mishra and Dwivedi (n 23) 3; Trade Unions Act 1926.

²⁷ See, T.C.A. Anant and others, 'Labor Markets in India: Issues and Perspectives' in Jesus Felipe and Rana Hasan (eds), *Labor Markets in Asia: Issues and Perspectives* (Palgrave Macmillan 2006) 205; Trade Disputes Act 1929.

²⁸ Mitchell, Mahy and Gahan (n 24) 417.

²⁹ Ibid.

³⁰ V.K.R. Menon, 'The Influence of International Labour Convention on Indian Labour Legislation' (1956) 73 (6) *International Labour Review* 551, 557.

³¹ Deakin, Marshall and Pinto (n 17) 12.

³² Sankaran (n 18) 630.

³³ Mitchell, Mahy and Gahan, (n 24) 419. For instance, in 1941, the insertion of s 49A in the Bombay Industrial Disputes Act 1938 empowered the provincial government to make references to mandatory arbitration. It banned any strikes or lock-outs before the arbitration process.

become the template for the Industrial Disputes Act in 1947 (IDA), which remains in force today.³⁴ The IDA adopted a narrow definition of “workman”, which excluded the bulk of the Indian workforce.³⁵ Sankaran notes that the present application of labour laws to only the formal sector can be traced back to the “social compact” underlying industrialisation in India after it became independent, with the legal framework sustaining this social compact including the IDA, the Industrial Employment (Standing Orders) Act 1946, and the Employees State Insurance Act 1948.³⁶

The question of who could be counted as a workman animated much of the labour legislation in the mid-20th century, with rights and protections being persistently denied to vulnerable workers, including piece-rate workers and home-based female workers, who fell outside the definitional boundaries of these enactments.³⁷ Although only 6 per cent of the total workforce during this period of industrial workers enjoyed the protection of labour laws, these workers were seen as “the prototype of the labour force that was to determine the future of land and people”.³⁸ The binary between formal and informal sectors originated in the colonial era. However, the postcolonial State viewed informality as a “waiting room”, with the idea being that the workforce would gradually be transitioned into the formal sector with increasing industrialisation and economic growth.³⁹

The Indian freedom movement was concerned not only with political freedom but also with the alleviation of poverty for both the industrial and

³⁴ Ibid.

³⁵ See Industrial Disputes Act 1947, s 2(s), which defines “workman” as “any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward...”.

³⁶ Kamala Sankaran, ‘Flexibility and Informality of Employment Relationships’, in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 29, 32–33.

³⁷ Karuna Dietrich Wielenga, ‘The Emergence of the Informal Sector: Labour Legislation and Politics in South India, 1940–60’ (2020) 54(4) *Modern Asian Studies* 1113, 1140.

³⁸ Jan Breman, ‘Industrial Labour in Post-Colonial India I: Industrializing the Economy and Formalizing Labour’ (1999) 44 *International Review of Social History* 249, 251.

³⁹ Jan Breman, ‘A Mirage of Welfare: How the Social Question in India got Aborted’ in Jan Breman and others (eds), *The Social Question in the Twenty-First Century: A Global View* (University of California Press 2019) 98, 104.

the rural population.⁴⁰ The text of the Constitution of India also reflected this commitment in the form of Part III, providing a catalogue of “Fundamental Rights”, which are essentially justiciable civil-political rights, and Part IV, enumerating the “Directive Principles of State Policy” (DPSPs), which reflect non-justiciable and progressively realisable socioeconomic ideals.⁴¹ The DPSPs, though non-justiciable, are nonetheless “fundamental in the governance of the country”, with it being the duty of the State to “apply these principles in making law”.⁴² They include, *inter alia*, the right to adequate means of livelihood, equality of pay, preventing the abuse of the health of workers, especially children, the right to work, just and humane conditions of work and maternity relief, and the right to a living wage.⁴³ In furtherance of these socioeconomic ideals, the early postcolonial period witnessed a spate of legislation aimed at decasualising informal workers from specific sectors, such as the Contract Labour (Regulation & Abolition) Act in 1970. However, most of the legislative enactments on social security applied only to the formal sector,⁴⁴ inevitably reinforcing the binary between the formal and informal sectors generated by the colonial regime. While the IDA did undergo a series of pro-worker amendments,⁴⁵ the safeguards merely strengthened the formal sector, resulting in a languishing informal sector. Industrialisation in the post-independence era did not occur as swiftly as anticipated and, thus, the “waiting room” of informality became “an end station for the swelling workforce locked up in it”.⁴⁶

In 1991, the government embarked upon a structural adjustment programme that necessitated economic liberalisation, in exchange for assistance from the IMF and the World Bank.⁴⁷ This new policy invariably entailed a shift to

⁴⁰ Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020) 44–46.

⁴¹ Madhav Khosla, ‘Making Social Rights Conditional’ (2010) 8(4) *International Journal of Constitutional Law* 739, 744.

⁴² Constitution of India, art 37. For a detailed discussion on the role of DPSPs in constitutional interpretation, see Gautam Bhatia ‘Directive Principles of State Policy’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* 644–661.

⁴³ Constitution of India, arts 39(a), 39(d), 39(e), 41, 42, 43.

⁴⁴ Sankaran (n 36) 33.

⁴⁵ See, Industrial Disputes Act 1947, ss 25M(1) and 25N(1), which were inserted by the Industrial Disputes (Amendment) Act 1976.

⁴⁶ Bremen (n 39).

⁴⁷ Ajeet N. Mathur, ‘The Experience of Consultation during Structural Adjustment in India (1990–92)’ (1993) 132 (3) *International Labour Review* 331, 333.

a less regulated labour market.⁴⁸ Reports by the Commissions set up by the government reintroduced the notion of rationalisation for the first time since independence,⁴⁹ buttressing the significance of organisational flexibility,⁵⁰ and essentially recommending employers be allowed to retrench and lay off at will subject to payment of compensation.⁵¹ Despite such recommendations, labour law reform was effected through a policy of “reforms by stealth”, rather than sweeping legislative changes.⁵² However, although the legislative framework remained largely intact, there was a pronounced pro-employer shift in court decisions during this period.⁵³

While the discourse on perceived overregulation in the formal economy took centre stage, the increase in employment in the formal sector post-liberalisation was like informal forms of employment within the formal sector, such as casual or contract labour,⁵⁴ reflecting a structuralist conceptualisation of informality.⁵⁵ Due to the abysmal condition of workers in the informal economy, the Parliament of India enacted the Unorganised Workers’ Social Security Act in 2008 (UWSSA), intending to provide social security benefits to workers in the informal sector.⁵⁶ However, the Act came under heavy criticism for, *inter*

⁴⁸ Mitchell, Mahy and Gahan, (n 24) 426.

⁴⁹ See, for instance, *Report of the National Commission on Labour – Volume I* (Ministry of Labour, Government of India 2002) 6, 10.

⁵⁰ Ibid, 364.

⁵¹ Anamitra Roychowdhury, *Labour Law Reforms in India: All in the Name of Jobs* (Routledge 2018) 2–4.

⁵² Mishra and Dwivedi (n 23) 3. For a detailed discussion on the “reforms by stealth” undertaken between 1998 and 2004, see Rob Jenkins, ‘Labor Policy and the Second Generation of Economic Reform in India’ (2004) 3 (4) *India Review* 333.

⁵³ See Santanu Sarkar, ‘How Independent is India’s Labour Law Framework from the State’s Changing Economic Policies?’ (2019) 30 (3) *Economic and Labour Relations Review* 422.

⁵⁴ Sankaran (n 36), 31.

⁵⁵ The structuralist theory argues that the formal and informal economies are interconnected, with the informal economy constituting a part of the production process employed by the formal economy. See Supriya Routh, ‘Building Informal Workers Agenda: Imagining “Informal Employment” in Conceptual Resolution of Informality’ (2011) 2 (3) *Global Labour Journal* 208.

⁵⁶ Paromita Goswami, ‘A Critique of the Unorganised Workers’ Social Security Act’ (2009) 44 (11) *Economic and Political Weekly* 17. See, National Commission for Enterprises in the Unorganised Sector, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (Dolphin Printo Graphics 2007) 202, which suggested the passing of social security laws for the informal sector workforce.

alia, merely putting together existing schemes without the addition of new benefits, not providing a dispute resolution or enforcement mechanism, and accounting for only three of the nine contingencies provided for by the ILO Convention No. 102 on minimum standards on social security.⁵⁷ This resulted in scholars describing the UWSSA as a “dysfunctional Social Security Law for unorganised workers”,⁵⁸ as it did little to extend the safeguards of labour law to the informal sector workforce.

In 2014, the Bhartiya Janta Party, led by Prime Minister Narendra Modi, became the first party to secure a full majority in the central elections since 1984. The initial set of proposed reforms introduced by this government sought to whittle down the applicability of existing formal sector regulation for factories and other industries.⁵⁹ In 2016, an amendment to the Child Labour (Prohibition) Act in 1986 allowed children below the age of 14 to work in family enterprises as well as the entertainment industry.⁶⁰ This process of dilution of labour laws took place against the backdrop of a broader government policy to encourage domestic manufacturing through the Make in India campaign, under which the Startup India initiative was launched.⁶¹ Under this initiative, startups were exempted from labour inspections for an initial three-to five-year period while also being allowed to self-certify themselves with respect to labour law compliances.⁶² Reforming the existing labour law framework was seen as a critical step in the overarching attempt to create a favoura-

⁵⁷ K.B. Saxena, ‘The Unorganised Workers’ Social Security Act 2008: A Critique’ 39 (2) Social Change 281.

⁵⁸ Kathyayini Chamaraj, ‘A Dysfunctional Social Security Law for Unorganised Workers’ (2019) Civic Discussion Paper <<https://civicspace.in/wp-content/uploads/2019/10/Revised-A-Dysfunctional-Social-Security-Law-for-Unorganised-Workers-Analysis-and-Recommendations-22.1.16-1.pdf>> accessed 23 June 2024.

⁵⁹ See generally Factories (Amendment) Bill 2014, which sought to increase the threshold of applicability of the Factories Act 1948 and increasing working hours and overtime limits. See also Small Factories (Regulation of Employment and Conditions of Services) Bill, 2014, which exempted industries employing fewer than 40 workers from complying with 14 labour statutes.

⁶⁰ Child Labour (Prohibition and Regulation) Act 1986, s3, which was substituted for the original provision by the Child Labour (Prohibition and Regulation) Amendment Act 2016.

⁶¹ Ministry of Commerce and Industry, Government of India, ‘Startup India Programme’ (Press Information Bureau, 25 July 2016) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=147661>> accessed 23 June 2024.

⁶² Deepak Patel, ‘Regarding 6 Laws: PMO Directs LabourMin to Ensure Self-certification System for Start-ups’ (*The Indian Express*, 15 August 2017) <<https://indianexpress.com/article/business/companies/regarding-6-laws-pmo>>

ble regulatory environment for technology-based entrepreneurship and foreign investment. To that end, in 2019 and 2020, the Parliament of India repealed 29 central labour legislations and consolidated the same into four new codes, namely, the Code on Wages 2019 (CoW), the Industrial Relations Code (IRC), the Occupational Safety, Health, and Working Conditions Code (OSHWCC), and the Code on Social Security (CSS).⁶³ However, these Codes, which are yet to come into force, have come under increasing criticism for diluting, rather than strengthening, pre-existing labour safeguards.⁶⁴ Significantly, the persistent exclusion of informal workers from the purview of formal labour laws continues under the new Codes, with only the CSS providing some limited protection to these workers. Despite most of the provisions of the CSS being recommendatory, it has been criticised for effectively replicating the failings of the UWSSA.⁶⁵

The emphasis on perceived overregulation in the formal sector has shifted attention away from the effective non-realisation of labour rights recognised as fundamental by the ILO.⁶⁶ In furtherance of its decent work agenda, the ILO DFPWR recognises five categories of labour standards: (i) the freedom of association and the effective recognition of collective bargaining, (ii) the elimination of all forms of forced or compulsory labour, (iii) the effective abolition of child labour, (iv) the elimination of discrimination in all forms of employment, and (v) a safe and healthy working environment.⁶⁷ These five standards are captured in 11 fundamental instruments – 10 conventions and one protocol

-directs-labourmin-to-ensure-self-certification-system-for-start-ups-4796936/> accessed 23 June 2024.

⁶³ Ministry of Information and Broadcasting, 'New Labour Code for New India: Biggest Labour Reforms in Independent India' (*Ministry of Labour and Employment*, 2021) <<https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/nov/doc202111101.pdf>> accessed 23 June 2024.

⁶⁴ Mani Mohan and others, 'Ushering Thin Welfare Regimes at the Cost of Thick Labour Jurisprudence: A Tale of New Labour Codes in India' (2021) 4 *Revue de droit comparé du travail et de la sécurité sociale* 38 <<https://journals.openedition.org/rdctss/2633>> accessed 23 June 2024.

⁶⁵ Rajrishi Ramaswamy and Anuradha Binnuri, 'An Analysis of the Impact of India's Labour Codes on its Organized and Unorganized Sectors' (2023) 9 *Cogent Social Sciences* <<https://doi.org/10.1080/23311886.2023.2238458>> accessed 23 June 2024.

⁶⁶ Aditya Bhattacharjea, 'Labour Market Flexibility in Indian Manufacturing: A Critical Survey of the Literature' (2021) 160 (2) *International Labour Review* 197, 214–215.

⁶⁷ ILO Declaration on Fundamental Principles and Rights at Work (adopted on 18 June 1998), as amended on 11 June 2022.

– with Member States having an obligation to “respect, promote and realise in good faith, the principles concerning the fundamental rights” regardless of whether they had ratified the conventions in question.⁶⁸ The DFPRW refers to “rights at work” as opposed to “worker rights” and, consequently, the rights articulated therein are human rights as they apply at work, regardless of employment status.⁶⁹ However, despite the freedom of association⁷⁰ and the prohibition of discrimination,⁷¹ child labour in hazardous industries⁷² and forced labour⁷³ being enshrined as fundamental rights in the Constitution of India, India has ratified only six of the 11 fundamental instruments.⁷⁴ Sankaran argues that the failure to ratify these instruments is due to the constitutionally guaranteed fundamental rights being subject to a range of exceptions and caveats, which do not align with the DFPRW. For instance, the failure to ratify conventions concerning collective organisation has been attributed to the restrictions on public servants and members of the armed forces with respect to unionising.⁷⁵ Rather than amending legislation that does not comply with the fundamental instruments identified by the DFPRW, the Indian government has simply opted to not ratify the instruments, with the decent work agenda being rendered largely nugatory concerning the informal workforce.⁷⁶

Informality is characterised not by the absence of an employment contract but, rather, by the vulnerability arising owing to the lack of legal safeguards.⁷⁷

⁶⁸ Ibid.

⁶⁹ Janice R. Bellace, ‘The ILO Declaration of Fundamental Principles and Rights at Work’ (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269, 274.

⁷⁰ Constitution of India, art 19 (1) (c).

⁷¹ Constitution of India, art 15.

⁷² Constitution of India, art 24.

⁷³ Constitution of India, art 23.

⁷⁴ India has not yet ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Occupational Safety and Health Convention, 1981 (No. 155), Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), or the Protocol of 2014 to the Forced Labour Convention, 1930. See ‘Up-to-date Convention and Protocols not ratified by India’ (*International Labour Organisation*), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102691> accessed 23 June 2024.

⁷⁵ Sankaran (n 19) 72–73.

⁷⁶ Jens Lerche, ‘Labour Regulations and Labour Standards in India: Decent Work?’ (2012) 3 (1) *Global Labour Journal* 16, 23.

⁷⁷ Kamala Sankaran, ‘Informal Employment and the Challenges for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 223, 226.

In the Indian context, this informality is not perpetuated “in the shadow of the state”, i.e., it does not exist outside institutional boundaries, but, instead, is arguably perpetuated by the State’s policies and practices.⁷⁸ The narrative of rationalisation to promote industrialisation underscored the evolution of Anglo-Indian labour law, with the impact of the labour law framework emerging in the colonial and immediate post-Second World War period being that of “limitation and exclusion”.⁷⁹ In independent India, labour continued to be conflated with industrial work,⁸⁰ with legal reform in furtherance of the constitutional commitment to socioeconomic justice focusing on the formal workforce. The move towards a less regulated labour market after liberalisation has also primarily concerned itself with diluting labour law safeguards in the formal economy. This enduring regulatory focus on the formal sector and the standard employment relationship has resulted in a “colonial continuity” within the labour law framework,⁸¹ which fails to reflect the reality of work in India.

3 THE REGULATION OF INFLUENCER LABOUR AND THE CONTINUITY OF INFORMALITY

The lack of safeguards in the informal economy impacts not only wage workers but also self-employed workers, who make up 52 per cent of India’s workforce.⁸² While much of this self-employment is disguised wage work,⁸³ in a broader sense, genuine self-employment may be understood as being characterised by: (i) autonomy, i.e., the lack of subordination, managerial control and organisational integration, (ii) economic independence, i.e., a plurality of customers and equality of bargaining power, and (iii) personal provision of

⁷⁸ Alessandra Mezzadri, ‘Globalisation, Informalisation and the State in the Indian Garment Industry’ (2010) *International Review of Sociology* 20 (3) 491, 492.

⁷⁹ Mitchell, Mahy and Gahan, (n 24) 419.

⁸⁰ Jan Bremen, ‘Industrial Labour in Post-Colonial India I: Industrializing the Economy and Formalizing Labour’ (1999) 44 *International Review of Social History* 249.

⁸¹ Sankaran (n 18).

⁸² T.S. Papola and K.P. Kannan, ‘Towards an India Wage Report’ (2017) ILO-Asia Working Paper Series, 29 <https://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_597270.pdf> accessed 23 June 2024.

⁸³ *Ibid.*

service, i.e., the work is directly by the individual.⁸⁴ The pervasive informality that has been engendered by the evolution of labour law in India, thus, affects both wage workers and those engaged in genuine self-employment. Ostensibly, novel forms of work, such as labour in the sharing economy, have been beleaguered by issues such as “low wages, tax evasion, no social security rights, and regulatory uncertainty”⁸⁵ – issues that, in India, pre-date the emergence of these forms of work and have been shaped by the aforementioned colonial continuities. As mentioned earlier, social media influencers may be said to operate within the broader framework of the emerging phenomenon of the sharing and platform economy.⁸⁶ However, as this section will demonstrate, their regulatory treatment is not emblematic of a failure to grapple with the business models of social media platforms, but, rather, represents a continuity in the perpetuation of informality by the Indian State.

Social media influencers operate outside the boundaries of an employment contract, are ordinarily not integrated into the organisational structures of their clients, and perform work personally.⁸⁷ The activities of social media influencers, apart from involving the direct labour of marketing or advertising, may be viewed as also constituting immaterial labour, i.e., activities that do not resemble traditional work but have been effectively commodified.⁸⁸ While consumers and small influencers may consider immaterial labour as a creative expression, with “passion” and “fun” being dominant tropes, there is nonetheless an underlying “hope” that the visibility and exposure might benefit in the long run.⁸⁹ Keuhn and Corrigan describe this as “hope labour”, where the work carried out in the present is uncompensated, but may result in experience

⁸⁴ Nastazja Potocka-Sionek, ‘Platformisation of work: Challenges beyond employment classification’ (PhD Thesis, European University Institute 2023) 198–202.

⁸⁵ Sofia Ranchordás, ‘The Risks and Opportunities of the Sharing Economy’ (2016) 7(4) *European Journal of Risk Regulation* 650.

⁸⁶ Goanta and Ranchordás (n 13) 1, 3.

⁸⁷ The issue of personal provision of service is blurred with respect to self-employed individuals who are assisted by their family members. See Jayesh Rathod and Michal Skapski, ‘Reimagining the Law of Self-employment: A Comparative Perspective’ (2013) 31 (1) *Hofstra Labour and Employment Law Journal* 159, 165.

⁸⁸ Jamie Woodcock and Mark R. Johnson, ‘The Affective Labour and Performance of Live Streaming on Twitch.tv’ (2019) 20(8) *Television and New Media* 813, 815–816.

⁸⁹ Ewan Mackenzie and Alan McKinlay, ‘Hope Labour and the Psychic Life of Cultural Work’ (2021) 74(11) *Human Relations* 1841.

or exposure, with the hope of future employment opportunities.⁹⁰ This valorisation of immaterial labour is often influenced by the platforms, without due compensatory mechanisms being put in place, resulting in the rising precarity and reduction of the value of labour.⁹¹ Conceivably, with the commodification of user interactions on platforms, a “society-factor” arguably comes into being, where this labour is “[s]imultaneously voluntarily given and unwaged, enjoyed and exploited”.⁹²

At the threshold, by being self-employed, social media influencers would be entitled to the rights at work enumerated in the DFPRW.⁹³ As mentioned earlier, informality is characterised by the vulnerability and precarity generated by the absence of legal protection, rather than by the mere absence of an employment contract. In the context of social media influencers, this vulnerability is generated by the power inequities existing between the influencers and social media platforms. The entrepreneurial spirit that animates social media marketing is capable of obscuring this power imbalance.⁹⁴ The platforms have effectively emerged as quasi-monopolies, with the considerable lock-in period required for receiving sizeable returns resulting in the absence of feasible alternatives. By their very design and technological architecture, platforms retain the ability to unilaterally alter any technical parameters and contractual terms of engagement with little legal recourse for influencers.⁹⁵ Furthermore, the role of platforms as intermediaries effectively generates a separation between the influencers and their followers, allowing them to gain “ownership” of the

⁹⁰ Kathleen Keuhn and Thomas Corrigan, 'Hope Labour: The Role of Employment Prospects in Online Social Production' (2013) 1(1) *Political Economy of Communication* 9.

⁹¹ There have been suggestions by those on the left of the political spectrum that user-generated content might be compensated through a Universal Basic Income scheme. See, Andrew White, 'A Universal Basic Income in the Superstar (Digital) Economy' (2019) 13(1) *Ethics and Social Welfare* 64.

⁹² Tiziana Terranova, *Network Culture: Politics for the Information Age* (Pluto Press 2004) 74, where the author speaks of the “society-factory” more generally in the context of digital labour on the internet.

⁹³ This claim may not extend to mega-influencers, who have effectively transformed their social media influence into an expansive business enterprise.

⁹⁴ Valentin Niebler, “‘YouTubers Unite’: Collective Action by YouTube Content Creator” (2020) 26(2) *Transfer* 223, 225.

⁹⁵ Donato Cutolo and Martin Kenney, ‘Platform-Dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy’ (2021) 35(4) *Academy of Management Perspectives* 584. Platforms also retain a more composite, or “panoptic”, view of the activities of all users, with the provision of information to influencers being tailored to suit the needs of the platform.

influencers' customer base.⁹⁶ Thus, platforms, rather than functioning as mere intermediaries for content distribution, have operated as “de facto provider[s] of labour”.⁹⁷ Although influencers arguably do not have a standard employment relationship with social media platforms, the vulnerability generated by these power asymmetries underscores the significance of the protection of fundamental rights at work, regardless of employment status, to “render the protective gap between employment and self-employment less dramatic”.⁹⁸

As mentioned earlier, the nascent attempts at regulating the influencer economy have primarily focused on the issue of disclosures, in the context of both consumer protection, generally, and investor protection, specifically. In 2021, the Advertising Standards Council of India (ASCI), which is a self-regulatory organisation,⁹⁹ issued a set of guidelines for influencer marketing in digital media.¹⁰⁰ The ambit of these guidelines was limited to necessary disclosures and due diligence, in consonance with the ASCI's own mandate. Subsequently, in 2023, the ASCI amended the guidelines to impose additional responsibilities on health and finance influencers to disclose their registration details and qualifications.¹⁰¹ While self-regulation, in order to bolster transparency and accountability in the exercise of influence, holds value, any attempts at self-regulation must sufficiently take the voices of labour into account, rather than veering into a lopsided pro-consumer direc-

⁹⁶ Donato Cutolo and Martin Kenney, ‘Entrepreneurship in the Platform Economy: Power Asymmetries and Risk’, in Bruno Dallago and Sara Casagrande (eds), *The Routledge Handbook of Comparative Economic Systems* (Routledge 2022) 360, 370. The authors provide the example of YouTube, where a YouTuber, if blocked by the platform, would instantly lose access to their entire fan base with no means of reconnecting in order to transfer their following to a new platform.

⁹⁷ Niebler (n 94) 223.

⁹⁸ Valerio De Stefano, ‘The Rise of the “Just-in-time” Workforce: On-demand Work, Crowdwork, and Labour Protection in the “Gig Economy”’ (2016) 37(3) *Comparative Labor Law and Policy Journal* 471, 501.

⁹⁹ ‘About Self-Regulation’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/about-self-regulation/>> accessed 23 June 2024.

¹⁰⁰ ‘ASCI Issues final Guidelines for Influencer Advertising on Digital Media, Launches ASCI Social platform’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/wp-content/uploads/2022/09/press-release-influencer-guidelines-2021.pdf>> accessed 23 June 2024.

¹⁰¹ ‘ASCI Places Additional Responsibility on Health and Financial Influencers, Extends Influencer Guidelines’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/wp-content/uploads/2023/08/Health-and-Finance-Guidelines-Update-Press-Release.pdf>> accessed 23 June 2024.

tion.¹⁰² Doing so risks the adoption of a lopsided view of the activities of social media influencers as being purely entrepreneurial, and negates the aspect of their labour as self-employed workers. Thus, regulatory attention in the realm of consumer protection and advertising standards, which primarily emphasises the “obligations” of social media influencers pertaining to disclosures and due diligence, obscure their status as self-employed workers and result in a lack of protections of their “rights” at work.

A year after the issuance of the ASCI guidelines, the Central Consumer Protection Authority (CCPA) issued the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements in 2022 (2022 Guidelines). These guidelines apply to “all advertisements, regardless of form, format or medium”,¹⁰³ and provide an expansive definition of the term “endorser”, which is wide enough to include influencers under its ambit.¹⁰⁴ The 2022 Guidelines, *inter alia*, require endorsers to carry out their own due diligence of the goods, products or services being endorsed,¹⁰⁵ and disclose any material connection with the trader, manufacturer or advertiser.¹⁰⁶ These guidelines were issued by the CCPA via the powers conferred upon it by section 18 of the Consumer Protection Act in 2019 (CPA). The CPA also empowers the Central Authority established under the Act to impose penalties of up to 1 million rupees on endorsers and manufacturers in case of false or misleading advertising, with every subsequent infraction inviting a penalty of up to 5 million rupees.¹⁰⁷ It is worth noting that this provision prescribes the same penalty for both endorsers and manufacturers, thereby failing to draw a distinction in the extent of their respective liabilities in respect of such false advertising. In the context of influencers, it treats self-employed workers on a par with business enterprises. It is highly questionable whether working-class nano and micro-influencers would have the financial means to pay the maximum leviable penalty, which is several times the GDP per capita,¹⁰⁸

¹⁰² De Stefano (n 98), 503, cautions against unilateral self-regulation by businesses and self-regulation with the singular goal of addressing consumer interests in the context of the gig economy.

¹⁰³ Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements 2022 (2022 Guidelines), para 3(a).

¹⁰⁴ 2022 Guidelines, para (f) defines “endorser” as including “an individual or a group or an institution making endorsement of any goods, product or service in an advertisement whose opinion, belief, finding or experience being the message which such advertisement appears to reflect”.

¹⁰⁵ 2022 Guidelines, para 13(1)

¹⁰⁶ Ibid, para 14.

¹⁰⁷ Consumer Protection Act 2019 (CPA), s 21(2).

although the exact penalty imposed in each case would, of course, be subject to the Central Authority's discretion. Furthermore, the CPA also states that the Central Authority may prohibit the endorser of a false or misleading advertisement from endorsing any products or services for a period of up to one year, with every subsequent infraction inviting a prohibition of up to three years.¹⁰⁹ However, no such penalty in terms of an embargo on similar activity exists in respect of the manufacturer under the CPA. Consequently, in cases where such a prohibition is imposed, the activities of informal, self-employed workers, i.e., influencers, would be severely restricted, whereas capital accumulation by the manufacturer would continue unabated. The CPA states that no penalty will apply in cases where an endorser has undertaken requisite due diligence.¹¹⁰ Recently, the Securities and Exchange Board of India (SEBI) has also issued a consultation paper to elicit public comments on a proposal to restrict the association of SEBI-registered intermediaries and regulated entities with unregistered finfluencers,¹¹¹ although this has yet to translate into any concrete policy formulation. The shifting of risks onto influencers without affording them any rights at work seems emblematic of the Indian approach, resulting in exacerbating precarity.

4 REALISATION OF DECENT WORK THROUGH UNDILUTED FUNDAMENTAL RIGHTS AT WORK

The regulatory approach of the State towards influencer labour has been marked by an overemphasis on obligations, with little to no attention to their fundamental rights at work. The TikTok ban is emblematic of this approach. On 3 April 2019, the Madras High Court, in response to a writ petition, directed the government to prohibit the downloading of TikTok, citing concerns about children being exposed to pornography and other inappropriate content on the platform.¹¹² This ban was subsequently lifted by the High Court on 24

¹⁰⁹ CPA, s 21(4).

¹¹⁰ CPA, s 21(5).

¹¹¹ 'Consultation Paper on Association of SEBI Registered Intermediaries/ Regulated Entities with Unregistered Entities (including Finfluencers)' (*SEBI*, 25 August 2023) <https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-association-of-sebi-registered-intermediaries-regulated-entities-with-unregistered-entities-including-finfluencers-_75932.html> accessed 23 June 2024.

¹¹² *S. Muthukumar v. Telecom Regulatory Authority of India*, Writ Petition (MD) No. 7855 of 2019 (Madras High Court, 3 April 2019).

April 2019.¹¹³ However, in June 2020, following a military clash along the Indo-China border, the Indian government banned TikTok alongside 58 other Chinese applications on the grounds that they were “prejudicial to sovereignty and integrity of India, defence of India, security of state and public order”.¹¹⁴ At the time of the ban, TikTok had 150 million active users,¹¹⁵ and the app had been hailed as an “equaliser” owing to a large chunk of the influencers on the app belonging to socioeconomically marginalised groups.¹¹⁶ The precarity of the TikTok influencers was exposed not only by the ban failing to account for TikTok being a source of income and opportunity generation for the influencers, but also by the labelling of content on TikTok as being “cringe” by elite influencers and consumers¹¹⁷ – a narrative that Khunteta and Rahman argue is rooted in the caste and class of TikTok influencers. Subsequent to the TikTok ban, influencers from marginalised groups have struggled to monetise their following through brand advertising, owing to the continued labelling of their content as “cringe” based on biases relating to caste and class, and biases inherent in collaborative algorithms that lead to the effective stratification of the social media space.¹¹⁸

The reproduction of hierarchies of caste and class, as well as rampant homophobia,¹¹⁹ bring out the significance of upholding non-discrimination

¹¹³ Abhijit Ahaskar and Prasad Banerjee, ‘Madras high courts lifts TikTok ban in India, in boost to ByteDance’ *Mint* (24 April 2019) <<https://www.livemint.com/technology/apps/madras-high-court-lifts-tiktok-ban-in-india-in-boost-to-bytedance-1556112108504.html>> accessed 23 June 2024.

¹¹⁴ Kumar and Thussu (n 11) 2.

¹¹⁵ Alexandra Levine, ‘India banned TikTok in 2020. TikTok still has access to years of Indians’ data’ (*Forbes*, 21 March 2023) <<https://www.forbes.com/sites/alexandralevine/2023/03/21/tiktok-india-ban-bytedance-data-access/>> accessed 23 June 2024.

¹¹⁶ Shivani Garg, ‘Unpacking the Impact of the TikTok Ban on Local Content Creators and the Rise of Indianized Social Media Apps’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 66.

¹¹⁷ See generally Unnati Sharma, ‘TikTok vs YouTube is the New Class War on Internet. It All Began with a Roast’ (*The Print*, 18 May 2020) <<https://theprint.in/opinion/pov/tiktok-vs-youtube-is-the-new-class-war-on-internet-it-all-began-with-a-roast/423346/>> accessed 23 June 2024.

¹¹⁸ Nishtha Khunteta and Qudsia Rahman, ‘That’s Cringe: How Aesthetics and Algorithms Affect Monetization’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 141.

¹¹⁹ See Shakuntala Banaji and Ramnath Bhat, *Social Media and Hate* (Routledge 2022) 75, 84, where the authors note that there is constant hostility and abuse via social media, often propagated by politicians and political parties, towards specific identities, namely LGBTQIA+, Dalits, and Muslims. See also, Lin Song

as a fundamental right at work for influencers, particularly those belonging to marginalised groups. At this juncture, it may be stated that India does not have a comprehensive anti-discrimination statute,¹²⁰ with the guarantee under Article 15 of the Constitution largely limited to State action and access to public spaces. For Dalit, Adivasi, female and queer influencers, non-discrimination in the digital space may also be tied to occupational safety, with growing instances of hate speech as well as death and rape threats. For instance, the recent suicide of a 16-year-old queer influencer from Ujjain, soon after reportedly receiving over 4,000 homophobic comments and threats on an Instagram reel, raised broader questions about non-discrimination, occupational safety, and the rights of kidfluencers in India.¹²¹ The existing legislative framework on occupational safety is largely sectoral and applies only to the formal workforce – a feature that is replicated by the OSHWCC, which is yet to come into force.¹²² In the context of the rights of kidfluencers, it is worth noting that the prohibition on child labour in the Indian Constitution is limited to hazardous employment for children below 14 years of age.¹²³ Additionally, the aforementioned 2016 amendment to the Child Labour (Prohibition) Act explicitly allows children to work in both family enterprises and the entertainment sector, thereby exempting kidfluencers with both an independent online presence and those who feature on their parents' accounts from the application of the Act. Lastly, given the power disparities and antagonistic relationship between platforms and influencers, the worker's right to organise is critical for challenging the platforms' "cloud empires".¹²⁴ However, given

and Avishek Ray, "'How Can a Small App Piss off an Entire Country?': India's TikTok Ban in the Light of Everyday Techno-Nationalism' (2023) 24(3) *Inter-Asia Cultural Studies* 382, 389.

¹²⁰ The Anti-Discrimination and Equality Bill 2016 was introduced by Dr Shashi Tharoor, an opposition MP, in the Rajya Sabha (Upper House) but did not result in an enactment by Parliament.

¹²¹ Navya Kharbanda, '16-year-old queer child Pranshu dies by suicide due to bullying; Did we fail as a society? Mental health expert opines' (*Hindustan Times*, 28 November 2023) <<https://www.hindustantimes.com/htcity/cinema/16yearold-queer-child-pranshu-dies-by-suicide-due-to-bullying-did-we-fail-as-a-society-mental-health-expert-opines-101701172202794.html>> accessed 23 June 2024.

¹²² See generally K.R. Shyam Sundar, 'Occupational Safety Continues to be Ignored as a Right' (2020) 55(39) *Economic & Political Weekly (Engage)* <https://www.epw.in/sites/default/files/engage_pdf/2020/09/24/157401.pdf> accessed 23 June 2024.

¹²³ Constitution of India 1950, art 23.

¹²⁴ Vili Lehdonvirta, *Cloud Empires: How Digital Platforms Are Overtaking the State and How We Can Regain Control* (MIT Press, 2022) 173.

the self-employed status of influencers, the statutory framework on collective organisation, both under the existing law and the new codes, is inapplicable to them. The constitutional right to form associations or unions enshrined in Article 19(1)(c) does not include the concomitant rights to collective bargaining and to strike, with the extent of the constitutional guarantee being exhausted upon the formation of a union.¹²⁵ Additionally, the implicit threat of deplatformisation and retaliation, the deliberate reduction of visibility, and the fragmentation of the influencers themselves operate as constraints on the right to organise meaningfully.

The veneer of entrepreneurship conceals the “nested precarities of visibility” for self-employed influencers, who experience precarity at the level of the market, industry, and platform features.¹²⁶ Although influencers seek to cast themselves in the mould of entrepreneurs, the power asymmetries between them and the social media platforms that they operate on result in the dismantling of traditional notions of entrepreneurship.¹²⁷ Indeed, the picture of the social media influencer emerges as that of a self-employed worker who is subjected to a heightened level of precarity and exists in a fraught relationship with both platforms and social hierarchies. In the Indian context, this precarity is exacerbated by the non-application of the extant labour law framework to social media influencers. However, this should not be cast as a failure to grapple with ostensibly novel forms of work. Rather, the lack of legal protections accorded to social media influencers is situated along a continuum of exclusions and dilutions, dating back to the colonial regime, that have denuded the fundamental rights at work of their universality and generated pervasive informality in the labour market.

5 CONCLUSION

The formalistic nature of Indian labour law is owed to both the colonial agenda of utilising labour law to transpose a largely rural and agrarian workforce into urban industries and factories, and the continued postcolonial salience of the “industry” in labour law.¹²⁸ This colonial continuity pervades the treatment of even ostensibly novel forms of work, as is the case with social media influencers. They operate in a context of precarity and informality that has come to define informal work in India. As the history of labour law in India suggests,

¹²⁵ Woodcock and Johnson (n 88), 814.

¹²⁶ Brooke Duffy and others, ‘The Nested Precarities of Creative Labor on Social Media’ (2021) 7(2) *Social Media + Society* 1.

¹²⁷ Cutolo and Kenney (n 95) 601.

¹²⁸ Deakin, Marshall and Pinto (n 17) 11.

the informal worker does not exist beyond the boundaries of State regulation; rather, the informality itself is a consequence of State policies that privilege the interests of capital over those of labour.¹²⁹ The influencer economy has, in fact, begun to elicit regulatory interest. The fact that this interest has limited itself to an articulation of influencers' obligations demonstrates how the State's policy choices can directly or indirectly lead to the reproduction of informality. However, to simply attribute the lack of legal protections accorded to influencers to the lack of regulatory attention to their rights is to capture only part of the problem. The broader issue is the aforementioned "protective gap" between standard employment relationships and non-standard forms of work. This gap has made short shrift of the fundamental rights at work for most workers, excluding the small minority in the formal economy, despite their universal character. The aforesaid reproduction of informality, in the context of social media influencers, is situated within this broader phenomenon of pervasive formality, shaped by the colonial continuities characterising Indian labour law.

¹²⁹ Mezzadri (n 78) 491.