



Volume 37 No 1, January 2022  
DOI: 10.20473/ydk.v37i1.34599

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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 1 September 2021; Accepted 9 December 2021; Available Online 14 January 2022.

## **Partnership Consultation: An Alternative Solution to the Nonexistent Collective Bargaining Right in the Indonesian Ride Hailing Gig Economy Sector**

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### **Abstract**

The absence of gig workers' right to collective bargaining affects the human rights condition of the app drivers. Previous studies roughly fall into two categories: either employing the drivers as a solution or opting for law-making intervention. This paper fills the gap using a new concept based on the United Nations Guiding Principle of Business and Human Rights by exploring the businesses' social responsibility realm. This qualitative socio-legal research finds that: (1) the clauses of the standardized partnership agreements contain unequal risks allocations, putting the independent contractors in a lose-lose situation; (2) the inability to determine the substantial domain of the contract marginalizes the partners from exercising the related social and economic rights; and (3) the pre-existed structural problems take part as a coercive forces to the partners' free will to consent, resulting in a doubtful partnership contract validity. As a solution, the insertion of meaningful partnership consultation, a concept adopted from collective bargaining concept in labor relations, enables better mutual consent arrangement and serves as a preemptive remedy to the human rights impact.

**Keywords:** UNGP; Ride-Hailing; Collective Bargaining; Access to Remedy.

### **Introduction**

The Indonesian gig economy's ride-hailing sector is like two sides of a coin. On one side, the presence of the application companies (applicators) positively correlates with the economic growth. A study claims that Gojek—one of a few applicators in the market, contributes up to IDR 55 Trillion to the local economy, opening millions of job opportunities and, at the same time, providing broader

market access to many small and micro-enterprises.<sup>1</sup> On the other side, what often escapes our attention are a few problems that come along with this glorified story: The disqualification of labor status, minimum wages, and inhumane working conditions that make the drivers susceptible to a new form of labor oppression.<sup>2</sup> Among others, the potential social and economic rights impact stems from the lack of meaningful bargaining in determining the fair partnerships course of action, and the imbalance contractual proportion among the parties.<sup>3</sup>

Even though International Labor Organization (ILO) instruments guarantee the right to collective bargaining as workers fundamental right,<sup>4</sup> the gig partnership asserts a distinct affair to labor relations, presenting the drivers as self-employed instead of labor. This business-to-business affair declares to embody the ‘sharing economy’ by the narratives of empowerment and mutually beneficial affairs. But from the start of this civil law association, the partners are put in a subordinate, dilemmatic position. Like a worker, the applicator unilaterally conforms the independent contractors to any existing or forthcoming policies, including some substantial domains that often negatively affect their income and working conditions and the use of penalties. At a glance, this sounds acceptable: Given the flexible partnership nature, any independent contractors disagreeing with the policies are free to quit anytime.<sup>5</sup> But, for the drivers, the solution to the unfair practice is not as simple as signing-off. A 2020 study by Anggraeni shows that most gig drivers

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<sup>1</sup> Paksi Walandouw and others, ‘GOJEK’s Impact on the Indonesian Economy in 2018’ (2019) <<https://www.engineeringforchange.org/wp-content/uploads/2020/05/Lembaga-Demografi-University-of-Indonesia-GOJEK’s-Impact-on-the-Indonesian-Economy-ENG-Nov-2019.pdf>> accessed 28 February 2022.

<sup>2</sup> Lauri Goldkind and John G McNutt, ‘Vampires in the Technological Mist: The Sharing Economy, Employment and the Quest for Economic Justice and Fairness in a Digital Future’ (2019) 13 *Ethics and Social Welfare* 51; Ryan Calo and Alex Rosenblat, ‘The Taking Economy: Uber, Information, and Power’ [2017] *Columbia Law Review*. [1623].

<sup>3</sup> Taofik Hidajat, Agung Hendra Kusuma and Achmad Sulchan, ‘Gamification in Ride-Hailing: What Drives a Driver to Drive’ (2021) 169 *Proceedings of the 3rd International Conference on Banking, Accounting, Management and Economics (ICOBAME 2020)*. [241].

<sup>4</sup> International Labour Organization, *Convention concerning The Promotion of Collective Bargaining* 1983. [154].

<sup>5</sup> Gojek, ‘Perjanjian Kemitraan GOJEK’.

rely on this profession to make ends meet.<sup>6</sup> Therefore, for some drivers, resigning is equivalent to losing their primary sources of income.

The applicator's dominant control over the drivers makes these business-to-business relations strongly identical to employment affairs. And, from that standpoint, few scholars emphasize the labor law approach to opt for employing independent contractors.<sup>7</sup> A positive precedent comes from the United Kingdom after the Supreme Court ruled the approximately 70,000 Uber's independent contractors as workers, not self-employed.<sup>8</sup> But even though employment conceivably serves as the best solution for improving workers' welfare, the recommendation sounds unrealistic to apply in the Indonesian settings for two basic reasons: *First, upgrading the status after all remains in the exclusive business domain of the management. In fact, from using this 'grey area' of partnership rule, these companies have been taking advantage of avoiding labor law obligations. As a precedent, even in other states adopting the same initiatives—California, in the United States, for instance—the legislation effort hit a dead-end after some financially leveraged application companies like Uber and Lyft proposed the counter-legislation ballot to revoke the employment article.*<sup>9</sup> *Second, the upgrading will increase the production cost, and, to some extent, any expense change negatively affects the market demand, notably the consumer preference to lower price.*<sup>10</sup> In other words, the formidable challenge

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<sup>6</sup> Fitria Nur Anggraeni, 'Survey Motivasi Kerja Driver Ojek Online Grab' (2020) 3 SCIENTIFIC JOURNAL OF REFLECTION : Economic, Accounting, Management and Business.[251].

<sup>7</sup> Arif Novianto, 'GoTo Menjauhkan Pekerja Gig Dari Kerja Layak Dan Adil : Survei Kondisi Kerja Kurir GoKilat' (2021) <[https://igpa.map.ugm.ac.id/wp-content/uploads/sites/274/2021/07/Buletin-Insight\\_GoTo-Menjauhkan-Pekerja-Gig-dari-Kerja-Layak-dan-Adil\\_Survei-Kondisi-Kerja-Kurir-GoKilat.pdf](https://igpa.map.ugm.ac.id/wp-content/uploads/sites/274/2021/07/Buletin-Insight_GoTo-Menjauhkan-Pekerja-Gig-dari-Kerja-Layak-dan-Adil_Survei-Kondisi-Kerja-Kurir-GoKilat.pdf)> accessed 28 February 2022; Kustin Ayuwuragil, 'Kemenaker: Sopir Ojek Online Harus Jadi Karyawan' (2018) <<https://www.cnnindonesia.com/teknologi/20180410190757-185-289808/kemenaker-sopir-ojek-online-harus-jadi-karyawan>> accessed 28 February 2022.

<sup>8</sup> Mary-Ann Russon, 'Uber Drivers Are Workers Not Self-Employed, Supreme Court Rules - BBC News' (2021) <<https://www.bbc.com/news/business-56123668>> accessed 28 February 2022.

<sup>9</sup> Faiz Siddiqui and Nitasha Tiku, 'California's Prop 22 Passes Making Gig Workers Independent Contractors - The Washington Post' (2020) <<https://www.washingtonpost.com/technology/2020/11/03/uber-prop22-results-california/>> accessed 28 February 2022.

<sup>10</sup> Research Institute of Socio-Economic Development (RISED), 'Kenaikan Tarif Ojek Online Tidak Menjamin Peningkatan Kesejahteraan Pengemudi | RISED — Research Institute Of Socio - Economic Development' (2020) <<https://rised.or.id/kenaikan-tarif-ojek-online-tidak-menjamin-peningkatan-kesejahteraan-pengemudi/>> accessed 28 February 2022.

to employ the drivers comes not only from the business perspective but also from the innate market preference.

Furthermore, the previous legal studies covering these issues fall roughly into two categories: The public law domain, such as the labor law approach that nominates the employment solution, contrasted with the private law domain that endorses the partnerships legal construction from the business approach.<sup>11</sup> What these two have in common, though, is the tendency to endure regulatory intervention. However, the predicament of such an authority-based recommendation is ignoring a lack of political will to protect the workers to be the prerequisite factor to this unresolved polemic. Having the recently enacted Job Creation Law endorsing more flexible labor market, the previous employment option sounds counterintuitive, if not a naïve solution.<sup>12</sup> Amid the dichotomy, Carolyn and Campbell's study offers a better angle as it highlights the importance of ethical analysis in identifying the impacts of the gig workers' misclassifications.<sup>13</sup>

Fittingly, the ethical domain presents a beneficial field to explore the uncovered realm of the gig business responsibility to seek the remedial options for the human rights impact, without having to terminate the partnership affair—which is somewhat unfavorable to the drivers relying on the profession to their living, or plump for the unlikely-implemented employment recommendation proposed by previous research. Departing from the standpoint that the absence of collective bargaining is at the root of the contractual problems in this civil law affair, this paper fills the gap by prescribing an enabler option—to be precise, a partnership consultation forum—to preempt the human rights impacts, by inserting a meaningful negotiation into the

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<sup>11</sup> Rizky Prananda Rahandy and Zil Aidi, 'Tinjauan Yuridis Kedudukan Pengemudi Transportasi Online Dalam Perjanjian Kemitraan Dengan Perusahaan Penyedia Aplikasi Transportasi Online' (2019) 2 Law, Development and Justice Review 135, 135; Luthvi Febryka Nola, 'Perjanjian Kemitraan vs Perjanjian Kerja Bagi Pengemudi Ojek Online' (2018) 10 Info Singkat Kajian Singkat Terhadap Isu Aktual dan Strategis.[4].

<sup>12</sup> Sigit Riyanto and others, 'Kertas Kebijakan: Catatan Kritis Dan Rekomendasi Terhadap RUU Cipta Kerja - Repository Civitas UGM' (2020).[9–11].

<sup>13</sup> Carolyn Conn and Linda Campbell, 'The Ethics of Worker Classification in a Gig Economy' in Charles Richard Baker (ed), *Research on Professional Responsibility and Ethics Accounting* (Emerald Publishing Limited 2021).

partnership conditions.<sup>14</sup> Simply put, this paper raises two questions: (1) What are the impacts of the non-existing collective bargaining right on the drivers' human rights? And (2) how can the internalization of a partnership consultation remedy the human rights issues?

Methodologically, this research makes use of the qualitative socio-legal method and readers are expected to observe some social science theory applied within the discussed legal issue. Primary data were extracted from interviews and survey: The surveys were assigned to 69 respondents (equals to 90% confidence level), gig drivers operating around the Greater Jakarta area;<sup>15</sup> whereas the interview was conducted with three informants (one from the applicator, and two from gig drivers); the paper anonymizes the informant's identity for confidentiality concerns. Next, secondary data are sourced from literature review over legal and non-legal materials, including but not limited to academic journals, books, institutional reports, legislation, court decisions, media articles and websites.

### **Human Rights Implications of Non-Existing Collective Bargaining**

The International Labor Organization (ILO) defines collective bargaining as a necessary means for employers and labor (unions) to establish fair wages and working conditions and provide the basis for sound labor relations. And it manifests in any form of negotiation or discussion, either formally or informally, to reach a joint decision-making to build trust and mutual respect between the parties.<sup>16</sup> In particular, typical issues on the bargaining agenda include wages, working time, training, occupational health and safety, and equal treatment. However, in contrast to the element of labor relations, the gig partnerships do not comprehend collective bargaining tradition. The gig economy model treats the affair between applicators and independent contractors solely as a business-to-business collaboration

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<sup>14</sup> B Waas and C Hiebl, *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Wolters Kluwer 2021).

<sup>15</sup> The questionnaire consists of nine Likert-scale items and priorly passes SPSS's based validity and reliability testing.

<sup>16</sup> International Labour Organization, 'Promoting Collective Bargaining: A Policy Guide'.

presenting the drivers as micro-entrepreneurs and consequently excludes the labor rights safeguards.

Prassl characterizes the three major features of gig economy: work flexibilities, human service based on demand, and digital technology as intermediation.<sup>17</sup> He argues that, although elements of physical interaction remain, the presence of technology makes labor less visible.<sup>18</sup> According to a 2016 study by the European Parliament, solo self-employed, as in the case of gig drivers, have a higher risk of precariousness than those who work with an employer.<sup>19</sup> And without proper protection, the gig workers are more susceptible to human rights abuse, notably concerning the working conditions and unfair contractual treatment. At the same time, many proponents of this innovation believe the gig economy promotes a ‘sharing economy’. It enables economic and social power redistribution by sharing the capital barriers,<sup>20</sup> creating inclusive economic access to all classes through collaborative production and consumption. On the surface, these ideas match the embodied partnership social missions on mutual needs, trust, empowerment, and profitability principles,<sup>21</sup> yet such virtuous sharing economy jargon seldom reflects in reality.

Plenty of studies have critically exposed the anomaly. According to Izzati, the *informalization of work by the gig economy resembles a new style of labor exploitation, hidden under flexibility narratives as she defines as ‘flexploitation’*.<sup>22</sup> Similarly, Novianto argues that the flexible system has trapped the workers under cheap wages and inhumane working conditions.<sup>23</sup> And Kamim and Khandiq object

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<sup>17</sup> Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018).[2–6].

<sup>18</sup> *ibid.*[6].

<sup>19</sup> Andrea Broughton and others, ‘Precarious Employment in Europe Part 1: Patterns, Trends and Policy Strategies’ (2016).

<sup>20</sup> Endang Yuniastuti, *Pola Kerja Kemitraan Di Era Digital - Perlindungan Sosial Transportasi Online Roda Dua* (PT Elex Media Komputindo 2018).[18–19].

<sup>21</sup> Micro, Small, Medium Enterprises Act 2008. [Art 1 (13)].

<sup>22</sup> Fathimah Fildzah Izzati, ‘Informalisasi Kerja Dan Kerentanan Para Pekerja Industri Kreatif Indonesia Dalam Flexploitation Dan Gig Economy’ in Andi Misbahul Pratiwi (ed), *Ekonomi Informal Indonesia: Tinjauan Kritis Kebijakan Ketenagakerjaan di Indonesia* (Trade Union Rights Centre 2020).[71].

<sup>23</sup> Novianto (n 7).

to the welfare and work flexibility promised by the gig partnership, as they define as ‘illusionary’, since the rating systems applied by the applicator situate the partners even more vulnerable to exploitation.<sup>24</sup> Not only in Indonesia but scholars also criticize the troubled gig partnerships overseas.

As Ahsan argues, the partnership scheme functions to justify an anomalous form of employment practices and make a case for regulatory oversight.<sup>25</sup> Pate correlates the gig phenomenon with the result of abnormal the labor market’s demand and supply forces:<sup>26</sup> The oversupply of people willing to take lower-barrier-to-entry job leverages the applicators to justify the subjugation of employees’ collective voice. Similar views are shared by Anwar and Graham who associate the precarity condition of the workers in consequence of temporary contracts, labor oversupply, lack of bargaining, and workforce insecurities.<sup>27</sup>

Furthermore, unlike employment agreements—whose elements are explicitly regulated by the Labor Law due to its quasi-public law domain,<sup>28</sup> partnership agreements rely solely on mutual consent. As it is assumed to be entirely under the private law domain, the applicators are at no cost to take advantage of the uncovered legal areas to justify a particular form of mistreatment by the pretext of mutual consent. In Article 1320 of the Civil Code, a lawful contract must encompass the subjective and objective validity criteria: The first requires the subjects’ competency and shared consent, whereas the latter measures the legality aspect of the object.<sup>29</sup> But the use of standardized (*take-it or leave-it*) contracts eliminates the importance of pre-contractual communication and further exacerbates the unequal stand. Even

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<sup>24</sup> ABM Kamim and Khandiq MR, ‘Gojek Dan Kerja Digital : Kerentanan Dan Ilusi Kesejahteraan Yang Dialami Oleh Mitra Pengemudi Dalam Kerja Berbasis Platform Digital’ (2019) 8 Jurnal Studi Pemuda.[59].

<sup>25</sup> Mujtaba Ahsan, ‘Entrepreneurship and Ethics in the Sharing Economy: A Critical Perspective’ (2020) 161 Journal of Business Ethics.[19].

<sup>26</sup> Richard L Pate, ‘Legal Status of the Present-Day Employee in the US: Arbitration, Gig Economy & AI - Kluwer Law Online’ (2020) 41 Business Law Review.[114–120].

<sup>27</sup> Mohammad Amir Anwar and Mark Graham, ‘Between a Rock and a Hard Place: Freedom, Flexibility, Precarity and Vulnerability in the Gig Economy in Africa’: (2020) 25 Competition and Change.[237].

<sup>28</sup> Manpower Law 2003.

<sup>29</sup> Burgerlijk Wetboek, Staatsblad 1847 No. 23. [Art. 1320].

if partnership contacts formally meet all those validity criteria, reassuring the fair interest's allocation of the independent contractors is somewhat impracticable due to the agreement's one-sided attributes (*Table 1*).<sup>30</sup>

**Table 1.** Unequal Partnership Agreement Contractual Positions

<i>No</i>	<i>Factors</i>	<i>Contracting Parties</i>	
		<b>Applicator</b>	<b>Independent Contractor</b>
1	Risk allocation (liability to third parties)	Exonerated	Charged
2	Access to profit	Maximum	Minimum
3	The contractual portion of rights	Explicitly in the contract (with additional discretion)	Partially accommodated
4	The contractual portion of obligations	Partially accommodated	Explicitly accommodated
5	Algorithm control	Maximum	None

Source: Author's analysis

Indeed, to the extent of business process efficiency, the standardized contract seems practically tolerable; assuming the dissenting party has no restraint to commence with the partnership. But ethical problems occur when a contracting party inevitably depends on the other. Since all the substantial contract domains are unilaterally determined by the counterparty, whereas the independent contractors lacked a meaningful choice to advocate their interest, chances are the agreement will likely be misused to justify some kind of unfair exchange.

According to KA (the informant from the applicator side), the standardized contracts have significantly improved over the last few years: 'The agreement includes the inclusion of social security protection, health care insurance, and many other clauses to protect the drivers whereby unavailable in the previous years'. But, regardless of the improvement, the contract's anti-bargaining nature still becomes a major problem as it contradicts the principles of mutual trust, benefit, and empowerment the gig partnership claims to offer: All the decisive rights, be it concerning fees charged on the drivers or the partnership's terms and conditions or sanctions, are possessed by the applicator's sole privilege. For

<sup>30</sup> M Kharis Mawanda and Adam Muhshi, 'Perlindungan Hukum Mitra Ojek Daring Di Indonesia' (2019) 6 *Lentera Hukum*. [42–43].



example, it gives the applicator discretion to determine discounts promotions that repetitively impinge on the independent contractor's economic return and workloads, not to mention the transfer of nearly every associated partnership risk to the independent contractors' liability.<sup>31</sup>

As a comparison, the Consumer Protection Law prohibits such liability exonerations imposed on the cost of the customer;<sup>32</sup> however, the same safeguard—from an applicators' point of view—is inapplicable to the partnership affair in the sense the drivers are not consumers but service providers. Nonetheless, the arguments are not entirely accurate. The consumer safeguards are pertinent considering the drivers' dual status: despite being independent contractors, they are also application users just like any other consumers, which makes the exoneration of the applicator liability problematic in the sense of propriety.

In the same way, Utami and others *argue that the partnerships contract contains consensual defects, given the wide gaps of obligations, especially in terms of control, and the granted right of the applicator to dominate the partners in all domains.*<sup>33</sup> 'The drivers can only accept all the contents of the agreement by force because if he tries to bargain with other alternatives, he will most likely suffer the consequences of losing what is needed'.<sup>34</sup> Tan advises that the clause does not subscribe to 'fair dealings' principles.<sup>35</sup> '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 [with the clause]'.<sup>36</sup> In such a scenario, the use of written agreement only necessitates

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<sup>31</sup> Examples of such clauses extend in Clause 17.1 of the Grab Partnership Agreement. It exonerates the applicator from any claims, namely for every damage, cost, and expense arising from using the platform service occur to the drivers. See: Grab, 'Terms of Service: Transport, Delivery and Logistics | Grab SG' (27 December 2021) <<https://www.grab.com/sg/terms-policies/transport-delivery-logistics/>> accessed 1 March 2022.

<sup>32</sup> Consumer Protection Law 1999. [Art. 18(1)].

<sup>33</sup> Tri Rahayu Utami and others, 'Rekonstruksi Peran Pemerintah Dalam Memberikan Perlindungan Hukum Bagi Pengemudi Transportasi Online | Utami | Administrative Law and Governance Journal' (2020) 3 Administrative Law & Governance Journal.[578].

<sup>34</sup> *ibid.*[585].

<sup>35</sup> David Tan, 'A Brave New Frontier in the Dichotomous Indonesian Labour Law: Gig Economy, Platform Paradox, and Workers Without Employee' (2021) 33 Mimbar Hukum.[1].

<sup>36</sup> *ibid.*[28].

the burden of proof to the applicators' legal interests but barely gives any utility for the drivers.

And some precedents may illustrate the detrimental effect of this unequal contract arrangement, for example, in a small-claim court case between MAH vs PT. TPI (in affiliation with Grab) at South Jakarta District Court,<sup>37</sup> the driver (plaintiff) sued the applicator for manipulating the contract by replacing what was agreed as a leasing agreement into a rental agreement—it consequently affected the arrangement of the object's legal ownership. The plaintiff also problematized the applicator for solitarily possessing the contract document and allowed him no chance to negotiate nor read the agreement. Whereas In DH vs TPI & Grab at Medan District Court suggests the same problem, but the difference is the applicator sued back the unfortunate drivers to recompense IDR 500 million for attorney fees.<sup>38</sup>

Moreover, in a sharp contrast to the previous studies by Waloundow and others (funded by Gojek),<sup>39</sup> and by the Research Institute of Socio-Economic Development,<sup>40</sup> which both claim most drivers are satisfied with the partnership scheme, the survey result affirms how the absence of collective bargaining issue infringes the drivers' rights (*Table 2*). Although most respondents agree that the partnership agreements were explicable, the unilateral policy changes often led to heavier workloads. Even in the substantial partnership domain that highly affects the economic rights of the workers, no approval is duly solicited to the affected parties. For the drivers, most of the detrimental effects irrevocably resurfaced after the policy had been enforced, aggravated by the applicator not providing room for policy complaints. Overall, the partners think the policies are only to gain the economic interest of the applicators rather than to protect the drivers.

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<sup>37</sup> *M Ali Hanafia vs PT Teknologi Pengangkutan Indonesia.*

<sup>38</sup> *Darajat Hutagalung vs PT Solusi Transportasi Indonesia Cabang Medan & PT Teknologi Pengangkutan Indonesia (TPI) Cabang Medan.*

<sup>39</sup> Walandouw and others (n 1).

<sup>40</sup> Tempo.co, 'Survei RISED: Mitra Puas Dengan Pola Kemitraan Transol - Tempo.Co' (10 September 2021) <<https://inforial.tempo.co/info/1005580/survei-rised-mitra-puas-dengan-pola-kemitraan-transol>> accessed 1 March 2022.

**Table 2.** Survey Result – Drivers' Perception on Partnership Agreement

<i>No</i>	<i>Questionnaire Item Statement</i>	<i>Percentage (%)</i>				
		<b>Strongly Agree</b>	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>	<b>Strongly Disagree</b>
1	The partnership agreement is clear and easy to understand	<b>55,1</b>	<b>39,1</b>	2,9	1,4	1,4
2	Detrimental effects of the newly issued partnership policy appear after the applicators enacted the rules.	<b>23,2</b>	<b>69,6</b>	5,8	0	1,4
3	New rules are ratified unilaterally by the applicators without asking the drivers approval	<b>37,7</b>	<b>55,1</b>	4,3	0	2,9
4	So far, Partners cannot or are barely able to address objections to the new regulations imposed by the applicators	<b>36,2</b>	<b>50,7</b>	10,1	1,4	1,4
5	A p p l i c a t i o n companies always provide dialogue space for partners who disagree with the new rules	14,5	13	18,8	<b>50,7</b>	<b>2,9</b>
6	Partners hope the determination of the rules can pay more attention to the interests of partners than just company profits	<b>31,9</b>	<b>65,2</b>	1,4	1,4	0
7	New rules are making drivers bearing heavier workloads	<b>34,8</b>	<b>60,9</b>	4,3	0	0
8	Policy changes are only accommodating the profit-seeking interest of applicators rather than the drivers	<b>33,1</b>	<b>55,1</b>	11,6	0	0
9	The process of negotiation between the company and partners prior to new policy can prevent detrimental outcomes	<b>44,9</b>	<b>49,3</b>	5,8	0	0

Source: Author's Random Survey Result: 69 Sample Respondents – Confidence Level 90/100

The drivers' negative perception is reasonable, knowing several unsettled issues, such as working conditions, use of sanctions, fees charged, have not much improvement. In terms of profit, the partnership fails to share a fair redistribution—it implies from the imbalance proportion allowing the drivers only to receive delivery fees paid by the consumer in every transaction, whereas the applicator levies three fees at once (from the merchant, the drivers, and the consumers).<sup>41</sup> Some applicators even charge the drivers to pay platform fees when not in use. Correspondingly, as Anwar and Graham reveal, such notions of flexibility mean more freedom to maximize the applicators' economic gain instead of the workers' flexibility.<sup>42</sup> Likewise, in terms of working conditions, a similar issue appears. In sharp contrast to the narratives of flexible working conditions that this ride-hailing sector promises, the applicators impose a selection of sanctions and restrictions to the unproductive drivers from a temporary account suspension up to permanent partnership termination or denylist. The use of penalty somewhat situates the partners to obey every predetermined performance target, otherwise getting sanction. As KA explains, that '...The system will automatically measure the partners' productivity based on how often they receive orders in the app'. In any case, the more the partners reject incoming orders, the higher the partners' chances of getting suspended accounts.

On one side, the use of punishment perhaps sounds acceptable to avert undesired outcomes to the consumers; besides, the applicators provide complaint handling in case of system error or a driver objection. On the other, a complaint system is of no use to the partners as long as asymmetric access to data and information persists. In this aspect, Darmawan and others criticized the unequal access to data and information that discriminates the drivers: it binds the driver

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<sup>41</sup> In investors' point of view, the money invested in developing the technology serves as a common *quid pro quo* for profit accumulation. But the investor-centric paradigms somehow underestimate the capital contribution of the drivers. Just as in partnership affairs, the Civil Code does not limited capital to only money, but also workforce. In a critical sense, the efforts carried out by the partners are the biggest value creation role: it exists as *conditio sine qua non* to the business for the reason that the app's utility value will never happen without the role of the partners operating in the field.

<sup>42</sup> Anwar and Graham (n 27).

to obey the platform's protocol without having the ability to question the advantages and disadvantages associated with the algorithm system.<sup>43</sup> Just as O'Neil claims, every created program for applicator contains specific settings in favor of the owner's interest.<sup>44</sup> Moreover, the rating systems, or what Kamim and Khandiq define as gamification,<sup>45</sup> have tied the partners into unhealthy working hours just to achieve predetermined targets. ST, a 51-year-old driver informant, admits that, on specific occasions, he works from early morning to late midnight to achieve targets; otherwise, he would be unable to claim the bonus. This gap contrasts the mandatory working hours in the Manpower Law, a maximum of eight hours per day.<sup>46</sup> When asked about his perceptions on the workload, ST explains, '...We [the drivers] are like a modern-day *Romusha*; no *win-win* solution, only *lose-lose*. If we work mildly, the money only affords to buy us food, but if we work hard, the money flies to buy us medicines'. Consistently, the statement somewhat affirms Prabaswari and others who assert how app drivers are at high risk of mental workload,<sup>47</sup> added to refute another Waloundow and others claim that the flexible work time is highly appreciated by the gig drivers.<sup>48</sup> In such a lose-lose situation, the decision to stay with the job is by no means of voluntary consent. 'Even if I wanted to [find other jobs], I could not. It is my only income, and no job for a high school graduate like me these days. If I quit, who else feed my children?' answered ST when asked why he did not find any other job. From this critical standpoint, the latent issues of free will and structural coercion vividly emerge.

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<sup>43</sup> Dodi Dermawan and others, 'Asymmetric Information of Sharing Economy', *Proceedings of the 23rd Asian Forum of Business Education* (Atlantis Press 2020).[29].

<sup>44</sup> Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown 2016).

<sup>45</sup> Kamim and MR (n 24).

<sup>46</sup> Manpower Law (n 28). [Art 77 (2)].

<sup>47</sup> AD Prabaswari, AN Hamid and H Purnomo, 'The Mental Workload Analysis of Gojek Drivers', *IOP Conference Series: Materials Science and Engineering* (Institute of Physics Publishing 2020).

<sup>48</sup> Walandouw and others (n 1) 12.

### **Beyond Freedom of Contract: Structural Coercion and Structuralist Approach**

Significant reductions to freedom of contract arising from the dominant tendency to perceive the principle as ‘the autonomy to determine anything to the extent authorized by law’. On the surface, it sounds acceptable—this liberal view stems from the rational agent theory that views humans as presumably rational beings, fully functioning to determine each cost and benefit of their exchange. And such a moral view highly endorses the *laissez-faire* rationale, rendered from utilitarian logic, that is not always applicable in unequal bargaining power circumstances.<sup>49</sup> In that sense, any valid agreement represents the free will of the contracting subjects.<sup>50</sup>

However, the drawbacks of rational agent theory are embedded in the core assumptions that often overlook the complex structural issues that exist as predetermined coercive forces in human lives.<sup>51</sup> As such, a generalized assumption of ‘freedom of contract’ is problematic when one contracting party is socially or economically vulnerable; it fails to address the intellectual gaps and social inequalities as determinants of unfair exchanges. This paper argues that the wiser point of view to such imbalanced situations is not contractual freedom but ‘contractual fairness’.

It is essential to address some moral standpoints before going further: *First*, as Sandel argues, the wave of a free-market society tends to the widening socioeconomic gaps between the poor and the rich that have legitimized many types of unethical commercial practices under the pretext of mutual consent.<sup>52</sup> In the same way, Banerjee and Duflo portray the counterintuitive realities among the poor populations that, in many of their exchanges, trap them into making irrational decisions despite knowing detrimental consequences.<sup>53</sup> *Second*, the moral dilemma relates with Fineman’s dynamic vulnerability concept, which contests the notion

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<sup>49</sup> Terence Ball, ‘Two Concepts of Coercion on JSTOR’ (1978) 5 *Theory and Society*. [99–100].

<sup>50</sup> Burgerlijk Wetboek, Staatsblad 1847 No. 23. [Art. 1338].

<sup>51</sup> Nigel Pleasants, ‘Free Will, Determinism and the “Problem” of Structure and Agency in the Social Sciences’ (2018) 49 *Philosophy of the Social Sciences*.

<sup>52</sup> Michael J Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (Allan Lane 2012). [8–9].

<sup>53</sup> Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of The Way to Fight Global Poverty* (Public Affairs 2011).

of legal subjects as autonomous, independent, and fully functioning.<sup>54</sup> Following Fineman's vulnerability theory, a person is defined as at a higher risk to economic exploitation when they are 'contractually vulnerable'.

In the sense of fairness, a contract clause that seems normal in everyday business practice might be unfair in a socio-legal sense. An example is the insertion of the arbitration clause in the Grab partnership agreement to be jointly paid.<sup>55</sup> Indeed arbitration is a better alternative than court litigation, but the problem, nonetheless, is that it costs so much that an average lower-middle-income gig worker can barely afford it. Consider this: The Indonesian National Arbitration Body (BANI) charges a minimum fee of IDR 45 million for its arbiter cost;<sup>56</sup> by contrast, the average income of an app driver in Jakarta amounts to only IDR 4,9 million per month.<sup>57</sup> Having the clause informed to him, the driver informant says, 'I would rather let my account be suspended [than to take the legal action]; besides, we will lose [the trial] *anyway...*'. Indeed, given the bizarre ratio—and not to mention the possibilities the arbitration costs exceed the disputed amount—the insertion of this clause is synonymous with narrowing one's access to justice. The pre-existed inequality issue makes such clauses strongly indicate circumstantial abuse.

On the topic of contract abuse, Kim proposes the use of 'unconscionability doctrine' for asking court refusal of contract enforcement where the party lacked meaningful choice and the contract terms were unreasonably one-sided.<sup>58</sup> As with undue influence, the party seeking enforcement is taking advantage of the other party, but, in this scenario, the vulnerability of the other party results from circumstances that pre-existed the relationship between the parties.<sup>59</sup> But although the doctrine gives grounds to the workers to terminate the contract, the attempt remains unfavorable to the drivers' standpoint. *First*, it insist on the drivers'

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<sup>54</sup> Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition by Martha Albertson Fineman :: SSRN' (2008) 20 Yale Journal of Law & Feminism.

<sup>55</sup> Grab (n 31).

<sup>56</sup> Peraturan tentang Biaya-Biaya Layanan Penyelesaian Sengketa.[Appendix 1 No. 5].

<sup>57</sup> Walandouw and others (n 1).[11].

<sup>58</sup> Nancy S Kim, 'Relative Consent and Contract Law' (2016) 18 Nevada Law Journal.[165].

<sup>59</sup> *ibid.*[205].

initiative to file a lawsuit against the financially-leveraged applicator companies, and chances are most of the legal challenges filed by the drivers ended up in loss. *Second*, terminating the contract means revoking the partnership and the drivers are in no position to lose income for losing the job opportunity. With this in mind, the presumption of one's right to confront by legal action does not always seem to be a solution to the drivers.

Further, the problem with the liberal contract law paradigm is that it tends to poorly scrutiny coercion, a distracting factor to mutual consent, under a narrow legal causality logic.<sup>60</sup> In such a view, coercion only exists when a malign cause and its negative effect directly prevail among the interacting subjects. By contrast, structuralists view the relationship between free will and coercion as a complex issue, beyond merely causal individual interactions. Marxian and Durkheimian analysis, for example, views individuals' actions as constrained or determined by causes emanating from the embedded social system.<sup>61</sup> Accordingly, a person's will to interact is strongly influenced by sophisticated external factors, ie economic, social, and cultural relations. In the same way, structural coercions are connected with Burawoy's concept of 'manufacturing consent' embedded deeply in almost every labor process under modern capitalism.<sup>62</sup>

Purcell and Brook argue that the applicators use the compelling hegemonic technique—by persuading self-entrepreneurial promise and intrinsic harness capacities to work flexibly and autonomously, to subconsciously influence the gig workers to be consensually dominated.<sup>63</sup> As a result, not only it displays the applicators as protagonist, but it somehow also normalizes the oppression against the workers for the sake of self-entrepreneurship narratives. Implications of such subconscious coercion are apparent in respondents' responses, for instance, some

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<sup>60</sup> Ball (n 49).

<sup>61</sup> Pleasants (n 51).

<sup>62</sup> Allen W Imershein and Michael Burawoy, 'Manufacturing Consent: Changes in the Labor Process under Monopoly Capitalism' (1982) 61 *Social Forces*.

<sup>63</sup> Christina Purcell and Paul Brook, 'At Least I'm My Own Boss! Explaining Consent, Coercion and Resistance in Platform Work:' [2020] *SAGE Journals*. [1].



drivers unreasonably refused to fill the questionnaire as if they were afraid that filling the survey would cause them trouble with the applicators for defaming them. What is shown by these counterintuitive answers is that cultural issues—such as inferiority complex or being afraid to express the honest perception, added another layer of this structural coercion. Hence, subsequent to the complex structural issues, the contractual freedom view must reach beyond the legalism realm and burden of proof realm onto some sociological aspects to perceive the degree of contractual justice.

And since the pre-existed social gaps appear in roughly every socioeconomic aspect, the applicator is taking advantage of its superior stance over the drivers (*Table 3*). As a result of such unequal social structure, the oppressed drivers are at a higher chance of undergoing undue influence—or, to use more extreme terms, what Nastiti extremely observes as a super-exploitation nature.<sup>64</sup> Such wide socioeconomic gaps have divorced the conjointly beneficial partnership into an antagonistic nature among the parties that alienates and marginalizes them from the fruit of their labor. It is most noticeable in the motivation aspect: Profit-seeking vs surviving interest.

**Table 3.** The Social Relations Gaps in the Partnership

No	Factors	Contracting Parties	
		Applicator	Drivers
1	Role in Production	Platform Owner	Value Creator
2	Labor Effort	Low – Intellectual Labor	High - Physical Labor
3	Competency to Regulate	Strong	None
4	Decision-Making	Dominant	Weak
5	Economic Resource	Strong	Weak
6	Access to Justice	Full	Limited
7	Access to Information	Full	None
8	Technological Literacy	High	Low to Middle
9	Legal Protection	Maximum	Minimum
10	Motives	Profit-making	Surviving

Source: Author's analysis result

<sup>64</sup> Aulia Nastiti, 'Worker Unrest and Contentious Labor Practice of Ride-Hailing Services in Indonesia 1 | Semantic Scholar', *Arryman Symposium* (2017).

What is more, the applicator's dominant control, in addition to the external pressures from not having the opportunity to bargain, coerces the drivers in a *minus malum* circumstance: A study from Margalit suggests that when decision-makers are situated to deal with uncertain risks like the lose-lose situation, they fail to produce outcomes as those expected by rational makers.<sup>65</sup> And, to some extent, it explains the embedded problems within the banal freedom of contract thinking: A formally accepted contract does not in itself justify the unfair advantages from the wide gaps of social structure. With that in mind, when the counterparty stands in a pre-existing fragile moral duress position, the fairness of contract principle prevails to protect the vulnerable from the vast probability of undue influence. That is why pre-contractual processes like effective bargaining cannot be detached from the core of this mutual activity: It functions as what Honey defines as an 'enabling environment' for creating an environment that facilitates and supports consensual and fair undertakings.<sup>66</sup>

### **Consultation Partnership as the Access to Remedy**

Despite criticisms against the UNGPs on the instrument's soft law approach, it serves as the only reliable instrument when the governing actor in truth lacks the political will, as in the case of Indonesia.<sup>67</sup> And with the enhancing transformation from government to collaborative governance, the traditional authority-based approach for human rights realization is no longer of absolute necessity. Beyond the legality discourse, the UNGPs attempt to mainstream behavioral expectations, which are not yet fully embedded in the corporate culture, serves as a new standard of today's corporate governance.<sup>68</sup> And, as inherent in almost every international

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<sup>65</sup> Liraz Margalit, 'Coercive Approach and Decision Making Models' (2011) SSRN Electronic Journal.[11].

<sup>66</sup> Robyn Honey, 'Renovating the Concept of Consent in Contract and Property Law' in Ron Levy (ed), *New Directions for Law in Australia* (ANU Press 2017).

<sup>67</sup> Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research' (2021) 6 Business and Human Rights Journal.[227].

<sup>68</sup> Wahyu Wagiman and Christian Donny Putranto, *Prinsip-Prinsip Panduan Untuk Bisnis Dan Hak Asasi Manusia : Menerapkan Kerangka Perserikatan Bangsa-Bangsa Tentang Perlindungan, Penghormatan Dan Pemulihan* | Perpustakaan ELSAM (ELSAM 2019).[xxxviii].

law product, the enforcement of an instrument, be it is a hard law or soft law, is always a dilemma but such a concern should not be the case to withhold any practical solutions the UNGP may offer.

The guiding instrument stipulates the ‘corporate responsibility to respect human rights’ by means of implementing basic and operating principles. Principle 12 of the instrument specifically refers to ILO Convention on the Declaration on Fundamental Principle and Rights at Work, which recognizes collective bargaining as the fundamental workers’ rights in every economic activity. And over the operational principle, the UNGP requires corporations to actively assess their human rights impact by conducting due diligence throughout the entire business process—and over that result, providing proper remedies for impacted persons.<sup>69</sup> In any case, the process should engage with stakeholders in the form of meaningful consultation.<sup>70</sup> And because the emerging human rights impact in this ride-hailing sector emanates from the neglect of collective bargaining, the reinforcement of meaningful partnership bargaining into the applicator’s self-regulation and decision-making process should be a considerable solution—as the adage says, ‘a good solution should be simple and feasible’. Compared to other lose-win alternatives like the employment or expecting for another regulatory interventions proposed in previous studies, promoting a meaningful partnership consultation serves as a better, realistic win-win option to all parties.<sup>71</sup> It may not only remedy the impact in preemptive manner but also, for the corporate interest, positively attribute a reputation to the

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<sup>69</sup> Principle 13: ‘The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.

<sup>70</sup> Principle 18: ‘...This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation’.

<sup>71</sup> Of course, some scholars will object this approach on the ground that ILO Convention No. 154, 1981 only covers labor relations scope. Nonetheless, the convention also acknowledges the bargaining rights ‘...applies in economic activity’ (Art 1.1). See again: International Labor Organization (n 15).

applicators. For the same reason, the channel may also motivate more Indonesian gig drivers to solidify themselves in stronger, confrontative organizing bodies.

In fact, studies show providing rooms for negotiation is viable in the ride-hailing sector. As exemplified by Goldkind and McNutt, few applicators, such as Up & Go and Juno that routinely provide room for the drivers to participate or vote for the partnership policy, generate a fairer return for both the drivers and the platforms, be it of wages, autonomy, and consumers' satisfaction, compared to those who monopolize the policy making.<sup>72</sup> This proposed consultation partnership opts to advance Moore's study, which highlights the urgency to make an effective 'correction' toward the gig's fundamentally structural labor failure, that is, 'the inherent incapacity of most flexible or non-standard workers to negotiate for effective proprietary'.<sup>73</sup> And similar initiative for promoting collective bargaining for self-employed workers has been advanced in Europe as the European Commission underway a proposal.<sup>74</sup> Again, despite the soft law's drawback, the UNGPs technically offer a holistic human rights assessment within all supply chains that serves as the best investigative means to remedy the impact.

As the partners play a significant part in the value-creation process, the supply chain approach may reveal the unfair business treatment experienced by the partners based on human rights risk assessment. The analytical indicators used in the human rights due diligence, in addition to the involvement of independent experts, is an open-ended advantage: It reaches beyond legal framework, bearing in mind that the partnership is actually legal, to the ethical dimensions whereby the abusive contractual relations or inhumane working conditions are taking place, which regular corporate risk assessments tend to overlook. Such urgency is affirmed by Conn and Campbell, that ethical analysis is of great necessity to see the detrimental

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<sup>72</sup> Goldkind and McNutt (n 2).[9–10].

<sup>73</sup> Marc T Moore, 'The Gig Economy: A Hypothetical Contract Analysis' (2019) 39 *Legal Studies*.

<sup>74</sup> European Commission, 'Collective Bargaining Agreements for Self-Employed – Scope of Application EU Competition Rules' (2021).

effect of gig workers' labor status classification.<sup>75</sup>

In business responsibility aspect, the UNGPs instrument reinforces a higher level of corporate social responsibility (CSR) standards. As noted by Öberseder and others, a socially responsible corporate reputation has a nudging role in influencing consumers' purchase intentions<sup>76</sup>—it subsists as an 'invisible hand' to voluntarily comply. Since few applicators declare to engaging with stakeholder consultation prior to making policy initiatives,<sup>77</sup> this precedent serves as modalities to opt for upgrading social responsibility standards by means of rendering the collective bargaining. As CSR expert Wayne Visser emphasizes, business entities in a developing country need ethical responsibility on top of any other campaign practices such as philanthropic and legal responsibilities.<sup>78</sup> In this view, ethically responsible businesses means adopting and complying with ethical values in corporate governance beyond merely positive law standards. With that in mind, the implementation will fill the gap amid the gig workers' protection that is inadequately addressed within the existing law and regulations. More importantly, empirical study by Alwi discovers how trust is a determinant variable to the independent contractors' loyalty to the platform.<sup>79</sup> This study implies that opening a meaningful negotiation may be economically beneficial for the business's sustainability as it serves as a proper channel for trust-building, and simultaneously ensures the corporate compliance. Somewhat correspondingly, Belanche and others *advise how specific populations of gig consumers in the United States are very concerned with the*

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<sup>75</sup> Conn and Campbell (n 13).

<sup>76</sup> Magdalena Öberseder, Bodo B Schlegelmilch and Patrick E Murphy, 'CSR Practices and Consumer Perceptions' (2013) 66 *Journal of Business Research*. [1839].

<sup>77</sup> Gojek in its annual sustainability report claims to have been actively participated in open dialogue with regulators to shape critical policies initiative; they also claim to engage with regulators and public consultations to keep abreast of dynamic consultations. Nonetheless, a crucial part that is absent here is the meaningful consultation with the drivers—the highly affected party of the business operations. See: Gojek, 'Sustainability Report 2020' (2021). [17].

<sup>78</sup> Wayne Visser, 'Corporate Social Responsibility in Developing Countries' in Andrew Crane (ed), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008).

<sup>79</sup> Taufik Alwi, 'Pengaruh Kualitas Pelayanan Online Dan Kepercayaan Online Terhadap Loyalitas Pelanggan Online' (2020) 3 *Prosiding Manajerial dan Kewirausahaan*.

*drivers' working conditions, which influences consumption decisions significantly,*<sup>80</sup> and such a market-based incentive possibly inspires the applicators to voluntarily comply with the trend regardless of the presence of regulation.

After setting the theoretical footings, the challenge is to design the proper consultation mechanism that maximizes the participation without burdening the arrangement. As a reference, the European Commission's social partnership consultation model covers seven vital issues, namely: (1) employment status, (2) working conditions, (3) access to social protection, (4) access to representation and collective bargaining, (5) cross-border dimensions of platform work, (6) algorithmic management, and (7) training and professional opportunities for people working through the platform.<sup>81</sup> Any policies proposed by the applicator intersecting with one of the seven issues must be priorly consulted with stakeholders.<sup>82</sup> The arrangement involves stakeholders including (but not limited to) gig worker unions, interest groups, experts, regulators, and applicators through two stages of consultation. In the operational aspect, a 2018 study by Johnstone and Land-Kazlauskas found few organizing practices used by on-demand (gig) workers worldwide, namely the trade unions basis, online forums, drivers' cooperatives, employer-union collaboration, and others.<sup>83</sup> Of all the methods, the progress of online dispute resolution (ODR) in e-commerce trend, such as e-Mediation and e-Consultation, provides positive modalities to be adopted in the online forum design. Technological issue asides, the benefit of using these online methods is efficiency for the applicators and inclusivity for the partners.

And now the technical challenge is to find the proper representative arrangement for the collective forum. Here, insights from Panimbang are helpful to

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<sup>80</sup> Daniel Belanche and others, 'The Role of Customers in the Gig Economy: How Perceptions of Working Conditions and Service Quality Influence the Use and Recommendation of Food Delivery Services' (2021) 15 *Service Business*.

<sup>81</sup> European Commission, 'Questions and Answers: First Stage Social Partners Consultation on Improving the Working Conditions in Platform Work' (24 February 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_656](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656)> accessed 1 March 2022.

<sup>82</sup> *ibid.*

<sup>83</sup> Hannah Johnston and Christopher Land-Kazlauskas, 'Organizing On-Demand Representation, Voice, and Collective Bargaining in the Gig Economy' (2018).

develop the concept; he illustrates three organizing collectives in Indonesian ride-hailing workers: (1) drivers community, (2) drivers association, (3) and trade union-alike model.<sup>84</sup> Considering the communities retain the most organic institution and the association organizing power that is evident in the past protest mobilizations, involvement of these two groups is more likely to produce constructive, not to mention confrontative, bargaining dialogue. To synthesize, the proposed consultation partnership adopts two stages of participation. The first stage involves meaningful consultation with representatives from the community, drivers associations, and trade unions; but not all policies must be consulted—only plans involving the human rights quality of the drivers are required to be discussed. And in order to resolve the exclusion issue, the second stage adopts the online polling methods to facilitate all independent contractors to voice their opinions—to agree, disagree, or abstain from the plan. To illustrate, the partnership consultation concept goes by the following flow (*Figure 1*):

*First*, any policy initiatives must initially disseminate through in-depth consultation with stakeholders including regulators and interest groups. This initial step seeks legality and propriety measures.<sup>85</sup> Afterwards, the applicators conduct a due review (or due diligence) to assess the detrimental effect potency to the partner's vital interests.<sup>86</sup> A vital interest refers to any domain that directly or indirectly affects partners' human rights, such as policy on working conditions, social security, and related economic rights. Correspondingly, the assessment result determines whether or not the plan should pass the consultation stages.

*Second*, the applicator announces the date of the first stage consultation to all drivers' community or association representatives. The applicators may determine the criteria of the attendee, but it should not be intended to exclude the participation

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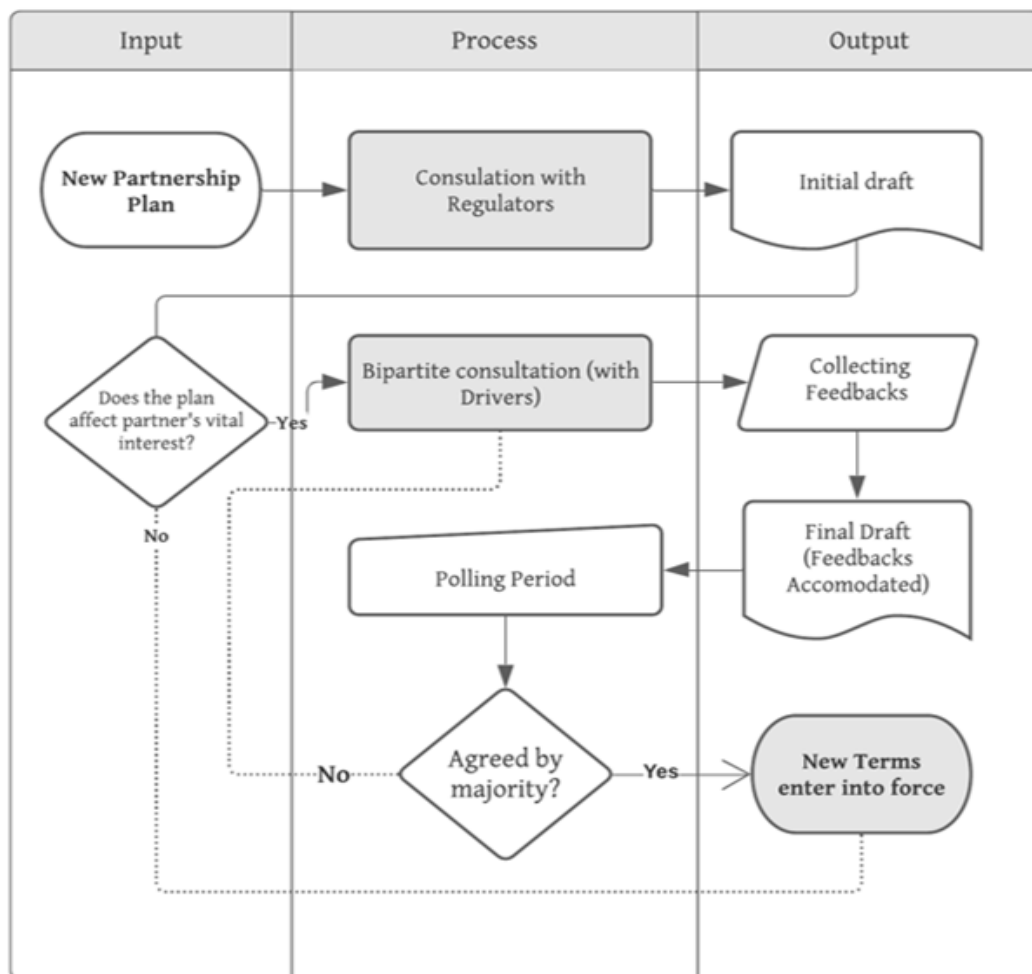
<sup>84</sup> Fahmi Panimbang, 'Solidarity across Boundaries: A New Practice of Collectivity among Workers in the App-Based Transport Sector in Indonesia' (2021) 18 *Globalizations* 1377.[9–10].

<sup>85</sup> Gojek (n 77).

<sup>86</sup> Principle 18 of the UNGPs.

discriminately.<sup>87</sup> The first stage process will collect responses and feedbacks from the independent contractor concerning the plan to be adopted to the policy draft. And to necessitate the burden of proof, the bargaining outcome should be transcribed into a memorandum of understanding that is useful in case the applicators unilaterally disregard the collective agreement.

Figure 1. Consultation Partnership Stages



Source: Author

*Third*, after the applicator has accommodated the partners' input into the draft, the consultation stage proceeds to the final decisive part. In the second stage, the applicators announce the polling period—for instance, 30 days—for

<sup>87</sup> Reportedly, several applicators like Grab have been inviting drivers' community representatives to participate in the partnership policy making. But an inclusivity issue persists because only specific partners, the 'elite partners', are allowed to join.



all independent contractors to vote through the app. This online voting aims to solve the unrepresentative decision-making process that deserts the partners' consent. Conceptually, the mechanism is no different to the online-based general shareholder meeting with which some applicators are already familiar. Finally, if the plan is agreed on by the majority voters, the policy initiative will enter into force. In the case of dissenting majority, the applicators shall revise the policy initiatives by reconsulting in the first stage, or may enforce the plan but limited to the agreeing partners only. Certainly, the proposed consultation scheme seems to oversimplify the complexity issues, but, as an overview, this concept anticipates the likely technical modifications in the future.

### **Conclusion**

To conclude, genuine partnerships stand on reciprocal interests to achieve mutual benefit. It relies on constructive negotiation to enable equal risks-and-profits distribution. However, the neglect of collective bargaining is at the root of all social and economic rights violations among the gig drivers. No labor safeguard prevails to duly protect the classified self-employed workers, whereas the use of standardized contracts puts the partners at a higher risk of contractual abuse. In that sense, the undemocratic policy making tradition repulses the mutualism mission to be another capital accumulation by which the applicator's dominant control gives the flexibility to exploit the subordinated drivers. Instead of empowering, the antagonist relation makes the precarious drivers even more dependent on the applicators. Seeing beyond banal freedom of contract view is necessary to understand the complex structural coercion embedded in this partnership.

The UNGPs instrument offers a reliable possibility to fill the gap amid the authority's lack of political will to intervene by engineering a human rights-friendly corporate culture. Despite the soft law drawbacks, the creation of meaningful consultation to the affected parties extends in the instruments operational principles on the basis of human rights impact assessment results. The partnership consultation provides access to remedy the human rights impacts in a pre-emptive fashion. It

facilitates better policy arrangements among the parties to improve contractual justice, reach an optimal degree of consent in the ethical reception, and avoid the recurring detrimental impact on the drivers' social and economic rights. From a business perspective, following the initiative expectantly encourages stakeholders' loyalty and deserving the ethically responsible reputation that will grant a better economic return.

As a note, there will be specific practical or technical issues to address in this consultation partnership design—such as the ideal voting quorum and the representation aspect—but the author passes that on for future research to complete. Future empirical market research to examine the Indonesian consumers' awareness of ethically responsible application companies is of great use to develop the concept this research cannot offer.

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**HOW TO CITE:** Auditya Firza Saputra, 'Partnership Consultation: An Alternative Solution to the Nonexistent Collective Bargaining Right in the Indonesian Ride Hailing Gig Economy Sector' (2022) 37 Yuridika.

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