Draft Code on Social Security, 2019: Comments

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Executive Summary

1. This submission focuses on three aspect of the Draft Code on Social Security, 2019:
   (a) The consultation process
   (b) Maternity benefits
   (c) Gig workers

   The consultation process

2. Noting that there are no rules in place for the process of pre-legislative consultation, we propose that **rules be put in place to ensure a uniform pre-legislative consultative process in relation to all bills**, to enable and encourage public participation and engagement in the legislative process. In particular, **the process should include sufficient time for proper engagement by the public with the process**.

   Maternity (Parental) Benefits

3. We endorse the crucial importance of maternity benefits in making it possible for women to reconcile their paid work with their caring responsibilities. We therefore welcome the provisions for paid maternity leave; the right to work from home during maternity leave; the requirement for employers to set up crèches in establishments with more than 50 employees; and the inclusion of adoptive/ commissioning mothers. However, we submit that by making these provisions available only to mothers and not to fathers, the proposed Code reinforces the assumption that women should be primarily responsible for child-care. We submit that, just as the Code facilitates reconciliation of paid work and caring responsibilities for women, it should also create the possibility for fathers to reconcile their paid work with their caring responsibilities. While pregnancy and childbirth require special rights for women, parenting requires rights for both men and women. This is consonant with the right to equality in the Constitution, as interpreted by the Indian Supreme Court. We therefore submit that:

   (a) Provisions for paternity leave and shared parental leave should be introduced, including for adopting and commissioning parents;

(b) The right to work from home option and to crèches in workplaces should be available on a gender-neutral basis;

(c) There should be protection from discrimination, detrimental treatment and dismissal on the basis of availing parental leave regardless of gender. This should include access to grievance redressal mechanisms in case of withholding of payment.

4. We furthermore submit that the cost of parental benefits should not be borne by employers alone, nor by workers alone. Instead, following standards set by the International Labour Organization (ILO) a century ago, and reaffirmed in recent decades, we submit **that the cost of parental benefits should be shared by the State and employers, through compulsory social insurance, or public funds, or in another manner determined by national law and practice.** This also reflects the practice of nearly 75% of ILO member states.

Schemes for Gig Workers and Platform Workers

5. The Draft Code defines gig work as work which falls outside the traditional employment relationship. **We submit that the traditional test of subordination and control is no longer an adequate guide to whether a worker should fall within the protective regime of labour law. Continuing to use this test to determine eligibility for labour rights leaves the most precarious workers without the protection they need. Instead, any person should be regarded as a worker and within the scope of labour law protection if she mainly provides personal labour and is not genuinely operating a business on her own account.**

6. The Draft Code also leaves the formulation of suitable welfare schemes for gig economy workers to delegated legislation, rather than setting out the schemes in primary legislation. This is in contrast with the concrete social security schemes set out in the rest of the Code. **We submit that social security schemes are crucial rights and entitlements owed to the workforce, and should be set out in primary legislation.** This is also consonant with the Directive Principles of State Policy in Part IV of the Constitution, which provide a set of labour rights that Government has a duty to move towards fulfilling.

Flaws in the Consultation Process

7. It is a matter of concern that there are no rules in place for the process of pre-legislative consultation. It is proposed that rules be put in place to ensure a uniform pre-legislative consultative process in relation to all bills, to enable and encourage public participation and engagement in the legislative process.

8. It is a matter of concern that a very short period of time was provided for submission of comments on the draft Code of Social Security, 2019. The draft was published on 17 September 2019, requiring comments to be submitted by 25 October 2019. This period was insufficient for comprehensive and detailed comments on a draft legislation of such length and importance.

9. In other jurisdictions, South Africa for example, there is a constitutional duty to facilitate effective public involvement in the legislative process – this is considered an important aspect of the right to political participation. It is also an important part of the commitment to real participatory democracy and the values of transparency, responsiveness and accountability.[1]

Maternity (Parental Benefits)

I. Parental Leave

a. Reasons for changes proposed:

10. Chapter VI of the Draft Code on Social Security ('Draft Code') deals with maternity benefit for women employed in 'establishments'[2]. The provisions within this Chapter closely reflect those provided for by the Maternity Benefit Amendment Act, 2017 ('MBAA'). For instance, the Draft Code, like the MBAA, provides paid maternity leave for a period

[1] Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006

[2] 'Establishment' is defined under Draft Social Security Code, 2019, s 2(xxiii).

of 26 weeks,[3] allows mothers to work from home after this period,[4] requires employers to set up crèches in establishments with more than 50 employees,[5] and extends the protection to 'adopting mothers' and 'commissioning mothers'.[6] While the MBAA was hailed as introducing a paradigm shift, it has been critiqued as it focuses only on mothers, and excludes fathers. It thus continues to further gendered norms about women as being primarily responsible for childcare.[7] This ignores the distinction between child *bearing*, and child *care*; merely because women are biologically capable of the former, they should not be held solely responsible for the latter.[8] By failing to draw this distinction, the MBAA, and the Draft Code, legitimise gendered stereotypes about women as mothers. It should be noted that the Supreme Court has held that legislation furthering stereotypes on the basis of gender is discriminatory, and unconstitutional.[9]

11. Taking some of these concerns into account, the Paternity Benefit Bill, 2017 ('Bill') was introduced,[10] though it has not yet become law. While it brought male employees into the framework, the Bill provides only 15 days of paid paternity leave,[11] as opposed to the 26 weeks provided under the MBAA. Thus, the Bill continues to view women as primarily responsible for childcare. Further, while the Bill entitles male employees to avail paid paternity leave, they are not required to do so.[12] Due to the gendered allocation of responsibility for childcare, male employees may not exercise the option to avail the leave, even if legally possible.[13] A recent study in the United Kingdom found that the

[3] Maternity Benefit Amendment Act, 2017, s 3(A)(i); Draft Social Security Code, 2019, s 62(3).
[4] Maternity Benefit Amendment Act, 2017, s 3(5); Draft Social Security Code, 2019, s 62(5).
[5] Maternity Benefit Amendment Act, 2017, s 4; Draft Social Security Code, 2019, s 68A.
[6] Maternity Benefit Amendment Act, 2017, s 3(4); Draft Social Security Code, 2019, s 62(4).
[7] Jean D' Cunha, 'India's bold Maternity Benefit Act can become a Game Changer if it Addresses Current Limitations' (2018) 53(31) Economic and Political Weekly.
[8] Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10 International Journal of Law in Context 442.
[9] For instance, Anuj Garg v Hotel Association of India, AIR 2008 SC 663; Joseph Shine v Union of India, 2018 SC 1676.
[10] Paternity Benefit Bill 2017; Rajeev Satav, 'We Need Fathers Helping With Child Care To Smash Gender Stereotypes' *Youth ki Awaaz* <https://www.youthkiawaaz.com/2018/08/why-i-am-fighting-to-make-paternity-leave-a-right-in-india-mp-rajeev-satav/> accessed 20 October 2019.
Currently, the only legislation providing paternity leave is the Civil Service Rules, 1972, s 43(A), which allows male government servants to avail paternity leave of 15 days.
[11] Paternity Benefit Bill 2017, s 4(3).
[12] Paternity Benefit Bill 2017, s 4(1).
[13] Fredman (n 8) 450.

gendered expectations surrounding parenting contribute to limited use of paternity leave, with only one percent of men availing the statutory paternity leave.[14] The Paternity Benefit Bill, 2017 is therefore inadequate is shifting focus away from the mother as the primary caretaker, and towards shared parenting.

12. In contrast, comparative provisions in other jurisdictions offer best practice alternatives which can be drawn upon. UN Women found that paternity leave is most successful when it is non-transferable and the male employee must 'use it or lose it' (the so-called "daddy quotas").[15] Iceland has 9 months of parental leave—3 months for the mother, 3 months for the father and 3 months to divide between them as they see fit.[16] Some of the Nordic countries are drawing a distinction between *paternity leave* which is leave for the male employee immediately after the birth of the child and *parental leave,* a type of temporary leave in connection with a new child. In Norway, the father is entitled to two weeks of paternity leave to be used at the time of birth plus a further 10 weeks of paternal leave that can be used over a longer period of time. In Sweden men have ten days of leave which differs from the 90 days "daddy quota".[17] To encourage male employees to use their paternity and parental leave, some states offer incentives and bonuses. Germany extends paid leave by two months if fathers take at least two months of leave.[18]

13. Based on the above, the following recommendations are made:

    a. Child care should not be seen solely as the responsibility of the mother. Provisions for paternity leave and shared parental leave should be introduced.

[14] Gayle Kaufman, 'Barrier to Equality: Why British Fathers Do Not Use Parental Leave' (2018) 21(3) Community, Work and Family 310.
[15] UN Women, 'Progress of the World's Women 2019-2020: Families in a Changing World' (2019) 160 <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/progress-of-the-worlds-women-2019-2020-en.pdf?la=en&vs=3512> accessed 21 October 2019.
[16] Sonja Blum et al, '14th International Review' (2018) International Network on Leave Policies and Research <https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/Leave_Review_2018.pdf> accessed 21 October 2019.
[17] ibid.
[18] ibid.

b. Considering the gendered social context in India where women continue to be responsible for childcare, incentives should be provided to encourage male employees to avail paternity leave and shared parental leave.
c. The provision of shared parental leave should be *in addition to* 'women-centric' provisions, accommodating women's needs pertaining to the biological process of child-bearing, breast feeding etc.[19]
d. The following provisions should be made gender neutral, as opposed to the Draft Code which restricts these provisions to women alone:
    (i) Work from home option
    (ii) Crèches in workplaces
    (iii) Extending protection to adopting/ commissioning parents
    (iv) Protection from discrimination/ dismissal on the basis of availing parental leave
    (v) Access to grievance redressal mechanisms, in case of withholding of payment, or dismissal/discharge on account of availing parental leave

b. Sections of Draft Code Identified:

Section/ Sub-section/ Clause/ Proviso of the Code	**Issue/ Problem identified in the Section/ Sub-section/ Clause/ Proviso of the Code**	**Proposed change that should be made**
Sections 61, 62(1), 64, 65, 72	The provisions are restricted to women alone, furthering stereotypes about women as mothers.	Paternity leave should be introduced. Shared parental leave should also be introduced, which can be availed by all parents, irrespective of gender. Incentives should be provided to encourage male employees to avail paternity leave and shared parental leave.

[19] D' Cunha (n 7).

		These provisions should be in addition to 'women-centric' provisions such as Sections 66, 68.
Section 62(4)	Paid leave is provided only to adopting *mothers* and commissioning *mothers*, excluding adopting/ commission fathers.	The provision should be gender neutral, allowing adopting/commissioning *parents*, irrespective of gender, to avail the leave.
Section 62(5)	The work from home option is provided only to mothers, excluding fathers.	The provision should be gender neutral, allowing *parents*, irrespective of gender, to avail the option to work from home.
Section 68A	This provision requires employers to set up a crèche in the workplace, for the benefit of women employees.	The crèche should be set up for the benefit of all employees with childcare responsibilities, irrespective of gender.
Section 69	Protection from dismissal for availing leave is restricted to women employees alone. This excludes male employees.	The provision should be gender neutral.
Section 73	This provision provides access to a grievance redressal mechanism in case payment is denied, or dismissal/ discharge occurs. The provision currently provides such access only to women employees.	The provision should be gender neutral.

II. Shared Responsibility of Employer and State

a. Reasons for changes proposed:

14. We propose a shift from a model where employers solely bear the cost of parental benefits, to a model where both employers and the state share the responsibility. This is to protect the position of women in the

labour market, by ensuring that employers do not refuse to employ women, or place onerous conditions of employment around marriage and pregnancy on women, because of the cost of maternity benefits to be borne by them. Although anti-discrimination provisions in legislation help in preventing discrimination against women on grounds of maternity, "preventing discrimination is not only a question of legislation against discrimination, but also of reducing the direct cost of maternity (and paternity) to the employer."[20] A recent report indicates that the cost of providing maternity benefits to women in India may be a concern for employers.[21] A shift to a model of parental leave and benefits, as opposed to only maternity leave and benefits, may ensure that employers do not discriminate between men and women due to concerns regarding provision of maternity benefits. However, under such a model of parental leave and benefits where employers solely bear the costs, employers may be motivated to discriminate against parents as a whole. A model under which the cost of parental benefits is shared between the state and employers, helps alleviate the concerns of employers, while respecting and protecting the needs of parents around having, and caring for, children.

15. A shared responsibility model has been adopted under a number of international and national legal instruments. For instance, the International Labour Organisation ('ILO') has always required that employers do not solely bear the cost of maternity benefits.[22] ILO Maternity Protection Convention 2000 (No. 183) provides that the cost

[20] ILO, *Maternity at work: A review of national legislation* (2nd edn 2010) 'Executive Summary'. Available at < https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_145921.pdf> accessed 20 October 2019.
[21] Anirban Nag, 'Maternity Perks May Cost 1.8 Million Indian Women Their Jobs' *Bloomberg* (26 June 2018) <https://www.bloomberg.com/news/articles/2018-06-26/india-s-maternity-law-may-cost-1-8-million-women-their-jobs> accessed 20 October 2019.
[22] See, ILO Maternity Protection Convention 1919 (No. 3), article 3, available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C103> accessed 20 October 2019. Article 3 of the convention required that maternity benefits sufficient for the full and healthy maintenance of herself and her child, be provided to every working mother either out of public funds or by means of a system of insurance.
See, also, Maternity Protection Convention, 1952 (No. 103), art 4(4) available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C103> accessed 20 October 2019. Article 4(4) of the convention required that required that cash and medical benefits be provided to working women when absent from work on maternity leave, either by means of compulsory social insurance or by means of public funds.

of maternity benefits should not be borne individually by employers.[23] This is to protect the position of women in the labour market, by ensuring that employers do not refuse to employ women because of the cost of maternity benefits to be borne by them. The costs should be borne through compulsory social insurance, or through public funds, or in another manner determined by national law or practice, such that employers are not individually liable for the costs.[24] Employers may be individually liable for the cost only if they specifically agree to the same, or if there is a tripartite agreement at the national level regarding this, between the government, employers and workers.[25]

16. India is a founding member of the ILO, and a permanent member of the ILO governing body since 1922. Although India has not ratified the maternity protection conventions of the ILO, and the conventions are not legally binding on India, India should strive to adopt internationally recognised standards around maternity protection and benefits.

17. Moreover, a review of national legislation on maternity benefits in 167 ILO member states, found that "by 2009, half of the countries examined (53 per cent) financed benefits through social security, while 17 per cent relied on a mix of payments by employers and social security. Roughly one-fourth (26 per cent) of countries continued to stipulate that payment during leave be covered entirely by the employer with no public or social security provision."[26] India, thus, remains in the minority of countries that require employers to solely bear the costs of maternity and parental benefits.[27]

[23] ILO Maternity Protection Convention 2000 (No. 183), available at <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/genericdocument/wcms_114195.pdf> accessed 20 October 2019.
[24] ILO Maternity Protection Convention 2000 (No. 183), art 6(3).
[25] ibid.
[26] ILO, *Maternity at work: A review of national legislation* (2nd edn 2010) 'Executive Summary'. Available at < https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_145921.pdf> accessed 20 October 2019.
[27] Recently, the South African government amended its labour laws to ensure that all parents have access to all parental benefits under the national unemployment insurance fund, see Labour Laws Amendment Act 10 of 2018.

b. Sections of Draft Code identified:

Section/ Sub-section/ Clause/ Proviso of the Code	**Issue/ Problem identified in the Section/ Sub-section/ Clause/ Proviso of the Code**	**Proposed change that should be made**
Section 62(1)	Employers solely liable for payment of maternity benefits. This may disincentivise employers from employing women or parents.	Liability for maternity and parental benefits should be shared by the state. Wider consultation and research may be necessary to determine the precise manner in which this should be done – through public funds, a system of social insurance, etc.
Section 66	Cost of medical bonus borne solely by employers. This may disincentive employers from employing women or parents.	Liability for medical bonus should be shared by the state.

Schemes for Gig Workers and Platform Workers

a. Reasons for changes proposed:

18. The spread of business models such as digital labour platform or gig economy, that depart from the standard open-ended full-time employment relationship, has had the effect of pushing a growing number of workers outside the scope of employment regulation and labour protection.[28]

19. One of the crucial insights of the European Confederation Report (on platform and gig work) was that self-employment has increasingly

[28] Nicola Countouris and Valerio De a Stefano, 'New trade union strategies for new forms of employment' (2019) Syndicate European Trade Union, Brussels. (The European Confederation Report) 64.

become a ‘catch-all category in which the most diverse forms of work are being lumped, in total disregard of the vulnerabilities affecting large swathes of weakly positioned workers classified or misclassified as self-employed.’ This is reflected in the Indian Draft Labour Code as well, which classifies all gig workers as those that fall outside traditional employment-employee-relationship. However, the platform/gig economy is very diverse, and policy measures should address the heterogeneity in this economy. Heterogeneity in this sector means that some platforms exert a substantial amount of control over workers, suggesting some level of subordination and creating an employment or employment-like relationship; while on the other hand some resemble traditional freelance work. This can exist even *within* the same platform industry: conversations with Ola and Uber drivers reveal, for example, that drivers who own their own vehicle exercise a substantial amount of control over their own time, value the flexibility of platform work, and consider themselves to be freelancers, even making money “on the side.” On the other hand, drivers who either use vehicles provided by the platform, or have taken loans, end up driving for between twelve to fourteen hours a day to meet a daily, monetary target, with little to no control over their time. It is obvious that if legislation is to work, it must remain cognisant of these fundamental differences.

20. The “Personal Work relation”[29] approach constructed by Mark Freedland can be used to define and understand the true nature of work that the gig/platform workers engage in. This approach could be advantageous because it both ‘reveals the artificiality of, and breaks down, the self-employment monolith, and goes beyond contractual classifications in providing access to protection.’[30] Departing from the traditional view that the binary divide between what falls within the protective domain of labour law and what falls outside it ought to be defined by reference to the concepts of subordination and control, this approach suggests instead that a person is a worker if she mainly

[29] Mark Freedland, ‘Application of labour and employment law beyond the contract of employment’ (2007) International Labour Review 3 (‘idea of the personal work relationship can provide a valid normative paradigm in this respect, by leaving outside the scope of labour law (broadly understood as including individual and collective labour law but also employment equality law), work that is not predominantly personal, and is mainly (as opposed to occasionally or exceptionally) provided by means of dependents or substitutes, or as an accessory to capitalised and asset intensive (as opposed to labour intensive) business undertakings’); See also Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

[30] The European Confederation Report (n 27) 65.

provides personal labour and is not genuinely operating a business on her own account (in which case competition law would naturally apply).[31]

b. Sections of the Draft Code identified:

Section/ Sub-section/ Clause/ Proviso of the Code	**Issue/ Problem identified in the Section/ Sub-section/ Clause/ Proviso of the Code**	**Proposed change that should be made**
Definitions, section 2 Section 2 (xxvii) - definition of gig worker Section 2 (xxxxvia) and (xxxxvib) - definition of platform work	Gig work has been defined as work which falls outside the traditional employment-employee relation. However, there are examples of platform or gig work which exert a substantial amount of control over workers, suggesting some level of subordination work and mimic an employment or employment-like relationship (see, for example, the situation of one subset of Uber/Ola drivers described above).	The employment status of platform and gig workers need to be clarified further to avoid misclassification. The "personal work" relation definition can be used to classify the status of platform/gig workers, so that it can reflect the true nature of their work.
Platform workers (chapter IX, s 110A)	First (1), the nature of social security schemes have been left to secondary legislation, and the rule-making power of the government. It is our firm belief that social security schemes and benefits should be set out in primary legislation, as these are crucial rights and entitlements	Drafting of specific social security schemes after consultation with platform and gig workers so that the particular needs of platform/gig workers can be accommodated for. Furthermore, and ideally,

[31] Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011). See also The European Confederation Report (n 27) 65.

	owed to the workforce, and not left to the discretion of the government. This is also in consonance with Part IV of the Constitution: the Directive Principles of State Policy, which provide a set of labour rights that the Government is obligated to move towards fulfilling. Secondly (2), in contrast to the specific provisions pertaining to social security schemes in the rest of the Code, no concrete social security schemes have been formulated for platform/gig workers. Thirdly (3), there are some rights and entitlements that ought to apply to *all* platform and gig-workers, on the same terms and conditions as they do to employees (for example, the right to equal pay for equal work, the right to unionise, the right against unfair labour practices, etc.) Others may be selectively applicable, depending on the status of the worker (as outlined in the previous section), and their relative level of subordination to the putative employer or platform (for example, payment of bonuses etc.) This gradation is best identified *after* consultation with gig and platform workers themselves.	there would be a separate legislation altogether to deal with platform and gig work, that sets out a graded level of entitlements based on point (3) in the adjacent section. Even if that is not possible, within this legislation, there should be specific provisions making clear that certain social security schemes shall be applicable to all gig or platform workers, on the same terms as they are available to employees, while other schemes will be applicable depending on the particular status of the worker, in line with the "personal work relation" approach discussed above.