

# LEGISLATING FOR DOMESTIC ‘CARE’ WORKERS IN INDIA – AN ALTERNATIVE UNDERSTANDING

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*Neo-liberal agendas that dictate policy and lawmakers are fundamentally at odds with exploitative market forms that reinforce gender, class and caste hierarchies. Activities that are not purely economic, such as the domestic work industry, are especially incompatible with faith in free market forces, given the popular market-oriented notions that inform the valuation of forms of ‘productive’ work. Any attempt for the State to intervene, has to be more facilitative than regulatory. There needs to be a fundamental shift in the way these systems are viewed and such work valued. This paper is an attempt to introduce, into the Indian policy sphere, a discourse on the need to understand the peculiarities of domestic care work and propose that any legislative intervention needs to be contextual, with a different understanding of the ‘worker’ and the ‘workplace’.*

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## I. INTRODUCTION

An estimated 4.75 million to 90 million people are engaged in the Indian domestic work industry.<sup>1</sup> Increasing urbanization has contributed to the rise of nuclear families, which in turn has led to an increase in the demand for domestic workers in the country.<sup>2</sup> As a result, domestic work has emerged as an important source of occupation, especially for women in India.<sup>3</sup> There is, however, an absence of both adequate data and literature on this issue in the Indian context.

Despite being a common feature in everyday life, domestic work has received little attention in contemporary socio-legal discourses. In India, there is no comprehensive framework for either regulation of domestic work, or for protection of those engaged in it. This paper tries to give an overview of the issues surrounding regulation of domestic work, the need for protection, and proposes alternative theoretical models that could be considered while legislating for the domestic workspace.

In discussing effective approaches to legislating for the domestic workspace, two elements form the central theme of this paper.

First, household chores are typically understood as the duty of the quintessential ‘home-maker’ – the housewife.<sup>4</sup> It is kept out of traditional and mainstream understanding of ‘labour’ and seen as acts of ‘love and care’.<sup>5</sup> Undervaluation of such ‘care work’ is then carried forward even to situations when these services are paid for,<sup>6</sup> even though it is no longer done out of affec-

<sup>1</sup> Self-Employed Women’s Association (‘SEWA’), *Domestic Workers’ Laws and Legal Issues in India*, November 12, 2014, available at <http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-India.pdf> (Last visited on August 25, 2017).

<sup>2</sup> Women in Informal Employment: Globalizing and Organizing, *Domestic Workers*, available at <http://www.wiego.org/informal-economy/occupational-groups/domestic-workers> (Last visited on December 24, 2017).

<sup>3</sup> Business Line, *52.6 m domestic workers worldwide, highest in Asia: ILO*, January 10, 2013, available at <http://www.thehindubusinessline.com/economy/526-m-domestic-workers-worldwide-highest-in-asia-ilo/article4294195.ece> (Last visited on December 23, 2017).

<sup>4</sup> See STEPHEN EDGELL, *THE SOCIOLOGY OF WORK: CONTINUITY AND CHANGE IN PAID AND UNPAID WORK* 194 (2012); RUTH ROACH PIERSON & MARJORIE GRIFFIN COHEN, *CANADIAN WOMEN’S ISSUES: VOLUME II: BOLD VISIONS* 42 (1995).

<sup>5</sup> See Margrit Eichler, *Power, dependency, love and the sexual division of labour: A critique of the decision-making approach to family power and an alternative approach with an appendix: On washing my dirty linen in public*, 4 *WOMEN’S STUDIES INTERNATIONAL QUARTERLY* 2 (1981).

<sup>6</sup> CAROLINE SWEETMAN, *GENDER DEVELOPMENT AND MONEY* 25-32 (2001).

tion. Despite the commodification of care work, "it continues to carry the stigma of 'women's work', consigned to the private sphere of the home; thus, it is largely perceived as work that does not belong in the general marketplace."<sup>7</sup> Domestic workers are hence rarely given recognition as 'workers', and their work is largely unregulated.<sup>8</sup> They occupy a lower status in the society and consequently in the economy, including amongst workers in the informal sector.<sup>9</sup> Not being seen as 'real work' or 'legitimate employment', it is largely excluded from the scope of regulatory protection.<sup>10</sup> The thresholds in labour regulations<sup>11</sup> designed for industrial units automatically excludes informal sector workers in smaller units,<sup>12</sup> and especially domestic workers where there may only be one worker. Further, the definitions of "workman", "employer" or "establishment" under these laws preclude their applicability to the domestic workspace.<sup>13</sup>

Second, as it takes place within the confines of private homes, it remains largely hidden,<sup>14</sup> making regulation difficult. Further, state enforcement of their rights can be perceived as illegitimate, being seen as state intervention into private affairs of the family.<sup>15</sup> This further insulates domestic labour from governmental scrutiny, facilitating exploitation of the workers.<sup>16</sup>

In the backdrop of these two factors, this paper explores an understanding of domestic work as being *both* productive as well as involving 'caring' labour, with the home being the workplace. These features that set the industry apart from other forms of employment, we advocate, necessitates any regulatory attempt to be informed of the nuances and peculiarities of the industry to be effective. In this light, we will propose that this should be done by adopting an 'ethic of care' and reorienting the state's approach at regulation for this sector.

<sup>7</sup> See generally Katherine Kaufka, *The Commodification of Domestic Care: Illegitimacy of Care Work and The Exploitation of Migrant Worker*, 18 Geo. Immigr. L.J. (2003). (Although Kaufka speaks in the American context, a similar phenomenon exists in India).

<sup>8</sup> Despite 72% of the Indian workforce being engaged in the informal sector, it is largely unregulated; The Hindu, *India's informal economy*, September 3, 2014, available at <http://www.thehindu.com/opinion/columns/Chandrasekhar/indias-informal-economy/article1119085.ece> (Last visited on January 1, 2018).

<sup>9</sup> Sharanya Bhattacharya and Shalini Sinha, *Domestic Workers in India: Background and Issues*, 2009, available at <http://182.71.188.10:8080/jspui/bitstream/123456789/496/1/Domestic%20Workers%20in%20India.pdf> (Last visited August 24, 2017).

<sup>10</sup> Kaufka, *supra* note 7.

<sup>11</sup> The Industrial Disputes Act, 1947, §33; The Factories Act, 1948, §2.

<sup>12</sup> Kamala Sankaran, *Domestic Worker and Fish Worker Consultation Bangalore*, August 23, 2008, available at [http://www.wiego.org/sites/wiego.org/files/resources/files/fw%20&%20dw\\_consultation\\_bangalore\\_report.pdf](http://www.wiego.org/sites/wiego.org/files/resources/files/fw%20&%20dw_consultation_bangalore_report.pdf) (Last visited May 01, 2017).

<sup>13</sup> SEWA, *supra* note 1.

<sup>14</sup> JAMIE FARICELLIA DANGLER, *HIDDEN IN THE HOME: THE ROLE OF WAGED HOMEWORK IN THE MODERN WORLD-ECONOMY* 35 (1994).

<sup>15</sup> VANESSA H. MAY, *UNPROTECTED LABOR: HOUSEHOLD WORKERS, POLITICS, AND MIDDLE-CLASS REFORM IN NEW YORK, 1870-1940* 12 (2011).

<sup>16</sup> See generally Kaufka, *supra* note 7.

Part II of the paper lays down the scope of domestic work discussed. Part III analyses domestic work as constituting productive employment, despite involving ‘caring’ labour. Part IV provides an overview of the abuse and exploitation that domestic workers are subject to, critically analysing the existing legal framework in India; and then discusses the hindrances to regulatory efforts. Part V advocates for future legislative attempts to borrow from family laws, and be informed by an ethic of care, which is best suited to regulate the domestic care industry. It then gives a glimpse into how such shifts in perspective may translate into regulatory methods better suited for the industry, reflecting upon similar attempts in other jurisdictions. Part VI presents the conclusions.

## II. THE SCOPE OF DOMESTIC WORK

As per International Labour Organization’s (‘ILO’) Convention concerning decent work for domestic workers, domestic work can be understood as ‘work performed in or for a household or households’.<sup>17</sup> Domestic workers are those who are employed to perform these tasks.<sup>18</sup> It thus entails an exchange of services for remuneration, and should therefore be accorded the same status as any other form of paid employment within the economy and be regulated by appropriate legislation. This may seem like a simple and straight-forward proposition. However, understanding the exact nature and scope of domestic work is extremely difficult, given that there is no uniformity – either in the nature of work, the conditions and terms of work, or even in the nature of employment relations.

However, some basic commonalities need to be identified so as to demarcate a class of relations that would require separate regulation. In this part we first try to understand the extent and scope of domestic work covered in this discussion, and second, we advocate for an understanding of domestic work as involving caring labour, given the nature of the tasks involved.

### A. PART-TIME OR LIVE-IN WORKERS?

At the outset, we note that there are both part-time and live-in domestic workers.<sup>19</sup> While the former are employed in multiple households for limited time-periods in a day, the latter only work in one respective household, residing within the household premises. The nature of difficulties faced by both sets of

<sup>17</sup> International Labour Organization Convention concerning decent work for domestic workers (No.189), 2013, Art. 1(a).

<sup>18</sup> *Id.*

<sup>19</sup> Director General Labour Welfare, Ministry of Labour and Employment, Final Report of the Task Force on Domestic Workers, 2011, available at [http://wiego.org/sites/wiego.org/files/resources/files/dw\\_taskforce\\_report.pdf](http://wiego.org/sites/wiego.org/files/resources/files/dw_taskforce_report.pdf) (Last visited April 30, 2017) (‘Task Force’); (The Report divides domestic workers in three categories: Part Time, Full Time and Live-in. However, in our opinion, the category designated as full-time domestic worker can be adequately covered cumulatively by the other two categories).

workers, which may overlap, are markedly different. Part-time domestic workers are comparatively less vulnerable normally – they spend a limited duration of time in each household, reducing the overall vulnerability and reliance on any particular employer for subsistence.<sup>20</sup> Thus, considerations concerning availability of food and accommodation, maximum working hours, overtime, holidays, etc., are issues that commonly plague the lives of live-in domestic workers. The lack of regulation means that both live-in and part time domestic workers are left at the mercy of employers, without any recourse against exploitation.<sup>21</sup> However, the live-in domestic workers, whose interactions are largely limited to the employer's home, unlike part-time workers, do not get to interact with friends and family on a regular basis, and are more likely to face and tolerate abuse, making them highly vulnerable.<sup>22</sup> A maid who washes utensils or clothes for some time every day or a cook who only prepares the food and leaves, and performs the same task in different households is placed in a relatively different position than a live-in domestic worker. This level of dependence and interaction facilitates greater and peculiar forms of exploitation for live-in domestic workers and is the primary focus of the discussion that follows.

However, it needs to be noted that no rigid classification can be made. For instance, a domestic worker may spend her entire day at the employer's house, but may not stay within the house, but in a 'servant's quarter' in the compound or building or may return to a nearby home (usually in slum settlements). However, they might not be in a position much better than the live-in worker (for instance those that spend the greater part of the day in the employer's home and/or are dependent on the employer for all meals and other amenities) and cannot squarely be excluded from the purview of the discussion.

Therefore, in discussing domestic work, both live-in and part-time workers need to be accommodated. However, due to the greater vulnerability of live-in workers, additional protections should be put in place to safeguard against exploitation. These protections however, need to be flexible enough to accommodate those part-time workers who spend majority of their day in the same household or are exposed to similar risks.

## *B. THE NATURE OF CHORES AND WORK INVOLVED*

Household work can include various chores performed to maintain the home and the family, including a gamut of tasks ranging from cooking, cleaning, washing, ironing, etc., to caring for children, tending to the elderly and even

<sup>20</sup> *Supra* note 2; LISA RODGERS, LABOUR LAW, VULNERABILITY AND THE REGULATION OF PRECARIOUS WORK 162 (2016).

<sup>21</sup> United Nations in India, Rights for Domestic Workers, available at <http://in.one.un.org/page/rights-for-domestic-workers>, (Last visited May 01, 2017); Kamala Sankaran, *supra* note 12.

<sup>22</sup> Aditya Srivastava, A maid-in-India problem, *Governance Now*, June 19, 2012, available at <http://www.governancenow.com/views/columns/maid-india-problem> (Last visited May 01, 2017).

looking after pets. There may be substantial overlap between these tasks; the worker may be assigned all such tasks, several or only a few. There may even be those who perform only one of these tasks – only cleaning or only cooking for bigger or more affluent households.

Broadly, it is the nature of the chores performed as well as the site of employment that is determinative. The scope of our discussion envisages domestic work as the daily chores within the place of residence – and would thus exclude activities such as gardening and driving, popularly seen as semi-skilled employment in the informal sector. Moving away from an expansive classification of ‘domestic’ work that would include the gardener, the driver, and other such personnel, the focus remains on household work.

Delineating the scope of such household work will also be informed by the next section – to collectively view workers engaged in ‘care work’ as different from those that merely engage in a singular kind of manual or semi-skilled household chore, that does not typically entail emotional labour. This paper focuses on the idea of such ‘domestic care work’.

### C. *UNDERSTANDING DOMESTIC ‘CARE’ WORK - NEED FOR A CHANGE IN PERSPECTIVE*

Friedrich Engels in the 19th century drew a stark distinction between ‘productive’ and ‘reproductive’ work.<sup>23</sup> The former was typically the ‘labour’ provided typically by men in the public space, while the latter constituted household responsibilities of women in rearing and caring for children and the family.<sup>24</sup> Feminist debates in the 1970s challenged this dichotomy, arguing that domestic work is nothing but production of human beings that then constitute the labour force,<sup>25</sup> thus presenting a case for perceiving the labour of housewives as productive and valuable. The only difference, they argued, lies in the fact that it was unpaid, done within private homes, and regulated by patriarchal relations instead of the state or market forces.<sup>26</sup>

The upkeep of the household is inherently productive and holds economic value, even if difficult to quantify.<sup>27</sup> It reproduces labour power, sustaining industrial wage work by ensuring adult workers are fed and tended to, so that they

<sup>23</sup> F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 4 (1884).

<sup>24</sup> *Id.*

<sup>25</sup> M. DALLA COSTA & S. JAMES, *THE POWER OF WOMEN AND THE SUBVERSION OF THE COMMUNITY* (1972).

<sup>26</sup> C. PATEMAN, *THE SEXUAL CONTRACT* (1988).

<sup>27</sup> India Infoline, *Economics for Everyone: Evaluating Economic Activity-Home Economics – Housewives Contribution to the Economy*, March 28, 2016, available at [https://www.indiaonline.com/article/news-top-story/economics-for-everyone-evaluating-economic-activity-home-economics---housewives-contribution-to-the-economy-116052800707\\_1.html](https://www.indiaonline.com/article/news-top-story/economics-for-everyone-evaluating-economic-activity-home-economics---housewives-contribution-to-the-economy-116052800707_1.html) (Last visited on December 30, 2017).

are able and willing to work, and children are raised and socialised so that they too can work.<sup>28</sup> It cannot be deemed to be inferior to industrial labour. Both are important and cannot be placed within a hierarchical model. However, they are different in terms of the subject matter, and therefore require separate considerations. People are not just 'units of labour', but social, cultural and ideological beings.<sup>29</sup> This means that most domestic work is more than maintenance of mere physical bodies.<sup>30</sup> Reproduction of labour power involves strong inter-personal relationships, and is far less alienating and inhuman compared to other forms of paid work.<sup>31</sup>

While Bridget Anderson defines domestic work to constitute cleaning, cooking and caring,<sup>32</sup> these are not watertight compartments. For instance, as Helma Lutz points out, caring may include cooking and even overlap with cleaning.<sup>33</sup> It is better understood as an inextricable web of related tasks, often required to be performed simultaneously.<sup>34</sup> This has prodded scholars to advocate for referring to domestic work as 'care work' defined as "multifaceted labour that produces the daily living conditions that make basic human health and well-being possible".<sup>35</sup> Lutz describes care work as involving "emotional work (support, the expression of affection, kindness, enthusiasm, love, and so on)", which unlike any other activity, "is a personalized relationship characterized by intimacy, trust, and responsibility."<sup>36</sup> It is distinct from most other forms of formal production-oriented employment and cannot be grouped together as such. However, this difference cannot form the ground to undervalue the work or deem it inferior.

The feminist struggle has been two-fold – on one hand, it has struggled to ascribe value to such domestic care work and advocate for it to be considered as an economic activity like any other.<sup>37</sup> On the other hand, they have also fought to claim public spaces outside the home and break the public-private

<sup>28</sup> RUTH ROACH PIERSON & MARJORIE GRIFFIN COHEN, CANADIAN WOMEN'S ISSUES: VOLUME II: BOLD VISIONS 42-43 (1995).

<sup>29</sup> Johanna Brenner & Barbara Laslett, *Social Reproduction and the Family* in SOCIOLOGY FROM CRISIS TO SCIENCE? THE SOCIAL REPRODUCTION OF ORGANISATION AND CULTURE 145,146 (1986).

<sup>30</sup> Sweetman, *supra* note 6.

<sup>31</sup> PIERSON & COHEN, *supra* note 28.

<sup>32</sup> BRIDGET ANDERSON, DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR 58-60 (2000).

<sup>33</sup> Helma Lutz, *Domestic workers and migration* in THE ENCYCLOPEDIA OF GLOBAL HUMAN MIGRATION (Immanuel Ness ed., 2013).

<sup>34</sup> SCHWARTZ COWAN, MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY FROM THE OPEN HEARTH TO THE MICROWAVE 122 (1983).

<sup>35</sup> MARY K. ZIMMERMAN, JACQUELYN S. LITT, AND CHRISTINE E. BOSE, GLOBAL DIMENSIONS OF GENDER AND CAREWORK 3-4 (2006).

<sup>36</sup> Helma Lutz, *Domestic workers and migration* in THE ENCYCLOPAEDIA OF GLOBAL HUMAN MIGRATION 56 (Immanuel Ness, 2013).

<sup>37</sup> Stanford Encyclopaedia of Philosophy, *Feminist Perspectives on Class and Work*, October 1, 2004, available at <https://plato.stanford.edu/entries/feminism-class/> (Last visited on February 14, 2018).

dichotomy.<sup>38</sup> The latter objective seems to have seen more success than the former. While the ‘outside’ is becoming more accepting of women as workers, domestic work continues to be undervalued and is still considered largely as the domain of the ‘women of the household’.<sup>39</sup> As public workspaces become increasingly egalitarian, ‘home-makers’ seek gainful employment outside the home, but responsibilities of child-rearing and household still remain. The care deficit so created is filled by domestic care-workers.<sup>40</sup> In more affluent households, public employment is not always a pre-condition to employ domestic help, who then aid the primary home-maker in discharging care-giving duties. Domestic workers often also facilitate the middle-class woman’s participation in social and communal activities, enabling them to enjoy a higher standard of lifestyle.<sup>41</sup> A new service industry has thus emerged within the household.

However, we see that undervaluation of domestic work carries forward even though it is now a paid-for economic activity. The primary step to make a case for ascribing dignity to domestic care work and consequently domestic care workers, is done by understanding, first, that care is a social good with inherent public value, and second, that it also requires skill and hard work like other forms of employment.

Martha Fineman traces the under-valuation of caregiving to “a historic and highly romanticised affair with the ideal of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good.”<sup>42</sup> Therefore, domestic chores and caregiving that were seen to define private spaces, were never seen as a social good and kept away from public policy debates. The inalienable nature of care work is routinely overlooked amidst the market-oriented notions of work that define labour market policy.<sup>43</sup> Care needs to be recognised as a public good with inherent social utility, which in turn would ascribe importance to caregiving as well – both by a house-wife and consequently domestic care workers. It needs to be understood as reproducing labour power, sustaining workers and their capacity to work,<sup>44</sup> an activity essential to sustain the economy and communities. Care-work will only be then construed

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<sup>38</sup> Ulla Wischermann & Ilze Klavina Mueller, *Feminist theories on the separation of the private and the public: Looking back, looking forward*, 20 WOMEN IN GERMAN YEARBOOK: FEMINIST STUDIES IN GERMAN LITERATURE & CULTURE 184-197 (2004).

<sup>39</sup> The Economist, *Women alone are driving a recovery in workforce participation*, August 19, 2017, available at <https://www.economist.com/united-states/2017/08/19/women-alone-are-driving-a-recovery-in-workforce-participation> (Last visited on June 15, 2018); United Nations Human Rights, *Behind Closed Doors: Protecting and Promoting the Human Rights of Migrant Domestic Workers in an Irregular Situation*, available at [https://www.ohchr.org/Documents/Publications/Behind\\_closed\\_doors\\_HR\\_PUB\\_15\\_4\\_EN.pdf](https://www.ohchr.org/Documents/Publications/Behind_closed_doors_HR_PUB_15_4_EN.pdf) (Last visited on June 15, 2018).

<sup>40</sup> See generally Kaufka, *supra* note 7.

<sup>41</sup> Sweetman, *supra* note 6.

<sup>42</sup> Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403 (2001).

<sup>43</sup> K. LYNCH, J. BAKER & M. LYONS, *AFFECTIVE EQUALITY: LOVE, CARE AND INJUSTICE* (2009).

<sup>44</sup> RUTH ROACH PIERSON & MARJORIE GRIFFIN COHEN, *CANADIAN WOMEN’S ISSUES: VOLUME II: BOLD VISIONS* 42-43 (1995).



as 'legitimate work' that is eligible for regulation and just remuneration. The society at large as well as all social institutions within it are dependent on caretaking labour.<sup>45</sup> It preserves and perpetuates societies.<sup>46</sup>

Further, domestic care work cannot be considered as 'unskilled', 'trivial', or just for 'leisure'. It necessitates significant management abilities and can be a formidable task for someone who is new to it. It requires hard work, and necessitates various skills acquired mostly via on-the-job training.<sup>47</sup> The failure to recognise human skill in care work is the major fallacy that underlies any attempt to theorise this sphere.<sup>48</sup> The relational skills involved in childcare or nursing are grossly discounted, and wages, world-over equate only the physical labour to any other manual work.<sup>49</sup> However, good quality care work is beyond mere manual labour. These activities further the development of another, and are of the highest quality when accompanied by authentic emotional commitments of 'caring feelings'.<sup>50</sup> While hiring a domestic care worker, one expects them to have certain skills. It is also preferred if they get along with the rest of the family, especially when a major portion of their job is to look after children or elderly. In a UK-based organisation that works with domestic workers, for instance 'Kalayaan', the request for workers often comes with a stipulation of a 'happy' or 'affectionate' worker.<sup>51</sup> Not only does domestic work require hard work and skill, it also often includes a degree of 'caring feelings'.

This becomes even more evident as we recognise that the role of the domestic care worker is at the heart of the home and family life. Daily interaction with a few people in a private household, inevitably leads to a relationship being developed.<sup>52</sup> This becomes much more difficult for the care worker to manage, when the job entails caring for a child, whom they tend to develop a deep attachment with. The relationships between children, parents and care workers are complex and often make it difficult for care-givers to set boundaries on their emotional commitment.<sup>53</sup> While social and economic hierarchies cut across such emotional bonds,<sup>54</sup> the investment of emotional labour cannot be overlooked.

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<sup>45</sup> Fineman, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> Helma Lutz, *Domestic workers and migration* in THE ENCYCLOPEDIA OF GLOBAL HUMAN MIGRATION (Immanuel Ness ed., 2013).

<sup>48</sup> Gabrielle Meagher, *Making Care Visible: performance measurement in welfare services*, UnitingCare Burnside Discussion Paper No. 2 (2002).

<sup>49</sup> Julie A. Nelson, *Gender and Caring* in HANDBOOK OF RESEARCH ON GENDER AND ECONOMIC LIFE 62-76 (Deborah M. Figart & Tonia L. Warnecke ed., 2013).

<sup>50</sup> *Id.*, at 62.

<sup>51</sup> Sweetman, *supra* note 6.

<sup>52</sup> *Id.*

<sup>53</sup> Lucy Delap, 'For ever and ever': *Child-raising, domestic workers and emotional labour in twentieth century Britain*, 3 STUDIES IN THE MATERNAL 2 (2011).

<sup>54</sup> *See id.*

Care work is undervalued as it is equated to a mother's labour stemming from love and care. Ironically, when being performed by a domestic worker, it is seen only as outsourcing of labour, in ignorance of the 'love and care' that justified the under-valuation. The 'care worker' while entrusted with caring for the child, is treated as the help, who only receives compensation for physical labour. There is no accounting for the emotional labour invested, the detachment of care-taking labour from care justifies another level of emotional exploitation. When 'caring feelings' is a part of the job description, and forging of emotional ties a logical corollary, to view this form of employment relation as purely contractual is not accurate and misses this defining characteristic of care work. This is discussed further in Part IV where we assess the contractual and fictive kin models to assess this form of work.

The domestic care industry is thus inherently social, enmeshed in a web of interpersonal relationships. It is not like other forms of formal and public employment that typically have a 'professional code of conduct', an expectation of 'workplace ethic', and deal with goods and professional services. This form of work thus must be understood as domestic carework, but the fact that it is different does not in any manner tantamount to it being inferior to other forms of work – in many ways, it is necessary for a productive, egalitarian society.

ILO's definition of domestic work as work performed in and for a household(s) is wide enough to accommodate for flexibilities. However, it needs to be understood in the 'caring labour' framework. There needs to be an acknowledgement of the emotional and caring labour involved, and all policy discourses need to accommodate for this understanding. This may not be incorporated into the definition, necessitating caring labour as a pre-requisite for domestic work, as this would bring in subjectivities of interpretation, and may make the framework exclusionary. However, this distinction needs to be understood for policy-makers so as to understand the distinctiveness of the subject matter of regulation.

As will become clear from the discussion in the next section, for any regulation to be effective, it needs to account for the peculiarities of such work and cannot be equated to other forms of industrial employment. The regulatory approach so far has not been able to account for this difference and has thus seen little success.

### III. EXPLOITATION AND THE REGULATORY RESPONSE

Despite the sheer number of people employed in the domestic work industry, it is largely informal and unregulated.<sup>55</sup> Along with all the problems that

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<sup>55</sup> Anti-Slavery International, *Joint Submission for the Universal Periodic Review of India – 3rd cycle*, September 2013, available at <http://www.antislavery.org/wpcontent/uploads/2017/01/>

plague the informal sector, there are several other practices that place domestic care workers in a position of greater vulnerability than the members of the organised labour sector. This part discusses some of these issues that plague the domestic workers, including exploitation and abuse of domestic labour, discrimination based on caste, religion or gender, the peculiar position of migrant workers and child abuse. These are further compounded by the lack of an adequate system of state protection. In this part, we explore some major factors that contribute to and are manifestations of such abuse.

### A. LABOUR ABUSE AND EXPLOITATION

The Indian domestic work industry is riddled with exploitative and discriminatory practices, some of which include unpaid wages, long working hours with little to no breaks, undefined nature of employment and precariousness of employment in addition to confinement in the workplace.<sup>56</sup> There is no concept of paid or sick leave and workers are exposed to long hours of hazardous employment.<sup>57</sup>

Moreover, the domestic work industry does not require specialised skill, and on-the-job training is common. (This is however not to say that it is devoid of human skill, but merely that it does not require technical expertise.) This opens the industry up to a large pool of potential workers, and a large number of people are readily available as replacement,<sup>58</sup> thus leaving the workers with little bargaining power. This is acclimated by the inaccessibility to the few existing legal remedies, further exacerbated by the lack of education which pushes domestic workers to a situation of marginal existence.<sup>59</sup>

When workers demand a change in working conditions or even request remuneration for work done, employers may simply reject the request or

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asi\_and\_partners\_submission\_india\_upr-1.pdf (Last visited on August 27, 2017).

<sup>56</sup> See International Labour Organisation, *Indispensable Yet Unprotected: Working Conditions of Indian Domestic Workers at Home and Abroad*, 28, Fundamental Principles and Rights at Work Branch (June 25, 2015), available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_378058.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_378058.pdf) (Last visited on August 24, 2017); International Labour Organisation, *India: Decent work for domestic workers*, January 7, 2010, available at [http://www.ilo.org/asia/publications/WCM\\_041954/lang--en/index.htm](http://www.ilo.org/asia/publications/WCM_041954/lang--en/index.htm) (Last visited on August 24, 2017).

<sup>57</sup> Shraddha Chigateri, Mubashira Zaidi & Anvesha Ghosh, *Domestic Worker Mobilisations in India— Work Like Any Other, Work Like No Other*, available at <http://www.unrisd.org/indiareport-chapter4> (Last visited on February 4, 2018).

<sup>58</sup> Parvati Raghuram, *Interlinking Trajectories: Migration and Domestic Work in India* in GENDER, MIGRATION AND DOMESTIC SERVICE (J. H. Momsen, 1999); Utkarsh Agrawal & Shailija Agarwal, *Social Security for Domestic Workers in India*, 14 SOCIO-LEGAL REV. 30 (2018).

<sup>59</sup> See Devon W. Carbodo, *Race to the bottom*, 49 UCLA L. REV. 1283-313 (2002); Vimala M, *Socio-Economic Status of Domestic Women Servants - A Case Study of Thrissur Corporation*, available at <http://www.cds.ac.in/krcpds/report/vimala.pdf> (Last visited on April 30, 2017).

even go to the extent of subjecting the worker to physical abuse.<sup>60</sup> Even otherwise, physical and even sexual abuse is common.<sup>61</sup> Considering that domestic workers spend a significant amount of time inside the private home of the employer, they are particularly vulnerable in areas of abuse including physical and sexual abuse, the situation being far worse for female domestic workers.<sup>62</sup> A 2012 study<sup>63</sup> conducted by Oxfam India & Social and Rural Research institute found that 23% of the women most vulnerable to workplace harassment, belong to the domestic worker category. More often than not, no action was taken against the harassment. This is mainly due to fear losing their job which they desperately need for income, absence of an efficient complaint redressal mechanism, absence of knowledge of any redressal mechanism in place and in addition to all these factors, the perpetual fear of getting stigmatised in the community, which prevents them from changing employment.<sup>64</sup>

Domestic workers are often subject to conditions similar to bonded labour and slavery.<sup>65</sup> The workers are heavily underpaid and, in addition to this, are subject to very long working hours. The very low wages being paid to domestic worker are often unable to sustain the worker to access their basic needs.<sup>66</sup> Workers are even denied basic comforts like a bed to sleep on and are often made to sleep on the floor.<sup>67</sup> Given the less-than subsistence level of wages, they have

<sup>60</sup> Rajiv Gandhi Institute for Contemporary Studies, *Domestic Workers and Policy Discourse in India*, September 21, 2017, available at <http://www.rgics.com/wp-content/uploads/policy-issue-briefs/Issue-Brief-Domestic-Workers-and-Policies-September-2017.pdf> (Last visited on November 11, 2017).

<sup>61</sup> The Guardian, *The Global Plight of Domestic Workers: few rights, little freedom, frequent abuse*, March 17, 2015, available at <https://www.theguardian.com/global-development/2015/mar/17/global-plight-domestic-workers-labour-rights-little-freedom-abuse> (Last visited on May 29, 2018).

<sup>62</sup> *Id.*; Human Rights Watch, *Psychological, Physical, and Sexual Abuse*, April 24, 2008, available at <https://www.hrw.org/reports/2008/saudi-arabia0708/6.htm> (Last visited on January 6, 2018); Amnesty International, *Foreign domestic workers in Qatar: Shocking cases of deception, forced labour, violence*, April 23, 2014, available at <https://www.amnesty.org/en/latest/news/2014/04/foreign-domestic-workers-qatar-shocking-cases-deception-forced-labour-violence/> (Last visited on January 6, 2018).

<sup>63</sup> Oxfam India, *Thorny Transition-Women's Empowerment and Exposure to Violence in India*, June 2014, available at <https://www.oxfamindia.org/sites/default/files/WPI0Thorny%20transition%20final.pdf> (Last visited on February 12, 2018).

<sup>64</sup> Martha Farrell Foundation, *Sexual Harassment of Domestic Workplaces Workers at their Workplaces*, available at [http://www.marthafarrellfoundation.org/uploaded\\_files/pdf\\_files/1529667465\\_First%20report.pdf](http://www.marthafarrellfoundation.org/uploaded_files/pdf_files/1529667465_First%20report.pdf) (March 25, 2019).

<sup>65</sup> Verfasst Von Wipolakademie, *Working Under Slavery-like Conditions: Migrant Domestic Workers in the UK*, October 20, 2014, available at <https://blog.wipol.at/2014/10/20/working-under-slavery-like-conditions-migrant-domestic-workers-in-the-uk/> (Last visited on December 15, 2017); Anti-slavery organisation, *Domestic Slavery*, January 31, 2016, available at <https://www.antislavery.org/slavery-today/domestic-work-and-slavery/> (Last visited on December 15, 2017).

<sup>66</sup> International Labour Organisation, *Why Domestic Worker's Wages are often very Low*, available at [http://www.ilo.org/global/topics/wages/minimum-wages/domestic-workers/WCMS\\_438267/lang-en/index.htm](http://www.ilo.org/global/topics/wages/minimum-wages/domestic-workers/WCMS_438267/lang-en/index.htm) (Last visited on May 30, 2018).

<sup>67</sup> Wipolakademie, *supra* note 65.

to take loans from the employer.<sup>68</sup> Employers exploit this scenario, inflate the debt with charges, making it impossible for the worker to pay back and thus trapping the worker in a vicious debt cycle.<sup>69</sup> The employers may also withhold or delay the pay check leaving the worker completely dependent on the employer for their basic needs. Even holidays promised in the initial working arrangements are not extended to the domestic worker.<sup>70</sup> Employers also confiscate the legal documentation of workers (especially in cases of migrant domestic workers), drastically reducing their personal freedom since they are now unable to leave the country and seek alternative employment elsewhere.<sup>71</sup>

Unlike in many other employments where organisation or unionisation may help, a number of difficulties arise when trying to organise and unite domestic workers under the banner of trade unions or worker groups.<sup>72</sup> The main hurdles presumably include lack of time off, fear of both employers and the public authorities. This is worse for live-in domestic workers who are prone to more control by the employers and often depend on the employers for food and sustenance. These factors often render traditional organising strategies ineffective. From a broader perspective, the view that domestic workers who are mostly women are not employees but 'rather part of the family', often leads to their rights and contributions as workers not being recognised. The domestic worker is thus forced to accept conditions of services, often skewed in favour of the employer.<sup>73</sup>

Therefore, the lack of collective bargaining, coupled with oversupply of labourers,<sup>74</sup> has pushed domestic workers into a race to the bottom,<sup>75</sup> solely benefitting the relatively well-off employer at the cost of the vulnerable domestic workers.<sup>76</sup> As

<sup>68</sup> Human Rights Law Network, *National Domestic Workers Welfare Trust*, available at <http://www.hrln.org/hrln/labour-rights/pils-a-cases/269-national-domestic-workers-welfare-trust-vs-union-of-india-.html> (Last visited on November 13, 2017).

<sup>69</sup> Mariam Seeday-Khan, Gunasekharan Dharmaraja & Sinthemba Sidloyi, *A New Form of Bonded Labour: A Comparative Study between Domestic Workers of South Africa and India*, March 17, 2015, available at [https://www.researchgate.net/publication/273682487\\_A\\_New\\_Form\\_of\\_Bonded\\_Labour\\_A\\_Comparative\\_Study\\_between\\_Domestic\\_Workers\\_of\\_South\\_Africa\\_and\\_India](https://www.researchgate.net/publication/273682487_A_New_Form_of_Bonded_Labour_A_Comparative_Study_between_Domestic_Workers_of_South_Africa_and_India) (Last visited on August 12, 2017).

<sup>70</sup> Huffpost, *Mistreatment of Domestic Worker By Indian Diplomat Is Not Unique*, January 17, 2014, available at [https://www.huffingtonpost.com/rebecca-smith/wage-theft\\_b\\_4619509.html](https://www.huffingtonpost.com/rebecca-smith/wage-theft_b_4619509.html) (Last visited on February 8, 2018).

<sup>71</sup> Human Rights Watch, *Hidden in the Home*, June 1, 2001, available at <https://www.hrw.org/report/2001/06/01/hidden-home/abuse-domestic-workers-special-visas-united-states> (Last visited on June 15, 2018).

<sup>72</sup> Society for Labour and Development, *India's Labour Law Changes*, 29, (July 2016), available at [http://actionaid.org/sites/files/actionaid/e\\_book\\_indias\\_labour\\_law\\_final\\_1.pdf](http://actionaid.org/sites/files/actionaid/e_book_indias_labour_law_final_1.pdf) (Last visited on November 24, 2017).

<sup>73</sup> Indika Alliance, *Domestic Workers in India*, available at <http://www.indikaalliance.org/domestic-workers-in-india/> (Last visited on December 12, 2017).

<sup>74</sup> Raghuram, *supra* note 58.

<sup>75</sup> Carbodo, *supra* note 59.

<sup>76</sup> Bipul Hazarika, et al., *Indian Women: Rights, Economic Position and Empowerment*, CENTRE FOR WOMEN'S STUDIES (2002); Ragini Bhuyan, *Who'll Cry for Domestic Workers?* LiveMint, available at <http://www.livemint.com/Politics/XERWJTd0p4JhFzp6mEXjWK/>

a result, domestic workers constitute one of the most exploited classes of workers in India.<sup>77</sup>

## B. CASTE, RELIGION AND GENDER

The situation is further complicated by realities of caste, class, religion and gender.<sup>78</sup> Caste and religious differences set up hierarchical and wage differences in domestic employment. Often domestic workers are considered to occupy lower rungs in the employment hierarchy, and even within them, those that engage in activities like cleaning are not allowed to take up tasks which are considered superior, like cooking, due to difference in social perception, mainly based in caste.<sup>79</sup> Domestic workers belonging to lower castes are more prone to discrimination in the employer's home – they are not allowed to use toilet facilities or drinking water, and are made to use different utensils.<sup>80</sup> On a more institutional level, this bias based in caste or religion is apparent in how the police and other state officials tend to dismiss or overlook the concerns or complaints of such workers.<sup>81</sup>

Religion-based factors also compound the abused faced in several ways. Workers of certain religion often find difficulty in gaining employment, due to employers' biases.<sup>82</sup> Domestic workers, especially the more vulnerable migrant

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Wholl-cry-for-domestic-workers.html(last visited April 30, 2017); Pankhuri Tandon, *Domestic Workers: How to Give Them Their Due*(Centre for Civil Society, Working Paper No. 278, 2012, available at [http://ccs.in/internship\\_papers/2012/278\\_domestic-workers\\_pankhuri-tandon.pdf](http://ccs.in/internship_papers/2012/278_domestic-workers_pankhuri-tandon.pdf) (Last visited April 30, 2017); Neetha N., *Minimum Wage Setting Practices in Domestic Work: an Inter-State Analysis*, International Labour Office (2015) ('Neetha N.')(Even where minimum wages are prescribed for domestic workers, they are generally lower than other similarly placed workers).

<sup>77</sup> Human Rights Watch, *Decent Work for Domestic Workers*, July 20, 2009, available at [https://www.hrw.org/news/2009/07/20/decent-work-domestic-workers#\\_ftn1](https://www.hrw.org/news/2009/07/20/decent-work-domestic-workers#_ftn1) (Last visited on August 25, 2017); N. Neetha, *Making of Female Bread Winners: Migration and Social Networking of Women Domestic in Delhi*, ECONOMIC AND POLITICAL WEEKLY, April 24, 2004; Anti-Slavery Organisation, *India: Domestic Workers*, available at <https://www.antislavery.org/what-we-do/where-we-work/india-domestic-workers/> (Last visited on August 24, 2017).

<sup>78</sup> United Nations, *Rights for Domestic Workers*, February 20, 2014, available at <http://in.one.un.org/page/rights-for-domestic-workers/> (Last visited on August 26, 2017).

<sup>79</sup> Sengupta, Nilanjana and Sen, Samita, *Bargaining over Wages- Part time Domestic Workers in Kolkata*, 48 ECONOMIC AND POLITICAL WEEKLY (October 26, 2013).

<sup>80</sup> Lakshmi Srinivas, *Master-Servant Relationship in Cross-Cultural Perspective*, 30 ECONOMIC AND POLITICAL WEEKLY (February 4, 1995).

<sup>81</sup> *Clear Bias against Domestic Workers*, 52 ECONOMIC AND POLITICAL WEEKLY (July 22, 2017).

<sup>82</sup> The Hindu, *Domestic Workers no Longer Drawn only From Lower Castes: Study*, January 10, 2015, available at <http://www.thehindu.com/news/cities/bangalore/domestic-workers-no-longer-drawn-only-from-lower-castes-study/article6773704.ece> (Last visited on June 15, 2018).

workers are often targeted for religious conversions.<sup>83</sup> They may even be forced to give up their freedom to practice the religion of choice.<sup>84</sup>

A recent ILO estimate noted that almost 83% of the worldwide domestic workers are women, so gender specific problems and biases in the industry become inevitable.<sup>85</sup> These include gender based social discrimination, culminating in under-valuation of work, and systemic sexual abuse.<sup>86</sup> In a recent survey in and around Delhi, over twenty nine percent domestic workers reported being sexually harassed at work.<sup>87</sup> Factors such as invisibility and illiteracy compound the gender-based vulnerabilities and also deter reporting.

### C. CHILD LABOUR

The large number of child domestic workers only exacerbates the gravity of the problem.<sup>88</sup> In India, despite the fact that domestic work has been included as a hazardous occupation in the List of Hazardous Child Labour by the Government of India, employment of child domestic workers is common.<sup>89</sup> The Child Labour (Prohibition and Regulation) Act, 1986, has reduced the threshold by allowing children above the age of 14 to be employed as domestic workers.<sup>90</sup> A study conducted by National Commission for protection of Child Rights found that around twenty three percent of all working children are employed in the domestic

<sup>83</sup> Institute for Study of Islam in the Modern World, *Religious Conversion of Filipino Domestic Helpers in Hong Kong*, available at [https://openaccess.leidenuniv.nl/bitstream/handle/1887/17350/ISIM\\_4\\_Religious\\_Conversion\\_of\\_Filipino\\_Domestic\\_Helpers\\_in\\_Hong\\_Kong.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/17350/ISIM_4_Religious_Conversion_of_Filipino_Domestic_Helpers_in_Hong_Kong.pdf?sequence=1) (Last visited on June 15, 2018).

<sup>84</sup> United Nations Human Rights Office of the High Commissioner, *The Human Rights of Migrant Domestic Workers in Irregular Situation*, available at <https://www.ohchr.org/EN/Issues/Migration/Pages/GlobalAction.aspx> (Last visited on June 15, 2018); See also Bahrain Center for Human Rights, *Bahrain: Domestic Workers Freedom of Religion and Worship Rights*, September 6, 2016, available at <http://www.bahrainrights.org/en/node/8139> (Last visited on June 15, 2018).

<sup>85</sup> International Labour Office, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (January 9, 2013), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_173363.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf) (Last visited on December 14, 2017).

<sup>86</sup> Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67 (2008).

<sup>87</sup> PTI, *Over 29% Domestic Workers Reported Sexual Harassment at Work: Survey*, THE WIRE, September 11, 2018, available at <https://thewire.in/gender/over-29-domestic-workers-reported-sexual-harassment-at-work-survey> (Last visited on September 15, 2018).

<sup>88</sup> Scroll, *Underage Children as Domestic Workers: Middle-Class India's Greatest Shame?*, April 16, 2015, available at <https://scroll.in/article/720811/underage-children-as-domestic-workers-middle-class-indias-greatest-shame> (Last visited on May 30, 2018).

<sup>89</sup> Child Labour (Prohibition and Regulation) Act, 1986; International Labour Organization, *Hazardous Work List*, available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new\\_delhi/documents/genericdocument/wcms\\_486746.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_486746.pdf) (Last visited on May 30, 2018).

<sup>90</sup> SEWA, *supra* note 1.

worker industry.<sup>91</sup> Child labour is intrinsically connected to social and cultural patterns, and is even seen in positive light, especially for girls, and only contributes to the growing problem of child labour in the industry.<sup>92</sup> Poverty, lack of education, and unstable, violent households only add to these numbers.

Children are often paired with agents by their families to be sent off to be placed with employer families.<sup>93</sup> Employer's household is seen as an extended family, building the narrative that such employment provides a protected environment for a child.<sup>94</sup> This is a woefully misguided view. There is certainly an element of care involved, but this does not point to the conclusion that such an environment would be safe for the child. The element of care (emotional labour), which is the basis of considering the household as a safe place (discussed further in Part III), leaves the domestic worker vulnerable to more forms of abuse, since the terms of employment go beyond monetary remuneration, involving personal investment. This may pressure the child to take up unfair forms of employment.<sup>95</sup> Child labour drastically affects the physical, moral and psychological development of the child and is often an irreversible effect.<sup>96</sup> Moreover, several other rights are also threatened, including access to education and health, leisure, recreation and the right to be cared for by parents and regular contact with them for wholesome development of the child.<sup>97</sup>

#### D. MIGRANT WORKERS AND CREATION OF CARE-DEFICITS

Taking from our discussion on 'care' work within households, even domestic care workers, especially live-in workers and migrants, create a care-deficit in their own families.<sup>98</sup> They, however, often do not have the economic resources to fill this care deficit.<sup>99</sup> As a stark contrast to the trickling-down of benefits from the top, there is a 'drain of care' from the bottom of the socio-economic hierarchy.<sup>100</sup> A compelling argument can be made that there is a strong economic

<sup>91</sup> Ministry of Women and Child Development, *National Study on Child Abuse-2007*, available at <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf> (Last visited on February 20, 2019).

<sup>92</sup> SEWA, *supra* note 1.

<sup>93</sup> United Nations Human Rights Office, *supra* note 84.

<sup>94</sup> Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 1 YALE JOURNAL OF LAW & FEMINISM 3 (1990).

<sup>95</sup> International Labour Organization, *Child labour and domestic work*, available at <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm> (Last visited on February 12, 2018).

<sup>96</sup> UNICEF India, *Assessing Child Domestic Labour in India*, available at <http://unicef.in/Story/1139/Assessing-Child-Domestic-Labour-in-India> (Last visited on February 12, 2018).

<sup>97</sup> *Id.*

<sup>98</sup> Dissent, *The Care Deficit*, 2016, available at <https://www.dissentmagazine.org/article/care-deficit-ha-domestic-worker-organizing-history> (Last visited on May 30, 2018).

<sup>99</sup> Speranta Dumitru, *From "brain drain" to "care drain": Women's Labor Migration and Methodological Sexism*, 47 WOMEN STUDIES INTERNATIONAL FORUM (July 19, 2014).

<sup>100</sup> Global Commission on International Migration, *Global Care Chains: A Critical Introduction*, September 11, 2015, available at <http://www.refworld.org/pdfid/435f85a84.pdf> (Last visited on May 30, 2018).



consideration that follows such care deficit.<sup>101</sup> This is particularly worrisome from the perspective of migration, often in circumstances of coercion, economic and otherwise.

An interesting model of this is visible in the country of Philippines where women have strongly responded to the global care deficit.<sup>102</sup> It can be seen that as a result thirty four to fifty percent of the Filipino is sustained by remittance from migrant workers.<sup>103</sup> These figures leave no doubt as to the economic importance. However, children and elderly in such families face disruption of care. Fathers in such countries form the most important part of the substitute care givers.<sup>104</sup> It is seen that despite this, children fare better when the father is displaced for work, even though it translates to the mother taking on more responsibilities and as a result less care for the children and elderly.<sup>105</sup> Children of transnational families where the mother is displaced, repeatedly stress that they lack the emotional comfort and stability and often feel a lacunae.<sup>106</sup>

Family can be seen as an adaptive unit but often even the primary substitute care giver in the family, which is the father, is unable to bridge the gap due to the father himself being immersed in generating additional income. The adaptive behaviour is thus stretched and children are left without care and support mechanism.<sup>107</sup> The 'care gain' in industrialised countries has been seen to leave behind a care-gap for the children and elder family members of these migrant workers.<sup>108</sup> However, some scholars have identified a 'care chain' that evolves in response to the 'care drain' – the migrating caregiver's shoes are filled in either by hiring of domestic care-workers from an even poorer country ('replica model') or

<sup>101</sup> Tinda Rabie, Hester C. Klopper, *Martha J Watson, Relation of socio-economic status to the independent application of self-care in older persons of South Africa*, 2 HEALTH SA GESONDHEID 22 (2016).

<sup>102</sup> International Labour Organization, *Translational Migration of Domestic and Care Workers in Asia Pacific*, available at [apmigration.ilo.org/resources/transnational-migration-of-domestic...care.../file1](http://apmigration.ilo.org/resources/transnational-migration-of-domestic-care.../file1) (Last visited on June 17, 2018).

<sup>103</sup> PubMed, *Sending money home: a mixed-Methods study of remittances by migrant nurses in Ireland*, July 30, 2009, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2726118/#B26> (Last visited on February 9, 2018).

<sup>104</sup> Anca Ghaeus, *Care Drain as an Issue of Global Gender Justice*, 1 ETHICAL PERSPECTIVES 20 (2013).

<sup>105</sup> PubMed, *Transnational families and the family nexus: perspectives of Indonesian and Filipino children left behind by migrant parent*, November 21, 2013, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3836409/> (Last visited on February 9, 2018).

<sup>106</sup> Rhacel Salazar Parrenas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, available at [https://s3.amazonaws.com/academia.edu.documents/3454062/GlobalWomanPhilippines.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1518130212&Signature=FCtuFf5G0st4k7YUMY3KC948Ozw%3D&response-content-disposition=inline%3B%20filename%3DThe\\_care\\_crisis\\_in\\_the\\_Philippines\\_child.pdf](https://s3.amazonaws.com/academia.edu.documents/3454062/GlobalWomanPhilippines.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1518130212&Signature=FCtuFf5G0st4k7YUMY3KC948Ozw%3D&response-content-disposition=inline%3B%20filename%3DThe_care_crisis_in_the_Philippines_child.pdf) (Last visited on February 8, 2018).

<sup>107</sup> *Id.*

<sup>108</sup> See e.g. Helma Lutz, *Domestic workers and migration* in THE ENCYCLOPEDIA OF GLOBAL HUMAN MIGRATION (Immanuel Ness, 2013).

by female members in the wider family or friend circle.<sup>109</sup> This effect is however limited since the family or friend circle have their own families and the transnational children get secondary importance, thus generating the feeling that they were left without a proper surrogate care mechanism, leading to feelings of detachment and emotional anguish.<sup>110</sup> While not enough work has been done in the Indian context, it can be presumed that inter-state and rural to urban migration being common, similar patterns emerge.<sup>111</sup> The domestic care industry then becomes operational on multiple levels.

Instances of Indian migrant domestic workers, both overseas and inter-state, deserve some attention. The fact that they often do not have any acquaintances in the foreign environment coupled with the fact that they often migrate due to instances of unemployment and poverty, leave them particularly vulnerable to abuse.<sup>112</sup> Overseas migration stems from the demand of wealthy countries that are in dire need of filling their low tiers of economic labour and look upon favourably to cheap labour.<sup>113</sup> The women who do migrate overseas are subject to harsh conditions and are in increasingly foreign environments,<sup>114</sup> but they do earn more than what they would have in India even though the wages are far below the minimum wage prescribed by the wealthier societies for the same job profile.<sup>115</sup> Steps such as pre-migration familiarisation and education programs would go a long way particularly since migration for work remains largely unregulated in India.<sup>116</sup>

Further, urban centres also have several illegal migrant workers from neighbouring countries like Bangladesh serving as domestic care workers.<sup>117</sup>

<sup>109</sup> *Id.*; See also A.R. Hochschild, *Global care chains and emotional surplus value* in ON THE EDGE: LIVING WITH GLOBAL CAPITALISM 130–146 (A. Giddens & W. Hutton, 2000).

<sup>110</sup> Parrenas, *supra* note 106.

<sup>111</sup> While international migrants commonly perform domestic care work in countries like Hong Kong, USA, Europe, Singapore, etc., rural to urban migrants are common in India, South America, Philippines, Indonesia, etc. See Sweetman, *supra* note 6; The Hans India, *Challenges associated with domestic workers in India*, August 8, 2017, available at <http://www.thehansindia.com/posts/index/Hans/2017-08-08/Challenges-associated-with-domestic-workers-in-India/317650> (Last visited on January 1, 2018).

<sup>112</sup> Rufina Augustine & Dr. Rupesh Kumar Singh, *Condition & Problems of Female Domestic Workers*, 2 JOURNAL OF SOCIOLOGY AND SOCIAL WORK 4 (2016).

<sup>113</sup> Hans India, *Challenges Associated with Domestic Worker in India*, August 8, 2017, available at <http://www.thehansindia.com/posts/index/Civil-Services/2017-08-08/Challenges-associated-with-domestic-workers-in-India/317650> (Last visited on June 2, 2018).

<sup>114</sup> YaleGlobal, *Migrant Domestic Workers: Working Conditions can Emulate Enslavement*, July 4, 2017, available at <https://yaleglobal.yale.edu/content/migrant-domestic-workers-working-conditions-can-emulate-enslavement> (Last visited on June 15, 2018).

<sup>115</sup> International Labour Organization, *Indispensable yet Unprotected: Working Conditions of Indian Domestic Workers at Home and Abroad*, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_378058.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_378058.pdf) (Last visited on June 15, 2018).

<sup>116</sup> National Domestic Workers' Movement, *Issues of Domestic Workers in India*, available at <http://www.ndwm.org/resources/Issues%20of%20Domestic%20workers%20in%20India.pdf> (Last visited on June 1, 2018).

<sup>117</sup>

These illegalities make them even more vulnerable and lose whatever bargaining power they do amass, in fear of being reported to the authorities.

### E. EXCLUSION FROM REGULATION

Domestic workers are often unable to avail social and other employment benefits extended to other labourers as they are largely excluded from national labour laws in India.<sup>118</sup> The inadequate protection under labour laws and lack of awareness of the few rights available to them,<sup>119</sup> illustrate their vulnerability. This, in addition to the inefficiency of the existing policy approach, is capitalised to further exploit these workers.<sup>120</sup> This emboldens employers to take advantage, often dictating the terms and conditions of the employment without any accountability,<sup>121</sup> and the fact that it is done within the confines of the private homes, keeps it hidden from scrutiny.<sup>122</sup> Their vulnerability is the product of poverty, discrimination and social exclusion, compounded by the ineffective steps taken by the government to remedy the same.<sup>123</sup>

While the campaign for legislative protection and rights-realisation for domestic workers in India has been gaining momentum,<sup>124</sup> state action has been the exception. Pushing past such harsh realities, National Domestic Workers Movement ('NDWM') has successfully transitioned domestic worker associations to trade unions in eleven states.<sup>125</sup> However, change has been slow and government action sparse. While a change in social perception and sensitisation of employers and employees is the need of the hour, social transformation in the context of

<sup>118</sup> Hans India, *Plight of domestic workers*, September 12, 2017, available at <http://www.thehansindia.com/posts/index/Opinion/2017-09-12/Plight-of-domestic-workers-/325871> (Last visited on November 25, 2017).

<sup>119</sup> International Labour Organization, *Working Time of Live-in Domestic Workers*, November 28, 2013, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_230837.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_230837.pdf) (Last visited on December 27, 2017).

<sup>120</sup> International Labour Organization, *Indispensable Yet Unprotected: Working Conditions of Indian Domestic Workers At Home And Abroad*, June 25, 2015, available at [http://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_378058/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/publications/WCMS_378058/lang--en/index.htm) (Last visited on November 7, 2015).

<sup>121</sup> Kamala Sankaran, *Domestic Worker and Fish Worker Consultation Bangalore*, August 23, 2008, available at [http://wiego.org/sites/wiego.org/files/resources/files/fw%20%26%20dw\\_consultation\\_bangalore\\_report.pdf](http://wiego.org/sites/wiego.org/files/resources/files/fw%20%26%20dw_consultation_bangalore_report.pdf), (Last visited on August 24, 2017).

<sup>122</sup> United Nations in India, *Rights for Domestic Workers*, available at <http://in.one.un.org/page/rights-for-domestic-workers> (Last visited on August 24, 2017).

<sup>123</sup> Human Rights Law Network, *supra* note 68.

<sup>124</sup> See National Domestic Workers Movement, available at <http://ndwm.org/> (Last visited on August 24, 2017).

<sup>125</sup> Human Rights Watch, *Claiming Rights: Domestic Workers Movements and Global Awareness for Labour Reform*, October 27, 2013, available at <https://www.hrw.org/report/2013/10/27/claiming-rights/domestic-workers-movements-and-global-advances-labor-reform> (Last visited on June 17, 2018).

practices that are so pervasive and normalised, cannot take place in isolation of legal reform.<sup>126</sup>

Thus, we see that basic labour law protections are not extended to the domestic workers. Employers get away with lopsided terms of employment and exploitative practices as domestic work is shielded from any scrutiny. The lack of bargaining power requires state intervention and a credible threat of sanction in situations of abuse. However, as we see in the next sub-section, the regulatory response has been far from adequate and suffers from several shortfalls.

#### IV. THE EXISTING REGULATORY FRAMEWORK

Despite having voted for ILO's Domestic Workers Convention, 2011,<sup>127</sup> India has not ratified it.<sup>128</sup> This section gives an overview of how the legislature has largely ignored the concerns of domestic workers, similar to the rest of the informal sector.<sup>129</sup> *First*, we look at the failed attempts to pass bills for protection of domestic workers, while identifying the change in the content of these bills. *Second*, we trace how there has been an emerging trend of extending existing labour laws to the domestic workspace while identifying its inadequacies. *Third*, we analyse how the legislative approach has several shortfalls, and identify the reasons for the same.

##### A. ATTEMPTS AT LEGISLATING

The earlier attempts at national legislation did not find much support – both the Domestic Worker (Conditions of Service) Bill, 1959, and the House Workers (Conditions of Service) Bill, 1989, neither formed the subject-matter of much discussion nor were eventually enacted into law. There was little support from the state governments, and concerns such as implementation, monitoring and enforcement were cited as grounds.<sup>130</sup>

The first concrete attempt was made when the Housemaids and Domestic Workers (Conditions of Service and Welfare Bill), 2004, was introduced

<sup>126</sup> Mark Darebloom-Griffith, *The Law as a Tool for Social Reform*, available at [http://www.jus.umu.se/digitalAssets/79/79991\\_mark-darebloom-griffith.pdf](http://www.jus.umu.se/digitalAssets/79/79991_mark-darebloom-griffith.pdf) (Last visited on June 2, 2018).

<sup>127</sup> Live Mint, *New rights for domestic workers*, July 5, 2011, available at <http://www.livemint.com/Politics/RhXFz7Yo2vLiAGSxY37wql/New-rights-for-domestic-workers.html> (Last visited on February 14, 2018).

<sup>128</sup> International Labour Organisation, *C189 - Domestic Workers Convention, 2011 (No. 189)*, available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:2551460:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:2551460:NO) (Last visited on August 24, 2017).

<sup>129</sup> Sankaran, *supra* note 12.

<sup>130</sup> Rajiv Gandhi Institute for Contemporary Studies, *Domestic Workers and Policy Discourse in India*, September 21, 2017, available at <http://www.rgics.com/wp-content/uploads/policy-issue-briefs/Issue-Brief-Domestic-Workers-and-Policies-September-2017.pdf> (Last visited on November 11, 2017).

in the Rajya Sabha as a private member's bill.<sup>131</sup> This bill put the responsibility on the State and the Central Government to ensure that the workers falling under its jurisdiction are mandatorily registered.<sup>132</sup> This bill also required the government to frame regulations to provide domestic workers with sufficient employment opportunities,<sup>133</sup> medical benefits<sup>134</sup> and other social welfare measures<sup>135</sup>. To ensure compliance with the registration norms, employers who were engaging unregistered workers were met with heavy fines including fine and simple imprisonment.<sup>136</sup> However, besides the registration element,<sup>137</sup> the bill did not provide any guidelines on substantive protections. Furthermore, the bill did not provide any instructions on ensuring proper implementation; rather it was left to the discretion of the State and Central governments, already known for their inefficiency and apathy.<sup>138</sup> It however, was not passed by the Parliament.

In 2008, the issue formed part of public discussion,<sup>139</sup> and several draft bills were floated, including by the National Commission for Women's – Domestic Workers (Registration, Social Security and Welfare) Bill, 2008, as well as the National Campaign Committee for Unorganized Sector Worker's – Domestic Workers (Regulation of Employment, Conditions of Work, Social Security and Welfare) Bill, 2008. Several other bills were introduced over the years,<sup>140</sup> with many of them seeking to extend existing labour law protections to domestic workers. The Domestic Workers (Decent Working Conditions) Bill, 2015, for instance, much like the Domestic Workers (Condition of Service) Bill, 1977, sought to include them under the Industrial Dispute Act, 1947. None of these have been enacted into law.

However, two developments mark a positive change in this trend. First, at the State level, the Maharashtra Domestic Workers Welfare Board Act, 2008, was enacted. It envisages the setting up of a Domestic Labour Welfare Board with equal representation from employers and domestic workers and is tasked with providing benefits to the latter for cases of accidents, financial assistance for their

<sup>131</sup> Housemaids and Domestic Workers (Conditions of Service and Welfare Bill), 2004(This Bill was never enacted).

<sup>132</sup> The Housemaids and Domestic Servants (Conditions of Service and Welfare) Bill, 2004, 35 of 2004, Cl. 3.

<sup>133</sup> The Housemaids and Domestic Servants (Conditions of Service and Welfare) Bill, 2004, 35 of 2004, Cl. 6.

<sup>134</sup> *Id.*

<sup>135</sup> The Housemaids and Domestic Servants (Conditions of Service and Welfare) Bill, 2004, 35 of 2004, Cl. 7.

<sup>136</sup> *Id.*, Cl. 8.

<sup>137</sup> *Id.*, Cl. 2.

<sup>138</sup> See JEAN DREZE AND AMARTYA SEN, *AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS* (2013).

<sup>139</sup> United Nations Development Programme, *Synthesis of Important Discussions on Livelihood and Microfinance Issues of Domestic Workers*, available at <http://www.undp.org/content/dam/india/docs/poverty/synthesis-of-important-discussions-on-livelihood-and-mf-issues-r.pdf> (Last visited on December 12, 2017).

<sup>140</sup> *Id.*

children, medical expenses, maternity benefits etc.<sup>141</sup> However, it does not go far enough, and has several roadblocks to effective implementation. *First*, the benefits are contingent upon registration under the Act, but the onus of registration is upon the worker, who is required to submit all prescribed documents and a fee.<sup>142</sup> Hidden within private homes, unaware of such beneficial provisions and often lacking necessary paperwork, this excludes most of the domestic workforce. *Second*, it requires the worker to contribute to the fund,<sup>143</sup> and a financial waiver is based solely on the discretion of the Board,<sup>144</sup> with no guidelines to exercise such discretion.

At the national level, the government constituted a task force in 2009 for domestic workers, entrusted with making recommendations for a policy framework.<sup>145</sup> It came up with several reports and recommendations.<sup>146</sup> The draft national policy for domestic workers calls for promoting awareness of domestic work as a “legitimate labour market activity” recommending amendments to existing labour laws, such that domestic workers benefit from labour rights that other workers enjoy.<sup>147</sup> In this backdrop, there have been a few steps taken by the government recently, whereby it seeks to extend the application of a few formal sector laws to include domestic workers – those relating to minimum wages and sexual harassment, as well as welfare schemes adopted by the government.<sup>148</sup> This seems to have brought the issues plaguing the sector to the forefront, with some progress being made. More recently, several new bills have been introduced and are pending before the legislature. Member of Lok Sabha, Dr. Shashi Tharoor introduced the Domestic Workers Welfare Bill, 2016.<sup>149</sup> It includes within its ambit both migrant and minor domestic workers,<sup>150</sup> prescribes working conditions and

<sup>141</sup> Hindustan Times, *Now, Maharashtra domestic workers to get benefits of minimum wages act*, August 19, 2013, available at <https://www.hindustantimes.com/mumbai/now-maharashtra-domestic-workers-to-get-benefits-of-minimum-wages-act/story-W69wX4CrZVqMpuZBTEdN7H.html> (Last visited on August 3, 2018).

<sup>142</sup> United National Development Program, *Synthesis of Important Discussion on Livelihood and Microfinance Issues of Domestic Worker*, available at <http://www.undp.org/content/dam/india/docs/poverty/synthesis-of-important-discussions-on-livelihood-and-mf-issues-r.pdf> (Last visited on August 3, 2018).

<sup>143</sup> The Maharashtra Domestic Workers Welfare Board Act, 2008, §16.

<sup>144</sup> *Id.*

<sup>145</sup> Director General Labour Welfare, Ministry of Labour and Employment, *Final Report of the Task Force on Domestic Workers*, September 12, 2011, available at [http://www.nirmana.org/pdf-national\\_policy\\_on\\_domestic\\_work\\_2011.pdf](http://www.nirmana.org/pdf-national_policy_on_domestic_work_2011.pdf) (Last visited on February 14, 2018).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> The Hindu, *Focus on Issues faced by Domestic Workers*, June 19, 2012, available at <http://www.thehindu.com/news/cities/Thiruvananthapuram/focus-on-issues-faced-by-domestic-workers/article3546319.ece> (Last visited on May 30, 2018); Business Line, *Government Working on a National Policy for Domestic Workers*, March 12, 2018, available at <https://www.thehindu-businessline.com/economy/policy/govt-working-on-national-policy-for-domestic-workers/article23101391.ece> (Last visited on May 30, 2018).

<sup>149</sup> The Domestic Workers’ Welfare Bill, 2016 (Bill no. 204 of 2016).

<sup>150</sup> The Hindu, *It’s not help, it’s work*, July 14, 2017, available at <http://www.thehindu.com/todays-paper/tp-opinion/its-not-help-its-work/article19274069.ece> (Last visited on December 2, 2017).

terms of employment, mandates collection of a cess from employers for maintenance of a social security fund and requires employers/placement agencies to register employees.<sup>151</sup> Notably, this bill also proposes the expansion of the major labour law provisions to include domestic workers. The bill is still pending in the Parliament.<sup>152</sup>

Oscar Fernandes introduced the Domestic Workers (Regulation of Work and Social Security) Bill, 2017.<sup>153</sup> An identical bill was also introduced a few months later by Member of Lok Sabha, Mr. Sankar Prasad Datta.<sup>154</sup> Among other things, these prescribe compulsory duties of employers and placement agencies, and perceive migration as a cause of further marginalisation – requiring the district board to keep a record of the domestic workers' mobility. These measures seek to include domestic workers in most major labour laws. The bill is still pending in the Parliament.

An analysis of the various bills over the course of the last few decades illustrates a significant shift in the approach towards the regulation of domestic work, which could probably be traced to the progress made in the discourse in civil society circles, and to the domestic workers' rights movements which is gaining momentum steadily.<sup>155</sup> From earlier bills, that only sought to regulate basic labour entitlements such as work conditions and hours, the more recent bills go further in recognising worker's rights, duties of employers, and even envisage a distinct institutional mechanism. The lack of political will and support, in addition to there being little public discussion have so far prevented from any of these being passed in Parliament.<sup>156</sup> Thus, there still exists a major legislative void in for the legal protection of domestic workers.

<sup>151</sup> *Id*; National Platform for Domestic Workers, *Domestic Workers Regulation of Work and Social Security Bill*, available at <http://www.nirman.org/Documents/Domestic%20Workers%20Regulation%20of%20Work%20and%20Social%20Security%20Bill-2017.pdf> (Last visited on March 25, 2019).

<sup>152</sup> The Quint, *Prioritise Tharoor's Bill to Give Domestic Workers Legal Security*, July 17, 2017, available at <https://www.thequint.com/news/india/mahagun-noida-law-domestic-workers-welfare> (Last visited on May 30, 2018).

<sup>153</sup> The Domestic Workers (Regulation of Work and Social Security) Bill, 2017 (Introduced in the Rajya Sabha by Mr. Oscar Fernandes on 7th April 2017).

<sup>154</sup> The Domestic Workers (Regulation of Work and Social Security) Bill, 2017 (Introduced in the Lok Sabha by Shri Sankar Prasad Datta on 21<sup>st</sup> July 2017).

<sup>155</sup> The Hindu, *We too are professionals*, October 20, 2017, available at <http://www.thehindubusinessline.com/specials/india-interior/we-too-are-professionals/article9916917.ece> (Last visited on January 25, 2018).

<sup>156</sup> Divyansh Hanu, *Situation of Domestic Workers in India: What needs to Change?*, September 6, 2017, available at <http://www.lawyerscollective.org/the-invisible-lawyer/situation-domestic-workers-india-needs-change> (Last visited on May 30, 2018); Wiego law & Informality Project, *Domestic Worker's Laws and Legal issues in India*, November 2014, available at <http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-India.pdf> (Last visited on May 30, 2018).

## B. EXTENSION OF FORMAL SECTOR LAWS

However, as the following discussion will illustrate, the extension of these laws, designed for the formal workspace, do not fit the unorganised domestic workspace. These extensions are also informed by stereotypes associated with the nature of work. While certain protections like minimum wages and prohibition on sexual harassment need to be similarly recognised, we postulate how these need to be adapted to suit the peculiarities of the domestic care industry that exposes workers to several additional vulnerabilities not envisaged by these laws.

### 1. Minimum Wages Act, 1948

Domestic workers are commonly paid much less than the minimum wage.<sup>157</sup> Some states added domestic work to the schedule under the Minimum Wages Act, 1948.<sup>158</sup> However, this has been done only by eleven states, and the more populous states such as Uttar Pradesh are yet to notify.<sup>159</sup> Further, the notifications define domestic work as a sum of the tasks undertaken, and not in terms of an employer-employee relation.<sup>160</sup> First, this is in complete ignorance of live-in workers, who do not have delineated working hours, as a result of which quantification of tasks undertaken is not possible. Second, the nature of domestic work, as discussed, is largely overlapping,<sup>161</sup> making it difficult to delineate jobs such as child-rearing, looking after the household, etc., into specific tasks. A task-based fixation of wage is thus inadequate. Third, no form of such domestic work is classified as skilled, and largely reflects only the gendered, traditional understanding of domestic work.

While on one hand the stress on hourly payment leaves the position of live-in workers ambiguous, the ignorance of overtime pay leaves both live-in and part-time domestic workers open to over-exploitation.<sup>162</sup> The method of calculation is complicated,<sup>163</sup> and reflects a fundamental flaw when designed for a sector where illiteracy characterises the workforce.<sup>164</sup> Across states, there is a systematic

<sup>157</sup> NimushakaviVasanthi, Addressing Paid Domestic Work: A Public Policy Concern, *ECONOMIC & POLITICAL WEEKLY* Vol XLVI No 43 (2011)(Even when minimum wages are notified, it is often considerably lower than similar ones in the informal sector).

<sup>158</sup> Labour Bureau Chandigarh, Ministry of Labour and Employment, Government of India, Report on the Working of the Minimum Wages Act, 1948 for the Year 2013, available at [http://labourbureau.nic.in/MW\\_2013\\_final\\_revised\\_web.pdf](http://labourbureau.nic.in/MW_2013_final_revised_web.pdf) (Last visited on August 24, 2017)(The following states have extended applicability of Minimum Wages Act, 1948 to domestic workers- Punjab, Karnataka, Haryana, Dadra and Nagar Haveli, Andhra Pradesh, Bihar, Rajasthan, Kerala, Meghalaya, Tripura, Odisha and Jharkhand).

<sup>159</sup> *Id.*

<sup>160</sup> Neetha N, *Minimum Wages for Domestic - Work Mirroring Devalued Housework*, 52 *ECONOMIC AND POLITICAL WEEKLY* (March 18, 2017).

<sup>161</sup> See Part II of this paper.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*



devaluation, where minimum wages for domestic work are pegged lower than that for sweeping and cleaning workers employed outside private homes – reinstating the view that housework is not as productive as public employment, even when tasks performed may be similar.<sup>165</sup> Unlike other violations under the Act, states have imposed limitations on inspections within the home – inspectors are not at liberty to enter any residential location; additional requirements such as specific directions from the commissioner or a written complaint have been imposed.<sup>166</sup>

However, the implementation so far has been abysmal.<sup>167</sup> The State's unwillingness and cautious approach in inspecting households does not help.<sup>168</sup> Overpopulation and widespread poverty also means that there are always those willing to work for even lesser wage, there being little incentive to complain.<sup>169</sup> Minimum wage notifications are also riddled by lack of awareness of all those involved – the workers, the employers as well as labour inspectors, further adding to the myriad of challenges concerning its implementation. Unlike trade unions that could be notified, or industry employers who could be informed, awareness generation and inspection have to cater to the peculiarities of the employment – hidden within private homes, without registration, at times even portrayed to be a family member.<sup>170</sup> The existing mechanisms under the Act that are designed to cater to public workspaces are clearly insufficient. Until there is a shift in the perception of domestic care work, a legislation reflecting the gendered and social stereotypes of housework will be of little help.

## 2. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

This Act seeks to protect domestic workers through the establishment of a district level grievance redressal mechanism 'the Local Complaints Committee', which can grant monetary compensation.<sup>171</sup> This however, does not address the more serious sexual transgressions beyond the limited definition

<sup>165</sup> The Scroll, *Government employees earn more than private sector ones*, June 30, 2016, available at <https://scroll.in/article/810922/government-employees-earn-much-more-than-private-sector-ones-but-only-at-the-entry-level> (Last visited on February 14, 2018).

<sup>166</sup> Govt. of Karnataka, Ministry of Labour, No.- KAE/15/ LMW/04 (March 12, 2004); Neetha, *supra* note 160.

<sup>167</sup> *Id.* (In 2013, Rajasthan and Jharkhand launched 3 and 8 prosecutions respectively under the Minimum Wages Act, 1948 across all sectors (including formal and informal employment).

<sup>168</sup> Neetha N., *Minimum Wage Setting Practices in Domestic Work: an Inter-State Analysis*, International Labour Office (2015).

<sup>169</sup> United Nations Development Program, *Human Development Report*, available at <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (Last visited on May 31, 2018).

<sup>170</sup> See Part VA of this paper for cross reference to discussion on fictive kin model.

<sup>171</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Chapter III.

of harassment in the Act.<sup>172</sup> Proof of employment too is difficult to produce.<sup>173</sup> However, employment within the home gives an employer much more liberty to violate bodily autonomy than in a formal workspace. Their dependence on the employer, especially for live-in workers, keeps them from taking action, fearing unemployment and homelessness.<sup>174</sup> Coupled with this is the unwillingness to harm the care-receiver or members of the family that they might develop a bond with, that will disincentive filing of official complaints.<sup>175</sup> Even when reported, the presence of witnesses within the private home is unlikely, as opposed to a traditional office that the Act envisages.

Notably, the Women and Child Development Ministry had opposed inclusion of domestic workers within the Act, citing “practical difficulties in applying the law within the household, especially as no code of conduct could be laid down within the household”.<sup>176</sup> The Protection of Women from Domestic Violence Act, 2005, would illustrate that this concern is largely unfounded. While the extension was allowed, the existing law, holding domestic workers to the same standard (for instance, in terms of evidentiary burden), provides little respite.<sup>177</sup> The enactment also remains mostly unknown and unimplemented.<sup>178</sup>

### 3. The Unorganized Workers’ Social Security Act, 2008

The Unorganized Workers’ Social Security Act includes within its ambit domestic workers.<sup>179</sup> The main focus of the bill was to take steps to ensure the social security and welfare of the members of the unorganised sector (which includes the domestic worker). It envisaged setting up a Central level board which would make recommendations regarding social security schemes such as health, maternity benefits and retirement benefits.<sup>180</sup> It set up a National Social Security

<sup>172</sup> Labour and Employment Department, Government of Tamil Nadu, Government Order No.12 (January 22, 2007).

<sup>173</sup> The Quint, *From Judge to Maid-No One is Spared Sexual Harassment in India*, November 18, 2017, available at <https://www.thequint.com/news/india/sexual-harassment-in-india> (Last visited on February 14, 2018).

<sup>174</sup> See International Labour Office, *Working time of live-in domestic workers*, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_230837.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_230837.pdf) (Last visited on February 14, 2018).

<sup>175</sup> See Part III(A) & Part III(B) of this paper for more factors contributing to dis-incentivisation of filing official complaints; See Part III(F)(2) of this paper for a more detailed look on nuances of emotional bonds of domestic workers.

<sup>176</sup> Firstpost, *Bill against sexual harassment a boost to domestic workers*, August 28, 2012, available at <http://www.firstpost.com/india/bill-against-sexual-harassment-a-boost-to-domestic-workers-433985.html> (Last visited on February 14, 2018).

<sup>177</sup> Salon, *Domestic workers face rampant harassment on the job with little protection*, November 30, 2017, available at [https://www.salon.com/2017/11/30/domestic-workers-face-rampant-harassment-on-the-job-with-little-protection\\_partner/](https://www.salon.com/2017/11/30/domestic-workers-face-rampant-harassment-on-the-job-with-little-protection_partner/) (Last visited on December 28, 2017).

<sup>178</sup> See Namrata Singh, *Compliance to Sexual Harassment Law Poor*, THE ECONOMIC TIMES, September 18, 2016.

<sup>179</sup> The Unorganized Workers’ Social Security Act, 2008, §2(n).

<sup>180</sup> The Unorganized Workers’ Social Security Act, 2008, §5.

Board and State Social Security Board, with tripartite representation – the unorganised worker, employers and the government.<sup>181</sup> They have however been relegated to advisory and monitory roles in formulation and implementation of schemes,<sup>182</sup> with little power to make any tangible impact.<sup>183</sup> The Act has been criticised as being grossly inadequate, as being a mere compilation of existing schemes, without penal sanction or even stipulations about working conditions.<sup>184</sup> Further, it requires contributions by beneficiaries,<sup>185</sup> which makes the endeavour futile, given the meagre incomes of these workers. In any case, domestic work involves concerns that although do generally overlap with the rest of the unorganised sector but a majority of their vulnerabilities are peculiar to the industry, as discussed later.

Recently, however, the Supreme Court has been dealing with the implementation of the Act,<sup>186</sup> noting that the National and State boards contemplated under the Act had not been set up,<sup>187</sup> directing the government to do the same within a stipulated period of time.<sup>188</sup> As part of this litigation, the Court specifically has been looking into the issue of registration, directing the initiation of the registration process and issuance of identity cards.<sup>189</sup> The National Legal Services Authority ('NALSA') expressed difficulty in reaching domestic workers,<sup>190</sup> and the unlikelihood of domestic workers voluntarily coming forward for registration

<sup>181</sup> The Unorganized Workers' Social Security Act, 2008, §5(2).

<sup>182</sup> Rathish Balakrishnan, Review of Social Security for Unorganised Workers in India(March 29, 2016) available at <http://www.thealternative.in/society/review-of-social-security-for-unorganized-workers-in-india/>, (Last visited on August 25, 2017).

<sup>183</sup> Communist Party of India (Marxist-Leninist) Liberation, Unorganised Workers' Social Security Act 2008: A Beginning for Bigger Struggles!, Communist Party of India (Marxist-Leninist) Liberation, available at [http://archive.cpiml.org/liberation/year\\_2009/feb\\_09/commentary\\_3.html](http://archive.cpiml.org/liberation/year_2009/feb_09/commentary_3.html)(Last visited on August 25, 2017).

<sup>184</sup> Paromita Goswami, *A critique of the Unorganised Workers' Social Security Act*, EPW Vol XLIV No. 11 (2009); South Asia Citizens Web, *A Critique of India's Unorganised Workers' Social Security Act, 2008*, February 16, 2009, available at <http://www.sacw.net/article658.html> (Last visited on January 24, 2017).

<sup>185</sup> The Unorganized Workers' Social Security Act, 2008, §4, §7 & §10.

<sup>186</sup> The Economic Times, *Domestic Workers Registration: Supreme Court asks Government not to give funds to State*, May 31, 2018, available at <https://economictimes.indiatimes.com/news/politics-and-nation/domestic-workers-registration-supreme-court-asks-govt-not-to-give-funds-to-states/articleshow/64404124.cms> (Last visited on June 16, 2018).

<sup>187</sup> *Shramjeevi Mahila Samiti v. State of NCT of Delhi & ANR*, WPCRL No. 879/2007 (High Court of Delhi); Outlook, *Domestic Workers Registration: Supreme Court asks Government not to give Funds to States*, May 31, 2018, available at <https://www.outlookindia.com/newscroll/domestic-workers-registration-sc-asks-govt-not-to-give-funds-to-states/1320649> (Last visited on June 16, 2018).

<sup>188</sup> *Shramjeevi Mahila Samiti v. State of NCT of Delhi & ANR*, WPCRL No. 879/2007, (High Court of Delhi).

<sup>189</sup> India Today, *Domestic workers registration: SC asks Govt not to give Funds to States*, May 31, 2018, available at <https://www.indiatoday.in/pti-feed/story/domestic-workers-registration-sc-asks-govt-not-to-give-funds-to-states-1247243-2018-05-31> (Last visited on June 16, 2018).

<sup>190</sup> Centre for Advocacy and Research, *Building awareness on NALSA Schemes for unorganised workers*, February 23, 2017, available at <http://cfar.org.in/building-awareness-on-nalsa-schemes-for-unorganised-workers/> (Last visited on June 16, 2018).

was pointed out.<sup>191</sup> The Supreme Court in August, 2017 directed the Delhi government to initiate a pilot scheme to ensure that the domestic workers in Delhi are registered under the Unorganised Workers Social Security Act, 2008.<sup>192</sup> The Court duly directed the government to make sure that all the duty is evenly and efficiently carried to ensure smooth registration.<sup>193</sup> Appellants suggested that the Labour Department, by cooperating with the RWAs, and NALSA through its para-legal volunteers, could tackle the issue of the domestic workers.<sup>194</sup> The need for a pro-active campaign by the para-legal volunteers attached to the Taluk Legal Services Committees was also stressed upon.<sup>195</sup> The litigation is ongoing,<sup>196</sup> and while its effectiveness is yet to be determined, there may be some scope for improvement in the applicability of the legislation. This however does not take away from the substantive shortfalls of the enactment itself.

#### 4. Employees' State Insurance Act, 1948

As a pilot scheme in 2016, the application of Employees' State Insurance Act, 1948, was extended to domestic workers in Delhi and Hyderabad.<sup>197</sup> The ESI Act, known for its egalitarian approach, generally makes no distinction in providing benefits based on the workers' contribution, which is a reflection of their wages.<sup>198</sup> However, its extension to domestic workers reflects a starkly discriminatory approach, reinforcing the undervaluation of the nature of work – they are only eligible for medical benefits, that too in a partial manner, i.e. the exclusion of certain sickness, maternity, disablement, dependence, and other need-based benefits.<sup>199</sup> Given that the sphere is highly feminised, not extending sickness and maternity benefits results in the most pressing vulnerabilities of female domestic workers being left unaddressed.<sup>200</sup> Another important factor that must be noted is that ESI benefits are only available at restricted (ESIC approved/run local) hospitals.<sup>201</sup> Moreover, they have been held to be under the category of self-employed

<sup>191</sup> Live Law, *Supreme Court Directs Delhi Govt. To Register Domestic Workers Under The Unorganised Workers Social Security Act*, August 12, 2017, available at <http://www.livelaw.in/sc-directs-delhi-govt-register-domestic-workers-unorganised-workers-social-security-act/> (Last visited on June 16, 2018).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Matters India, *Supreme Court Stops Grant to States that have not Registered Domestic Workers*, June 7, 2018, available at <http://mattersindia.com/2018/06/supreme-court-stops-grant-to-states-that-havent-registered-domestic-workers> (Last visited on June 16, 2018).

<sup>197</sup> See N. Neetha, *Employees' State Insurance Scheme for Domestic Workers*, 52 ECONOMIC AND POLITICAL WEEKLY 11 (2017).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Business Manager, *Benefits Under the ESI Scheme*, November 1, 2016, available at <https://www.businessmanager.in/benefits-under-esi-scheme.php> (Last visited on June 2, 2018).

<sup>201</sup> Mondaq, *India: ESI Corporation Raises Wage Threshold to 21,000*, January 18, 2017, available at <http://www.mondaq.com/india/x/560980/Employee+Benefits+Compensation/ESI+Corporation+Raises+Wage+Threshold+To+RS+21000> (Last visited on June 2, 2018).

workers, in complete disregard of the domestic space as a work-space where rights like minimum wages, working conditions, etc., need to be safeguarded.<sup>202</sup> Contributions are also required to be paid by the workers.<sup>203</sup> Again, in a scenario where wages are meagre, and workers might not even have control over their wages,<sup>204</sup> this makes the measure almost redundant. Registration in the statute is merely voluntary.<sup>205</sup>

As pointed out by N Neetha, designed primarily for the organised sector, it cannot be tweaked to be sensitive to the needs of domestic workers, at least not without an overhaul of its approach and design.<sup>206</sup> It is, at best, another half-hearted attempt at protection by arbitrarily modifying regulations meant for formal workforce to the informal sector.

Common through the inefficiencies of all these attempts at extending regulations designed for the formal or public workspace to domestic care workers, has been the lack of political will, the apprehension to intervene within the workspace, and an undertone of social and gendered stereotypes related to housework. These attempts have largely been unsuccessful in capturing the peculiar nature of domestic care work. A blanket extension of formal sector regulation, as will be elaborated upon, may not be the best legislative response.

### C. THE SHORTFALL IN THE LEGISLATIVE APPROACH

The legislative response, as discussed, has been grossly inadequate, and even the small attempts such as inclusion have been ineffective. There are fundamental shortcomings in the policy approach. First, the state has been unwilling to legislate for the sector, as can be attributed to the lack of incentive and the apprehension of intervening within the private sphere. Second, its frugal attempts at extending the existing laws to the sector reflect a lack of understanding of the peculiarities of domestic 'care' work, and its nature, which cannot be accommodated within laws designed for public employment.

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<sup>202</sup> *Id.*

<sup>203</sup> The Economic Times, Contribution to Employees' State Insurance, February 27, 2019, available at <https://economictimes.indiatimes.com/wealth/personal-finance-news/contribution-to-employees-state-insurance-scheme-rate-reduced-employees-employers-to-benefit/articleshow/68180953.cms?from=mdr> (Last visited on March 25, 2019).

<sup>204</sup> Human Rights Watch, *Workplace Abuses in Singapore*, available at <https://www.hrw.org/reports/2005/singapore1205/6.htm>, (Last visited on December 27, 2017).

<sup>205</sup> Neetha, *supra* note 197.

<sup>206</sup> *Id.*; Press Release, PRESS INFORMATION BUREAU, December 16, 2016, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155586> (Last visited on May 31, 2018).

## 1. Lack of Political Will

The lack of political will to address the issue of domestic workers is evident.<sup>207</sup> This is intrinsically linked to the question of undervalued and gendered housework, and of class differences. Male-dominated legislatures,<sup>208</sup> most members of which presumably employ domestic workers, will have little vested interest in taking the issue forth.<sup>209</sup> Further, unlike traditional labour unions that constitute major vote banks, domestic workers are scattered and invisible,<sup>210</sup> thus having little or no political clout.<sup>211</sup>

The apprehension to intervene within private homes does not help. Even the minimal legislation for the domestic workspace is impeded by a general lack of monitoring or enforcement capacity.<sup>212</sup> Most attempts to regulate, discussed above, do not envisage an enforcement mechanism to monitor compliance.

Fundamentally, the notions of the ‘workplace’ and ‘home’ in this sphere embody the watering down of the public-private dichotomy.<sup>213</sup> The worker’s place of employment is actually the employer’s private space i.e. his/her home. Furthermore, it connotes values inherently different from the traditional notions of an office or factory. In most cases, the employment site will not be considered even by the domestic worker as a public space.<sup>214</sup> The nature of the care work, and the relations established, alienates domestic care workers from the traditional, mainstream labour movement that strives for formalisation, regulation, and intervention

<sup>207</sup> Eesha Kunduri & Sonal Sharma, *Of Law, Language and Labour - Situating the Need for Legislation in Domestic Work*, 50 ECONOMICS AND POLITICAL WEEKLY 28, July, 2015.

<sup>208</sup> Factly, *Women in Parliament: Where does India figure among the rest of the World*, March 6, 2016, available at <https://factly.in/women-in-parliament-where-does-india-figure-among-the-rest-world/> (Last visited on December 27, 2017); See generally CATHARINE A. MACINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (She argues how the State, being a male-dominated institution, its laws are informed by a male worldview, ignorant of the lived experiences of women).

<sup>209</sup> Kunduri & Sharma, *supra* note 208.

<sup>210</sup> Borgen Magazine, *Domestic Workers in India: Need for Legislation and Change in Governmental Attitude*, August 5, 2017, available at <http://www.borgenmagazine.com/domestic-workers-in-india/> (Last visited on May 30, 2018); The Guardian, *India’s domestic workers need a break*, June 10, 2015, available at <https://www.theguardian.com/global-development/2015/jun/10/india-domestic-workers-labour-need-break-rest-sick-pay> (Last visited on May 30, 2018).

<sup>211</sup> United Nations Research Institute for Social Development, *Domestic Worker Mobilization in India- Work Like any Other, Work like No Other*, available at <http://www.unrisd.org/indiareport-chapter4> (Last visited on May 31, 2018).

<sup>212</sup> International Labour Organization, *C-182- Worst Forms of Child Labour Convention (No.182)*, available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C182](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182) (Last visited on February 10, 2019); International Labour Organization, *Observation (CEACR) – adopted 2010, published 100th ILC session*, available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:2332702](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2332702) (Last visited on February 10, 2019).

<sup>213</sup> See Wischermann & Mueller, *supra* note 38.

<sup>214</sup> Rosie Cox, *House/Work: Home as a Space of Work and Consumption*, 7 GEOGRAPHY COMPASS 12 (2013).

– goals questionable within a home-space.<sup>215</sup> A lot of ideological opposition and practical hurdles to enforcement can be traced to apprehension against state-intervention in private homes as opposed to the 'office' or the 'factory'. Neither is domestic work included within the ambit of labour ministries, as it is related to families, nor is it regulated or reflected by family or gender related ministries as it is related to labour.<sup>216</sup> The public-private dichotomy insulates domestic labour from governmental scrutiny, facilitating the exploitation of such workers.<sup>217</sup>

The employer's right to privacy, a fundamental right in India,<sup>218</sup> is pitched as being at odds with the domestic care-worker's access to justice.<sup>219</sup> However, often overlooked, there is also the question of the care-worker's right to privacy – a luxury for a full-time help, with little private space or time. This is especially so, given that it has been justified in the sanctity of 'domestic life',<sup>220</sup> and characterised as 'a right to be left alone'<sup>221</sup>. However, it is also seen as an essential facet of the right to human dignity.<sup>222</sup> Thus, there is a contradiction at another level between the employer's and the care worker's right to privacy. While the home-owner is entitled to safeguard against state-intrusion into the home, the care worker is entitled to a right against exploitation and a right to bodily privacy and dignity.

Catherine MacKinnon's work,<sup>223</sup> cited with approval by the Supreme Court,<sup>224</sup> brings out the dangers of privacy – to cover up domestic violence in the home, vis-à-vis the woman's right to privacy against impositions such as sterilisation programmes and mandatory state-imposed drug tests.<sup>225</sup> Prioritising the home

<sup>215</sup> *Id.*; International Labour Organization, *Working time of a Live-in Domestic Worker*, November 28, 2013, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_230837.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_230837.pdf) (Last visited on May 31, 2018); International Labour Organization, *Study on Living and Working Conditions of Domestic Workers in Cambodia*, available at [http://www.idwfed.org/en/resources/ilo-study-on-living-and-working-conditions-of-domestic-workers-in-cambodia/@@display-file/attachment\\_1](http://www.idwfed.org/en/resources/ilo-study-on-living-and-working-conditions-of-domestic-workers-in-cambodia/@@display-file/attachment_1) (Last visited on May 31, 2018).

<sup>216</sup> International Labour Organization & UN Women, *Worker, helper, auntie, maid? : Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia*, 2016, available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms\\_537808.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_537808.pdf) (Last visited on December 12, 2017).

<sup>217</sup> See generally Katherine Kaufka, *The Commodification of Domestic Care: Illegitimacy of Care Work and The Exploitation of Migrant Worker*, 18 GEO. IMMIGR. L.J. (2003).

<sup>218</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, Writ Petition (Civil) No 494 of 2012 ('Right to Privacy Case').

<sup>219</sup> Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUSTRIAL LAW JOURNAL (2012).

<sup>220</sup> Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332 (per Subba Rao J.); See Right to Privacy Case, ¶184 (privacy includes sanctity of family life and the home).

<sup>221</sup> Right to Privacy Case, ¶¶ 2, 169 & 177.

<sup>222</sup> *Id.*, ¶184.

<sup>223</sup> CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

<sup>224</sup> Right to Privacy Case, ¶ 140.

<sup>225</sup> Right to Privacy Case, Part L, ¶ 140 (The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty).

owner's right to be left alone over the care worker's right to privacy and dignity is both arbitrary and unjust. An invasion of privacy is only justified on the basis of a fair, just and reasonable procedure laid by law.<sup>226</sup> Any regulation of the domestic workspace cannot thus at once be seen as intrusive, although it should adopt an integrated approach to strike a balance of competing rights. An egalitarian stand will not allow for such a trade-off between competing right.

This would necessitate an assessment of ILO's 'holistic approach' that rejects traditional distinctions between the civil and the social rights, and thus any hierarchisation between these seemingly incompatible rights.<sup>227</sup> The ILO Convention on Domestic Workers, in Articles 17 (privacy of the employers' household) and 6 (private life rights of domestic workers) recognises the challenge of this private/public divide.<sup>228</sup> It is ignorant of any hierarchy between the right to privacy and to decent working conditions.<sup>229</sup> No trade-off between rights of competing right-bearers is thus justifiable. The state policy has to harmonise realisation and strike a balance. While recognising the inspection of homes as intrusive, safeguards such as prior-authorisation of inspection by a judicial body or the employer's consent are seen to as practicable compromises to harmonise the realisation of rights.<sup>230</sup>

On the other hand, we would argue that even if such a trade-off were to be made, the worker's right to bodily autonomy and dignity ought to be prioritised over the homeowner's right to domestic privacy. The Indian legislature has already made this choice multiple times, such as through the Protection of Women from Domestic Violence Act, 2005, or even through Section 498A of the Indian Penal Code, 1860.

While we see that the claim of privacy violations justifying non-intervention of domestic care workers has little standing, this debate brings to the fore the unique nature of the home as the workplace. It is a private space for the employer, but a care-giver will too not consider it a public space, and it may often even serve as a home for the worker. The relation between the care-worker and the family is a unique feature of this form of employment. No notion of the formal work-place can arbitrarily be imposed in this space without accounting for a multitude of such factors that would need labour laws to be re-theorised for effectively catering the needs of this sector.

<sup>226</sup> Right to Privacy Case, ¶ 184.

<sup>227</sup> *Id.*; See V.A. Leary, *The Paradox of Workers' Rights as Human Rights* in COMPA & DIAMOND, HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 22 (1996).

<sup>228</sup> Domestic Workers Convention, Convention concerning decent work for domestic workers, 2011 (No. 189); See Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUSTRIAL LAW JOURNAL (2012).

<sup>229</sup> Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 INDUSTRIAL LAW JOURNAL (2012).

<sup>230</sup> International Labour Conference, June 2-18, 2010, *Decent work for domestic workers*, ¶249, Report IV(1) (August 10, 2010).



## 2. Extension of Laws Designed for the Organised Sector

The approach of the Indian legislature has been clearly incompatible with the needs of domestic care workers and a blanket extension of formal sector labour regulations may not be the best legislative response. To avoid an imposition with inadequate protections at best and disastrous consequences at worst, an in-depth understanding of the 'worker' and the 'workplace' in domestic care work has to inform any legislative intervention.

As discussed in Part II, domestic care work involves both emotional and mental labour, and more often than not, interpersonal bonds with the employers. While on the one hand, a bond of trust and care is shared between the employer and the employed, lending a personal facet to the relation, on the other hand, this makes the latter more vulnerable to abuse and leads to internalisation of unjust practices and treatment.<sup>231</sup> The care-taking nanny gets attached to the child, and vice-versa.<sup>232</sup> When the care worker is asked to perform some task after working all day, it is seen as a 'favour', not working overtime. For live-in workers especially, they might either not be in a position to say no, and at times they might themselves not mind working for the care-receiver.<sup>233</sup> Acts in such situations, as is the claim of feminist ethics, come from a sense of compassion, and not only duty.

The care industry is thus inherently social, where the personal nature of relationships between care-givers and is characteristic of the employment, much more so than formal industrial employment.<sup>234</sup> An understanding of the human element becomes imperative. To extend the existing dehumanised regulatory framework to the care industry is not a well-deliberated legislative response. These laws are largely meant to cater to mechanical work arising out of the industrial revolution, extended now to include formal sector jobs. To balance the objectives of profit maximisation with the rights of workers against exploitation, they identify minimum standards<sup>235</sup> and in recognition of social security needs of workers, impose certain correlative duties on employer.<sup>236</sup> However, they assume a strict employer-employee relationship; they envisage a rights-bearing worker who

<sup>231</sup> See for example Hand in Hand: The Domestic Employers Network, *My Home is Someone's Workplace: Re-envisioning Domestic Employment in New York State* (June 2017), available at [http://domesticemployers.org/wp-content/uploads/2017/06/Hand\\_in\\_Hand\\_Report\\_061217\\_web.pdf](http://domesticemployers.org/wp-content/uploads/2017/06/Hand_in_Hand_Report_061217_web.pdf) (Last visited on August 23, 2017); Jennifer Bickham Mendez, *Of Mops and Maids: Contradictions and Continuities in Bureaucratized Domestic Work*, 45(1) SOCIAL PROBLEMS (1998).

<sup>232</sup> Jaan van der Merwe, *Being Raised by a Domestic Worker: A Postmodern Study*, October 16, 2009, available at <https://repository.up.ac.za/bitstream/handle/2263/23107/dissertation.pdf?sequence=5> (Last visited on June 1, 2018).

<sup>233</sup> See Mary Romero, *Maid in the U.S.A.*, 2 ORAL HISTORY REVIEW 21 (2013).

<sup>234</sup> See Alfred P. Sloan Foundation Industry Studies Annual Conference, May, 2008, *Cleaning and Caring in the Home: Shared Problems? Shared Possibilities*, LERA Research Volume (2008).

<sup>235</sup> The Minimum Wages Act, 1948; The Factories Act, 1948.

<sup>236</sup> Employees' State Insurance, 1948; Workmen's Compensation Act, 1923; Employees Provident Fund, 1952.

has a delineated set of duties, with limited interaction with the employer – premises that are at odds with the domestic care industry.

Incentives of profit sharing, joint decision making, participative management, and other such modern employment approaches are out of place in the domestic workspace and caregiving industry. Modern approach of management of work looks to analyse the work in a situational sphere which is adjusted on the basis of a myriad of cause and effect relationship and this in turn is used to interpret the efficiency or the progress made in achieving a certain goal. It encompasses an extensive model of certain cause and effects which are used to evaluate the work used to achieving that goal and remuneration is provided accordingly.<sup>237</sup> Formal employment laws are similarly out of place and out of sync with the realities of the sector.<sup>238</sup>

The law's claim to objectivity and the individualism, a premise often attacked by feminist and queer scholarship, might deter re-conceptualisation in light of caring-relations.<sup>239</sup> However, although complicated, it is not entirely inconceivable. The law can and ought to accommodate such relations and their legal implications. The relation between a nursing care-giver with the elderly patient is not very different and can be a case in point. Understanding the relationship between a senior dependent and a care worker, contract law has accommodated for modalities of relations based on trust and emotional bonds.<sup>240</sup> While on the one hand, the care worker might be in a position to unjustly appropriate property, on the other hand, the care-receiver, having developed a reciprocal affectionate bond with the care-giver might actually want to will property away in exercise of *ze* autonomy. A grandparent may be oblivious to being tricked by children, making an imposition of the due diligence duty unfair, a reality recognised in law.<sup>241</sup> To accommodate caring and fiduciary relations therefore, legal processes and thresholds need to and can be altered.

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<sup>237</sup> Wolfgang H. Steahle, *Situational Approach to Management*, 3 MANAGEMENT INTERNATIONAL REVIEW 16 (1976).

<sup>238</sup> Of course, this analysis might not be entirely true of new models of formal sector business models that train domestic workers, invest in skill-building and connect them to customer households. This model is however not representative of the oppressive structure of paid domestic labour that the paper addresses; nor is this a prevalent practice, but only a rare exception. See Business Times, *A cut below*, March 31, 2013, available at <http://www.businesstoday.in/magazine/cover-story/companies-work-towards-skills-gap-in-india/story/193097.html> (Last visited on December 28, 2017); International Labour Organisation, *Formalizing domestic work*, December 5, 2016, available at [http://www.ilo.org/travail/whatwedo/publications/WCMS\\_536998/lang-en/index.htm](http://www.ilo.org/travail/whatwedo/publications/WCMS_536998/lang-en/index.htm) (Last visited on January 6, 2018).

<sup>239</sup> See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

<sup>240</sup> J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439 (1997).

<sup>241</sup> Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 4 B.C. L. REV. 38 (1997); See also *Saunders v. Anglia Building Society*, (1970) 3 All ER 961; *Bhupinder Jit Singh v. Sonu Kumar*, Civil Revision Petition 176 of 2017 (Del. H.C.).

To appropriately address the nature of work, defined by caring relationships, a fundamental shift in theorising care-work is called for in legislative and policy discourses.

## V. A SHIFT IN PERSPECTIVE FOR REGULATING THE DOMESTIC CARE INDUSTRY

The feminist project in law has shown how the intended beneficiaries of the law and its authorship is responsible for exclusion of the lived experiences of marginalised groups.<sup>242</sup> The two imperative steps to remedy these exclusions for creating effective legal theory is to *first*, acknowledge and critique the biased jurisprudence that is understood to be neutral; and *second*, engage in 'reconstructive jurisprudence' that is informed by the experiences and realities of the diverse groups upon whom the legal framework would apply.<sup>243</sup> This framework has clear parallels to regulation for domestic workers. Laws designed by privileged classes and intended for the regulated, formal workspace, as we have seen in the previous section, exclude the lived realities of domestic care work. *First*, the inadequacies of the existing system need to be identified and acknowledged. *Second*, the reconstructive jurisprudence needs to accommodate the peculiar defining features of domestic care work, in addition to the class, caste and gender-based dimensions to it. There is a need for a contextual understanding of the domestic care-giving industry, as being remarkably different from the more traditional forms of formal employment. For inclusive legislation, therefore, a *sui generis* protection is ideal.

The twin-fold objective of such protection would include lending some parity of bargaining power in terms of negotiating working conditions, as well as a safeguard of recourse to some redressal mechanism upon violation of rights. The former would necessitate the setting of some minimum core entitlements and the latter would involve the recognition of anti-discrimination and exploitation rights within a structural system that incorporates an accessible redressal mechanism, which also works as a credible deterrent threat for deviant employers. This envisages comprehensive legal protection for domestic care workers. However, this legal intervention needs to be contextualised in terms of the realities and peculiarities of the industry and employment relations.

In this Part, we attempt to introduce a discourse to assess different approaches to legislation, *first*, proposing a framework that combines both an understanding of labour regulation and family law; and *second*, adopting an ethic of care in framing regulations.

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<sup>242</sup> Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60-61 (1988).

<sup>243</sup> *Id.*

## A. SOMEWHERE BETWEEN LABOUR AND FAMILY LAW

Care and dependency has been seen as the responsibility of the family – a quintessentially private institution.<sup>244</sup> However, when the tasks are assigned to an ‘outsider’, it is arguable whether it remains ‘privatised within the family’. However, the nature of these tasks remains the same – with a fundamentally personal and caring element to it, within the close confines of the family and home. It is a world apart from the job description in ‘public employment’ – the expectations from both the ‘employee’ and ‘employer’ are starkly different. Recognising the nature of domestic care work, both UN Women and ILO highlight how “[h]omes are spaces of emotion, they are not just where jobs get done, and these emotions are not simply extras but go to the heart of the employment relations.”<sup>245</sup>

However, care work cannot be understood as provided only within intimate relations; neither can it be viewed purely as a commodity that is marketable.<sup>246</sup> Such polarisation only reinforces stereotypes of caregivers into rigid categorisations of “cold, third party providers or as equally faceless beings who give selflessly for the well-being of others”.<sup>247</sup> Domestic care work cannot be labelled as being ‘purely contractual’ or as entirely a family affair. The complexity of care needs to be understood in the multitude of relationships in which it occurs.<sup>248</sup>

On one end of the spectrum is the ‘fictive kin’ model, where employers treat domestic care-workers as ‘part of the family’, not ‘workers’.<sup>249</sup> This was common practise in the past, where workers were sourced through village ties, and were portrayed as relatives.<sup>250</sup> This could amass greater respect and better working conditions. However, on the downside, in the absence of any core minimum of rights and standards, the justness of this model is contingent entirely on the benevolence of the employer. This submergence of the employment into the family leaves the caregivers open to abuse.<sup>251</sup> When employers can couch the worker’s labour as help by a member of the family, law ceases to apply. The worker is no longer in employment, and therefore, no related rights accrue. They are not recognised as ‘workers’ in an employment contract. Minimum wage, employment conditions, working hours – the fundamentals of labour regulation then have no

<sup>244</sup> Martha A. Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403 (2001).

<sup>245</sup> International Labour Organization & UN Women, *Worker, helper, auntie, maid?: Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia*, 2016, available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms\\_537808.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_537808.pdf) (Last visited on December 12, 2017).

<sup>246</sup> See NICOLE BUSBY, *A RIGHT TO CARE* 43 (2011).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Supra* note 239.

<sup>250</sup> Scroll, *Cheap domestic workers (even Bangladeshi) are fine. The problem is when they protest*, July 16, 2017, available at <https://scroll.in/article/843870/what-it-means-to-be-domestic-labour-in-india-maximum-labour-and-minimal-care> (Last visited on January 24, 2018).

<sup>251</sup> *Id.*

play within the home. Like the mother, all work is altruistic and the 'fictive kin' has no designated duties or working hours.

Further, the family space, feminist scholars have amply displayed, is also an interplay of hierarchical relationships where violence and abuse is not rare.<sup>252</sup> Giving up the rights as workers does not translate into amassing rights as family members; the status is that of a *fictive* kin.<sup>253</sup> Unlike familial ties, this fictive kinship can be withdrawn at any time, often done arbitrarily and more so at times such as illness, pregnancy and old-age.<sup>254</sup> Employers routinely structure the relations to differentiate and make care-workers feel inferior, limiting and controlling their access to spaces, food, etc.<sup>255</sup> In the absence of standards, even what constitutes as abuse or as unfair labour conditions are couched in ambiguity.

A contractual agreement that defines some non-derogable minimums or attracts the application of labour regulation would seemingly address these concerns. The newer middle class has subscribed to the market model, which in turn brings in another layer of exploitative practices.<sup>256</sup> Such purely contractual arrangements as envisaged under current legal regimes embody the other end of the spectrum – failing to acknowledge the relational and emotional aspects of care-work. First is the fact that in the context of Indian society, formal contracts, like in any unorganised sector are unheard of.<sup>257</sup> In such a fluid labour market, to expect contractual engagements to resolve the issues facing domestic workers would be optimistic at best, and the disparity in bargaining power will make the objective of equity unattainable. Even if these practical difficulties were to be overlooked, a traditional contractual regime might not translate into a boon for domestic care-workers. While strictures against arbitrary and unjustifiable dismissal can be imposed on the employer, it also restricts the freedom of the care-workers. Working conditions can at least be negotiated on the force of the ultimate threat of withdrawing one's labour – something that a contractual constraint on exit can undo.<sup>258</sup> Further, as enforcement is voluntary, care-workers are often reluctant to seek legal recourse. This might be based upon emotional ties with those they care for – the employer's baby, the elderly care-receiver, etc. Responses such as these are common – "I love the baby so much...I fear if I answer my employer back...I

<sup>252</sup> Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1984-1985).

<sup>253</sup> See generally BRIDGET ANDERSON, *DOING THE DIRTY WORK?: THE GLOBAL POLITICS OF DOMESTIC LABOUR* 6 (2000).

<sup>254</sup> *Id.*

<sup>255</sup> M. ROMERO, *MAID IN THE USA: PERSPECTIVES ON GENDER* (2002).

<sup>256</sup> Anderson, *supra* note 254.

<sup>257</sup> International Domestic Workers Federation, *Domestic Work in India*, March 20, 2013, available at <http://archive.idwfd.org/news.php?id=233> (Last visited on December 14, 2017).

<sup>258</sup> International Labour Organization & UN Women, *Worker, helper, auntie, maid? : Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia* (2016), available at [http://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/--sro-bangkok/documents/publication/wcms\\_537808.pdf](http://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/--sro-bangkok/documents/publication/wcms_537808.pdf) (Last visited on December 12, 2017).

will not be able to see the baby again.”<sup>259</sup> When the employer is different from the care-receiver, even in the absence of reciprocal ambivalence, care-workers may tend to condone exploitation. Their social and economic location also is also a major deterrence to effective legal recourse.

We thus see that while a ‘fictive kin’ approach accords due recognition and dignity to care-workers, it can facilitate mistreatment, and thus perpetuate segregation and discrimination. Rather, now the care-worker has rights neither of a worker, nor that of a family member. Nonetheless, the shortcomings of a strictly legal contractual regime bring forth the fallacies of an abstract language of rights – its ineffectiveness and detachment from the realities facing its subjects. This analysis is an embodiment of the fallout from the fictitious legal binary of emotion-rights, defining the scholarship of the ethics of care.

On one hand, a presumption of benevolence of *all* employers cannot justify non-intervention. In the face of abuse and exploitation, rights and standards need to be delineated. On the other hand, regulatory response clearly requires an understanding of the utility of care, of the emotional relationships forged. A domestic care-worker is essentially *employed* to be a part of the family,<sup>260</sup> *Ze* is neither strictly an employee, nor a family member. What follows is that neither labour regulation, nor relegation to the family sphere would be appropriate. A convergence of the principles of labour rights and regulating personal relationships is necessitated to address the industry’s peculiar concerns.

Such an understanding may inform legislative efforts in several ways. Substantively, as discussed, the thresholds of abuse and violence in caring relations ought to mimic not criminal laws or unfair labour practices but should be more in tune with legal responses to domestic violence. Any normative statutory standards ought to account for forms of emotional abuse. At the same time, separate protections based in minimum wages, maximum working hours, and other such ordinarily contractual prescriptions need to be concretised through statute.

At the procedural level, several other factors need to be considered so as to ensure that the modes of enforcement, of dispute resolution and even inspection are sensitive to the familial set-up. These would include providing for non-adversarial dispute resolution that has preservation of the relation as one of its goals; and adopting an investigation format that for instance requires an order from a court or an official such as a protection officer as a pre-requisite. This will ensure that unreasonable intrusions within the household are not permitted.

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<sup>259</sup> Interview with Sharon, an Indonesian domestic worker, in International Labour Organization & UN Women, *Worker, helper, auntie, maid? : Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia* (2016), available at [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms\\_537808.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_537808.pdf) (Last visited on December 12, 2017).

<sup>260</sup> BRIDGET ANDERSON, *US AND THEM?: THE DANGEROUS POLITICS OF IMMIGRATION CONTROL* 163 (2013).

Therefore, the legislative approach has to be convergent, that utilises family law's capability of accounting for the nature of space and relations, and at the same time adopts a statutory protection of minimum rights under the labour law regimes.

## B. ADOPTING AN ETHIC OF CARE

The central theme of care ethics scholarship is to rethink care as a public good with inherent social value. Care work aids “development and maintenance of human capabilities”, a public good with intrinsic value that yields vital “positive spill-overs for living standards, quality of life and sustainable economic development”.<sup>261</sup> Care ethics marks a shift from a neoliberal, economics-driven approach towards valuing interdependence, connection, and reciprocity.<sup>262</sup> In stark contrast to the independent, rational individual subject of neoliberal capitalism, feminist care ethics locates the self as a ‘relational self’, enmeshed in networks of care relations.<sup>263</sup> Adopting this lens addresses the two primary concerns that we identified as plaguing domestic care work – the undervaluation of care work and the failure of regulation to understand that relational underpinnings of the industry.

There has been a lot of work that brings care into public domain and debates, revising political values with the goal of ensuring access to good care in just democratic society.<sup>264</sup> At its core, it questions the linear binary of reason and emotion – seeing them as not mutually exclusive. Therefore, law's claim to rationality and objectivity, resulting in a complete refusal of accommodating emotions and relations, is being challenged as the discourse progresses.

An ethic of care is pitted against an ethic of rights – defined as individualistic, competitive and hierarchical;<sup>265</sup> it primarily focuses on preservation of individual autonomy.<sup>266</sup> Encouraging an aggressive assertion of individual rights and downplaying communal aspects of human society; a rights-based approach to law benefits those with political and socio-economic power against the disadvantaged weaker groups, not similarly placed or inclined to wield their rights amidst

<sup>261</sup> N. Folbre, C. Howes & C. Leena, *A Care Policy and Research Agenda* in FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES 183 (2012).

<sup>262</sup> Kim England, *Home, domestic work and the state: The spatial politics of domestic workers' activism*, 37(3) CRITICAL SOCIAL POLICY 1–19 (2017).

<sup>263</sup> See M. Barnes, *Care in Everyday Life: An Ethic of Care in Practice*, POLICY PRESS (2012); J. Tronto, *Caring Democracy: Markets, Equity and Justice*, NYU PRESS (2013).

<sup>264</sup> *Id.*; V. Held, *The Ethics of Care: Personal, Political, and Global* (2006); F. Williams, *Towards a Transnational Analysis of the Political Economy of Care* in FEMINIST ETHICS AND SOCIAL POLICY: TOWARDS A NEW GLOBAL POLITICAL ECONOMY OF CARE 21–38 (R. Mahon & F. Robinson, 2011).

<sup>265</sup> CAROL GILLIGAN, IN A DIFFERENT VOICE 32 (1982).

<sup>266</sup> Francis Carleton & Jennifer Nutt Carleton, *An Ethic of Care and the Hazardous Workplace*, 10 WIS. WOMEN'S L.J. (1995).

competing claims.<sup>267</sup> In this context, the homeowners' rights would ordinarily take precedence over those of domestic workers, be it in terms of political unwillingness to impose stringent regulations or even at the enforcement stage, given the insurmountable economic costs that litigation or the administrative processes involve. Glendon in her critique of the rights-based political discourse, remarks how "in its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old."<sup>268</sup> Domestic care workers due to their position lower down in the socio-economic order, have been the losers in a polity where their rights have been pitted against the wealthy, more powerful employers. Where enforcement of competing rights in an adversarial set-up necessitates some amount of economic and/or political clout, groups such as care workers are unlikely to succeed. The fact that the essence of their work 'care' is not valued as an economic activity, does not help.

On the other hand, an ethic of care is characterised by "cooperation, relationship, and interdependent nurturance," placing emphasis on the duty owed to protect vulnerable groups and individuals from harm.<sup>269</sup> It has been argued to be essential to establish a gender-equitable workplace,<sup>270</sup> given that women in these spaces are disproportionately in positions of vulnerability.<sup>271</sup> The majority of domestic workers are women and their relationship with their employers being an interdependent relation, often transcends beyond contractual terms and requires to be understood as such.

However, an ethic of care and that of rights are not to be seen as fundamentally contradictory. Any successful methodology to theorise or address inequality cannot abandon a rights discourse. The power in its imposition of duties and obligations lends some parity to the otherwise grossly unequal relations that breed exploitation and dominance.

A rights-based approach is an important tool of empowerment, especially when the right-bearers have little bargaining power. However, there is a need for refinement of the rhetoric of rights such that the public discourse incorporates more fully, the notions of responsibility.<sup>272</sup> Feminist scholarship advocates for an expansion of the rights discourse to incorporate an ethic of care, working against "a language of rights that refuses to take seriously the idea that society must cultivate, express, and implement a deep concern for the well-being of individuals and groups in distress."<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> MARY ANN GLENDON, RIGHTS TALK 14 (1991).

<sup>269</sup> Mary Raugust, *Feminist Ethics and Workplace Values* in EXPLORATIONS IN FEMINIST ETHICS 125 (E. Cole & S. Coultrap-McQuin, 1992).

<sup>270</sup> *Id.*

<sup>271</sup> CARLETON & CARLETON, *supra* note 267.

<sup>272</sup> GLENDON, *supra* note 269.

<sup>273</sup> CARLETON & CARLETON, *supra* note 267.



For effective realisation, especially given the nature of competing rights, a more facilitative and contextual understanding of a framework of rights is needed. Competing individual claims must be seen as enmeshed in a broader framework of social relations and hierarchies. Legal tools in their recognition of rights thus need to accommodate a wider understanding of care as a social good and of the inherent utility of social relationships.

Drawing on this framework, the authors advocate for adopting a combined ethic of rights and care to protect domestic care workers given the different levels of exploitation and vulnerability they are subjected to. A regulatory response will best be informed by an ethic of care – recognising rights but envisaging the right-bearers to not be abstract legal subjects but rather be relational care-givers. This will also buttress the need to contextualise the subject matter of regulation within a familial set-up.

At the outset, this will necessitate an understanding of care as a social good of importance. This would mean that valuation of care work for purposes such as arriving at minimum wages will need to be ascertained. While this will be informed by several regional and economic factors, the nature of work cannot by itself justify devaluation. Beyond this, the key goals of a care-oriented regulatory framework will involve preserving relationships, preventing hurt, and adopting cooperative methods of resolving conflicts. This again will translate into providing for a model of conflict resolution that is non-adversarial. Softer enforcement means examples such as periodic visits by social workers within homes to gather whether violations, after being reported still persist, and solutions arrived at via non-adversarial means are being adhered to. Both employers and workers might be more receptive to such a system as opposed to police visits and more formal modes of inquiry. A discussion-based approach might also help in gauging whether the worker has been threatened against disclosing violations as opposed to a more formal inquiry.

Using some workable ideas of recognising paid work within a familial set up and accommodating an ethic of care that envisages regulatory subjects that are enmeshed in a web of caring relationships, the approach towards regulating the domestic workspace needs to be changed. The key challenge remains to arrive at tangible laws from these guiding principles.

### *C. TOWARDS AN IDEAL LAW*

There exists no model legislation, and any scheme/law has to address the systemic issues characteristic of the Indian scenario, where caste, religion, and gender pose unique conundrums which necessitate a novel approach. An understanding of the theoretical underpinnings discussed earlier lay the foundation for some tangible policy shifts.

However, as pointed out before, there has been little discussion on regulation of the domestic workspace in India. The discourse on the appropriate model of regulation has consequently been non-existent. Much more theorisation, data collection, and an extensive understanding of the issues and nuances of the sphere are needed. At this stage, any suggestions for reform will contain inadequate reflections of the lived realities of those it will seek to regulate and affect. All stake-holders and pressure groups need to be made a part of this policy discourse and the government needs to take an active step in terms of holding local and national consultations, commissioning research and surveys, and even setting up a task force with the mandate to work upon a suitable framework for regulation. Our aim is thus not to suggest concrete reforms but to begin a discourse to re-envision regulation in this sphere. Taking our discussion forward, we try to highlight some key pointers that should inform this debate, while taking note of several developments world over that try to accommodate some of these concerns.

At the outset, a comprehensive and separate legislation would be ideal. This would not only allow regulation to be tailor-made for the domestic workspace, but also prevent implementational hurdles from extending different formal sector protections that are overseen by different regulatory authorities. Reference can be made to the New York Domestic Worker's Bill of Rights that was a result of years of advocacy and campaigning.<sup>274</sup> It introduced a host of protections including the right to overtime pay (for work in excess of forty hours per week or forty four hours for live-in workers), a minimum of three rest days every year, and a full day of rest (twenty four hours) every seven days, as well as coverage under the New York State Human Rights Law.<sup>275</sup> There are several pointers that the content of such law ought to accommodate.

## 1. Inclusive Definitions and acknowledging the peculiarities of care work

The definition of a 'worker' needs to be both flexible and expansive. They need to accommodate care workers and the diverse forms of employment they lead to. It should enumerate only an 'illustrative' list of chores or adopt the broad ILO definition.

Drawing from the work on care ethics, care as a social good has to be acknowledged as having independent worth, and care-giving activities thus have to be accorded due valuation. For instance, minimum wage notifications would need to reflect such valuation. Understanding the nature of the workspace, working conditions need to be appropriately provided for. This becomes imperative given

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<sup>274</sup> See Claire Hobden, *Winning Fair Labour Standards for Domestic Workers: Lessons Learned from the Campaign for a Domestic Worker Bill of Rights in New York State* (ILO, GURN discussion paper No.14, 2010).

<sup>275</sup> New York State, Department of Labor, *Domestic Workers' Bill of Rights*, available at <https://labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm> (Last visited on June 16, 2018).

the long hours spent at work, especially for live-in domestic workers. Sufficient quantity of food, adequate arrangements for sleeping, etc., need to be provided as the minimum essentials to employ a live-in domestic worker. Access to the washroom also needs to be ensured, especially if several hours are spent at home.

The peculiar nature of exploitative practices in domestic care work needs to be catered to. The layers of subjugation and vulnerability due to the dependence and caring relations are unique. Definitions of abuse and discrimination thus need to be expansive enough to accommodate the lived realities of care workers. A catch-all provision that allows for an evaluation of particular fact scenarios over an exhaustive list of pre-defined modes of exploitation should be adopted. Anti-discrimination provisions would need to account for everyday exclusions while dictating the worker's activities (not related to the work they have been employed for), and the entire day be should accounted for loss of freedom and dignity, and thus be recognised as exploitative. Specific bars against confinement within the home, over and above existing criminal and tortious prohibitions, will be required to overcome loopholes such as a worker who consents to such treatment under economic duress or does not know any better.

The caring and relational nature needs to be accommodated while at the same time recognising rights against exploitative practices. There cannot, for instance, be a blanket ban on working at night – as the worker might be inclined to aid the ailing care-receiver or the baby they have grown to care for, but at the same time, remunerative structures need to account for the nature of such work, and this cannot rise to the level of taking undue advantage. When there is no defined duration of employment and the worker is within the employer's beck and call even at night, the remuneration needs to be higher. Further, provisions such as a mandatory two hour leave for live-in domestic workers, as adopted in Italy,<sup>276</sup> should also be considered.

## 2. Provision for Social Insurance

The need for social security for domestic workers has been overlooked across the world,<sup>277</sup> primarily due to the lack of contributory capacity as well as administrative difficulties in intruding upon the private nature of the home.<sup>278</sup> Providing social security, especially given their socio-economic location is imperative, and the response should be to address the lack of such capacity

<sup>276</sup> International Labour Organization, *Domestic Workers Negotiate New Collective Agreements in Italy and Delhi*, available at [https://www.ilo.org/travail/areasofwork/domestic-workers/WCMS\\_212212/lang-en/index.htm](https://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_212212/lang-en/index.htm) (Last visited on October 3, 2018).

<sup>277</sup> International Labour Organisation, *ILO: 90 per cent of Domestic Workers Excluded from Social Protection*, March 14, 2016, available at [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_458878/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_458878/lang-en/index.htm) (Last visited on June 17, 2018).

<sup>278</sup> United States Social Security Administration, *Domestic Workers in Private Homes*, available at <https://www.ssa.gov/policy/docs/ssb/v2n3/v2n3p10.pdf> (Last visited on June 9, 2018).

rather than using it to justify exclusion. Possible measures could include government subsidies, fiscal incentives, requiring the employer to pay contributions, etc. Government subsidies to the contribution of the worker for instance, can be proportional to the wages received by the worker.<sup>279</sup> Turkey, for instance, has adopted a similar approach, where the government directly contributes to the health insurance scheme and the pensions given out by the Social Security institution.<sup>280</sup> However, the measure is not limited to domestic worker but the entire the labour workforce.<sup>281</sup> Some of the other fiscal incentive measures include, employer contributions accessed as tax deductible expenses (practiced in Germany and France),<sup>282</sup> reduced quantum of contribution for employers who register voluntarily and make timely payments towards social security contributions (practised in Ecuador).<sup>283</sup>

Another alternative could be considering an employer's mandate. Hong Kong, for instance, has excluded domestic workers from social insurance regimes and granted them protection under employer's mandate, whereby all medical expenses of the domestic worker, whether an employment injury, occupational disease or otherwise, have to be paid for by the employer.<sup>284</sup> However, this cannot be limited to situations where fault can be attributed to actions/omissions of the employer. Provisions have to be made for holistic social security, where other eventualities such as ill-health, pregnancy, will also require financial support from employers. These broad-based schemes might require contributions from both the employers as well as the government.

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<sup>279</sup> International Labour Organization, *Social Protection in Domestic Worker: Key Policy Trends and Statistics*, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_458933.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_458933.pdf) (Last visited on June 9, 2018).

<sup>280</sup> Investment Office of Turkey, *Turkish Social Security System*, available at <http://www.invest.gov.tr/en-us/investmentguide/investorsguide/employeesandsocialsecurity/pages/turkishsocialsecuritysystem.aspx> (Last visited on March 27, 2019).

<sup>281</sup> Seyhan Erdoğan & Gülay Toksöz, *The Visible Force of Women's Invisible Labour: Domestic Workers in Turkey*, available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1302&context=intl> (Last visited on June 9, 2018).

<sup>282</sup> European Federation of Food, Agriculture and Tourism Trade Unions, *Domestic Workers in Europe*, available at [http://www.effat.org/sites/default/files/news/13931/effat\\_booklet\\_domestic\\_workers\\_in\\_europe\\_en.pdf](http://www.effat.org/sites/default/files/news/13931/effat_booklet_domestic_workers_in_europe_en.pdf) (Last visited on June 9, 2018).

<sup>283</sup> Escuela Superior Politecnica del Litoral, *Domestic Workers and Social Security: A Survey in Guayaquil, Ecuador*, available at [http://www.espae.espol.edu.ec/wp-content/uploads/2014/12/5A\\_Maids.pdf](http://www.espae.espol.edu.ec/wp-content/uploads/2014/12/5A_Maids.pdf) (Last visited on June 9, 2018).

<sup>284</sup> Social Security Administration, United States, *Hong Kong, Social Security Programs Throughout the World: Asia and the Pacific, 2010*, available at <https://www.ssa.gov/policy/docs/progdsc/ssptw/2010-2011/asia/hongkong.html> (Last visited on August 25, 2017).

France<sup>285</sup> and Spain<sup>286</sup> have both adopted a scheme of social insurance that allows for effective cost distribution and only requires facilitative institutions. In 2006, France adopted a scheme called Universal Service Employment Voucher that applies to domestic workers and requires the employer to pay the worker using a cheque from a bank which is registered with the scheme which automatically contains the tax deductions/tax credits in exchange for a small contribution to the social welfare fund of domestic worker.<sup>287</sup> The employer includes the wage with a ten percent extra amount to account for paid annual leave, fills out a slip declaring the worker and the amount of hours worked, and forwards it to the National CESU Centre. In turn, the contribution from the employer is tabulated and corresponding changes are made in the employer's account.<sup>288</sup> Furthermore, employers have to give detailed breakdown of number of hours worked, overtime, wages given, etc.<sup>289</sup>

Spain's scheme started on a good note, but it was traditionally a more integration friendly approach, with the formal labour sector.<sup>290</sup> It required the employers to register with the social security system from the very inception of the job itself. In 2012, a change in approach came, transferring the onus of contribution from the social welfare scheme back to the employee if the hours of employment are less than sixty hours per month.<sup>291</sup> This, however, has been met with criticism.<sup>292</sup> On the side of enforcement, Spain has shown an aggressive approach to check compliance which even includes inspection in private homes.<sup>293</sup> They insist on forming a contract and in cases where it is absent after a period of six months after employment, the government agency in Spain is empowered to

<sup>285</sup> The Connexion, *Employing people to help at home*, January 22, 2010, available at <http://www.connexionfrance.com/home-employment-hiring-cleaner-handyman-nanny-cheque-emploi-france-news-article.html> (Last visited on August 25, 2017) (It offers a comprehensive explanation of the process of employing domestic help in France; International Comparison: Offers a comparison of the legal provisions relating to domestic workers in France and obligations under ILO Convention No. 189).

<sup>286</sup> International Labour Organisation, *Spain approves new regulations for domestic employees*, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_173686.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_173686.pdf) (Last visited on August 25, 2017).

<sup>287</sup> European Federation of Food, Agriculture and Tourism Trade Unions, *supra* note 283.

<sup>288</sup> International Labour Organisation, *Formalizing Domestic Work Through the use of Service Vouchers*, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_dialogue/@actrav/documents/publication/wcms\\_220717.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_220717.pdf) (Last visited on June 9, 2018).

<sup>289</sup> Impact, *France- Universal Service Employment Voucher (CESU)*, available at <http://impact-phs.eu/national-practices/france-universal-service-employment-voucher-cesu/> (Last visited on June 9, 2018).

<sup>290</sup> Vera Pavlou, *Migrant domestic workers, vulnerability and the law: immigration and employment laws in Cyprus and Spain*, 1 INVESTIGACIONES FEMINISTAS 7 (2016).

<sup>291</sup> Eurofund, *Regulating the labour relationship of domestic workers- Spain*, June 2, 2013, available at <https://www.eurofound.europa.eu/data/tackling-undeclared-work-in-europe/database/regulating-the-labour-relationship-of-domestic-workers-spain> (Last visited on June 17, 2018).

<sup>292</sup> *Id.*

<sup>293</sup> Ana Gomes & Inmaculada Baviera Puig, *Domestic Work after Labour Law: The case of Brazil and Spain*, available at [https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf\\_GomesxBaviera.pdf/aec17fa7-a90e-4692-9040-0932b99e1b50](https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_GomesxBaviera.pdf/aec17fa7-a90e-4692-9040-0932b99e1b50) (Last visited on June 9, 2018).

give documentation proving employment which would help the worker ascertain rights with regard to work permits as such, which is especially relevant in cases of migrant workers.<sup>294</sup>

However, to locate every household that employs a domestic worker and accordingly allocate costs for administering such a scheme is not feasible. Argentina, perhaps in recognition of this, employs a unique system of ‘presumption of employment’.<sup>295</sup> All households with income above a certain level and with assets exceeding a certain amount are, for taxation purposes, presumed to be employers of a domestic worker and charged the respective social security contribution.<sup>296</sup> It is for the household to then rebut the presumption. Where there is no defined industry with registered or at least locatable factories, such an approach offers a novel administrative solution.

The (Draft) Labour Code on Social Security, 2018, aiming at universalisation of social security,<sup>297</sup> covers the unorganised sector<sup>298</sup> including domestic workers.<sup>299</sup> It adopts the understanding of ‘social security’ in the ILO Convention on Social Security (C102)<sup>300</sup> and includes nine types of social security covers as described in the said Convention. Households employing domestic workers are required to contribute towards schemes, and can make consolidated contribution for quarter, semester, etc.<sup>301</sup> It also allows the central government to establish a Domestic Workers Contribution Augmentation Fund.<sup>302</sup> Although it is a step in the right direction, it has come under the scanner in as much as it replaces and hence threatens established security protections under legislative frameworks without providing comprehensive alternatives. It is feared that it will lead to the dilution of available protections, and that it is not much more than any political eyewash.<sup>303</sup>

<sup>294</sup> International Labour Organisation, *Promoting Integration for Migrant Domestic Workers in Spain*, available at [http://ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_232520.pdf](http://ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_232520.pdf) (Last visited on June 9, 2018).

<sup>295</sup> International Labour Office, Social Protection Department, Geneva, *Social protection for domestic workers: key policy trends and statistics*, 2016, available at <https://www.social-protection.org/gimi/RessourcePDF.action?ressource.ressourceId=53511> (Last visited on October 20, 2018).

<sup>296</sup> This presumption allows them to inspect such households where there is no declared domestic worker but which is presumed by law to have a domestic worker.

<sup>297</sup> The Draft Labour Code on Social Security, 2018, Cl. 2.13.

<sup>298</sup> *Id.*, Cl. 2.14

<sup>299</sup> *Id.*, Cl. 2.42.

<sup>300</sup> Social Security (Minimum Standards) Convention, Convention concerning Minimum Standards of Social Security, 1952 (No. 102).

<sup>301</sup> Social Security (Minimum Standards) Convention, Convention concerning Minimum Standards of Social Security, 1952 (No. 102), Article 21.

<sup>302</sup> Social Security (Minimum Standards) Convention, Convention concerning Minimum Standards of Social Security, 1952 (No. 102), Article 22(2).

<sup>303</sup> Centre of Indian Trade Unions, *Code on Social Security: An Exercise of Deception & Fraud*, available at <http://www.citucentre.org/documents/books/384-code-on-social-security-an-exercise-of-deception-fraud> (Last visited on August 15, 2018).

The Ministry had initiated consultations with stakeholders,<sup>304</sup> but the lack of unionisation and inadequate representation in political circles makes significant changes to the fate of domestic workers unlikely. In any case, the peculiarities of the nature and structure of domestic employment necessitates a more nuanced and well thought-out system for providing effective social security.

### 3. Enforcement Models

Enforcement in the informal sector and especially within homes, as we saw, creates momentous roadblocks. The hidden nature of employment within private homes is the first challenge.<sup>305</sup> The (Draft) Labour Code on Social Security, 2018, requires the inspection mechanism to account for factors that may pose challenges for labour and social security inspection, such as private households employing domestic workers and the workplace having the nature of a private space for home-based workers as well domestic workers.<sup>306</sup> However, no further specifics or modalities are provided.

Previous attempts have considered registration. While this could be useful, the onus needs to be on both, the employer and employee, and is not in itself sufficient, given that there will be little incentive and willingness. Even while registration may be required, unless it sees substantial success, benefits cannot be made contingent on such registration. Hong Kong's aforementioned scheme, for instance, is not contingent on registration of the employee.<sup>307</sup> The European Parliament on the other hand has taken measures to combat undeclared workers by providing incentives like tax-free income band for employers.<sup>308</sup> This may help in the declaration of domestic workers, which will lead to easier inspection by relevant authorities. A similar incentive-based model for registration of workers could prove to be more successful.

Collective bargaining could potentially serve as a parallel force that oversees implementation of standards through more informal channels. ILO's tripartite model (of involving the unions of both the domestic workers and the

<sup>304</sup> Ministry of Labour & Employment, Circular No. Z-13025/13- 2015/LRC(Issued on March 16, 2017).

<sup>305</sup> European Commission, *European Policy Brief*, available at [https://ec.europa.eu/research/social-sciences/pdf/policy\\_briefs/demandat\\_policybrief\\_italy\\_lpalumbo.pdf](https://ec.europa.eu/research/social-sciences/pdf/policy_briefs/demandat_policybrief_italy_lpalumbo.pdf) (Last visited on June 9, 2018).

<sup>306</sup> Ministry of Labour & Employment, Draft Labour Code on Social Security & Welfare, 2018, §134.2, available at <https://labour.gov.in/sites/default/files/Social%20Security%20Code-11.04.2017.pdf> (Last visited on March 22, 2019).

<sup>307</sup> Hong Kong Employment Ordinance, 1968.

<sup>308</sup> European Parliament, Resolution 2008/2035(INI), *Stepping up the Fight Against Undeclared Work*, October 9, 2008, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:009E:0001:0011:EN:PDF> (Last visited on March 24, 2019). *Stepping up the Fight Against Undeclared Work*, European Parliament Resolution 2008/2035 (INI) (October 9, 2008).

employers along with government representation) has been followed in Uruguay, Italy, France, and Argentina with some degree of success.<sup>309</sup>

Even Italy, for instance, facing the brunt of the economic crisis, was able to reach an understanding between the domestic workers union and the employers union, which envisaged a salary increase to restore the purchasing power of the domestic workers that was wiped out by the economic crisis.<sup>310</sup>

The Uruguay model too strongly encourages unionisation of employers since it will inevitably make bargaining easier, due to the fact that it has now become one collective against another, as opposed to dispersed workers with dispersed household owners.<sup>311</sup>

However, given the substitutability of labour in the domestic work sector, coupled with other hindrances to effective unionisation discussed earlier which is essentially due to peculiarities of domestic work, would render serious doubts on the success of collective bargaining.<sup>312</sup> However, unionisation of domestic workers in the form of a trade union has been relatively successful in Kolkata,<sup>313</sup> and any proposed legislation could take steps to facilitate such structures to test the viability of collective bargaining and unionisation of domestic workers in the Indian system.

Softer enforcement models for regulation and enforcement should be considered, that should be used along traditional methods. This includes initiatives such as awareness and grievance redressal camps, among others.<sup>314</sup> If local boards are instituted, they need to be given the legal obligation to create awareness – both amongst employers and workers – about working hours, wages, etc. The domestic workers need to be informed that it is okay to say no or that to ask for overtime is acceptable. Given, as we have seen, that the nature of care work is in itself devalued, awareness generation is the key to better working conditions. The law should

<sup>309</sup> International Labour Office, *Labour Relations and Collective Bargaining*, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_432886.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_432886.pdf) (Last visited on August 19, 2018).

<sup>310</sup> International Labour Organization, *Domestic Workers Negotiate new Collective agreements in Uruguay and Italy*, available at [https://www.ilo.org/travail/areasofwork/domestic-workers/WCMS\\_212212/lang--en/index.htm](https://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_212212/lang--en/index.htm) (Last visited on June 18, 2018).

<sup>311</sup> International Labour Organization, *Domestic Work Voice and Representation through Organizing*, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_436279.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436279.pdf) (Last visited on August 18, 2018).

<sup>312</sup> Balmurali Natrajan & Rajesh Joseph, *Domestic Workers and the Challenges of Collective Action in Informal Work*, May 4, 2018, available at [https://cse.apu.edu.in/wp-content/uploads/2018/05/Natarajan\\_Joseph\\_Collectivization\\_DWs.pdf](https://cse.apu.edu.in/wp-content/uploads/2018/05/Natarajan_Joseph_Collectivization_DWs.pdf) (Last visited on June 18, 2018).

<sup>313</sup> The Wire, *In a First, Kolkata Domestic Workers Organisation Gets Trade Union Status*, June 19, 2018, available at <https://thewire.in/rights/in-a-first-kolkata-domestic-workers-organisation-gets-trade-union-status> (Last visited on August 18, 2018).

<sup>314</sup> International Labour Organization, *The Informal Economy and Decent Work: A Policy Resource Guide. Supporting Transitions to Formality*, 2013, available at [https://www.ilo.org/emppolicy/pubs/WCMS\\_212688/lang--en/index.htm](https://www.ilo.org/emppolicy/pubs/WCMS_212688/lang--en/index.htm) (Last visited on October 30, 2018).



place an onus on the relevant local authority to undertake awareness drives and campaigns, educating domestic workers' unions as well as employers. Countries like Spain,<sup>315</sup> Paraguay,<sup>316</sup> Malaysia,<sup>317</sup> conduct proper and systematic drives for improving the awareness in the industry.

#### 4. Resolution of Conflicts

Grievance redressal, dispute resolutions and sanctions are key elements that may be determinative of the success of a legislative framework. Workers are often reluctant to come out and speak due to fear of reprisals or due to conditions around them which do not allow them to break off the employment.<sup>318</sup> Recognising the familial set-up, the default recourse to an adversarial setup, as discussed, might not serve its purpose. Rather, alternatives should be explored. Hong Kong, for instance, offers free conciliation services to resolve employment disputes.<sup>319</sup> In Jordan, upon information of noncompliance, the Labour Ministry summons the worker and the employer for amicable resolution of disputes.<sup>320</sup> Even sanctions, following the recent trends in family legislations,<sup>321</sup> should allow for civil and restorative remedies for the less severe violations. Models of regulated settlements and conciliations that do not require the payment of procedural fees by complainants should be explored. These alternatives encourage domestic care workers to take recourse to the law without the threat of necessarily souring relations.

This discussion on the alternatives only explores a few ways in which an understanding of the industry can inform a more effective policy response. Central to most of these suggestions is an understanding of the peculiarities of care work, of the subjective positions of care workers, and of the highly personalised nature of the employment relation. This draws heavily from discussions on ethics of care; trying to ascertain a middle ground between family and labour regulations. However, these are only illustrative and require much wider and systemic

<sup>315</sup> European Federation of Food, Agriculture and Tourism Trade Unions, *supra* note 283.

<sup>316</sup> International Labour Organisation, *Domestic Workers' Awareness Campaign in Paraguay*, December 1, 2014, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/event/wcms\\_383826.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/event/wcms_383826.pdf) (Last visited on June 9, 2018).

<sup>317</sup> Jeanine Kok, *Organizing Migrant Domestic Workers: The Challenges for a Trade Union in Malaysia*, available at [https://dspace.library.uu.nl/.../Organizing%20Migrant%20Domestic%20Workers\\_igitu.docx](https://dspace.library.uu.nl/.../Organizing%20Migrant%20Domestic%20Workers_igitu.docx) (Last visited on June 9, 2018).

<sup>318</sup> Human Rights Watch, *I Was Sold*, July 13, 2016, available at <https://www.hrw.org/report/2016/07/13/i-was-sold/abuse-and-exploitation-migrant-domestic-workers-oman> (Last visited on January 4, 2018).

<sup>319</sup> Government of Hong Kong, *How to Seek Voluntary Conciliation Service for Free*, available at <http://www.gov.hk/en/residents/employment/employee/conciliation.htm> (Last visited on August 25, 2017).

<sup>320</sup> Ministry of Labour, Jordan, *2009 Regulation of Domestic Workers, Cooks, Gardeners and Similar Categories*, October 1, 2019, available at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/85397/95601/F1107048298/JOR85397.pdf> (Last visited on March 24, 2019).

<sup>321</sup> Protection of Women from Domestic Violence Act, 2005.

deliberations to be undertaken by the government, involving different stakeholders and policy groups. A shift in perspective is crucial to address systemic problems considering social and at times, relational realities. Amicable dispute resolution, employer's privacy and integration of the care worker into the family unit, all signal a changing legislative understanding. These provide for a good starting point to re-theorise protection for the domestic care worker in India.

## VI. CONCLUSION

Care is a public good with intrinsic worth. 'Care-work' addresses care-deficits within the household and has to be viewed as such. In correcting the undervaluation of the care services, the underlying need for care and empathy in providing those services cannot be ignored. To see care-giving as non-productive or undervalue it, is not justified. Care-work, especially when done by third party care-workers, is 'legitimate work' that needs to be adequately remunerated. The notions of the 'employer', the 'employed', and the workspace are not the same, nor are the underlying power hierarchies and relations. This must be the ground-zero for law and policy makers.

Domestic care-givers have been routinely neglected by the State and excluded from any protective measures and benefits. This only adds to the various levels of exploitation – physical, economic and even emotional that they are routinely subject to. While understanding that domestic work happens within a private home and is mostly hidden, implementation hurdles cannot justify non-intervention in light of exploitative practices. The homeowners' and employers' rights cannot be negated nor can the employees' rights against exploitation of bodily autonomy and fair working conditions. Given however the vulnerabilities that the latter encounters due to a multitude of social and economic factors, the law needs to step in to regulate their inherently unequal relationship. A comprehensive legislative framework that addresses the peculiarities of the industry is imperative.

Extending existing formal sector employment regulation has not been effective. Even the formal workspace is moving towards democratisation and humanisation of employment relations. Inclusion of childcare centres, flexible hours and work spaces are only representative of recognising work as a communitarian and relational notion, embroiled with human interaction. Given this trend to apply imperfect formal sector standards to the care industry will only be regressive at best.

The distinct nature of work requires a separate legislation. A legislative response that adequately wishes to represent the domestic workspace and the domestic care-worker should be sensitive to the 'caring' nature of the work involved, be sensitive to the place of work, i.e., the familial set-up as well as the web of caring relations within which this work is performed. We have suggested re-theorisation of the basis of regulating this sphere.

A legal framework to be effective must encompass this relational understanding of workers who are employed to be family members. We propose, *first*, that looking at the domestic workspace through the lens of care ethics can help assess and account for the emotional quotient as part of the job description, necessitating isolation from mainstream labour debates. *Second*, exploring models of regulation closer to family laws may be better suited to the domestic workspace. This would entail borrowing from models of family regulation to overcome hurdles of approaching caring relations and intervening within the home. The bare minimum would require ascribing value to care work; for regulation to accommodate for caring relationships and for modes of implementation to be sensitive to the domestic workspace. Some suggestions along these lines have been discussed below. On one hand this necessitates substantive protections to encompass a broader set of possible exploitations. On the other hand, enforcement models need to be wary of privacy considerations and adopt an intervention model suited to the home-space. Dispute resolution methods need to allow for non-adversarial processes. Most importantly, given the culture of servitude and widespread exploitation, raising awareness about these rights, about working conditions, and terms of employment in care work becomes imperative in order for any such framework to succeed.

Even the conventional labour law discourse is slowly progressing towards assessing 'caring labour' as an economy-wide necessity, even in the formalised sector; drawing on the worker as a social being, business as a social entity, markets as social institutions and economics as a part of society.<sup>322</sup> The domestic care industry befits the perfect test ground for employing an ethics of care perspective to employment regulation whose success may even help making a case for an economy-wide rethinking of the premise of employment.

The inadequacy of the current regulatory status or the lack thereof has been sufficiently illustrated, and the need for a more suited comprehensive alternative been highlighted. Our discussion has focussed on identifying the starting points for a nascent discourse, that needs to be built upon to include many more stakeholders and diverse voices so as to materialise into an effective framework for regulation.

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<sup>322</sup> See Julie A. Nelson, *Gender and Caring* in HANDBOOK OF RESEARCH ON GENDER AND ECONOMIC LIFE 62-76 (Deborah M. Figart & Tonia L. Warnecke, 2013).