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Cover Page Footnote

I would like to thank Prof. Amy Kapczynski for many helpful conversations and comments on an earlier draft of this paper.

ARTICLE**LOCATING THE ‘NANNY’ IN LEGAL THEORY**

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ABSTRACT

Paid domestic workers pose a challenge to legal theorists since they occupy the unique intersection of the market and the home. While being paid for the ‘care’ they provide, their work is characterised by a high degree of informality and is usually also considered emotive. I use India as a case study to show how attempts to include paid domestic workers within formal labour law protections have been consistently unsuccessful, which demonstrates the unique nature of paid domestic work. At the same time, academic arguments for the inclusion of such workers in family law frameworks raise several practical concerns and do not respond to the demands of domestic worker organising. This presents both difficult questions and unsatisfying answers. I suggest that instead of looking for all-encompassing legal theories, the law should embrace the legal ambivalence of paid domestic workers and create a menu of options that address their specific vulnerabilities.

I. INTRODUCTION

A nanny often evokes the image of an old, doddering, faithful family retainer who has spent her life in the service of her employers, but who is conveniently forgotten in her old age and left to her own devices. The story of a maid called Constantine in Kathryn Stockett’s *The Help*, who, in spite of serving a family for twenty years, is ultimately let go of due to her employer’s racism, epitomises this trope.¹ However, nannies are not the only domestic workers who lead a precarious existence. Older Bollywood movies often cast male actors as the quintessential ‘Ramu Kaka’, who faithfully waits upon the family and performs a variety of miscellaneous functions.² Almost all categories of paid domestic workers,³ including cooks, cleaners, personal aides, etc., find themselves occupying complex

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1 Kathryn Stockett, *The Help* (Penguin 2009).

2 Although the realist turn in Bollywood seems to have given the character of the domestic worker an update, see Nandini Ramnath, ‘Domestic Workers in the Movies: Piku’s Budhan and the Mystery

3 I use the terms ‘paid domestic workers’ and ‘domestic workers’ interchangeably. While using the term ‘domestic work’, however, I specify if I am referring to paid or unpaid domestic work. of Ramu Kaka’ (*Scroll.in*, 10 May 2015) <<https://scroll.in/article/726366/domestic-workers-in-the->

locations where they are intimately involved with the families they work for and often live with, but do not enjoy the benefits of any of the rights and obligations that family members ordinarily owe each other.

This is because, unlike the bonds of love and affection and family law rules that form the basis of family members' obligations to each other, domestic workers are paid for the 'care' they provide. Ironically, however, the fact of paid caregiving does not transform their status as full-fledged workers. In fact, labour law regimes in most countries exclude domestic workers and revolt against the idea of viewing the household as a workplace. For instance, the International Labor Organization (ILO)' Domestic Workers' Convention, 2011 (C-189), which seeks to include domestic workers in existing labour law regimes, has been ratified by only 35 countries.⁴ Reasons advanced for such exclusion range from the persistence of the separate spheres ideology which views the home and the market as fundamentally different settings, difficulties in implementing labour law in an essentially private setting, to problems with defining the roles and tasks of domestic workers.

As a consequence, paid domestic work is often characterised by a high degree of informality, uneven and low wages, the absence of occupational health and safety measures, and the lack of social protections such as health insurance and retirement benefits. There is a unique interaction between the market and home in the case of domestic workers. They are simultaneously subject to market conditions—such as the lack of alternative well-paying employment opportunities, which result in them entering paid domestic work—and the interpersonal power dynamics within the home which shape the employer-employee relationship. They are also simultaneously members of two families, their own families and the families for which they work, and therefore often end up bearing a double burden of care.⁵ Paid domestic workers therefore find themselves at several unique intersections.

movies-pikus-bhudan-and-the-mystery-of-ramu-kaka> accessed 26 December 2022.

4 Ratification of C189.- Domestic Workers Convention, 2011 (No. 189), International Labor Organization <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460> accessed 4 May 2022.

5 Scholars have written about 'global care chains' where women from the Global South often immigrate to the Global North as domestic workers, while their children end up being looked after by poorer women in their own countries, see Arlie Russell Hochschild, 'Love and Gold' in Barbara Ehrenreich & Arlie Russel Hochschild (eds) *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Holt 2003).

Where does this leave them? Do paid domestic workers occupy a subliminal legal vacuum? How can we theorise about their roles and ensure that they receive a fair deal? While domestic worker organising has largely focused on labour law protections, such campaigns have not always met with success. Even in cases where labour laws have been extended to include domestic workers, it has not translated to increased protection. Modern family law has not explicitly recognised the role of domestic workers, but scholars have made arguments for their inclusion in both these frameworks. In this article, I explore the various arguments for the inclusion of domestic workers in labour and family law and highlight the tensions in such framings. Based on these, I explore some tentative ways to respond to domestic workers' ambivalent legal status.

In order to do this, I engage with theoretical literature on domestic work in labour and family law. However, to contextualise my discussion I use India as a case study to trace the history and challenges in the legal recognition of domestic work. This choice is pragmatic, given my personal familiarity with Indian law. I am also conscious that we cannot theorise domestic work at a high degree of generality since local circumstances, such as political, economic and social contexts, condition the realities of domestic work to a large extent. In my discussion, I acknowledge these varied contexts while trying to draw out more general conclusions for the purposes of my broader theoretical discussion. This is also true for the various theoretical literatures I rely on, which have been theorised in specific jurisdictional contexts and therefore must be viewed in those contexts.

In Part II, I analyse how concepts such as 'domestic work' and 'care' have been defined, trace the efforts to treat 'domestic work' as 'work', and look at the complications in understanding the legal status of domestic workers. Part III is a deep dive into the history of legal recognition of domestic workers in India. I specifically focus on the efforts to enact comprehensive labour law protections for domestic workers, and on the barriers that have prevented the enactment of such protections. I draw out the tensions in including domestic workers in labour laws based on the Indian experience. Part IV looks at how scholars have addressed arguments for applying family law protections to domestic workers and their implications. In Part V, I explore ways in which we can respond to the legal ambivalence of domestic work, before concluding in Part VI.

II. DOMESTIC WORK AS CARE, AND CARE AS WORK

The ILO has defined domestic work as any work performed in a household by a person who is in an employment relationship.⁶ This can include a range of functions such as cooking, cleaning, gardening, childcare and elder care, among others. Domestic workers are also expected to perform additional tasks—such as picking children up from schools—which are not part of their job descriptions. Domestic workers have been categorised as part-time, full-time, and live-in workers.⁷ Live-in domestic workers constitute a unique category since they live with their employers and are often available at all hours of the day. Domestic work is often characterised by informality, resistance to legal regulation, and the specificities of the employer-employee relationship.⁸

Scholars have understood domestic work both as social reproduction and as care.⁹ Barbara Laslett and Johanna Brenner define social reproduction as 'the activities and attitudes, behaviours and emotions, responsibilities and relationships directly involved in the maintenance of life on a daily basis, and intergenerationally.'¹⁰ Some scholars explicitly use the term 'care', as opposed to the more traditional reproductive labour understanding, to emphasise the emotional content of specific kinds of labour, and to avoid the hierarchies between different kinds of work like cleaning and childcare.¹¹ There is, however, some disagreement on whether 'domestic work' and 'care' should always be used interchangeably. For instance, Mignon Duffy notes that domestic worker tasks are not all relational and do not necessarily involve an emotional element.¹²

This has several practical implications. For instance, in India, due to the persistence of social locations like caste, workers engaging in 'care work' usually have a higher social standing than those engaging in more menial

6 See Article 1, C-189 – Domestic Workers Convention, 2011 (No. 189).

7 Neymat Chadha, *Domestic Workers in India: An Invisible Workforce* (Social and Political Research Foundation 2020).

8 Asha D' Souza, 'Moving towards Decent work for Domestic Workers: An Overview of the ILO's Work' (2010) ILO Bureau of Gender Equality, Working Paper 2/2010.

9 Lauren Wilks, 'Gender and Domestic Work in India' in Shirlena Huang & Kanchana N. Ruwanpura (eds), *Handbook on Gender in Asia* (Edward Elgar 2020).

10 Barrie Thorne, 'Feminism and the Family: Two Decades of Thought' in Barrie Thorne & Marilyn Yalom (eds), *Rethinking the Family: Some Feminist Questions* (Longman 1982).

11 Wilks (n 9).

12 Mignon Duffy, 'Reproducing Labor Inequalities: Challenges for Feminists Conceptualizing Care at the Intersections of Gender, Race, and Class' (2005) 19(1) *Gender & Society* 66.

tasks. Nimushakavi Vasanthi notes that it may thus be more useful to distinguish the two in the Indian context.¹³ Indian scholars have therefore often used the term 'domestic work' instead of 'care work' since it seen as closer to the self-perception of workers.¹⁴ Even more practically, this distinction plays out in domestic worker organising, where more skilled professionals such as gardeners or drivers are not usually seen as part of the grassroots domestic worker movement which primarily comprises 'maids' who work within the home.¹⁵ This is in contrast to the very broad definitions of 'domestic work' proposed by international organisations like the ILO.

The effort to treat women's work within the household as work that is also eligible for market quantification, has a long history in feminist legal thought.¹⁶ The devaluation of women's unpaid domestic work is often extended to paid domestic work within the household. Inclusion of such work under labour law, which extends protection to other categories of paid workers, is therefore an intuitive response to valuing paid domestic work. Domestic workers as paid workers have also demanded such inclusion, with labour law recognition being one of the key demands of global domestic worker organising.¹⁷ However, due to the complications associated with the uniqueness of domestic work, the recognition of domestic care work as work within labour law has never been straightforward.

Writing about 'care'¹⁸ in the American context, Evelyn Nakano Glenn emphasises concepts of 'social organisation of caring' and 'coercion' as

13 Nimushakavi Vasanthi, 'Addressing Paid Domestic Work: A Public Policy Concern' (2011) 46(43) *Economic and Political Weekly* 85.

14 Wilks (n 9); also see, Samita Sen and Nilanjana Sengupta, *Domestic Days: Women, Work, and Politics in Contemporary Kolkata* (Oxford University Press 2016).

15 Neetha N., 'Paid Domestic Work: Making Sense of the Jigsaw Puzzle' in Neetha N. (ed), *Working at Other's Homes: The Specifics and Challenges of Paid Domestic Work* (Tulika 2019) 1, 17.

16 See Katherine Silbaugh, 'Turning Labor into Love: Housework and the Law' 91(1) *Northwestern University Law Review* (1997) 1.

17 See International Domestic Worker Federation <<https://idwfed.org/en/about-us-1>> accessed 10 May 2022; Christine Bonner and Dave Spooner, 'The Only School We Have: Learning from Organizing Experiences Across the Informal Economy, Women in Informal Employment: Globalizing and Organizing' (2012) <<https://www.wiego.org/resources/only-school-we-have-learning-organizing-experiences-across-informal-economy>> accessed 10 May 2022.

18 Glenn defines care as follows: 'caring can be defined most simply as the relationships and activities involved in maintaining people on a daily basis and intergenerationally.' Her conception of care includes direct caring of another person, maintaining the physical surroundings/milieu in which

being significant in the context of domestic work.¹⁹ By social organisation of caring, she implies the systematic ways in which society assigns the burden of care, and by coercion, she implies the physical, economic, social and moral pressures that induce persons to practise care work.²⁰ Both these concepts play out uniquely in the context of paid domestic workers, who often belong to marginalised groups, such as communities of colour, or immigrant groups, and have been systematically excluded from federal labour protections. Glenn argues that domestic workers have both a quasi-family standing as well as a quasi-property status, which makes their situation doubly coercive.²¹ Being located within the home, domestic work is viewed from the lenses of altruism and status obligation, which leads to domestic workers' exclusion from formal employment laws.²² At the same time, due to their quasi-property status they do not enjoy family law protections and can be easily discarded when they are no longer useful.²³

The need for valuing domestic work in market terms and concerns for improving the conditions of domestic work have led to efforts to include domestic work within labour laws. However, the status of domestic workers as paid caregivers within the home raises several complications in their smooth inclusion into labour law and leaves them particularly vulnerable.

III. DOMESTIC WORKERS AND THE QUEST FOR LABOUR RIGHTS RECOGNITION IN INDIA

In India, due to the high degree of informality, reliable data on paid domestic workers is hard to come by. According to government statistics there are 4.75 million domestic workers in India, of whom almost 3 million are women.²⁴ The ILO and other experts, however, estimate much higher numbers, ranging from 20 to 80 million.²⁵ Regardless of numbers, there is consensus on the overwhelmingly feminised nature of the workforce.

the person lives, and fostering people's relationships and social connections. See Evelyn Nakano Glenn, *Forced to Care: Coercion and Caregiving in America* (Harvard University Press 2012) 5.

19 *ibid* 5–9.

20 *ibid* 5–9.

21 *ibid* 128–151.

22 *ibid* 128–151.

23 *ibid* 128–151.

24 Domestic Work is Work, Using ILO Convention 189 to Protect Workers' Rights Across the Commonwealth, Commonwealth Human Rights Initiative (2021).

25 *Ibid*.

While the increase in numbers over recent decades has been attributed to the rise of the Indian middle class and higher rates of internal rural-to-urban migration coupled with a lack of alternative employment opportunities, 'servitude' has a much longer history in South Asia.

A. Brief History

While scholars are still in the early stages of creating a historiography of domestic work, existing academic writing suggests a complicated and variegated understanding of servitude based on different local contexts and times in pre-colonial South Asia.²⁶ This ranges from changing understandings of the word 'servant' in South Asian languages to the changing employment relationship—from *adab* traditions to caste—due to transformations in political economy and its impact on the household.²⁷

In the colonial period, Indian servants came to be considered as essential to the smooth functioning of European/British households, with the household becoming a metaphor for the empire.²⁸ The role of the lady of the house, or the 'memsahib', in negotiating relationships with the various categories of servants—the butler, the cook, the washerman, etc.—has particularly been highlighted.²⁹ A similar demand for varied servants has been documented in Indian upper caste, middle class households in the colonial period.³⁰ Caste, with its notions of purity and pollution linked to various tasks and occupations, informed these various categories of domestic work. For instance, tasks such as cleaning were often restricted to persons from lower castes, while cooking was associated with persons of upper castes.

From a legal perspective, Nitin Sinha highlights a much more formal regulation of servants in colonial times. For instance, in colonial Calcutta, regulations governing the master–servant relationship (including the prescription of fines and criminal punishments for violation) and wage lists for different categories of servants were issued as far back as the late 1700s.³¹ This was accompanied by mechanisms for the registration

26 Nitin Sinha and Pankaj Jha, 'Tracing Historical Forms of Servitude: Introductory Remarks and Elementary Reflections' [2022] South Asian History and Culture <https://doi.org/10.1080/19472498.2022.2050025> accessed DATE.

27 *ibid.*

28 Wilks (n 9).

29 *ibid.*

30 *ibid.*

31 Nitin Sinha, 'Between Welfare and Criminalisation: Were Domestic Servants Always Informal?'

of servants, which sought to police servants and ensure that they were apprehended if they sought to flee their workplaces.³² The breach of a master–servant contract was considered an offence before it was eventually dropped from the newly enacted penal code.³³ Sinha argues that this equation of servants with criminal activity has cast a long shadow over Indian legal thought and has manifested itself through measures like licensing and registration even in modern legislation.³⁴

B. Understanding Paid Domestic Work in Modern India

Paradoxically, after India's independence, domestic workers became increasingly informalised and found themselves ignored by formal legal frameworks. This was despite the explicit emphasis on labour welfare in the Indian Constitution and a rising discourse on labour rights and social security.³⁵ Another shift was the increasing feminisation of the workforce: whereas in the past, it was men who primarily served as domestic workers, over time, women came to be overrepresented in the workforce.

The modern image of the domestic worker is often of the part-time help in urban areas who frequents multiple households in a single day. Platforms like BookMyBai.com (book my maid) have heralded the entry of the gig economy in this sector as well.³⁶ A rich body of anthropological work has sought to document and theorise the condition of domestic workers in modern India. Ray and Qayum, in their ethnographic study of domestic workers in Kolkata, argue that a culture of servitude, which can be traced back to the feudal/colonial past, continues to inform domestic worker employment relations.³⁷ Therefore, even though there has been a shift in the understanding of the employment relationship from being based on ties of affection and loyalty to one based on wage labour, both employers and domestic workers invoke familial notions to explain their relationship.³⁸ Such a rhetoric often hides the exploitation involved in the employer–employee relationship. In contrast, Sen and Sengupta's ethnographic study

(*The Wire*, 26 Mar 2020) <<https://thewire.in/labour/domestic-servants-informal-workforce>> accessed 7 May 2022.

32 *ibid.*

33 *ibid.*

34 *ibid.*

35 Sinha and Jha (n 26).

36 See <bookmybai.com> accessed 7 May 2022.

37 Raka Ray and Seemin Qayum, *Cultures of Servitude: Modernity, Domesticity and Class in India* (Stanford University Press 2009).

38 *ibid.*

based in Kolkata focuses on the domestic worker's agency and describes their relationships with their employers as being one of 'pragmatic intimacy'.³⁹ Their relations are simultaneously caring and exploitative.

The substantial number of domestic workers in India has to do with both the changing political economy and the influence of social mores. Neetha N. argues that 'economic changes leading to increased inequalities, marked by agrarian distress, indebtedness and rural-urban migration, encouraged the growth of paid domestic workers, as they produced both a class of employers who can afford it and a surplus of unskilled workers.'⁴⁰ Moreover, class status often necessitates the hiring of domestic workers, where the delegation of domestic work to lower class women is considered an essential part of social mobility.⁴¹ The hiring of domestic workers is not always motivated by the woman's need to go out to work. This has led to a body of scholarship which focuses on the unique relationship between the mistress and the maid and the role that gender and power play in conditioning it.⁴²

Gender, along with caste and class, has a unique influence on the domestic worker-employer relationship in India.⁴³ First, women comprise the largest category of paid domestic workers in India and often deal with other women as their primary employers. The nature of work, that is housework, has traditionally been gendered and devalued, which leads to the devaluation of domestic work as well. Second, while the link between caste and occupation is perhaps less rigid than it was in the past, it continues to inform the workforce with persons of lower caste often performing more menial tasks.⁴⁴ Unsurprisingly, persons of lower castes

39 Sen and Sengupta (n 14).

40 Neetha (n 15) 2.

41 *ibid* 2.

42 For instance, see Chudamani Basnet and A.S. Sandhya, 'Female Employers and their Maids in New Delhi: "This is Our Culture"' [2020] South Asia Research <<https://doi.org/10.1177/0262728020915561>>; Otsu Harju, 'Women and Maids: Perceptions of Domestic Workers, Housework and Class among Young, Progressive, Middle- to Upper-Class Women in Delhi' (2017) Working Papers in Contemporary Asian Studies; No. 55 (Centre for East and South-East Asian Studies, Lund University, Sweden).

43 Parvati Raghuram, 'Caste and Gender in the Organization of Paid Domestic Work in India' (2001) 15(3) *Work, Employment & Society*; Sujatha Gothoskar, 'The Plight of Domestic Workers: Confluence of Gender, Class and Caste Hierarchies' (2013) 48(22) *Economic and Political Weekly* 63.

44 Neetha (n 13); Wilks (n 9).

comprise a majority of paid domestic workers in India.⁴⁵ Third, domestic workers' marginalised class status and poverty leads to the easy dismissal of their voices in political discourse as well as conditions their weak bargaining position with their employers. All three factors contribute to domestic worker vulnerability.

C. The Quest for Labour Rights Recognition

There is extensive academic literature documenting domestic workers' quest for inclusion within labour laws in India.⁴⁶ Some of the impetus for this comes from the strong labour rights protections in the Indian Constitution.⁴⁷ Post-independence labour reforms have, however, systematically excluded domestic workers from their ambit.⁴⁸ Demands for legal reforms and inclusion have also consistently been made by organised groups of domestic workers.⁴⁹ Due to the very nature of domestic work, while domestic workers lack the same level of organisation as traditional trade unions, groups such as the National Domestic Workers Movement and SEWA have had a notable presence.⁵⁰ Global measures for greater labour protections such as the ILO Domestic Workers Convention 2011 (No. 189) have also spurred demands for comprehensive legislation.

A series of legislative proposals aimed at giving labour law protections, comprising bills introduced by private members in Parliament as well as those drafted by public institutions such as the National Commission for Women, have been made over time but none of them has been enacted.⁵¹ The central government has held several consultations on a draft national policy for domestic workers but has not taken any concrete steps towards

45 Neetha (n 15) 13: 'In caste terms, Other Backward Classes (OBC) accounted for the highest proportion of domestic servants (32.4 per cent) and upper castes (28.4 per cent)'.

46 Nicola Cunningham Armaocast, 'Domestic Workers in India: A Case for Legislative Action' (1994) 36(1) *Journal of the Indian Law Institute* 53; SEWA, *Domestic Worker's Laws and Legal Issues in India*, WIEGO Law & Informality Resources (WIEGO 2014); N. Neetha and Rajni Palriwala, 'The Absence of State Law: Domestic Workers in India' (2011) 23(1) *Canadian Journal of Women and the Law* 97.

47 The Directive Principles of State Policy in the Indian Constitution, while being legally unenforceable, enshrine various labour welfare values, such as the right to work, equal pay for equal work, right to living wage, right to humane conditions of work and maternity relief. See Constitution of India, 1950, Art. 39, Art. 41, Art. 42 and Art. 43.

48 Sinha and Jha (n 26).

49 Neetha and Palriwala (n 46).

50 Decent Work Deficits: The situation of Domestic Workers in India, Indonesia, Nepal and Philippines, Committee for Asian Women (2010).

51 Neetha and Palriwala (n 46).

adopting it.⁵² In fact, in recent years, national discourse on domestic workers has shifted from the need for a comprehensive legislative framework to greater skill development, with the expectation that upskilling would result in the market responding with better protections.⁵³

In the absence of a comprehensive labour law covering domestic workers, disparate legal regimes have sought to regulate domestic work. One key legal change has been the inclusion of domestic workers under the Minimum Wages Act, 1948 by several states.⁵⁴ The minimum wage law allows both the federal and state governments to lay down minimum wage entitlements to be followed by both public and private employers for specified employments. While this is an important achievement in terms of the official recognition of domestic workers' entitlement to minimum wages, scholars have pointed to several problems with both design and implementation. Neetha N., in her study of minimum wage notification across several states, notes that the wage ceilings are uniformly low and set without adequate consultations with domestic workers.⁵⁵ Moreover, in several states, these notifications do not distinguish between different kinds of domestic work and conflate several categories.⁵⁶ They also do not seem to account for the peculiarities of domestic work, which includes both live-in and live-out work.⁵⁷ For instance, live-out domestic workers often work part-time across several households. If a minimum wage law were to include an employment timeframe, these domestic workers may not qualify since they may not have worked for that long in any one household,⁵⁸ despite their cumulative work across households exceeding the minimum time stipulation.

Finally, the laws do not have a strong implementation mechanisms and are extremely employer friendly as they bar enforcement actions such as

52 *ibid.*

53 N. Neetha, 'Misconstrued Notions and Misplaced Interventions: An Assessment of State Policy on Domestic Work in India' (2021) 64 *The Indian Journal of Labour Economics* 543 <<https://doi.org/10.1007/s41027-021-00334-w>>.

54 Vasanthi Nimushakavi, 'Extending Legal Protection to Domestic Workers' in N. Neetha (ed), *Working at Other's Homes: The Specifics and Challenges of Paid Domestic Work* (Tulika 2019) 250.

55 N. Neetha, 'Mirroring Devalued Housework? Minimum Wages for Domestic Work' in N. Neetha (ed), *Working at Other's Homes: The Specifics and Challenges of Paid Domestic Work* (Tulika 2019) 278.

56 Nimushakavi (n 54) 262–266.

57 Neetha (n 55) 290–291.

58 *ibid* 290–291.

inspections/audits in private homes.⁵⁹ According to Neetha N., the laws are designed in such a way that they paradoxically end up reinforcing the already devalued nature of domestic work and do not account for the specificities of paid domestic work.⁶⁰ Moreover, the recent consolidation of different labour laws into four key labour codes is likely to result in removing even existing protections since most of the codes do not account for domestic workers.⁶¹

Two other federal legislations, the Unorganised Workers Social Security Act, 2008 and the Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013, explicitly include domestic workers. While the former sought to bring domestic workers within the ambit of social security schemes, the latter was enacted to cover instances of sexual harassment within the private space of the home. However, both legislations have been marked by shoddy implementation and have been criticised for not accounting for the peculiar position of domestic workers which makes it difficult for them to access measures otherwise designed for the organised sector.⁶²

This experience with existing labour laws should be seen in the light of broader critiques of extending formal labour laws to domestic workers. Vasanthi, for instance, argues that most existing laws are gender neutral and do not address the gendered nature of domestic work.⁶³ Moreover, they do not acknowledge the specific conditions of domestic work. Most labour laws in India proceed on a common law understanding of concepts and do not account for labour rights and welfare. For instance, concepts like the 'control test', to establish an employer–employee relationship, and the definition of an 'industry' as comprising an organised labour sector, exclude informal workplaces which do not meet the criteria of full-time work.⁶⁴

Scholars have also sought to identify reasons for the failure to enact comprehensive legislative protections for domestic workers. Broadly, there are four policy conundrums which make regulation difficult. First,

59 *ibid* 292–294.

60 *ibid* 292–294.

61 Neetha (n 53).

62 Mihika Poddar and Alex Koshy, 'Legislating for Domestic "Care" Workers in India – An Alternative Understanding' (2019) 12(1) NUJS Law Review 67, 92–93.

63 Nimushakavi (n 54).

64 *ibid*.

domestic work remains gendered and devalued and therefore does not get sufficient policy or legal attention. The problem of devaluation of paid domestic work is linked to the wider devaluation of women's work in the home. This devaluation is not only because of who does the work but also due to the linking of emotion to the nature of the menial tasks.⁶⁵ Neetha diagnoses this as broadly a problem of sex discrimination, which the women's movement in India needs to address.⁶⁶ These notions feed into the refusal to view the home as a workplace where paid work can occur. In a similar vein, Kamala Sankaran has argued that labour law must track developments in other laws such as family law where efforts are being made to value women's work in an economic sense.⁶⁷

Second, domestic work is characterised by a great deal of heterogeneity, which raises various definitional issues. For instance, should work outside the home such as gardening or driving be distinguished from domestic work inside the home, like cooking, childcare and eldercare, that focus on care?⁶⁸ The intimacy and personal discretion involved in many of these tasks also make it difficult to standardise and quantify them.⁶⁹ Moreover, the varying local contexts in which such work occurs makes it hard to come up with uniform legal categories.⁷⁰ For instance, even at the highest level of generality, it is hard to regulate live-in domestic workers and live-out/part-time domestic workers in the same way.

Third, collective action and organising remains difficult in the sector due to the isolating nature of domestic work.⁷¹ Here again, live-in and live-out domestic workers may have different experiences of worker consciousness and differing opportunities for organising. Apart from the physical barriers—given the unique nature of the home as a workplace—domestic workers may view their relationships with their employers differently. For instance, Neetha has argued that worker negotiations often proceed on patronage and familial notions rather than pure contractual negotiations.⁷² Workers' self-identification, where they often rely on their employers for

65 Neetha (n 55).

66 *ibid.*

67 Kamala Sankaran, 'Domestic Work, Unpaid Work and Wage Rates' in N. Neetha (ed), *Working at Other's Homes: The Specifics and Challenges of Paid Domestic Work* (Tulika 2019) 298.

68 Neetha (n 15).

69 Neetha and Palriwala (n 46).

70 *ibid.*

71 *ibid.*

72 Neetha (n 55).

several additional benefits (for instance, advances on their salaries or other kinds of assistance during emergencies) can make it hard for them to see themselves as part of formal unions.⁷³

Finally, glaring inequalities between domestic workers and their employers, in terms of both gender and caste, often pose structural barriers to legal change. Sonal Sharma has argued that the exclusion of domestic workers has served to preserve the old paternalist frame where ideas of family and kinship are utilised to secure a good relationship with domestic workers rather than using a contractual frame.⁷⁴ The issue of domestic work has therefore been cast in terms of poverty and human trafficking rather than as a peculiar form of employment. Such political framings of domestic work have posed ideological barriers to any meaningful legal reform.

Therefore, Glenn's formulation about the doubly coercive nature of domestic work—given workers' quasi-family and quasi-property status—has a special resonance in India, where domestic workers, despite forming a large workforce, lead a marginalised and precarious existence. Yet, the Indian experience shows the tensions in extending labour rights protections. Apart from the ideological and other social constraints to law reform, these tensions also arise from the peculiar nature of domestic work which does not correspond to existing legal categories of employment (in the formal sector), which labour law has been traditionally designed to regulate. The domestic worker–employer relationship is premised on the fact of wage labour; yet it has something more that is explained through various concepts such as familial-status, feudalism and patronage. This 'something more' is a consequence of the intimate nature of tasks that domestic workers perform and the nature of their workplace. This ends up masking the often-exploitative components of the employer–domestic worker relationship.

IV. FAMILY LAW THEORIES FOR UNDERSTANDING PAID DOMESTIC WORK

While labour law remains the predominant frame for extending protections to domestic workers, the quasi-family status of domestic work has prompted scholars to also theorise the inclusion of domestic workers

⁷³ *ibid.*

⁷⁴ Sonal Sharma, 'Domestic Workers, Class-Hegemony, and the Indian State: A Sociological Perspective on Ideology [2022] *South Asian History and Culture* <<https://doi.org/10.1080/19472498.2022.2068481>>.

in family law frameworks. I analyse three such articulations in existing scholarship.

A. Paid Caregiving and Minimum Marriage Rights

Philosopher Elizabeth Brake has argued that paid caregiving should enjoy 'minimum marriage rights'.⁷⁵ She views family law rights as an additional basis for protecting domestic workers over and above labour rights. She envisions minimum marriage rights as a thin conception of state support for caring relationships which, due to their very nature, states ought to support.⁷⁶ This is because such relationships are 'primary goods', which are valuable in and of itself, and do not require appeals to contested doctrines.⁷⁷ Such goods are, '"normally needed" for citizens' varying life plans and for the development and exercise of the moral powers.'⁷⁸ She defines minimum marriage rights as the legal entitlements necessary to directly support and protect caring relationships.⁷⁹ This includes recognition of legal status as well as functional entitlements of relationships such as immigration, bereavement leave, etc.

Therefore, paid caregivers should be eligible for State protection.⁸⁰ Instances where long-term paid caregivers grow to be close to their clients and, due to reciprocal affection, become non-fungible to each other, are paradigmatic cases for state recognition.⁸¹ Here the fact of payment or the fact that the relationship began with a different, more professional goal in mind, becomes immaterial since eventually the relationship becomes valuable for its own sake. The fact that such a relationship would likely continue even when payments cease underscores the need for state recognition since such a relationship is valuable in and of itself. Not recognising such relationships would violate equal treatment of caring relationships in liberal democracies.⁸²

75 Elizabeth Brake, 'Paid and Unpaid Care' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press 2018) 75; also generally see, Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford University Press 2012).

76 Brake (n 76) 77–78.

77 *ibid* 82–83.

78 *ibid* 82–83.

79 *ibid* 77–78.

80 *ibid* 84–88.

81 *ibid* 84–88.

82 *ibid* 84–88.

The kind of practical consequences that Brake has in mind, in cases where such reciprocal caring relationships develop, include 'protections against the employee's arbitrary reassignment, visitation rights, a role for the care worker in end-of-life decision making, and a symbolic or expressive shift in the law's regard for such workers as family members.'⁸³

Brake's formulation for family law protection for paid caregivers is sophisticated and principally coherent since it is based on the development of a non-fungible, caring relationship between the paid domestic worker and their client. The romanticised image of 'Ramu *kaka*' from older Bollywood movies neatly adheres to this formulation. However, in practical application its ambit may be too narrow and may demand too much of both domestic workers and their employers.

The kinds of paradigmatic cases that Brake has in mind do not cover the sheer variation in domestic work. For instance, part-time domestic workers may enjoy relationships of intimacy with each of their employers but may not spend sufficient time with any of them individually to develop truly reciprocal, non-fungible relationships. The kind of *Ramu Kaka*-esque long-term, live-in domestic workers may be few and far between. Even the classic case of a nanny, where such a relationship is most likely to develop, is inherently transient, with nannies moving on to different homes once the children they look after grow up. The temporality of care inherent in the social reality of most domestic workers poses a key challenge to Brake's theory and reduces its practical significance. Moreover, realistically, in a dispute between the domestic worker and their employer, establishing such a relationship may involve a highly fact-intensive inquiry which may be hard for third parties like state authorities and courts to undertake. Thus, at the threshold level, establishing what a truly caring relationship between a domestic worker and their employer should look like may be harder than anticipated.

B. Rights and Ethics of Care: Somewhere between Family and Labour Law

Writing in the Indian context, Mihika Poddar and Alex Koshy have suggested that perspectives on the regulation of domestic work should lie somewhere between family and labour law and incorporate an ethics-of-care approach.⁸⁴ They argue that neither family law nor labour law

⁸³ *ibid* 86.

⁸⁴ Poddar and Koshy (n 62) 101–107.

can solely account for the domestic worker–employer relationship. Viewing domestic workers purely with the lens of family law ignores the hierarchical nature of the family itself, which is often oppressive for its various members.⁸⁵ Family law-based justifications such as altruism and loyalty can also counter-intuitively become rationales for denying domestic workers fair wages and other protections.⁸⁶ This echoes Glenn’s idea of familial status leading to coercion in domestic work. On the other hand, viewing domestic workers in purely contractual terms ignores the relational and emotional aspects of care work. Poddar and Koshy argue that the attachment that domestic workers feel to their employers may make it difficult for them to resort to formal dispute resolution mechanisms.⁸⁷ A purely labour rights-based approach ignores the asymmetries in power between the domestic worker and their employers and how rights often end up favouring those with access to power and resources.⁸⁸

Poddar and Koshy argue for a combined ethics-of-care and rights approach which, apart from individual entitlements, also accounts for the relational nature of domestic work.⁸⁹ Adopting an ethics-of-care approach emphasises the responsibilities that are owed to those who are vulnerable and avoids the excessive individualisation of rights. While acknowledging the challenges of translating this approach into tangible legal measures, Poddar and Koshy suggest concrete legislative measures. One of them is to borrow thresholds of abuse in domestic work from domestic violence law rather than from criminal or labour law. Another is the use of non-adversarial methods of dispute resolution which aim to preserve relationships, instead of relying on traditional labour law tools such as inspections and audits, which could be perceived as being too intrusive.⁹⁰

Poddar and Koshy’s approach is useful in so far as it accounts for a variety of domestic work and combines features of both traditional family law and labour law. It also seeks to identify tangible outcomes of their theoretical reorientation. However, it does not create any independent basis for family law protections such as the creation of mutual rights and obligations between the domestic worker and the employer due to their familial

85 *ibid.*

86 *ibid.*

87 *ibid.*

88 *ibid.*

89 *ibid.*

90 *ibid.*

relationship. It can be better understood as a labour-law-plus standard where parts of labour law are modified to account for the unique nature of domestic work. Aside from these limitations, however, such an approach may directly respond to the standard critiques of extending formal sector labour laws to informal sectors like domestic work. However, it falls short in creating any additional family law protections which directly address domestic worker vulnerability owing to their quasi-family status.

C. The Networked Family

In the American context, Melissa Murray has argued for the need to recognise non-parental caregivers in a bid to reflect how families actually raise children, as opposed to how the law assumes they do.⁹¹ For instance, family law in the United States recognises the rights of parents to raise their children without any interference from the state or other third parties.⁹² Murray argues that such a strong doctrine of parental rights does not reflect the complex networks of caregiving—from grandparents to paid caregivers—that families rely on to care for children.⁹³ Recognising such caregivers is important not only to better reflect social realities but also to confer legal benefits—such as caregiving leave and other tax benefits—that non-parental caregivers are otherwise denied.⁹⁴ Murray relies on a broader category of caregivers, which includes paid domestic workers but also others like family members who may undertake unpaid caregiving.

Such an analysis responds directly to the classic domestic worker conundrum: how should the law deal with domestic workers such as nannies who often act like parents for the children under their care? In fact, parental rights for nannies may appear to be the intuitive response in a conversation on family law and domestic workers. Murray's answer, however, is more nuanced.⁹⁵ She suggests a theory of networked families, which includes both alternative and competing possibilities. These possibilities include: i) expanding the notion of parenthood to recognise functional parents, that is, third parties such as caregivers who function as

91 Melissa Murray, 'The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers' (2008) 94(2) *Virginia Law Review*; Also see response: Laura A. Rosenbury, 'Rights and Realities' (2008) 94 *Virginia Law Review*.

92 See generally, Douglas NeJaime, 'The Family's Constitution' (2017) 32 *Constitutional Commentary* 413.

93 Murray (n 92).

94 *ibid.*

95 *ibid.*

parents; ii) recognising explicit alternative statuses such as paid caregivers, as is, in the law; and iii) dismantling the status of parent and instead only recognising caregiving relationships in the law.⁹⁶

These possibilities locating domestic workers within the law are perhaps most strongly rooted in family law doctrine and respond to one of the most common conundrums of a domestic worker performing a parental role. The suggestion to legally recognize their alternative caregiver status, with its own attendant rights and obligations, is particularly compelling as it could also address issues of paid caregiving beyond the childcare context. For instance, family law could explicitly recognise paid domestic workers who perform various care tasks as unequivocal members of the household who are, beyond mere pay, owed various obligations in return for the care that they provide. However, such a status-based approach could reinforce the traditional coercion that domestic workers have felt due to their quasi-family status. Moreover, it may also not fully reflect the aspirations of respect and dignity for work as articulated by domestic worker organising over recent decades. After all, a status cannot be enforced from above and even if available as an opt-in, may not be useful if those it seeks to benefit are not interested in opting-in.

V. DIFFICULT QUESTIONS AND UNSATISFYING ANSWERS: EMBRACING AMBIVALENCE AND MOVING TOWARDS A MENU OF OPTIONS

Both labour and family law have sought to theorise the legal status of paid domestic workers who occupy several unique intersections—those of the market and the home, as well as of wage labour and familial status. The general devaluation of women's work within the home in legal thought also extends to paid domestic work, which has created barriers to legal reform. However, as we see in the Indian case, apart from the role of factors such as caste and class, the question of extending formal labour law protections to domestic workers has never been straightforward. The uniqueness of domestic workers' roles and workplaces poses several conceptual and practical challenges to extending labour law protections to them.

Applying family law protections is also easier said than done. Families are often sites of hierarchy and power, and while family members owe rights and obligations to each other, these are difficult to enforce since

96 *ibid.*

enforcement often requires litigation. Moreover, the effort to treat domestic workers as family members by analogising their status to parenthood or codependent, non-fungible relationships could require fact-intensive inquiry and is only likely to benefit a small category of domestic workers. Familial status has also often been the source of coercion for domestic workers, which has led to demands for greater labour law recognition in domestic worker organising. In this context, it is counterintuitive to suggest a status-based family law regime when domestic workers' movements ostensibly want to transcend that. Attempting to theorise the legal status of domestic workers therefore raises both difficult questions and unsatisfying answers.

I suggest two tentative ways in which we can respond to this challenge. First, we should avoid the search for all-encompassing legal theories. Rather, legal responses should embrace the ambivalence of domestic work and meet such workers where they are. Constructing legal categories backwards may serve as a better response to the vulnerabilities of domestic work. For instance, a key issue with domestic work is that of economic vulnerability post-termination of the domestic worker–employer relationship. This arises because domestic work is often not adequately compensated and familial status is used as a justification for denying formal labour law protections. To remedy this, the law could recognise long-term domestic workers' rights to economic support after termination of employment as well as corresponding obligations on families to provide such support. This is because their dependencies and vulnerabilities arise precisely owing to the nature of the care work that they do. Such discrete protections may be more effective in addressing some of the practical problems that domestic workers face.

Second, domestic worker–employer relationships remain highly privatised even though the need for care and support is universal to the human condition. In this context, it may be useful to think about a more active role for the State in addressing domestic workers' vulnerability. If care or social reproduction sustain human endeavour, then the State has an interest in supporting such care work since it benefits from it. Such State interventions could include social sector schemes focusing on aspects like healthcare and economic support that are targeted at paid domestic workers and address their specific vulnerabilities.

These suggestions, albeit tentative, aim to derive support to address domestic worker vulnerability from both the family and the State. They

seek to highlight how the ambivalences of domestic work may require solutions that go beyond our existing understandings of labour and family law protections. In making this point, I by no means wish to suggest that labour and family law reforms are futile endeavours. In fact, recognising the agency of domestic workers may often necessitate reliance on both these frameworks while being conscious of their limitations. Improving the conditions of paid domestic workers may therefore require a menu of options that address the many vulnerabilities associated with their work.

VI. CONCLUSION

Paid domestic work lies at the intersection of the market and the home. This unique position poses challenges for the inclusion of domestic workers in both labour and family law frameworks. This article demonstrates how attempts to include paid domestic workers within formal labour laws in India have met with very little success. Similarly, academic arguments for their inclusion in family law frameworks raise various practical concerns and do not respond to the demands of paid domestic worker organising. Therefore, locating paid domestic work in legal theory raises difficult questions and produces unsatisfying answers. A tentative approach by which legal theorists could respond to paid domestic work is by embracing its legal ambivalence. Instead of looking for all-encompassing legal theories, scholars could focus on a menu of options that address the specific vulnerabilities of domestic work. One such solution could include making families responsible for providing post-termination economic support to long-term paid domestic workers. Another solution would require the state to take a more active role in supporting paid domestic workers, and ultimately caregiving at home.

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