

FEMINIST REFLECTIONS ON LABOUR:
THE ‘ETHICS OF CARE’ WITHIN
MATERNITY LAWS IN INDIA

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The Maternity Benefit (Amendment) Act, 2017 has recently been passed by the Parliament of India. While this Act is a progressive step for women, there is a need to question the theoretical foundations of the law, rather than merely its consequential ramifications. Through this paper, we attempt to critique the individual rights-justice model that is integral to conceptualising maternity laws and labour laws in India. We employ a critical feminist lens to argue that such a model reproduces the public-private dichotomy and devalues the work of care within the private sphere- suggesting that it is not “transformative” labour, but “merely reproductive”. We draw from the feminist philosophy of care to argue that child-rearing must be recognised by the State as a form of labour in itself. Further, we root these theoretical suggestions in the contemporary Indian context by providing certain tangible suggestions in terms of legislative and judicial changes that would further the responsibility-care approach to the issue of maternity in the Indian legal framework. Through this paper, we argue for broadening the scope of “labour” to include the work of care-thereby creating a space for care, relationships and connectedness within the law.

Introduction	2	The Public-Private Dichotomy and its	
An Analysis of ‘The Ethics of Care’ Within		Implications on the Conception of	
Labour Law Jurisprudence: Transitioning		Labour	3
from the Language of ‘Benefit’ to the			
Approach of Care	3		

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The Ethics of Care as an Alternative Moral Philosophy: Incorporating Care within Labour Laws	6	The Maternity Benefit (Amendment) Act, 2017: Recommendations and Modifications	11
Recognizing Child Rearing as Caring Labour: Contrasting the Rights- Justice Model with the Responsibility- Care Model	8	Creation of Social Insurance Schemes to Ensure Maternity Protection	13
The Extension of Maternity Leave and the Creation of Social Insurance Schemes: Recommendations for the Legislature	11	Judicial Recognition of Child Rearing as a Form of Labour: Evaluating trends within Indian Courts	16
		CONCLUSION	21

INTRODUCTION

The importance of paid maternity leave and the need for maternity protection is a crucial element of the health and economic protection of women workers and their children in contemporary societal frameworks. This role is universally acknowledged and firmly established. A vast majority of countries have adopted statutory provisions for paid maternity leave. In recognition of the importance of maternity protection, the Indian legislature passed the Maternity Benefit Act, 1961 (hereinafter, 'the Act') - a statute that we will analyse along with judicial precedent in the course of this paper. Further, recently, The Maternity Benefit (Amendment) Act, 2017 has been passed by the Parliament (hereinafter, 'the Act') which shall also be analyzed in the course of this paper.

We divide this paper into three parts. In Part I, we undertake an analysis of the ethics of care and its relevance in labour law jurisprudence. Within this part, we contextualize the feminist theoretical work that challenges the public-private divide, and note its ramifications on the spheres of market, labour and the law. We suggest a jurisprudential shift from the approach of justice and rights to the approach of responsibility and care. In Part II, we suggest certain tangible ways in which this approach of care can be incorporated within the Indian legal system by specific legislative modifications such as the creation of social insurance or contributory public funding schemes to ensure maternity protection. In light of the new Act passed and the extension of the duration of maternity leave, it becomes crucial, now more than ever, for the employer to not bear the entire financial burden. Finally, in Part III, we provide a comprehensive judicial overview of case law on maternity leave. We also suggest a modification in judicial approach in favour of valuing child-rearing as a form of transformative labour that the state has an active duty to further. Cumulatively, hence, our objective in the course of this paper is to employ a feminist lens to reflect on the adequacy of maternity laws in India and suggest modifications in this legal framework. In doing so, we use the evolving area of feminist moral philosophy- the ethics of care- to argue for the state recognition of caring labour as a form of transformative labour. We aim to establish that our legal systems need to be more receptive

to care-giving work and view it as a form of labour in itself. This recognition should inform the framing and interpreting of laws related to maternity in India.

I. AN ANALYSIS OF ‘THE ETHICS OF CARE’ WITHIN LABOUR LAW JURISPRUDENCE: TRANSITIONING FROM THE LANGUAGE OF ‘BENEFIT’ TO THE APPROACH OF CARE

We begin this part of the paper with a dilemma that feminist¹ legal scholarship² has routinely faced. In women’s attempts at entering the public sphere of organized labour, is it desirable to deprioritize the work of care that women have undertaken for centuries within the private? Or, instead of a denouncement of this work, is there a way to conceptualize it as a form of labour in itself? Within this part of the paper, we divide our analysis into two primary sub-sections. In the first sub-section, we analyse the ‘public-private sphere’ dichotomy and demonstrate ways in which the legal system reflects this demarcation and endorses the biases inherent to. In the second sub-section, we provide a detailed overview of the ‘ethics of care’. We further discuss the ideas of justice and care, though not mutually exclusive, as distinct lenses through which laws are conceptualized. In the course of this part of the paper, we suggest that the state shift its policy from viewing maternity as a ‘benefit’ that women are granted, to a form of caring labour. Once maternity and the work involved with it is conceptualised as a form of labour, the state itself has a duty to further and encourage it. We argue that this ideological shift is crucial to enforce the practical modifications to the law that we suggest in subsequent portions of the paper.³

A. The Public-Private Dichotomy and its Implications on the Conception of Labour

One of the most fundamental theoretical critiques within feminist scholarship is that of the ‘public-private dichotomy’ that political thought has been

¹ We broadly refer to feminism or feminisms as modalities of a generally uniform and “passionate belief in the freedom of women to live as free and equal human beings” (reflecting Emma Goldman’s analytical work on feminism- in *WRITINGS OF EMMA GOLDMAN: ESSAYS ON ANARCHISM, FEMINISM, SOCIALISM, AND COMMUNISM* (2013) Also See: SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953) and BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963). The feminist movement is a revolutionary program, committed to overthrowing the deepest and most entrenched hierarchy of all—the hierarchy of gender, but with persistence. See: VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL AND GLOBAL*, 32 (2006).

² Feminist legal scholarship refers to the critique of the traditional legal method as well as the evolution of an alternative jurisprudential method- referred to as “feminist jurisprudence”. (See: Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 *YALE L.J* 3, 375-376 (1981).

³ In the course of this paper, we restrict our analysis solely to women working outside the sphere of the home in the public sphere and reflect on the maternity laws that shape and affect their employment.

conceptualized on. Right from their inception, ancient theoretical understandings of politics and society have been founded on a division between public and private spheres. The particularly gendered nature of this division was first clearly problematized by second-wave feminist critics, such as Susan Okin and Carole Pateman.⁴ However, with the rise of third wave feminism the critique of this dichotomy has acquired depth and nuance. Third wave feminism challenges the notion that 'women' form a homogenous category and instead of solely pointing out differences between men and women, it analyses the contradictory power relations that make women different from other women.⁵ Hence, the presence of women in the private sphere and the absence of men from this sphere, is a problem of power for third-wave feminists. Therefore, the public-private dichotomy that has been analysed by both waves of feminist academic thought, now stands as one of the most fundamental causes of patriarchal oppression.

The origin of the divide between these two spheres emerges from the deeply entrenched idea that women and men perform different roles in society because of their biological nature and function.⁶ The female body is conceptualized as being solely designed around its reproductive function- an argument that has confined women to the private sphere and legitimized their exclusion from the public sphere.⁷ Hence, based on this conceptualization of the male and female bodies, the male role is that of the worker and breadwinner while the female role is that of child bearer and rearer.⁸ The male sphere is constructed as the public world of work, of politics, and of culture-the sphere to which our legal and economic systems have been thought appropriately to be directed.⁹ The female sphere is the private world of family, home, and nurturing support for the separate public activities of men.¹⁰ Restricted into the private sphere on the basis of

⁴ Both of these feminist theorists uncovered and made explicit the public/private divide in Western political thought and, more importantly, began to analyze the implication of this division on the relationship between gender and politics. See: Carole Pateman, *Feminist Critiques of the Public Private Dichotomy*, in S.I. Benn and G.F. Gaus, eds., *PUBLIC AND PRIVATE IN SOCIAL LIFE*, 281-303 (New York: St. Martin's Press, 1983); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (Stanford University Press, 1988); SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* (Princeton: Princeton University Press, 1978); and Susan Moller Okin, *Feminism and Political Theory*, in *PHILOSOPHY IN A FEMINIST VOICE: CRITIQUES AND RECONSTRUCTIONS*, 116-44 (Princeton: Princeton University Press, 1998).

⁵ *Id.*

⁶ Susan B. Boyd, *Challenging the Public/Private Divide: An Overview* in *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY*, 3-34 (ed. U. of Toronto, 1997).

⁷ *Id.* This form of biological essentialism reduces the women's body to purely her function reproductively and ignores her capacity for any other sort of labour. Thus, the confinement of women to the reproductive, private sphere occurs.

⁸ Barbara Amiel, *Women as Wives, Servants and Slaves: Rethinking the Public/Private Divide*, 34(1) *CANADIAN JOURNAL OF POLITICAL SCIENCE*, 29-54 (2001).

⁹ Everything that is not within the sphere of the family then becomes part of the public sphere-excluding women from all its different forms. See: Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, *YALE LAW SCHOOL FACULTY SCHOLARSHIP* (1986).

¹⁰ *Id.*

this biological construction, women were never seen as engaging in productive 'labour' as facilitated in the public sphere of functioning.

This distinction between spheres has had bearing on the way the idea of labour is constructed in market and society- a construction that is also reflected in the law.¹¹ The origin of labour law jurisprudence lies in the vibrant movements across the world that campaigned for the rights of labourers in industries post the industrial revolution, in the ages of mass production.¹² The fundamental concepts of the way labour is imagined are often based on Marx's distinction between productive and reproductive labour wherein productive labour is considered to be transformative rather than merely repetitious, like reproductive labour.¹³ In light of this fact, productive labour is seen as superior, as compared to the work of women within the households, which is seen as a work of caring and therefore reproductive labour. Feminist political philosophers, such as Virginia Held, challenge the hierarchical distinction between productive labour in the public sphere and reproductive work in the private sphere.¹⁴ Held argues that although this has not been acknowledged in traditional views of the household, the potential for creative transformation in the nurturing that occurs there, and in child care and child-rearing, is enormous.¹⁵ Care has the capacity to shape new persons with advanced understandings of culture and society and morality and advanced abilities to live well and cooperatively with others.¹⁶ Hence, she concludes that only an entirely prejudiced misconception can hold that caring merely reproduces our material and biological realities while what is new and creative and distinctively human must occur within the public sphere.¹⁷ Therefore, it has been argued that reproductive work or the work of caring can be constructed as a form of labour in its own right.

¹¹ *Id.* For in-depth explorations of how the law has operated differently in each sphere and impacted the creation and facilitation of the public private divide, See: Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294 (D. Kairys ed., 1982)

¹² VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL AND GLOBAL*, 32 (2006).

¹³ *Id.*

¹⁴ *Id.*, at 61. (Held points out that this has not been acknowledged in traditional views of the household. However, the potential for creative transformation even in spheres of education generally, is massive. Each child is raised differently and hence, the labour of child-rearing is the most important example of labour that is directly transformative in its function.)

¹⁵ *Id.*, at 109.

¹⁶ VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* (Chicago: University of Chicago Press, 1993).

¹⁷ *Id.*

B. The Ethics of Care as an Alternative Moral Philosophy: Incorporating Care within Labour Laws

In the past few decades, the ethics of care¹⁸ has developed as a promising alternative to traditional conceptions of morality.¹⁹ Although some advocates of the ethics of care or care ethicists resist generalizing this approach into a moral theory,²⁰ for the purposes of this paper, we explore the specific literature on care that has been produced within the realm of moral philosophy and consider its incorporation within jurisprudence and legal theory and its relevance to labour law regimes in India.

Care ethics finds its inception in the groundbreaking work of feminist psychologist, Carol Gilligan, in her book titled 'In a Different Voice'.²¹ Gilligan argues that women were speaking in a voice that emphasized the importance of values such as inclusiveness and relationality, rather than individualistic conceptions of justice and autonomy.²² This relational morality, she argued, is not a morally inferior perspective, but just a different voice- one that emphasizes care as a value and as a practice.²³ After Gilligan's work, there has been extensive literature on care. Virginia Held, in particular, can be credited with starting a targeted conversation on using care to create an alternative to traditional moral philosophy.²⁴ Held and other care ethicists identify certain primary factors of an 'ethics of care'. First, care ethics views human beings as inherently interdependent as opposed to inherently independent.²⁵ Second, and most crucially, it is the idea that relationships and attachment can be the basis for making legitimate moral decisions.²⁶ Finally, care ethics views emotion as an important force within moral philosophy and advocates a version of morality that is not premised on the rejection and restriction of emotional responses amongst people.²⁷ Care ethicists focus on different elements of care to describe its fundamental nature. Nel Noddings emphasizes on the close responsiveness for the feelings, needs, desires, and

¹⁸ Some theorists do not like the term 'care' to designate this approach to moral issues and have tried substituting 'the ethic of love,' or 'relational ethics,' but, Held argues that the discourse keeps returning to 'care' as the so far more satisfactory of the terms considered, though dissatisfactions with it remain. See: VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL AND GLOBAL*, 32 (Oxford Univ. Press, 1st ed. 2006).

¹⁹ The ethics of care is not incompatible intrinsically with the ethic of justice. However, their epistemological origins differ - with the former rooting itself in interdependence and the latter in the idea of independence.

²⁰ MARILYN FRIEDMAN, *WHAT ARE FRIENDS FOR? FEMINIST PERSPECTIVES ON PERSONAL RELATIONSHIPS AND MORAL THEORY* (Ithaca, N.Y.: Cornell University Press, 1993).

²¹ See: CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1992).

²² *Id.*

²³ *Id.*

²⁴ JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993).

²⁵ HELD, *supra* note 12.

²⁶ HELD, *supra* note 12.

²⁷ HELD, *supra* note 12.

thoughts of those cared for;²⁸ Joan Tronto and Berenice Fisher view care more explicitly as a form of labour in itself and Diemut Bubeck sees care as the practice of meeting the needs of one person by another person, where face-to-face interaction between carer and cared-for is a crucial element of the overall activity.²⁹ Therefore, although care ethicists see care through different lenses, they mostly focus on the fundamental nature of care as comprising of attentiveness, responsibility and responsiveness.³⁰

Care ethics stands in opposition to the dominant schools within traditional jurisprudence and moral philosophy- the categorical Kantian school of thought as well as the utilitarian tradition.³¹ These traditions themselves are ideologically in opposition to each other. However, Held argues that both Kantian moralities of universal, abstract moral laws, and the utilitarian ethics of Bentham and Mill advocating impartial calculations to determine what will produce the most happiness for the most people, focus on a disinterested, autonomous individual making impartial decisions. This is in direct contrast to care ethicist's depiction of an individual as the 'relational self' that they identify as the center of moral thought and experience.³² This relational self, Gilligan had argued, inhabits a different voice- one that has been marginalised by truth-making processes, but one that requires attention from the worlds of economy, politics, international relations and law.

Having analyzed the standpoint of care ethicists within moral philosophy and jurisprudence, we now extend our argument to potentially applying their work to the context of labour law. Feminist academics like Held, Sara Ruddick and

²⁸ NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION*, 14-19 (1986). Held characterizes the works of Noddings as arguing that the cognitive aspect of the carer's attitude is receptive-intuitive rather than objective-analytic, and argues that understanding the needs of those cared for depends more on feeling with them than on rational cognition.

²⁹ DIEMUT BUBECK, *CARE, GENDER, AND JUSTICE* 129 (1995).

³⁰ HELD, *supra* note 12.

³¹ HELD, *supra* note 12.

³² In the Kantian categorical imperative, the commanding principle is reason wherein a person is divided from her context and makes an individual decision. Within utilitarian thought as well, an individual weighs her own happiness to the exclusion of her relationships with others. Relationships and attachment are considered to be hindrances to rational thought, by both these schools of moral philosophy. On the other hand, the ethics of care sees human beings as inherently relational. An example of how these distinct approaches to morality influence the law is described by Selma Sevenhuijsen in her work. She demonstrates how inadequate legal approaches, influenced by traditional morality, are in dealing with conflicts over the custody of children. Family law, she says, "provides a perfect illustration of the limitations and pitfalls of equal rights reasoning." In India, the 'best interests of the child' threshold is seen as the most important threshold in deciding custody disputes. Often, the interests of the child or the rights of the child are pitched against the rights of the parents by Indian courts. Such an approach is fundamentally flawed as it fails to see the connections that the parents and the child have - often, their rights cannot be seen as conflicting, but must be seen as relationships of care that are inherently interconnected. The ethics of care, unlike, traditional moral schools of thought values this interconnectedness rather than oversees it. See: SELMA SEVENHUIJSEN, *CITIZENSHIP AND THE ETHICS OF CARE*, Chap. 4 (London: Routledge, 1998).

Eva Kittay argue for the adequate recognition and valuing of care-giving labour within our conceptions of society and subsequently, legal regimes. Held reasons that care is surely a form of labour, but it is also much more.³³ The labour of care is inherently relational and cannot be easily and efficiently replaced by machines in the way a majority of industrial or market oriented labour can. Held further argues that recipients of care sustain caring relations through their responsiveness—the look of satisfaction in the child, the smile of the patient.³⁴ Ruddick agrees that “caring labour is intrinsically relational,” but regards this relationship as assumed rather than the primary focus.³⁵ She thereby argues that strangers can also practice caring labour towards each other if their work is characterised by efforts motivated by responsiveness, relationships and duty.

Eva Kittay, in her influential work, ‘Love’s Labour’, examines what she calls “dependency work,” which overlaps with care but is not the same. She defines dependency work as “the work of caring for those who are inevitably dependent,” for example, infants and the severely disabled.³⁶ Kittay argues that as dependency work is so often unpaid, when dependency workers use their time to provide care instead of working at paid employment, they themselves become dependent on others for the means with which to do so and for their own maintenance.³⁷ Kittay’s study on dependency work has been pioneering as it analyses the cycle of dependency- where care-givers themselves are dependent on other people to sustain themselves economically as their work often goes entirely unpaid or is paid substantially less than other forms of labour. The work of care-givers, hence, remains undervalued and ignored by the state as it is not deemed as ‘labour’ in the legal sense- thereby, creating and facilitating a cycle of harm for care-givers and the recipients of care.

C. Recognizing Child Rearing as Caring Labour: Contrasting the Rights-Justice Model with the Responsibility-Care Model

In the course of this part of the paper, we extend the analysis on care as a form of labour to argue that the state has a responsibility to facilitate child bearing as a form of caring labour. The question that would arise then is- what should the state and the legal regime do in order to facilitate the work of care? Held has a response to these questions within her theoretical framework wherein she

³³ HELD, *supra* note 12.

³⁴ HELD, *supra* note 12.

³⁵ For traditional schools of moral philosophy, like the Kantian and Utilitarian traditions, the focus is on the individuals and their autonomy rather than on relationships and ties of connectedness. Held and Ruddick argue that any understanding of caring labour has to see care or interconnect-edness as central to moral philosophy and not an ancillary concern. The epistemological origin of care ethics is interdependence that is the foundation of the labour care- where care is given and provided to vulnerable individuals by care-givers.

³⁶ EVA FEDER KITTAY, *LOVE’S LABOUR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999).

³⁷ *Id.* Thus, dependency work makes the care-givers themselves dependent on other individuals. This is a hindrance to their autonomy.

argues that legal regimes must recognize the intrinsic and not merely instrumental value of activities.³⁸ The state and its legal mechanisms should recognize the enormous value of caring work—in expressing social connectedness, in contributing to children's development and family satisfaction, and in enabling social cohesion and well-being.³⁹ We should demand of society that such work, in all its various forms, be compensated more in line with its evaluated worth, noting that its exchange or market value is one of the least appropriate ways in which to think of its value.⁴⁰ Therefore, the argument made by care ethicists in this context is that there is an urgent need for the State and its legal systems to recognize the value of the work of care. It is this ideological shift that is necessary—wherein the state should positively encourage the labour of care and has a duty to promote it.

In status quo, maternity laws in India view maternity provisions as 'benefits' given to women labourers⁴¹ pitched against the rights of their employers. However, we argue that the language of 'benefit' is problematic and does not encompass the range of concerns that women labourers have with respect to maternity. At best, when the language of benefit is not used, we see Indian courts and statutes referring to a woman's maternity protection as a 'right'. We argue that a policy based shift in the language and lens of the law is crucial as this language informs the law. Maternity protection must be viewed through the lens of state responsibility to facilitate caring labour, instead of as a benefit or a right.

The debate on care and justice finds its inception in the critique of the rights-based model of justice and fairness. Critics have argued that the language of individual rights often does not encompass the true goals of equality and responsibility of the State that a legal system must aspire to.⁴² Care was perceived as valuing relationships between persons and empathetic understanding; justice valued rational action in accord with abstract principles.⁴³ A justice based approach has its clear shortcomings when applied to a model like maternity. Allowing for

³⁸ HELD, *supra* note 12, at 109. The instrumental value of work is also related to how much direct intrinsic value laws and governments accord it. Therefore the devaluing of caring labour has made the work of care itself seem instrumentally not as productive as other forms of work.

³⁹ *Id.* Rather than merely aspiring for justice based goals, it is important for societies to nurture a culture of care. These approaches are inherently opposed to each other in crucial ways—where justice prioritises the individual over relationships of care, care reverses this prioritisation. This comes from a recognition that human beings are inherently inter-connected and at some point, entirely vulnerable and in the need of care. It is then the function of care that keeps societies functioning and not merely an ensuring of rights.

⁴⁰ *Id.*

⁴¹ The guiding legislation on the subject, the Maternity Benefit Act, 1961 employs the language of 'benefit'—thus, furthering the idea that maternity leave and protection are 'benefits' granted by the employer, rather than situations of caring labour in themselves that have intrinsic value as labour.

⁴² VIRGINIA HELD, *RIGHTS AND GOODS. JUSTIFYING SOCIAL ACTION* (1984).

⁴³ HELD, *supra* note 12, at 66. Sara Ruddick, *Injustice in Families: Assault and Domination*, in *Justice and Care: Essential Readings in Feminist Ethics* (ed. Virginia Held, Boulder, Colo.: Westview Press, 1995).

a rights based construction allows the employers rights to be weighed against the women's rights, thereby implying that the employer also has a right over the women's body despite her pregnancy and her duty to care. As we will demonstrate through the examination of judicial precedents in Part III of the paper, such an approach then requires courts to mechanically balance two conflicting rights. We argue that maternity should not be perceived merely as one individual woman's right to leave or monetary financial benefits, but as the responsibility of the state to facilitate child-rearing and caring labour that further enables the genuine development of its people.⁴⁴ Such an approach reduces the abstraction associated with individual rights and justice and deals with the issue of maternity for what it is- the labour of care that deserves due recognition and facilitation from the welfare state.⁴⁵ Although it is true that the existence of a right leads to the corresponding creation of a duty to ensure that right, an understanding of the fundamental difference between approaches based on 'rights' and approaches rooted in 'responsibility' is crucial. The former merely recognizes the freedom of an individual to care, but the latter facilitates maternity as a form of caring labour that is crucial for the growth of communities and societies.⁴⁶ In the latter, there is recognition of the value of the work undertaken in the private sphere as productive labour in itself. This, we argue, is crucial in valuing work and experience of women within the private sphere that have been devalued for very long. Hence, this ideological shift is important for the legislature and the judiciary to undertake in transitioning away from a model of individual rights towards an approach that focuses on the responsibility of the state to facilitate child-rearing as a crucial labour of care.⁴⁷ In the subsequent portions of the paper, we argue that a responsibility based approach needs to be incorporated to proceed in certain directions- such as encouraging the state to start helping in bearing the cost of maternity leave and ensuring that in a judicial determination of balancing rights,

⁴⁴ Questions then arise on whether paternity leave must also be granted in furtherance of this idea of responsibility. There have been varying perspectives on how men will respond to paternity leave, if granted the same, in the Indian context. We argue for a gradual incorporation of the same within India when men will truly participate in the process of child rearing, after education and awareness, rather than being women's responsibility alone. Although that is a different debate, paternity leave has also been seen to fall within the ambit of desirable forms of caring labour. Hence, we welcome paternity leave but caution against its misuse due to the fact that fathers, even on leave, in a deeply patriarchal society can be unwilling to share the child-rearing responsibility, in an Indian context. For an analysis of paternity as caring labour as well, See: VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS*, (1993), Arnlaug Leira, *Caring as Social Right: Cash for Child Care and Daddy Leave*, *SOCIAL POLITICS: INTERNATIONAL STUDIES IN GENDER, STATE & SOCIETY*, 1998.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Critics of the 'ethics of care' argue that an approach of 'responsibility-care' imposes a responsibility or burden on the women to commit to the rearing of her child. However, it is important to note the distinctions that care ethicists draw in this regard. They argue that it is the responsibility of the State to recognize the labour of care as a form of 'labour'. They do not advocate for the pushing of the responsibility on the woman against her choice. In situations where women ask for leave for the work of child care, the state should recognize its duty towards child care as a form of labour in itself.

the courts recognise the duty of the state to encourage maternity as a form of caring labour.

II. THE EXTENSION OF MATERNITY LEAVE AND THE CREATION OF SOCIAL INSURANCE SCHEMES: RECOMMENDATIONS FOR THE LEGISLATURE

In this part of the paper we provide suggestions to incorporate the responsibility-care approach within the Indian legal framework. We provide two primary suggestions in light of the recent Maternity Benefit (Amendments) Act that has been approved by the Parliament. Although the extent of maternity leave has been extended to ensure compliance with the latest International Labour Organisation (hereinafter, ILO) standards on maternity protection, we argue that the Act still suffers from two primary issues. First, it still restricts the leave given to pregnant women who already have two or more children at twelve weeks. Second, and most importantly, the payment of maternity benefits under the Act are the sole burden of the employer even under the scheme of the new Act. These are inter-related problems. In an attempt to refrain from imposing too much financial pressure on the employer, the Act attempts to restrict leave given to a woman who is pregnant for the third time. However, this still completely ignores the responsibility of care that the mother, as well as the community and the state, have towards the third child. In light of the need to reduce the burden on the employer, we argue for the creation of social insurance programs with a high payroll tax to account for maternity leave. This is a more effective model to facilitate caring labour in Indian society and allows the state to recognise its duty in facilitating caring labour.

A. The Maternity Benefit (Amendment) Act, 2017: Recommendations and Modifications

In the ILO Report on Maternity and Paternity Leave of 2014, the ILO has conducted a cross-jurisdictional survey of the duration of maternity leave provided statutorily across countries.⁴⁸ In doing so, it has assessed the compliance of countries with the requirements that the ILO has laid down for maternity leave. If countries provide maternity leave for a period between twelve and thirteen weeks, it meets the minimum requirements of the oldest ILO conventions on maternity leave - Convention 3 and 103.⁴⁹ The most recent ILO standard on the duration of paid maternity leave is Convention No. 183, which mandates a

⁴⁸ International Labour Organization, Report on Maternity and Paternity at Work, 2014, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf.

⁴⁹ International Labour Organisation, Maternity Protection Convention, 2000, (No. 103), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:51:0::NO:51:P51_CONTENT_REPOSITORY_ID:2543096:NO.

minimum leave period of fourteen weeks – an increase from twelve weeks in the previous Conventions.⁵⁰ Its accompanying Recommendation No. 191 goes further and suggests that ILO member States should try to increase the period of maternity leave to at least eighteen weeks.⁵¹ Therefore, the requirements stipulated by the ILO now stand at a minimum of fourteen weeks being provided as statutorily provided maternity leave, with a recommendation to countries to further increase this duration to eighteen weeks.

India has recently passed the Maternity Benefit (Amendment) Act, 2017 (hereinafter, 'Amendment Act') which extends maternity leave to meet the requirements of the ILO. However, there is major institutional backlash to this Act and its proposed extension. Anticipating rising cost of women employees, the Federation of Small and Medium Enterprises (FISME) had expressed its concerns about the inability of employers to bear costs of such a long duration of maternity leave.⁵² Although employers have raised genuine concerns regarding economic loss, we argue that this is a problematic lens to view the Act with as the question has again become one of competing, equally important rights of the woman and the employer. Such an approach to considering the Act calls for a balancing of rights of the woman and the employer, rather than focusing on the responsibility of the State to encourage and facilitate caring labour. In a responsibility-care approach, the law recognizes the work of care as a form of labour that it has a responsibility to further. Hence, even if this responsibility of the state has to be balanced with other responsibilities, such as protecting the economic interests of employers, this approach still accords a heightened recognition to the work of care. Hence, adjudicating bodies will find themselves balancing the labour of care with the labour in the market sphere. The recognition of the former as a type of labour, however, is crucial as it allows societies to imagine the previously devalued work of care as productive, transformative labour.

As argued in Part I and Part II of this paper, there exists a responsibility on the state to recognize maternity not as a vacation that women take from work, but as a form of labour in itself that deserves facilitation by the state. In light of this, it is crucial to analyse Section 3 (A) (ii) of the Amendment Act that proposes a modification to Section 5 of the original Act. This section states that:

Provided that the maximum period entitled to maternity benefit
by a woman having two or more than two surviving children

⁵⁰ International Labour Organisation, Maternity Protection Convention, 2000, (No. 183), available at: http://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/genericdocument/wcms_114195.pdf

⁵¹ International Labour Organisation Maternity Protection Convention, 2000. (Recommendation No. 191), available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312529.

⁵² Government should bear additional cost of maternity leave: MSME Body, TIMES OF INDIA, Aug. 26, 2016, available at: <http://timesofindia.indiatimes.com/india/Government-should-bear-additional-cost-of-maternity-leave-MSME-body/articleshow/53861179.cms>.

shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery;⁵³

Hence, as per the Amendment Act, while women will be provided with 26 weeks of maternity leave for two children, the period of leave for a third child will be 12 weeks. This exception that has been carved out lacks a principled basis and could have extremely adverse effects on the growth and development of the third born child. The idea that a woman should not be entitled to the same duration of leave due to a third pregnancy is only justified by the State due to extensive pressure put on the employer.⁵⁴ These are legitimate concerns and must be accounted for. As noted by feminist scholars, the problem with increasing maternity leave is not the pressure it puts on the employer per se but the fact that employing women now becomes an unattractive option for employers.⁵⁵ Hence, these moves have drastic consequences on the hiring of women in public employment and hence, must be incorporated with caution. If employers do, in fact, hire fewer women, this leads us back to the private-public dichotomy where women will be curtailed in the private sphere and restricted to jobs of child-rearing. These are consequences that must be avoided and hence, it becomes crucial to shift the burden from the employer entirely and inculcate a system of participation wherein the State also bears the financial pressure of maternity leave. Hence, we argue that the Amendment Act must be viewed not as a conflict between the employers' rights and the rights of women, but as the responsibility of the state to facilitate caring labour. In light of this, we must shift from an 'employer's mandate model' to a 'social insurance model' under the Act as has been argued in the subsequent portion of the paper.

B. Creation of Social Insurance Schemes to Ensure Maternity Protection

The ILO Report on Maternity Leave states that in order to protect the situation of women in the labour market, monetary benefits during the duration of maternity leave shall be provided systematically and solely through compulsory

⁵³ Section 3(A)(ii), in The Maternity Benefit (Amendment) Act, 2017.

⁵⁴ The other reason that could be possibly cited is population control which is entirely illegitimate considering the right of the woman to maternity benefit is crucial under the Indian constitutional framework. Article 42 of the Constitution states that the State shall make provisions for securing just and humane conditions of work and for maternity relief. In light of this crucial policy goal, it is unjustified for the state to restrict maternity benefits due to population control measures. However, in the course of our analysis, we engage with their best case scenario, where the goal is to prevent additional pressure on the economic unit and the employer. This conflict between the right of the mother and the right of the businesses has for long characterized the discord regarding maternity-based legislations.

⁵⁵ Erin Kelly, Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105(2) *AMERICAN JOURNAL OF SOCIOLOGY* (1999).

social insurance or public funds.⁵⁶ The principle of payment through social insurance or public funds is important for mitigating discrimination in the labour market, which, as explained earlier, becomes more likely when employers have to bear the full costs of maternity leave directly.⁵⁷ Hence, the ILO encourages the payment of these benefits from public funds rather than solely imposing the monetary burden on the employers. This principle is maintained in Convention No. 183, which as stated before, India has not ratified. Therefore, under the Act, India continues to persist with a model of solely making the employer liable for payments rather than shifting to a model of publicly funded benefit schemes in the case of maternity.

Social insurance is an employment-related system which generally bases eligibility for pensions and other periodic payments on length of employment or self-employment.⁵⁸ In the event of maternity, the level of short term payments is usually related to the level of earnings before earnings ceased due to the pregnancy.⁵⁹ Such programs are contributory and are being financed by a combination of the following sources- either entirely or largely from contributions (usually a percentage of earnings) made by employers, workers or both, and with a government subsidy.⁶⁰ In most instances, they are compulsory for defined categories of workers and their employers.⁶¹ Maternity benefits are often provided along with, or as part of, another social insurance scheme, such as sickness, health insurance, unemployment compensation, or employment injury and disease benefits.⁶²

In India, such a scheme has been instituted under Section 46 of the Employees State Insurance Act that mandates the payment of maternity benefits by way of a social insurance scheme.⁶³ With the gradual extension of coverage under the

⁵⁶ ILO, *supra* note 48. This model is encouraged emphatically by the ILO over a model of employer mandate that the Indian maternity legislation contemplates.

⁵⁷ Convention 183, although, to allow for its ratification by member States which do not have a social security maternity benefits branch, this Convention allows employers to assume individual liability for maternity benefits in cases where they have given their specific agreement. Convention No. 183 also authorizes employers to bear the cost of maternity benefits, where this was determined at the national level before the adoption of the Convention in 2000, or where it is agreed upon at the national level by the government and the social partners.

⁵⁸ ILO, *supra* note 48.

⁵⁹ ILO, *supra* note 48.

⁶⁰ ILO, *supra* note 48. The models vary from each jurisdiction. However, the ILO Report notes that most jurisdictions now are encouraging a shift towards public funding with high payroll taxes on the employer rather than a singular model of employer's mandate.

⁶¹ ILO, *supra* note 48.

⁶² ILO, *supra* note 48.

⁶³ See: Section 46 in The Employees' State Insurance Act, 1948:

Benefits:

- (1) Subject to the provisions of this Act, the insured persons, 134 [their dependants or the persons hereinafter mentioned, as the case may be,] shall be entitled to the following benefits, namely:

- (a) periodical payments to any insured person in case of his sickness certified by a duly appointed medical practitioner 135 [or by any other person possessing such qualifications

Employees' State Insurance Act, 1948 (ESI Act) which also provides for maternity and certain other benefits, the area of application of the Maternity Benefit Act, 1961 has shrunk to some extent. However, the coverage under the ESI Act is at present restricted to factories and certain other specified categories of establishments located in specified areas.⁶⁴

A model of social insurance for all forms of maternity benefits will provide for a more sustainable scheme for the assurance of maternity protection. We suggest a model that would ensure a contribution from the state by means of subsidy⁶⁵ as well as high payroll tax⁶⁶ to ensure that a tangible sum of the employer's earnings are made a part of the insurance scheme. We argue that a model of social insurance is more effective than a model of employer mandate wherein the employer bears the full cost for two reasons. First, this does not impose the entire burden on the employer which will prevent discrimination against women workers at the stage of hiring in order to escape the cost of maternity benefits.

and experience as the Corporation may, by regulations, specify in this behalf] (hereinafter referred to as sickness benefit);

136 [(b) periodical payments to an insured woman in case of confinement or mis-carriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, such woman being certified to be eligible for such payments by an authority specified in this behalf by the regulations (hereinafter referred to as maternity benefit);]

(c) periodical payments to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be eligible for such payments by an authority specified in this behalf by the regulations (hereinafter referred to as disablement benefit);

(d) periodical payments to such dependants of an insured person who dies as a result of an employment injury sustained as an employee under this Act, as are entitled to compensation under this Act (hereinafter referred to as dependants' benefit); 137 [***]

(e) medical treatment for and attendance on insured persons (hereinafter referred to as medical benefit); 135 [and]

135 [(f) payment to the eldest surviving member of the family of an insured person who has died, towards the expenditure on the funeral of the deceased insured person, or, where the insured person did not have a family or was not living with his family at the time of his death, to the person who actually incurs the expenditure on the funeral of the deceased insured person (to be known as 138 [funeral expenses]):

Provided that the amount of such payment shall not exceed 139 [such amount as may be prescribed by the Central Government] and the claim for such payment shall be made within three months of the death of the insured person or within such extended period as the Corporation or any officer or authority authorised by it in this behalf may allow.]

(2) The Corporation may, at the request of the appropriate Government, and subject to such conditions as may be laid down in the regulations, extend the medical benefits to the family of an insured person.

⁶⁴ Hence, a model that solely relies on the employer for payment of benefit continues to apply to women workers of most institutions- thereby unjustly discriminating between workers that fall under the Act and those that do not.

⁶⁵ Government subsidy would demonstrate the state's active prioritization of the issue of equalizing the space of labour and markets by emphasizing the importance of maternity protection to women in labour law regimes. This model has been incorporated in several other jurisdictions like Germany and France amongst several others. (See: ILO, Convention No. 183).

⁶⁶ A payroll tax is the contribution mandated by the employer within the social insurance scheme- a deduction from the revenue generated by the employer in the course of business.

Second, this approach follows directly from the analysis in Part I of this paper on the importance of employing a responsibility-care approach to the question of maternity protection. Sole reliance on the employer mandate model, as in status quo, sees the right of a woman and the employer as conflicting and then seeks to reasonably weigh and balance the two. However, social insurance schemes that are funded by public contributions further the responsibility of the state in encouraging the labour of care within the private sphere.⁶⁷ Such an approach is in consonance with the reasoning of the ethics of care as it values child rearing as transformative, and therefore productive, labour that the state and legal systems have a role in furthering. Therefore, after a cumulative appraisal of these reasons, we conclude that a scheme based on public funds or social insurance prevents discrimination in labour markets as well as furthers the responsibility of the state to facilitate caring labour.

III. JUDICIAL RECOGNITION OF CHILD REARING AS A FORM OF LABOUR: EVALUATING TRENDS WITHIN INDIAN COURTS

In this part of the paper, we provide a brief judicial overview of the major developments in the case law on maternity protection that has been developed by Indian courts. We distinguish progressive judgments from regressive ones, and argue for the responsibility-care approach to be incorporated by the judiciary rather than a mechanical weighing of rights.

Several Supreme Court judgments, if read together, seem promising in guaranteeing adequate protection in cases of maternity to women employees. In the landmark case of *MCD v. Female Workers (Muster Roll)*, the question of maternity benefits for daily female workers was raised.⁶⁸ The facts of this case involve the Delhi Municipal Workers Union demanding maternity benefits for female workers on muster roll.⁶⁹ The Corporation recruited them on regular basis and they claimed that the nature of work done by them is same as the regular employees.⁷⁰ The Corporation contended that these were daily wage workers who were

⁶⁷ The argument normally cited against an approach of state insurance scheme creation is that India is a developing country with major financial limitations and constraints. However, it has been repeatedly noted that the problem does not lie in a lack of resources, but in the incorrect allocation of resources between different causes. For example, the 2017 budget has declared that there will be a 6.2 % hike to the amount that India allocates to the already large defence fund. This has been received with some concern, especially considering that large amounts are allocated in some sectors, while others are ignored. See generally, TNN & Agencies, Union Budget 2017: Defence Allocation gets 6.2 Percent Hike, *THE TIMES OF INDIA (BUSINESS)*, Feb. 1, 2017, available at <http://timesofindia.indiatimes.com/business/india-business/union-budget-2017-defence-allocation-gets-10-percent-hike/articleshow/56912761.cms>.

⁶⁸ *MCD v. Female Workers (Muster Roll)*, (2000) 3 SCC 224 : AIR 2000 SC 1274.

⁶⁹ *Id.*

⁷⁰ *Id.*

not covered by the Employees State Insurance Act, 1948 and therefore, not entitled to maternity leave under the provisions of Maternity Benefit Act, 1961.⁷¹

The Supreme Court upheld the right to maternity benefits of these employees and ordered the Corporation to extend the benefits to these daily wage female employees.⁷² The court reasoned that depriving muster roll female workers of maternity benefits was against the principles of social justice as they had been working for the Corporation for a number of years and in the same capacity as regular workers.⁷³ The court importantly reiterated that the concept of social justice demands a proactive effort to remove socio-economic inequalities.⁷⁴ It is the duty of the State and the society to secure the welfare of the female workforce and they should not be made to suffer physical discomfort. In that light such progressive support from the judiciary is crucial to improve the working conditions of the female labourers. The Uttarakhand High Court followed the same tradition in *Shalini Pathak v. State of Uttarakhand* by refusing to distinguish between temporary, permanent or contractual workers under the ambit of Maternity Benefit Act.⁷⁵ Any employee who had worked for 80 days under any employer is entitled to the benefit- thus, extending the scope of the Act and its reach.

Additionally, in *Kakali Ghosh v. Andaman & Nicobar Admn.*, the important issue of childcare leave for women was discussed.⁷⁶ The Division Bench of the Calcutta High Court affirmed that a woman government employee can take an uninterrupted paid leave of 730 days, allowed to her under Rule 43-C of the Central Civil Services (leave) Rules, 1972, to take care of her minor children.⁷⁷ These rules allow her to take leave in part or in total at any point during her entire career. The decision acted as a relief to women employees as they need to take care of illness and examination other than the general responsibilities of looking after small children.⁷⁸ In case of single mother, divorcee or a widow it becomes even more important as she has no one to share the responsibility or the financial burden of her family needs- hence, intensifying her responsibility of care towards her child. Hence, over the years efforts have been made to make the Act as inclusive as possible.

However, we see an equally worrying trend of regressive judgments arising from the Supreme Court. The issue of relaxing attendance rules due to pregnancy was discussed in *A. Arulin Ajitha Rani v. Film and Television Institute of Tamil*

⁷¹ See: Section 46, Employees State Insurance Act, 1948 in comparison to the mandate and scope of the protection granted under the Maternity Benefit Act, 1961.

⁷² *Supra* note 68.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Shalini Pathak v. State of Uttarakhand*, 2014 SCC OnLine Utt 2233.

⁷⁶ *Kakali Ghosh v. Andaman & Nicobar Admn.*, (2014) 15 SCC 300 : (2014) 3 SCJ 714.

⁷⁷ *Id.*

⁷⁸ *Id.*

Nadu.⁷⁹ The Court denied relief and held that although the object of the Act is to promote welfare of the women in as many fields of work, interfering with the attendance rules of educational institutions is not within the powers of the judiciary in the absence of any policy decision by the government.⁸⁰ The judiciary faced the same dilemma in *Jasmine V.G. v. Kannur University*, where the petitioner was not allowed to sit for an examination due to attendance shortage.⁸¹ The petition was turned down on the ground that she was not equipped to appear for the examination given her low attendance and given that she was training to be a teacher, it was not in public interest to allow her absence from practical classes.⁸² The Court adopted a clearly regressive approach here by stating that pregnancy is not an unexpected medical condition, it is an option which if exercised by female students will hamper their own competence in the long run. The Court also held that the objective of the Act is to facilitate motherhood, and cannot encompass derogation of educational values.⁸³

In a move of progress from the earlier stance on attendance being compulsory for maintaining quality of education, the Delhi High Court allowed such a relaxation to two female law students in *Vandana Kandari v. University of Delhi* in 2010. While agreeing that the law cannot allow mediocrity to breed in educational system under legal provisions, the Court stressed that the Act aims to facilitate a dignified motherhood and is in line with the Constitutional provisions for special care and assistance for women and children. Therefore, eligibility requirements for female students can be relaxed if they are not able to attend classes due to advanced pregnancy.⁸⁴ The Court also suggested formulation of rules for students claiming leniency on the grounds of pregnancy relief.⁸⁵ However, even within this case, we witness the court viewing motherhood and the need for care as an allowance given to the mother, rather than a responsibility of the State.⁸⁶ If we analyse the trend from these three judgements, it is clear that the reluctance of courts in allowing the extension of the Act to educational institutions comes from them questioning whether students, as well, have the rights contemplated under the Act. Again, the rights of the educational institution are pitched against the rights of the student, rather than the court recognizing that child-rearing is a form of labour in itself that courts must recognize as a responsibility of the state to value and further.⁸⁷

⁷⁹ *A. Arulin Ajitha Rani v. Film and Television Institute of Tamil Nadu*, 2008 SCC OnLine Mad 418 : AIR 2009 Mad 7.

⁸⁰ *Id.*

⁸¹ *Jasmine V.G. v. Kannur University*, 2016 SCC OnLine Ker 3221 : (2016) 3 KHC 183.

⁸² *Id.*

⁸³ *Id.* The problems associated with the rights based approach and immense reliance on it are seen here- because the state views the right of the educational institution above the need to facilitate caring labour as a society and state.

⁸⁴ *Vandana Kandari v. University of Delhi*, 2010 SCC OnLine Del 2341 : (2010) 3 SCT 363.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Although the woman student is aware often that her pregnancy would mean that she would be ineligible from appearing for an examination or completing an educational degree, it is important

Another landmark judgement in which a deep-rooted prejudice against women was unveiled is *Air India v. Nergesh Meerza* when service rules regarding age, marital status and pregnancy were challenged. This case was the occasion for the Supreme Court to set right the sex discrimination in the country.⁸⁸ The need for young and attractive cabin crew to pacify temperamental travelers was underlined during the discussions.⁸⁹ The court tried to lessen the damages but failed to uphold the dignity and equality of the petitioners⁹⁰. The Court justified the inferior treatment to women by putting them in a “different class” and reasoning that these “special conditions” meant there was no instance of discrimination.⁹¹ On the question of equal remuneration, the court termed service conditions of women as inferior to their male counterparts thus violating the fundamental right of equality.⁹²

Nergesh Meerza was an example of a case, where a progressive ruling by the Supreme Court could have altered the constitutional analysis of discrimination against women in India. The judiciary not only failed to counter the stereotype of women as purely care givers, but also failed to recognize their responsibility towards their children and therefore, undervalued caring labour with an explicit and problematic analysis. In this case, the Court reasoned that women are primarily care givers as the institution of motherhood is the most sacrosanct and cherished institution for Indian women.⁹³ However, in addition, it held that restricting maternity leave in cases where a woman was pregnant for the third time, was legitimate and a reasonable restriction on the right of the woman towards leave.⁹⁴ The Court cited the problem of population explosion faced by India as reason enough to restrict maternity leave for third pregnancies- thereby deterring women from getting pregnant for the third time.⁹⁵ This approach of the court is problematic in its homogenization of women as primary care givers as well as its endorsement of policies that restrict maternity leave towards goals like population control. In light of this, if the court would be directed to value maternity not as

to note that a woman's choice of motherhood should not disentitle her from leave. The same principle applies when employees are given maternity leave in factories or other establishments under the Maternity Benefit Act. Even if they chose pregnancy, the state has a responsibility to grant them leave. We argue for the extension of the same to educational institutions to incentivize women to study further and also, act on their choice as mothers to care for their children.

⁸⁸ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : AIR 1981 SC 1829.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* However, this specific classification in itself, was held to be discriminatory- thereby, setting precedent against the creation of separate classes or conditions for workers.

⁹² *Id.*

⁹³ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : AIR 1981 SC 1829.

⁹⁴ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : AIR 1981 SC 1829, para 104. It would be legitimate to restrict maternity leave where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning program is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world.

⁹⁵ *Id.*

a right, or worse, as a privilege, but as a form of valuable labour in itself, such rhetoric would be avoided or limited in the Indian judicial framework.

A perfect example of the court's existing approach is also seen in *P. Geetha v. Kerala Livestock Development Board Ltd.*⁹⁶ In this case, the Court agreed that all women were entitled to a statutorily determined level of maternity leave and protection. The question before the court was whether the mother of a child can be entitled to leave even though the child has been delivered by a surrogate. The Court held that a woman who had not delivered the baby would not be entitled to maternity leave under the Act as she had not undergone physical hardship. The reasoning was that the Indian Maternity Act focused on conception, gestation and delivery, and hence, the focus was on the individual mother's hardship during birth.⁹⁷ It intends to protect the health of the woman and not cater to the upbringing of the child.⁹⁸ Hence, the court held that these women were not entitled to leave in either the pre-natal or the post-natal period.⁹⁹ Further, the Court interpreted international conventions on maternity in a similar manner and stated that conventions like International Labour Organisation Convention No. 183, support the view that maternity is restricted to birthing and the individual right of the birthing mother.¹⁰⁰ This bias in interpretation has been reflected in several cases in other cases as well.¹⁰¹

It is clear from the approaches employed in these cases that legal interpretation in cases involving the labour of care reflects certain problematic assumptions. A woman is not considered to be a mother in the eye of the law unless she has actually given birth to the child. The care she provides the child is not considered sufficient. Such an interpretation is problematic as when the judges are given discretion in adjudication they clearly interpret maternity leave as an individual right of the birthing mother, rather than a provision to further the responsibility of care towards a young child that the state and law recognizes. Hence, is important for judges to recognize an approach of the recognition and furtherance of caring as a value and practice at an interpretive stage.

Cumulatively, an assessment of judicial trends clearly shows that whether the judgments by the court are progressive or regressive in their outcome, they all conduct a mechanical analysis of weighing the rights of the employer against the rights of a pregnant woman. However, this approach views maternity and the responsibilities that arise from it as a break from labour that is productive to society, rather than a form of productive labour itself.¹⁰² This approach by the

⁹⁶ *P. Geetha v. Kerala Livestock Development Board Ltd.*, 2015 SCC OnLine Ker 71.

⁹⁷ *P. Geetha v. Kerala Livestock Development Board Ltd.*, 2015 SCC OnLine Ker 71.

⁹⁸ *P. Geetha v. Kerala Livestock Development Board Ltd.*, 2015 SCC OnLine Ker 71, para 39.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : AIR 1981 SC 1829, para 104.

¹⁰² Courts seem to be keen in encouraging labour only within the public sphere with a devaluing of the work of care within homes as this is not considered to be labour at all. The parallel viewing

courts is inherently problematic because of the weighing of economic production versus reproduction as contradictory goals.¹⁰³ This reaffirms the biases that characterize the public-private sphere dichotomy and creates the imagery of maternity as solely the function of reproduction with no value or worth as a form of transformative labour. We argue that the courts must refrain from undervaluing caring labour and instead, undertake an approach where maternity protection is seen as a goal and responsibility of the state, rather than a woman's individual right that contradicts the employer's right. The duty of courts to create spaces for caring labour within societies is important, and we suggest the proactive co-option of such an approach for the future.

CONCLUSION

In conclusion, we argue that an ideological shift is required at the law-making level, from a rights-justice model to a responsibility-care model that aligns with the developments within the ethics of care. In doing so, we suggest a two-pronged modification. First, we argue for the re-evaluation of the new Act and the creation of social insurance schemes rather than a restrictive model of sole reliance on the employer. Second, we argue for a judicial recognition of maternity responsibilities as caring labour- an approach that we suggest should inform the decisions of judicial bodies. Although often ignored, the theoretical foundations on which the idea of labour is constructed, if critiqued and modified, can be improved to better serve the interests of women and the democratic nation state.

of work in both these spheres as a form of productive bias will lead to less discriminatory and more informed decisions within Indian courts.

¹⁰³ This conclusively ties into Held's argument about the problem about viewing these kinds of labour as opposing ends of a spectrum- thus, precluding caring work or the work of maternity to be viewed as caring labour. See: VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS*, (1993).