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# ON CAREGIVERS : IMAGES FROM INDIAN LAW

—Ira Chadha-Sridhar\*

**Abstract** – To take care of another person is work. This work has immense value not just for the individuals who are being cared for, but also for communities, societies, and nations at large. Despite this, those who engage in care work – caregivers – are often denied the compensation, rights, and protection they need. In this paper, I will investigate the status of caregivers under Indian law. Who is a caregiver, and who is not? As there is no law in India that specifically deals with caregivers, we turn to cases and statutes that mention caregivers anecdotally and define the term. An analysis of this legal material reveals a range of contradictory images. In particular, two conceptual constructions seem to emerge: ‘responsibility-based accounts’ and ‘action-based accounts’. I argue that a conceptual account of caregivers – broadly of the latter type – must be incorporated in any future law (or range of laws) that confers rights, benefits, and protections upon caregivers. I hope to show, more generally, that such laws for caregivers are very much the need of the hour.

## I. INTRODUCTION

I think it is safe to say at least this much: most of us require care. We have all been children, we are likely to age, we are very often ill or frail – both mentally and physically – and at each of these junctures, we need to be cared for. Even in our daily lives as adults (though perhaps in more subtle forms), we find ourselves dependent on others – friends, family, people we see every day, those that can harm us, and those that we love. A tough relationship, a bad day, tangled hair, a wounded arm or leg, hunger, thirst, feelings of loneliness

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and alienation, weakness, and fragility – we require care at all these moments in order to get by, and get by well. Joan Tronto writes, ‘what is definitive about care . . . is taking the other’s needs as the starting point for what must be done’.<sup>1</sup> And so, in our many states of need, we require the care of another – making caregiving a shared feature of most of our lives.

Despite the importance of caregiving, though, caregivers are often not given the recognition, protection, and legal rights they require. A caregiver is, very broadly speaking, someone that does the work of meeting the needs of another person. Caregiving may be unpaid or paid. Apart from professional caregivers, the work of care tends to be often relegated to the familial context. Data shows that the burdens of care work seem to be borne disproportionately by women in families world over, as compared to men.<sup>2</sup> In the last three decades, caregiver unions, alliances, and movements across the world have highlighted the issues that caregivers face and pushed states to address these issues, often through a host of legal and policy measures.<sup>3</sup>

Responding to these demands, several countries have enacted a range of legal measures for caregivers.<sup>4</sup> Consider the Care Act 2014 in England and Wales which deals with the care and support of vulnerable adults and makes provision for the support of carers.<sup>5</sup> Also consider the Carer Recognition Act 2010 in Australia which is intended to increase recognition and consideration of carers, along with the 2016 Guidelines which supplement the Act.<sup>6</sup> In Scotland, we see the Community Care and Health (Scotland) Act 2002 and the Carers (Equal Opportunities) Act 2004 which were enacted to provide protection to carers across the United Kingdom. In the United States, in addition to

<sup>1</sup> Joan Tronto, *Moral Boundaries: A Political Argument for An Ethic of Care* (Routledge 1993) 105; Camilla Boisen and Matthew C. Murray, eds. *Distributive Justice Debates in Political and Social Thought*(Routledge2015) 113.

<sup>2</sup> Reports state that around the world, women spend two to ten times more time on unpaid care work than men. See OECD Development Centre Report –*Gaëlle Ferrant, Luca Maria Pesando and Keiko Nowacka*, ‘Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcome’(2014) 1-3.

<sup>3</sup> Some of these alliances are Carers Worldwide, Caregiver Action Network, Carers Australia, Carers UK, Eurocarers, National Alliance for Caregiving, International Alliance of Carer Organizations (IACO) among several others. For a discussion on some of these policies, see generally, the Embracing Carers, ‘Embracing the Critical Role of Caregivers Around the World: White Paper and Action Plan’(2017)<[https://www.embracingcarers.com/content/dam/web/healthcare/corporate/embracing-carers/media/infographics/us/Merck%20KGaA%20Embracing%20Carers\\_White%20Paper%20Flattened.pdf](https://www.embracingcarers.com/content/dam/web/healthcare/corporate/embracing-carers/media/infographics/us/Merck%20KGaA%20Embracing%20Carers_White%20Paper%20Flattened.pdf)>

<sup>4</sup> For extensive material on laws for caregivers in the United Kingdom and a theoretical discussion on this legal material, see generally Jonathan Herring, *Caring and the Law* (Bloomsbury Publishing 2013); Jonathan Herring, ‘Compassion, ethics of care and legal rights’(2017) 13(2) *International Journal of Law in Context* 158-171; Julie Wallbank and Jonathan Herring, *Vulnerabilities, Care Family Law*.(Routledge,2013).

<sup>5</sup> Introductory Text, *Care Act 2014*.

<sup>6</sup> See *Carer Recognition Act 2010 Guidelines, 2016: A guide for Australian Public Service Agencies for the implementation of the Carer Recognition Act 2010*: <[https://www.dss.gov.au/sites/default/files/documents/05\\_2016/carers\\_recognition\\_act\\_2010\\_guidelines\\_april\\_2016.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2016/carers_recognition_act_2010_guidelines_april_2016.pdf)>.

a host of different legislations across states, there is the Family and Medical Leave Act 1993 which provides labour and employment benefits to those with care giving responsibilities. The RAISE Family Caregivers Act, which became law in 2018, directs the Secretary of Health and Human Services to develop a national family care giving strategy.<sup>7</sup> In Asia, Japan has a legislation for the welfare of caregivers that provides them with benefits and allows leave from work to fulfil caregiving responsibilities.<sup>8</sup> Bhutan also recently launched a nationwide ‘Caring for the Caregiver Programme’ that seeks to draw attention to the needs of caregivers – financial, emotional, and societal – in the wake of the COVID-19 pandemic and implement laws and policies towards this end.<sup>9</sup>

In India, there is no such legal enactment specifically for caregivers. Caregivers are entitled to some benefits. However, as I will show in this paper, the range of such benefits is limited, conditional, and has not yet been consolidated under a specific legal enactment. Studies in medical contexts have strongly affirmed the need for a range of legal enactments. A recent study recommends:

Legal provisions should be brought in[to] Indian labour legislations to protect the jobs of caregivers by providing job-protected paid or unpaid leave. An adequate number of respite care facilities should be established, and separate departments should be established to assess the needs of caregivers. There should be a system of assessment of lost earning due to care giving, and [the] State should take the onus of either providing care for the disabled or by providing the compensation to the caregiver. Unless there is accountability, services may never reach those who require it; hence, chosen social justice and empowerment officials should be allotted these duties, and they should be made accountable for carer assessments.<sup>10</sup>

This excerpt is a call to pay attention to the issues faced by caregivers in the medical community in India. Social scientists have also highlighted the structural issues faced by caregivers in India – a lack of financial resources, deteriorating mental health, a lack of protection and recognition from the state, and the lack of unionisation.<sup>11</sup> Despite this, the interests of caregivers continue

<sup>7</sup> RAISE Family Caregivers Act 2018.

<sup>8</sup> *Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members 1991.*

<sup>9</sup> For detailed information on the programme, see: <<https://www.unicef.org/bhutan/press-releases/bhutan-becomes-first-country-asia-pilot-caring-caregiver-programme>>.

<sup>10</sup> Hareesh Angothu and Santosh K. Chaturvedi, ‘Civic and legal advances in the rights of caregivers for persons with severe mental illness related disability’ (2016) 32(1) *Indian Journal of Social Psychiatry* 28.

<sup>11</sup> See generally Allen Prabhaker Ugargol, et al., ‘Care needs and caregivers: Associations and effects of living arrangements on caregiving to older adults in India’ (2016) 41(2) *Ageing*

to be ignored by lawmakers and overlooked by the legal community. If we are to think of laws for caregivers, whether in a consolidated fashion as some countries have, or in the form of multiple separate legal provisions, we must first deal with a prior conceptual question: *how should we define caregivers?* I take up this question in the course of this paper.

In Section II, I will provide a broad overview of the existing construction of caregivers under Indian law. Who is a caregiver? Who is not? What are the constructions of caregivers that we find emerging and what do these constructions reveal? An analysis of these materials reveals a range of disjunct and even contradictory images in Indian law, across case law and statutes. In Section III, I will demonstrate that on sieving through the several images on caregiving that emerge in Section II, there are two constructions that seem to emerge – ‘*responsibility-based constructions*’ and ‘*action-based constructions*’. I will explain what each of these approaches entails and highlight instances wherein each approach has been relied on. Drawing broadly from the philosophical material on the concept of care, I will compare both approaches and show that if we are to pave the way for any beneficial enactments for caregivers, an ‘*action-based construction*’ is the preferable conceptual approach.

A possible law on caregivers could take several forms. There is a world of regulatory possibilities that exists. The contents of such a legislation would of course require further examination which I hope this paper can provoke. My aim here is only to start a conversation on how the law in India can respond to caregiving and what construction of caregivers we require in our laws and legal imagination.

## II. THE CONSTRUCTION(S) OF CAREGIVERS UNDER INDIAN LAW

Who is a caregiver under Indian law? This question has so far not been addressed in depth, perhaps because of the complexity associated with it. If there is no single legal enactment that deals with caregivers and their rights, we must look at a range of legal material to be able to glean who a caregiver is under Indian law. In an attempt to deal with this complexity (even if not to resolve it), I will explore how the notion of a ‘caregiver’ is constructed by the law in India. In Part 1 of this Section, I will deal with the question of how caregivers are constructed in case law – bringing images from a range of doctrinal areas. In Part 2, I will turn to the construction of caregivers under statutes.

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*International* 193-213; Geetha Jayaram Agrawal, ‘Burden among caregivers of mentally-ill patients: A rural community-based study’ (2013) 1(2) *International Journal of Research and Development of Health* 29-34; Ankush K Khanna, et al., ‘Social, Psychological and Financial Burden on Caregivers of children with Chronic Illness: a Cross-sectional Study’ (2015) 82(11) *The Indian Journal of Pediatrics* 1006-1011.

## A. Images from Case Law

Caregivers feature in cases across a range of doctrinal areas. Perhaps the one area in which they most often feature is family law. Particularly in child custody disputes, we find courts employing certain images of who counts as a caregiver (and indeed a good caregiver) for the purposes of child custody. Let us take a closer look.

In child-custody disputes, courts are most often engaged in the question: who is the ‘primary caregiver’ or the ‘main caregiver’ of a child? Such a deliberation then becomes about which parent is ‘the better caregiver’ – the person who can cater better to the child’s best interests.<sup>12</sup> As we can see, such a determination takes up the question of who is a qualitatively *better* or *more important* caregiver, rather than the initial conceptual question – *who is a caregiver?* As I mentioned earlier, I am interested in the latter question. However, judicial determinations about the former question greatly influence the latter. By examining these cases, we are able to glean who counts as a caregiver (and who does not).

In determining who qualifies as the primary caregiver of a child, one factor that courts have discussed extensively is the gender of the caregiver. This seems unintuitive at first glance because certainly, the main caregiver should be the person who can care for a child in a *qualitatively better manner* (a strange judicial determination that courts, unfortunately, have to make in custody disputes). Why must the gender of the caregiver matter at all?

Care work is overwhelmingly done by women (as compared with men), and the work of caring has historically and culturally been considered to be women’s work – within the confines of the private sphere.<sup>13</sup> The notion of caring has thus become uncomfortably linked with gendered notions of the feminine ideal.<sup>14</sup> We see that Indian courts reflect such gendered constructions in their discussions on care. Courts often hold that despite the fact that fathers can be good caregivers to their children, the *primary caregiver* is still the mother. Consider the 2019 case of *JK v NS HC* where the Delhi High Court stated that:

<sup>12</sup> The ‘best interests’ threshold is used to decide custody disputes in India. See generally, the Law Commission Report ‘Reforms In Guardianship And Custody Laws In India’ (Law Com No 257, 2015) which traces the evolution of the doctrine from the United Nations Convention on the Rights of the Child 1989 (UNCRC).

<sup>13</sup> See generally Marilyn Poole and Dallas Isaacs, ‘Caring: A gendered concept’ (1997) 20(4) *Women’s Studies International Forum*; Nancy Folbre, ‘Measuring Care: Gender, Empowerment, and the Care Economy’ (2006) 7(2) *Journal of Human Development* 183-199; Diane Elson, ed. *Progress of the World’s Women: UNIFEM Biennial Report*, United Nations Development Fund for Women, 2000.

<sup>14</sup> *Ibid.*

While we have no doubts in our mind that the *mother is a primary caregiver*, but we cannot also shut our eyes to the fact that even the father can contribute a lot to the upbringing of a child and, in fact, the love, affection, guidance and moral support of a father is extremely important in shaping the life of the children.<sup>15</sup>

In the case of *Bindu Philips v Sunil Jacob*, the Apex Court stated that the mother is the primary caregiver and traces its reasoning to the fact that the mother gives birth to the child. This cements the idea that care must be a woman's job, as an extension of *biological functions* such as pregnancy and childbirth. Consider the following excerpt from the Apex Court:

So far as the mother's role towards her child is concerned, it is *more pivotal* because she gives birth to her child. She is, therefore, capable of giving more love, affection and good training to her child.<sup>16</sup>

There is also a further distinction made between guardianship and custody that becomes relevant for our discussion here on caregivers. Under the *Hindu Minority and Guardianship Act 1956* ('HMGA 1956') the custody of a young child (below five years of age) lies with the mother and so do the caregiving responsibilities, whilst the guardianship rights lie with the father. Consider Section 6(a) of the HMGA 1956:

The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are— (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.<sup>17</sup>

The dichotomy between custody and guardianship is a curious one. As the 257<sup>th</sup> Law Commission Report states, 'guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor.'<sup>18</sup> There is thus a conceptual division between the decision-making rights and powers, and the actual day-to-day care in the law – entrenched through the custody/guardianship dichotomy.

<sup>15</sup> (2019) 261 DLT 649 (DB), para 12.

<sup>16</sup> AIR 2017 SC 1522, para 10.

<sup>17</sup> Hindu Minority and Guardianship Act 1956, s 6.

<sup>18</sup> Law Commission (n 12).

Considering this, it is especially interesting to see that the legal guardianship of a young child (below five years) is separated from the child's custody. This bifurcation is purely along the lines of gender – making caregiving the role of the mother, whilst guardianship (the title, control, and the power to make crucial official decisions for the child) remains with the father. This cements, as Saptarshi Mandal writes, ‘ a gendered (di)vision of parental roles in the patriarchal family ... which associated the father with the public sphere and the mother with the private’.<sup>19</sup> The public/private divide – highlighted on the lines of guardianship and custody – further deepens the gendered connotations of the construction of caregiving in Indian law.<sup>20</sup>

Furthermore, even while these gendered constructions of caregivers persist to seemingly benefit women and mothers with respect to *custody* (even if not guardianship), courts have sometimes taken the opposing view in matters of custody as well. In the case of *Jasmeet Kaur v Navtej Singh*, the Delhi Family Court held that:

Research indicates that fathers are *as important as mothers* in their respective role as caregivers, protectors, financial supporters & models for emotional & social behaviours... It is unreasonable to supersede this aspect in view of the projected solitary importance of the mother in the life of the children as primary care given, nurturer and comfort provider. There is nothing brought on record that given the opportunity the respondent cannot act as [a] “sit home dad” or look after all the needs of the kids and perform the assumed role of mother of the children.<sup>21</sup>

Therefore, there is sometimes a divergence from the settled position that the mother is the primary caregiver to a position which states that both parents are equally good caregivers. This kind of discord shows that there is no settled position of law on the issue of gender and the judicial determination of primary caregivers. Considering this, family law verdicts have often confused understandings of what role gender should play, if any, in determining who the ‘primary caregiver’ is.

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<sup>19</sup> Saptarshi Mandal, ‘Conditions of Possibility: Law, Patriarchy and Single motherhood in India’ in Tanja Herklotz and Siddharth Peter De Souza(eds) *Mutinies for Equality: Contemporary Developments in Law and Gender in India*(Cambridge University Press 2021).

<sup>20</sup> But see *Ibid.* Mandal, 207, who points out that certain ‘constitutional challenges to the primacy given to the father in the law governing guardianship of children’ have in fact been successful. Mandal notes, that interestingly, single mothers – as petitioners in important constitutional cases – have been successful in their petitions, and the courts have further nudged the state to change its rules on parental names in various identificatory documents.

<sup>21</sup> 2018 SCC OnLine Fam Ct (Del) 1, para 136-137.

Outside child custody, we see that family law cases are also replete with gendered notions of caregiving. Daughters have been held to have more responsibilities towards their parents than sons and are spoken of as having a ‘gentle hand and a reasonable voice’ that embodies caregiving. In *Shabnam v State of U.P.*, the court holds:

Indian culture has been [a] witness to, for centuries, that daughters dutifully bear the burden of being the caregivers for her parents, *even more than a son*. Our experience has reflected that an adult daughter places greater emphasis on their relationships with their parents, and when those relationships go awry, it takes a worse toll on the adult daughters than the adult sons. The modern era, led by the dawn of education, no longer recognises the stereotype that a parent would want a son so that they have someone to look after them and support them in their old age. Now, in an educated and civilised society, a daughter plays a multifaceted and indispensable role in the family, especially towards her parents. She is a caregiver and a supporter, a gentle hand and responsible voice, an embodiment of the cherished values of our society and in whom a parent places blind faith and trust.<sup>22</sup>

Simultaneously, daughters-in-law also have caregiving responsibilities toward their in-laws. Empirical studies show that care for the elderly on a daily basis is provided predominantly by daughters-in-law, rather than sons.<sup>23</sup> This is of course influenced by the understanding that a woman leaves her household after marriage and gains dual caring responsibilities after marriage – ideas steeped in notions of ‘Indian culture’ and Hindu tradition, often with deeply casteist and patriarchal connotations.<sup>24</sup>

Therefore, gendered understandings of caregiving shape the discourse on care in Indian courts. There is a simultaneous recognition – and troubling endorsement – that the work of care continues to be more the responsibility of wives and daughters in traditional familial setups, rather than that of anyone.

Now we should also note that while women are considered to be the default caregivers, there is no legislation or statute that provides caregivers with any

<sup>22</sup> MANU SC 064 2015, para 29.

<sup>23</sup> See Neetu Chandra Sharma, ‘Caring for elderly still a burden, daughters in law provide most support: Report’ *Mint* (New Delhi, 14 June 2019) <<https://www.livemint.com/news/india/caring-for-elderly-still-a-burden-daughters-in-law-provide-most-support-report-1560517138028.html>>.

<sup>24</sup> Ambika Pandit, ‘Children-in-law will also be responsible for care of the aged’ *Times of India* (5 December 2019) <<https://timesofindia.indiatimes.com/india/children-in-law-will-also-be-responsible-for-care-of-aged/articleshow/72375817.cms>>.

state-conferred benefits, rights or protections. Instead, we see courts sometimes trying to compensate for this care work haphazardly through a host of monetary routes. One such route is maintenance. During a divorce, one of the remedies provided is maintenance. Consider the case of *Vejudla Sugunamma v Vejudla Irmeiah*.<sup>25</sup> The court refers to the judgment of the Apex Court in *Rajnesh v Neha*, where care work was considered relevant in determining maintenance. The court holds that the caregiver's contribution to a marriage is relevant when determining the quantum of maintenance:

In a marriage of long duration, where parties have endured the relationship for several years, it [caregiving] would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children and the elder members of the family, this factor would be required to be given due importance.<sup>26</sup>

Therefore, while caregivers are not directly conferred upon with rights, protections, or benefits through any statutory mechanism, courts sometimes provide monetary remedies to caregivers through maintenance in divorce disputes.

Monetary compensation is also provided in other avenues. Caregivers of physically disabled people are eligible to receive financial benefits under the *Income Tax Act 1961*. Under Section 80 DD of the Income Tax Act, a caregiver is eligible for income tax exemption of Rs. 75,000–125,000 (at the time of writing) depending on the disability of the recipient.<sup>27</sup> Additionally, caregivers are eligible for a 25%–75% concession by the Indian railways for travel, when they are travelling with a physically disabled recipient of care.<sup>28</sup>

Another instance of this – where care work is sought to be monetarily compensated – is, rather interestingly, in the context of the *Motor Vehicles Act 1988*. Consider the case of *Chigulla Koteswaramma v Andhra Pradesh State Road Transport Corporation*, wherein it was held as follows:

The loss of supervisory services of the wife in managing the house should be taken into consideration before awarding compensation. The gratuitous services rendered by her, with love and affection to the members of the family cannot be

<sup>25</sup> MANU/AP/0453/2021, para 10.

<sup>26</sup> MANU/SC/0833/2020.

<sup>27</sup> Income Tax Act 1961, s 80(DD).

<sup>28</sup> “S. Category of Persons Percentage of Concession” (*The Details of Major Concessions Granted to Different Categories of Persons on Indian Railways Along with Class and Element of Concession*) [https://indianrailways.gov.in/railwayboard/uploads/directorate/traffic\\_comm/Concession\\_list\\_different\\_persons.pdf](https://indianrailways.gov.in/railwayboard/uploads/directorate/traffic_comm/Concession_list_different_persons.pdf).

equated in term[s] of money and none can be a substitute to her. Unmindful of the time and period of the day, the wife/mother will be employed in taking care of all the requirements of [the] husband and children. As held by the Apex Court, it is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family. However, for the purpose of awarding compensation to the dependents or for the deficiency in service due to disability sustained by the wife/mother due to an accident, some monetary value to the work of a caregiver has to be made. As held, while estimating the services of a housewife, a narrow meaning should not be given to that of services, but should be construed broadly by taking into account the loss of constant love and affection and also loss or deficiency in care and attention.<sup>29</sup>

Here, we see that the courts encounter a dilemma. They first state that caregivers' contributions cannot (and should not) be equated in terms of money. Then they proceed to do precisely this. Caregiving done in these cases by women is presented as an altruistic and naturalised function – one that is noble and cannot be quantified monetarily. Arguably, such images obstruct positive action in favour of caregivers and prevent adequate compensation from being given to them in a range of disputes.

Some benefits have been provided to caregivers under the ambit of labour law as well. In several cases, courts have held that civil servants who are caregivers to their family members must not be given routine transfers, as this would hinder their caregiving responsibilities.<sup>30</sup> Within the realm of maternity benefits, there are some verdicts that hold that maternity leave is not just about pregnancy and bearing the child (or childbirth), but rather about the caregiving responsibilities after birth.<sup>31</sup> In granting adoptive (and surrogate) mothers the right to maternity leave, courts have delinked maternity leave from pregnancy and the physical fatigue of childbirth, to the caregiving responsibilities towards the child. If interpreted in such a fashion, then, the provision of maternity benefits may also be thought of as some kind of remedy for caregiving.

As we can see through this analysis, it is difficult to pick out an account of caregiving that is devoid of gendered underpinnings from judicial verdicts – caregivers are most often thought of as being women, and in family law set-ups women are assumed to be the primary caregivers. The inequity comes along with this recognition. The woman is deemed to be the primary caregiver

<sup>29</sup> MANU/AP/1045/2012, para 18.

<sup>30</sup> *Netramoni Kakati v State of Assam* 2019 (4) GLT 243; *Sam Joseph v Indian Railway Catering* 2020LabIC4098.

<sup>31</sup> *Rama Pandey v Union of India* (2015) 221 DLT 756; *P. Geetha v Kerala Livestock Development Board Ltd.*, 2015 (1) KLJ 494.

of a young child but is not given guardianship rights.<sup>32</sup> She has responsibility but not agency. Women are sometimes given compensation for care work through routes such as maintenance, compensation for accidents, and some limited exemptions from work during maternity. However, the process of caregiving is not made easier or more rewarding for caregivers: laws do nothing to give them recognition and rights, or ensure that the division of responsibilities and labour is more equitable.

From this analysis, we see that caregivers are mentioned in several types of cases: child custody, maintenance, motor vehicles matters, labour and service matters, and maternity benefit matters. Images of caregivers – most often as women within the traditional family – are dominant. Caregiving itself becomes associated so intimately with gendered ideas, that courts often do not speak of caregiving except with these underpinnings.

Having briefly examined the images of caregivers in cases, I will now turn to two statutes that define caregivers. Both these statutes can be classified under the realm of law and medicine or public health and are interesting sites for examining the legal construction of caregivers in India.

## B. Statutory Images

The term ‘caregiver’ seems to have been defined statutorily only in two legislations: *The Mental Healthcare Act 2017* (‘MHA 2017’) and the *Rights of Persons with Disabilities Act, 2016* (‘RPD 2016’). Consider the following two excerpts from these recent statutes:

MHA 2017:

**Section 2 (e) “care-giver”** means a person who resides with a person with mental illness and is responsible for providing care to that person and includes a relative or any other person who performs this function, either free or with remuneration;

RPD2016:

**Section 2 (d) “care-giver”** means any person including parents and other family members who with or without payment provides care, support or assistance to a person with a disability;

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<sup>32</sup> Hindu Minority and Guardianship Act 1956, s 6.

Both these definitions of caregivers provide a conceptual account that I am interested in. Who counts as a caregiver under these statutes? What does this construction reveal?

I will now provide a bit of background about each of these legislations. The MHA 2017 superseded the Mental Health Act 1987. The new legislation came into force to provide for ‘mental healthcare and services for persons with mental illness and to protect, promote, and fulfil the rights of such persons during delivery of mental healthcare and services’<sup>33</sup> Mental illness is defined under the MHA 2017 in accordance with nationally and internationally accepted medical standards.<sup>34</sup> The RPD 2016 came into force to give effect to the United Nations Convention on the Rights of Persons with Disabilities which was adopted by the General Assembly in 2006. The act codifies several principles for the empowerment of persons with disabilities – including respect, dignity, autonomy, and non-discrimination.<sup>35</sup>

As is evident, neither of these laws was enacted to protect the rights and interests of caregivers. Rather, they each seek to protect the recipients of care. However, as work in care theory and practice has affirmed, the quality of care that a recipient gets depends significantly on the rights and protections accorded to caregivers. Strong legal provisions thus need to be brought in either into these very legislations or into a new consolidated one, that is specially targeted towards caregivers. With such a goal in mind, we are well-placed to ask – what definition of a caregiver should we adopt in any beneficial legislation(s)? What do the statutory constructions here show, and what points of further examination emerge?

I think that there are at least three conceptual questions that arise when we look at the constructions of care in both of these statutes. I will delineate them here.

### 1. Remuneration

One conceptual question that arises is whether caregivers are to be thought of as only those who are *paid* for their work, or whether persons engaged in both *unpaid and paid work* should be counted. The Indian statutory constructions in both the MHA 2017 and the RPD 2016 state that caregivers can be

<sup>33</sup> Preamble, Mental Healthcare Act 2017.

<sup>34</sup> Section 3(1) of the Act states that ‘Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government.’

<sup>35</sup> Introductory text, Rights of Persons with Disabilities Act 2016.

either paid or unpaid. This comes after a recognition of the fact that most care work in the Indian context comes from family members, and is often unpaid.<sup>36</sup>

Even courts seem to now be aware of the fact that caregivers are often unpaid, and care work is done by family members in many situations. Consider the case of *Common Cause (A Regd. Society) v Union of India (UOI) and Ors*:

The immediate family and in many situations, the larger unit of the extended family are caregivers. In the absence of a social security net, universal medical coverage and compulsory insurance, it is the family to which a patient turns to in distress. Families become the caregivers, willingly or as a result of social conditioning, especially in the absence of resources and alternative institutional facilities.<sup>37</sup>

Therefore, there seems to be a consensus in Indian law that caregivers are not necessarily paid and could in fact be unpaid, particularly in the case of family members and relatives.

Even when caregivers are paid, a great deal of caregiving is done by workers in the informal sector. Often, domestic care workers perform caregiving tasks for persons with disabilities or severe mental issues.<sup>38</sup> The labour done by domestic workers across the country would not be considered 'paid' in the absence of formal contractual agreements and employment status – 3.9 million domestic workers are present in India of which 2.6 million are women.<sup>39</sup> Note that workers in the informal sector are subject to a range of discriminatory, casteist, and classist practices by their employees.<sup>40</sup> Care work in India is structured and framed along caste-based lines and the discriminatory practices that upper-caste employers perpetuate against care workers in the informal

<sup>36</sup> See *Vijay Verma v Union of India*, WP (PIL) No.17 of 2018 para 38; Amrit Bakhshy, 'Family caregivers of persons living with mental health conditions: Challenges and concerns (2021) 37(4) *Indian Journal of Social Psychiatry* 371.

<sup>37</sup> MANU/SC/0232/2018, para 475.

<sup>38</sup> For a discussion on the nature of unpaid domestic work in India, see generally Pushpendra Singh and Falguni Pattanaik, 'Unfolding unpaid domestic work in India: women's constraints, choices, and career' (2020) 6(111) *Palgrave Communications* <<https://doi.org/10.1057/s41599-020-0488-2>>.

<sup>39</sup> Mitali Nikore, 'Care Economy: Why India Must Recognise and Invest in Care Work' *The Indian Express* (14 April 2021) <<https://indianexpress.com/article/opinion/care-economy-india-recognise-invest-care-work-7273537/>>.

<sup>40</sup> See generally Aayush Rathi and Ambika Tandon, 'Platforms, Power and Politics: Perspectives from Domestic and Care Work in India', (2021) <<https://cis-india.org/raw/platforms-power-and-politics-pdf>>; Varsha Torgalkar 'Caste and the Kitchen: Domestic Workers in Pune Allege Systemic Discrimination' *The Wire* (Pune, 12 September 2017) <<https://thewire.in/caste/pune-domestic-workers-caste-discrimination>>; Parvati Raghuram 'Caste and gender in the organisation of paid domestic work in India' (2001) 15(3) *Work, Employment and Society* 607-617.

sector require urgent attention.<sup>41</sup> There is an urgent need to ensure tangible protections, rights and benefits to domestic workers performing caregiving tasks. The *National Platform for Domestic Workers Bill 2016* and the National Policy on Domestic Workers remain under consideration with the Parliament. In light of this, and considering care work in India is divided structurally across caste and class lines, laws must recognise this prevailing inequity and address it in a manner that is informed by constitutional principles such as equality and dignity. It is crucial to make sure that any legislation on caregivers incorporates a similar definition to the ones in the MHA 2017 and the RPD 2016 with respect to *remuneration*.

If and when such a statute (or statutes) exists, we must then include both unpaid and paid caregivers in our definition to ensure an equitable allocation of rights, protections and benefits. It is straightforward to *recognise* that care work is in fact done by both paid and unpaid workers. The important task is to *employ such a definition when benefits are being provided* as well – so as to extend the ambit of benefits across the board. It is then that it becomes crucial to ensure that a definition of ‘caregivers’ includes those that are both paid and unpaid for their care work.

## 2. Residence

Another issue that comes up when we look at the definitions in the MHA 2017 and the RPD 2016 is that of residence. Under Section 2(e) of the MHA 2017, a caregiver must be a person who resides with a person with a mental illness. Let us call this the ‘residence requirement’. Why does the MHA 2017 incorporate the residence requirement? Is such a requirement justified or necessary for the care work?

There are two things that come to mind here. *First*, it is curious why the residence requirement is present in the MHA 2017 and absent in the RPD 2016. The claim is not that the notion of caregivers must be uniform across different contexts (different issues and situations may certainly require different definitional accounts), but what is the *reason* for this difference? It does not seem accurate to state that a person who has been diagnosed with a mental health condition requires their caregiver to be in residence with them, whereas persons with disabilities do not. *Second*, several caregivers may actually not live with the person who is the recipient of care. A large part of the provision of psychiatric care and therapy is done by doctors and medical professionals who are not in residence with the recipients of care. Are all these medical professionals – or indeed anyone not residing with the recipient of care - not to be thought of as ‘caregivers’?

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<sup>41</sup> *Ibid.*

On analysis of the MHA 2017, we can see that the residence requirement is perhaps present in the legislation because the drafters intended to define the term ‘caregiver’ in a narrow and specific fashion. In Section 2 (y), MHA 2017 defines the term ‘psychiatrist’ and in Section 2(g) the term ‘clinical psychologist’ is also further specifically defined.<sup>42</sup> This shows that the drafters intended to distinguish caregivers from psychologists and psychiatrists, and thus sought to define “caregiving” in an unintuitively restrictive manner. This becomes further evident when we look at Section 98 (1) of MHA 2017. Section 98(1) deals with the discharge of a person who is undergoing treatment for a mental illness in a mental healthcare establishment.<sup>43</sup> The establishment is the place wherein the psychiatrist is in charge of treating the person.<sup>44</sup> The psychiatrist may decide to discharge the person and send them home after some treatment ‘to reside with the family member or the caregiver’.<sup>45</sup> The caregiver is thus the person in charge of the daily care of the person at their place of residence in contrast with the psychiatrist who works at the healthcare establishment. Therefore, the term ‘caregiver’ is defined restrictively in a manner that requires the caregiver to be in residence with the recipient at their home.

While this may be suitable for the specific purposes that the MHA 2017 seeks to secure and pins down responsibility on the caregiver, the definition of caregivers under Section 2(e) of the Act is inadequate as a more general definition of the kind that I am interested in. If we want to decide on a definition of caregiving for a legal enactment that seeks to *provide rights and benefits to caregivers*, it is not clear why caregivers must only be those that reside with the recipients. Such an account would result in an unreasonably exclusionary result. Caregivers may or may not be in residence with the person they are taking care of and this nuance must be accounted for in more general accounts of caregiving. While we do not want to adopt an excessively wide definition of caregivers (so as to render any future laws meaningless), we must also be careful of what factors we choose to include and exclude in our definitions. While the residence requirement is placed in the MHA 2017 because of the specific nature of the legislation, I think that if our goal is to define caregivers more broadly and imagine beneficial legislations that are geared towards them, the residence requirement seems out of place.

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<sup>42</sup> Mental Healthcare Act 2017, s 2(y) and s 2(g).

<sup>43</sup> Section 98(1) of the Mental healthcare Act, 2017: ‘Whenever a person undergoing treatment for mental illness in a mental health establishment is to be discharged into the community or to a different mental health establishment or where a new psychiatrist is to take responsibility of the person’s care and treatment, the psychiatrist who has been responsible for the person’s care and treatment shall consult with the person with mental illness, the nominated representative, the family member or caregiver with whom the person with mental illness shall reside on discharge from the hospital, the psychiatrist expected to be responsible for the person’s care and treatment in the future, and such other persons as may be appropriate, as to what treatment or services would be appropriate for the person.’

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

### 3. Responsibility

One final theme that becomes important here is that of *responsibility*. Under the MHA 2017, a caregiver is constructed as a person who is ‘responsible for providing care’ to another. In contrast, under the RPD 2016, a caregiver is just someone who ‘provides care’ to another.<sup>46</sup> At first glance, this difference may seem purely semantic and inconsequential. We may also doubt whether much thought was put into this distinction at the stage of drafting the respective legislations, or whether this distinction was merely an oversight on the part of the drafters. Even if it is the case that this distinction was not intended (which I suspect is the case), the distinction still has important *repercussions* for our discussion here on possible future legal enactments. We will see that this is not in fact a semantic issue – but one that has the effect of including (or indeed excluding) an entire category of caregivers from the ambit of protection.

The first definition stipulated above requires that the caregiver must have been given the *responsibility* to care for the recipient, while the latter does not. This introduces another question regarding what we may call the ‘responsibility requirement’. Should our definition of caregiving include the requirement of responsibility? In other words, must it be the case that for X to qualify as a caregiver for Y, X needs to have been given the *responsibility* to care for Y, perhaps by Y themselves?

This is often the nature of caregiving arrangements, where there is an agreement (sometimes even in written form) between the caregiver and the recipient (or their guardian) that gives the former the responsibility of providing care to the latter. In any such case where there is an agreement between the caregiver and the recipient, we would be able to clearly say that the caregiver is responsible for the care of the recipient.

The plot thickens if we think of different kinds of cohabitation agreements. Think of cohabitation arrangements wherein X has not been given the *responsibility* to care for A by any agreement or even a socially understood or sanctioned role. Consider the case of two friends living together. One friend is diagnosed with an illness and the other one ends up taking care of them in the course of their cohabitation. There is no agreement between the two that one friend is responsible for the care of the other and perhaps there has been no communication of this. No socially sanctioned role *requires* that the caregiving friend has a *responsibility* to care for the other. In such a case, can we call the friend giving care a ‘caregiver’? Would this friend, who is not bound or responsible in any explicit terms, be eligible for rights or protections that ‘caregivers’ would receive?

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<sup>46</sup> The Rights of Persons with Disabilities Act 2016, s 2(d).

Under the definition provided in the MHA 2017, the friend would not be able to avail of benefits and may be excluded from the definitional ambit. The mandate of showing prior responsibility – in some form – would preclude persons who perform the function of care, despite the absence of any contractual agreement or social role that imposes responsibility upon them.

This issue of responsibility, I think, opens up a deep conceptual issue that goes to the very heart of the question: who is a ‘caregiver’? In the following section of the paper, I will show that there are two constructions of caregivers present under Indian law: the ‘responsibility-based construction’ and the ‘action-based construction’. I will differentiate between the two in some detail and show that a definitional account of caregivers, of the latter type, must be incorporated in any future beneficial legislation.

### III. EXAMINING THESE CONSTRUCTIONS

An analysis of both the case law material and the statutes reveals a conceptual confusion that often arises. Two constructions of caregiving emerge. On the first construction, the law deems X to be a caregiver for Y if X can be said to be *responsible for* the care of Y. On the second construction, the law deems X to be a caregiver for Y if X performs the *action of caring* for Y. On this latter account, whether or not responsibility has explicitly been taken or assigned is immaterial. We may call these constructions ‘responsibility-based’ and ‘action-based constructions’ respectively.

#### A. Responsibility-Based Constructions

Under the MHA 2017, we have seen that a caregiver is defined as someone who is responsible for providing care to another. This is a paradigmatic example of the ‘responsibility-based’ construction.

As I mentioned earlier, it is likely that this issue was not given much thought at the stage of drafting. However, we can still glean reasons for the prevalence of this construction if we look at the history of the MHA 2017. Importantly, the earlier (now repealed) Mental Health Act 1987 does not use the term ‘caregiver’ at all. It was introduced through the MHA 2017. The preamble of MHA 2017 states that the legislation is concerned with the ‘*delivery of mental healthcare and services*’.<sup>47</sup> This idea – and the notion of care being a professional ‘service’ that is ‘delivered’ – runs across the act. With the increase in professional psychiatric treatment across the country and the rise in the hiring of paid caregivers, the notion of caregiving as a professional service seems to be dominant. It is perhaps such an understanding that motivated the responsibility-based construction of caregiving present in the Act. Under such

<sup>47</sup> Preamble, Mental Healthcare Act 2017.

a construction, for someone to be deemed a ‘caregiver’, there must be material to show that they have a responsibility to care for another.

This responsibility can be thought of in at least two different ways – *first*, by explicit agreement (often through contractual arrangements) or *second*, by certain recognised societal roles that courts presume bring with them responsibility. Let us take a closer look.

### *1. Responsibility on the Basis of Contract/Agreement*

When the caregiver and the recipient of care have entered into some agreement which makes it clear that the former is responsible for the care of the latter, we may say that responsibility has been explicitly agreed upon by both parties. Caregivers may be appointed here through contractual mechanisms and agreements – verbal or written. In these cases, the contract between the parties would be precisely geared towards the caregiver taking responsibility for the recipient. The agreement would stipulate details like the ambit of the responsibility, the compensation for the work and the liability in case of any negligence or misconduct on part of the caregiver. The parties to this contract may be either the caregiver and the recipient themselves, or in cases wherein the latter is not able to enter into an agreement, a family member, a guardian, or third party may consent on the recipient’s behalf. Therefore, we can often think of cases wherein A and B contract in such a way that B agrees to care for C. These types of contractual arrangements are often part and parcel of caregiving. A large part of what is generally termed ‘professional caregiving’ would fall neatly within this ambit.

Other than caregivers that are hired formally by recipients of care or their guardians, even state actors that act as caregivers would fall within this category. For instance, under the *Juvenile Justice (Care and Protection of Children) Act 2015*, personnel at childcare institutions are considered to be caregivers appointed by the state. In the case of *In Re: Contagion of COVID 19 Virus in Children Protection Homes*, the Apex Court issued guidelines to childcare institutions:

Reassure the children that they are safe. Let them know it is okay if they feel upset. Share with them how you deal with your own stress so that they can learn how to cope from you. Caregivers need to validate these emotions and talk to children calmly about what is happening in a way that they can understand.<sup>48</sup>

<sup>48</sup> See *Re: Contagion of COVID 19 Virus in Children Protection Homes* MW(C) No. 4/2020PIL-W, para 11.

The persons in charge of children at such institutions are thus given responsibility from the state and have agreed to assume such responsibility in their appointments to their posts. Thus, we see an explicit assumption of responsibility by the caregivers here, which qualifies such cases as instances of ‘explicit agreement’.

Any arrangement wherein a person has thus been given responsibility and subsequently agreed to take on such responsibility would fall within this category.

## 2. *Responsibility on the Basis of Accepted Societal Roles*

Courts often hold that due to *certain societal roles*, people have the responsibility to care for another. If someone is related to the recipient in a *particular (legally relevant) way*, courts would recognise that they have a responsibility to care for them. We have seen this in cases of child custody, discussed earlier, wherein somebody’s role as a parent *brings* with it certain responsibility to care for the child. Courts in India would hold that *certain societal roles* bring with them the responsibility to care for another – a daughter, son, daughter-in-law, son-in-law, parent and perhaps even a sibling. In these cases, even if there is no explicit contractual agreement between the parties, the caregiver is said to be responsible for the recipient’s care due to a certain accepted social role.

In a case concerning the MHA 2017 –*Vijay Verma v Union of India* – it was held that in most cases, *families* are the primary caregivers of persons with mental illness.<sup>49</sup> The judges quoted excerpts from literature which states as follows:

The roles of families or other carers of people with mental disorders vary significantly from country to country and from culture to culture. Nonetheless, it is common for families and carers to assume many responsibilities for looking after persons with mental disorders. These include housing, clothing and feeding them, and ensuring that they remember to take their treatment.<sup>50</sup>

This shows that familial ties – especially among immediate families – bring with them the responsibility to care for, according to courts. This is not a position advocated only by courts of law, but also by statutes such as the *Maintenance and Welfare of Parents and Senior Citizens Act 2007*. As Bianca Brijnath’s work identifies:

<sup>49</sup> WP (PIL) No.17 of 2018 Para 38.

<sup>50</sup> *Id*, Para 43.

Currently in India there remains a preference for elder care to occur within the family setting. Cultural concepts of care and joint family structures have constructed elder care as critical to family functioning and family cohesion. Such cultural practices are augmented by a legal environment which seeks to locate the primary responsibility of care on families and both reward and penalise families when they do/do not fulfil these responsibilities. A notable example is the Senior Citizens Act, which gives tax relief to families who care for elderly relatives but applies penalties, including monetary fines and a maximum prison sentence of three months, to those families which avoid their responsibilities.<sup>51</sup>

Such understandings show why the responsibility requirement exists under Section 2(e) of the MHA 2017: it is generally assumed that caregivers are either appointed through some official contractual employment agreement or that family members in particular will be caregivers because they occupy certain legally sanctioned societal roles.

What societal roles receive legal recognition? This is a complex question which can be examined in further depth. However, preliminarily, we can say that Indian courts picture only *certain societal roles* as bringing with them responsibility (while others do not). A parent has the responsibility to care for their child. But a parent may not have a *responsibility* to care for someone else's child. When courts rely on someone's societal role to assume the responsibility that has been taken, they rely on a range of facts – very often societal norms, constructions, and even biases that decide what relationships bring with them what responsibility. Certain societal roles are recognised as giving rise to responsibility because of the legal recognition of these roles – the wife, the husband, the parent, and the child. Roles that do not fall strictly within this traditional familial set-up may not be thought of as generating responsibilities to care by Indian courts.

Particularly considering the reluctance of courts to recognise roles outside the heteronormative and traditional family set-up,<sup>52</sup> several relationships in which care is *actually provided* would not be considered to be societal roles that have legal recognition and bring with them some responsibility. If we seek to recognise those who care for their partners in same-sex marriages and relationships – those that provide care for friends, and those that care for another

<sup>51</sup> Bianca Brjnath, 'Why does institutionalised care not appeal to Indian families? Legislative and social answers from urban India', (2012) 32(4) *Ageing and Society* 698.

<sup>52</sup> Samanwaya Rautray, 'The Apex Court denies legal recognition of same-sex marriages: Government' *The Economic Times* (15 February 2021) <<https://economictimes.indiatimes.com/news/politics-and-nation/same-sex-partners-not-comparable-with-indian-concept-government/articleshow/81209328.cms?from=mdr>>

person outside of a socially sanctioned role – we must rethink a responsibility-based construction because of the tendency it has to exclude this range of caregivers.

## B. Action-Based Constructions

On such accounts, responsibility is not the determining factor. What matters here is the *act* of caring – that is, that a person *actually takes care of* another. We see that an action-based account has been adopted in the RPD 2016, as opposed to the responsibility-based accounts of the MHA 2017. Section 2(d) of the RPD 2016 defines a caregiver as someone who *provides care, support, or assistance*. The act is the focus and the actual provision of care is what matters, not whether or not a pre-existing relationship of responsibility<sup>53</sup> can be said to exist.

Consider a case wherein two housemates, who are not connected to each other in any way (perhaps are not even friendly with one another) are in cohabitation. One of them falls seriously ill and requires ongoing care. The other housemate steps in and takes care of the person in need. In such case, there is no contract or agreement between the two housemates wherein one assumes responsibility for the other. In the eyes of the court, there is also no legally sanctioned or relevant relationship that generates responsibility – considering Indian courts most often rely on familial ties to show the presence of responsibility.

Courts cannot say that one housemate is *responsible* for the care of the other, but would they still qualify as a caregiver? On a responsibility-based account, they would not. On an action-based account, they would.

Note that an objection to my line of argument here could be as follows: if A performs the action of taking care of B, it is implicit, through A's performance of said act, that A has taken responsibility for B. This may seem plausible at first glance, but on closer examination, this line of argument comes apart for the following two reasons.

*First*, it is often the case that the person who is deemed responsible for caring for someone is different from the person that actually provides the care or does the labour for the person. We can see this if we refer back to the distinction I pointed to earlier in the case of child custody and guardianship. As the law in India bifurcates guardianship and custody along gendered lines, it is often the case that the father of the child has guardianship whereas the mother is

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<sup>53</sup> Note that in some cases, this relationship of responsibility would not need to be established prior to the taking of responsibility but could be a more continuous process.

given custody. While the father retains legal responsibility for the child, the mother does the actual daily work of taking care of the child.

Now suppose that, in a case like this, we are thinking of benefits for parents as potential caregivers for a child who is physically disabled or suffering from a chronic illness. If we adopt a responsibility-based construction, we may have to hold that the father is in fact that caregiver for the child (even though the mother performs the actual actions of caring). To caution against the *possibility of this*, we must steer clear of responsibility-based constructions and limit the possibilities available to judges in these cases. An action-based construction would be a more effective option.

*Second*, in case of such conflicts between two potential caregivers for a single person (considering only one is entitled to state-conferred benefits which would be plausible considering the limited nature of these benefits), the *action* of caretaking should be the crucial factor in any judicial determination. Particularly in familial set-ups wherein the son has assumed the responsibility to care for his parents, but it is in fact the daughter-in-law who is doing the work of caring, the daughter-in-law should be deemed the ‘caregiver’ and be entitled to benefits that facilitate her care-work. In case of potential conflict, again, we must avoid even the possibility of such results and ensure that the action or function of caring is the determinative factor in statutes and in cases before courts.

I, therefore, suggest that instead of asking who has been conferred the responsibility to care, we must adopt a definition based on the action-based approach. In recognition of the benefits of such framing, an action-based construction has been adopted in several legislations across the world. Consider Section 5 of the *Carers (Recognition) Act 2010* in Australia which reads as follows:

For the purposes of this Act, a person is a **carer** if the person is an individual who provides ongoing personal care, support and assistance to any other individual who needs it because that other individual: (a) is a person with [a] disability within the meaning of the Disability Inclusion Act 2014, or (b) has a medical condition (including a terminal or chronic illness), or (c) has a mental illness, or (d) is frail and aged.<sup>54</sup>

Here, the *act* is the operative factor – a carer is someone who *provides* ongoing personal care, support and assistance.

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<sup>54</sup> *Carers (Recognition) Act 2010*, s 5.

We also see this approach in the *RAISE Family Caregivers Act* in the United States. Section 2(2) of that Act defines caregivers as follows:

The term “family caregiver” means an adult family member or other individual[s] who has a significant relationship with, and who provides a broad range of assistance to, an individual with a chronic or other health condition, disability, or functional limitation.<sup>55</sup>

Again, the focus here is on the actual provision of the care, rather than any responsibility.<sup>56</sup>

In Scotland, the *Carers Act 2016*, defines a carer as ‘an individual who provides or intends to provide care for another individual, the cared-for person’.<sup>57</sup> Furthermore, the law in England and Wales also employs such a construction. The *Care Act 2014* in Section 10(c) defines a ‘carer’ as ‘an adult who provides or intends to provide care for another adult’.<sup>58</sup> On the accounts given here, if X intends to provide care or actually provides care to Y, then X would be considered a caregiver. It is X’s actions towards Y that determine whether X is a caregiver or not, rather than any pre-existing agreement, arrangement or responsibility. In fact, we could say that such constructions go even beyond the action-based construction as they accommodate mere *intention*. So, if X *intends* to perform caring actions towards Y, then X would qualify as a caregiver. Whether such a definition that allows for just *intent* to determine who counts as a caregiver should be adopted is a further question for investigation.

Therefore, on action-based accounts, anyone who cares (or sometimes intends to care) is a caregiver. But then the law must take up the secondary task of dealing with what it means to care. If we admit that we require such action-based constructions of caregivers, we have good pragmatic reasons to think closely about what the concept of care would entail and how we are to define the work of care in any future legal material. We are led closer to the investigations on the concept of care itself: what does it mean to care for someone? Without a broad understanding of the same (though certainly not a precise one),<sup>59</sup> we are unable to delineate at all who qualifies as a caregiver.

<sup>55</sup> *RAISE Family Caregivers Act* 2018, s 2(2).

<sup>56</sup> Note that in this definition we see the use of the term ‘significant relationship’. This is not present in the other definitions we have examined so far and brings in a relational element to the account of caregiving – one that is implicit in the other constructions, but not specified.

<sup>57</sup> *Carers Act 2016*, s 1(1).

<sup>58</sup> *Care Act 2014*, s 10(c).

<sup>59</sup> There is a difference between clarity and precision that becomes important here. When a term is unclear or ambiguous, it has more than one meaning and there is confusion about which meaning is in use. When a term is vague (instead of being precise), it has only one meaning but its application is unclear – there are borderline cases for its application. For a more detailed discussion about this, see generally Lawrence M Solan, ‘Vagueness and Ambiguity in Legal Interpretation’ in Vijay K Bhatia et al.(eds), *Vagueness in Normative Texts* 73; Ira

Some legislations seem to have taken up this task. For instance, the *Care Act 2014* in Section 3(2) uses a concept of care that is based on ‘meeting [the] needs’ of another.<sup>60</sup> Without delving into further specifics on what it means to meet needs, the act generally sees care as actions that meet the needs of another. This definition is in line (at least in most ways) with the recent work in the philosophy of care. Care ethicists largely agree that to care for someone involves meeting (or intending to meet) their needs.<sup>61</sup> This approach seems to be in line with the conceptual accounts of care that philosophers have developed – and reflects an action-based account of caring.

Informed by this, if we are to conceptualise a legislation (or a host of legislations) in India, I suggest we must adopt an action-based construction. Action-based constructions are better definitions for the following two reasons. *First*, action-based definitions include more persons who perform care work within their ambit as compared to responsibility-based ones. Further, as discussed earlier, a lot of care work happens outside of formal caregiving arrangements. An action-based approach would serve to include those in the informal sector within its ambit by defining care purely in terms of the performance of caring actions and providing care labour. A more inclusive definition – that brings within it more people who perform care work, in both the formal and informal sector, within and outside traditional familial arrangements – must be incorporated in any legislation on caregiving.

*Second*, not only is such an approach more inclusive and therefore desirable for political and social goals, it is also more accurate. Philosophers who work on care often rely on action-based definitions because it is more accurate of the phenomena we are seeking to capture. The performance of the actions of caring is what determines whether someone qualifies as a caregiver or not and the law must find ways to reflect this complexity.

From the images that have emerged in legal material, we see that two constructions of caregiving are present: the responsibility-based ones and the action-based ones. Delineating the differences between these approaches, I have suggested that an action-based account, which has been incorporated in a host of legislations world over, would work well in any future legislation on the rights and interests of caregivers in India.

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Chadha-Sridhar, ‘The Value of Vagueness: A Feminist Analysis’ (2021) 34(1) *Canadian Journal of Law & Jurisprudence* 64-65.

<sup>60</sup> Care Act 2014, s 3(2).

<sup>61</sup> Steven Steyl ‘Caring Actions’ (2020) 35(2) *Hypatia* 284-285; Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019) 51.

#### IV. CONCLUSION

In the course of this paper, I have examined how Indian law – across cases and statutes – constructs the term ‘caregiver’. We see a range of contrasting images in case law with confused notions on the relationship between gender and caregiving in several doctrinal areas such as family law, labour law, maternity benefits and even the law relating to motor vehicles. No consolidated or clear account of caregiving emerges through cases.

We then turned to statutes. The two statutes that define ‘caregivers’ are the MHA 2017 and the RPD 2016. The similarities between the two accounts are that both accounts define caregivers to include both paid and unpaid caregivers. The accounts differ because the MHA 2017 includes what I have termed the ‘residence requirement’ and the ‘responsibility requirement’, that the RPD 2016 lacks.

I have analysed the legal imagery in the *status quo* and concluded that two opposing constructions of caregivers emerge from the material at hand: the responsibility-based constructions and the action-based ones. Distinguishing between the two and what they entail, I have made a case for an action-based account of caregivers. Such an account is more inclusive and accurate – serving the purposes that any beneficial legislation would seek to perform.

I want to conclude by noting the immense importance of laws for caregivers. Laws are perhaps never the solution to structural problems, but rather, are often an unavoidable starting point. Especially considering the historic and cultural devaluation of care work, the recognition, compensation and protection of caregivers from discrimination is immensely important. If we are to ensure that those who need care can be cared for – and cared for well – it is important to pay attention to caregivers. I hope this paper can act as a nudge in that direction.