



Himachal Pradesh National Law University, Shimla (India)

HPNLU
Law Journal

Journal Articles

ISSN:2582-8533

HPNLU Law Journal

Volume II (2021)

KIRTI V. ORIENTAL INSURANCE LIMITED: Juxtaposing Household Labour into Economic Equivalents

Vanshika Maan & Varin Sharma

This article can be downloaded from: <https://www.hpnlu.ac.in/journal-level-3.aspx?ref-id=14>.

Recommended Citation:

Vanshika Maan & Varin Sharma, *KIRTI V. ORIENTAL INSURANCE LIMITED: Juxtaposing Household Labour into Economic Equivalents* II HPNLU. L. J. 80 (2021).

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KIRTI V. ORIENTAL INSURANCE LIMITED: Juxtaposing Household Labour into Economic Equivalents

*Vanshika Maan & Varin Sharma**

[Abstract: In the contemporary era of increasing awareness about the plight of women and demand for the practical enforcement of their legal rights, one question that begs to be answered is about the economic value of work done by homemakers. The apex court has faced this question along with the task of reaching a precise figure, all while giving a tangible form to such estimations. The court revisited this question in the case of Kirti v. Oriental Insurance Company¹, wherein the three-judge bench comprising of Justice N.V. Ramana, Justice S. Abdul Nazeer and Justice Surya Kant awarded compensation to the dependants of a female homemaker while simultaneously addressing the issue of the calculation of the notional income of a homemaker. The judgement also goes on to highlight the calculation of future prospects of such homemakers who more often than not happen to be women, a phenomenon time and again highlighted, specifically in the reasoning provided by Justice N.V. Ramana in the case at hand.

The case comment focuses on the Supreme Court judgement in Kirti v. Oriental Insurance Ltd. It deals with the concept of calculation of notional income for homemakers and how their economic contribution to the nation's wealth is not one to be ignored. The case comment will also talk about giving importance to the contributions made by the homemakers by rendering their services to those involved in activities termed 'economic activities' and contributing to the national welfare through the same. It will also emphasise Justice Ramana's opinion on the issue that calls for immediate recognition of the contribution of homemakers through appropriate legislation or specific other measures and why such credit is both necessary and beneficial for the State. An attempt to show that the work done by the homemakers and their contribution made without the generation of any economic rewards is equivalent to declared illegal practices like forced labour or beggar.]

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¹ 2021 2 SCC 166.

I

Introduction

The demand for the recognition of the work done by homemakers was first raised at the International Women's Liberation Conference in England in the year 1972,² since then there has been a constant struggle for the formal economic appreciation of the work done by homemakers, the ripples of which were felt when the National Housewives' Association of India³ raised a demand to be recognised as a trade union which was subsequently rejected by the deputy registrar stating that housework is not a trade or even an industry.⁴ Women, on an average, spend more time than men doing unpaid domestic work, a disparity which has been rightly pointed out by the court in the present judgement. The fact that this data materialises in the form of lack of financial independence of women and their subsequent social degradation puts a question on the face of gender justice policies and their reception in the country today. This phenomenon of unequal division of work at home is not only limited to India but can be observed throughout the world.⁵ While discussing the quantum of work taken by men and women, one cannot forget to mention the theory of gender division of labour which highlights how society supports the idea of women fitting to housework like a glove fits the hand and men being the primary bread winners of the family.⁶ This theory found its critics in the form of feminist sociologists who pointed that such ideas dampen the spirit of gender equality.⁷ Also, the sociological approach of the functionalist school

² Arpan Tulsyan, *A salary to women for domestic work institutionalises idea of men as 'providers'*, THE INDIAN EXPRESS (9 Jan., 2021), available at:

<https://indianexpress.com/article/opinion/columns/housewives-income-moeny-patriarchy-arpan-tulsyan-7138881/>.

³ R. Gopakumar, *Salary for housewives? No way, says govt*, DECCAN HERALD (20 May, 2010), available at: www.deccanherald.com/content/70650/salary-housewives-no-way-says.html.

⁴ *Id.*

⁵ A. Kundu & P. Mohanan, *Employment and Inequality Outcomes in India*, OECD (2009), available at: <https://www.oecd.org/employment/emp/42546020.pdf>; Maitreesh Ghatak, *India's Inequality Problem*, THE INDIA FORUM (June 2021), available at: <https://www.theindiaforum.in/article/does-india-have-inequality-problem> (last visited 26 May, 2022).

⁶ Browne, Irene, and Joya Misra. *The Intersection of Gender and Race in the Labour Market*, 29 ANNUAL REVIEW OF SOCIOLOGY 487 (2003).

⁷ R. Crompton, *Class Theory and Gender*, 40(4) THE BRITISH JOURNAL OF SOCIOLOGY 565 (1989); C.L. Ridgeway, *Small-group Interaction and Gender*, INTERNATIONAL ENCYCLOPAEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (2001), available at: <https://www.sciencedirect.com/science/article/pii/B0080430767039991?via%3Dihub> (last visited 26 May, 2022).

specifically that of Talcott Parsons⁸ cannot be ignored which states that the mere existence of a social practice showcases its need in the society, thereby highlighting the need for women to stick to housework and giving it biological roots with a psychological touch. These theories have not only limited the role that have been allowed to play in the social arena but have also transformed housework as a natural phenomenon which is best suited to women and does not need any compensation or economic recognition.

The wheels of social change have already been set in motion with movements like the #MeToo,⁹ 'Black Lives Matter',¹⁰ Demand for legal recognition same-sex marriage coming to the forefront, it can be rightly said that all the world's a stage and the human right activists the primary players. Even India has added its name to the growing list of countries where same-sex relationships have been decriminalised¹¹ and where women are given the right of abortion (through not completely).¹² These circumstances have made the field ripe for the introduction of debates surrounding the value of a homemaker's work. Amidst this social chaos the development of a legal, specifically statutory mechanism for the determination of a homemaker's income becomes even more important, not only for the integrity of a woman as an independent human being but also for the ease of the judicial decision-making process.

The importance of the issue can be judged firm the fact that various courts around the world have come face to face with the same question, these instances will be further discussed in the coming section at length with the help of cases like *MW v. AN*¹³ and *Echaria v. Echaria*.¹⁴

⁸ UKEssays, *The Gender Division of Labour Sociology Essay* (Nov., 2018) [online], available at: <https://www.ukessays.com/essays/sociology/the-gender-division-of-labour-sociology-essay.php?vref=1> (last visited 26 May, 2022).

⁹ Global Opinions, *#MeToo is at a crossroads in America. Around the world, it's just beginning*, THE WASHINGTON POST (8 May, 2020), available at: https://www.washingtonpost.com/opinions/2020/05/08/metoo-around-the-world/?itid=lk_inline_manual_25 (last visited 26 May, 2022).

¹⁰ BBC, *George Floyd: 10 things that have changed since his death*, BBC NEWS (13 Jun., 2020), available at: <https://www.bbc.com/news/newsbeat-53007952> (last visited 26 May, 2022).

¹¹ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

¹² The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971) read with The Medical Termination of Pregnancy (Amendment) Act, 2021 (Act No. 8 of 2021).

¹³ *MW v. AN* [2021] eKLR.

¹⁴ *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR, Equality, Family and Unpaid Domestic Work: Kenyan High Court Ruling. <https://www.theelephant.info/ideas/2021/10/01/equality-family-and-unpaid-domestic-work-kenyan-high-court-ruling/?print=pdf>.

The Indian courts have also had the opportunity to peruse this question in cases like *Arun Kumar Agrawal v. National Insurance Co. Ltd.*,¹⁵ *M.S. Grewal v. Deep Chand Sood*,¹⁶ and *Lata Wadhwa v. State of Bihar*,¹⁷ but the lack of a statutory mechanism is still being felt, otherwise such decisions will only add on to the court's habit of creating a right without a remedy.

II

Background of the Case

In the present case the deceased couple, namely Vinod and Poonam were travelling by a motorcycle in Delhi when they were hit by a santro car, which incapacitated them both resulting in cranio- cerebral damage and haemorrhagic shock. Pursuant to this incident an FIR was registered under section 279 and 304 of the Indian Penal Code against the driver of the car and evidence of rash and negligent driving on his part was recorded. Consequently, a claim petition was also filed under the Motor Vehicle Act by the couple's two surviving daughters and septuagenarian parents. The driver and owner contested that the deceased themselves were driving negligently. Subsequently, the insurance company offered Rs. 6.74 lakhs and Rs. 10.71 lakhs as compensation for the death of Poonam and Vinod respectively.

The tribunal concluded that that the car-driver was driving negligently thereby fixing the liability on the respondent- insurer. As far as the quantum of compensation was concerned the tribunal began by considering the age of Poonam and Vinod which was 26 and 29 respectively, the court simultaneously adopted an age multiplier of 17. Vinod's father took a plea that he was earning Rs. 14000 every month as a teacher in Delhi, but the same could not be evidentially substantiated by him, therefore the court considered the minimum wage in Delhi for computing the loss of dependency, an addition of 25% of income was made for the future prospects of Poonam, and one third of Vinod's salary was deducted toward personal expenses, an additional Rs. 2.5 lakhs were awarded in the form of compensation for the loss of love, estate and the funeral charges. Therefore, the tribunal arrived at the total sum of Rs.40.71 lakhs as compensation for both the deceased to the claimants.

This was challenged by the insurer before the High Court on the ground that the tribunal had wrongly taken the minimum wage of Delhi as the basis of calculation because there was no proof that the deceased Vinod was employed in Delhi, also the addition of future prospects of Poonam were requested to be removed from the final

¹⁵ AIR 2010 SC 3426.

¹⁶ AIR 2001 SC 3660.

¹⁷ AIR 2001 SC 3218.

computation and the compensation was sought to be halved pursuant to the claim of contributory negligence.

The High Court accepting these contentions reduced the notional income for the deceased couple by relying on the minimum wage in Haryana for unskilled workers. Similarly, the claimants were also denied the future prospects of Poonam and one-third of her income was deducted on the ground of personal expenses.

III

Synopsis of the Judgement- Justice Ramana's Observation

Justice Ramana dealt with the issue of the application of future prospects to the notional income of a housewife.

He mentioned the calculation of the notional income of a non-earning victim in case of insurance claims specifically housewives and while doing so he highlighted the case of *Lata Wadhwa v. State of Bihar*¹⁸ wherein the calculation was based on the services rendered by women in their house and their age. He pointed out the 2011 census in which nearly 159.85 million women identified 'household work' as their primary occupation, which eclipsed the 5.79 million men doing the same.¹⁹ Also, the report called 'Time Use in India'²⁰ released by the Ministry of Statistics and Programming calculated information collected from 1,38,799 houses and observed the same gender disparity. He also referred to the international nature of the problem, citing a 2009 report by the French government, which analysed data received from six countries namely Germany, Italy, United Kingdom, France, Finland and the United States, which highlighted the huge gap between time spent by men and women on household work.

A housemaker takes care of every domestic need of the family and contributes extensively to its well-being, but despite this fact, there is no mechanism for the economic recognition of this work, this bias has also been highlighted in the *Arun Kumar*²¹ judgement. He highlighted that this recognition will serve a multitude of

¹⁸ *Id.*, Para no. 9

¹⁹ Census (2011), Office of Registrar General & Census Commissioner of India, Ministry of Home Affairs, Government of India, available at: <https://censusindia.gov.in/census.website/data/population-finder>.

²⁰ PIB Delhi, *NSS Report: Time Use in India- 2019 (January – December 2019): Ministry of Statistics and Programme Implementation*, PRESS INFORMATION BUREAU (29 Sep., 2020), available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1660028#:~:text=The%20primary%20objective%20of%20Time,activities%20of%20the%20household%20members> (last visited 26 May, 2022).

²¹ *Supra* note 13.

purposes ranging from a better and more inclusive economic analysis to the realisation of the constitutional vision of social equality and dignity of life.

While pondering upon the question as to how to calculate the notional income of a homemaker, he suggested the use of formula given in the Second Schedule of the Motor Vehicles Act, 1988²² which has now been replaced by the Motor Vehicle (Amendment) Act, 2019, which provided that one-third of the income of the surviving earning spouse can be used as the income of the deceased spouse, which was used by the court in the case of *Arun Kumar Agrawal*.²³

He also mentioned the case of *Minor Deepika*,²⁴ wherein the court highlighted that the income of a housewife can be calculated by assessing the amount she would have earned had she got the opportunity to do so, another method could be calculating the salary of the homemaker as half of her husband and the third method could be a direct calculation of the amount of money it would have taken to replace the homemaker by a paid worker, which is called the replacement method.

But whichever method the court chooses would depend on the facts and circumstances of the case, with the aim of awarding a just compensation to the victims.

The next question which he addressed was about awarding the future prospects, wherein the case of *Sarla Verma (Smt) v. Delhi Transport Corporation*²⁵ was discussed which focused on the stability of job while calculating future prospects, the court adopted the thumb rule of an addition of 50% of the actual salary of the deceased, provided that the deceased was below 40 years and had a permanent job, but where such person was self-employed or on a fixed salary then the courts will only consider the income at the time of death. But this was changed in *Pranay Sethi*²⁶ where the court decided to make an addition even in case of people who were self-employed or on a fixed salary.

Justice Ramana reasoned that awarding future prospects was not only related to the type of profession but was also a part of the duty of the court to award just compensation with due consideration to the prevailing circumstances in each case.

²² Motor Vehicles Act, 1988 (Act No. 59 of 1988) amended by the Motor Vehicles (Amendment) Act, 2019 (Act no. 32 of 2019). The Second Schedule provides for the amount of compensation for third-party fatal accident/injury cases claims. It provides for the age of the victim and also provides for the multiplier for arriving at the amount of compensation which became payable to the heirs and legal representatives of the deceased depending upon his annual income. As per the Second Schedule, compensation is to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors relevant therefore.

²³ *Id.*

²⁴ *National Insurance Co. Ltd. v. Minor Deepika*, 2009 SCC OnLine Mad 828.

²⁵ (2009) 6 SCC 121.

²⁶ *National Insurance Co Ltd v. Pranay Sethi*, (2017) 16 SCC 680.

When it comes to the calculation of notional income of the non-earning victims, the principle of awarding compensation along with the future prospects should be applied with a vigour which equals that of an earning victim.

In a nutshell Justice Ramana highlighted the following-

- a. Grant of compensation on pecuniary basis to homemakers is a settled principle of law
- b. The recognition of work done by homemakers who more often than not happen to be women is a step taken in furtherance of a changing mindset and the nation's international law obligations
- c. Court has the choice to employ various methods for the calculation of notional income
- d. The method chosen in such cases should be with respect to the facts and circumstances of the case.
- e. Awarding of future prospects is a part of granting just compensation.

IV

An Epilogue to the Judgement: References for Justifying *Economic Equivalents*

Dignity of labour

Dignity of labour refers to a philosophy which believes that all occupations are to be given equal respect and no job is superior or inferior to other and no job is to be discriminated against.²⁷ Social reformers like Basava²⁸ and Mahatma Gandhi²⁹ are prominent believers of this sociological theory and advocated the same. Idleness is an evil, and industry as its counterpart is a righteous duty, but at the same time, intense labour in any cause, or at any business, whereby evil is done, cannot dignify the actor, however assiduously he may toil to accomplish his infamous ends.³⁰ The philosophy of dignity of labour and such a point of view on the backs our stance on defending the dignity of the homemakers' profession and how we have reduced a highly significant and labour-intensive occupation to nothing by lack of recognition of the same. Another sphere which we can encompass based on the philosophy is that the financial

²⁷ *Infra* at 28.

²⁸ Kumar Buradikatti, *He upheld dignity of physical labour*, THE HINDU (21 Apr., 2015), available at: <https://www.thehindu.com/news/national/karnataka/he-upheld-dignity-of-physical-labour/article7126122.ece> (last visited 26 May, 2022).

²⁹ D.G. Tendulkar, MAHATMA (VOL. V) 185 (1952), available at: https://www.mkgandhi.org/ebks/Mahatma_Vol5.pdf.

³⁰ The Sciences, *The Dignity of Labour*, 8(42) SCIENTIFIC AMERICAN 333 (July 1853).

dependency of women often forces them to lead such often abusive modes of lifestyle comprising no dignity or value for work done and the same has to be done away with. The doing away of such a vicious cycle requires monetary recognition of household work. On this Italian lawyer and ex-parliamentarian Giulia Bongiorno³¹ advocated financial salary for homemakers as a way to end the evil of abusive household relationships where the homemakers (usually women) don't have a way out because of the dependence on their spouse and financial recognition of household work as a salaried profession is a solution to the same. The idea that even now spouses (husbands) provide some monetary amount as pocket money to their homemaker spouse, is problematic as that is not the recognition of the service rendered by the homemaker but sum paid for managing the basic household expenses. This was the approach taken by former Union minister Krishna Tirath while rejecting the government's proposal which made it mandatory for men to provide a portion of incomes to their wives doing household chores. The former Union Minister of State for Women and Child Development opined - *'I am not using the word salary to signify this amount. What can you call it, may be honorarium or some other name. If the women have to be given money, what is the objection? Even now husbands do hand over their salaries to their wives.'*³² Such a stance has its own flaws, however, the aim of the proposal was to witness a reduction in cases of domestic violence caused by women being forced to share their homes with an abusive husband due to financial constraints.

In 1929, Hildegard Kneeland³³ estimated the housewife's financial contribution based on the replacement cost of each individual service engaged at the household and estimated that US\$ 3,000 (US\$ 50,000 in 2022) per year could well be the upper limit. An editor of the *Washington Daily News* in 1946, however, objected that \$3,000 was a huge understatement. Four full workers— a housekeeper, a cook, a Maid and gardener - and in two parttime temporary workers were considered necessary to replace a single housewife. On this basis, their annual contribution was estimated at \$9,062 (US\$ 151,317.89 in 2022). The scenario is similar even in many present-day families and they will have similar estimates with no acknowledgement of the many tasks performed by one single family member. For families, fortunately for the members apart from the

³¹ Lizzy Davies, *Italian campaigners call for housewives to be paid a salary*, THE GUARDIAN (7 Mar., 2014), available at: <https://www.theguardian.com/world/2014/mar/07/italian-campaigners-housewives-paid-salary> (last visited 26 May, 2022).

³² PTI, *Don't consider monthly income to housewives as salary': Krishna Tirath*, THE ECONOMIC TIMES (11 Sep., 2012), available at: https://economictimes.indiatimes.com/news/politics-and-nation/dont-consider-monthly-income-to-housewives-as-salary-krishna-tirath/articleshow/16355908.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited 26 May, 2022).

³³ Hildegard Kneeland, *Woman's Economic Contribution in the Home*, 143 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 36 (1929).

homemaker doing such tasks, jurisdictional disputes do not interfere with the homemaker being cook, maid, nurse, gardener, cleaner etc. – all in one.³⁴

Homemakers' contribution to national income

The contribution of housewives is not usually taken into account in estimates of national income in our nation including several others for the simple yet unjustified reason that there is no easy way to determine it. That for the case of other workers is calculated in dollars received in wages or the sale of products. In the absence of such a standard for housewives, it is not surprising that year after year, those responsible for calculating the national income do not want to be disturbed by what is going on in the house, apart from the salaried workers there.³⁵

Estimates of the economic contribution of full-time housewives have been widely scattered in the past and the valuation of their services has been mostly according to the income of domestic workers. This salary base can hardly be termed an exaggeration. We can estimate that full-time housewives contributed \$15 billion in 1940 (US\$ 239.59 billion in 2022) and \$34 billion in 1945 (US\$ 543.06 billion in 2022) for every \$100 of national income reported.³⁶ Such estimates help us realise the extent to which the society, voters and law makers have collectively ignored such an enormous value of services rendered.

The importance of homemakers in the total economy and the rapid changes occurring both in knowledge relating to homemaking and in conditions under which families live make widespread education for homemaking imperative. Adult education should bulk large in this, because of the dual capacity of most women as homemakers and gainful workers. The importance of the full-time services of homemakers, especially when the children are young, should not obscure the fact that families now live in a money economy. They can afford a full-time homemaker only if funds are available to supplement home production. Two conditions would affect a better balance, better in homemaking and other production: (1) a floor under family income at a level where extreme pressure is not put on the mothers of small children to earn; and (2) part-time jobs for homemakers and childcare facilities at relatively low cost as a substitute for home care.

Commodification of household labour

The addition of economic attributes to a presently “non-market” concept like household labour is based on context rather than scientific or economic reasoning. There is no way to tell from the description whether the activities involved are market or non-market,

³⁴ *Id.*

³⁵ *Id.*

³⁶ The wage rates used for nonfarm home-makers were the earnings of domestic workers, and for farm homemakers they were the monthly rates of farm workers. The rate of increase in these wages from 1940 to 1945 was relatively high.

whether the work is a commodity or not. Would it help to categorize the work by a woman homemaker if one knows the location (her home or someone else's). Suppose that she is a paid domestic worker, and this housework is a commodity. She leaves her employer's home. She goes home and does exactly the same thing there, but this time she is preparing dinner, the child is her own. Hence, whether these activities are viewed as a commodity is contextual, not activity-based³⁷.

The need to formally acknowledge that the work done in the home is important – not only to the individual family and its members but also to the larger economic order – and that responsibility for this work inhibits women's lives. That women's unpaid work was usually not acknowledged in terms of compensation, pensions, divorce settlements and social prestige and that women were, in fact, penalised when they attempted to move into the paid labour force was presented as evidence of profound gender-based inequity.³⁸ Further, the popular belief through much of the 20th century that women's work was 'freely' or wilfully chosen as a labour of love rather than socially constructed as the primary adult role for women spoke to the bind women found themselves in – socialised into assuming a role which was socially denigrated, economically marginalised yet culturally romanticised.³⁹

In the present discussion, the 'work' identified is work which in other or the same context in the same economy is generally compensated or paid. This feature is increasingly self-evident with domestic labour as increasing numbers of tasks are commodified or contracted out.⁴⁰ From childcare to house-cleaning, lawn care and small household maintenance jobs, there is little that is routinely performed without pay in many households that is not elsewhere undertaken for pay.

Thus, discussions on whether home labour ought to be commodified or not proceed from the outset on a foundation that insults the population of women who already engage in domestic labour for pay. Quite simply, the market already exists. The idea presented is that paid domestic workers bear an extremely unfair burden generated by the following idea – the desire to construe home labour as something other than work. The problem of the "pricelessness" of unpaid home labour bears down on the paid domestic labourer, in both broad social understandings and concretely through impairment of the ability to achieve a remotely even playing field from which to sell her

³⁷ Katharine Silbaugh, *Commodification and women's household labour*, 9(1) YALE JOURNAL OF LAW AND FEMINISM 81 (1997).

³⁸ Norene Pupo, & Ann Duffy, *Unpaid work, capital and coercion*, 6(1) WORK ORGANISATION, LABOUR & GLOBALISATION 27 (2012).

³⁹ *Id.*

⁴⁰ Pupo, N. & A. Duffy 'Blurring the Distinction Between Public and Private Spheres: The Commodification of Household Work – Gender, Class, Community and Global Dimensions', in WORK IN TUMULTUOUS TIMES: CRITICAL PERSPECTIVES 289 (V. Shalla & W. Clement (eds.), 2007).

labour. The former point can be illustrated through an examination of the labour laws⁴¹ that apply to paid domestic workers. The latter point is evident from the tax treatment of unpaid labour.⁴²

Housework performed in the home by a family member is not "taxable income" for the purposes of the income tax in almost all nations. In India the exemption of GST⁴³ on housekeeping, cleaning and security services provided at educational institutes and hospitals goes along similar lines. Cleaning and housekeeping services in India are only taxable under the GST when they are done for commercial purposes. This is so despite the general rule that nonmonetary income and income from informal economies is taxable.⁴⁴ The exception is for income that does not come from a market bargain, whether it is monetary or not. This is thought to exclude household labour, which is prejudged as non-negotiable. The failure to tax attributed income from unpaid household labour works like a tax-subsidy provided to the choice of unwaged over wage-labour, more specifically a tax-subsidy to unpaid home labour. This is so because a person deciding whether to allocate time to paid versus unpaid labour may take account of the extent to which wages from paid labour will be brought down by taxes, while value produced by the home labour will be enjoyed in full. Since the majority of home labour is unpaid, the paid domestic worker competes for a wage against a tax-subsidized unpaid worker. This may be one of the factors that drives down the wages of paid domestic workers. The paid domestic worker is the victim by association with the unpaid domestic worker and both unpaid and paid domestic labourers are victims of non-recognition of household labour as an economic activity⁴⁵. The non-taxing of unpaid domestic labour brings down the competitive price of paid home labour as well as they are viewed with context to each other.

The waged and unwaged domestic worker are commingled; by failing to view the unpaid domestic labour in economic terms, it becomes more difficult to see the paid domestic labour in economic terms. This also explains the absence of labour law protections to paid domestic workers. The failure to understand unpaid labour in economic terms has a more direct impact - as stated above, the competitive price of paid

⁴¹ See, Domestic Workers (Registration, Social Security and Welfare) Act, 2008 (Act no. 33 of 2008). Also see Wiego Law & Informality Project, *Domestic Workers' Laws and Legal Issues in India*, (Nov. 2014), available at: <https://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-India.pdf>.

⁴² *Supra* 37, p. 81-122

⁴³ Goods and Services Tax (GST) is a comprehensive, multistage, destination-based tax. It is an indirect tax that was implemented to replace a variety of previous indirect taxes, including the value-added tax, service tax, purchase tax, excise duty, and others. GST is a tax in India imposed on the supply of specific products and services. More info available at: <https://www.gst.gov.in/> (Last accessed on 14-12-2022).

⁴⁴ Staudt, *Taxing Housework*, 84 GEO. L. J. 1571 (1996) at 1575-76.

⁴⁵ *Infra* at p. 79-83.

home labour is reduced. This adds to perpetuating poverty among paid domestic workers⁴⁶.

Finally, the argument comes full circle; at the times when a price might be placed on unpaid home labour in law, as in the wrongful death suit or the divorce context (a relevant point to the discussion at hand), that price has been deflated by distortions in the market for paid domestic labour.⁴⁷

MW v. AN:⁴⁸ *Ending institutional inequalities within the family*

In an interesting judgment delivered during late 2021, the High Court of Kenya at Nakuru held that the housework and care-work which is performed by a female spouse (the plaintiff in this case) entitles her to an equal share of the matrimonial property at the time of the dissolution of marriage. The facts of *MW v AN* tell a tale where the parties were married in 1990, separated in 2003, and divorced in 2011. The dispute was fixated on the fate of a house constructed at Nakuru. While the house was registered under the name of the male spouse (the defendant in the case), the plaintiff also argued that she had taken out widespread loans to finance the purchase of the land and the construction of the house.

The High Court of Kenya at Nakuru in its judgement on the issue held that the housework and care-work which is performed by a female spouse (here, the plaintiff) entitles her to an equal share in the matrimonial property during the dissolution of marriage.

In *Echaria v. Echaria*⁴⁹, it was held by the Court of Appeal (in Kenya) that where there was a 'substantial but unascertainable contribution' by both parties, a default rule would apply involving equal division. The question, of course, focused upon the meaning of the word 'contribution'. In this context, Justice Matheka opined and observed that the 'contribution' would have to include not only tangible financial contribution, but also take into account the 'unseen' contribution of housework and care-work. In paragraph 38 of the judgement, she observes –

'This other part of mothering, housekeeping and taking care of the family is more often than not, not given any value when it comes to sharing matrimonial property. It is easy for the spouse working away from home and sending money to lay claim to the whole property purchased and developed with that money by the spouse staying at home and taking care of the children and the family. That spouse will be heard to say that the other one was not

⁴⁶ Katharine B. Silbaugh, *Turning Labour into Love: Housework and the Law*, 91 NORTHWESTERN UNIVERSITY LAW REVIEW 1 (1996).

⁴⁷ *Id.*

⁴⁸ *MW v. AN* [2021] eKLR

⁴⁹ *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR, Equality, Family and Unpaid Domestic Work: Kenyan High Court Ruling, available at: <https://www.theelephant.info/ideas/2021/10/01/equality-family-and-unpaid-domestic-work-kenyan-high-court-ruling/?print=pdf> (last visited 26 May, 2022).

employed so they contributed nothing. That can no longer be a tenable argument as it is a fact that stay-at-home parents and in particular women because of our cultural connotations do much more work (house wives) due to the nature of the job . . . hence for a woman in employment who has to balance child bearing and rearing this contribution must be considered. How do we put monetary value to that process where a woman bears the pregnancy, gives birth, and takes care of the babies and where after divorce or separation she takes care of the children single-handedly without any help from the father of the children. . . ? Should this court take this into consideration when distributing matrimonial property where the husband as in this case is left in the matrimonial home where the wife rents a house to provide shelter for herself and the children? I think it should count, especially where the husband has not supported the raising of the children, has not borne his share of parental responsibility'.⁵⁰

Justice Matheka's judgement holds solid ground because of the explicit recognition it has given to the 'unseen' and unpaid housework, within the background of domestic relationships; as is well established now, across the globe and across societies, within the institution of the family itself, the burden of such work is gendered in nature and often, the unseen aspect (women adopting the notion to not acknowledge their own service in the household) and the unpaid domestic work by the female spouse is what 'frees up' or allows the male spouse to enter the labour market and engage in the kind of financially remunerative work recognised as economic contribution to the society that, ultimately, results in (for example) matrimonial property being purchased with 'his' money, and therefore ultimately registered in his name. Thus, departures from the traditional notions of property are essential in order to do justice in and within the institution of the family and a this is a crucial concept explaining why such recognition in monetary terms is a scientifically as well as morally justified notion. In the context therefore, the judgment in *MW v. AN* is important, as it has essentially restored the position of the default equality rule which included that there is evidence of 'non-monetary contribution', and allays fears that judiciaries that might not have entirely broken out of patriarchal norms will use the vagueness of the statutory clause to devalue housework or care-work. This essentially fixes the in-built inequalities within households across the globe as well as recognises the need for justifying the remuneration for an immensely crucial service rendered.⁵¹

Justice Matheka's language can be found to be remarkably similar to a 1992 judgment of the Colombian Constitutional Court. In *Sentencia No. T-494/1992*, the Constitutional Court (in Columbia) had to consider the eviction of a widow from her matrimonial home. Here, the widow's non-monetary contributions were not taken into account as a determining factor in whether or not she had some legal interest in the home. The

⁵⁰ *Id.*

⁵¹ Gautam Bhatia, *Equality, the Family, and Unpaid Domestic Work: The Judgment of the Kenyan High Court in MW v AN*, INDCONLAWPHILL.WRDPRESS, available at: <https://indconlawphil.wordpress.com/2021/09/25/equality-the-family-and-unpaid-domestic-work-the-judgment-of-the-kenyan-high-court-in-mw-v-an/> (last visited 26 May, 2022).

Constitutional Court notes that such a view has the effect of 'invisiblising' the domestic work, and deepening inequalities within social relations. The court also goes on to question the 'artificial' or arbitrary distinction between 'productive' and 'non-productive work', and notes that refusal to consider the unpaid domestic work would amount to violation of the guarantee of equality and non-discrimination in the Colombian Constitution. This holds as strong precedent for recognition of homemakers' services through appropriate legislation in order to truly meet the ends of equality and justice as ascribed in our transformative constitution.

V

Way Forward – Structural Mechanism to Enact Legislation

Certain precedents in Indian legal system as well as around the world have shown strong justification for the concept of recognition of economic recognition of the services of homemakers. It is pertinent to highlight the notable opinion of several Hon'ble Judges acknowledging the same during the discourse of this case comment.

In *Arun Kumar Agrawal v. National Insurance Co. Ltd.*⁵², Hon'ble Justice A. K. Ganguly highlights the problem of gender bias incorporated in the Census mechanism and how it is a travesty that the Central government has taken such a stance. Justice Ganguly notes – *'This bias is shockingly prevalent in the work of Census. In the Census of 2001, it appears that those who are doing household duties like cooking, cleaning of utensils, looking after children, fetching water, collecting firewood have been categorised as non-workers and equated with beggars, prostitutes and prisoners who, according to Census, are not engaged in economically productive work. As a result of such categorisation about 36 crores (367 million) women in India have been classified in the Census of India, 2001 as non-workers and placed in the category of beggars, prostitutes and prisoners. This entire exercise of Census operation is done under an Act of Parliament.*⁵³ The judgement has rightfully shown how such notions of equating the stature of homemakers to that of beggars, prostitutes and prisoners as economically non-productive segments of society is highly problematic and only shows deeply engraved gender biasness towards women, particularly portraying blatant disregard for concepts like dignity of labour and basic human dignity. The judgement highlights – *'Therefore, this approach of equating women, who are homemakers, with beggars, prostitutes and prisoners as economically non-productive workers by statutory authorities betrays a totally insensitive and callous approach towards the dignity of labour so far as women are concerned and is also clearly indicative of a strong gender bias against women'*⁵⁴

⁵² (2010) 9 SCC 218.

⁵³ *Id.*

⁵⁴ *Id.*

In English courts, the courts followed the practice of awarding damages solely on the basis of pecuniary loss caused to family due to the demise of the wife. Bringing to light the need for the same was first acknowledged in *Berry v. Humm and Co.*⁵⁵ – *'I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death.'*

The central government finds strong precedent for fixation of certain monetary recognition for the services rendered by homemakers in the opinion of Justice G.S. Singhvi in *Arun Kumar Agarwal*⁵⁶ where he observed that even though it is an impossible task to decide a monetary exchange sum for the services rendered by the homemakers, it is significant that certain monetary recognition of the same be there for the basic purpose of awarding compensation to the dependants. He notes on this issue – *'It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e., husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term 'services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.'*⁵⁷ This stands as appropriate precedent for the legislature to notify, in whatever means fit, an appropriate monetary sum taking into account the contribution to the economy, services rendered and dignity of labour for purposes of establishing adequate compensation as well as proper recognition of an invaluable service rendered. The reason for calling such services invaluable has been explained articulately in the same opinion by Justice Sanghvi as – *'In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean.'*⁵⁸

⁵⁵ (1915) 1 K.B. 627.

⁵⁶ *Supra* note 12.

⁵⁷ *Id.*

⁵⁸ *Id.*

Another such precedent in international decisions for the State lies in *Mehmet v. Perry*⁵⁹, where the pecuniary value of a wife's services was assessed and granted under the following heads: -

- (a) *Loss to the family of the wife's housekeeping services.*
- (b) *Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.*
- (c) *Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.*

Taking into account the above precedents, the State also has to follow the legal framework and mechanism it holds to enact appropriate legislation regarding the concept of monetary recognition of the homemakers' not only as a compensatory provision or remedy but a recognition of services rendered in the due course of their lives. As mentioned through above mentioned precedents the country's judiciary has developed an 'innovative' legal framework for 'solid wages for housework': judges recognised the unpaid work of women who died in traffic accidents and awarded their heirs compensation. To calculate the value of domestic work, the judges considered the opportunity cost - forgoing something else - of a woman's decision to work at home at minimum wage for skilled and unskilled workers, taking into account the qualifications of the deceased woman and the, taking into account the allowances adjusted according to age and whether or not she has children. The precedents hold much value and substance when they offer facts such as the principle of compensation after the death of the homemaker in itself recognises the importance (monetary recognition) of the services rendered while the homemaker was alive, even though the compensation or remuneration has been paltry at various instances.

Such precedents however, if not formulated into proper legislation by the State hold no value by themselves. The onus lies on the State's part and it cannot wash its legislative hands off when it comes to the matter of legal recognition of remuneration to the homemakers by an Act of parliament. If we closely analyse the provisions under the Motor Vehicles Act, section 163A of the legislation reads as follows –

'Special provisions as to payment of compensation on structured formula basis –

- (1) *Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.*

Explanation – For the purposes of this sub-section, 'permanent disability' shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

- (2) *In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim*

⁵⁹ (1977) 2 All ER 52.

has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.’⁶⁰

Such a section effectively puts the responsibility to enact suitable legislation concerning matter about payments of compensation and do the needful on a structured formula basis. This is the legislation courts of law have used to grant compensation to several non-earning members' claims like the homemakers, in motor-accident deaths and hence this piece of legislation paves way for the government to enact statutory provisions for recognition of compensation/renumeration for the homemakers taking into account the various precedents of the hon'ble courts discussed as guidelines while drafting the same.

Lawyers can also interpret the above discussed judgements to use these judgments to 'trigger developments in constitutional law and family laws to recognise the unpaid work of housewives in normal times, rather than only at times of disruption'⁶¹ Such a stance also opens up new dimensions regarding the concept of women in labour, increasing participation rate in our country of women in labour and also enabling possibilities for specific and separate labour codes for the same.

A concept which has gained wide acceptance by the Supreme Court and also shows government the way to go is the evolving doctrine of constitutional morality⁶². The concept of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves⁶³ as per Ambedkar Constitutional morality meant the provision of a principled understanding for unfolding the work of governance⁶⁴. It specifies certain norms for institutions to survive and an expectation of behaviour that will meet not just the text but the soul of the Constitution. It also makes the governing institutions and representatives accountable. The principle conveys a sense which shows morality which has inherent elements in the constitutional norms and conscience of Constitution.⁶⁵ Its essence is such that it refers to the adherence to or being faithful to bottom line principles

⁶⁰ S.163A, Motor Vehicles Act, 1988.

⁶¹ Prabha Kotiswaran, *An Ode to Altruism: How Indian Courts Value Unpaid Domestic Work*, 56(36) EPW 45 (2021).

⁶² *Infra* note 63.

⁶³ For easy access to the Ambedkar speech referred to in this text, see the selection, *The Constitution and the Constituent Assembly Debates*, LOK SABHA SECRETARIAT (1990) pp. 107-131 and pp. 171-183.

⁶⁴ Ambedkar, 'Speech Delivered on 25 November 1949' in *The Constitution and Constituent Assembly Debates*, p. 174.

⁶⁵ *Government of NCT of Delhi v. Union of India*, 2018 SCC OnLine SC 661.

of constitutional values. It includes a pledge to inclusive and democratic political process in which both individual and collective interests are satisfied. The stance has been solidified by the Supreme Court in various judgement over the course of previous few years. The application of the principle can be seen in recent judgements of eminence delivered by the Supreme Court. A difference was identified highlighting the significance of Constitution morality by the Hon'ble Supreme Court where in *Navtej Singh Johar*⁶⁶ case it was shown that in *Suresh Koushal*⁶⁷ case the bench was guided by social morality leaning on majority perception whereas the issue, in actuality, had to be debated after taking into account constitutional morality. In the *Sabrimala (5-J)*⁶⁸ hearing the court went on to bypass the doctrine of essentiality⁶⁹ in order to uphold the values constituted under the concept of Constitutional morality.

The problem of no monetary recognition to the services rendered by the homemakers is an impediment to the accomplishment of the Constitutional duties we as a nation ought to fulfil. Strong legal precedents by the Apex court in instances where constitutional morality had to be ensured in order to uphold the constitutional spirit and values are applicable to the matter of discussion of this case comment as well. The issue at hand is not merely an issue of securing of rights of a particular section of the society, but a multidimensional aspect which finds its solution in the legal framework that may be created by a legislation by the State which appropriately addresses the issues in order to uphold constitutional principles, the State's moral obligations and due recognition of a service of immense importance which has been long overdue.

V

Conclusion

The aim of this case comment was to peruse the question of calculation of the notional income of housewives which was discussed in the present case of *Kirti v. Oriental Insurance Ltd.*⁷⁰ The opinion given by Justice Ramana was discussed at length which highlighted the prevalence of the gender gap when it came to the quantum of housework done, a bias which favoured men.

⁶⁶ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

⁶⁷ *Suresh Kumar Koushal v. NAZ Foundation*, (2014) 1 SCC 1.

⁶⁸ *Indian Young Lawyers Association v. The State of Kerala*, 2018 SCC OnLine SC 1690.

⁶⁹ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (Shirur Mutt case)* AIR 282 SCR 1005 - The court held that the term 'religion' will cover all rituals and practices 'integral' to a religion, and took upon itself the responsibility of determining the essential and non-essential practices of a religion.

⁷⁰ *Supra* note 1.

The concept of philosophy dignity of labour was also highlighted with special emphasis on work done by female homemakers, and how they suffer abuse because of a lack of financial independence. This problem is also manifested in the form of non-inclusion of work done by housewives in the estimation of national income.

The Kenyan case of *MW v. AN*⁷¹, a prominent and new precedent with an innovative approach, was also discussed wherein the court stated that a female spouse was entitled to an equal share of the matrimonial property at the time of dissolution of marriage because of her contribution in the household work and care- work. Similarly, another case of *Echaria v. Echaria*⁷², the court highlighted the importance of the unseen housework done by women.

The question then quite naturally proceeded to the way forward and to the need for a structural mechanism for calculating the economic value of housework, various opinions of Indiana as well international courts were discussed at length to provide backing to the stance and the route provided under section 163A of the Motor Vehicle Act which while holding the central government as the responsible authority also assists in the calculation of compensation in case of accidental death or permanent disablement was also explored.

The need for monetary recognition of housework especially that done by women can be felt in the bones of the economic, legal and social structure today. Denying a class of citizens this opportunity would indirectly amount to a violation of their socio-economic rights with long-lasting legal implications because the society cannot progress when half of its members have to live as the unfortunate children of a lesser God.

⁷¹ *Supra* note 13.

⁷² *Supra* note 14.