



# Law and its discontents: ageing and Family Law in India

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## Abstract

Ageing is an overarching phenomenon, its effects felt across lines of region, gender, caste and other identifiers. Standards in international human rights law as well as the Constitution of India lay down broad guidelines to protect rights including ideals of equality and non-discrimination. These are reflected in the legal landscape on the ground and its working. However, both these seem to fall short of Constitutional guarantees. The abdication of responsibility by the State in terms lack of social security and inordinate delays on issues relating to rights claims outweigh the minor gains made by maintenance and domestic violence legislations that seek to ensure life with equality and dignity in times of ageing. This paper critiques the legal landscape on maintenance and domestic violence from the lens of rights of older persons.

**Keywords** Elderly · Ageing · Maintenance of Parents and Senior Citizens Act, 2007 · Disability · Constitution

## Introduction

“One of the unique features of ageism is that age, unlike race and sex, represents a category in which most people from the in-group (the young) will eventually (if they are fortunate) become a member of the out-group (older persons)” (Nelson 2004).

Like the proverbial sausage factory, everything that goes in comes out as a sausage. Old age is the ‘sausage’ of many intersectionalities of caste, gender and ability among others. While the law may consider burdens of each of the above, and may recognise the burdens of ageing, intersectionalities are often lost. While it is true that some of the remedies that law has to offer may be available to those who carry the double burden of intersectionality (The Protection of Women from Domestic Violence Act, Section 3), it is clear that this is a coincidence and not always a good fit.

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The percentage share of the number of older persons has increased from 5.6% of the total population in 1961 to 8.6% in 2011 (Ministry of statistics and program implementation 2016). Most discontents related to ageing revolve around a few major areas. Pensions and retirement benefits which are governed by labour law and are paid by employers is a crucial area, although it does not cover all ageing populations. These cover both private and State employers. Another area involves the family and this is the area this paper focusses on. Family law related issues fall largely into the areas of maintenance laws and domestic violence laws. Maintenance laws are often governed by the dual provisions of community-based personal laws and secular laws of general application. Personal laws vary based on a number of indicators. These include religion, for example, Hindu law (Hindu Adoptions and Maintenance Act 1956) and Muslim law (Muslim Personal Law (Shariat) Application Act 1937, Section 2), *tribal identity*, e.g. Mizo law or Khasi law, *region*, for example States may make their own Rules under the Act (The Goa Maintenance and Welfare of Parents and Senior Citizens Rules 2009) and other variables leading to a variance in available maintenance rights. Secular legislations (Maintenance and Welfare of Parents and Senior Citizens Act and the Criminal Procedure Code) also apply. Elder abuse is also an area where increasing complaints have come up in recent years. Here, the laws that apply are a mix of criminal laws which are in the crime and punishment mould and more recent civil legislations which are in the relief and rehabilitation mould and especially relevant to elder abuse in families (The Protection of Women from the Domestic Violence Act).

This paper draws the contours of the legal landscape of rights of older persons in international human rights law and in the Constitution of India, examines how far standards in family law are compliant with these rights and finally throws up suggestions for law reform. It argues that rights of older persons are largely viewed through a charity model and in a disabling manner and a stronger focus on rights with corresponding duties on the part of the State and family members should be the future trajectory of laws relating to maintenance and domestic violence.

## The legal landscape of rights

Rights of older persons (also referred to in law as senior citizens or aged or elderly) is an area which has not been adequately covered in law. Although there are many documents dealing with rights of all including older persons, provisions specifically for this group are very few. It is thus necessary to get an idea of the entire legal landscape before gaps can be properly identified.

The legal landscape consists of conventions and other international instruments dealing with human rights law, the Constitution of India with its enumeration of rights, legislations at the federal (Union) level, case laws through judicial decisions of the Supreme Court of India and the High Court of States.

## Standards in international law

In International law, while there are broad standards where one could read in rights related to ageing, there is no separate, comprehensive standard. This may in part have prevented a similar comprehensive law in the domestic context.

In terms of international law, rights are only protected by implication in the Universal Declaration on Human Rights, 1948, and the International Convention on Civil and Political Rights, 1966 (ICCPR), as well as the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) (Fredwang and Biggs 2012, pp. 8–12).

Although there are no provisions dealing with the elderly, rights to social security (Article 9, ICESCR and ICCPR), adequate standard of living (Article 11, ICESCR and ICCPR) and highest attainable standard of physical and mental health (Article 12, ICESCR and ICCPR) are there. These have much meaning in the context of ageing. Under the Universal Declaration of Human Rights, (UDHR) Article 21(1) similarly talks about the right to standard of living, adequate of health and well-being of persons and their families. Although these Conventions do not directly speak about older persons, General Comment No. 6 on ‘the economic and social rights of elder persons’ (Committee on Economic, Social and Cultural Rights, General Comment No. 6 (1995)) provides an explanation of why the ICESCR should apply to older persons and states that ageing and its attendant issues were not evident at the time when the Conventions were drafted.

In General Comment 20, although the focus of the comment was not age, discrimination on age was prohibited in the context of economic, social and cultural rights (Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009)). While there is a case for a separate Convention for the rights of older persons as there are identifiable age specific rights as well as discrimination based on ageism, no such working draft exists yet. However, there is an open-ended working group on ageing which has been set up under the UN General Assembly (Fredwang and Biggs 2012, p. 13). While there have been meets and reports dealing with ageing and old care at the UN level (Majumdar and Chakrabarti 2020), this has not really developed into concrete legal standards.

In the international arena, these broad standards have been tested through the complaint mechanism at the UN level. In two significant cases, the UN Human Rights Council was called to interpret existing international standards with respect to ageing. The outcomes of these cases show mixed results. The first case was that of *John K Love v Australia* (2003, para 8.2) In this case the Council was called to decide whether age based discrimination would be violative of Article 26 of the ICCPR which prohibits discrimination on a number of specific grounds and also adds- ‘...or other status’. The Council noted that although age was not explicitly listed as a ground of prohibited discrimination, any distinction made which was not based on “reasonable and objective criteria” would amount to prohibited discrimination. Age could therefore be construed a prohibited ground for discrimination.

In *Albareda v Uruguay* (2007, para 9.3–para9.4) the challenge was of a civil service rule which required compulsory demotion on attaining age of 60 and here the Council approved of the rationale that elder persons had a loss of memory and reflexes that led to lower efficiency and hence the civil service rule was based on good rationale and objective criteria. Thus, outcomes at the international level are varying. In the case of *Albareda*, the Court could certainly have avoided being insensitive and using criteria that were discriminatory and prejudicial when carrying out its legal analysis (Joseph and Castan 2013, p. 793).

An international convention on rights of the elderly is necessary as it would help highlight a problem which is otherwise invisible in society as currently most human rights instruments have no explicit reference to elderly people as a vulnerable group of their own. Further a Convention would allow civil society and important stakeholders to lobby domestic authority and could help generating the political will for change (Ramachandran 2014, pp. 544–545).

The lack of clear standards at the international level seems to lead to unpredictable and varying outcomes which does not bode well for older persons. A clear rights-based framework at the international level is needed to avoid paternalism and disabling of older people.

## Constitutional standards and ageing

While Constitutional rights are available to all *citizens* and in some cases, to all *persons* including older persons, there are some which are especially relevant in the context of ageing in families. Along with Fundamental Rights that are justiciable and can be litigated in courts, there are Directive Principles of State Policy. The test is to see how far Constitutional rights protect rights of older persons.

## Equality for older persons in a family setting

Article 14 clearly states-

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Equality can be many things. It includes real equality over nominal equality, and it also includes the concept of affirmative action in order to ensure equality. There have been cases which have challenged this basis of equality on the grounds of ageing although most have been in the area of public law in matters of employment/retirement, age bars for admission to colleges, etc. (The Print, 02nd April, 2019).<sup>1</sup>

The family is not a place where everyone is equal. Patriarchy, paternalism and ageist mentalities may be oppressive to women, children and older persons. Where rights in family law to maintenance and freedom from violence are violated, there are barriers that older persons face when trying to access rights. The stage of life argument is often used to devalue older persons. Even when the stage of life is immaterial to a law, there might be situations where older persons face prejudice by those who carry a bias. Oftentimes, equality is also denied because of barriers. A parallel may be drawn with voting rights. Persons with disabilities may be able to book wheelchairs, avail transport facilities and have assured minimum facilities at polling stations in order to cast their votes (FAQs for voters with disabilities (2018)) (The Rights of Persons with Disabilities Act and the Mental Healthcare Act). Many challenges are shared by persons with disabilities of all ages and older persons. However, older persons may not necessarily fall within the twenty one disabilities recognised by law and thus be excluded.

Thus, equality while a right may sometimes fail age-based standards.

## Age as a prohibited marker for discrimination

It is interesting to note that the Constitution in Articles 15 and 16 talks about discrimination under a variety of grounds including caste, sex, religion, etc. It is also pertinent to note

<sup>1</sup> One example of this is the stage of life argument which has often been read into law and policy. Ironically, this has been effectively challenged in the field of law itself where the Bar Council set a maximum age to study law through a petition in the Supreme Court. Such a rule is not only ageist but also casteist and classist as those who are working to put themselves through college would definitely be older students (The Print, 02nd April, 2019).

To take examples of law- many higher education opportunities are not available to mature students in India. Childhood receives special care and attention whereas old age does not. Older persons are seen as unproductive and retirement ages are fixed which do not have a direct link with the ability of a person (The Times of India, 3rd Mar, 2017).

that age is not a ground which is specifically mentioned. Laws which then treat persons differently on the basis of age, if they are discriminatory would they be upheld?

Many other unnamed markers have been held to be discriminatory. An example of this would be disability where the discrimination on the basis of disability has been well established as a violation of the right to equality under the Constitution (Article 15(1)). Thus, just because age is not a marker specifically mentioned in Articles 15 and 16, it does not mean that discrimination on the basis of age will in any way be considered to be within the spirit of the Constitution. If this is to be considered, many other interesting questions could also arise like that of having an arbitrary retirement age when one is fit to work. More importantly, it would challenge the inequalities to access to services including barriers faced by older people. Not providing for accessible and barrier free services would constitute a rights violation for a group for whom substantive rights would otherwise be meaningless. Rights without accommodation and services which allow older persons to live a truly equal life would constitute discrimination. Also importantly, this would place a burden on the State to prevent discrimination by providing for and investing in such accommodation and services.

### **The right to life and livelihood**

The right to life and livelihood is a well-established right guaranteed under the Article 21 of the Constitution. The right to life goes beyond protection of bodily integrity (Surenranath 2016, p. 760) and would include social security which itself encompasses the right to live with human dignity. This may be an inclusive list covering adequate nutrition, clothing, shelter and facility and therefore protecting basis needs.

Article 21 is a bundle of rights which include the right to life and livelihood, as well as personal dignity (Olga Tellis 1985 and Francis Coralie Mullin 1981). Social security forms an important part of livelihood once employment opportunities are diminished. In India, the State has shied away from the burden of providing for its senior citizens. While there are provisions in legislations, they are very limited in their scope. The main areas where there is State intervention is in setting up old age homes, in developing pension and support schemes<sup>2</sup> and in providing aid particularly legal aid to older persons to be able to secure livelihood options from their families.

### **Protection in vulnerabilities of ageing**

This is buttressed by a Directive Principle in the Constitution While it is relatively easier to enforce a right tagged to a fundamental right, some Constitutional rights covering older persons form a part of the Directive Principles of State Policy (DPSP). While these are often non-justiciable and are generally considered non-enforceable, sometimes they are recognised and given effect to by the judiciary. Even with a judiciary that is active on this issue, many rights remain inefficacious in practice due to many reasons which include poor implementation and lack of legal awareness. Non-reporting plays a major role due to the vulnerabilities caused by financial dependence on others and notions of family honour (Khanna 2019, p. 313).

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<sup>2</sup> E.g. widows pension. The National Old Age Pension Scheme (NOAPS) gives social security benefits to senior citizens, widows and persons with disabilities for BPL (Below Poverty Line) applicants. The sum is a paltry one ranging between Rs 200–500 per month (National Old Age Pension Scheme (NOAPS) 2007)

Among Directive Principles, Article 39(e) speaks about age. While the use of the word ‘age’ has been generally considered as being relevant to children, this can be used for older persons especially since there is a separate rendering of children’s rights in the next clause which was introduced by Constitutional amendment later.<sup>3</sup> The Article stipulates that the State should ensure that citizens are not forced by need to take up tasks which are unsuitable to their age. In India like many other Asian countries, society is still more comfortable with the notion of the main support system in old age being children. However, through legislation and the role of fundamental rights of the Constitution, this responsibility is also being thrust upon the state in terms of demands for social security (Thakur 2008). Social security will help negate discrimination and neglect older persons face.

Thus, the Constitution in text and interpretation prohibited discrimination on age and also allows for affirmative action.

## Maintenance

The law relating to maintenance has grown organically from roots in communities and many of these community based personal laws continue to be legally binding today. The obligation to maintain older persons which today is seen as the responsibility of the family rather than the State has found legal expression in personal law. Personal laws vary vastly across region, tribe, caste and religion. Most of them do see maintenance couched as a right of the parents and a duty of the children.

However, many laws do not provide strong support for maintenance. For example, both Hindu law and Muslim law reflect this.

### Maintenance in personal laws

In Hindu law, the principle that aged parents, chaste wives and children must be maintained forms the crux of the Hindu Law of maintenance (Mayne 2014, p. 1436 n.9). While the husband is living he must maintain the wife, only when both husband and wife are aged could they depend on their son. The quantum of maintenance was often based on the stage of life or Ashrama system which has a basis in some texts of Hinduism. In the Bramhacharya or the bachelor student life, students are expected to be young and studying at older age is not acceptable. Then there is the Grihastha stage, which is the stage of work and family. Older persons fall into Vanaprastha (forest dwelling) or retired life and Sanyasa which is a stage of renunciation. Older persons are expected to live a frugal life and are seen as unproductive in this division of stages.<sup>4</sup> In Muslim law, the maintenance of parents and grandparents are considered to be duties not as strong as the maintenance of the wife and the child. A person is bound to maintain wife and children; however, a person “in easy circumstances” should maintain parents and grandparents who are poor (Mahmood 2008, pp. 175–176). There is an obligation upon the husband to maintain the wife and this is an

<sup>3</sup> Clause (f) that childhood and youth are protected against exploitation and against moral and material abandonment.

<sup>4</sup> This especially applied to widows whose worth was dependent on her husband’s being alive; otherwise she was dependent on family members.

Unchastity would lead to her losing her right to maintenance. E.g., *Trimbak Wamanrao v. Bhagu Bai* (AIR 1939 Nag 249). If she reformed she would still be entitled to a starving maintenance which as the name suggests is only to prevent her from starving to death. (*Jain Kissan Vs Mt. Ram Rakhi* AIR 1950 HP 12).

absolute one whether the wife is indigent or not. In classical Muslim law, this extended only during the marriage itself and for the period of *iddat* which was about three months after the divorce (Mahmood 2008, p. 121).

Personal law has not stayed static and it is clear that modern Maintenance law for Hindus does place a duty to take care of aged and infirm parents (Hindu Adoptions and Maintenance Act, Section 20(1)). Unlike traditional law, this law places an equal burden on sons and daughters (Hindu Adoptions and Maintenance Act, Section 20). Adoptive parents and childless stepmothers are also entitled to claim (Kirtikant D Vadodaria 1996). However, this obligation is subject to the condition that each parent is unable to maintain herself out of her earnings or other property (Hindu Adoptions and Maintenance Act, Section 20(3)).

In Muslim law too, this position has changed and the wife got a right to be maintained for her lifetime after the court's decision in cases like the Shah Bano case (1985) Legislative support came in the form of the Muslim Women (Protection of Rights on Divorce Act), 1986 which gave divorced Muslim women the right to a fair and reasonable settlement for her lifetime in addition to maintenance during the *Iddat* period.<sup>5</sup> In *Danial Latifi vs. Union of India* (2001) the court confirmed that this Act protected a Muslim woman's right to maintenance.

Despite changes, we see that social realities are often quite harsh especially for older women. The Hindu widow, for instance, is poorly treated and may receive very little maintenance and be expected to live frugally. Popular perceptions continue that a Muslim husband does not have to maintain a divorced wife and husbands usually claim triple talaq and say they are not liable for maintenance (Agnes 2011, p. 162). There is often strong social opinion in the community that accepting maintenance from an ex-husband would be against the principles of Islam. Thus practically, older widows are dependent on children or more remote kin.

An additional concern would arise in the case of Hindus where the property is Hindu Undivided Family (HUF) property.<sup>6</sup> Sometimes, to get out of maintenance claims, husbands may claim that the property belongs to their families and is HUF property to which women do not have an enforceable right against their husbands. Of late, Courts have been more creative in recognising such rights. For older persons who are Hindus, beyond the immediate family, if the older person belongs to a Hindu Undivided Family (HUF), the Karta (Manager) of such a family would be bound to maintain them out of the resources of the HUF. Thus, in a Hindu undivided family, widowed mothers, older men were maintained in the family by the Karta or whoever was managing the property.

The Karta has an obligation to maintain all the family members and this duty of the Karta was absolute and family property could be alienated in order to fulfil this obligation (Mayne 1878). With Hindu undivided families becoming smaller or becoming nuclear families, this obligation to maintain a large group of people in a family has now reduced to the idea of a nuclear family where persons are responsible for the maintenance of their immediate family members only such as parents, wife and children. Increasingly older people are more and more isolated from families. Writers have theorised that changes brought about by globalisation weaken rather than strengthen family ties and there are more conflicts between generations than cooperation. All this leads to many adverse social consequences for older persons (Phillipson 2013, p. 110).

<sup>5</sup> The *Iddat* period is a time where the divorced woman is supposed to remain unmarried before remarrying.

<sup>6</sup> Also popularly referred to as joint family property or ancestral property.

Maintenance in personal laws was thus often patchy and had gaps that vulnerable older persons would fall through. Implementation of such personal laws also left a lot to be desired.

## Maintenance in secular laws

The British enacted secular laws which would apply across the board to strengthen maintenance. The focus of the then Criminal Procedure Code, 1898 was the wife and children only (Criminal Procedure Code, 1898 (Section 488)). Thus while an elderly wife could claim from her husband, the right of parents to claim from their children only came in with the new Criminal Procedure Code, 1973 which included “father or mother, unable to maintain himself or herself” (The Criminal Procedure Code 1973 (Section 125(1)(d)).

Even this provision was considered insufficient. With an ageing population, concerns about maintenance grew and it is in this context that the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was passed. This law was in addition to earlier laws and had an overriding effect over other laws (Maintenance and Welfare of Parents and Senior Citizens Act 2007, Section 3). The Act placed a responsibility to maintain a natural, adoptive or step parent on all adult children and grandchildren and adult legal heirs who would inherit the property of the older person. The definition of maintenance included food, clothing, residence, medical attendance and treatment. In order to get help during legal proceedings, a maintenance officer who would provide assistance during a legal proceedings was envisaged in the Act legislation.

Some of the specific questions asked in a HelpAge India study were: Have you heard about MWPSA Act (Maintenance and Welfare of Parents and Senior Citizens Act) passed in 2007? If yes, what more do you know about the Act? What are the provisions in this Act? If required can you avail benefits of this Act independently? If no, what support do you need from the society and the government? Is this Act helping elder people in the society? How? (HelpAge India Report 2018). The results show lack of knowledge and implementation challenges.

With the working of the Act, it was felt that there is a need to further amend it to ensure better coverage in terms of who should be maintained, who should maintain and what maintenance should include. There is a Bill pending to further fine-tune the Act. This seeks to add stepchildren to the definition of ‘children’. While the law covers only adult children and adult legal heirs, the amendment proposes to place a burden on minor children via their guardians. The Bill seeks to add parents in law to describe parents. It added healthcare, safety, and security for parents and senior citizens to lead a life of dignity. It also expanded the role of a maintenance officer by making the maintenance officer responsible for liaison and to follow-up on maintenance orders. Welfare has also been expanded to mean not just food, healthcare and amenities as in the Act, but also housing, clothing, etc., to ensure both physical and mental well-being. The Act had capped a payout to Rs 10,000 per month. This has now been removed and there is no limit to the amount that may be claimed. Of course the usual parameters of maintenance law will apply including looking at earnings of parent/senior citizen and the child as well as other maintenance obligations of the child which is standard practice in maintenance cases.

The Maintenance Tribunals which are set up are the bodies to decide on maintenance and the time for making a decision on this has decreased from 30 to 15 days (Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill 2019). Personal laws,



secular laws like the Criminal Procedure Code 1973 and special laws like the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 often have concurrent jurisdiction and personal laws can also be used if they give a better remedy (Hindu Adoption and Maintenance Act, Section 18(e)).<sup>7</sup>

To non-working of the Act, there are also practical considerations. An already poor family without State support may find the sudden responsibility of care difficult especially as it may require giving up of work by the care giver, crowding of already small housing and financial stress of medical bills among others. The long-term care required and the incapacity of the elderly to contribute to their own care are also important factors which causes older persons to be viewed as a burden (Hooyman 1983, p. 24).

The children or other family members may also facing stresses of middle age with children's education and their own health needs putting pressure on existing resources. They may also have limited knowledge and skills for caring for older people especially when there are particular health concerns (Hooyman 1983, p. 27).

Where a family is financially sound, they may still be reluctant to provide for maintenance. Since maintenance is so crucial and necessary for survival, the Maintenance and Welfare of Parents and Senior Citizens Act (2007) provides for the setting up of maintenance tribunals which can give expeditious remedies to parents. There has, however, been much criticism that these tribunals where they have been set up are not functioning as effectively as they ought to. In *Ashwani Kumar vs. Union of India* (2018), four different issues were raised before the Supreme Court where immediate relief was sought. These were pension for the elderly, shelter for the elderly, medical facilities and geriatric care for the elderly and the effective implementation of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (Ashwani Kumar 2018, para 5).

On pensions, one of the criteria raised was that it should at least be half the minimum wage (Ashwani Kumar 2018, para 10) and that adequate finances are necessary for a person to live a life of dignity. Dignity being a fundamental right under Article 21, it is essential to make sure that the dignity of elderly persons is protected (Ashwani Kumar 2018, para 11). The State in its response to the Court referred to several programmes such as the National Social Assistance Programme (NSAP) among which are old age pension schemes later known as the Indira Gandhi National Old Age Pension Scheme (Ashwani Kumar 2018, para 17). The court, however, said that there is still a need to make this pension plan workable and meaningful (Ashwani Kumar 2018, para 18).

Quoting earlier cases (*Shantistra Builders* 1990 and *Chameli Singh* 1996), the court recognised the right to shelter as one of the basic needs. The court, however, cautioned that this right to shelter is subject to 'economic budgeting' by the state and the court cannot give a blanket order in this matter (Ashwani Kumar 2018, para 25). On the right to healthcare the government pointed out in the case that they had launched national programmes for the healthcare of the elderly during 2010–2011 and the implementation of the programme was underway. The court stated that the Union and States should take a greater interest in the implementation of the programme.

On the Maintenance and Welfare of Parents and Senior Citizens Act, the court was focussed on Section 19 which talks about the establishment of old age homes and places a duty upon the State Government to set up such homes. The petitioner had stated that there are about 300 old age homes which are not sufficient for the country's population (Ashwani

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<sup>7</sup> For example, a Hindu wife may be entitled to separate maintenance if her husband is living with another woman. S. 18(e) of the Hindu Adoption and Maintenance Act.

Kumar 2018, para 37 and 38). In addition to this, Section 20 talks about medical support for senior citizens.

The court also looked at medical support for senior citizens where the Act places a duty upon the State Government and the court noted that there is a huge gap between the law and implementation (Ashwani Kumar 2018, para 39 and 40).

The court directed the state to develop a status report relating to old age homes in the country, geriatric care and medical facilities available, prepare an action plan and review such action plan by giving appropriate directions to the state governments. It also asked the Government of India to take a relook at the schemes and make them more realistic to fulfil the needs of the elderly (Ashwani Kumar 2018, para 51).

The *Ashwani Kumar* case and its critique on the working of the maintenance law as a whole for the elderly has led to a push towards law reform and it is hoped that older persons will receive better care not just from the families they are in, but also from the State.

## Domestic violence against older persons

Domestic Violence is the technical legal term used in India to cover all violence faced in domestic/family settings. This would also cover elder abuse and neglect in families.

### Growing incidence of domestic violence against older persons

A recent HelpAge India report (A HelpAge India Report 2018) shows that while elder abuse is common all over the world, in India the forms of abuse that have been reported are disrespect (56%), verbal abuse (49%) and neglect (33%). While disrespect may not be covered under any particular law, verbal abuse and neglect certainly are covered under the definition of domestic violence (A HelpAge India Report 2010). The main abusers are the sons (52%) and the daughter-in-law (34%) and about 82% of the persons abused did not report the matter because of two major reasons to maintain confidentiality, since it was a family matter (52%) or because they did not know how to deal with the problem (34%) (A HelpAge India Report 2018, p. 3).

In a case study of India on domestic violence against older people by Govil and Gupta (2016), it is noted that about 93% of older persons live with their families (77% with families, 14% with spouse and 2% with other relatives) and very few live alone or in assisted living arrangements. They point out that half of the elders have personally experienced abuse and 83% reported that elder abuse was prevalent in society. Women faced abuse more than men and abuse was largely emotional and economic.

The Longitudinal Survey of India in its analysis shows varying percentages with abuse of older persons in different States in India with Bihar at the highest (11.7%) and the North Eastern states having the lowest (Mizoram recording 0.1%, Nagaland 0.3% and Meghalaya 0.8%).

The Agewell Foundation report during the pandemic that said as many as 71% (Chandra Sharma 2020) of the nation's elderly believed mistreatment had increased towards them during the pandemic and points towards how important research on this issue is and how vulnerabilities are heightened during the current pandemic.

These studies support the already present anecdotal evidence and raise concerns about elder abuse in families. Domestic violence against older persons needs both a nuanced and efficacious approach.

WHO-CIG uses the following definition “Elder abuse is a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person” (World Health Organisation 2008, p. 1). Thus, physical abuse, mental abuse and neglect would all constitute elder abuse.

### **The protection of women from domestic violence act, 2005**

A definition of domestic violence in India is given in the Protection of Women from Domestic Violence Act, 2005 (Section 3) which covers acts, omissions and conduct which may adversely affect “health, safety, life, limb or well-being, whether mental or physical”.

While this definition applies only to women and elderly women can use it, it may be worth exploring a similar format for all older persons along with the range of remedies that are civil in nature, does not place the older person in an adversarial position against the family in court and can provide a quick remedy.

The Domestic Violence Act has largely been used by wives (Shoma Nikhil Danani 2019) against their husbands when they face violence. However, anyone in a domestic relationship who has lived in a shared household and are related either by consanguinity (blood relation), marriage, or through a relationship in a nature of marriage (live in relationship), or adoption are considered family members. This definition now covers not just a wife, but also mothers, sisters, sisters-in-law and mothers-in-law who live in the same household. Women who are ageing face gender specific concerns as well as age specific concerns (Desai 1999) and this law may bring some relief.

While the Domestic Violence Act and maintenance law deal with economic, physical and other abuse in civil law, they carry no criminal ramifications. However, many sections of the Indian Penal Code, 1860 ranging from murder to grievous hurt to assault and battery can be used in cases of violence. As mentioned earlier, usually, parents do not complain against their children because of social reasons.

### **The maintenance and welfare of parents and senior citizens act, 2007**

Although this is primarily a maintenance legislation as discussed in the earlier section of this paper, it has some provisions dealing with specific forms of domestic violence faced by older persons. These include abandoning an older person.<sup>8</sup> The proposed Amendment Bill increases penalties for these acts.<sup>9</sup> There is also an obligation placed upon the State to set up one home in every district with a capacity of at least 150 inmates. The amendment proposes a private–public partnership. It also requires one person in every police station to deal with complaints by older persons. It envisages a Special Police Unit at State level to deal with developing strategies to deal with elder abuse.

While all these provisions would be welcome additions, a thorough review of laws on elder abuse and neglect, both constituting domestic violence, is needed in order to be able to identifying gaps and patterns (Bonnie and Wallace 2003).

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<sup>8</sup> Carrying a punishment of upto 3 months imprisonment, fine upto Rs 5000 or both.

<sup>9</sup> Carrying a punishment of 3–6 months. It also doubles the fine of Rs 10,000.

## The criminal justice system

Domestic violence against older persons would be crimes which are punishable. Crimes which may be committed by family members against older persons may range from simple assault to wrongful restraint/confinement to murder. While in the case of more heinous crimes or gross neglect, the State can step in without a formal complaint from the older person, in less serious crimes, a complaint by the older person is needed. Many refuse to complain. The overwhelming reason for non-reporting was the perception that family matters must remain confidential (Govil and Gupta 2016, p. 112). Nancy Hooyman adds other reasons including three important gaps-information, service and impersonalization of such services (Hooyman 1983, p. 28). She calls for community intervention while recognising the necessity for more professional care (Hooyman 1983, p. 28). Crimes against the elderly unless they take extreme forms like murder or its cultural variants, are not covered by mandatory reporting provisions (Subramanian 2015).<sup>10</sup> This may also contribute to low rates (World Health Organisation 2008, p. 1).

Researchers warn against stereotyping and having ageist notions (Sharma 2016, p. 73) Clara Berridge and Nancy Hooyman have pointed out that the COVID-19 pandemic has fortified these stereotypes (Berridge and Hooyman 2020, p. 509).

Prosecutions of crimes against older persons have led to 33% convictions (Times of India, 6th October 2020). Prosecutorial responses lacks study not just in India, but other places too. (See for example Bonnie p. 120). While there are lawyers specialising in elder law in some countries, this is not true of India (Bonnie p. 130). The one advantage we have is that there is a single Central/Federal law dealing with many of these aspects. Although both Centre/Union and States have concurrent jurisdiction in family law (Constitution of India (Schedule VII), most secular and personal laws are applicable with a large degree of uniformity across the country and this is true of criminal laws too.

An important study of the working of the justice system with regard to older persons was carried out by the Agewell Foundation in 2019–2020. The sample consisted of 5000 older adults which consisted of almost an equal number of men and women. The survey was conducted across 100 districts of 20 states and union territories.

The survey indicated that about one third of the respondents required legal remedies and about one-fifth needed legal aid/assistance but only one-sixth had actually tried to seek such help. In specific cases of perceived injustice, about 86% did not take measures to seek legal help or protection. This is despite the fact that the law provides free legal aid to older persons (The Legal Services Authority Act, Section 12). Legal illiteracy was prevalent to a high degree with 43.5% of respondents being unaware of their rights. More than half the women in this group were unaware of their rights.

Reasons for not going to court included lengthy legal processes (pendency 40%), and dissatisfaction with the judicial system in general (32.8%) The popular perception among legal practitioners was that most cases involving older persons were regarding property disputes, but more than half of the respondents (58.8%) with legal background did not corroborate with this view.

Legal provisions on paper may not translate into tangible results. There are also concerns about the rising cases against older persons and pendency in the cases with long disposal times. According to reports there are 28,104 cases where victims of crimes were

<sup>10</sup> Like Thalaikoothal in Tamilnadu (Subramanian 2015).

over the age of 60 in 2019 alone. There is a pendency of 62,076 cases which are still to be disposed of. The case pendency rate is around 88% (The Times of India 6th October 2020). While there is no data to show how many of these happened in family settings, the pendency of these cases means that older persons continue to live in abusive families or insufficient shelters. Old age is not experienced equally by all elderly persons. There is increasing inequality between the well off and poor families. This is so especially when there are impediments to work and health as persons grow older (Anne L Alstott 2016, pp. 1–2).

Even when there are complaints, the slow pace of the criminal justice system makes it difficult to get justice (Muralidhar 2004), when cases drag on, the complainants become too frail to be able to testify as a witness or may have passed on before the trial comes to an end.

## Conclusion

From the point of view of older persons, the legal landscape of rights of older persons both in international human rights law and in the Constitution of India is robust. Ageist stereotypes have no place and all-pervading standards of equality and non-discrimination extend their protection to this group as much as it does to others. Even though discrimination based on the marker of ‘age’ is not expressly prohibited, there is sufficient case law to make an averment that it is in fact prohibited in the spirit of Constitutional guarantees. While the Directive Principles of State Policy are non-justiciable, they nevertheless play an important role in policy making. The State cannot abdicate its responsibility in protecting the right to life, liberty and dignity of older persons both by providing services to prevent and prosecute elder abuse and by ensuring that by social security as well as robust maintenance laws, older persons are not deprived of a dignified life with a standard of living enshrined in the Constitution.

So far the State has leaned heavily on the family. While standards for maintenance in personal laws and secular laws are fairly comprehensive, they are not without gaps. Older persons who do not have children, widows with no husband or in laws and older persons with intersectionalities of poverty, gender and disability may be adversely affected both in terms of family notions of their entitlements and the lack of knowledge and access to alternatives.

Courts have now clearly said that the State must step in with minimal social security protections in the form of setting up homes and providing pensions. Both require substantial financial outlay and this has not yet happened. During the Covid-19 Pandemic, access to health and legal services were severely curtailed as expected. The machinery for other kinds of services including first points of contact in domestic violence cases also broke down. (Tata Trusts 2019). This must be rejuvenated quickly to ensure that Constitutional rights of right to life which includes the right to live with dignity do not continue to be violated.

Urgent law reform to include clear deliverables on the part of the State along with visible changes on the ground are needed. As of now, rights of older persons are largely viewed through a charity model as being receivers of the munificence of family members. This is ageist and views older persons in a disabling manner. The language must change to include a stronger focus on rights with corresponding duties on the part of the State and family members. This should be the future trajectory of laws relating to maintenance.

Domestic violence must be dealt with swiftly and fast tracked in Courts to ensure speedy justice. A safe place with amenities is needed to ensure decent living during the pendency of the litigation. Tight timelines for decisions in cases involving older persons must be legislated into existing protections.

Elder abuse can cover a range of crimes beginning with assault, all carrying different penalties but all firmly in the crime and punishment model. The remedies that older persons usually seek are, however, in the civil model- stop violence orders, residence orders, and maintenance orders on similar lines as the Domestic Violence Act. Lack of remedies may be exacerbated by the hesitancy to file a criminal complaint which would tarnish the image of a 'good son' especially in Indian society where seeking help for parental care is often looked down upon. In cases of abuse, there is unwillingness to approach 'outsiders' for help due to perceptions that it is a family matter.

The use of legal provisions by older persons are often fenced with social and cultural norms which lead to not using legal rights including not demanding maintenance, not viewing an event as a crime, non-reporting of cases, destruction of evidence through immediate cremation or burial and the culture of silence in families. Access to justice for vulnerable persons is also a key factor which persists even where there are support mechanisms like an elders' helpline or old age homes.

Although a number of laws exist in the civil and criminal spheres, access to justice is an issue for many older persons who choose to use legal remedies. There are delays in courts and very often they are not able to procure quality legal aid services. While this is relevant in all aspects of law, this is extremely poignant in the case of the elderly as a delayed decision may mean that they are no longer alive to reap the benefit of the decision in their favour. The availability of substantive rights in the Constitution and legislations will not translate to justice on the ground unless these access to justice issues are appropriately addressed.

Regarding services essential for constitutional claims to equality, life and non-discrimination as well as legal rights to maintenance and recourse in domestic violence, while there are helplines for elderly, they are only in a few places. Many helplines do not have legal or paralegal staff and while they are well equipped to refer complainants to hospitals, police stations and old age homes, they are rarely connected to the District Legal Services Clinics and even if they are, follow up and handholding does not exist. Expanding portfolios of helplines to include paralegals/ lawyers will help on the ground.

There are insufficient studies done on intersectionalities. Even with the studies available, it is clear that class, caste, gender and disability are intersectionalities which may heighten vulnerabilities of ageing. Policy makers must also be open to changing ageist prejudices which continue to dog our legal system.

A combination of bottom up and top down processes are called for to effectively address discontents in the law relating to ageing and to uphold rights well recognised in international human rights law and the Constitution of India. 'Justice delayed is justice denied' is chillingly true when the legal system fails to respond to rights claims for sustenance and safety for its older citizens.

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