

A Socio-Legal Analysis of Elder Care Laws in India

*Deblina Dey**

Care for older persons in India is considered to be the prerogative of the family, particularly the adult children. The legal and policy discourse reiterates this notion as well. In a country that glorifies the notion of filial piety, one finds a rising number of instances of parental neglect and abuse over the last decade. Against this background, it is important to revisit the existing laws, especially the Maintenance and Welfare of Parents and Senior Citizens Act (2007) which aims to provide relief to aggrieved parents and senior citizens. In this Article, I analyse the relevant laws and discuss the nature of complaints lodged by elderly parents at the Maintenance Tribunal in Kolkata (India). The nature of intergenerational disputes and the way they are dealt with by the Tribunal highlight the law's inability to imagine a world of needs beyond the economic needs of survival. Despite a few positive measures, the law presently falls short of interpreting the social 'needs' of belongingness, retaining authority and a position of importance in the family, a set of needs that often remain unspoken and are therefore disregarded by the law's agent (the Tribunal judge in this case). I argue that in the process of translating the 'needs' of older persons into 'rights' through the application of the law, justice is disserved.

* Deblina Dey is an Assistant Professor at Jindal Global Law School, O.P. Jindal Global University, Sonapat. The arguments in this Article were first presented at the international conference on *Elder Law and its Discontents* organized by the Cegla Center for Interdisciplinary Research of the Law, Tel Aviv University, on June 18–19, 2018. I thank the Cegla Center and Professors Daphna Hacker and Nina Kohn for making me a part of this conference and the journal editors for providing detailed feedback. The chief commentator of my paper, Dr. Shelly Kreiczler Levy's insights were immensely valuable. I also thank Dr. Shiri Regev-Messalem for introducing me to interesting literature on elder care laws in Israel. A special thanks to my PhD advisor, Dr. Pratiksha Baxi, for her critical inputs. Cite as: Deblina Dey, *A Socio-Legal Analysis of Elder Care Laws in India*, 21 THEORETICAL INQUIRIES L. 77 (2020).

INTRODUCTION

The legal and policy discourse on care for older persons in India emphasizes the importance of care for ageing parents by their adult children. Such discourse also paints westernisation and urbanization as agents of erosion of the Indian joint family system — a system which in contemporary times allegedly survives mostly in the form of smaller, nuclear units.¹ Even though various sociological studies have challenged the assumption that “joint families” existed in India’s past,² it is argued that the ideal type of “joint family” with its spirit of jointness is an important aspect of the “psychic reality”³ of an Indian and comprises a more dominant part of the “inner world of Indians than is the case with Europeans and Americans growing up in nuclear families...”⁴ However, despite the glorification of filial virtues of care and harmonious collective existence, in contemporary times there are a rising number of cases of abuse, abandonment and neglect of elderly parents. Findings of various studies hint at this grim reality.⁵ While disheartening narratives about older persons being abandoned by children in public places and during religious fairs may have been known earlier, what seems to have emerged in recent

1 GOVERNMENT OF INDIA, THE NATIONAL POLICY FOR OLDER PERSONS (1999) (Section 11 discusses the reasons for the breakdown of the joint family in India).

2 See A. M. SHAH, THE FAMILY IN INDIA: CRITICAL ESSAYS (1998); Patricia Uberoi, *Imagining the Family: An Ethnography of Viewing Hum Aapke Hain Koun...!*, in PLEASURE AND THE NATION: THE HISTORY, POLITICS AND CONSUMPTION OF POPULAR CULTURE IN INDIA 309 (Rachel Dwyer & Christopher Pinney eds., 2003); SUDHIR KAKAR, THE INDIANS: PORTRAIT OF A PEOPLE 8 (2009). Kakar writes:

The Indian family: large and noisy, with parents and children, uncles, aunts and sometimes cousins, presided over by benevolent grandparents, all of them living together under a single roof. There are intrigues and secret liaisons, fierce loving and jealous rages. Its members often squabble among themselves but remain, in most cases, intensely loyal to each other and always present a united front to the outside world. The Indian family – animated with such a powerful sense of life that separation from it leaves one with a perpetual sense of exile. This is the ‘joint’ family of Bollywood movies which, social scientists tell us, has never been a universal norm.

Id.

3 KAKAR, *supra* note 2, at 9.

4 *Id.* at 11.

5 Sweta Goswami, *The Ugly Truth About Old Age in India*, THE HINDU (Oct. 18, 2016), <https://www.thehindu.com/news/cities/Delhi/The-ugly-truth-about-old-age-in-India/article14423922.ece>. See also HELPAGE INDIA, MAIN FINDINGS REPORT ON ELDER ABUSE IN INDIA (2014), <https://www.helpageindia.org/pdf/highlight-archives.pdf>.

times is a new trend of parental neglect within urban households, with older persons lodging complaints against their children by making use of the law.

One need only look at recent reports, for example, the study conducted by HelpAge India in 2018, to get a sense of the increasing incidence of abuse.⁶ According to this study, conducted across 23 cities in India with a sample size of 5014 persons, sons were reported as the main abusers (52%), followed by daughters-in-law (34%). The median age of the abuser was found to be 42 years. Although older men and women both named the son as the main abuser, older women named the daughter-in-law as an abuser more frequently than was reported by older men. The study also suggests that there is an increase in abuse by daughters-in-law as the age of the older person rises. Daughters and sons-in-law were not named as abusers as frequently as the others listed above. Shockingly, the report said that these trends were quite consistent across cities. Disrespect, verbal abuse and neglect featured as the top three manifestations of abuse faced by the elderly. Around 20% of people were not sure what comprises abuse.⁷ Of the 25% of people who reported having faced abuse, only 18% of them reported it to the authorities, fewer older women reported than men. The reason for not reporting was not wanting to “tarnish

6 HelpAge India is a premier non-profit organization that works for disadvantaged older persons primarily fighting for better healthcare, universal pension and against elderly abuse. Most of the reports by HelpAge India use the word “abuse” to denote physical, financial, emotional and psychological harm. It must be pointed out that there is no definition available in the reports that I have referred to, rather the reports refer to what respondents consider as abuse. In this Article, I have used the definition of abuse as provided by the World Health Organization (WHO). They define abuse as “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. Elder abuse can take various forms such as financial, physical, psychological and sexual. It can also be the result of intentional or unintentional neglect” (*Elder Abuse*, WORLD HEALTH ORGANIZATION, https://www.who.int/ageing/projects/elder_abuse/en/).

7 It is my observation that over the years the concept of elder abuse in India has also evolved, and awareness among older persons of what constitutes elder abuse has grown. One can trace a shift from the perception of abuse as an extreme form of violent act, to the belief that abuse is constituted by more subtle forms of disrespect, verbal abuse and neglect. Compare Shubha Soneja, *Elder Abuse in India: Country Report for World Health Organization* (2011), (available at http://www.who.int/ageing/projects/elder_abuse/alc_ea_ind.pdf) with HelpAge India, *Elder Abuse in India–2018: Changing Cultural Ethos and Impact of Technology* (2018), (available at <https://www.helpageindia.org/wp-content/uploads/2018/06/ELDER-ABUSE-IN-INDIA-2018-A-HelpAge-India-report.pdf>).

the family honour” by reporting against their own children. This was followed by a lack of awareness about how to lodge a complaint.

The above observations call for an urgent reexamination of elder care laws in India, especially the Maintenance and Welfare of Parents and Senior Citizens Act (hereinafter MW Act 2007) that was enacted in 2007, to better understand the effectiveness of the latter as a tool of empowerment of older persons.⁸ Even though the MW Act 2007 is quite a comprehensive law, it does not deal with abuse per se. The law has two components. The first is related to the maintenance needs of older persons. It describes the role of adult children⁹ and relatives regarding the care of parents. The second component addresses questions of social security and welfare of senior citizens and the role of state governments. In this Article, I focus only on the first component of the law, that is, I have only analyzed cases of intergenerational disputes related to maintenance and property inheritance and the way it is dealt with by one Maintenance Tribunal in Kolkata¹⁰

I employ an ethnographic approach to understand the courtroom discourse at the Maintenance Tribunal at Kolkata where these cases were heard. I present one such ethnographic vignette here, along with the discussion of a complaint letter filed by an elderly complainant. I argue that the complainants (the elderly parents) are not always or necessarily from a low-income background of harsh circumstances, demanding a monetary allowance or “maintenance” from their children. Rather, what they seek more often are forms of care that the law is not able to fully address or make provisions for. Also, what they seek from the children precisely often remains unarticulated or only indirectly indicated. Therefore there remains a zone of needs that is not fully discovered by the law or addressed by the Tribunal.¹¹ I argue that in order to understand these needs, one must be sensitive to the cultural expectations of care in India which may point towards the absence of companionship, dwindling decision-making power in the household, and attention to the daily needs of the elderly, which for them is very important.

8 The Maintenance and Welfare of Parents and Senior Citizens Act, No. 56 of 2007, INDIA CODE (2007) (hereinafter MW Act 2007). Understanding laws such as MW Act 2007 can afford a better understanding of the “social context in which people age because law helps shape that context.” Nina Kohn, *Legal Gerontology: How a Legal Perspective Can Contribute to the Gerontological Imagination*, in GERONTOLOGY: PERSPECTIVES AND ISSUES 317, 322 (Janet M. Wilmoth & Kenneth F. Ferraro eds., 2013).

9 Hereinafter, I have used “children” to refer to “adult children.”

10 Kolkata is the capital city of West Bengal, an eastern state of India.

11 This conclusion is only with respect to the data obtained at the Maintenance Tribunal in Kolkata.

One may question to what extent the law can enable an older person to claim from their children the cultural expectation of care as a matter of right? My argument is that even though the law is a well-intended legal prescription, it does not anticipate the actual needs of the elderly — first and foremost, of being made to feel less neglected, unappreciated and abandoned by family members. The primary argument made in this Article highlights the difficulty of granting legal validity to feelings and measuring them in the courtroom and as such it points to the challenges faced by the legal system.

In part I, I will discuss the narratives of pain and experiences of neglect arising out of the non-fulfilment of expectations of care in old age from one's children. In part II, I will provide a critical analysis of the MW Act 2007 and examine some of its salient provisions. In parts III and IV, I will discuss the nature of complaints lodged at the Tribunal in Kolkata that evoke specific sections of the law more commonly and the implications of this phenomenon. I will discuss the law's difficulty to define "needs" by "rights" in part V.

I. NARRATIVES OF PAIN AND NEGLECT: WHAT PARENTS WANT?

At the Maintenance Tribunal in Kolkata, during the courtroom hearings, "*amar khub koshto*," which may be roughly translated from Bengali¹² as "I am in pain" or "I am suffering," emerged as a recurrent theme. Sometimes the phrase "*amake khub koshto dichhe*" (I am being given pain) was also used by the elderly complainant to indicate suffering arising out of intergenerational disputes at home. However, most older persons did not clearly articulate what this "pain" was and where it was located, nor did they pinpoint its source. Also, this pain wasn't directly observable, but evinced through the resentment expressed during the proceedings and the indirect references to the non-fulfilment of expected forms of care, only some of which featured in the complaint letters. The experience of pain, I argue, assumes with greater significance when analyzed against the cultural imagination of parental care that is valorized in popular discourse.

In the Indian society, one is expected to take care of, love and respect one's parents in their old age. Performing this duty is considered as a way to repay the debt of unconditional care that parents bestowed previously upon their young children. While this can in no way be generalized, as patterns of caregiving may differ across communities, I specifically focus on the notion of *seva*, a specific kind of care documented by anthropologists in

12 Bengali or *bangla* is the regional language of Kolkata.

Hindu, Bengali-speaking households in West Bengal.¹³ *Seva* may include various forms of embodied care, such as “serving food and tea, massaging tired limbs, combing hair, bringing warm bath water, and offering loving respect — in short, striving to fulfil all of the elder’s bodily and emotional needs.”¹⁴ What the complainants seemed to be drawing attention to through their complaints was the absence of *seva* and a certain kind of filial piety that they were expecting from their children.

The “pain” articulated by the elderly indicated a moral domain which, according to the older person, was under threat.¹⁵ I argue that the law was being used by them to reestablish that moral domain. Through the examples provided in this Article, I demonstrate how the Tribunal works as a “therapeutic space” so essential for the restoration of the moral world.¹⁶ The literature on pain and suffering, often focuses on subjects of extreme pain that stems from physical violence over a considerable period of time. However, the location of the pain articulated by the elderly is seldom the body per se, but rather it is the *mon* (roughly translated as mind or heart), with older persons often gesturing around their heart during the proceedings. This pain in most cases seemed to stem from a complex mixture of feelings of neglect and humiliation. The primary argument made here is that even though most of the complainants evoked the MW Act 2007, there are indications that their “pain” was not always related to their economic misery or the desire to be provided maintenance by their children. It was rather a desire to be “heard.” Hearing, in this context, maybe simply a mode of paying attention, not only to the “expressive” needs presented by the older persons, but most importantly to the “inferred” needs

13 The term *seva* originally comes from Sanskrit, the ancient classical language of Hinduism. Commonly *seva* refers to selfless service and in the context of the family, it means services towards the elders.

14 SARAH LAMB, AGING AND THE INDIAN DIASPORA 32–33 (2009). See also Sylvia Vatuk, *To be a Burden on Other*, in DIVINE PASSIONS: THE SOCIAL CONSTRUCTION OF EMOTION IN INDIA (O.M. Lynch ed., 1990). Vatuk, elaborating on the concept of *seva*, mentions that it includes serving meals at regular intervals during the day, as well as clothes being laundered and replaced by new ones when necessary. This yet again highlights the cultural expectation of care that some older parents in India might have.

15 Veena Das, *The Anthropology of Pain*, in CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPORARY INDIA 177 (1995). She writes: “The paradigmatic anthropological model looks at illness and pain as a socially constructed reality. The patient’s complaints and convictions, for example in the case of the Bhopal gas tragedy, did not simply represent an underlying disease – they reproduced a moral domain.”

16 *Id.* at 193.

of the complainant.¹⁷ The various complaints of not being looked after well by one's children exposed the ignorance of the children with regard to those inferred needs. It is my argument here that the Tribunal tried to highlight these "inferred" needs for the benefit of the children only to a certain extent. This was observed in a few cases, where the judge rebuked the children and asked them to abide by their parents' wishes.

It is often argued that pain can inhibit the ability to communicate, but borrowing from Wittgenstein's proposition, Das writes:

It was Wittgenstein's argument that the statement 'I am in pain' is not a declarative statement which seeks to describe a mental state; rather, it is a complaint. It is not a descriptive statement because the word 'pain' comes to refer to the sensation of pain only by virtue of being a learnt, articulate expression of such unlearnt inarticulate expressions as whines, moans, etc. Although it is true that I might say 'I am in pain' or make moaning and groaning sounds indicating behaviour under pain without in fact being in pain, or though I might conceal the fact that I am in pain, this does not make the relation between the expression of pain and the sensation of pain a contingent one. As Wittgenstein puts it, to say 'I am in pain' is not the end of a language game but the beginning of it. This does not make my pain incommunicable, although the other person is only in a position to surmise it.¹⁸

Wittgenstein's proposition as stated above is most relevant to my study of older persons' complaints regarding pain: to prove whether the pain is really there and where it is located is less consequential than the fact that there has been a complaint, which expresses agony of the parent due to intra-familial disputes. A complaint filed by an older person is an appeal to others (the Tribunal in this case) to share the pain, since after all "The expression of pain is an invitation to share."¹⁹ Albeit in a limited way, the Tribunal offered a healing or cathartic space, which enabled the older people to voice their pain.²⁰ In other words, the Tribunal facilitated the communicability of pain by providing a space for them to share their grievance, but to what extent it is legally enforceable remains questionable. I argue that justice is lost sight of in the interstices between their "rights" as senior citizens and their "needs" as ageing parents, which are never to be wholly realized. Prior to discussing

17 NEL NODDINGS, *STARTING AT HOME: CARING AND SOCIAL POLICY* 135 (2002).

18 Das, *supra* note 15, at 193.

19 *Id.* at 194.

20 I will discuss how the "pain" in the form of complaints is addressed by the law in parts III and IV.

some of the complaints filed at the Tribunal, an understanding of the relevant inheritance and maintenance laws is essential, since most of the complaints were related to grievances regarding quality of care post transfer of property.

II. THE JURIDICAL VIEW OF CARE FOR ELDERLY PARENTS: A CRITICAL ANALYSIS

In this Part, I will address two issues; first, the problems regarding the law's view of maintenance as care, and second, the process of redressal of grievances brought by the parents to the Tribunal. I will start by explaining the provisions in the law regarding maintenance. The obligation to provide maintenance to one's parents first featured in the Hindu Adoption and Maintenance Act (1956), followed by an addition under Section 125 Code of Criminal Procedure (CrPC). However, it was observed that older people often suffered due to the inordinate delay in the resolution of cases and the the burden of expenditures incurred during the litigation. Mindful of these aspects, Shrimati Meira Kumar, the then Minister of Social Justice and Empowerment, expressed the dire need for a new law in 2007. While proposing the Maintenance and Welfare of Parents and Senior Citizens Bill, she argued that

[. . .] [T]hese parents who are in need of care and protection and the senior citizens are suffering. Most of them are suffering from ill-health. There is an absence of social security for them. There is an absence of a social role for them. They have no work to do. So, they feel very rejected. There is no sense of purpose and a sense of belonging. There is no opportunity for them to engage themselves in any creative work during their free time. All these things are very important in our society.²¹

The minister clearly admitted that the social security system for older persons in India was gravely inadequate. She also pointed out that older persons often faced a threat from their children of fraudulently taking away their property. She explained that the main thrust of the new law would be to shorten the litigation process, for previously cases would drag on for years and older persons, many of whom were resourceless, had to spend a lot of money in the process. These concerns were eventually addressed in the MW Act 2007.

21 Lok Sabha Debates, *Discussion on the Motion for Consideration of the Maintenance and Welfare of Parents and Senior Citizens Bill* (14th Lok Sabha, Parliament of India, Sess. 12, Dec. 5, 2007), <http://loksabhaph.nic.in/Debates/result14.aspx?dbsl=9305>.

Thus, neglect, abuse and wrongful usurpation of the property of the older persons by relatives were the primary reasons for the enactment of this law.

The MW Act 2007 is quite a comprehensive law that aims to safeguard the economic and social wellbeing of parents and senior citizens. I argue that the law is clear in the way it envisages the financial security of older persons, obligating children to provide maintenance to their parents. ‘Maintenance’ as defined by the law includes “provision for food, clothing, residence, and medical attendance and treatment.”²² The law makes it mandatory for children (who are not minors) and relatives (who are potential heirs of the older person’s property and have sufficient means) to provide maintenance to the older person if the latter is unable to do so by themselves. The law does not specify what constitutes “sufficient means” and leaves it to the discretion of the judges to determine the same. This act charts out a new legal paradigm of care within the country. It reflects the acknowledgement by the state of the growing problem of isolation of older persons and abuse and neglect at the hands of one’s own children. In the following section, I discuss a few important aspects of inheritance laws in India in order to look upon the provisions in the MW Act 2007 with greater clarity.

A. The Relation Between Care and Inheritance: Salient Points about Inheritance Laws among Hindus

Property inheritance in India is a matter to be determined under the personal laws of different religious communities in India. All the cases discussed in this Article involved Hindus, the largest religious community in India. It was only in 1956, nine years after India gained independence from British colonial rule, that the Hindu Succession Act 1956 brought about a uniformity within the Hindu law. Before that, property matters among Hindus were governed on the basis of inconsistent interpretations of Hindu textual (religious) laws as well as customary practices, both subject to regional variations across India. Intestate succession relied on rules laid down under the Mitakshara, Nambudri and Dayabhaga Schools of Law, which have different rules regarding property inheritance.²³ This law of 1956 paved the way for testamentary succession

22 MW Act 2007, Ch. I, § 2(b).

23 For example, Mitakshara law gives sons the right to their father’s ancestral property by birth (sons are coparceners of the property). Dayabhaga law gives property rights to sons only after the father’s death. *Inheritance Rights for Women*, 57 MANUSHI–INDIA 1 (1990), http://www.manushi-india.org/pdfs_issues/PDF%20files%2057/Inheritance%20Rights%20for%20Women.pdf (last visited Dec. 18, 2019).

through the formulation of a will, giving to the owner of the property the power to transfer the property before death to anyone the person wanted to. This was a significant development, as the concept of a will was thus introduced for the first time in India.

The rush to secure the parental property, in the cases analyzed here, could stem from anxieties among the children regarding the will made by their parents. The uncertainty of transfer of property as desired by the children and the presence of other siblings are possible factors explaining why one particular child might want to get the property transferred in her/his name while the parent was still alive.²⁴ Under the Hindu Succession Act 1956 (s.10, Rule 1–2), the property of an intestate would be immediately divided equally among the widow and class I heirs, namely the sons and daughters and the mother of the intestate.²⁵ Thus, since the law grants immense power to the testator to formulate the will to anyone's benefit, there may be a feeling of insecurity among the children. Sibling rivalries over who would look after the parent in old age and then get their property transferred to them were found to exist in some instances. It is therefore not improbable that a child would play upon the trust of the parent to get them to willingly sign over property in their name. Nonetheless, as this Article demonstrates, the parents after transferring property to one child also expect a certain amount of care from that child.

B. Maintenance and Welfare of Parents and Senior Citizens Act 2007: Re-Familializing Care

As argued above, an expectation of care from one's children in old age is culturally rooted in India. The legal debates preceding the enactment of the MW Act 2007 reflected that. Opposing the initial proposition made before the law was passed by the parliament, one minister argued that the maintenance of parents should not be related to the inheritance of property and should be made unconditional:

A son who is affluent and is an earning person, he is believed to be liable for maintaining his aged father whether he has inherited property or not is

24 I argue that this is a strong probability but it could not be verified from the children, because firstly, no child would admit this in an interview, secondly, I was unable to secure permission from the magistrate to interview the family members separately, and thirdly, some of the analysis was of complaint letters read in the absence of either party.

25 The Hindu Succession Act, No. 30 of 1956, GAZETTE OF INDIA EXTRAORDINARY, part II § I (1956), <http://egazette.nic.in/WriteReadData/1956/E-2173-1956-0038-99150.pdf> (hereinafter: The Hindu Succession Act 1956).

immaterial because being a son, he is duty-bound to maintain his father during his old age. There is no dispute about that. But unfortunately, there is a provision that if he is inheriting the property of the father, then alone he will be liable. That is not correct. A son may not inherit property. The father is maintaining his baby even at the time when he was born and the father has brought him up as a grown-up man. After growing up, he becomes a rich man in society. Then, even though he has not inherited a pie from his father, he should be legally bound to maintain his father. He should also come within the purview of this Act. We should not let him go. There are sons, who are earning lakhs of rupees, but his father may not have been able to earn so much during his time, but he had maintained his son during his childhood. If that is the position, that is not good. All sons and children, and legal heirs should maintain their parents irrespective of whether they inherit any property or not.²⁶

The above was ensured in the MW Act 2007. However, the maintenance amount was fixed at a maximum of INR 10,000, and the exact amount to be paid by the children would be decided on a case-by-case basis.²⁷ By making it mandatory for children to provide maintenance to parents irrespective of whether they inherit property or not, the law underscores the importance of familial care in Indian culture. It would not be wrong to argue therefore that “The family is the institution to which children, the elderly, and the ill are referred – it is the way that the state has effectively privatized dependencies that otherwise might become the responsibility of the collective unit or state.”²⁸ It may also be relevant to point out here that the Maintenance and Welfare of Parents and Senior Citizens (Amendment) Draft Bill of 2018 has proposed to widen the definition of ‘children’ to include son-in-law and daughter-in-law as well. This marks an ever-increasing “disciplinary power of the state” over the family.²⁹

26 Lok Sabha Debates, *supra* note 21.

27 Every state has the discretion to formulate its own rules under § 32 of the MW Act 2007. So, when addressing cases from Kolkata, as I have, one needs to consider the West Bengal Maintenance and Welfare of Parents and Senior Citizens Rules, No. 4347–SW of 2008, KOLKATA GAZETTE EXTRAORDINARY, part I (2009) (Ind.). Under §§ 7(5)(c)–(d) the income of the children and the assets and properties they own are of importance in determining the maintenance amount.

28 Martha Fineman, *Dependencies*, in *WOMEN AND WELFARE: THEORY AND PRACTICE* 23 (Nancy J. Hirschmann & Ulrike Liebert eds., 2001).

29 MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 256 (1995).

The MW Act 2007 specifies the conditions under which an older person can claim maintenance and the kind of obligations that children or relatives have towards such persons.³⁰ According to this Act,³¹

- (1) A senior citizen including a parent who is unable to maintain himself/herself from his/her own earning or out of the property owned by him/her shall be entitled to make an application in case of –
 - (i) parent or grand–parent, against one or more of his children not being a minor;
 - (ii) a childless senior citizen, against such of his relative.
- (2) The obligation of the children or relative, as the case maybe, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.
- (3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case maybe, so that such parent may lead a normal life.
- (4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

Let me further explain the linkage between property inheritance by children and other relatives and care provided by them with respect to the MW Act 2007. Can the older persons use the ‘incentive’ of a gift of property in order to seek care from their children or relative? Or, conversely, can the relatives claim property from the older person in exchange of care? The MW Act

30 The MW Act 2007 is for senior citizens, defined as anyone 60 years of age and above, as well as for parents and grandparents, who may not necessarily be above 60 years old. I argue that the MW Act marks a rather interesting moment of anthropological discovery – that old age is a cultural construction. It is acknowledged by the state that problems typically associated with old age, such as declining physical capacity, safety, financial and social security, may appear sooner or later than the 60–year threshold. Conversely, however, if one reads the act carefully, it becomes apparent that matters related to parents (who may not be senior citizens) are left to the family entirely, whereas the state leaves to itself only matters related to the welfare of senior citizens. It dodges the responsibility for any parent who may be close to 60 years old and indigent. *See* MW Act 2007, Ch. III, § 19.

31 MW Act 2007, Ch. II, § 4.

2007 defines a ‘relative’ as the “legal heir of a childless senior citizen who is not a minor and is in possession of or would inherit his property after his death.”³² Therefore, a relative is mandated to care only if the person would inherit the senior citizen’s property.³³ However, this logic was dropped by the law-makers with respect to children, as it was argued that children are taken care of by their parents unconditionally. So, the expectation that adult children would look after parents in old age is assumed.³⁴ In the context of this cultural expectation, it will be wrong to say that parents “incentivise” their children with their property to care for them. In India too, the legal discourse refrains from using such a contractual framework to define kin-based care.³⁵

32 MW Act 2007, Ch. I §2(i).

33 In such cases, the expectations of care may be partially explained by the reciprocity theory or the exchange model according to which gifts, bequests, or financial help is provided by parents in expectation of goods and services from children, such as visitations, telephone calls and care. This highlights the partially contractual relation in such cases as well. See M.S. Bianchi et al., *Intergenerational Ties: Alternative Theories, Empirical Findings and Trends, and Remaining Challenges* (UCLA: California Center for Population Research On-Line Working Paper Series, 2006), <https://escholarship.org/uc/item/1g93v4kk>. See also Shelly Kreiczler-Levy, *Parents and Adult Children: The Elusive Boundaries of the Legal Family*, 44 L. & Soc. INQUIRY 519 (2019) (a review of HENDRICK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012)).

34 See The Hindu Succession Act 1956.

35 HARTOG, *supra* note 33. Hartog writes about the contestation of will cases in New Jersey in the nineteenth and twentieth centuries, presenting the claims made by children that they were the rightful owners of their parent’s property because “... one had done as one ought as a good and loving child or family member,” *id.* at 32. Such assumptions are not assigned any legal weight in India and highlights the different cultural norms in two different contexts.

Elaborating on the reason why older persons might use property as an incentive to mobilize care by their children, Hartog writes that “because the promise of future family property was the only resource they [older person] possessed. They lacked a cash flow — or even any cash at all,” *id.* at 33. He further elaborates that “Nonetheless, they [older person] needed to do something to mobilize the care or the support that occurred only within a family. And bought ‘love’ was perhaps better than no love at all,” *id.* This tendency has also been eloquently summed up by Hartog, as the Annie Rippe’s problem (named after an older woman) which demonstrates the lack of alternatives a senior citizen might have in the light of poor social security provisions in the country,

In addition, behind that reality [of incentivizing the children to care on the promise of property] lay a swirl of social expectations about old age and

I found this assumption at work among the elderly complainants too. When such expectations were not fulfilled, litigation was initiated by the parents against their children, not always to seek maintenance, but to express their dissatisfaction with the quality of the care provided by the children.

It may be argued that there is no singular theory which can explain the motive for an intergenerational transfer of property from parent to child, and reversely for the provision of care by a child to a parent in the Indian context.³⁶ Parent and child are both bound within a normative framework, where it is expected that children will care for their parents when they grow old. However, it may be argued that “Obligations to help one’s aged parents thus do not simply follow from an abstract normative principle but are created concretely through interaction over time.”³⁷ Anthropologists also argue that it is not uncommon to hear parents talk about their personal sacrifices while raising their children. There exists a “dependency anxiety” among older persons in India, in that the expectations regarding care in old age are made amply explicit to the children.³⁸

Nonetheless, there are cases where parents are made to sign gift deeds under the promise of care. To protect parents from fraudulent property transfers,

about how, in a world without social security, retirement benefits, or pensions, it was possible to have a good, or at least a decent, old age. . . . In life, the now or soon-to-be-dead older persons had had particular goals shaped by their legal and economic situation. Those goals characteristically had to do with, first, how to engage and mobilize family members in one’s care and well-being as one declined physically and perhaps mentally and, second, how to control and to keep those family members attentive and caring.

Id. at 9. While this may not be precisely the case in the Indian context, one is left intrigued by the elderly parents’ complaints of lack of care after the property transfer was made. Their complaints too revealed the perceived lack of attention and care by family members.

36 The “motives” for “giving” have been examined by Kohli and Künemund. They take note of the complexity of this question, claiming that determining the motive for giving transfers may be dependent on numerous factors. The authors outline the limitations of economic theories in analyzing this question and point to the relevance of reconsidering sociological theories of reciprocity, which take a multidimensional view of such giving. See Martin Kohli & Harald Künemund, *Intergenerational Transfers in the Family: What Motivates Giving?*, in GLOBAL AGING AND CHALLENGES TO FAMILIES 123 (Vern L. Bengtson & Ariela Lowenstein eds., 2003).

37 *Id.* at 130.

38 See LAMB, *supra* note 14; Vatak, *supra* note 14. In sharp contrast to Western societies, the virtue of appropriate dependence is found to be the norm in Indian society.

another significant provision was made under Section 23 of the MW Act 2007, protecting the parent against the usurpation of property. Ordinarily a gift deed is non-revocable under the Indian law, but the MW Act 2007 recognizes the possibility of transfer of property to children under coercion or undue influence. The law can nullify a gift deed under the following circumstances:

Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.³⁹

This provision is of particular importance, as in the largest number of cases it was found that the older persons evoked this section of the law to reclaim their property from their children on account of ill-treatment by their children. Such cases are analyzed below.

C. Ambiguous Meaning of ‘Normal Life’

The law also sets ‘normal life’⁴⁰ as a goal, forgetting that normality is a value-laden concept. For example, a normal life could be one in which certain forms of abusive treatment are normalized and hence accepted, as they may be considered to be a concomitant of familial relationships.⁴¹ The law does not indicate what ‘normal life’ implies and the term ‘abuse’ does not feature in the MW Act 2007. One may ask if ‘normal life’ means having financial security and basic amenities to live life, or does it mean something beyond that? This is a particularly important question, since the children in the study reported here mostly declared that they were providing all that was required for the sustenance of the older person, but nonetheless complaints were being lodged by their parents.

Mostly emotional and verbal abuse, and only sometimes physical threats to elderly parents were found to be the common forms of abuse behind lodging

39 MW Act 2007, Ch. V, § 23.

40 MW Act 2007, Ch. II, § 4(2).

41 Anthropological works have alerted us to situations of domination and control of the lives of older persons by sons and daughters-in-law, where the elderly parents learn to normalize agony, humiliation and abuse. See Penny Vera-Sanso, *Dominant Daughters-in-Law and Submissive Mothers-in-Law? Cooperation and Conflict in South India*, 5 J. ROYAL ANTHROPOLOGICAL INST. 577 (1999).

complaints. However ‘abuse’ is not defined under the current law. It is only in the MW Act Draft Bill,⁴² which was proposed in 2018 in the parliament, that one finds the inclusion of ‘safety and security’ within the definition of ‘maintenance,’ which has the potential to allow the prosecution of children for abusive behaviour. It appears that the law has gradually broadened its area of intervention since 2007, when ‘abuse’ was added to section 24 of the MW Act. The 2018 Bill defines abuse as “intentional or negligence in such manner which causes physical or mental suffering, assault, or injury to a parent(s) or senior citizen(s) by his/her child/children or relative(s), who are obliged to take care of them, leading to a decreased quality of life.” I argue that by addressing “mental suffering,” the 2018 Bill, if accepted as law, has the potential to accommodate these unarticulated needs of the older persons .

D. Informalization of the Dispute Resolution System

In this section, I will examine the relationship between the MW Act 2007 and the legal mechanism it creates. The provisions of the law allow the older persons to bring their issues to the Tribunal or approach alternate dispute resolution forums and even legal advocacy centres affiliated to nongovernmental organizations (hereinafter: NGOs). The examples discussed in this section emphasize the limitations and possibilities that the law creates. First, I discuss a few positive aspects of the law. Mindful of the challenges in terms of time and money that many older persons face if they get involved in litigation, the law dictates speedy grievance redressal and prohibits the involvement of any legal counsel by either party, except that it provides for older persons to be represented by the Maintenance Officer, if they so desire. Any application made by an older person “shall be disposed of within ninety days from the date of the service of notice of the application to such person.”⁴³

Second, the law allows greater involvement of non–state organizations like NGOs in cases of intergenerational disputes. The Tribunal⁴⁴ can appoint a Conciliation Officer from among these organizations who can conduct an

42 The Maintenance and Welfare of Parents and Senior Citizens (Amendment) (2018) (Ind.), <http://socialjustice.nic.in/writereaddata/UploadFile/MWpsc%20Act,%2020181636580082691025377.pdf>.

43 MW Act 2007, Ch. II § 5(4).

44 In India, the Tribunal is a subordinate court that exists to preside over special cases, such as maintenance–related cases. The Tribunal judge is an officer not below the rank of a sub–divisional officer of a state (MW Act 2007, Ch. II § 7). However, in the present context, the Tribunal has been vested with the powers of a civil court to conduct an inquiry (MW Act 2007, Ch. II § 8) and enforce payment of maintenance (MW Act 2007, Ch. II § 11). The Tribunal’s order has

independent inquiry before the Tribunal hears the case. In some cases, the Tribunal may ask the Conciliation Officer to hand over their report of the case within a month, on which basis the Tribunal then makes its judgment.⁴⁵ Given that the Tribunal judge (a sub-divisional magistrate or SDM) is often encumbered with other responsibilities, the intervention by NGO personnel can expedite the process. This flexibility as regards the process of inquiry shows the foresight of the lawmakers, because their aim was to resolve the concerns of the older persons and their families as quickly as possible, with as little court intervention as possible. The SDM whom I interviewed during research informed me: “Allowing non-state actors to intervene can lead to greater informalization which may be beneficial since some older persons might find courts intimidating.” It can therefore be argued that the MW Act 2007 is perhaps not as alienating as other laws. Frankenberg opines that frequently, in human rights litigation, the sufferers themselves “... experience juridification as separation from their original plea and plight; they see themselves placed in a relation of unrelatedness and restricted in their ‘positive freedom.’”⁴⁶

It is a well-documented fact that in many instances the bureaucratic legal machinery overwhelms the claimants, who subsequently face some degree of estrangement from the system itself, even though it exists to serve the common people. However, by removing legal intermediaries, the MW Act 2007 has aimed to achieve a more collaborative space, has expedited the process of grievance redressal, and is arguably less alienating. The tonality of grievance redressal is also less formal than in common court cases. The parties sit in front of the SDM across his table. The objective is “reconciliation not litigation.”⁴⁷ However, despite the thoughtful provisions in the law, I argue that it is sometimes unable to pay heed to other kinds of grievances beyond the material needs of older persons, to which I turn in the next section.

the same force as an order passed under Chapter IX of the Code of Criminal Procedure, No. 02 of 1973, INDIA CODE (1974).

45 MW Act 2007, Ch. II § 6(6).

46 Günter Frankenberg, *Human Rights and the Belief in a Just World*, 12 INT’L J. CONST. L. 35, 55 (2014).

47 Bianca Brijnath, *Why Does Institutionalised Care Not Appeal to Indian Families? Legislative and Social Answers from Urban India*, 32 AGEING & SOC’Y 697, 702 (2012).

III. THE PERFORMATIVE DIMENSIONS OF ELDER CARE LAW: AT THE MAINTENANCE TRIBUNAL IN KOLKATA

Statistically, not too many cases of intergenerational disputes come to the Tribunal. In 2016, only about 20 cases of intergenerational disputes were registered in their office, which has jurisdiction over only the southern regions of Kolkata. I was informed that this particular Tribunal that I visited was the busiest one. In this section, I discuss a few observations regarding the way the Tribunal functioned in these cases. The state government either appoints the District Social Welfare Officer or any other government officer of the same rank who will be nominated as the Maintenance Officer and whose primary job will be to represent elderly parents during proceedings, but only when called upon to do so.⁴⁸ The Maintenance Officer whom I interviewed at the Tribunal explained to me that there is a big difference between those who live in the cities and those who reside in the villages. According to him, in the village co-residence between elderly parents and their children is peaceful because of lower living costs. In the cities the maintenance is more expensive as living expenses are higher. The law was made keeping in mind the high expenses of living in the cities. The Maintenance Officer directed me to the SDM's office, where I met the two clerks, my chief respondents.

In the clerks' room, two files were kept: one for the ongoing cases, and another for the disposed of cases. I learned that a case was disposed of if it was not a maintenance case and/or if it entailed complicated property disputes. The clerk narrated a case which had been disposed eventually as it was not related to maintenance directly. An older woman had filed a maintenance suit against her son, along with a request that her property, which had been transferred to the son via a gift deed, be restored to her. This case was dismissed because Maintenance Tribunals can revoke a gift deed provided the inheritor of property did not provide maintenance to the elderly parent. In this case, the son did provide maintenance to his mother, and she herself admitted the same. Nonetheless, her complaint was that her son did not provide her tiffin [a light snack in between main meals], and was not cared for properly. Serving meals at regular intervals and providing satiating food may be culturally read as affection and care.⁴⁹ Tiffin, according to him could not be considered as crucial for survival and 'normal life' of the older persons, hence the case would be dismissed. Likewise, I noticed similar cases, where maintenance was

48 MW Act 2007, Ch. II § 18(2). The Maintenance Officer informed me that he performed other administrative tasks in the department of social welfare and would only represent the older persons if they so wished.

49 Vatuk, *supra* note 14.

being provided to the parents, yet the elderly parents brought up allegations of unfulfilled expectations of care to the courtroom.

According to the clerk, Section 23 of the MW Act 2007 was most commonly evoked by older persons in their complaints. It was under this provision that the older persons claimed that they have not received the kind of treatment that was expected from their children post property transfer. As per Section 23 a “transfer of property shall be deemed to have been made by fraud or coercion or under undue influence” if the “transferee” fails to “provide” for the “basic amenities” and “basic physical needs” of the “transferor.” The demonstration of love and regard is not encompassed within the definition of “maintenance” or the satisfaction of “basic physical needs.” This marks the limits of the law and the difficulties involved in legislating filial piety.

It also appears from the cases examined that the decision to transfer property to one’s children was also aimed at securing care for themselves and, most importantly, securing a certain position in the family. “When this does not happen,” the clerk explained, “some older people take recourse to the legal machinery, the police and the court in order to remind the children of their duty to look after their parents.” Feeling that they hadn’t been heard by their families, the older persons hoped to be heard by the court. It can be argued that the court, as discussed in the sections below, follows the doctrine of *parens patriae*, under which it intervenes in a situation of a dispute between the older persons and their children as a moral guardian. The allegations brought into the court by elderly parents are about feelings and hence not easily discernible by law. “These feelings are hard to bring into the legal system.”⁵⁰ Among most of the complainants, these feelings were related to their dwindling authority and/or importance in the household, and to their neglect and abandonment. Next, I examine the case of Bimala Devi (name changed), who appealed to the Tribunal to revoke the gift deed made to her younger son.

Bimala Devi, a 75-years-old-woman, was residing with her younger son. The latter and his elder brother were present during the proceedings. Devi reported that she had used to stay with these two sons in the same house. Due to frequent bickering between the brothers, Devi advised the older son to move to another two-room house, which their father had built nearby and had been inherited by the older son. Devi had prepared a will and handed over the bigger share of her property (the house she was living in and the surrounding land) to the younger son. Her allegation was that her younger son threatened to not let her into the house unless she agreed to confine herself to the smallest room (*chhoto ghor*) in the house. She was not allowed inside

50 SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 59 (1990).

the common areas. Her allegation was that her sons had “tricked her” into signing the property transfer papers by “playing upon her trust.”

The SDM asked her during the proceeding: “So what do you want now? Your younger son is already looking after you by giving you money and food.” In response, Devi argued that her son did not provide an adequate quantity of food and had also cut down on her tea and snacks consumption. She wanted her house back at all cost. The SDM explained to Devi that she could stay in the house, but since she had given away the entire property to her younger son, she could not get the house back. If only the house had been transferred (and not the entire property), then something could have been done, he explained. On being asked by the SDM, “So what exactly do you want now?” Devi responded: “I will stay in the house lifelong. I want my house back. My son convinced me (*bujhiye shujhiye niye niyechilo*) to hand over the property to him, now he does not care. I want my property back.” The sense of anger and annoyance was evident.

The SDM explained to Devi that since she was being provided with the basic necessities, her son’s actions did not constitute “fraud” under the MW Act. He advised her to approach the civil court in order to cancel the gift deed. “However,” he remarked rather undemonstratively, “I am not saying you must cancel the deed, I will not say it because I am not supposed to.” Having said that, the SDM turned to the younger son and declared that he had to ensure that Devi gets everything she needs in life. The SDM clearly was aiming to strike a balance, demonstrating control over the situation by chiding the son. The son interrupted: “I did not say I would not take care of her.” The SDM retorted, “Ah! Don’t speak out of turn.” He explained to the son that it was his duty to take care of his mother because she was old and he must provide for her needs (“*onar bhoron poshoner dayitto apnake nite hobe*”), especially since she had reached the fag end of her life (“*jehutuk uni akhon shesh boyeshey chole eshechen*”).

The parties tended to break into fights during the proceeding, which was more like a counselling session, with the SDM having to intervene each time to stop them. He would explain that it was not his job to resolve domestic problems, and that he could only help with regard to maintenance issues. Coming to a decision, he concluded that since the house had initially belonged to Devi, she had “full rights to decide who will stay where inside the house. If she wants to live in the big room, so be it. This is her end-of-life desire.” To pacify the situation, he added that “later, if your mother wishes to move to the smaller room in consideration of your concerns, then she can, but you cannot force her.” After his decision had been delivered, there was another round of confrontation, and Devi said, “Twenty years I know how I have lived. He did not care for me at all.” The son refuted this, mentioning that he had

only asked her to stay in the smaller room since the birth of his daughter, four years ago, since his family was growing. In another instance, Devi muttered, “It has been five years, he has not given me a new *sari*⁵¹ also.” This was a very thought-provoking statement, indicating the absence of a kind of care that was expected by the older woman.

One of the clerks, whose role in these cases is mainly to take notes during the proceedings and prepare a final copy of the decision taken by the SDM, informed me that cases such as this are quite common. Many of these cases involve more than one child of the older person, and “we would never know if a parent considers applying for revocation of a gift deed made to one child upon the instigation of another child.” In such instances, the judge resorted to counselling and eventually disposed of the case, if it did not fit into the definition of “maintenance” or did not involve “fraud” as defined by the MW Act.

In the following section, I will discuss an excerpt from a complaint letter filed at the same Tribunal. This case also highlights a similar allegation of lack of care by the daughter.

IV. COMPLAINT LETTERS

Much like the ethnographic vignette in the previous section, here too I argue that the idea of justice envisaged by the law is limited to the fulfilment of the economic needs or providing for the material requirements of the elderly complainant. Emotional needs may get completely sidelined. The following is an account of Mita Dutta (name changed), a 73-years-old woman who lodged a complaint against her elder daughter. A few years earlier, the daughter had left her husband’s home (for reasons of physical abuse by in-laws) and started staying with her. She had also brought her 2-year-old son with her. After a few years, when the complainant purchased another apartment, the daughter tried to persuade her to transfer the house to her. Since the time her daughter had left her husband’s home, the complainant claimed, she had been providing for their daily needs. Soon the grandson had moved to a hostel. Over the years, the daughter finally persuaded her mother to transfer the property in her name and promised that she would take care of her mother’s needs and that Dutta would be secure for life. Trusting her daughter, she had finally transferred the property, but very soon she began to be mistreated.

51 A *sari* is an outer garment that is worn by women in several communities in India. It is a very long piece of cloth that is draped around the body, and different regions in India have different styles of wearing it.

Even though the complainant gave her daughter INR 2,000 per month towards the latter's own maintenance, she was not given decent meals. She wrote:

Still, I was not given food properly (*thik moton khete dito na*) and sometimes I was given only boiled rice and boiled potatoes to eat. When my grandson used to come back from the hostel, they used to have fish and chicken curry but did not give me. All this I bore with a heavy heart. Gradually when my grandson left the hostel and started staying with us permanently, I started being tortured more. They did not give me a place to sleep. If I slept on the bed my grandson would often get on the same bed and start jumping and my daughter did not rebuke him at all. If I resisted, she would hurl abuses at me, would come to hit me and would get the knife with which we chop vegetables to scare me off. She would not let me use the bathroom. Thus, unable to bear all this, I lodged a police complaint, but when there was no respite even further, I decided to approach the Tribunal directly.

In the complaint letter, she mentioned how she had been subjected to different forms of harassment. The tipping point came when one day her daughter had asked her to leave the house, telling Dutta that her presence was causing problems for her grandson who "needed more space." Her daughter called a taxi, dumped her luggage (with some clothes) in it, and directed the driver to take her to Dutta's younger daughter's home. She wrote, "My bed, fans, small gas cylinder, and other precious things they kept." Since then, she had been residing in her younger daughter's house. She ended the letter with an earnest appeal to revoke the gift deed. I later learnt that though there had been no revocation of the gift deed, a settlement was finally reached whereby the complainant would be able to stay in her own apartment with her older daughter, who would have to take care of her and not harass her if she wished to stay in her mother's house, or else the Tribunal would take the "necessary action."

The cases discussed above draw attention to how "needs" are articulated by the older persons and how they are dealt with by the Tribunal. It is quite clear that even ensuring that an elderly parent gets three meals every day might not be sufficient and might not be regarded as proper care. Care is closely related to respect in old age. Respect as "performative deference" may partly explain this need for being cared in old age with occasional and symbolic gestures of respect and affection from children. "Performative deference to the no longer powerful," Cohen argues, is not an

empty practice, but rather that for the normative order of a family to be maintained, the emergent political hierarchy of children over parents must be reversed through symbolic action that generates a normative hierarchy of parents over children and yet does so without endangering

the family's political order. By seeking parents' advice on decisions that they will ultimately not control, by placing their parents physically within shared family space or at the threshold as a *sign* defining *ghar*, domestic space, and the household, children identify their parents with the household and with authority over it. The elder is the household; his or her performative control over it signifies the moral integrity of the family.⁵²

Similarly, in this study I found that the older persons needed to be assured that they are not a burden upon anybody, and they are constantly looking for reassurances, in the form of saris or other gifts of love. It is hard to say whether taking recourse to the law can ensure that in the long run the older persons will be treated with the utmost care, but the nature of the complaints does indicate the absence of an expected form of care in the lives of older persons and the lack of respect as performative deference.

V. THE CHASM BETWEEN 'RIGHTS' AND 'NEEDS': LAW'S INJUSTICE?

In Indian society, which is witnessing a rise in cases of elderly neglect, abuse and unlawful property usurpation of older persons, the law intervenes in areas of family life that were formerly not within its ambit. With the help of the law, an older person is able to position oneself as a 'right-bearing citizen' and demand their rights. However, when the 'needs' of the older persons are translated into the legal language of 'rights' something is lost in the process of translation. In most of the cases in this study, the concept of 'rights' often seemed to be conflated with 'needs,' and I argue that during the articulation of the needs in the legal vocabulary of rights, something went amiss.

It is my observation that most of the elderly complainants did not always clearly articulate what their 'needs' were or what exactly they wanted from their children. These needs did not always feature in the complaint letters, but 'spilled over,' if I may say so, during the Tribunal proceedings. In some cases, it was easier to understand the nature of the demand, for example, when the older person appealed for a respite from torture (sometimes physical, but in most cases emotional) and for arrangements to be made for a "peaceful existence in the remaining part of life." In the other cases, their articulation of the grievances took the form of either highlighting the absences of care ("My son did not give me a new sari," "My daughter did not provide me with

52 LAWRENCE COHEN, *NO AGING IN INDIA: MODERNITY, SENILITY AND THE FAMILY* 180 (1999).

a decent meal,” or “I am never given a cup of tea”), or simply demonstrating their unhappiness with the kind of care they received from their son/daughter through an appeal to the Tribunal for the revocation of the gift deed made to their children. Such lack of care over a long period of time led older persons to believe that they had been brainwashed into handing their property over to their children. Such a belief may not be unfounded, since we know that ordinarily in the Indian context parents would not litigate against their children, as this also invites aspersions as to how they socialized their children and consequently becomes a matter of family honor. This perception regarding the ill-intentions of one’s child seemed to be the source of their ‘pain’ and ‘suffering.’

It was observed in some cases that ‘maintenance’ (as strictly understood in legal terms) was being provided, but the older persons yearned for ‘something else.’ They could, with the help of legal advice, write complaint letters explaining that what they wanted was what they thought were their rights, but it was only through the more understated complaints and mostly unwritten, verbal and gestural demonstrations of older persons in court that the need to be given ample attention, to be heard and be considered a respectable and important person in the family — that their real ‘needs’ became evident to me. The translation of needs into rights incurs a certain degree of discursive violence. “Whatever it is that the law is after, it is not the whole story,” and human rights law “cannot possibly be after the whole story. Its narratives of justification contain mechanisms that, as was shown above, represent, reconstruct, and change reality.”⁵³ The translation of conflicts into a battle of rights and entitlements reflects a practical technique to “select the legally relevant aspects and information and transform reality.”⁵⁴ By doing so, law interprets the social needs of older persons primarily as their economic rights. The judges’ mediation served mainly to bring about “disciplinary efficiency”⁵⁵ among the children of the elderly complainants. The judges and the clerks together were found to “fill the cultural silences with their own interpretations, often reducing the pain or violation to the pinch of the economic bottom line.”⁵⁶

53 Frankenberg, *supra* note 46, at 51. Quoting Geertz, Frankenberg writes about the techniques by which human rights reinterprets situations and translates them in terms of rights and legal entitlements and in the process sidelines aspects which may be vital to the phenomenological world of the sufferer or victim.

54 *Id.*

55 SRIMATI BASU, *THE TROUBLE WITH MARRIAGE: FEMINISTS CONFRONT LAW AND VIOLENCE IN INDIA* 61 (2015).

56 *Id.*

Nonetheless, I argue that in the way the Tribunal dealt with the cases justice was not wholly absent, but only limited because the law defines care as maintenance, the absence of any fraudulent property transfer, and no abandonment in public places. The law is willing to recognize the injustices inflicted upon older persons in terms of observable proof, but it is unable to fully accommodate the cultural nuances of the situation (the emotions related to and expectations of filial piety). It is said that “Naming the injustice empowers the victims,”⁵⁷ but in the case of this study the law is able to only partially name the ‘injustice’ in the form of maintenance and fraudulent property transfer issues. So even though the legal space of the Tribunal is therapeutic, it not does fully ‘empower’ the elderly complainant.

CONCLUSION

This Article has attempted to explain the role of the law in resolving intergenerational disputes related to property fraud, abuse and neglect. The findings suggest that the juridical form of care sometimes fails to take into account the cultural nuances of care (specifically identified as the concept of *seva* in the present context). At the Tribunal a complex articulation of ‘needs’ unfolds and there is often an evident hesitation on the part of the elderly parents to ask their children for more time and attention in daily life. While the material fulfilment of certain kinds of needs like food and medicines is important to many, the need for ‘something else’ was constantly lurking in the background. The law makes it mandatory for maintenance to be provided by the children and relatives (inheritors of property), who are required to provide all things essential to leading a ‘normal life.’

It was observed that maintenance in terms of provision of food, residence, clothing, medical attendance and treatment was often being provided by the children, but a zone of needs experienced by older persons remained unaddressed by the law. Such needs point to the missing *seva*. For instance, when an older person complained that she was not being provided tiffin or *bhalo-mondo khabar* (pleasing and toothsome food), or long had not received any saris or gifts, it indicated their desire to be constantly reassured that they still wielded importance in the family. In most cases, what they desired was not expensive material goods, but symbolic gestures of affection and respect from their children. The waning of authority and decision-making power of older persons, which manifested in clashes of interests and their felt deprivations,

57 Patricia Ewick, *The Scales of Justice*, in *WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE* 303, 308 (Austin Sarat ed., 2009).

often led them to resort to the Tribunal. Their sense of ‘victimhood’ and ‘pain’ ended up falling into the chasm between the rights (provided by the law) and the needs (experienced by older persons).

Also, the fact that in many cases the elderly complainants appealed for the revocation of a gift deed, which was not always heeded by the Tribunal, highlights the need for rethinking the idea of ‘maintenance as care’ as the law presently holds. The narratives of pain and agony discussed in this Article also highlight the challenges of granting legal validity to the sentiments of elderly complainants and demonstrate the miscarriage of justice that may occur when needs are translated into the legal vocabulary. Nevertheless, it can be argued that even though the law does not address the expected needs of care, it provides a channel and a therapeutic space for the older person to express their grievances. The law becomes a site of resistance towards the perceived lack of expected care by children, and the act of filing a complaint against the children may be a mechanism to reprimand the children who are not ‘listening’ to, that is, paying adequate attention to their (changing) needs.