

# A REVIEW OF THE GLOBAL ELDERLY RIGHTS FRAMEWORK AND THE PROSPECTIVE ROLES OF CONSTITUTIONAL COURTS IN AUGMENTING ELDERLY RIGHTS IN THE INDIAN JURIDICAL CONTEXT

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## Abstract

*Elderly persons play an instrumental role in not only fostering inclusive growth but also creating strong value chains that augment social cohesion. They promote intergenerational equity and facilitate the promotion, preservation, and dissemination of traditional knowledge. However, despite playing such critical roles, the elderly population, especially the poor elderly, become victims of income and health insecurity. Although many of the international legal instruments bestow plenary rights on elderly people, in reality, they have very few remedies to exhaust. The paper attempts to revisit the global elderly rights framework and strives to know whether the existing international normative safeguards are sufficient to promote elderly rights and whether constitutional courts in the Indian juridical context have any thoughtful role to play in consolidating the rights framework. The main argument that resonates across the length and breadth of the paper is that the implementation and monitoring of laws and policies governing elderly rights are weak and that there is an impending need to revamp the implementation and monitoring framework through the purposive role of constitutional courts. In light of the prevailing facts and the normative findings, the paper proposes that the constitutional courts in India must invoke their review and epistolary jurisdictions to ensure effective implementation and monitoring of elderly rights at the municipal level. It employs analytical and descriptive approaches to thematically correlate existing frameworks and to reach apriori generalisations.*

**Keywords:** *Elderly rights, Constitutional courts, Judicial review, Epistolary jurisdiction, National human rights institutions*

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## I. Introduction

Elderly persons<sup>1</sup> play an instrumental role in not only fostering inclusive growth but also creating strong value chains that augment social cohesion. They promote intergenerational equity and facilitate the promotion, preservation, and dissemination

of traditional knowledge.<sup>2</sup> However, despite playing such critical roles, the elderly population, especially the poor elderly, become victims of insecurity. In fact, many of them suffer from social and economic insecurity and a substantial number of them do not have sufficient health protection. The

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<sup>1</sup> For the purposes of this article, the terms ‘elderly persons’, ‘aged people’, ‘senior citizens’, ‘older persons’ have been interchangeably used.

<sup>2</sup> Usha Dixit & V. C. Goyal, *Traditional Knowledge from and for Elderly*, 10 IJTK 429, 430 (2011). According to the authors, traditional knowledge includes critical information about resources, practices, techniques and technologies that are critical to the survival of mankind across generations.

laws and policies guiding the elderly appear inappropriate in addressing the multi-faceted issues facing them. In addition, a considerable number of the aged population, irrespective of their social, economic, and cultural backgrounds are exposed to various kinds of abuse (primarily in the hands of their children or relatives) that mainly include physical abuse (including sexual abuse), emotional abuse and psychological abuse. Further, a few of them are subject to torture.<sup>3</sup> Furthermore, some of them are even susceptible to crimes.

The conspicuous lack of an overwhelming international or even a regional convention on the rights of elderly persons further exacerbates their problems and concerns and makes them vulnerable to abuse and mistreatment.<sup>4</sup> Although a bundle of elderly rights operates at the international and regional levels by virtue of some of the overarching international and regional human rights instruments and many of the rights find expressions in municipal human rights laws, aged persons have only a few remedies to exhaust. Many states that ratify the human rights treaties fail to induce compliance and

tend to perpetrate even worse behavior.<sup>5</sup> In addition, on several occasions states fail to enforce their human rights obligations<sup>6</sup> of *respect-protect-fulfil*, leading to a situation wherein elderly persons become victims of social and economic injustice so much so that they cannot even apply their rights to establish themselves as victims of such injustice. Further, because of the states' inability to implement the rights envisaged under various global and regional instruments, elderly persons generally are unable to explore the truth (behind their victimization) in order to access substantive justice through courts and other forums. Furthermore, they can hardly exercise their basic right to reparations.

In the absence of forward-looking administrative systems, there are hardly any remedies against violations of elderly rights. Municipal administrative systems that embody national and local administrative rules, governance ethics, implementation and monitoring frameworks, administrative adjudication mechanisms, etc., seemingly fail to complement the rights framework created through the international and regional

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<sup>3</sup> Dorota Smetanová, *Domestic Violence against Seniors in the Slovak Republic* in *VIOLENCE AGAINST THE ELDERLY CHALLENGES – RESEARCH – ACTION* 251 (Katarzyna Jagielska et al., eds., 2015).

<sup>4</sup> Diego Rodriguez-Pinzón & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. UNIV. INT. LAW REV. 915, 917 (2003).

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<sup>5</sup> Ryan M. Welch, *National Human Rights Institutions: Domestic Implementation of International Human Rights Law*, 16 J. HUM. RIGHTS 96, 97 (2017).

<sup>6</sup> In the absence of an overwhelming international executive agency to oversee the implementation of human rights, the states are endowed with the non-derogable responsibility to ensure the enforcement of human rights obligations.

instruments. One possible explanation behind such failure is the incapacity of the national human rights organizations and institutions, which are supposedly dedicated to the causes of ensuring compliance, mobilization and legalization,<sup>7</sup> to protect and promote human rights. Another probable explanation behind the failure may be attributed to states' unwillingness to embrace a rights-based approach to growth and development.<sup>8</sup> It is needless to mention here that such an approach would help these states integrate the broad normative human rights principles into national policies, strategies and maneuvers that promote inclusive growth.<sup>9</sup>

Even global administrative law (which embodies principles, rules and administrative norms created and practised by supra-national institutions)<sup>10</sup> seems unfit to ensure implementation, enforcement and monitoring of human rights obligations, especially in the context of elderly individuals. Since global administrative law is based largely on globalized principles focusing on a range of institutions, norm-creating bodies and

dispute settlement mechanisms that are largely endorsed by agencies such as the International Monetary Fund and the World Bank, etc., the law fails to cater to the principles of diversity and pluralism.<sup>11</sup> Further, to gain authority (and in a restricted sense, legitimacy), it may unnecessarily juridify the political processes and the prevailing values through the transnational and international dispute settlement bodies.<sup>12</sup> Furthermore, global administrative law may relegate developing countries to an inferior position because the law seemingly frustrates the sovereign equality principles; under the law, powerful nations would have a clear strategic advantage over weak nations.<sup>13</sup> Debatably, the law is linked inextricably to imperial institutions and contemporary international law and may therefore defeat the causes of justice and democracy, especially from the point of view of third world countries.<sup>14</sup> Consequently, global administrative law does not provide an immediate answer to the question of enforcement of human rights at the municipal level. On the contrary, the law can *stricto sensu* have adverse effects on fundamental

<sup>7</sup> Welch, *supra* note 5, at 97.

<sup>8</sup> Savitri Goonesekere, *National Implementation of International Human Rights, Social Inclusion and the Empowerment of People* <https://www.un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/National%20Implementation%20of%20International%20Human%20Rights.pdf> (last visited May 15, 2021).

<sup>9</sup> *Id.*

<sup>10</sup> Benedict Kingsbury & Megan Donaldson, *Global Administrative Law* (September 06, 2016), [https://www.iilj.org/wp-content/uploads/2016/08/EPIL\\_Global\\_Administrative\\_Law.pdf](https://www.iilj.org/wp-content/uploads/2016/08/EPIL_Global_Administrative_Law.pdf) (last visited May 15, 2021).

<sup>11</sup> Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EJIL 187, 188 (2006).

<sup>12</sup> *Id.* at 208.

<sup>13</sup> Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EJIL 1, 11 (2006).

<sup>14</sup> B. S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 INT'L L. & POLITICS 799, 800 (2006).

freedoms and individual rights because it strikes at the very root of self-rule and local autonomy.<sup>15</sup>

Resultantly, with both municipal and global administrative law having limited applications, the elderly population has only a few remedies to exhaust in the event of a violation of their basic rights. This seems to frustrate the common law principle *ubi jus ibi remedium* that was recognized formally in *Mathew Ashby v. William White*<sup>16</sup> and that had consolidated over the years through the rulings of various courts and quasi-judicial bodies.

In addition to the implementation and monitoring gaps caused largely because of the failure of the municipal and global administrative law, the world is struggling badly with the issue of active population aging and the issue of the aging workforce. At the international level, the issue of population aging worsens the problems faced by elderly people. The world is witnessing an exceptional challenge in terms of population growth and if UN figures are believed, the world population is going to increase to 1548.9 million (from the current 702.9 million) by 2050.<sup>17</sup> In the face of this challenge posed by population aging, we are faced with a crucial question. Do we have the

<sup>15</sup> *Supra*, note 10.

<sup>16</sup> (1703) 92 ER 126.

<sup>17</sup> UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, WORLD POPULATION AGEING 2019 5 (2020).

requisite systems and processes in place to address active population aging?

Because of the implementation gaps coupled with the issues caused by population aging, the elderly population, especially the poor elderly, are exposed to a number of vulnerabilities. Even in developed countries, the situation is not commendable. Japan, for example, is a classic example in this regard. In conjunction with the international normative framework governing elderly rights, Japan has passed quite a few laws.<sup>18</sup> However, there seem to be striking implementation gaps.<sup>19</sup> Similarly, in Italy, which boasts of having one of the best healthcare infrastructures across the world, the elderly rights framework is not in a stable state; elderly people need to depend on foreign migrants, especially women, for

<sup>18</sup> Japan has the fourth highest number (about 35.58 million) and the highest percentage (28% approximately) of elderly persons in the world. Japan also has the highest old-age dependency ratio and life expectancy (at birth). Arguably, Japan has one of the highest number of laws and policies that strive to promote elderly care and support. Some of the laws include the National Pension Act, 1959, the Employment Insurance Act, 1974, the Public Assistance Law, 1950, the Social Welfare Service Act, 1951, etc. Some of the policies (especially governing elderly healthcare) include Active 80 Health Plan, 1988, The Healthy Japan 21, etc.

<sup>19</sup> Staff Reporter, *Japan's Pension System Inadequate in Aging Society, Council Warns*, THE JAPAN TIMES (June 4, 2019), <https://www.japantimes.co.jp/news/2019/06/04/business/financial-markets/japans-pension-system-inadequate-aging-society-council-warns/> (last visited May 17, 2020).

household services (mainly as caregivers).<sup>20</sup> Cases of elder abuse are also on the rise in Italy.<sup>21</sup> In developing countries such as India, the situation is far worse. India has only one law, the Maintenance and Welfare of Parents and Senior Citizens Act (hereinafter referred to as the MWPSA Act) 2007, and a few policies to support the plight of the elderly population. However, because of conspicuous implementation gaps, the law and the policies have been inapt in attending to the causes of the aged population.

The first part of the article introduces the matter and discusses the (in)effectiveness of administrative law, both global and local, in the implementation and monitoring of the laws and policies promoting the elderly rights framework. The second part strives to revisit the various normative safeguards protecting elderly individuals at the international level. The penultimate part focuses on the prospective roles of constitutional courts in India in fostering elderly rights. It refers to a few case laws adjudicated by the highest constitutional courts in India to argue that the courts must act as custodians of the principles of the rule of law and access to justice. The article

concludes by saying that one effective way of implementing the global elderly rights framework in the Indian juridical context is through judicial activism.

## **II. The global normative framework guiding elderly rights jurisprudence**

Despite the fact that there is no overarching international instrument governing the rights and privileges of aged individuals, a few global, regional and local human rights instruments (particularly those concerning economic and social rights) recognize the aged persons' rights to social protection and social security. Seemingly, one of the main human rights instruments (operating at the international level) that officially recognize the relevance of social security was the Universal Declaration of Human Rights (UDHR), 1948. Article 22 of the UDHR mandates that all members of the society are entitled to social security rights and are allowed to enjoy economic, cultural and social rights that are indispensable for promoting their personality and ensuring their dignity. A bare reading of Article 22 of the Declaration indicates that an individual's right to social security is entwined with certain social, economic and cultural rights, the realization of which is compulsory for the holistic physical, mental and psychological development of an individual. The contemplation of Article 22 is augmented by Article 25(1) of the Declaration that

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<sup>20</sup> Daniela Del Boca & Alessandra Venturini, *Migration in Italy is Backing the Old Age Welfare*, IZA, Discussion Paper No. 8328, 18 (2014).

<sup>21</sup> Licia Boccaletti, *Introduction to Elder Abuse in Italy* (January 2014), [http://www.combatinglelderabuse.eu/wp-content/themes/Visionpress/docs/Presentation\\_kick\\_off\\_ITALY.pdf](http://www.combatinglelderabuse.eu/wp-content/themes/Visionpress/docs/Presentation_kick_off_ITALY.pdf) (last visited May 17, 2021).

mandates the right to social security in case of old age and the right to a decent standard of living. Apart from the UDHR, other international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 also support social protection and social security of all, including the elderly. Article 9 of ICESCR embodies the right to social security and social insurance. Apart from the ICESCR, Article 7 of the International Covenant on Civil and Political Rights (ICCPR), 1966, read with the provisions of the Torture Convention, 1984, protects the elderly people from torture and coercive medical or scientific experimentation. In addition, the equal protection clause under Article 26 of the ICCPR encapsulates social security rights. In *Brooks case*,<sup>22</sup> the Human Rights Committee had held that the scope of Article 26 is wide and that it forbids both *de facto* and *de jure* discrimination in any field that is *inter alia* protected and regulated by the state machinery.<sup>23</sup> The Committee had also held that the economic right to social security could be read in the broader ambit of civil and political rights. The reasoning of the Committee in *Brook's case* became a precedent for the determination of the second-generation economic and social rights

through the first-generation civil and political rights.

Among the regional instruments, the European Social Charter (ESC), 1961 bestows a non-derogable obligation on member states to achieve conditions wherein the rights of the elderly individuals to social assistance and security may be protected. The ESC, through Article 23, creates an obligation on the states to undertake measures to guarantee all-inclusive social protection of the elderly persons. The said stipulation (Article 23) obligates states to create enabling circumstances and conditions in which the aged population may realize their potential and may lead a dignified and healthy life. Apart from Article 23, Article 12, read with Article 27(1)(b) of ESC, entitles everyone, including the aged persons, to social security. Further, Article 13 of the Charter stipulates the right to medical and social assistance. In the perspective of the European Union (EU), the Treaty on the Functioning of the European Union (TFEU),<sup>24</sup> 2007 recognizes the right to social protection and social security (though not exclusively for the elderly population). Various provisions of the TFEU, especially under the title 'social policy,' supplement the causes of social protection and security in accordance with the provisions of the ESC.

<sup>22</sup> *Brooks v. Netherlands*, U.N. GAOR Hm. Rts. Comm., 39<sup>th</sup> Sess., Supp. No. 40, U.N. Doc. A/42/40 (1987).

<sup>23</sup> Rodriguez-Pinzón & Martin, *supra* note 4, at 923-924.

<sup>24</sup> The treaty, which was passed in Lisbon, strives to consolidate the operational and structural bases of the EU.

In addition, the Charter of Fundamental Rights (CFR) of the EU, 2000, which achieved a binding effect subsequent to the passage of the Treaty of Lisbon in 2007, acts as a beacon to other human rights instruments for the aged population. By virtue of Article 25, the CFR obligates States Parties to the Charter to respect and recognize elderly rights so that they may lead an independent and dignified life and may take part in the social and cultural life. Further, Article 34(1) of the CFR stipulates that the EU recognizes and respects elderly peoples' rights to social services and social security to that extend protection during old age.

Apart from the European system, the African system and the inter-American system also strive to promote elderly rights. Of remarkable mention is Article 4(5) of the American Convention of Human Rights (ACHR), 1969 that stipulates that no person aged 70 years or more shall be subject to capital punishment. The Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights through Article 17 extends social protection to the elderly population. Article 17 read with Article 9(1)<sup>25</sup> of the Protocol bestows an obligation on States Parties to (1) embark on

programmes that may provide them the prospect of engaging themselves in productive work tailored to their needs and capabilities (2) arrange for appropriate facilities in terms of food, medicines, etc., to those elderly people who are unable to take care of themselves (3) promote institutions that may augment the quality of life of the elderly population. Article 18(4) of the African Charter of Human and Peoples' Right (also known as the Banjul Charter), 1981, states that the elderly population shall have the right to special measures of protection in conjunction with their moral and physical requirements. Last but not least, the Andean Charter, 2002 through Articles 46 and 47, strive not only to protect the elderly population against all forms of violence but also to promote social security. The said provisions also obligate member states to ensure the participation of the elderly people in the decision-making process.

Barring from the important provisions envisaged under the aforementioned international and regional legal instruments on rights (especially elderly rights), a few International Labour Organization (ILO) conventions and recommendations vouch for social security, especially in the context of income protection.<sup>26</sup> The ILO instruments'

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<sup>25</sup> Art. 9(1) of the Protocol envisages the right to social security for the aged. The right also percolates to dependents, in the event of death of an elderly beneficiary.

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<sup>26</sup> While the ILO Conventions are binding in nature, the Recommendations have persuasive value and morally obligate states to adopt the requisite

focus is mainly on revamping the social security framework through income security, which is achieved through either social insurance or social assistance or both. One of the earliest ILO instruments on income security is the Income Security Recommendation, 1944 (Recommendation No. 67).<sup>27</sup> The main objective of the instrument (from the perspective of income security for the aged population) is to vouch for income security schemes that may relieve want and preclude destitution through the restoration of income that may be lost because of inability to work during old age. Recommendation 67 also determines the threshold age that would allow an elderly person to have access to social security benefits.<sup>28</sup> Further, it attempts to achieve income security through both social assistance and social insurance.<sup>29</sup>

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frameworks suggested in the respective recommendations.

<sup>27</sup> The 1944 Recommendation draws heavily from the Old-Age Insurance (Industry) Convention (No. 35), 1933, Old-Age Insurance (Agriculture) Convention (No. 36), 1933 and the Invalidity, Old-Age and Survivors' Insurance Recommendation (No. 43), 1933. While the first two instruments are outdated and are no longer in force, the last instrument, i.e., Invalidity, Old-Age and Survivors' Insurance Recommendation was withdrawn.

<sup>28</sup> The age when an elderly individual becomes incapable of rendering effective work is considered as the threshold, according to Recommendation 12 of the instrument.

<sup>29</sup> Recommendations 5 through 27 deal with social insurance whereas 28 through 30 deal with social assistance indicating *inter alia* that ILO wanted the member states to focus more on social insurance to ensure income security for the elderly population.

The most important among all ILO instruments is the Social Security (Minimum Standards) Convention,<sup>30</sup> 1952 (No. 102), which is dedicated to the cause of social security. The Convention identifies certain benefits, viz., Sickness Benefits, Medical Benefits, Old-age Benefits, Unemployment Benefits, Survivor's Benefits, Maternity Benefits, Family Benefits, Invalidity Benefits and Employment Injury Benefits for the design and implementation of programmes, policies and laws on social security. Further, Articles 25 to 30 (Part V) of the Convention obligates member states to provide old-age benefits to certain classes of elderly people contemplated under Articles 27 and 28 of the Convention. Furthermore, Article 26 of the Convention sets the age of receiving old-age benefits at 65 or higher. The 1952 Convention was followed by the 1967 Convention (No. 128) on Invalidity, Old-age and Survivors' Benefits. Articles 14 to 19 (Part III) of the 1967 Convention augments the old-age benefits contemplated under Part V of the 1952 Convention. The provisions of the 1967 Convention are consolidated by the Invalidity, Old-Age and Survivors' Benefits Recommendation (No. 131), 1967, which mandates not only the types of contingencies that are covered but also the benefits that aged individuals are entitled to. Further,

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<sup>30</sup> The Convention, which entered into force on 27<sup>th</sup> April, 1955, provided (through annexure) a classification of 99 economic activities based on international labour standards.

Recommendation 131 also envisages a strong system of calculating benefits, including special benefits. Overall, both the aforementioned Conventions help in rationalizing and harmonizing income security policies and laws relating to the aged population. They are dynamic instruments,<sup>31</sup> which envisage that benefits must be reviewed and adjusted from time to time in view of the changing socioeconomic needs of the beneficiaries.<sup>32</sup>

The latest instrument of the ILO is the Social Protection Floors Recommendation (No. 202) of 2012.<sup>33</sup> The instrument provides efficacious guidance to member states to create, maintain, execute, and screen social protection floors, which are municipally determined social security guarantees that help in reversing poverty, vulnerability and exclusion, and to supplement the national social security frameworks. Further, the Recommendation alludes to the measures that member states may adopt to ensure effective design and implementation of the

social protection floors. Furthermore, it assures access to income security and basic healthcare, the two fundamental requirements for a dignified and secured life during old age.<sup>34</sup> Overall, although the instrument fails to identify elderly individuals as a vulnerable group requiring substantive protection and also refrains from defining critical expressions such as active age, old-age, etc.,<sup>35</sup> it creates an onus on nation-states to ensure old-age benefits in the form of basic income security for the elderly population at a defined (nationally) minimum level.<sup>36</sup>

The Sustainable Development Goals (SDGs)<sup>37</sup> also endeavour to protect elderly individuals. The Goals relating to the eradication of poverty (Goal 1), achievement of gender equality (Goal 5) and reduction of inequalities (Goal 10) are intricately linked to the causes and requirements of the aged population. Of special mention is Goal 3, which obligates nations to ensure healthy lives and the well-being of all. Further, Goal 8 of the SDGs asks states to promote work

<sup>31</sup> In 2002, the ILO had confirmed that both the 1952 and 1967 Conventions are fully operational instruments. For details see: Krzysztof Hagemeyer & Valérie Schmitt, *Providing Social Security in Old Age: The International Labour Organization View* in SOCIAL PROTECTION FOR OLDER PERSONS SOCIAL PENSIONS IN ASIA 138 (Wening Handayani & Babken Babajanian eds., 2012).

<sup>32</sup> ILO, WORLD SOCIAL PROTECTION REPORT 2014/15: BUILDING ECONOMIC RECOVERY, INCLUSIVE DEVELOPMENT AND SOCIAL JUSTICE: BUILDING ECONOMIC RECOVERY, INCLUSIVE DEVELOPMENT AND SOCIAL JUSTICE 91 (2014).

<sup>33</sup> It was adopted by 185 member states and was later endorsed by the UN.

<sup>34</sup> INTERNATIONAL LABOUR OFFICE, SOCIAL PROTECTION DEPARTMENT, SOCIAL PROTECTION FOR OLDER PERSONS: KEY POLICY TRENDS AND STATISTICS 1 (2014).

<sup>35</sup> Tineke Dijkhoff, *The ILO Social Protection Floors Recommendation and its Relevance in the European Context*, 21 EJSS 351, 358 (2019).

<sup>36</sup> Paragraph 5(d) read with Paragraph 9(2) of the Recommendation.

<sup>37</sup> SDGs are in a way extensions of Millennium Development Goals (MDGs). While the MDGs had nine goals, the SDGs embody 17 Goals that are more holistic and pragmatic. The Goals are supposed to be realized by 2030.

for people across ages; this Goal is primarily relevant because many elderly people prefer to continue work post their retirement.<sup>38</sup> In addition to the Goals mentioned above, Goal 16 of the SDGs, which strives to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels,” tries to create a broader platform through which elderly rights may be effectively promoted and protected. Goal 16 of the SDGs not only points out that holistic justice should be made available to all it also tries to uphold and develop a robust mechanism to address concerns relating to violation of the principles of substantive justice. A purposive interpretation of Goal 16 indicates that it is the pious obligation of the states to expressly include the disadvantaged people (which include elderly persons) so as to ensure the interplay of the rule of law and access to justice.<sup>39</sup>

The Madrid International Plan of Action on Aging (MIPAA), which was adopted by the UN in 2002 during the Second World Assembly on Aging, is yet another instrument that attempts to consolidate the

elderly care and support framework.<sup>40</sup> The main objectives of the Madrid Plan are to (1) promoting the causes of social protection and social security (2) addressing the discrimination faced by elderly people (3) creating a normative framework to promote the life and living and the dignity of the elderly population (4) bridging intergenerational gaps. The Plan lays down recommendations based on three priority areas, viz., Older Persons and Development, Ensuring Enabling and Supportive Environments and Advancing Health and Wellbeing into Old Age.<sup>41</sup>

Surprisingly, despite the aforementioned ILO conventions and recommendations, the mandated rights mentioned under the global and regional human rights instruments, the universal objectives under the SDGs, and the interplay of MIPAA/RIS, quite a few nations have not yet embraced any social security policy or law for the aged population at all. In terms of income security, the situation is worse; a policy paper published by ILO in 2014 indicates that only 3.3 percent of the global GDP is spent towards the income security of the elderly population.<sup>42</sup> It further confirms that, internationally, the right to social security (in terms of income security)

<sup>38</sup> HelpAge International, *Sustainable Development Goals* (2015), <https://www.helpage.org/what-we-do/post2015-process/> (last visited May 17, 2020).

<sup>39</sup> OECD & Open Society Foundations, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All* (July 11 2018), <https://namati.org/wp-content/uploads/2017/06/delivering-access-to-justice-for-all.pdf> (last visited Oct. 28, 2020).

<sup>40</sup> It was adopted in two parts, a Political Declaration (Part 1) comprising 19 Articles and a Plan of Action on Aging (Part 2) comprising recommended actions based on three priority areas.

<sup>41</sup> Rodriguez-Pinzón & Martin, *supra* note 4, at 949.

<sup>42</sup> INTERNATIONAL LABOUR OFFICE, *supra* note 34, at 5.

in old age is largely frustrated, and that substantial inequalities exist; only 42.2 per cent of the working-age population is covered by laws that support old-age pension coverage (through either contributory or non-contributory schemes).<sup>43</sup> Furthermore, it states that only a little more than half of the elderly population (about 51.5 percent) who are above the statutory pensionable age (which is generally 65, although in some countries the age is 60) receive an old-age pension.<sup>44</sup>

In terms of social security against abuse, there are only a few countries that have policies and laws addressing the subject in light of the stipulations envisaged under the MIPAA. Studies indicate that, across jurisdictions, cases of violence and abuse against elderly individuals are on the rise, indicating further that legal and policy interventions are required to address the issue.

If we do an intelligent skimming of all the global and regional instruments, policies and initiatives, we observe that only fractional attention is accorded by these global and regional instruments, policies and initiatives to augment elderly care and to vouch for the protection and reinforcement of elderly rights. This lack of generous attention explains why there is a need to reexamine

elderly concerns and issues. The global community is yet to adopt an over-arching Convention on Elderly Persons, although the UNGA has lately undertaken an initiative to seek advice from the member states regarding the viability of drawing up a global convention on the rights of older persons.

### **III. The prospective role of constitutional courts in augmenting elderly rights jurisprudence in India**

There is no denying the fact that the dignity of elderly individuals is inviolable and, therefore, must be respected and protected. However, their right to live with dignity will only be ensured if they are provided with the requisite facilities and care. It is no new knowledge that the implementation of laws and policies governing elderly rights in India is weak. Debatably, the roles of the municipal human rights institutions<sup>45</sup> such as the National Human Rights Commission (NHRC) and the State Human Rights

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<sup>45</sup> The competence and responsibility of such national institutions, composition, the methods of operation, etc., are determined by the Paris Principles that was adopted by the UN General Assembly (UNGA) (vide UNGA Resolution 48/134) in December 1993. According to the Paris Principles, the main competence of a national human rights institution shall be the protection and promotion of human rights. The primary responsibilities of such institutions shall include (a) addressing any situation wherein human rights are violated (b) ensuring harmonization of municipal and international norms governing human rights (c) cooperating and liaising with the UN and other global, regional and national human rights agencies and institutions for the protection of human rights, etc.

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<sup>43</sup> *Id* at 11.

<sup>44</sup> *Id* at 13.

Commissions<sup>46</sup> that are responsible for the protection and promotion of elderly rights have not been promising. Questionably, one of the major shortcomings of the NHRC and the State Commissions is that they are conservative and prioritize a complaint-based approach over a policy-based one.<sup>47</sup> In addition, since the NHRC and the State Commissions lack *de facto* authority to take any direct action and to punish perpetrators of abuse and crimes,<sup>48</sup> they seem to shy away from performing the critical review functions.<sup>49</sup> One of the major structural infirmities that these Commissions suffer from is that their recommendations cannot be enforced.<sup>50</sup> Another operational limitation is lack of adequate manpower; while the Commissions receive thousands of complaints every year, they hardly have sufficient staff to effectively address the complaints.<sup>51</sup> The Commissions are also bureaucratic in appeal, especially because

they comprise government officers, including retired officers.<sup>52</sup>

In view of the Commissions' ineffectiveness in enforcing human rights obligations, it becomes imperative for the constitutional courts, the guardians of the constitution,<sup>53</sup> to take on themselves the non-derogable responsibility of ensuring the implementation of elderly rights bestowed on them by virtue of various international and municipal laws. Constitutional courts do play a critical role in effectuating the supremacy of constitutional norms.<sup>54</sup> Through the expansion of their judicial powers, these courts tend to redefine the contours of democratic government and to recast policy-making.<sup>55</sup> Constitutional courts act not only as authoritative interpreters but also as trustees of the prevailing constitutional order.<sup>56</sup> As authoritative interpreters, they construct, deconstruct and reconstruct norms and as trustees, they have the final say in assigning the operative meaning to an emerging constitutional norm.<sup>57</sup> Constitutional courts

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<sup>46</sup> The NHRC and the State Human Rights Commissions were constituted by virtue of Sections 3 and 21 of the Protection of Human Rights Act, 1993 (Act 10 of 1994), respectively.

<sup>47</sup> Monika Mayrhofer et al., *International Human Rights Protection: The Role of National Human Rights Institutions - a Case Study* (2016), <https://fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-4.3.pdf> (last visited May 17, 2021).

<sup>48</sup> Manickavasagam Bhoothalingam, *Effective Role of Human Rights Commission in India* in HUMAN RIGHTS IN INDIA: ISSUES AND CHALLENGES 94 (C. Subramanian and M. Sugirtha eds., 2016).

<sup>49</sup> *Supra* note 47.

<sup>50</sup> Mandeep Tiwana, *Needed: More Effective Human Rights Commissions in India*, [https://www.humanrightsinitiative.org/publications/nl/articles/india/needed\\_more\\_effective\\_hr\\_comm\\_india.pdf](https://www.humanrightsinitiative.org/publications/nl/articles/india/needed_more_effective_hr_comm_india.pdf) (last visited May 17, 2021).

<sup>51</sup> *Id.*

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<sup>52</sup> *Id.*

<sup>53</sup> Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1757 (2006).

<sup>54</sup> Lee Epstein, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government* (2001) <http://epstein.wustl.edu/research/conferencepapers.2000APSA.pdf> (last visited May 17, 2021).

<sup>55</sup> *Id.*

<sup>56</sup> Alec Stone Sweet, *Constitutional Courts in COMPARATIVE CONSTITUTIONAL LAW* 822 (Michel Rosenfeld and Andras Sajó eds., 2012).

<sup>57</sup> *Id.* at 827.

also tend to self-consciously address and shape the participation of social groups and institutions, including national human rights institutions, in the regulatory processes.<sup>58</sup> In addition, these courts play a progressive role in promoting multi-level governance and in making sure the implementation of policies and laws.<sup>59</sup> Further, they function as regulatory watchdogs and use regulatory tools in adjudication; these tools help the courts to determine the (un)justified or (un)reasonable nature of laws that tend to frustrate fundamental rights.<sup>60</sup> Therefore, in these courts, judges are better informed about the actual import and impact of a legislation.<sup>61</sup>

In the Indian constitutional perspective, these courts, by virtue of their jurisdictional and institutional segregation from other courts,<sup>62</sup> enjoy a unique status. The judgments that they render are also of a *sui generis* nature. Moreover, these courts have redefined the parameters of fundamental rights jurisprudence and have fostered a *rights revolution*.<sup>63</sup> Through their power of judicial

review, both *ex ante* and *ex post*, they have helped in reversing injustice and in promoting the principles of the rule of law. In fact, their power of judicial review has downplayed the principles of parliamentary sovereignty and has put fundamental rights on the priority list.<sup>64</sup> It has encouraged popular sovereignty and has mitigated the principal-agent problem, allowing constitutional courts to monitor, signal and coordinate government actions.<sup>65</sup> It has enabled people to control their government and has obligated the government to obey court orders.<sup>66</sup> In addition, the review power of constitutional courts has also allowed them to adopt an institutional approach in addressing the fetters created by usurping governments.<sup>67</sup> The power has unequivocally authorized constitutional courts to walk that extra mile and even conduct an abstract review, which allows them to examine the *vires* of a statutory/constitutional law even in the absence of a dispute.<sup>68</sup> In a way, judicial review has helped in promoting new constitutionalism (that had emerged as a dogma in many democracies, including Western European democracies, sometime in the 1950s).<sup>69</sup> In the Indian judicial context,

<sup>58</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001).

<sup>59</sup> Carlo Panara, *Multi-Level Governance as a Constitutional Principle in the Legal System of the European Union*, 16 HKJU-CCPA 705, 723-724 (2016).

<sup>60</sup> Patricia Popelier, *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 LEGISPRUDENCE 257, 262 (2012).

<sup>61</sup> *Id.*, at 267.

<sup>62</sup> Scheppele, *supra* note 53, at 1764.

<sup>63</sup> Marco Dani, *National Constitutional Courts in the European Constitutional Democracy: A Reply to Jan Komárek*, 15 I•CON 785, 791 (2017).

<sup>64</sup> Sweet, *supra* note 56, at 816.

<sup>65</sup> David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 730 (2008).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, at 732.

<sup>68</sup> Scheppele, *supra* note 53, at 1763.

<sup>69</sup> Sweet, *supra* note 56 at 816. According to the author, the Western European model of judicial review, which draws inspiration from the works of

the power of judicial review has repeatedly been upheld by the review courts, especially by the Supreme Court. In *Minerva Mills v. Union of India*,<sup>70</sup> for example, a constitution bench of the Supreme Court had held that the judiciary is independently and constitutionally vested with the power of judicial review to determine the legality of executive actions. The Court further noted that the principles of the rule of law would be violated if constitutional courts were not allowed to exercise review powers.

Another way through which the constitutional courts in India have promoted the rights jurisprudence is by invoking the epistolary jurisdiction, a social invention made by Late Justice P. N. Bhagwati, which extended the *locus standi* rule in constitutional matters.<sup>71</sup> Epistolary jurisdiction allows any public-spirited person to bring a matter (in the form of public interest litigation or social action litigation) before the constitutional courts whenever state machineries violate the fundamental rights of vulnerable individuals and social groups.<sup>72</sup> It also empowers constitutional courts to take *suo motu* cognizance and

necessary action in cases where the state machineries are *prima facie* accused of violating human rights.<sup>73</sup> Further, epistolary activism is not affected, generally, by technical irregularities and constitutional courts may proceed with matters departing from the rules of procedure and evidence required in adversarial proceedings.<sup>74</sup>

That constitutional courts can augment elderly rights in India was proven correct in *Ashwani Kumar v. the Union of India*,<sup>75</sup> wherein the Supreme Court had pulled up the states for its non-compliance to the normative framework created by virtue of the MWPSA Act. It had observed that an elderly person's right to social security must be protected and that aged persons must live with dignity. In the given case, the Apex Court had passed several directives asking the states to implement the stipulations under the MWPSA Act, especially the ones relating to old-age homes,<sup>76</sup> geriatric and medical care,<sup>77</sup> publicity to the provisions of the Act,<sup>78</sup> etc. It had also directed the Central government to issue suitable guidelines to the state governments<sup>79</sup> and to overhaul the old-

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Hans Kelsen, empowers constitutional courts to review legislation even before they are enforced. In fact, the power of *abstract review* differentiates constitutional; courts from other ordinary litigation courts.

<sup>70</sup> AIR 1980 SC 1789.

<sup>71</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 TWLS 107, 119 (1985).

<sup>72</sup> *Id.*

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<sup>73</sup> Amanullah, *Constitutional Jurisdiction of Public Interest Litigation Assuring Access to Justice in India*, 55 J. RES. SOC. P. 1, 2 (2018).

<sup>74</sup> *Id.*, at 3.

<sup>75</sup> *Ashwani Kumar v. Union of India & Ors*, Writ Petition (C) No. 193 OF 2016 (India).

<sup>76</sup> Sec. 19, MWPSA Act.

<sup>77</sup> Sec. 20, MWPSA Act.

<sup>78</sup> Sec. 21, MWPSA Act.

<sup>79</sup> Sec. 30 of the MWPSA Act empowers the Central government to issue necessary directions to the states for the implementation of the provisions of the Act.

age programmes and schemes, including the ones relating to income security. Apart from the interventions of the Indian Supreme Court in elderly matters, the respective High Courts had also invoked their supervisory jurisdictions to revamp the elderly care and support framework. For example, in *Sunny Paul v. NCT of Delhi*,<sup>80</sup> the Delhi High Court had observed that elderly parents have the right to evict their adult children from property if the children are abusive. Similarly, in *Dattatrey Shivaji Mane v. Lilabai Shivaji Mane*,<sup>81</sup> the Bombay High Court had upheld the right of a senior citizen to dispossess her abusive son from the tenement that she owned. In the said case, the Court had defended the eviction order passed by the Maintenance Tribunal by virtue of its powers stipulated under Section 4 of the MWPSA Act. The court decisions attest beyond any reasonable doubt that constitutional courts play the roles of guardians by ensuring the effective implementation of rights, including elderly rights.

The saga of judicial populism and judicial democracy that the Supreme Court of India had adopted in the post-emergency period is continuing and the constitutional courts have

become the last resort for the underprivileged and oppressed persons and social groups.<sup>82</sup> They can now intervene in matters wherein administrative high-handedness, lawlessness and repression bring miseries to such underprivileged and oppressed persons and groups.<sup>83</sup> By virtue of judicial review and epistolary jurisdiction, they have liberalized the *locus standi* rule and have promoted social action litigation, which is both judge-induced and judge-led.<sup>84</sup> Last but not the least, they have started taking sufferings (of common people) seriously,<sup>85</sup> indicating that the plight of the elderly individuals is being addressed (*albeit* on a lesser scale) gradually. Overall, by virtue of their autonomy and sovereign nature, these courts have started shedding passivity in addressing the issues of violations of elderly rights or the ineffective implementation of the elderly laws and policies. They are seemingly not embracing a high deferential standard because too much deference may frustrate the core purpose of dispensation of socioeconomic justice and may embolden the legislative and administrative apparatus to use their discretionary powers in an unrestrained manner.<sup>86</sup>

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Sec. 31 further empowers the Central government to conduct periodic reviews and to monitor the effective application of the Act.

<sup>80</sup> *Sunny Paul & Anr. v. State NCT of Delhi and Ors.*, 2017 SCC OnLine Del 7451 (India).

<sup>81</sup> *Dattatrey Shivaji Mane v. Lilabai Shivaji Mane & Ors.*, W.P. NO.10611/2018. (India).

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<sup>82</sup> Baxi, *supra* note 71, at 107.

<sup>83</sup> *Id.*, at 108.

<sup>84</sup> *Id.*, at 111.

<sup>85</sup> *Id.*, at 132.

<sup>86</sup> Popelier, *supra* note 60, at 257.

#### IV. Conclusion

Shockingly, regardless of the contribution of the older individuals in promoting development and in supporting the consolidation of traditional knowledge systems, they do not get due regard and consideration, and their privileges and freedoms are to a great extent unprotected. They become victims of social injustice and are subjected to discrimination, which is generally the outcome of an intricate process wherein a person, a group, or a category of people is/are differentiated on assumed/real characteristics or/and specific beliefs.<sup>87</sup> The appalling conditions of the aged persons in India bear testimony to India's inability to abide by the *respect-protect-fulfil* requirement mandated under International Human Rights laws. At the municipal level, the NHRC and the State Commissions have also not done too much to protect and promote the elderly rights framework in India. Overall, despite the formal complaint registration procedure mandated under various human rights instruments and the respective additional protocols that empower the municipal constitutional courts to create laws and standards (keeping in background the requirement of inclusive growth and development) for the effective

implementation of the rights framework,<sup>88</sup> constitutional courts in India have certainly fallen short of enforcing human rights obligations. This is despite the fact that no privative clause (clauses in a legislation that disempower superior courts to review the legality of administrative actions) may affect the inherent powers of the courts to exercise their supervisory jurisdiction and to adopt a purposive interpretation to (in)validate the *reasonableness simpliciter* of legislative and administrative actions.

The underlying argument of the present essay is that the implementation, execution and monitoring framework *vis-à-vis* elderly laws and policies in India is weak and that there is an imminent need to restore the framework through the purposive role of constitutional courts. The decision of the Apex Court in *Ashwani Kumar's case*<sup>89</sup> is sufficient evidence that in the absence of strong normative safeguards, the purposive role of constitutional courts in creating norms is the most crucial requirement. Their powers of norm creation (especially when there is a conspicuous dearth of constitutional or statutory law) and of intervention<sup>90</sup> are plenary.

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<sup>88</sup> Welch, *supra* note 5, at 100.

<sup>89</sup> *Supra*, note 75.

<sup>90</sup> If a certain provision (constitutional or statutory) suffers from manifest arbitrariness or if the rule-making or rule-adjudicatory bodies fail to ensure justice or if administrative rule-making bodies fail to exercise discretion, constitutional courts can intervene.

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<sup>87</sup> Wim JA van den Heuvel, *Discrimination against Older People*, 22 REV. CLIN. GERONTOL. 293, 294 (2012).

While constitutional courts in India have started taking human sufferings seriously and have pledged to address state tyranny and state-induced injustices,<sup>91</sup> they are still to tread on a truly activist path. Therefore, it is ripe time that they invoke their review and epistolary jurisdictions to ensure effective implementation, execution and monitoring of elderly rights at the municipal level. Human rights laws are *emanation*<sup>92</sup> of judicial activism, and only a predominantly active judiciary may address the multifarious issues facing the elderly population in India. Concludingly, it may be said that the role of constitutional courts both as *positive and negative legislators*<sup>93</sup> would probably go a long way in augmenting the elderly rights jurisprudence in India not only through annulment of laws that frustrate the holistic rubric of the constitution but also through the progressive creation and effectuation of new norms.

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<sup>91</sup> *Supra* note 71, at 132.

<sup>92</sup> Amartish Kaur, *Protection of Human Rights in India: A Review*, 2 JAMIA L. J. 22, 25 (2017).

<sup>93</sup> Sweet, *supra* note 56 at 819.