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HUMAN RIGHTS OF ELDERLY PEOPLE IN INDIA

Gurpreet Pannu*

1. Introduction

The elderly people represent a distinct class in themselves. They are a treasure of knowledge, experience and historical perspective, but they are frequently neglected and almost wished away by younger generations as a source of stress on society. Senior citizens[1] do not comprise a homogeneous class, with distinctions on basis of difference in age between them, their level of mental and physical attentiveness and their capacity to work. According to the definition, 'elderly' is someone whose age is of 60 years or above.[2] As according World Population Ageing 2019, by 2050, one out of every six individuals on the world will be beyond the age of 65. Globally, 703 million people are there over 65 years age in 2019. Eastern and South Eastern Asia have the world's highest proportion of elderly people.[3] Life expectancy has increased significantly throughout time as science has progressed. India is home to 1/8th of total older people in the world. As a result, around 8% of the population is over the age of 60 years. Kerala has the highest percentage of individuals who are above the age of 60 years, accounting for 12.55 percent of the state's population. Females exceed males in the over sixty years age group, with 5,27,77,168 females compared to 5,10,71,872 males according to the 2011 Census.[4]

2. Problems of Elderly People

Elder people suffer a variety of problems that are specific to them, including financial, mental, social and physical. Economic difficulties could arise as a result of job loss, which would result in a loss of income and economic uncertainty. Health and medical issues are examples of physical issues. Lack of familial support and social maladjustments could be the source of social issues. Another big concern for the elderly is security. The situation is exacerbated by the breakdown of the joint family system, which leaves an increasing number of older people on

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1 The person above the age of 60 years are referred to as 'senior citizens' and the terms 'older persons', 'elder persons' are used synonymously.

2 National Policy on Older Persons, 1999, Government of India.

3 *World Populating Ageing 2019:* Highlights United Nations Department of Economic and Social Affairs, Population Division at pp. 5.

4 Census of India, 2011, Registrar General and Census Commissioner, India, Ministry of Home Affairs, 2013.

their own. There is a movement of productive family members in urban areas from rural locations. As a result, elderly humans and women in rural areas confront increased challenges. Following are main problems of elderly persons:

2.1 Economic Problems

The older population is facing financial difficulties. Females have a high level of economic dependency. The necessities of elderly force them to work and earn their livelihood. There is a scarcity of social security to help the elderly. Even government policies and regulations are ineffective in ensuring security. The National Sample Survey Report, 2007-08 demonstrates that older persons often take loans to pay their medical expenses.[5]

2.2 Health Problems

Chronic illnesses such as heart disease, cancer, arthritis, hypertension, diabetes, kidney disease, eyesight loss, and memory loss are common among the elderly. Elderly people who are in good health are treated with respect. Elderly people in poor health are treated as a liability and a burden. They are sometimes abused as a result of their poor health. The emergence of the nuclear family results in the elderly being victimised. Social isolation, loneliness, and withdrawal from society can all have serious impacts for one's mental health. Psychological illnesses such as dementia, depression, and delirium are common among the elderly.

2.3 Social Problems

Social isolation is a problem for the elderly. Their freedom of movement is restricted. They seem to be unable to visit anywhere and family members do not spend time with older family members. Isolation like this can lead to depression and other issues. The elderly are the ones who suffer the most in a society where cleanliness, infrastructure, and health care are inadequate. According to the Age Well Foundation's "Human Rights of Elderly in India Survey," which was conducted in collaboration with ECOSOC in 2015, the elderly in India face issues such as a lack of profitable employment chances, deteriorating health, loss of regard in family/society, feelings of hopelessness, mental issues and financial difficulties, legal issues and inter-personal issues.[6] The main findings are as follows:

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[5] Government of India, Ministry of Statistics and Programme Implementation, '*available at*' *http://www.mospi.nic.in* (last accessed on 1 February, 2020).

[6] *'Available at' www.agewellfoundation.org* (last accessed on 3 March, 2020).

- In India, the elderly people have no medical care system near them and must rely on community/family care to assist them.
- Older women are perceived to have less time for leisure and recreation than males and have fewer opportunities to live a retired life.
- Elderly people in urban regions face more emotional care and abuse than those in rural areas.
- There are numerous economic difficulties in addition to the social, physiological, and psychological issues.[7]

3. International Efforts to Protect Elderly People

The United Nations has always demonstrated that it is concerned not just with the quality of human life, but also with human lifespan. The United Nations is committed to assisting countries that are confronting problems in meeting the needs of elderly people while also maximising their development contributions. The issue of ageing was first discussed at the United Nations in 1948, at Argentina's request. Malta raised the matter once more in 1969. In the year 1971, the Secretary-General on the request of United Nations General Assembly prepared a thorough report on the aged, as well as recommendations for international and national action. The United Nations General Assembly decided in 1978 to host a World Conference on Aging. As result in the year 1982, International Plan of Action approved from the World Assembly on Aging held in Vienna. The Plan included 62 suggestions for action in various sectors comprising nutrition and health, senior consumer protection, family, income security, employment, environment, education and housing. Following that, Assembly urged countries to keep on putting its principles and suggestions into practice. The Secretary General on the request of Assembly keep working to make sure that the Plan's follow-up actions are carried out efficiently.[8]

October 1 of every year was recognised as the International Day for the Elderly by the United Nations General Assembly in 1990 and was later renamed the International Day for Older Persons. In April 2002, the World Assembly on Ageing II was conducted in Madrid. It endorsed the Madrid International Plan of Action on Ageing, 2002, as well as a Political Declaration emphasizing the critical need of including ageing issues in all development strategies. Older people were given

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7 *Ibid.*

8 Dr. H.O. Agarwal, *International Law and Human Rights,* pp. 888-89, Central Law Publications, Allahabad, 2016.

three priorities in the Plan of Action: elderly people and development, increasing well-being and health in old life and enabling a supportive environment.[9]

The first priority that is elderly people and development, focus on eight concerns, including the need for immediate steps to make sure the continued elderly people's inclusion and empowerment, allowing for fully engage in labour force, development and society. Governments should make endeavour to prioritise incorporating senior citizen in decision-making, establishing job possibilities for such individuals who want to do work and improve rural living standards and infrastructure. They should also make endeavour to reduce poverty especially in rural regions, unite older migrants into new communities, and provide equal educational and training opportunities.

Governments should limit the effects of factors that increase sickness and reliance in older period, implement policies to prevent poor health, and ensure access to food and proper nutrition under the second objective of improving health and well-being into old life. The needs and views of elderly people should be incorporated into health policy development.

The third priority, assuring, enabling, and supportive environment, suggested proposals for improving older people's housing and living environments, promoting a positive perspective of ageing and increasing public awareness of older people's significant contributions. It also called for the availability of accessible and cheap transportation for older people, as well as a continuum of care and service for them and support for their caregiver role. Till stated that mainstreaming ageing and older people's concerns into national development frameworks, alleviating poverty and policies would be a critical first step toward implementation.[10]

3.1 Principles

On December 16, 1991, Eighteen Principles were adopted by the United Nations General Assembly which are classified into 5 clusters, that are Older people's dignity, freedom, engagement, care, and self-fulfillment,[11] which are as:

1) Older people should be able to work and choose when they wish to quit the workforce.

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9 Second World Assembly on Ageing, 2002/United Nation Ageing, ' *available at*' *http://www.un.org* (last accessed on 22 January, 2020).

10 *Supra* note 9 at 889.

11 Dr. Shashi Nath Mandal, "Protection of Rights of Old age Person in India: A Challenging Facet of Human Rights", *Global Journal of Human Social Science,* Vol. 11, No. 5, August 2011, pp. 23 -32.

2) Elderly people should remain active participants in society and actively participate in the development of policies that influence their well-being.

3) Older people should also have access to care of their health in order to maintain their physical, mental, and emotional health.

4) Older people should be able to seek out options that allow them to fulfil their full potential including cultural, recreational resources, spiritual, educational.

5) Elderly people should be able to live in dignity and security, free of exploitation and physical and mental abuse.[12]

4. Legal Protection to Elderly People in India

Legal protection has been provided to elderly people in India. The details given below:

4.1 Constitutional Protection

Physical and mental issues become an everyday occurrence for elderly persons as they age. They are unable to work and earn a living as a result of their illnesses, making them reliant on others. Our Constitutional framers incorporated some measures on this subject under Part IV of the Constitution, titled Directive Principles of State Policy, in order to defend the interests of the country's most important assets, the elderly. Furthermore, the judiciary interprets the rights of the aged as a component of article 21 of the Constitution, despite the fact that they are not officially listed as a Fundamental Right. Article 38(1) provides that the state to seek to improve people's well-being through establishing and protecting a social order in which all institutions of national life are governed by social, economic, and political justice as effectively as possible. In particular, the state must work to reduce disparities in status, resources and opportunities. Article 39(e) mandates the state to ensure that the strength and health of employees, men and women and children of specified age are not exploited and that citizens are not compelled to engage in occupations that are inappropriate to their areas of strength due to economic need.

To achieve these objectives, the state gives pensions to former employees as a monetary benefit so that they can live a meaningful and dignified life. Article 21 of the Indian Constitution guarantees every individual's right to life and personal liberty. This has been construed to comprise the right to live in dignity, which would include the right of senior citizens to live in dignity. Article 41 of Constitution states that the state must make appropriate efficient provisions for safeguarding the right to labour,

[12] *Ibid.*

education, and public assistance, as well as providing protection in circumstances of unemployment, old age, disease, and disablement, within the limitations of economic capability and development etc. Article 46 also establishes a positive duty on the state to improve the economic interests of the weaker class of the population with special care and to safeguard them from social injustice and exploitation in all forms. These principles are included in the directive principles, which, while not enforceable in a court of law, impose positive obligations on the state and are significant to the governance of the country.

The State List[13] and Concurrent List[14] in the Constitution's Seventh Schedule deal with old age pensions, social insurance and social security as well as social and economic planning. The Concurrent List's Entry 24 addresses labour welfare, including working conditions, provident funds, obligation for workers' compensation, invalidity and old age pensions, and maternity benefits. As a result, there are multiple constitutional references to old age. The State is required under the Constitution to safeguard the elderly.

4.2 The Code of Criminal Procedure, 1973

It allows a father or mother who is unable to support himself or herself to seek support from his or her major son or daughter if they ignore or deny to maintain their parents. This is a secular law that applies to all people irrespective of their religion. If the order is passed against the person who fails to pay the amount of maintenance without reasonable cause, proceedings of execution can be initiated and a warrant may be issued by the court imposing fine for the breach of the order as well as such individual may be imprisoned.[15]

4.3 The Protection of Women from Domestic Violence Act, 2005

Females of all ages are protected by this Act. A mother, grandmother, widow aunt, unmarried aged sister, daughter or any female member of the family may file a petition for maintenance against her son/male family member. If she is the victim of domestic violence, she is entitled to a number of reliefs under the Act.

4.4 The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

This Act was enacted in response to the necessity to protect senior citizens' rights while also furthering constitutional ideals. The terms 'Parent' and 'Senior Citizen' are defined

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13 The *Constitution of India*, 1950, entry 9, list II.
14 *Id.,* entry 20, 23 and 24 of list III.
15 The *Code of Criminal Procedure*, 1973, ss. 125-128.

under this Act, (a) 'Parent' is defined as a biological, adoptive, or stepfather or stepmother; and (b) 'Senior Citizen' is defined as a person who has completed the age of 60 years or above. According to provisions of the Act, a parent or grandparent may seek maintenance from one or more of his or her children, i.e., son, daughter, grandson, or granddaughter, who are not minors; and a childless senior citizen may seek maintenance from a relative, i.e., legal heir, who has possession of or will inherit his property after he dies. The Act also provided for the establishment of one or more Tribunals for each sub-division to adjudicate and decide on maintenance orders, as well as the establishment of an Appellate Tribunal for each district to hear appeals against the Tribunal's decisions. Pertinently, the right to get maintenance is enforceable against a transferee of a parent's or senior citizen's property if the transferee has been given notice of the right or if the transfer is gratuitous, but it is not enforceable against a transferee who has been given consideration and has not been given notice of the right. When a senior citizen transfers property by gift or otherwise, if the transferee agrees to provide the transferor with basic amenities and bodily necessities, and the transferee refuses or fails to do so, the Tribunal may declare the transfer void at the transferor's discretion. Another significant feature of the Act is that leaving a senior citizen by anyone responsible for their care or protection is a punishable offence by up to three months in prison or a fine of up to Rs.5000/- or both. This is a significant provision for preserving senior citizens' lives and their properties as well as preventing them from being abandoned in such locations where they cannot be found. Other significant features of the Act are discussed as follows:

- For the emergence of Old Age Homes for those senior citizens who are indigent i.e., senior citizens who do not have sufficient means;
- For Government of State, it is to ensure that Government run hospitals or those hospitals funded entirely or partially by the Government provide beds for all senior citizens;
- For the State Government, it is also to ensure separate queues for senior citizens are arranged and that facilities for the treatment of chronic, terminal illnesses are available for senior citizens.
- The state government provides services for the treatment of chronic, terminal, and degenerative illnesses.

4.5 The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019

The Union Cabinet has approved a proposed Bill to amend the 2007 Act, which is

likely to be introduced in both upper and lower house of Parliament. “With the gradual breakdown of the joint family system, the number of cases of neglect, crime, exploitation, and abandonment of parents and elderly citizens is on the increase,” according to the Bill's justifications. If sons-in-law and daughters-in-law fail to care for their elderly in-laws and pay monthly maintenance, the Bill recommends that they be charged. It also allows for the removal of the Rs. 10,000 maximum maintenance cap. Those with higher incomes will have to pay more in child support to their parents. Some new features have been added in this Bill, which include:

- Priority given to applications/complaints involving neglect by child or nonpayment of support by senior citizens over the age of 80.
- All senior citizens homes shall register with the appropriate authorities and meet the basic requirements for such homes.
- To address the problems of senior citizens, nodal officers for senior citizens would be assigned to each police station or district-level special police unit.
- In every state, a senior citizens' helpline number is available.
- The definition of 'maintenance' has been expanded to encompass the parents' safety and security in addition to their food, clothing, shelter, and health-care requirements.

5. Schemes for Elderly People in India

The Central Government creates numerous schemes for citizens from time to time. The National Policy relating to Senior Citizens focused on older citizens, particularly older women and improving the principle of 'ageing in place' or ageing in one's own home, income security, homecare and housing services, old age pension and access to schemes relating to health-care insurance, as well as other programmes and services to facilitate and sustain dignity in old age, among other things. The major Schemes for elderly people are discussed as follows:

5.1 Integrated Programme for Older Persons

Since 1992, the Ministry of Social Justice and Empowerment has been implementing a Central Sector Scheme of Integrated Programme for Older Persons (IPOP) with the goal of improving the quality of life of the elderly population by providing basic necessities such as shelter, medical care, food and recreational opportunities, as well as encouraging productive and active ageing. This Scheme

provides monetary assistance to Panchayati Raj Institutions, Non-Governmental/Voluntary Organisations, and others for the maintenance of Old Age Homes, Respite Care Homes and Continuous Care Homes, Mobile Medicare Units, Day Care Centers for Alzheimer's disease/Dementia patients, Multi-Service Centers, physiotherapy clinics for the elderly and other facilities. Non-Governmental/Voluntary Organizations (NGOs) implement programme.[16]

5.2 Indira Gandhi National Old Age Pension Scheme

This Scheme provides old age pension which is a component of the Ministry of Rural This Scheme provides old age pension which is a component of the Ministry of Rural Development's National Social Assistance Program (NSAP). Under IGNOAPS, Rs. 200/- per month in form of central assistance is given to people aged 60 years to 79 years of age and Rs. 500/- per month is provided to people aged 80 years or above and also to those who are below the poverty line (BPL) household according to Government of India criteria. Under this scheme, each state and union territory has been asked to contribute at least the same amount.[17]

5.3 Programme for Health Care of the Elderly

During the 11th Plan period, the Ministry of Health and Family Welfare launched the National Programme for Health Care of the Elderly (NPHCE) to address various problems relating to health of elderly people, taking into account suggestions made in the National Policy on Older Persons, 1999, as well as the State's obligations under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. The major objective of NPHCE is to provide committed care of health to the aged through the State Public Health Delivery System at the primary, secondary and tertiary levels, as well as outreach services. The major components of this Programme, launched in 2010 - 11, are as follows:

- A primary healthcare strategy rooted in the community;
- Strengthening of health services for elderly persons at District Hospitals, Community Health Centers, Primary Health Centers, and Sub-Centers;
- 100 District Hospitals have dedicated facilities for the aged, including ten-bed units;

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16 Ministry of Social Justice and Empowerment, '*available at' http://www.socialjustice.nic.in* (last accessed on 19 January, 2020).

17 Press Information Bureau, Government of India, Ministry of Social Justice and Empowerment.

- Strengthening eight regional medical institutes to provide specialised tertiary medical care treatment for the aged, with 30 bed wards, as well as the establishment of postgraduate courses in geriatric medicine and in-service training for healthcare staff.

At present, this programme covers 104 districts throughout 24 states and union territories.[18]

5.4 Financial Incentives

Under the provisions of Income Tax Act of 1961, a senior citizen (that is an individual, resident in India, who attained the age of 60 years or more at any time during the relevant previous years) may receive a number of benefits. A few of these incentives are listed below:

- If a senior citizen's total income exceeds Rs. 3 lakhs, he is subject to income tax, as compared to the Rs. 2.5 lakh exemption limit for other citizens. In case of senior citizen who is 80 years of age or more at any time during the relevant previous years, such person is exempted for income tax upto income of Rs. 5 lakhs, but if the total income exceeds Rs. 5 lakhs, such senior citizen who is 80 years old or more, liable to income tax.
- Under section 80C of the Income Tax Act, any amount deposited in an account under the Senior Citizens Savings Scheme Rules, 2004 is eligible for a deduction up to Rs. 1.5 lakh.
- Section 80D of the Income Tax Act permits a deduction of Rs.20,000/- (Rs.15,000/- in other cases) for premiums paid to effect or keep in force a health insurance on the health of a senior citizen.
- In the case of a senior citizen, section 80DDB of the Income Tax Act allows a deduction of Rs.60,000/- (Rs.40,000/- in other situations) on the amount of expenditure actually made for the treatment of specified illnesses.
- In the instance of a senior citizen who supplies to the deductor a declaration to the effect that the tax on his expected total income for the relevant prior year will be nil, no deduction of tax at source is needed under section 193, 194, 194A, 194EE, or 194K of the Income Tax Act.
- Activities pertaining to the improvement of skill development or educational programmes in connection to persons over the age of 65 who reside in a

[18] National Programme for Health Care of the Elderly by Ministry of Health and Family Welfare, '*available at*' *http://www.india.gov.in* (last accessed on 20 January, 2020).

rural region by an entity registered under section 12AA of the Income Tax Act, 1961 are exempted from service tax under the Service Tax law. [19]

5.5 Incentives by the Ministry of Railways

- According to the rules, male senior citizens of at least 60 years of age and female senior citizens of at least 58 years of age are entitled to a discount on the base rates of all classes of the Mail/Express/Rajdhani/Shatabdi/Jan Shatabdi/Duronto group of trains. It provides a 40% discount for males and a 50% discount for women. At the time of purchase, no proof of age is necessary. They are, however, obliged to carry documentary verification of their age or date of birth, which they must give if asked by on-board ticket checking employees. Senior citizens can make reservations at both reservation counters and on the internet.
- Even if no choice is offered, the computerized Passenger Reservation System (PRS) has a provision to automatically assign lower berths to senior citizens and female passengers 45 years and older, subject to availability of accommodation at the time of booking.
- Senior citizens, female passengers aged 45 and older, and pregnant women traveling alone have a combined quota of two lower births per coach in sleeper, A/C 3 tier, and A/C 2 tier classes on all trains with reserved accommodation.
- Senior persons are also accommodated by Central and Western Railways at specific hours on suburban sections.
- Wheelchairs are available at stations, according to instructions. As is customary, this service is provided, escorted by coolies, for a fee. Furthermore, Zonal Railways have been urged to provide complimentary battery vehicles at train stations for disabled and elderly passengers.[20]

5.6 Advisory by the Ministry of Home Affairs

The Ministry of Home Affairs issued two detailed advisories to all State Governments/UTs, suggesting them to take steps to ensure security and safety, as well as to eliminate all forms of abuse, neglect, and violence against the elderly, through approaches such as identification of older people, sensitisation of police

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[19] Senior Citizens-Income tax, '*available at*' *http://www.incometaxindia.gov.in* (last accessed on 21 January, 2020).

[20] Senior Citizens, '*available at*' *http://www.india.gov.in* (last accessed on 25 January, 2020).

personnel regarding the security and safety of the elderly, regular visits of beat staff, and the establishment of helpline number of senior citizen among others.[21]

5.7 Incentives by the Ministry of Civil Aviation

All stakeholders have been asked to guarantee that the following requirements are met in order to assist passengers, particularly senior citizens:

- At all airports with annual aircraft movements of 50,000 or more, the airline/airport operator will provide free automated buggies in the terminal building for all senior citizens to enable their access to boarding gates placed beyond reasonable walking distance. On demand, this facility may be expanded to other needy passengers at free of cost.
- Following the security check, airport operators must provide small trolleys for the carriage of handbags (as permitted by rule) up to the boarding gate.
- Senior citizens can also get a 50% discount on Air India's highest economy class Basic Fare. The discount offered to those persons who has attained 63 years of age on the date of commencement of journey.
- Elderly citizens can also take advantage of multi-level fares offered by Air India on each sector for domestic travel, starting at a low-level advance purchase fares that facilitate early selling and ending at the highest level.[22]

5.8 NALSA (Legal Services to Senior Citizens) Scheme, 2016

Under this Scheme, [23] the persons are above the age of 60 years regarded as senior citizens. The main aim of this Scheme is discussed hereunder:

- It outlines the basic rights and benefits which senior citizens should be entitled to;
- To improve legal aid and representation for senior citizens at the national, state, district, and taluka levels;
- To ensure that senior citizens have access to various government schemes and programs;

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[21] Advisory on Protection of Life and Property of Senior Citizens, '*available at' http://www.mha.gov.in* (last accessed on 25 January, 2020).

[22] The information was given by the Minister of State for Social Justice and Empowerment, Shri Vijay Sampla in a written reply in the Rajya Sabha.

[23] NALSA (Legal Services to Senior Citizens) Scheme, 2016, 'available at' *http://www.Nalsa.gov.in*. (last accessed on 21 January, 2020).

- Old age homes for senior citizens have been built by institutions and authorities such as Tribunals and Appellate Tribunals under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007;
- Through the District Legal Service Authority, Taluka Legal Committees, panel lawyers, paralegal volunteers, students, and legal service clinics, raise awareness of older persons' rights and entitlements under various laws and government schemes and programmes;
- To organise training, orientation, and sensitization programmes for panel lawyers, paralegal volunteers, volunteers in legal services clinics, government officers tasked with the execution of various schemes, service providers, police personnel, and non-governmental organisations at all levels; and
- To do research and documentation in order to examine various schemes, laws, and other documents in order to identify gaps, needs, and provide recommendations to appropriate authorities. The aim of the Scheme is to make sure that older persons live in dignity and have access to all benefits and services that they are entitled to.[24]

5.9 India Union Budget, 2019

In the 2019 Union Budget, the Union Government announced the Pradhan Mantri Shram Yogi Maandhan pension scheme for workers in the unorganised sector. Workers in the unorganised sector will receive a monthly pension of Rs. 3000 after reaching the age of 60 years under this scheme. This Scheme is for the benefit of senior citizens as well as women around the country.[25]

6. Role of Judiciary in Protecting the Rights of Senior Citizens

The Indian Judiciary performs a significant function as the guardian of the Constitution and the fundamental rights afforded to all citizens of the country. The rule of law is the main basis of democracy and the judiciary bears major responsibility for its implementation.[26] It is within the scope of judicial review to make sure that democracy is inclusive and that everyone who wields or uses public power is held accountable.

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[24] *Ibid.*

[25] Budget 2019: How senior citizens, women will get benefited?, '*available at*' *http://www.financialexpress.com* (last accessed on 22 January, 2020).

[26] Dr. Justice A.S. Anand and Justice N.D. Krishna Rao, *Memorial Lecture on Protection of Human Rights — Judicial Obligation or Judicial Activism*, 1997 (7) SCJ 11.

The first step in extending the scope of human rights in India was to widen the concept of locus standi to embrace any public-spirited citizen, hence promoting the emergence of Public Interest Litigation. The horizon of writ jurisdiction has also been broadened in order to protect fundamental human rights and human dignity.

In *Yogesh Sadhwani* v. *Commissioner of Police*[27] case, public interest litigation was filed on behalf of Mrs. Jayashree Gholkar. This case revealed a complete failure of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 to be carried out. The State Government was ordered by the Court to file an affidavit detailing the efforts taken.:

i. To appoint tribunal in accordance with section 7.
ii. Designate a maintenance officer as mentioned in section 18.
iii. For the purpose of establishing old age homes under section 19.
iv. To provide medical assistance to the senior citizens as prescribed under section 20.
v. Publicity, awareness and other activities related to senior citizen welfare under section 21.

This case is an instance of court intervention to put the executive's efficacy in dealing with the elderly into question.

In another case, *Santosh Surendra Patil* v. *Surendra Narasgopnda Patil*,[28] the litigating parties were parents and their sons. The respondent was the petitioners' son and he was appealing against the order of vacation of the petitioners' home premises, which he owned and constructed. The Court then went on to address why the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, was needed. The moral obligation to care for one's parents was crystallised as a legal responsibility through this Act, according to the Court. The state also assumes responsibility for the care of senior citizens and elderly infirm parents. The Court maintained the eviction order because it is admissible under section 23 of the Act of 2007.

In *People's Union of Civil Liberties* v. *Union of India*,[29] the Court issued multiple directions touching various programmes as part of interim measures. The decree was issued specifically for older people, instructing states to identify beneficiaries and

[27] 2015 SCC Online Bom 959.
[28] 2017 SCC OnLine Bom 3053.
[29] 2007 (1) SCC 728.

provide payments under the National Old Age Pension Scheme. By the 7th of each month, such payments were to be made on time.

A writ petition was filed in *H. Mariyam Beevi* v. *The Secretary to Government, Government of Tamil Nadu, Social Welfare and Nutritious Meals Scheme Department*,[30] challenging an order passed by the Special Tehsildar of Social Security Scheme. The petitioner was intimated that her claim for an old-age pension would only be considered if her name was placed on a list of people living below poverty. According to the Muslim Personal Law applicable to the petitioner, the son-in-law has no obligation to support his mother-in-law and her elder daughter, who had undergone an operation and spent huge expenses. As a result, the impugned order was reversed, and the respondents were ordered to pay old age pensions under the Indira Gandhi National Old Age Pension Scheme.

In another case, *H.S. Subramanya* v. *H.S. Lakshmi*,[31] the petitioners questioned the legitimacy of the judgement directing the petitioners and the 3rd respondent to pay support to the mother under section 9 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. The first respondent was a widow whose husband had made a will naming his children as beneficiaries of his estate. A provision was established in the will for her to be paid maintenance, and each of her sons was to pay her a certain sum. The petitioners asserted that they paid their mother monthly maintenance on a regular basis, however the third respondent did not. The third respondent allegedly pocketed the maintenance money sent to their mother, causing the petitioners to discontinue paying maintenance. The Tribunal ordered all of the sons to pay Rs. 3,000/- per month to their mother in form of maintenance who is unable to maintain herself.

In another judgment,[32] The fundamental right of every senior citizen to live in dignity has been recognised by the Uttrakhand High Court. The Court also issued required guidelines for the development and maintenance of old age homes in India. In another case of *Dattatrey Shivaji Mane* v. *Lilabai Shivaji Mane & ors.*,[33] While considering the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, the Bombay High Court allowed senior citizens, including parents, who are should apply for such relief if they are unable to support themselves out of their earnings and

30 W.P. No. 22122 of 2010.
31 ILR 2014 Karnataka 4978.
32 *Senior Citizen Welfare Organisation and &r.* v. *State of Uttrakhand & Anr*, W.P. No. 52 of 2013 (decided on 12 June, 2018).
33 W.P. No. 10611 of 2018.

property and are unable to live a normal life, that is eviction under section 4 of the Act, not only against their children but also against their grandchildren.

7. Conclusion and Suggestions

Elderly people are a wonderful resource for our country. We may gain a lot from their life experiences and maturity. It is alarming to learn that there are numerous incidents of elderly persons being neglected or abused. They feel isolated and alone, especially widowed older ladies who live alone. The rights of old individuals cannot be enforced simply by adopting laws. Society must play a part in reducing the trauma experienced by senior citizens. Children should sympathies with their parents since they, too, will get elderly and helpless at some point. History repeats itself, and the wounds caused on one's parents may have unintended consequences. The crimes done by their parents are generally witnessed by their grandchildren. We should appreciate the older generations since they are a benefit to the community. Schools and universities should conduct field visits to senior citizen homes so that students understand their responsibilities to the elderly. In the family and in society, we should offer children with emotional security. They sacrificed their beautiful years in the service of India's future people, and we owe them our undying love and admiration. We must take responsibility for our societal responsibilities and work to fulfil them.

Besides from that, there are some particular recommendations for improving the situation of the old age people in society which are discussed as under:

- In every district, senior citizens cells with specially trained police personnel should be established.
- There should be an aged helpline where the elderly can report their difficulties so that they can be effectively addressed. A follow -up monitoring system should also be in place.
- Every police station should get training to familiarise officers with the requirements of senior citizens.
- As preventive measure, the government should organise awareness initiatives with the support of NGOs, not only among elders or police officers, but also among children and the younger generation.

E-WASTE DISPOSAL SYSTEMS IN INDIA VIS -À-VIS HUMAN RIGHTS VIOLATIONS

Pushpinder Kaur*
Dolly Singh **

1. Introduction

Rapid innovations in information and communication technology have increased the quantum of electrical and electronic equipment (EEE) in the global market. At the same time, there is a high rate of obsolescence of EEE forcing consumers to buy EEE with updated features. Such a scenario in the global market of rapid purchase and obsolescence of EEE has intensified the growth of e-waste. India is also on move towards digitalisation where both consumption and obsolescence of EEE has increased to a noticeable extent. The substantial generation of e-waste accompanied by a dismal state of implementation of the regulatory framework for handling and disposal of this hazardous waste has given rise to the informal e-waste recycling sector where e-waste is handled, dismantled and recycled in a crude and rudimentary manner.[1] Handling of e-waste by the persons engaged in the informal sector exposes them to various health hazards. It is also detrimental to the environment as the processes involved in handling and disposal of e-waste lead to the release of toxic gases in the air, pollutants in water and soil.

E-waste is any waste consisting of discarded electronic products (such as computers, televisions, and cell phones).[2] It consists of a wider range of IT equipment such as personal computers, mainframe computers, minicomputers, input devices, output devices, cellular phones, etc. and consumer items such as televisions LEDs, LCDs, washing machines, air conditioners, refrigerators, electrical lamps.[3] Even accessories and attachments like earphones, stabilizers, etc. so long these are sold with EEE are considered as components

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1 Priti Banthia Mahesh, *Report: Time to Reboot II*, THE TOXIC LINK, available at *http://toxicslink.org/?q=content/time-reboot-ii (last accessed on 6 June 2020)*.

2 'E-waste', *The Merriam Webster, available at https://www.merriam- webster.com/dictionary/e-waste (last accessed 9 September 2019)*.

3 *E-Waste Management Rules*, 2016, G.S.R. 472(E) 17 (India).

of EEE which becomes e-waste when discarded by the consumers.[4] It emanates from various sources such as households, government offices, business houses, hospitals, etc. Noteworthy reasons due to which people chose to discard their EEE include impaired working, need for greater functionality and desire to have better technology.[5] It is asserted that there is a decrease in the average life span of EEE due to a factor identified as planned obsolescence.[6] The manufacturers and producers produce goods that get obsolete after a few years. Therefore in totality, it can be gathered that for one or the other reason consumers are compelled to discard their old EEE to buy new updated versions, leading to an increase in the generation of e-waste.

The global figures of the generation of e-waste are even appalling. According to estimates of 2014, United States of America generated 7.1 million tonnes (Mt) of e-waste and became the world's largest producer of e-waste followed by China which generated 6.0 Mt.[7] In the year 2016, India was ranked as the fifth-largest producer of e-waste with 1.85 Mt generated annually.[8] A report by World Economic Forum revealed that in the year 2018 e-waste stream touched the figure of 50 Mt and in all likelihood, it may double if nothing will be done to control this stream of waste.[9] Due to COVID-19 pendemic new trend of holding online classes, e-meetings, work from home has begun in India which has further increased the demand for electronic appliances and is definitely going to add to the magnitude of already growing e-waste. Furthermore, it is estimated that it is likely to reach 52 Mt by 2020 which means that e-waste is growing with an uncontrollable pace.[10] With these figures management of e-waste is becoming a complex, critical and delicate issue that seriously needs to be pondered over.

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4 'Technical Review Committee, Agenda 3: Clarification regarding Implementation of theE-Waste (Management) Rules' (2016) *MOEF, available at http://moef.gov.in/wp-content/uploads/2019/05/56th-final-Minutes_0.pdf* (last accessed 10 September 2019)

5 Kausar Jahan Ara Begum, "E-Waste Management in India: A Review", *IOSR Journal of Humanities and Social Science*, Vol. 10, No. 4, IOSR-JHSS 46, 2013, pp.50-57.

6 *Id*., at p. 5.

7 Michelle Heacock, Carol Bain Kelly, et. al, "E-Waste and Harm to Vulnerable Populations: A Growing Global Problem", *Environmental Health Perspectives*, Vol. 124 , No. 5, 2016, pp 551-555, at p. 550.

8 Saptarshi Dutta, 'E-Waste: Tackling India's Next Big Waste Problem' (2020) *Swachhindia.NDTV, at https://swachhindia.ndtv.com/e-waste-tackling-indias-next-big-waste-problem-6126/* (last accessed 10 June 2020).

9 World Economic Forum, 'A New Circular Vision for Electronics Time for a Global Reboot", *The WWW3.Weforum, at, http://www3.weforum.org/docs/WEF_A_New_Circular_Vision_for_ Electronics.pdf* (last accessed 10 September 2019).

10 'India likely to generate 52 lakh Mt of e-waste by 2020: Study', *The Economic Times, at https://economictimes.indiatimes.com/tech/hardware/india-likely-to-generate-52-lakh-mt-of-e-waste-by-2020 study/printarticle/52569725.cms* (last accessed 10 September 2019).

2. Overview of Existing E-Waste Recycling Industry in India

The majority of the waste is collected and recycled by the informal sector (junk dealers) who have from ages played a key role in the waste management sector. In India, nearly 90 percent of the internationally dumped and domestically generated e-waste is collected by an unorganized sector and recycled in informal markets.[11] Chain of informal sector comprises of informal collectors, middlemen and traders who function in the large competitive network and collect e-waste from industries, offices, educational institutions, households and act as grassroots suppliers of e-waste to the informal recycling industry.[12] The informal sector of e-waste processing encompasses poor recycling techniques such as backyard recycling, dismantling with bare hands, open burning, open-pit acid baths, throwing e-waste sludge at river banks, unsecured landfills, etc.[13] Recycling operations are performed in an uncontrolled environment by unskilled workers without the use of any protective gear. Activities involved in recycling processes are characterised by workers working in unsafe working conditions accompanied by low income and unstable employment.[14] The majority of workers working in this sector are rural migrants, with low literacy levels, deprived of minimum wages with no access to social upliftment schemes or recognition by authorities.[15] Furthermore, women and children are delegated hazardous jobs at the end stage of recycling and get poorly paid for the same. Reports assert that women and children make up to 30 percent of the workforce in the informal e-waste recycling sector.[16] Such a scenario reveals physical, mental and economic exploitation of both women and children.

On one hand, e-waste contains many rare and expensive materials such as platinum, gold, cobalt, aluminium, tin, etc. which can be recovered using formal and better techniques of recycling. On the other side presence of arsenic, mercury, lead, cadmium, flame retardants, chromium beyond certain permissible limits classifies e-waste as hazardous waste. Exposure to the perilous composition of e-waste has a direct impact on human body

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11 Annamalai Jayaprada, "Occupational health hazards related to informal recycling of E-waste in India: An overview", *Indian Journal of Occupational and Environmental Medicine,* Vol. 19, No. 1, 2015, pp. 64-65, at p. 61.

12 Kate Lines, Ben Garside, et. al., 'Report: Clean and inclusive? Recycling e-waste in China and India', *PUBS.IIED, available at https://pubs.iied.org/pdfs/16611IIED.pdf (last accessed 12 June 2020)*.

13 Michelle, *Supra* note 7.

14 Jacob Koshy, 'Nearly 50,000 people make a living out of Seelampur's e-waste', *The Hindu, available at https://www.thehindu.com/scitech/nearly-50000-people-make-a-living-out-of- seelampurs -waste/article29531237.ece#:~:text=In%20nearly%20two%20decades%2C%20Seelampur,being% 20paid%20less%20than%20men* (last accessed on 10 September 2019).

15 Kate, *Supra* note 12.

16 Lucy McAllister, Amanda Magee, et.al, "Women, E-Waste and Technological Solutions to Climate Change", *HHR* , Vol. 16, No. 1, 2014, pp. 170 -178 at p.176.

systems such as the respiratory system,[17] digestive system,[18] endocrine system[19], reproductive system,[20] nervous system, etc. The hazardous nature of e-waste mystifies the issue of management and recycling of e-waste. Recycling rates of e-waste are globally low. Even in the European Union, which is globallyknown for its comprehensive e-waste management regime, out of the total e-waste generated nearly 35 percent is formally collected and recycled and the remaining is undocumented or gets buried in landfills.[21]

3. E-Waste and Human Rights Framework

Human rights are understood as those rights that are inherent by being born as a human being. These are certain entitlements to every person for being human irrespective of his color, race, sex, religion, language, origin, opinion, property, birth, or any other status.[22] Human Rights law exists in the form of international treaties, customary international law and national legislation. It seeks to protect the rights of individuals, communities, sections against actions of the Governments that hamper the enjoyment of human rights. These rights are universal in applicability, inalienable, indivisible, interrelated and are interdependent founded on the principle of the worth of each person and respect for his dignity.[23]

A strong link between improper disposal of e-waste and violations of human rights is visible when commitments of the international community to protect the rights of health, life and sound environment are taken into consideration. Many of the fundamental rights enshrined in international conventions such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), etc. have significant environmental dimensions. India is a party to the number of several international human rights treaties including UDHR, ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR). In pursuance of these treaties, India

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17 'Swedish Environmental Protection Agency, Annotation, Report 6417: Recycling and Disposal of E-Waste-Health Hazards and Environmental Impact', *NATURVARDSVERKET, available at https://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-6417-4.pdf (last accessed 5 September 2019)*.

18 "Eliminating Mercury in Hospitals", *Environmental Best Practices for Health Care Facilities,* 2002*,* pp. 1, 5-13.

19 Tsydenova, O Bengtsson, et.al, "Chemical Hazards Associated with Treatment of waste Electrical and Electronic Equipment", *Waste Management* , Vol. 31, No. 1, 2011, pp. 45, 49-58.

20 Kristen Grant, Fiona F. Goldizen, et.al., "Health Consequences of Exposure to E-Waste: A Systematic Review", *The Lancet Global Health*, Vol. 1, No. 6, 2013, pp.350, 356-361.

21 Great Lakes Electronic Corporation, 'Why Does Europe Have Stronger E-Waste Recycling Than the U.S.?', *EWASTE1, available at https://www.ewaste1.com/why-does-europe-have-stronger-e-waste-recycling-than-the-usa/ (last accessed 10 June 2020)*.

22 Marry Robinson, 'Human Rights: A Basic Handbook for UN Staff', *The OHHCR ,available at https://www.ohchr.org/documents/publications/hrhandbooken.pdf* (last accessed on 10 June 2020).

23 *Id.* at22.

has undertaken a commitment to protect individuals and societies within its jurisdiction by reducing or eliminating, the risks that perilous products or wastes may pose to the complete enjoyment of human rights that includes right to life,[24] right to a healthy and safe working environment,[25] right to the enjoyment of the highest attainable standard of mental and physical health, right to food and safe drinking water[26] and other associated human rights enshrined in UDHR. Besides these India has also ratified many other international environmental conventions, regulating the sound management, handling and disposal of toxic and perilous wastes. These include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,1989, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998 and the Stockholm Convention on Persistent Organic Pollutants,2001. In the year 2017, India also ratified two more fundamental ILO Conventions i.e. Minimum Age Convention for Admission to Employment, 1973 and the Worst Forms of Child Labour Convention, 1999 which mandates states parties to set a minimum age under which no one shall be admitted to employment or work in any occupation, except for light work and artistic performances.[27] It is a commitment to a child labour free society. Article 3(d) of the ILO Convention on the Worst Forms of Child Labor specifies such labor as including "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children"[28].

As these treaties are not self-executing and as such are not enforceable in Indian courts, the human rights enshrined in these have been incorporated in the Constitution of India or domestic legislations. These treaties can also be referred to while interpreting the domestic legislation since there is a well-established principle of international law to interpret the statutes under international law.

Environmental protection has been given constitutional status under the ambit of Article 21, 48A and 51A(g). The Supreme Court of India has broadened "the right to life guaranteed in a civilised society to implies right to the right to food, water, decent

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[24] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 6.

[25] 'Article 7 (b) and Article 10 (3), International Covenant on Economic Social and Cultural Rights', *The OHCHR, available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx* (last accessed 10 June 2020).

[26] 'Article 25, Universal Declaration of Human Rights', *The OHCHR, available at https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf (last accessed 10 June 2020)* .

[27] *International Labour Organization, available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_557295/lang--en/index.htm (last accessed 10 January 2020)*.

[28] *'*C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)', *International Labor Organization, available at http: //www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB: 12100:0::NO::P12100_ILO_CODE:C182* (last accessed 10 June 2020).

environment, education, medical care and shelter."[29] Besides Supreme Court also stated that environmental pollution that deteriorates the atmosphere and thereby affects the life and health of the person has to be regarded as a curse on the enjoyment of Article 21 of the Constitution since a safe and healthy environment represents a necessary precondition for the effective enjoyment of the right to life.[30] Furthermore, India has also developed several legislative enactments, rules and regulations for the protection of the environment. One of the key legislations developed is the Environment Protection Act, 1986 under the umbrella of which several rules, regulations dealing with sound management and disposal of hazardous wastes. Pursuantly Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 were enactedto control the collection, generation, treatment, transportation, storage and handling of hazardous wastes. Later these rules were replaced by the E-Waste (Management and Handling) Rules, 2011which were further replaced by the E-Waste (Management) Rules, 2016. The Rules 2016 are exhaustive and obligates stakeholders involved in the handling of e-waste with obligations to manage and dispose of e-waste in an environmentally sound manner. These Rules have well-defined responsibilities for persons directly or remotely associated with use, handling, transportation, storage, buying, selling, production, recycling, or disposal e-waste. The Rules make producer, manufacturer, bulk consumer, consumer, dealers, e-retailers, refurbisher, collection center, dismantler and recycler responsible for proper channelization for e-waste. Besides for effective implementation of the E-Waste (Management) Rules, the 2016 Central Pollution Control Board has formulated guidelines that are also applicable to all the stakeholders to which these rules apply. Provisions concerning EPR, channelization, transportation, collection centers, and refurbishment environmentally sound manner, dismantling and recycling and random sampling to check RoHS parameters are some of the noteworthy features of e-waste management legal regime.

At the institutional level, Central Pollution Control Board and State Pollution Control Boards/Committees established under the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and The Environment Protection Act, 1986 also exercises powers and performs functions assigned under the E-Waste, Rules, 2016 that includes a duty to grant EPR licenses, set targets of e-waste collection, conduct regular checks and inspections to warrant compliance of responsibilities, prepare an inventory of e-waste, take actions against violations and conduct sensitization programmes.[31]Amidst the legal framework, human rights abuses are

[29] *Chameli Singh & Others* v. *State of Uttar Pradesh* (1999) 2S.C.C 549.
[30] *Subhash Kumar* v. *State of Bihar*, A.I. R 1991 SC 420.
[31] *E-Waste Management Rules*, 2016, G.S.R. 472(E) 17 Schedule IV(1) (India).

taking place in the country in a rampant manner.

4. Informal Recycling Industry and Human Rights Abuses

Environmental conditions are considered as an important factor to determine the extent to which people enjoy their basic rights like the right to health, right to life, adequate food, housing, working conditions, livelihood, culture etc. Therefore it becomes pertinent to take note of those committing crimes against the environment and nature and violating the human rights of millions.[32] E-waste disposal is a problem only if not handled in a formal manner. Its toxic composition has a disastrous impact on human health and the environment. Metals such as arsenic, barium, beryllium, mercury, cadmium, hexavalent chromium, lead, polyvinyl chloride contribute to environmental pollution and cause severe damage to human health. Their toxic compositions spoil the ecology in which human beings live. When e-waste is burnt large amounts of toxicants enter into the environment. Fugitive emission and slag contain several heavy metals. When plastic casings, circuit boards, cables, PVCs are burnt in the open, furans and dioxins of highly toxic nature are released.[33] When e-waste gets dumped in unsecured landfills heavy metals present in it get absorbed by the groundwater especially when in acidic conditions. Dioxins and furans once get into the water; deteriorate the quality of water and are tormenting the quality of the environment.[34]

The dangerous properties of e-waste affect the right to life of the persons handling e-waste in the informal sector. The open burning practices, backyard recycling and other crude ways and means to handle e-waste lead to the release of various toxins such as lead, and other organic pollutants into the environment thereby causing air, water and soil pollution. Polychlorinated Biphenyl (PCB) are extensively used in EEEs and Brominated Flame Retardant (BFRs) are used while processing toxic e-waste. The level of PCBs, BFRs and other hazardous compounds of e-waste at e-waste processing locations in India, China and Ghana are found to be much more than the ambient air quality standards.[35] The informal management practices of e-waste lead to the release of hazardous substances that reach the

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32 Tinashe Madava, "Illicit Dumping of Toxic Wastes Breach of Human Rights" , *Review of African Political Economy,* Vol. 28, No. 88, 2001, pp. 288-290, at p. 288 .

33 Frank Theakston, '2001 Air Quality Guidelines for Europe', *EURO.WHO.INT, available at https://www.euro.who.int/__data/assets/pdf_file/0005/74732/E71922.pdf*. (last accessed 11 June 2020).

34 Ashwani Kumar, Satyendra Choudhry, et.al., "Challenges and Way to the Solution of E-Waste", *International Journal of Advances in Electronics and Computer Science,* Vol. 3, No. 2, 2016, pp. 29-33, at p.29.

35 Kyere Vincent Nartey, et.., "Environmental and Health Impacts of Informal E-waste Recycling in Agbogbloshie, Accra, Ghana: Recommendations for Sustainable Management", 2016 (Unpublished Dissertation, University of Bonn).

soil and water leading to contamination of foods that humans and animals consume. Dietary intake is one of the routes from where toxic compounds present in e-waste reach the human body. Mercury is one such element that impairs the normal growth of foetus and gets released through mother's milk thereby causing a harmful impact on the infant.[36]

Furthermore, studies have confirmed contamination of soil and groundwater in East Delhi's Krishna Vihar area due to the presence of informal e-waste handling and dumping units.[37] Due to open dumping and landfilling, the process of leaching takes place through which toxic elements make their way to soil sediments and pollute it. Once these elements make their way into plants from the soil, they get biomagnified.[38] Polluted soil and sediments enter the food chain and adversely impact aquatic organisms and human beings. It has been observed that e-waste recycling units are often located on the outskirts of cities and share boundaries with vegetation sites where heavy metals present in soil are absorbed by crops. Levels of heavy metals tend to leach into crops increasing the risk of contamination and end up making their way to consumers of these crops. Further as evidenced by studies people living near to the e-waste management units or sites experience physical harms and women and children living and working in these dumps develop severe cognitive and physical disabilities.[39] Studies also focus on the impact of e-waste toxins exposure on children as they are more vulnerable to neurotoxins than adults.[40] WHO has also stated that:

"Human exposure to toxic chemicals and nutritional imbalances are currently known or suspected to be responsible for a range of human health problems, including promoting or causing cancer, kidney and liver dysfunction, hormonal imbalance, immune system suppression, musculoskeletal disease, birth defects, premature births, impeded nervous and sensory system development, reproductive disorders, mental health problems, cardiovascular diseases, genitor-urinary disease, old-age dementia, and learning disabilities. These conditions are prevalent in all countries, and, to some extent, most can be attributed to past and current exposure to chemicals in the foods we eat."[41]

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36 Geeraerts, K., Mutafoglu, K. et.al., "Illegal E-Waste Shipments from the EU To China. Quantitative and Monetary Analysis of Illegal Shipments and its Environmental, Social and Economic Impacts Economic Impact", 2015 (Unpublished Study, EFFACE Project, London, IEEP).

37 Sushmita Saha, 'E-Waste Contaminating Delhi's Groundwater and Soil', *THE DOWN TO EARTH, available at https://www.downtoearth.org.in/news/waste/e-waste-contaminating-delhi-s-groundwater-and-soil-59522(last accessed 10 June 2020)*.

38 Michelle, *Supra* note 7.

39 Erin McIntire, "The International Tribunal for E-waste: Ending the Race Towards Lethal Fallout", *Seattle Journal of Environmental Law*, Vol. 5, No.1, 2015, pp. 75-108, at p.7.

40 *Id*., at 39.

41 'Total Diet Studies: A Recipe For Safer Food', *WHO.INT, available at https://www.who.int/foodsafety/chem/TDS_recipe_2005_en.pdf (last accessed 10 June 2020)*.

The informal sector of the e-waste management system involves intensive manual labour practices that comprise of rudimentary methods of resource recovery and recycling. Such recycling units are usually neither registered nor licensed thus escape from the purview of vigilance mechanisms of environmental management agencies. Processes of disassembling and segregation of e-waste are carried out manually with the help of regular tools such as chisels, hammers, screwdrivers and with bare hands that expose workers to dust containing hazardous components. These processes are performed by usually sitting on the ground continuously for 12-14 hours a day in between piles of e-waste.[42] India deploys primitive hydrometallurgical methods to extract metals from e-waste.[43] These methods of recovery expose workers to toxic fumes of acids and many volatile compounds as while swirling workers lean over solutions for long hours continuously. Persons handling acid operations in the informal sector are not provided any protective clothing that can guard them against toxic exposure. A study by an NGO Toxic link has identified fifteen e-waste handling, management and disposal hotspots operating without adequate safeguard measures.[44] These hotspots cover nearly five thousand recycling units that provide employment directly or indirectly to more than 50,000 people.[45] These hotspots include as Mustafabad (North East Delhi), Seelampur (Shahdara), Turkman Gate, BehtaHazipur and Loni (Ghaziabad), Daryaganj among other places.[46] Furthermore what needs to be highlighted here is that majority of the such units are located around the Yamuna river which perform all kinds of e-waste processing operations such as refurbishing, dismantling, metal recycling and metal recovery and waste disposal. These crude methods directly expose the workers and remotely expose the rest of the population to hazardously dangerous contaminations.[47] These manual, rudimentary and unrefined operations not only directly expose the workers but also the environment to hazardous contaminants.The mismanagement of e-waste not only prevails in the state of Delhi but also in almost all the cities of the country as people are in habit of either selling their e-waste to informal door-to-door collectors or throw the same in the garbage.

According to Amnesty International child labour is widespread in the informal sector of e-

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42 D. Jaganram and M. Jeyamani, "E-waste- A Major Threat to Environment and Health", *INDJST*, Vol. 4, No. 3, 2011, pp. 314 -317.

43 Satish Sinha, Aashish Mittal, et. al., 'Report: Impact of E-waste Recycling on Water and Soil' *THE TOXIC LINK*, *available at http://www.indiaenvironmentportal.org.in/content/397330/impact -of-e-waste-recycling-on-water-and-soil* (last accessed 11 June 2020).

44 Amita Bhaduri, 'Unregulated e-waste hotspots operating in Delhi with no safeguards', *INDIA WATER PORTAL, available at https://www.indiawaterportal.org/articles/unregulated -e-waste-hotspots-operating-delhi-no-safeguards* (last accessed 11 June 2020).

45 *Id*., at 44.

46 *Ibid.*

47 *Ibid*.

waste recycling.[48] Women are also involved in the recycling activities of e-waste. They are not only poorly equipped but are also given low-technology equipment to extract the precious metals and reusable components of e-waste. They are also burdened to do dangerous tasks, including using acid baths to recover high-value metals.[49]

Besides this is pertinent to highlight that willingly sending e-waste to states where it is handled and recycled in a non-judicious manner, without ensuring the type of labour that would be involved in handling it amounts to playing a participatory role in the violation of their human rights. It is a serious global issue that industrial powers with an intent to clear their yards are moving hazardous waste to the developing world. This has given rise to a situation where the poor are recipients of the risk and poisons of the risk.[50]

Hereunder are the implications of the e-waste recycling industry that acts as a barrier in full enjoyment of the human rights of individuals, communities and the general public.

I. That existing legal framework is not implemented at the grassroots level in a way to safeguard the protection of human rights of individuals and groups who are adversely affected by hazardous impacts of the informal sector of e-waste recycling;

II. The fact that 90 percent of e-waste is handled by the informal sector[51],clearly indicates that the E-waste Rules, 2016 have failed to provide a strategy of merging the informal recycling sector into the formal sector. Working in unsafe conditions leads to clear cut violation of obligations undertaken by the State under Articles 6, 7 and 11 of the ICESCR.

III. As mentioned above that recycling processes used by the informal sector are highly hazardous that adversely affects the right to life (enshrined in Article 6 of ICCPR) of the workforce as well as those residing near these recycling units. Besides, the e-waste dumped in unsecured landfills gets absorbed into the groundwater, leading to contamination of water thereby harming the right to life of the general public.

IV. The inalienable rights guaranteed under Article 25 of UDHR and Article 11 of

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[48] Dummett Mark, 'The Dark Side of Electric Cars: Exploitative Labor Practices', *AMNESTY, available at www.amnesty.org/en/latest/news/2017/09/the-dark-side-of-electric-cars-exploitative-labor-practices/ (last accessed 11 June 2020)*.

[49] M. H. Wong, S. C. Wu et al., " Export of toxic chemicals – A Review of the case of uncontrolled electronic-waste recycling", *Environmental Pollution*, Vol. 149, No. 2, 2007, pp.133 -140, at p. 133.

[50] Tinashe Madava, "Illicit Dumping of Toxic Wastes Breach of Human Rights" , *Review of African Political Economy,* Vol. 28, No. 88, 2001, pp. 288-290, at p. 288 .

[51] Annamalai Jayaprada, "Occupational Health Hazards Related to Informal Recycling of E-waste in India: An Overview*", Indian Journal of Occupational and Environmental Medicine* ,Vol. 19, No. 1, 2015, pp. 64-65.

ICESCR also get violated when due to open dumping and landfilling, the process of leaching takes place. Due to leaching the toxic elements make their way to soil and pollute it. These toxic substances enter into the food chain and not only affect aquatic organisms but also human beings. As already discussed the e-waste recycling units are often located on the outskirts of cities and share boundaries with vegetation sites where heavy metals present in the soil are absorbed by the crops.

V. Due to lack of awareness and poor working conditions, workers in the informal sector work without protective gear. As a result of that, persons working in these units get exposed to various health hazards, which is clear cut infringement of their rights guaranteed under Article 7 (b) and Article 10 (3)ICESCR.

VI. Employment of young children in the informal sector of recycling jeopardises their well being, health and chance of normal development of their mental faculties. This is a violation of their right enshrined in Article 3(d) of the ILO Convention on the Worst Forms of Child Labor, 1999whichendeavours to protect children from work which by its nature or the circumstances is likely to harm the health, safety of children.

5. Conclusions and Recommendations

The figures of e-waste are growing at an uncontrollable pace and the dominance of the informal sector in processing this waste is posing not only a threat to the right to health of those working in this sector but also of the rest of the population. Simply proclaiming through a variety of charters, covenant, laws, judicial precedents,etc. that right to life as a human right includes right to work, right to health, right to live with human dignity, right to safety from occupational hazards, right to be protected by labour laws, right to grievance redressal, right to clean and healthy environment amounts to making a mockery of the human rights and human rights regime unless they are implementedat the grassroots level. Certain conclusions that can be drawn from the present research work are as follows :

I. India has a comprehensive legal framework to ensure the sound management and disposal of e-waste. However primary concern is the lack of effective implementation and insufficient enforcement of existing labour checks and precautions. The need of the hour is effective implementation of obligation imposed by law for proper management of the e-waste by every stakeholder so that e-waste doesn't get diverted to the informal sector.

II. Additionally, there is a need to integrate the informal sector with the formal one so as to ensure compliance of the E-waste Management Rules, 2016 at all stages.

III. Workers working in the informal sector have low literacy levels and are quite unaware of the existing rules and standards of safety; as a result they keep working in unsafe working conditions. Therefore there is a need to educate the workforce about occupational hazards that they may be exposed to while working in unsafe conditions. To ensure their safety there is a need to sensitise these workers about the need of protective gear while working.

IV. The E-Waste Rules, 2016 restricts the import of e-waste by permitting only EPR authorised producers of EEE to import EEE only after taking approvals from the regulatory authorities specified under the Hazardous and Other Wastes (Management, Handling and Trans-boundary Movement) Rules, 2016. These Rules need to be effectively implemented to prevent the unauthorised import of e-waste.

V. The involvement of children in processing e-waste in the informal sector is a matter of serious concern that needsto be urgently addressedand full effect should be given to the ILO Convention on the Worst Forms of Child Labor to which India became party a few years back.

VI. The Human Rights Commissions should keep a strict check on human rights violations taking place at occupational places and should take strict cognizance of such violations and initiate action against the persons involved in illegal practices.

VII. Several initiatives have been taken by the government to sensitise and bring awareness to the general public about the right methods of disposal of e-waste through programs like Swachh Digital Bharat, where the public is required to give away their e-waste to authorized recyclers.[52]However, participation in such programmes is negligible. Therefore, there is a need to intensify such campaigns. Apart from non-governmental organisations, institutions of higher education (colleges and universities) should be encouraged to adopt certain localities and ensure that awareness is created for proper management of e-waste and also bring into notice any violations to the proper authorities.

Mismanagement of e-waste has put to risk the human rights of millions of people; only through environmentally sound practices of e-waste management the enjoyment of human rights and the goal of sustainable development can be turned into reality.

[52] Harshini Vakakalanka, 'The A to Z of E-Waste Management', *THE HINDU, available at https://www.thehindu.com/sci-tech/energy-and-environment/what-about-e-waste/article24193081.ece* (last accessed 11 June 2020).

AN APPRAISAL OF THE LEGAL FRAMEWORK FOR THE CONTROL OF FEMALE GENITAL MUTILATION IN NIGERIA

Grace Abosede Oladele*

1. Introduction

Female Genital Mutilation (FGM) is a traditional practice that has generated serious concern both nationally and internationally as a health hazard and a violation the rights of women and girls globally.[1] There is actually no definite statistics on the number of girls and women who had undergone FGM, but it is estimated that so far, that at least 200 million women and girls have undergone the procedure in 30 countries including Nigeria.[2] It is also estimated that 4.3 million women and girls will be at risk of undergoing FGM by the year 2030[3] and 63 million more by the year 2050 if the practice is not abated.[4]

In Nigeria, the practice of FGM is very prevalent and worrisome. It is practiced in line with traditional belief which makes girls socially accepted and marriageable.[5] FGM is a harmful practice with no health benefits.[6] It has serious adverse health effects on women and girls as a result of the damage done to the female genital tissue and can lead to death of the victim.[7] It thus, constitutes a threat to the lives and wellbeing of women and girls.

In the year 2015, Nigeria enacted the Violence Against P ersons Act 2015 prohibiting FGM with only a section of the law prohibiting FGM. This legal provision also contains a low penalty which lacks the potency to curb the practice. However, in

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1 UNICEF "Statistical Profile on Female Genital Mutilation" available at *https://data.unicef.org/topic/child-protection/female-genital-mutilation* (accessed 21 February 2021).

2 *Ibid*.

3 World Health Organization, "Female Genital Mutilation" available at *https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1(last accessed 21 February 2021).*

4 UNICEF "UNICEF data highlights FGM Prevalence" available at *https://www.figo.org/news/unicef-data-highlights-fgm-prevalence-0014595* (last accessed *21 February 2021*).

5 E. Klein *et al*, "Female Genital Mutilation: Health Consequences and Complications - A Short Literature Review" *Obstetrics and Gynecology International*, Volume 2018, p. 2.

6 K. Brown, *et al* "The Applicability of Behaviour Change in Intervention Programmes Targeted at Ending Female Genital Mutilation in the EU: Integrating Social Cognitive and Community Level Approaches" *Obstetrics and Gynaecology International*, Special Issue, 2013, p. 2.

7 UNICEF "UNICEF data highlights FGM Prevalence" *supra* note 4.

some jurisdictions such as the United Kingdom, FGM has been curbed through effective, comprehensive and properly enforced legislation.

This paper examines the prohibition of FGM under the Violence Against Persons Act 2015 and makes a comparison with the Female Genital Mutilation Act 2003 of the United Kingdom (as amended by the Serious Crimes Act 2015). This is with a view to identifying the drawbacks in the Nigerian law and using the United Kingdom FGM law as a model, recommends appropriate legislation for the elimination of FGM in Nigeria in addition to other measures.

2. Meaning of Female Genital Mutilation

Female Female Genital Mutilation (FGM) means cutting off the external part of the genitals of a girl or woman.[8] The practice is carried out by traditional circumcisers and sometimes medical personnel including physicians, nurses and midwives.[9] When carried out by a medical personnel, it is referred to as medicalization of FGM.[10]

Medicalization of FGM creates the illusion of legitimacy despite the fact that the practice has no health benefit. This has been condemned by the World Health Organization.[11] Medicalization of FGM violates article 5(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

3. Classification of Female Genital Mutilation

According to the World Health Organization, there are four types of Female Genital Mutilation procedures, these are[12] -

Type I – Clitoridectomy - This involves cutting or removing the clitoris and sometimes the prepuce.[13]

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8 World Health Organization, "Female Genital Mutilation" *supra* note 3.

9 U.U. Epundu, *et al*, "The Epidemiology of Female Genital Mutilation in Nigeria - A Twelve Year Review" *Afrimedic Journal*, Vol. 6, No. 1, 2018, p. 3.

10 S. Nabaneh and A. Muula, "Female Genital Mutilation/Cutting in Africa: A Complex Legal and Ethical Landscape" *International Journal of Gynecology and Obstetrics* Vol. 145, Issue 2, 2019, p. 5.

11 World Health Organization Fact Sheet, February 2020, "Female Genital Mutilation" available at *https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation* (last accessed 13 March 2021).

12 Ibid.

13 UNICEF, "Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change" available at *https://www.unicef.org/cbsc/files/UNICEF_FGM_report_July_2013_Hi_res.pdf (last accessed 21 February 2021).*

Type II – Excision - This involves cutting or removing the prepuce, the clitoris and part of or all the labia minora.[14]

Type III - Infibulation - It involves cutting or removing the clitoris, the labia minora and labia majora.[15] This narrows the vaginal opening causing a seal to be formed and leaves only a tiny passage for urine and menstrual blood. Women who have been infibulated face a lot of difficulty in delivering children due to the narrow opening. It can also cause the death of the foetus.[16]

Type IV: This refers to other forms of cutting or removing the genitals of a girl or woman. These include pricking, piercing, incising, scraping and burning of part of the vaginal.[17] Type IV is referred to as 'gishiri' in the Northern part of Nigeria. G*ishiri* has both immediate and long-term health complications, such as haemorrhage, infection, shock and scar formation.[18]

4. Prevalence of and Reasons for Engaging in the Practice of Female Genital Mutilation in Nigeria

In Nigeria, about 19.9 million women and girls have undergone **FGM**.[19] It is carried out as early as a few days after birth, during adolescence and as late as just before marriage or during the first pregnancy.[20] FGM is practiced among all social classes and it cuts across various religious groups.[21]

The reasons for engaging in the practice of FGM include - preservation of virginity, social acceptance (even to be marriageable), family honour, cleanliness/hygiene, aesthetic reasons, prevention of promiscuity, enhancing fertility, sexual pleasure for the husband and prevention of still-birth.[22]

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14 *Ibid.*

15 *Ibid.*

16 "Country Profile: FGM in Nigeria" available at *https://www.refworld.org/pdfid/58bd4eda4.pdf* (last accessed *21 February 2021*).

17 UNICEF, "Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change" *supra*, note 13.

18 E.L. Ahanonu, "Mothers' Perceptions of Female Genital Mutilation"*Health Education Research*, Vol. 29, Issue 4, 2014, p. 686.

19 "Country Profile: FGM in Nigeria" *supra* note 16.

20 T.C. Okeke, *et al*, "An Overview of Female Genital Mutilation in Nigeria" Annals of Medical and Health Sciences Research, Vol. 2, No. 1, 2012, p. 71 .

21 E.L. Ahanonu, "Mothers' Perceptions of Female Genital Mutilation" *supra, note 21,* p. 687.

22 U.U. Epundu, *et al*, "The Epidemiology of Female Genital Mutilation in Nigeria - A Twelve Year Review" *supra*, note 9, p. 3.

Also, FGM is a source of income for the circumcisers because they are paid for the mutilation.[23] In addition, there is a lack of awareness and knowledge about the health problems associated with FGM. It is believed that circumcised women are more fertile than uncircumcised women and can tolerate birth pains more than women that have not undergone FGM. Thus, in communities where FGM is practised, women and girls are put under pressure to undergo the procedure and risk victimisation and stigmatization if they refuse to do so.

5. Negative Effects of Female Genital Mutilation

FGM is very traumatic and has both immediate and long-term consequences on the health of women and girls. Immediate health problems include severe pain, shock, excessive bleeding, infections, urine retention and sores in the genital area.[24] Other health problems are - fainting, menstrual disorders, excessive growth of scar tissue, painful sexual intercourse, infertility due to fibrosis of the vagina, infection of the reproductive tracts and chronic pelvic infections.[25] Infections (such as tetanus, HIV, hepatitis) are common due to the use of unsterilised instruments and also the application of traditional medicines contaminated with faeces and urine.[26]

Another serious complication of FGM is death.[27] Death occurs due to haemorrhage, neurogenic shock and acute septicaemia. Also, maternal mortality is prevalent among women who have undergone FGM, due to - (i) a high rate of sepsis from increased rates of episiotomies, (ii) complications during pregnancy which include difficulty in performing vaginal antenatal assessment (during labour, there is difficulty in assessing the degree of cervical dilatation), (iii) prolonged /obstructed labour leading to high rates of neonatal deaths, stillbirth, and increased risk of foetal distress, (iv) vaginal tears leading to vesico-vaginal or recto-vaginal fistulae, postpartum haemorrhage and infections.[28]

There are also a wide range of emotional and psychological effects of FGM including - sleeping and mood disorders, fear, anger, bitterness and low self-esteem.[29] These are mostly as a result of - embarrassment resulting from deformity of the vaginal

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23 G.E. Delano, *Guide to family planning*, Spectrum Books, Ibadan, 1989, p. 72.

24 T.C. Okeke, *et al* "An Overview of Female Genital Mutilation in Nigeria" *supra* note 20, p. 72.

25 *Ibid*.

26 *Ibid*.

27 Medical News Today "What is Female Genital Mutilation" available at *https://www.medicalnewstoday.com/articles/241726* (last accessed 15 April 2021).

28 World Health Organization "Health Risks of Female Genital Mutilation (FGM)" *https://www.who.int/teams/sexual-and-reproductive-health-and-research/areas-of-work/female-genital-mutilation/health-risks-of-female-genital-mutilation* (last accessed 15 April 2021).

29 *Ibid*.

area, anxiety, irritability, depression, marital conflicts, sometimes due to painful sexual intercourse and psychosis.[30]

Another problem created by FGM, is the management and treatment of its complications, which poses huge financial burden on the victim and family. The cost of managing the post mutilation complications per girl child in a paediatric clinic is estimated to about US $120.[31] This is a lot of money for a lot of Nigerian families considering the high level of poverty in the nation.

Furthermore, in Nigeria, FGM is a crime and a violation of the rights of women and girls.

6. Laws Against Female Genital Mutilation in Nigeria

Female Genital Mutilation constitutes an offence under section 6 of the Violence Against Persons Act 2015. It also violates the rights of women and girls under the Constitution of the Federal Republic of Nigeria (as amended),[32]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[33] and Child's Rights Act.[34]

The relevant provisions of these laws are examined below.

6.1 FGM as a Violation of Women and Girls' Rights

Under the Constitution of Nigeria, FGM violates the right to human dignity under section 34 and right to life under section 33 (where life of the victim is threatened).

Under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, FGM violates the right to human dignity under article 5, right to health under article 16 and the right to life.

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30 C. M. Oringanje, *et al*, "Providing Information About the Consequences of Female Genital Mutilation to Healthcare Providers Caring for Women and Girls Living with Female Genital Mutilation: A Systematic Review" *International Journal of Gynecology and* Obstetrics, Vol. 136, 2017, p. 66.

31 *Ibid*.

32 *Constitution of the Federal Republic of Nigeria Cap.C23 Laws of the Federal Republic of Nigeria* 2004.

33 *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9 Laws of the Federal Republic of Nigeria* 2004.

34 *Child's Rights Act Cap. C50 Laws of the Federation of Nigeria* 2004.

Under the Child's Rights Act, FGM violates the right of a girl to human dignity under section 11, right to health under section 13 and the right to survival and development under section 4.

6.2 Prohibition of Female Genital Mutilation in Nigeria

The main law prohibiting Female Genital Mutilation in Nigeria is section 6 of the Violence Against Persons Act 2015. Under this law, persons who perform, attempt to perform, aid or abet the carrying out of FGM can be prosecuted. However, what is required to curb the menace of FGM in Nigeria is beyond just a section of a law. There is a need to enact an entire Act that addresses all FGM issues including protection of victims and prevention orders. An example of such a comprehensive law is the Female Genital Mutilation Act 2003 of the United Kingdom (as amended by the Serious Crimes Act 2015). This Act prohibits all types of FGM. It places a duty on certain persons to report suspected cases of FGM, gives the court the power to make protection orders to protect victims and other women and girls from being subjected to FGM. It also mandates the protection of the identity of victims amongst other laudable provisions.

A comparison between section 6 of the Violence Against Persons Act 2015 and the Female Genital Mutilation Act 2003 of the United Kingdom (as amended by the Serious Crimes Act 2015) is carried out below.

6.3 Comparison Between Section 6 of the Violence Against Persons Act 2015 of Nigeria and the Female Genital Mutilation Act 2003 (as amended by the Serious Crimes Act 2015) of the United Kingdom

In Nigeria, the law prohibiting FGM is section 6 of the Violence Against Persons Act 2015. The entire Act itself prohibits all forms of violence against persons (both male and female gender).[35] All the provisions against FGM are contained in section 6 subsections 1-4 of the Violence Against Persons Act 2015. This is unlike in the United Kingdom where an entire Act containing 8 sections and 2 Schedules addresses FGM issues and protection of victims. Thus, the United Kingdom's law is far more comprehensive than that of Nigeria

Section 6(1) of the Violence Against Persons Act of Nigeria prohibits FGM. Section 6(2) of the Act provides that a person who performs female circumcision or genital mutilation or engages another to carry out such circumcision or mutilation commits an offence and is liable on conviction to a term of imprisonment not exceeding 4

[35] Preamble to the *Violence Against Persons Act 2015* of Nigeria.

years or to a fine not exceeding two hundred thousand naira (N200,000) or both. In addition, section 6(3) provides that a person who attempts to commit the offence of FGM is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding one hundred thousand naira (N100, 000) or both.

In comparison, a similar provision prohibiting FGM exists under the Female Genital Mutilation Act of the United Kingdom. Section 1(1) of the Act provides that "a person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris." Under the Act, a girl includes a woman.[36] The penalty for the offence is prescribed in section 5(1) as follows – "(a) on conviction on indictment, imprisonment for a term not exceeding 14 years or a fine (or both), (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both)."

Under the Violence Against Persons Act 2015 of Nigeria, section 6(4) provides that "a person who incites, aids, abets, or counsels another person to commit the offence of FGM, is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N100,000 or both."

Similarly, in United Kingdom, aiding and abetting the practice of FGM is an offence. Section 2 of the Female Genital Mutilation Act 2003 provides that anyone who aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris, commits an offence. Penalty for the offence is stated in section 5(1) as follows – "(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine (or both), (b) on summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both)."

Unlike Nigerian law, the Female Genital Mutilation Act 2003 of the United Kingdom does not stop at prohibiting FGM, its attempt, aiding and abetting as the case is under the Violence Against Persons Act 2015 of Nigeria. The Female Genital Mutilation Act goes further to state certain circumstances in which a person will not be found guilty of FGM. These are stated in section 1(2) of the Act – "no offence is committed by an approved person who performs - (a) a surgical operation on a girl which is necessary for her physical or mental health, or (b) a surgical operation on a girl who is in any stage of labour, or has just given birth, for purposes connected with the

[36] Section 6(1) of the *Female Genital Mutilation Act* 2003 of the United Kingdom (as amended).

labour or birth. The following are approved persons as stated in section 1(3) – "(a) in relation to an operation falling within subsection (2)(a), a registered medical practitioner, (b) in relation to an operation falling within subsection (2)(b), a registered medical practitioner, a registered midwife or a person undergoing a course of training with a view to becoming such a practitioner or midwife." Also, section 1(4) provides that "there is no offence committed by a person who – (a) performs a surgical operation falling within subsection (2)(a) or (b) outside the United Kingdom, and (b) in relation to such an operation exercises functions corresponding to those of an approved person". These are exceptions to the rule and medical personnel who carry out surgery on a woman or girls for her health benefits. This however, does not exempt carrying out FGM by medical personnel. That remains an offence under the Act. These detailed exceptions do not exist in the Violence Against Persons Act 2015 of Nigeria.

Also, section 3 of the Female Genital Mutilation Act makes it an offence for anyone to carry out FGM on a United Kingdom national or United Kingdom resident outside the United Kingdom. Section 3(1) of the Act provides that "a person is guilty of an offence if he aids, abets, counsels or procures a person who is not a United Kingdom national or United Kingdom resident to do a relevant act of female genital mutilation outside the United Kingdom". An act is a relevant act of female genital mutilation under section 3(2) "if - (a) it is done in relation to a United Kingdom national or United Kingdom resident, and (b) it would, if done by such a person, constitute an offence under section 1". However, section 3(1) provides that "no offence is committed if the relevant act of female genital mutilation - (a) is a surgical operation falling within section 1(2)(a) or (b); and (b) is performed by a person who, in relation to such an operation, is an approved person or exercises functions corresponding to those of an approved person". As a matter of fact, section 4(1) extends the offence of carrying out FGM if it done outside the United Kingdom. Section 4(2) provides that "if FGM is done outside the United Kingdom - (a) proceedings may be taken, and (b) the offence may for incidental purposes be treated as having been committed, in any place in England and Wales or Northern Ireland".

Failure to protect girls below 16 years from the risk of Female Genital Mutilation constitutes an offence under the Female Genital Mutilation Act. Section 3A(1) provides that "if a genital mutilation offence is committed against a girl under the age of 16, each person who is responsible for the girl at the relevant time is guilty of an offence". Section 3A(4) provides that "a person is "responsible" for a girl in the following two cases - the first case is where the person (a) has parental responsibility for the girl, and (b) has frequent contact with her". The second case is where the

person - (a) is aged 18 or over, and (b) has assumed (and not relinquished) responsibility for caring for the girl in the manner of a parent.[37]

However, there is a defence under section 3A(5) of the Act, that "if the defendant can show that - (a) at the relevant time, the defendant did not think that there was a significant risk of a genital mutilation offence being committed against the girl, and could not reasonably have been expected to be aware that there was any such risk, or (b) the defendant took such steps as he or she could reasonably have been expected to take to protect the girl from being the victim of a genital mutilation offence". A person is taken to have shown the facts mentioned in section 3A(5)(a) or (b) if – "(a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and (b) the contrary is not proved beyond reasonable doubt".[38] The offence stated in section 3A(1) is punishable under section 3A(6) - "(a) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine (or both), (b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or a fine (or both), (c) on summary conviction in Northern Ireland, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both)".

Also, section 5A makes provision for Female Genital Mutilation Protection Orders meant to protect a girl or woman from being subjected to FGM or to protect those who have being subjected to FGM. Female Genital Mutilation Protection Orders are contained in Schedule 2 to the Act.

In addition, section 5B of the Female Genital Mutilation Act places a duty on certain persons to inform the police if they are aware Female Genital Mutilation had been carried out on a girl below the age of 18 years. Section 5B(1) of the Female Genital Mutilation Act provides that "a person who works in a regulated profession in England and Wales must make a notification (an "FGM notification") if, in the course of his or her work in the profession, the person discovers that an act of Female Genital Mutilation appears to have been carried out on a girl who is aged under 18". According to section 5B(2)(a), a person works in a regulated profession "if the person is - (i) a healthcare professional, (ii) a teacher, or (iii) a social care worker in Wales; (b) a person who discovers that an act of Female Genital Mutilation appears to have been carried out on a girl in either of the following two cases". The first case

[37] *id*, s.3A(4).
[38] *id*, s.3A(6).

is stated in section 5B(3) – "where the girl informs the person that an act of Female Genital Mutilation (however described) has been carried out on her". The second case under section 5B(4) is – "where - (a) the person observes physical signs on the girl appearing to show that an act of Female Genital Mutilation has been carried out on her, and (b) the person has no reason to believe that the act was, or was part of, a surgical operation within section 1(2)(a) or (b)". However, section 5B(6) provides that "the duty of a person working in a particular regulated profession to make an FGM notification does not apply if the person has reason to believe that another person working in that profession has previously made an FGM notification in connection with the same act of female genital mutilation".

According to section 5B(5), "an FGM notification - (a) is to be made to the chief officer of police for the area in which the girl resides; (b) must identify the girl and explain why the notification is made; (c) must be made before the end of one month from the time when the person making the notification first discovers that an act of female genital mutilation appears to have been carried out on the girl; (d) may be made orally or in writing". Under section 5B(7), "a disclosure made in an FGM notification does not breach - (a) any obligation of confidence owed by the person making the disclosure, or (b) any other restriction on the disclosure of information". The FGM notification is a preventive measure against practicing FGM.

Furthermore, Schedule 1 to the Act makes provision for anonymity of victims of FGM. Paragraph 1(2), Schedule 1 provides that no matter, likely to lead members of the public to identify a victim of FGM should be included in any publication during the victim's lifetime. This is a very laudable provision because it will prevent discrimination and stigmatization of victims.

7. Conclusion

Female genital mutilation is a practice deeply rooted in traditional belief in Nigeria. It has negative effects on health, as well as social and financial consequences. Therefore, a lot more needs to be done to speed up its elimination, in particular, in the area of legislation (by adopting anti-FGM laws of the United Kingdom), enforcement, prosecution of perpetrators, protection of victims and awareness.

8. Recommendations

The National Assembly of Nigeria and State Houses of Assembly should as a matter of urgency, enact comprehensive and enforceable laws against FGM. The Female Genital Mutilation Act 2003 of the United Kingdom should serve as a model. The penalty for committing FGM under section 6(2) of the Violence Against Persons Act

2015 of Nigeria of an imprisonment term not exceeding 4 years or a fine not exceeding two hundred thousand naira (N200, 000) or both, is not severe enough to deter the practice of FGM. It must be reviewed upwards to minimum of 19 years imprisonment without an option of fine. And where death occurs as a result of FGM, the penalty should be imprisonment for life.

Education is a necessary tool for eliminating FGM in Nigeria. Government (in particular, Federal and State Governments) should make education free, at least up to secondary school level. There must be access to education. Facilitating education and support for girls is vital because educated parents are less likely to allow their daughters to be subjected to FGM. Also, women, in particular those in rural areas should be economically empowered.

Police officers should be effective in fishing out perpetrators of FGM and trained on how to protect FGM victims and their families from attacks from members of the community who insist on carrying out FGM in order to maintain their tradition.

Adequate awareness should be created on the harmful effects of FGM and the illegality of the practice. There should be regular anti-FGM advert on radio, television, billboards written in different local languages, with images displaying the negative effects of FGM and addressing many of the myths and misconceptions about FGM. People should be sensitized on the need to discontinue the practice and report perpetrators of FGM in their communities. This will help to foster attitudinal change and enhance elimination of the practice. The Local Government Councils are the grassroot government closest to the people who perform FGM. Thus, they must ensure the laws are adequately publicized, necessary awareness given about the hazards of the practice.

There should be targeted efforts from Government at all levels in Nigeria and sustainable, targeted approach involving Ministries of Women Affairs, Justice and health; religious and traditional leaders, health professionals, human rights groups, Non-Governmental Organizations and the media. These groups are very effective agents of cultural change at the grassroots where FGM is prevalent.

The Medical Association of Nigeria and other associations of medical personnel should openly (through the media) condemn medicalization of FGM. Medical professionals that perform FGM should be sanctioned and penalized by the relevant professional bodies and they must ensure that such people are prosecuted.

Government and Non-Governmental Organizations should provide medical, psychological and social support for victims of FGM. Governments at all levels in Nigeria should provide adequate funding for this purpose. Organisations working against FGM need sustained and committed support from the government.

Governments at all levels in Nigeria should provide adequate support, protection and care for victims of FGM. Government should also collaborate with International bodies such as World Health Organization, UNICEF and so on for necessary support.

Parents/guardians whose daughters have not been subjected should be given protection from community members who would like to coerce them into taking their daughters for FGM. In line with this, FGM protection centres (with adequate security), should be established in all Local Government Areas, particularly, in areas where the practice is prevalent. Government at all levels should adequately and consistently fund these centres where victims will be given adequate medical attention, counselling and other necessary protection measures.

Parents, whose daughters have been subjected to FGM, should be encouraged to bring their daughters to the protection centres and to expose those who carry out FGM in their communities. Such parents must be protected from community attacks and from being prosecuted. Fear of prosecution under the law for allowing their daughters to be subjected to FGM, could be an inhibition to reporting perpetrators of FGM to the police. It may also affect the cooperation that will be given during investigation by such parents.

ACCESS TO JUSTICE AND NECESSITY OF HUMAN RIGHTS COURTS: AN INDIAN PERSPECTIVE

Sonika *
Yagyadutt **

1. Access to Justice: A Human Right

The primordial objective of the Indian constitution is the ensure protection of 'life, liberty, equability and justice' to each individual. The basic foundation of our civilized nation 'Bharat' lies in the enforcement of the 'right to justice' enshrined in the Indian Constitution. It is well known proposition that the progression of law itself is founded upon the acknowledgment of right to justice as an indispensable hallmark of a nation. Ideally, it comes within the purview of the concept of 'Justice' enshrined in the preamble to the Indian Constitution. It imposes fundamental duties upon the 'the people' of India to protect and enforce each word in letter & spirit. Further, it imposes a constitutional obligation upon the state to enforce the fundamental rights guaranteed in the Indian constitution where 'access to justice' is one of them. In numerous international instruments, the fundamental right to 'access to justice' is demarcated as the essential facet of human rights. The Apex Court of India observed that it includes the 'availability of the adjudicatory mechanism'. Also, such mechanism should be reasonably accessible & affordable in terms of distance and cost respectively[1]. It empowers all individuals to get redressal of their grievance; Article-21 which is the epitome of justice gifts a 'personal liberty' and 'fearless life'. According to Learned Hand[2]:

> *"The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias."*

Being a welfare state, it has been empowered to establish a fair and sound administration of justice for the general masses. So, it is adopted in letter and spirit for the enforcement of fundamental rights in India Constitution. Hon'ble Justice *P. Sathasivam*, former judge of the Supreme Court opined that all legal rights are

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1 *Anita Kushwaha v. Pushp Sudan*, (2016) 8 SCC 509.
2 Charles A. Wright, *A modern Hamlet in the judicial Pantheon*, vol. 93, Issue 6, Michingan Law Review, (1995).

human rights[3]. The human rights are fairly incorporated in the Indian Constitution in the form fundamental rights. According to Hon'ble Justice A.H. Ahmadi, former Chief Justice of India, human rights are the bone of any state and the civil liberties are easily succumbed by the state[4]. Undoubtedly, human rights are the thread and fabric of socio-political justice enshrined in the Constitution; therefore, the Parliament of India has enacted PHRA in the year 2013. In order to accomplish its core objective, the provisions concerning the establishment of HRC in the districts was incorporated[5]. It demarcates that the human rights law in India has transformed its nature to meet the ends of its objective.

According to Hon'ble Justice A.H. Ahmadi, former Chief Justice of India, human rights are the bone of any state and the civil liberties are easily succumbed by the state[6]. Undoubtedly, human rights are the thread and fabric of socio-political justice enshrined in the constitution; therefore, the parliament of India has enacted Protection of Human Rights Act in the year 2013. In order to accomplish the core objective of the statute, provisions' concerning the establishment of Human Rights Courts in the district were embedded[7]. Hence, the human rights law in India has not only transformed its objective but its very nature too.

2. Human Rights Litigation v. Public Interest Litigation (PIL): A Dichotomy

Being a signatory to Universal Declaration of Human Rights, India ensured the availability and accessibility to the appropriate tribunal for inclusive justice to each individual[8]. For the best compliance, the provisions of Indian Constitution already provide for 'fair and public hearings' before the court of law. The sincere attempt was made with the introduction of PIL. It fostered the object of '*locus standi'* in the form of PIL for the upliftment of fundamental rights in case of violation of

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3 Role of Courts in the Protection of Human Rights, (2012) 2 LW (JS) 1

4 Visit of the Chief Justice of India and three other judges of Supreme Court to our city, (1996) 1 LW (JS) 53.

5 Section 30. Human Rights Courts - For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences: Provided that nothing in this section shall apply if-
(a) a Court of Session is already specified as a special court; or
(b) a special court is already constituted, for such offences under any other law for the time being in force.

6 *Visit of the Chief Justice of India and three other judges of Supreme Court to our City* , (1996) 1 LW (JS) 53.

7 *The Protection of Human Rights Courts*, 1993, s.30.

8 Article-10, Universal Declaration of Human Rights, 1948.

fundamental rights at large scale. The Supreme Court has itself observed that[9]:

> *"...To provide access to justice to every citizen and to make it meaningful, this court has evolved its public interest jurisprudence where even letter-petitions are entertained in appropriate cases. The history of public interest litigation over years has settled that the deprived sections of society and the downtrodden such as bonded labourers, trafficked women, homeless persons, victims of natural disasters and others can knock doors of our constitutional courts and pray for justice."*

Undoubtedly, the human rights issues have always been challenged under social interest litigation instead of individual interest[10]. However, the position demands scrutiny whether a PIL fulfils the desired objective of PHRA, 1993. It is very difficult to justify whether PIL bridges the gap between human rights of public and human right of individuals.

The evolution of the policy of PIL aimed to make justice affordable to the most vulnerable individuals of the society[11]. Since PILs are not allowed as routine affairs therefore, in case of violation of human rights of an individual, she or he may have to wait for the mass violation of human rights so as to present before the higher courts. It makes the mockery of 'access to justice' and 'individual rights'.

Ideally, the ultimate objective of 'access to justice' is to provide mechanism in producing acceptable results in shortest possible time without aggravating the wounds of victims. The real justice can be achieved by adoption of therapeutic approach in healing the human rights issues[12]. It poses a legitimate question whether the commissions and constitutional courts successfully redress an individual grievance by taking *suo-moto* cognizance or by hearing PILs. During the debates of constituent assembly, Dr. Ambedkar said about present Article 32 of the Constitution of India that:

> "*…if I was asked to name any particular article in the Constitution as the most important-an article without which this Constitution would be nullity-I would not refer to any other article except this one. It is the very soul of the Constitution and very heart of it and I am glad that the House has realized the importance*".

It is apt to analyze the statistics concerning number of individuals who approached

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9 *Extra Judicial Execution victim v. Union of India*, (2017) 8 SCC 417

10 Zachary Holladay, *Public Interest Litigation in India as a Paradigm for developing nations*, Indiana University Maurer School of Law, Article 9, vol 19, Issue 2, Summer (2012).

11 *Bihar Legal Support Society v. The Chief Justice of India & Ors*, AIR 1987 SC 38

12 *Narendra Kumar v. State of Uttar Pradesh and Others*, (2017) 9 SCC 426.

the Apex Court under Article-32 upon the degradation of their human rights. This may be because human rights violation sometimes demands proper investigation and trial proceedings before the court; the absence of such process corrodes entire fabric of the constitution and keeps the objective of the PHRA, 1993 meaningless. This notion stipulates scrutiny on the part of those states where proper human rights courts are not established; it disables the victims to claim and defend their human rights. There is a sharp difference between a 'public interest litigation filed regarding human rights' and 'an independent matter filed by an individual upon the violation of his/her human rights'[13]. Ideally, PIL gives ample opportunity to the opposite party to ascertain the precise allegation and remain non-responsive towards implement Supreme Court's orders, directions and guidelines effectively. However, PIL seems a doubtful luxury which elite can enjoy and ultimate victim, who need it most, cannot have it. It causes threat to the notion 'access to justice' and 'free democracy'. Also, PIL targets and seeks public issues rather than individual grievances. The sole victim becomes party to mass battle rather than party of his/her grievance in criminal matters having human rights perspective. Therefore, Human Rights Courts can be a new dimension of 'access to justice' in the realm of criminal justice administration as well.

3. Human Rights Courts in India: A Necessity

The Preamble to the PHRA, 2013 mandates the constitution of Human Rights Commissions and HRCs at National & State level and district level to ensure blanket protection to human rights. Further, it is apt to consider the definition provided under PHRA as the combination of all International instruments as well as the Constitutional provisions[14]. Chapter VI of the PHRA, 1993 determines the objective of the human rights court. The primordial objective of the statute is to uphold the constitutional values i.e. to ensure the availability of expeditious justice to each individual. It demonstrates that the State should mandatorily facilitate speedy trial of offences to the matters pertaining to human rights violation. Further, the availability of appropriate forum for getting remedy is an indispensable part of 'access to justice'. Since state is parens patriae of the peoples' right therefore, it should abide the statutory provisions[15]. The State governments can designate each

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[13] Upendra Baxi, *The Future of Human Rights in India, Oxford University Press*, New Delhi, 2002.

[14] Section 2(1) (d) of the PHRA, 1993 - human Rights means the life, liberty, equality and dignity of an individual guaranteed by the constitution or embodies in the International Covenants and enforceable by the Courts of India.

[15] Surendra Malik and Sudeep Malik, Supreme Court on Human Rights and Civil Rights and Political, Social, Individual and Economical Rights, Vo. 2, Eastern book Company, ISBN: 93-88822312, 2018.

Sessions Court as HRC. The same can be done in consultation with the Chief Justice of High Courts. The statistics about existing Human Rights Courts would be the deciding factor about duties discharging by authorities towards the implementation of Constitutional provisions.

It is significant to note that various episodes of fatal violence against the refugees, conflicts with tribal groups, inadequate educational opportunity, little conventional employment opportunity, chronic health diseases, communal violence, extra-judicial killings and natural hazards are rising constantly[16]. Such factors give rise to profound problems of human rights violated throughout the nation. That's why constitutional amendment was made and statutory tribunals were established[17]. For instance, National Green Tribunal deals with environmental matters; Motor Vehi cle Claims Tribunals deal with motor vehicle accident matters, Cyber Tribunal deal with information & technology matters, Central Administrative Tribunal deals with service matters, National Company Law Tribunal deals with corporate law matters, Bank Debt Recovery Tribunal deal with banking matters etc. The prime objective behind the establishment of tribunals is to dispense justice proactively. Occasionally, the remedy through PIL becomes costly and unaffordable for the people belonging to remote areas to reach constitutional courts. The Supreme Court recommended that the recruitment of bar members especially for the assistance of the tribunals and regular monitoring would uphold the 'access to justice' and 'rule of law'[18].

It is significant to note that 'Rule of law' is a guiding light as well as shields against arbitrary executive action. Further, it is an indispensable feature of the Indian Constitution; it widely covers the protection and preservation of human rights. Notably, the Apex Court articulate d few recommendations to the Central Government about the restructuring the tribunals as follows: a) the establishment of 'Access to Justice Facilitation Centres' (AJFCs) at the convenient locations with or without private participation b) To be accessible to all individuals with or without payment of specified charges c) To be equipped them with latest infrastructural facilities and technologies d) To evaluate the overlapping of jurisdictional powers of the AJFCs and the Commissions. The establishment of A JFCs would bring a

16 Annual Report, National Human Rights Commission, (2017-18).
17 42nd Constitutional Amendment Act, 1976 added Article -323-A and 323(B) in the Constitution.
18 *Rojer Mathew v. South Indian Bank Limted and Ors* , Special Leave Petition (Civil) No. 15804 of 2017.

major transformation and make 'access to justice' more people friendly at the grass root.

The delay and default in the establishment of the human rights court by the appropriate governments leads to corrosion of 'Access to justice' especially in disturbed states. The continuous growth of custodial violence and anomalies in police administration are highlighted by various committees and commissions. For the rectification of the same, the review committee of Ministry of Home Affairs reaffirmed the recommendations of the National Police Commission and opined that the Model Police Act should be in consonance of the 'human right norms' and 'the rule of law'[19]. The Apex Court numerous times directed the state governments to establish the state human rights commission. Interestingly, the apex court in Rajesh Kumar Case[20] has issued a detailed order as follows:

> *"...According to us, it is the mandate of the statute to establish human rights courts and to appoint special public prosecutors. In that regard, we would like the responses of all the states."*

Since few states have failed to file their responses therefore, the apex court has directed them to submit their responses within stipulated time otherwise a fine of fifty thousand rupees shall be paid to the Supreme Court legal services committee[21]. Presently, a petition concerning the establishment of Human Right Courts and the appointment of specialized public prosecutors is pending before the apex court[22]. Justice Shri *Cyriac Joseph* has recommended various amendments in PHRA, 1993 concerning the establishment and expansion of the jurisdiction of Human Rights Courts[23]. Section-30 of PHRA, 1993 enforces the natural justice principle therefore, provides provision for the appointment of public prosecutor. It is apt to mention that unavailability of representative or advocates tantamount to violation of natural justice principle too. Interestingly, Justice *Bhagwati*, who is the main architecture of 'substantive due process of law' determined it as a fundamental aspect of liberty as enshrined under Article-21 of the constitution. The concept of 'due process' covers 'natural justice principles' and 'fair trial'. For the

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19 List of questions tabled before the Lok Sabha dated April 26, 2016 available at *https://mha.gov.in/MHA1/Par2017/pdfs/par2016-pdfs/ls-260416/387.pdf*

20 *National Commission for Protection of Child Rights & Ors. v. Dr. Rajesh Kumar & Ors* . , Civil Appeal No. 7968 of 2019.

21 *In Re: Alarming Rise in the number of Reported Child Rape Incidents*, 2019 SCC Online SC1849.

22 National Commission for Protection of child rights and Others v. Dr. Rajesh Kumar and Others, 2020 SCC Online SC 27

23 Annual Report, National Human Rights Commission, 2015-16.

effective enforcement of such principles, NHRC itself has recommended[24]:

1) To establish separate human rights courts or to designate human rights courts as district courts.

2) The disposal of the matter has to be done within three months from the date of framing of charges.

However, State human rights commissions as well as human right courts have not been established in each state[25]. However, already existing commissions are in moribund condition for instance, a writ of mandamus filed seeking directions of Supreme Court for the appointment of secretary[26] to the State Human Rights Commission in the State of Rajasthan[27]. The Court observed that around sixty seven positions are lying vacant. Further, the directions were issued to the State of Rajasthan to submit an affidavit providing the progress status of establishment of Human rights Courts. It depicts that political lawlessness cannot restrain any individual to approach the appropriate court for the protection of his or her justifiable rights. Also, *Ubi Jus Ibi Remedium* must be enlarged to serve justice to every single citizen. The Law Commission of India[28] and Justice *Ahmadi* Committee have recommended the establishment of HRC. In this landmark ruling of *D.K. Basu*[29], the Supreme Court determined the importance of HRC in every district. The Court expressly observed that protection of human rights act, 1993 is struggling constantly. Also, any denial of access to appropriate forum frustrates the ultimate objective of ICCPR, 1996 and ICESCR, 1996 which India has signed & ratified. The court strictly ordered all the State governments to take appropriate actions regarding the setting up or specifying human rights courts[30]. Further, Madras High Court recommended the early set up of the HRCs in each district of the Tamil Nadu.

The Hon'ble Court constituted a special bench for the formulation of procedure and rules for the effective functioning of the human rights courts. The High Court

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24 National Human Rights Commission, Submission to the United Nations Human Rights Council for Second Universal Periodic Review, available at *http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf*

25 Working Group on Human Rights in India and UN, Human Rights in India: Status Report with first and second UN Universal Periodic Review Recommendations, (2012).

26 Section-21(3) of the PHRA, 1993

27 *Dalit Manavadhikar Kendra Samiti v. State of Rajasthan & Ors*., 2015 SCC Online SC 1378.

28 124th Report, Law Commission of India, (1988)

29 *D.K. Basu v. Union of India*, (2015) 8 SCC 744

30 *Tamilnadu Pazhankudi Makkal Sangam v. State of Tamilnadu, Crl.R.C.No.868 of 1996*

invited the suggestions of the state human right commission regarding the power, jurisdiction, sweep, amplitude, functions and scope of human rights courts. Also, the Hon'ble court framed crucial questions on the interpretation of various provisions of the Act of 1993 as referred in *M. Loganathan Case*[31]. The Apex Court also observed that the benches of tribunals should be setup at convenient locations which is accessible to common man. More importantly, the yearly institutional data of disposed cases is required to be furnished for comparing it with the rate of disposal. The limitation period of pending matters should be adequately specified. Therefore, the establishment of human rights courts in each district should be done for the protection of entire fabric of 'access to justice' under human rights jurisprudence.

4. Human Rights Courts: American-African Perspective:

4.1 Inter-American Courts of Human Rights (IACHR)

It is well known proposition that speedy disposal of the case is a basic guarantee in the administration of justice. Applying this proposition, the IACHR has reduced the duration of each case[32]. The Court has developed innovative human rights issues which are affecting the American society. The welcoming step was the holding of public hearings by the court. The general masses witnessed the functions of the court and got encouraged towards their human rights interest. It is established under American Convention on human rights and Statute of the IACHR. Accordingly, all seven judges are appointed by the secret ballot and by vote of absolute majority by the members of the Organization of American States (OAS) wherein their decision is final and non-appealable[33]. Its functions include monitoring of the compliance of judgment, hearing of matters and interpretation of the judgment etc. The Indian governing bodies can take idea from such episodes for the establishment the Human Rights Courts and fulfillment of its commitments towards international obligations.

4.2 *South-African Court on Human and Peoples' Rights (CHPR)*

The Court on Human and Peoples' Rights are established under Article-I of the

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31 *M. Loganathan v. V.R. Eswaramoorthy,* 2010 SCCOnline Mad 3227

32 Annual Report, Inter-American Court of Human Rights, (2016).

33 Daniel M. Brinks, Access to What? Legal Agency and Access to Justice for indigenous People s in Latin America, The Journal of Development Studies, ISSN: 0022-0388, (2018).

Protocol to the African Charter on Human and Peoples' Rights[34] wherein; the adoption by the member states of the Organization of African Unity in 1988 mandated the establishment of CHPR in South Africa. Such Court is known as continental court established by African Countries to safeguard the human rights of African citizens[35]. It has two types of jurisdictions namely advisory and contentious. The judges are elected once after get nominated by their respective states for a fixed term of six years[36]. Its functions involve aid and advise the functions of the Human rights Commissions. It receives the complaints filed by African commissions of human rights and peoples' rights.

The South-African as well as American human rights justice administration reflects that access to justice can solely be sought by using and facilitating the formal state-sponsored justice system and opening the court's doors. 'Right to access to justice' is a fundamental and human right of every single individual[37]. However, Indian justice administration has been struggling with a glacially slow adjudication process and serious backlog in criminal matters that have failed to reach the courts[38]. This proposition demands the immediate establishment of human rights courts across the nation.

5. Conclusion

'Timely access to justice' is enshrined under Article-21 'Right to life' in Indian Constitution. Undoubtedly, the constitution imposes a positive duty of the State to ensure expeditious access to justice. Hence, the state is obliged to establish special courts according to the nature of the offences. Interestingly, West Bengal is the first position holder in setting up of Human Rights Courts for the preservation of human rights. In its recent annual report, Supreme Court has recommended the requirement of manpower in Indian judiciary at the District level[39]. Though human rights commissions are set-up at national and state level however; the commissions

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[34] International Federation for Human Rights, Practical guide on the African Court on Human and Peoples' rights towards the African court of justice and Human Rights, (April 2010) available at *https://www.fidh.org/IMG/pdf/african_court_guide.pdf*

[35] Report of South African Human Rights Commission, National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa, 14-15, (April 2016).

[36] Dugard, J. Human Rights and the South African Legal Order. Princeton University Press. (1978), available at *http://www.jstor.org/stable/j.ctt13x1 69k*

[37] *Bihar Legal Support Society v. The Chief Justice of India & Ors,* AIR 1987 SC 38.

[38] *Maneka Gandhi v. Union of India,* (1978) 2 S.C.R. 621.

[39] *Subordinate Courts of India: A Report on access to justice*, Centre for research & planning, Supreme Court of India, New Delhi, (2016).

have no powers of tribunals and no binding force of its decisions. The Commissions recommended the authorities to initiate proceedings rather than giving binding decisions[40]. Hence, the authors conclude that establishment of human rights courts would facilitate to accomplish the perceptible aspiration of equitable, speedy & fair 'access to justice'.

[40] Dr. S.K. Kapoor, *Human Rights under International law & Indian Law*, Central Law Agency, Sixth Edition, (2014). *Fourth-Year Law Student, Maharashtra National Law University, Nagpur.*

PREGNANCY BASED DISCRIMINATION IN EMPLOYMENT: CRITICAL APPRAISAL OF KHUSHBU SHARMA V. BIHAR POLICE SUBORDINATE SERVICE COMMISSION

Ranu Tiwari*

1. Introduction

One of the major problems that working women in this country face is the issue of sex discrimination. According to a study done by TeamLease, it was found that more than a million women find it extremely hard to get employment (for the Financial Year 2018-2019). One of the reasons observed behind the same is that maternity leaves and allied benefits becomes unfeasible for the companies and employers.[1] As per another report, India was amongst the top countries when it comes to economic disparity.[2] The same report noted that a number of women are forced to leave their jobs owing to factors like absence of maternity leaves, inadequate facilities for childcare support, gender discrimination, etc.[3]

An often-neglected form of employment discrimination, coming under the ambit of gender discrimination is pregnancy discrimination. The term entails *"treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth"* (as per definition given by the United States Equal Employment Opportunities Commission).[4] This discrimination may take place at any stage of employment. The present case deals with pregnancy discrimination at the stage of recruitment.

The Constitution of India, through its mandates such as equality before law (Articles 14), prohibition of discrimination on grounds only of religion, caste, sex, etc. (Article 15), equality of opportunity in public employment (Article 16) and right to life and personal liberty entrenched under Article 21 addresses this discrimination which has been expounded more lucidly through judicial interpretation.

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1 'Indian companies aren't hiring women to avoid 'maternity leave' liability: Study', (2018) Business Insider, *available at https://www.businessinsider.in/indian-companies-arent-hiring-women-to-avoid-maternity-leave-liability-study/articleshow/64749016.cms* (last accessed 16 April 2021).

2 'Empowering the third billion Women and the World of work in 2012', (2012) Strategy&, *available at https://www.strategyand.pwc.com/gx/en/reports/strategyand-empowering-the-third-billion-full-report.pdf* (last accessed 16 April 2021).

3 *Id.*

4 'Pregnancy Discrimination', U.S. Equal Employment Opportunity Commission, *available at https://www.eeoc.gov/laws/types/pregnancy.cfm* (last accessed 16 April 2021).

2. Facts and Ruling

In September 2017, prodding by the Supreme Court of India led the Bihar Police Subordinate Service Commission to issue advertisements for vacancies for police sub-inspector position in Bihar. The appellant applied for the same and qualified the preliminary and main examination. The next stage was the 'Physical evaluation test ("*PET*")' for which the appellant requested for a grant of extension (for 3-6 months) as she was in the advanced stages of her pregnancy and was advised complete bed rest by her doctor. To this request of hers, there came no reply. She then approached the Patna High Court by filing a writ petition before it. The single-judge bench granted her relief but this decision was subsequently reversed by the division bench of the same High Court. The aggrieved woman then went on to appeal against this ruling to the Supreme Court through a Special Leave Petition.

The Hon'ble Apex court directed the Commission to allow the postponement for PET, sought by the appellant as well as other women who requested it on the basis of pregnancy alone.

3. Analysis of the case

One of the first issues that arises in the judgement is the fact that the court reached the conclusion by pointing out to the *"dilemma between the sanctity of the examination and the difficulties of pregnant women".*[5] But, the court did not even once mention constitutional mandates of right to equality under Articles 14, 15 and 16. It is to be noted that the precedents in cases based on pregnancy-based discrimination in India have relied greatly on constitutional rights of women to equality, importance of beneficial legislations for women (such as Maternity Relief Act, 1961), international conventions and foreign precedents.

At this juncture, it will be pertinent to how the Indian courts have dealt with the issue of discrimination based on pregnancy. In *Air India* v. *Nergeesh Mirza,*[6] a landmark case on sex discrimination at the workplace, it was held that the provision of termination of the job of an Air hostess upon pregnancy after four years in service is unconstitutional and held it to be a clear violation of Article 14 of the Constitution of India. In *MCD* v. *Female Workers*,[7] the need to assistance for maternity benefits was highlighted. Justice Saghir Ahmad observed here that,

> *"Whatever is needed to facilitate the birth of child to a woman who is in service, the*

[5] 2019 SCC OnLine SC 1323.
[6] (1981) 4 SCC 335.
[7] AIR 2000 SC 1274.

> *employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the workplace".*[8]

Recent cases on the subject matter involve a lot of contradictions. In *Vandana Kandari* v. *University of Delhi*,[9] the Delhi High Court granted an exemption to two female students who were unable to fulfil the attendance requirements because they were in their advanced stages of pregnancy. But this was overturned by a subsequent two-judge bench of the High Court. In *Fahad Hassan* v. *Jamia Milia Islamia University*,[10] the Delhi High Court called pregnant students as 'incorrigible'. It held that since pregnancy is not an unexpected health condition, there can be no leniency granted in attendance requirements. It heavily relied on *Vandana Kandari* judgment.

In 2013, the Karnataka High Court granted relief to a pregnant student who was debarred from giving examinations on account of low attendance as she had taken few months leave in later stages of her pregnancy.[11] Shifting from above decisions, the court aptly held that:

> *"such an act on the part of any of the university or college would not only be completely in negation of the conscience of the Constitution of India but also of the women rights and gender equality this nation has long been striving for".*[12]

But, again in *Jasmine* V. *G.* v. *Kannur University,*[13] the Kerala High court refused to grant relief to a law student who was disallowed to give exams because of short attendance owing to her pregnancy. The court made certain observations, which according to the author do not align with the spirit of substantive equality in our Constitution. The court there, as in the present case, tried to enforce upon the petitioner *"to plan her life accordingly",*[14] by advising the petitioner to *"have had definitely adjusted her priorities when continuing a higher education"*.

In *Neetu Bala* v. *Union Of India,*[15] dealing with denial of appointment to a doctor in the Army because of pregnancy, the Punjab-Haryana High Court (single judge bench) observed:

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8 *Id.*
9 2010 SCC Online Del 2341.
10 W.P.(C)NO. 2640, 2641 & 2765 OF 2011.
11 *Dr. L.A. Meena* v. *National Board of Examinations,* WP No.8787 OF 2013.
12 *Id.*
13 2016 SCC OnLine Ker 3221.
14 *Id.*
15 2016 SCC OnLine P&H 602.

> *"Apart from Articles 14 and 16 which were the basis of the Supreme Court decisions, discriminatory treatment of pregnant women would also fall foul of Article 42 of the Constitution which requires the State to make provision for securing just and humane conditions of work and for maternity relief".*[16]

It also observed that *"by forcing a choice between bearing a child and employment, it interferes both, with her reproductive rights and her right to employment"*.[17]

Of the International Conventions, Convention on the Elimination of All Forms of Discrimination Against Women ("*CEDAW*") and International Labor Organization ("*ILO"*): Maternity Protection Convention 2000 would be relevant here. India is a signatory only to the former.[18] Article 11 of this CEDAW calls for parties and states to enact measures to remove discrimination in the area of employment against women. Sub-clause (2) of the same Article deals with measures that can help prevent discrimination against women arising from marriage or maternity so that their right to work is effectively implemented. Article 8 and 9 of the ILO Convention regards pregnancy-based discrimination unlawful and calls the state to make appropriate policies for the same.

The cases from other jurisdictions are also pertinent. In *Sharron A. Frontiero* v. *Filliot L Richardson*,[19] the Supreme Court of the Unites States observed that pregnancy is not any disability and *"is a very natural consequence of a marriage*" and therefore distinction based on it is extremely arbitrary.

In *Brown* v. *Stockton-Ontees Borough*,[20] the House of Lords held that it is an unfair dismissal when a woman is dismissed from work only because of her pregnancy and the employer is unable to find alternative arrangements to compensate for her absence.

It is often a considerable inconvenience to an employer to make the necessary arrangements… whilst she is absent from work to have a baby, but this is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace.[21]

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16 *Id.*
17 *Id.*
18 'Convention on the Elimination of All Forms of Discrimination against Women', United Nations Entity for Gender Equality and the Empowerment of Women, *available at* https://www.un.org/womenwatch/daw/cedaw/ (last accessed 16 April 2021).
19 411 U.S. 677 (1973)
20 (1988) 2 WLR 935.
21 *Id.*

In *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen,*[22] the European Court of Justice held that the refusal to employ a woman because of pregnancy as illegal and called it a direct discrimination based on sex. It noted that, *"only women can be refused employment on the ground of pregnancy and such a refusal, therefore, constitutes direct discrimination on the ground of sex".*[23]

Based on the previous discussion, it is clear that the court's failure to identify the direct violation of constitutional provisions is a serious error. In all these cases, Article 14, 15 and 16 of the Constitution of India are violated. Article 42, which mandates the State to provide for *"securing just and humane conditions of work and for maternity relief"*, has also been ignored.

The court also remarked that had the examinations of the date been announced from the very start, then the decision of the court would have been different. And in that case, the women would have got a chance "to plan their life accordingly". The court also said that what they did was a one-time measure and they wouldn't interfere with the sanctity of the examination in the future.

This does not conform with what the earlier precedents reflected, which is to provide for beneficial treatment for women, especially during pregnancy. More inclusion of women in workplace requires that their separate needs be taken into account. Joan Williams, a noted feminist scholar has observed that the basic ground rules of a workroom are often not based on gender neutrality and therefore these rules function to the disadvantage of females.[24] The "ideal worker", is the man or the male worker who cannot become pregnant and it is mostly his perspective that shapes the ground rules of the work.[25]

The court, while advising women "to plan their lives accordingly", has not taken note of the fact that pregnancy and other reproductive rights of women cannot be interfered with. In *Inspector Ravina* v. *Union of India*,[26] the Delhi High Court held that the right to pregnancy or childbirth is a deeply personal choice that a woman makes and it is one of the facets of "right to life" protected under Article 21 of the

22 (1990) EUECJ R-177/88.

23 *Id.*

24 Gautam Bhatia, 'Maternity leave is not a question of charity', (2018) Hindustan Times, *available at https://www.hindustantimes.com/analysis/maternity-leave-is-not-a-question-of-charity/story-7bLaT3b9bR7tBIdYkPjIEL.html* (last accessed 16 April 2021).

25 *Id.*

26 W.P. (C) 4525/2014.

Constitution. However, this construction of pregnancy, being a wholly independent and informed decision of the woman does not align with the Indian social realities.[27] Women, more often than not, have no power to make their reproductive choices.[28]

Even though India is making great strides in economic advancement, there is a great gender imbalance with reference to labour force participation, employment and entrepreneurship.[29] Dealing with the issue of pregnancy discrimination effectively will be a great step forward to ensure equality of opportunity to women at the workplace.

4. Conclusion

The Apex court has missed the golden opportunity of taking the pregnancy jurisprudence a long way in this country. Had constitutional provisions of equality and foreign jurisprudence on the subject matter been relied on, the court would have done a great favor in remedying certain recent decisions on maternity benefits and pregnancy-related discrimination, which have led to great deal of confusion. It is to be remembered that providing for steps to ensure the participation of pregnant women in jobs, education or any other field is a question of justice and not the state or court's act of charity or kindness.

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[27] Anupriya Dhonchak, 'Gendered University Attendance Requirements in India: Is there Hope for the Future?' (2019), London School of Economics, *available at https://blogs.lse.ac.uk/humanrights/2019/03/18/gendered-university-attendance-requirements-in-india-is-there-hope-for-the-future/* (last accessed 16 April 2021).

[28] Satyajit Bose, 'Sex Discrimination and Pregnancy – Reviewing Khusbu Sharma's Case', (2019) Indian Constitutional Law And Philosophy, *available at https://indconlawphil.wordpress.com/2019/11/24/guest-post-sex-discrimination-and-pregnancy-reviewing-khusbu-sharmas-case/* (last accessed 16 April 2021).

[29] Ejaz Ghani, 'Gender discrimination defines India's economy', (2017) Live Mint, *available at https://www.livemint.com/Opinion/u1fO2yEso9nYra5DdfXmeL/Gender-discrimination-defines-Indias-economy.html*. (last accessed 16 April 2021).

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