Specific Human Rights for Older Persons?

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Abstract

The identification of possible new subjects for rights entitlement seems to be fuelled by sensibilities that develop over time. The global phenomenon of demographic ageing influences societies and within ageing societies demands for new rights and duties have emerged. At the beginning of 2010, the Advisory Committee of the UN Human Rights Council delivered a working document defending “the necessity of a human rights approach and an effective United Nations mechanism for the human rights of the older person”. Written from a legal positivistic perspective, this article illustrates the legal construction of the human rights of older persons by analysing the relevant case law as it has developed within the pertinent legislative human rights framework and drawing inspiration from the interpretative and systematising work of legal scholars. The article concludes that a new treaty on the human rights of the older persons could complement the overall human rights framework, provided that it incorporates a more positive, explicit conception of the rights and responsibilities of and towards those who are least advantaged, less well situated or less empowered.

Introduction

In recent years rumours have been aired concerning the impending recognition of old age rights which would appear alongside the human rights of minorities, women, children and persons with disabilities. The movement for old age rights seemingly achieved momentum at the beginning of 2010 when the Advisory Committee of the UN Human Rights Council delivered a working document defending “the necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person”.

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The rights of the elderly pose fundamental questions about the idea of human rights law and the least advantaged, frail and vulnerable. Furthermore, the rights of older persons raise legal and ethical questions: Who are older persons exactly? What specific to old age should human rights law protect? Scholarly legal work in the area of ageing offers a few excellent pieces of research regarding the status of older persons in human rights law and, more recently, about the opportunity of an ad hoc human rights framework.

This article describes the human rights of older persons, drawing from case law as it has developed within the pertinent legislative framework, and taking inspiration from the work of legal scholars.

The boundaries of the research are broad. We have drawn from a variety of sources: international policy documents on ageing (the international framework on ageing stricte sensu), international and regional positive human rights treaty provisions, reports and comments of treaty-based committees, such as the one operating under the International Covenant on Economic Social and Cultural Rights 1966, and a series of proposals or draft declarations on old age rights. As for case law, it comprises the decisions of international human rights courts, in particular the European Court of Human Rights and the Inter American Court, “quasi judicial” general comments of the Committee on Economic Social and Cultural Rights (CESCR), and the digest of the European Committee of Social Rights (ECSR).

The aim of this article is to assess what human rights “do” vis-à-vis older persons, or rectius: how far traditional human rights, such as the right to private life and non-discrimination, the right to health, to work etc., have gone in protecting older persons. Part I of the article provides an inventory of the main references and sources available about human rights and older persons. Part II analyses the legal concept of human rights of older persons which is derived from these sources. We will analyse, more specifically, the right not to be discriminated against on the ground of age, the right to be protected against abuse, the right to social security, the right to housing, the right to health, the right to private life, the right to work and the right to education. Whilst the article attempts to expand the breadth of the research to other legal traditions and systems, the main focus will be upon the European context, case law and doctrine. In the conclusive section, we explain why the legal positivistic approach to older persons’ rights needs to be complemented with an appropriate study regarding the ideologies of human rights (of older persons).

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1 Two preliminary notes on terminology: Vulnerability—literally, vulnerability refers to the easiness of being hurt by somebody or something. A person can be potentially offended by an offender more powerful and/or by the fact that he or she is unable to deal with life context and conditions and consequently succumb to the ambient. In both cases it is a matter of power relations, but in the former one speaks of inter-human, social relations; in the latter, one speaks of human-ambient relations. Identifying vulnerable older people and understanding the causes and consequences of their vulnerability is an essential task of social policy and studies. In this article we cannot develop further theoretical reflection on the relation(s) between power, age, and human rights. We shall avoid using the expression “vulnerable”, unless when the term is present in international documents. We thank Prof. Emilio Mordini for first drawing our attention to this issue. Older persons: United Nations documents on ageing have officially adopted the expression “older persons”. Although bearing different connotations, for convenience, in this article, older persons, elderly and old age (group or rights), are used interchangeably. The authors thank the anonymous reviewer for raising these two points. For a report on the contentious terminology issue in the field of disability/disabilities rights, see R. Kayess and P. French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 Human Rights Law Review 1.


3 The research presented in this article originates from an EU-funded research project called SENIOR, Ethical and Privacy needs in ICT for older persons (SENIOR), FP7 (Grant agreement no.216820) http://www.seniorproject.eur [Accessed July 6, 2011]. The authors are currently involved in another relevant research project, the Marie Curie IAPP research project: VALUE AGEING (Grant agreement no.251686) http://www.valueageing .eur [Accessed July 6, 2011].
The international framework for the protection of older persons

By the expression "international framework on ageing" we refer to a wide variety of legal rules, recommendations and guidelines collected in international policy documents on ageing (the international framework on ageing *stricto sensu*), international and regional positive human rights treaty provisions, the general comments of supervisory committees of the International Covenant on Economic Social and Cultural Rights 1966 and a series of proposals or draft declarations on old age rights.

The Draft Resolution on a Declaration of Old Age Rights 1948

The first bid to sanction the human rights of older persons came in 1948, a few days before the Universal Declaration of Human Rights was signed in Paris on December 10 in the same year. At its third session, the General Assembly of the United Nations received from Argentina a proposal for a "Draft Resolution on a Declaration of Old Age Rights". The preamble of the Draft Declaration on Old Age Rights 1948 defined old age rights as essential universal social safeguards for the improvement of the living conditions of the worker and for his welfare "when his physical strength is at an end and he is exposed to poverty and neglect". The 10 articles contained therein addressed specific and concrete needs, such as accommodation (art.2), food (art.3), clothing (art.4), physical and moral health (arts 5 and 6), leisure (art.7), work (art.8) and financial stability (art.9). The first article was dedicated to the right to assistance, "to full protection by his family and of the State". The last article consecrated a moral imperative: the right to respect (art.10), which was transmitted to the Economic and Social Committee for further study, but no additional action was taken.

In his seminal book on the International Convention on Economic, Social and Cultural Rights (ICESCR), Craven describes a second, minor bid to appraise a charter on old age rights. Craven states that during the debates on art.9 (social security) the Indian delegation proposed the insertion of an explicit reference to older persons. Curiously, Craven recounts that the proposal was refused on the account that "the rights of the elderly could be provided for in a separate convention".

International Human Rights Law and old age rights

International Human Rights Law (IHRL) holds a series of treaties which distinguish among rights holders on account of age, gender, disability and ethnic origin. To date no such instrument is dedicated to older persons. The only reference is to the "right to security in the event of... old age" mentioned in art.25 of the Universal Declaration of Human Rights. Specialised international agencies, such as the International Labour Organization (ILO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), have issued a sizeable number of recommendations and, in the case of the ILO, conventions on older persons setting minimum standards and guidelines on social

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6 Draft Resolution on a Declaration of Old Age Rights, Resolution 213 (III) of December 4, 1948.
7 Draft Resolution on a Declaration of Old Age Rights, Resolution 213 (III) of December 4, 1948, Preamble.
9 Other than children and women, addressed in arts 10 and 3 of the International Covenant on Economic Social and Cultural Rights (ICESCR) respectively.
security, health and education. Regional human rights instruments deal explicitly with older persons. The recognition relates mostly to the area of social, economic and cultural rights, albeit with differences between European and other legal traditions.


**General Comment no.6 on the economic, social and cultural rights of older persons**

The International Covenant on Economic Social and Cultural Rights 1966 (ICESCR) does not possess an individual or group petition system, but a reporting system that engages state parties in a constructive dialogue based on national periodic reports. Since 1987, the Committee on the Economic Social and Cultural Rights (CESCR) has started delivering general comments. Craven, Alston and Meron have all underlined the creative and quasi-judicial character of the general comments delivered by the CESCR. General comments have contributed to defining rights not fully expressed in the Covenant, such as the right to housing, or have helped to set a standard, as in the case of the right to education. The quasi-judicial character of general comments derives from the authority acquired by the CESCR, whose interpretations are often used by human rights courts in their judgments.

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13 Council of Europe—ETS no.163—European Social Charter (revised), 1996, art.23, "The rights of the elderly to social protection".


18 Done on July 11, 2003, on the occasion of the second summit of 53 member countries of the African Union, in Maputo, Mozambique. The Maputo Protocol is in force having been ratified by 28 countries, art.22 "Special Protection of Elderly Women".


21 Declaration of the Basic Duties of ASEAN Peoples and Governments, Kwangju, South Korea on May 17, 1998, art.5; Asian Human Rights Charter, Declared in Kwangju, South Korea on May 17, 1998.


24 For Meron, "such an interpretation is per se not binding on States parties, but it affects their reporting obligations and their internal and external behaviour. It shapes the practice of States in applying the Convention and may establish and reflect the agreement of the parties regarding its interpretation" (T. Meron, Human Rights Law-Making in the United Nations (Oxford: Clarendon Press, 1986), p.10). For Craven, three are the basic functions of the Committee, namely, the creative, the review and the corrective one (M. Craven, The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development (Oxford: Clarendon Press, 1995), p.3). Alston underlines the internal consistency of general comments and the independent status of experts (P. Alston, "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social, and Cultural Rights" (1987) 9 Human Rights Quarterly 352).

25 Derived from art.11 of the ICESCR on adequate standard of living; see General comment no.4: The right to adequate housing (art.11(1) of the Covenant), E/1992/23.

For our purposes, attention is drawn to General Comment no.6 on the economic, social and cultural rights of older persons, adopted in 1995. General Comment no.6 uses policy documents on ageing, such as the Vienna Action Plan 1982 and the UN Principles on older persons 1991, introduced below, to shed light on the significance of ESC rights for older persons. Successive general comments contain references to General Comment no.6, when discussing, for example, the right to health care, the right to education, the right of everyone to take part in cultural life, social security or anti-discrimination.

International policy documents on ageing

International policies on ageing comprise a rich body of recommendations and proposals, the outcome of consultations amongst international social policy experts, NGO representatives, associations of doctors, social workers and a variety of other operators over a period of almost 30 years. These forums have contributed to identifying and formulating needs, threats and vulnerabilities of older persons and ageing societies. Four moments are important. The First World Assembly on Ageing (Vienna, 1982) generating the Vienna International Plan of Action on Ageing (VIPAA) is the first moment. Adopted by the General Assembly of the United Nations, VIPAA 1982 contains 62 recommendations. The second moment was the adoption of the United Nations Principles for Older Persons of 1991, by the General Assembly of the United Nations. This document includes 18 recommendations organised under five ethical principles: dignity, independence, participation, care and self-fulfilment. The Second World Assembly on Ageing (Madrid, 2002) generating the Madrid International Plan of Action on Ageing (MIPAA) constitutes the third moment. Adopted by the General Assembly of the United Nations, MIPAA 2002’s aim is to ensure the question of ageing societies be mainstreamed into national policies. The MIPAA provided a sizeable body of recommendations and established five regional UN commissions on ageing. The fourth and last moment cannot be crystallised in a single document but in a series of initiatives taken by regional committees of experts, academia, activists etc. under the impetus of the 2002 MIPAA. One notable direction of research has concerned human rights and their potential of turning recommendations and guidelines for state action contained in international documents on ageing into a system of legally binding obligations.
The 2010 Chung report concerning the necessity of a treaty on the human rights of the older person

In January 2010, the Advisory Committee to the Human Rights Council released a report on the human rights of older persons. The “Chung report”, named after the rapporteur Ms Chunsung Chung, is a research document that illustrates, in sections I and II, the global impact of demographic ageing and the increasing number of human rights violations suffered worldwide by older persons in areas such as physical and moral integrity, susceptibility to poverty, employment, social security and health care. After discussing the need (“necessity”) for a human rights treaty, the report presents in section V a non-exhaustive list of human rights of the older person, prepared by the Yale law school. One of the basic claims of the Chung report is that a treaty on the human rights of the older person would enhance the visibility of older persons in human rights law. General human rights in principle applicable to everyone are “refracted” by discriminatory attitudes and practices; such refraction is exacerbated by the lack of any explicit reference to old age and, as a result, older persons are “invisible as a group within the law” and states parties are “age blind” in reporting violations of their rights. Older persons would become more visible, concludes the Advisory Committee:

“... if they were internationally recognized as holders of universal human rights, just as women, children, indigenous groups, and persons with disabilities were recognized as distinct groups requiring special care and concern under the existing human rights regime”.

A treaty would serve as the basis for reporting or supervisory mechanisms; it would provide a framework of standards, give a basis for advocacy, increase public awareness and influence allocation of resources.

Other draft proposals on older persons’ rights have seen the light in the recent years. One of the most notable examples is the “European Draft Charter of the Rights and Responsibilities of Older People in need of Long Term Care (LTC) and Assistance”, prepared by the European platform of older persons (AGE), an NGO heavily subsidised by the European Commission, and released in April 2010, four months after the Chung report. Unlike the latter report that spoke of the rights of older persons, the AGE draft charter refines the definition of right holders as the rights of elderly persons dependent on others for care and assistance.

Analysis of Specific Human Rights

This part of the article is concerned with an analysis of major human rights applying to older persons. Each paragraph illustrates the general salient features of the human right under scrutiny and discusses its relevance, drawing from case law and legal doctrine.

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43 Chung report (2010), paras 45-46.
44 Chung report (2010), para.45.
45 Chung report (2010), paras 40, 48 and 50.

Right to be protected against discrimination on grounds of age

The right to be protected against discrimination is beyond doubt the starting point for any analysis on elderly rights. It is a fundamental, founding principle of human rights that “all human beings are born free and equal in rights and dignity”. This égalité en droits creates obligations befalling on states, which bear a negative duty to abstain from taking discriminatory measures, and a positive duty to progressively remove obstacles—national laws or practices—which hinder one’s right to exercise his or her rights or to defend him or herself. However, the concept of discrimination, and therefore the limits and obligations of state action, are not fixed.

Through its case law the European Court of Human Rights has elaborated a test based on two criteria, reasonability and proportionality. A state measure creating a difference in treatment between comparable situations constitutes discrimination when it lacks reasonable justification, or when there is no proportionality between the means employed and the legitimate aim sought to be realised. From the case law of courts, legal doctrine has singled out three forms of discrimination, also applicable on the ground of age: when the age criterion can be qualified as the direct reason for a distinction which has been made, it constitutes “direct discrimination” on the grounds of age. For example, age limits applied in job advertisements. “Indirect discrimination” appears to be neutral but actually favours or disfavours persons belonging to one or more age groups when compared to persons belonging to one or more other age groups. For instance, a job advertisement stating that the future holder of the post in question must possess a driving licence. “Discrimination by association” or “by membership” refers to the association of individuals with a group characterised by one of the prohibited grounds or the perception by others that an individual is part of such a group. For instance, a person may be discriminated against in the workplace on account of his or her being the principal carer for a dependent elderly person at home or the parent of a child with a disability.

We have mentioned the “prohibited grounds of discrimination”. International human rights treaty instruments have all replicated the clause of non-discrimination formulated in art.2, para.1 of the Universal Declaration of Human Rights, according to which “every individual is due all the rights and all the liberties proclaimed in this declaration, without any distinction for reasons of colour, sex, language, religion, political or other opinion, national or social origin, wealth, birth or other condition”. This well-known clause identifies a series of so-called explicit grounds of discrimination, or forbidden grounds, such as race, colour, sex, language, religion, etc. It is equally well known that “age” is not explicitly mentioned. Promoters of a treaty on the human rights of the older person surmise that it is precisely the lack of an explicit reference to age that has contributed to making discrimination on the ground of age invisible in human rights law.

When the core human rights treaties, in particular the Universal Declaration of Human Rights1948 (UDHR) and the Covenants 1966, were drafted, the list of explicit forbidden grounds of discrimination was not intended to be exhaustive. As Morsink has demonstrated, it responded to “needs or concerns that—for different reasons—communities wanted to get past from and stem once for good as unnecessarily

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48 Article 1, Universal Declaration on Human Rights (UDHR) 1948.
49 Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistic Case) (1979–80) 1 E.H.R.R. 252 at [10].
50 Mangold v Helm (C-144/04) [2005] E.C.R. I-9981.
53 See General Comment no.20, Non-Discrimination, para.5.
54 Chung report (2010), paras 45–46.
and unreasonably discriminatory. It is reasonable to suppose that there was not, at the time when major human rights treaties were drafted, a perception of systemic national practices of discrimination on the ground of age. Accordingly, General Comment no.6 on the rights of older persons reminds that the absence of age is probably best explained by the fact that when these instruments were adopted the problem of demographic ageing was not as evident or as pressing as it is now. However, as the reference to "demographic ageing" in General Comment no.6 suggests, if age was not a concern at that time, age barriers may have emerged as a concern over the years for a great number of ageing men and women. Since the end of the Second World War, age limits have increasingly been de jure and de facto imposed in areas such as employment, retirement, health care and education. Following Morsink, one could say that claims against discrimination on the ground of age emerge in human rights law as reaction to or as limit to the formalisation of age barriers in an increasing number of areas. Accordingly, concerns regarding discriminatory practices based on age were first voiced in the area of employment by the International Labour Organisation. Likewise, the insertion of age in the non-discrimination article of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, responds to similar concerns, namely, to protect migrant workers and their families when workers or breadwinners reach old age and are less fit to work. It is also significant that early distinctions between adults and older adults were introduced in criminal law in matters of capital punishment and in provisions of international humanitarian law.

The foregoing indicates that non-discrimination on the ground of age is recognised in international human rights law à la carte in regulated environments, where it constitutes an instruction to state and private parties alike. In general, i.e. where non-discrimination on ground of age is not explicitly mentioned as a forbidden ground, national laws or practices that make distinctions based on age can be challenged using the test of reasonableness and proportionality. To what extent courts will question the necessity of the distinction and the intentions of the legislature will arguably depend on the level of internalisation of age distinctions as unnecessary or unreasonable. A concrete illustration is offered by the first human rights document of the new millennium, the 2000 Charter of Fundamental Rights of the European Union.

51. J. Morsink, Inheren Human Rights (University of Pennsylvania Press, 2009), pp.154–155. reports the fourth principle of the Potsdam Conference 1945, which stated that: "All Nazi laws which provided the basis of the Hitler regime or established discrimination grounded on race, creed or political opinion shall be abolished". However, Mégret reminds that "there is no doubt that the Holocaust was preceded by, among other things, a campaign of 'euthanasia' that was specifically directed at the old" (F. Mégret, "The Human Rights of Older Persons: A Growing Challenge (2011) 11 Human Rights Law Review 46.

52. General Comment no.6, para.11.


54. See, for example, ILO Older Workers Recommendation (1980), point 5g; "older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers". Similarly, the ILO Convention concerning Private Employment Agencies 1997 lays down a prohibition of discrimination "or any other form of discrimination covered by national law and practice, such as age or disability". Also ILO, Workers' Housing Recommendation (115), 1961, para.1. See below on the right to work.

55. Article 7, Non-discrimination with Respect to Rights.

56. For example, American Convention on Human Rights 1969 art.4.5 ("the application of capital punishment upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age"). Article 11 of the ILO Forced Labour Convention 1930 provides for age limits beyond which persons should not be called upon for compulsory labour. See also art.16, Part II "General Protection of Prisoners of War" of the Third Geneva Convention 1949, which calls for privileged treatment of prisoners on account of "their state of health, age or professional qualifications". Similarly, art.27, Part III "Status and Treatment of Protected Persons" of the Fourth Geneva Convention 1949 prescribes the occupying power to treat protected persons "without prejudice to the provisions relating to their state of health, age and sex".


The non-discrimination clause (art.21) includes age, and it applies horizontally. On the one hand, the insertion of age in art.21 codifies the EU *acquis* which has existed since 1997 when the treaty of Amsterdam inserted art.13 in the Treaty Establishing the European Communities (TEC). On the other hand, art.21 looks ahead and is transformative insofar as it incorporates recent trends towards the elimination of age barriers. However, notwithstanding the EU Charter, the elimination of age barriers in general is still very much work in progress; to date, EU law prohibits discrimination on the ground of age only in the field of employment.

*Elder abuse and the right to protection against it*

According to the definition of the WHO, elder abuse is “a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person”; the “expectation of trust”, says the WHO, can be broken down into physical, sexual, emotional and financial spheres leading to different forms of abuse. Just as the forms of abusive conduct against the aged are diverse, so too are the legal bases on which protection can be invoked. Concerned with a growing number of cases of ill treatment of older persons, the 2010 Chung report proposes a general right “to enjoy protective measures to protect [older persons] from all forms of abuse, exploitation, and marginalisation”.

In what follows, we will focus on the legal basis and protective measures offered by the right not to be subjected to torture or to cruel, inhuman or degrading treatment as enshrined in art.3 of the European Convention on Human Rights (ECHR). Next, we will delve into art.8 of the ECHR (private life) to assess proposals for the criminalisation of abusive or violent conduct against older persons.

Right not to be subjected to torture or to cruel, inhuman or degrading treatment

The European Convention on Human Rights, signed in 1950, is a typical liberal, civil human rights document. Article 3 protects the individual right not to be subjected to torture or to cruel, inhuman or degrading treatment. The legal framework of the Council of Europe on art.3 is reinforced by the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987. The 1987 Convention established a supervisory Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) with the power to carry out unrestricted visits to places of detention, police stations, mental health centres, and also elderly care institutions.

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66 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, December 3, 2000. OJ L 303, art.6. In July 2008, the European Commission tabled a proposal for a horizontal Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Brussels, July 2, 2008. COM(2008) 426 final. The ECI, on its part, sent mixed messages in *Mangold* (C-144/04), when it held that “the principle of non-discrimination on the grounds of age must be regarded as a general principle of Community law” but also stated the general principle prohibiting all forms of discrimination, including on ground of age, is not found in Community law properly, but “in various international instruments and the constitutional traditions common to the member states”.
68 Adapted in art.16 of CRPD (2006) “Freedom for exploitation, violence and abuse”.
70 Compare UDHR 1948, art.5; ICCPR 1966, art.7; African Charter on Human and Peoples’ Rights 1981 art.5, American Convention on Human Rights 1969, art.5.
In 1994, the Committee of Ministers of the Council of Europe reminded state parties that, pursuant to art.3 of the Convention, "[…] elderly people should be able to live in security, wherever they are, free from fear of exploitation or of physical or mental abuse". The case law of the European Court of Human Rights, however, indicates that acts or omissions subject to complaint must be clearly and narrowly detailed and must reach a particular level of severity to engage this article. In Mouisel v France, for instance, the Strasbourg Court argued that health, age and severe physical disability had to be considered among the factors to be taken into account under art.3, "in assessing a person's suitability for detention". The court considered that the conditions imposed on the applicant, a detainee who was forced to wear handcuffs when going to the hospital, were incompatible with art.3. The court considered that the use of handcuffs was disproportionate to the needs of security, having regard to the applicant's health, to the need to undergo regular, intensive medical treatments, and having regard to his age.

The legal exigency for narrow definition under art.3 also requires that a direct link is established between abusive behaviour or neglect and degrading treatment. In Larioshina v Russia, the applicant argued that her pension was too low in order for her to live with dignity and thus alleged that Russia was treating her in an inhuman and degrading way. In the admissibility decision, the court reviewed Mrs Larioshina's plea on the ground of art.3 and refused to review her case on that basis. If, as a matter of principle, one cannot exclude that a complaint about insufficient social benefits may raise an issue under art.3 of the Convention, the court argued, there was no indication of a causal link between level of pension and damage to her physical or mental health capable of attaining the minimum level of severity falling within the ambit of art.3 of the Convention. While petitioners may invoke art.3 against various forms of ill-treatment, art.3 offers protection for serious offences which are narrowly formulated. In conclusion, rules which apply to inhumane and degrading treatment and torture "do not always make it possible to deal with ill-treatment of older persons satisfactorily".

Right to private life

As mentioned above, concern over an increase in the number of cases of abusive conduct or neglect against older persons has led to proposals (voiced in the 2010 Chung report, the 2010 AGE proposal, and in international policies on ageing) to adopt protective measures, including legislative measures, to combat elder abuse. International documents on ageing, in particular, underline the opportunity to use criminal law provisions and procedures. This proposal raises the questions of on what basis and within which limits human rights law may require states to adopt criminal laws against deviant conduct.

In the case law of the European Court of Human Rights, the penalisation of deviant conduct has been justified on the basis of the right to private and family life. The basic historic function of art.8 of the ECHR has been to shield private and family life from excessive intrusions. Progressively, the court has stated that individual self-determination or autonomy is also an important principle underlying its interpretation of art.8 of the ECHR; under art.8, states have been compelled to adopt positive measures deemed necessary

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72 Recommendation no.R (94) 9 concerning elderly people.
to enable individual self-determination or autonomy, as part of the right to private life.\textsuperscript{76} The point of
interest in this line of cases is that, on the basis of art.8, states have also come under the obligation to
adopt appropriate criminal law provisions or legal procedures which protect individuals from certain
serious offences, and to prosecute offenders.\textsuperscript{77} In the case \textit{MC v Bulgaria}, the court discussed the existence
of a positive obligation to punish rape and to investigate rape cases.\textsuperscript{80} On the basis of art.3, seen above,
and art.8, the judge held that states “have a positive obligation inherent in Articles 3 and 8 of the Convention
to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective
investigation and prosecution”.\textsuperscript{81} The court explained that while the choice of the means to secure
compliance with art.8 is within the state’s margin of appreciation, “effective deterrence against grave acts
such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient
crimal-law provisions”. The court added that “[c]hildren and other vulnerable individuals, in particular,
are entitled to effective protection”.\textsuperscript{82}

The \textit{MC} case suggests that where offences are serious, protective measures must be effective and may
include, in extreme cases, criminal law solutions. However, as the analysis of art.3 clarifies, serious
offences covered by criminal provisions need to be clearly and narrowly formulated. There are important
“political choice” reasons to consider too. In a concurring opinion to \textit{MC}, Judge Tulkens reminded judges
that effectiveness of general deterrence based on the criminal law is always questionable, since criminal
law is “not the only way of preventing undesirable behaviour”.\textsuperscript{83} Abuse of the elderly represents a complex,
quite recent matter laden with coexisting social and psychological causes and implications. Although it
instills discontent and a sense of urgency, the use of criminal law should be kept to a minimum and remain
a measure of last resort.\textsuperscript{84} This invites contemplation of the public policy tools best equipped to address
it; for instance, how attention should be paid to risk factors, such as living conditions, income, health
status, training and respite care for caregivers.\textsuperscript{85}

\textbf{The right to social security for the elderly}

In 1944, the International Labour Organization proclaimed solemnly the “extension of social security
measures to provide a basic income to all in need of such protection and comprehensive medical care”\textsuperscript{86}
and, in 1952, the ILO fixed minimum standards for old age social benefits.\textsuperscript{87} It is indeed a principle boldly
engraved in human rights law that a person who finds himself or herself in circumstances or contingencies
in which he or she cannot satisfy “the economic, social and cultural rights indispensable for his dignity
and the free development of his personality”, should be accorded support by the state.\textsuperscript{88} The right to social
protection in the event of old age, in arts 22 and 25 of the UDHR 1948, has been subsequently incorporated

\textsuperscript{79} \textit{MC v Bulgaria} (2005) 40 E.H.R.R. 20 at [153].
\textsuperscript{80} \textit{MC v Bulgaria} (2005) 40 E.H.R.R. 20 at [150].
\textsuperscript{81} “The only point I wish to clarify concerns the use of criminal remedies. […] Admittedly, recourse to the criminal law may be understandable where offences of this kind are concerned. However, it is also important to emphasise, on a more general level, that recourse to the criminal law is not necessarily the only answer. I consider that criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of restraint.”
\textsuperscript{82} The appeal to the penal state to the detriment of the welfare state model is first discussed by L. Wacquant, \textit{Les prisons de la misère} (Paris, Raisons d’Agir, 1999).
\textsuperscript{83} Compare the provisions on violence and abuse in CRC (1989), art.19 and CRPD (2006), art.16.
\textsuperscript{84} International Labour Organization, \textit{Declaration Concerning Aims and Purposes}, May 10, 1944, art.3(f).
\textsuperscript{85} ILO, Convention no.102 concerning Social Security (Minimum Standards), 1952, Part V (Old Age Benefit). See also Equality of Treatment (Social Security) Convention 1962 (no.118); Employment Injury Benefits Convention 1964 (no.121); Invalidity, Old Age and Survivors’ Benefits Convention 1967 (no.128); Medical Care and Sickness Benefits Convention 1969 (no.130); Maintenance of Social Security Rights Convention 1982 (no.157).
\textsuperscript{86} See General Comment no.19, para.1.
in many international human rights treaties. In particular, the right of older persons to social protection has found recognition in regional human rights instruments, namely the Protocol of San Salvador 1988, the Andean Charter 2002, the Revised European Social Charter 1996, the African Charter 1981 and in the European Social Charter 1996. A review of these instruments provides a strong illustration of the interest and concern that human rights law places on this matter.

The Protocol of San Salvador of 1988, which expands the scope of the American convention to the area of economic, social and cultural rights, recognises social security as the right to be protected from the consequences of old age and of disability which prevents a person, physically or mentally, from securing the means for a dignified and decent existence. Article 17 is specifically dedicated to those who have reached old age. Such individuals are entitled to receive “suitable facilities, as well as food and specialized medical care” when he or she “lack[s] them” or “is unable to provide them himself or herself[themselves]”. Alongside the obligation to protect, art.17 includes provisions that aim to empower the elderly by giving them “the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires”.

Signed in Guayaquil, on July 26, 2002, by Bolivia, Colombia, Ecuador, Peru and Venezuela, the non-binding Andean Charter for the promotion and protection of human rights includes in s.IX a provision dedicated to the “rights of groups object of special protection”. Under art.46c, “older adults”, states parties “reiterate their commitment to fulfill and enforce fulfillment of the rights and obligations designed to promote and protect the human rights of older adults”. Article 47 spells out five “themes” that should be addressed “with a view to improving the promotion and protection of the human rights of older adults”. Themes one and two incorporate the principle of non-discrimination to older adults’ access to services; theme four draws on the ILO recommendations on old age and social security, mentioned above, while the third and fifth themes invite, respectively, the opening of a consultation platform with older persons’ organisations and the inclusion of older adults in the socio-economic life of their countries.

The African Charter on Human and Peoples’ Rights 1981 (also known as the Banjul Charter) incorporates social security in art.18, dedicated to the protection of the family. Social security measures are conceived of as directed to the family as the social unit that accompanies the individual throughout life, thus also as he or she ages. The fourth and last paragraph of this provision states that “the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs”. The special measures designed to support elderly people should tally with the physical and the moral needs of both older persons and their families; the two, the individual older persons and his or her family, are seen as interdependent. The relation of interdependency emerges from art.29, which states the duty of any person “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need”. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (also known as the Maputo Protocol) recognises in art.22 the special protection of elderly women. This provision points at the important issue of the interchange between age and gender, minority status, marital status, health status, citizen or migrant status. In general, individuals or categories of people, notably women, who have been the victims of enduring discriminatory socio-economic conditions during youth and adult life, are at risk of experiencing deeper discrimination and harsher living conditions as they get older.

89 For example art.11 of the CEDAW, art.26 of the CRC, arts 27 and 54 of the IC on the Protection of the Rights of All Migrant Workers and Members of Their Families. The CRPD (2006) recognises the right to social security in art.28. See also art.24 of the UN Convention on the Status of Refugees 1951.
92 They are: a. Women; b. Children and adolescents; c. Older adults; d. Persons with disabilities; e. Migrants and their families; f. People with different sexual orientation; g. Internally displaced people; h. Persons deprived of liberty; i. Refugees and stateless persons.
93 Article 18 “[F]amily shall be protected by the State which shall take care of its physical health and moral”. See below on health care.
94 CEDAW, Draft general recommendation on older women and protection of their human rights, May 12, 2009, CEDAW/C/2009/II/ WP.1/R.

With the ICESCR 1966, the European Social Charter is the most important and detailed piece of international human rights law dealing with economic, social and cultural rights. The Charter foresees a system of periodic national reports and, since 1998, a collective complaints procedure or protocol which gives NGOs or other relevant organisations the right to lodge complaints with the European Committee of Social Rights at the centre. The rights of older persons to social security are protected by three provisions (arts 12, 13 and 14) read in conjunction with art.23 (social security of older persons). The meaning of these provisions and their obligations on states has been clarified by the ECSR in a series of answers to national reports. Article 12 pursues the attainment of similar levels of social security across the Council of Europe area, inviting states to maintain their social security system at a satisfactory level. To this end, the Committee states, pensions should be index-linked and compared to the average wage levels and cost of living, including costs of transport, medical care and medicaments; in addition, "the existence of a carer's allowance for family members looking after an elderly relative" should be taken into account. Article 13 (the right to social and medical assistance) and art.14 (the right to benefit from social welfare services) lend special protection to persons who, although they have a pension, are unable to cover the costs of assistance or care. Read in conjunction with art.23 para.1 (the social protection of older persons) -- "to enable elderly persons to remain full members of society for as long as possible" -- these provisions indicate that older persons may not suffer a diminution in the full enjoyment of their political and social rights even when they are in need of continuous assistance and care.

The justiciability of social security payments in the case law of the European Court of Human Rights and the Inter-American court

In Europe there are three human rights regimes relevant to the right to social security of older persons: the European Social Charter, discussed above, the newly binding 2000 EU Charter (art.34) whose implications will not be tackled in this paper and the European Convention on Human Rights 1950.

The European Convention on Human Rights does not recognise any social rights. However, under certain circumstances, the right to own property protects allowances or pension benefits. More explicitly, the case law of the European Court indicates that the right to social security can be protected by art.1 of Protocol 1, the right to the peaceful enjoyment of one's possession, or the right to own property, read in conjunction with art.14, the right to non-discrimination. In a string of cases, Gaygusuz v Austria, Van Raalte, Wessels-Bergervoet v Netherlands, the court has consistently held that once conditions of eligibility are fulfilled and individuals have an ascertainable right to a benefit, such a tangible expectation amounts to possession and, as such, enjoys the protection of the right to own property. In the admissibility

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67 Council of Europe Treaty Series no.158, Strasbourg, November 9, 1995. The Committee has heard 62 cases so far. None have been heard, however, on the basis of art.23, the social protection of older persons.


70 According to some doctrine, this provision would provide the basis for minimum income or guaranteed income. From a socio-economic perspective, see B. Frati, *L'Enjeu des retraites* (Paris: La Dispute, 2010). For a legal perspective, see G. Bronzini, "Il diritto al reddito garantito come diritto fondamentale europeo" (2009), 2 *Rivista critica di diritto del lavoro* 335 and in the same journal issue: William Chiaromonte, "Un ulteriore tassello nel mosaico del reddito di cittadinanza. Considerazioni a margine di Trib. Napoli 22/4/09", 345.

71 Gaygusuz v Austria (1997) 23 E.H.R.R. 364. The case concerned the refusal of unemployment assistance to an Iranian on the basis that he did not fulfil the nationality requirements.


73 Wessels-Bergervoet v Netherlands (2004) 38 E.H.R.R. 37, where the Strasbourg judge held that a difference in treatment in old-age pension schemes constituted a violation of art.1 Protocol 1 and art.14 right to non-discrimination.

74 Silvestro v Latvia (2004) 39 E.H.R.R. 24. In [121] the court explains: "Possessions can be 'existing possessions' or assets, including claims by virtue of which the applicant can argue that he or she has at least a 'legitimate expectation' of acquiring effective enjoyment of a property right."
decisions in *Stec v United Kingdom*,\(^{105}\) the Strasbourg judges clarified the rationale behind this line of cases. When legal systems guarantee the least advantaged a degree of security, e.g. by means of payment of benefits in cash or kind, such benefit or privilege qualifies as right. The European tendency in which judges start to screen national security rules on their compatibility with fundamental human rights principle laid in international Conventions, however, seems far from being settled. On the contrary, it has been the subject of fierce debate in legal doctrine. Some welcome the growing case law of the Strasbourg Court in the field of social security as finally shaping principles that, whilst formally belonging to the socio-economic arena, are essential to the exercise of liberty rights.\(^{106}\) Others contend that an individual liberty rights approach will not work. Some fear the extension of the European Court of Human Rights to the socio-economic field goes beyond the competence of the court.\(^{107}\) Others take a more substantive legal approach and point out that the right to social security represents something radically different from liberty rights. Social security responds to a demand for solidarity and a collective interest in redistribution between citizens and cannot be watered down to a compilation of individual rights.\(^{108}\)

The Inter-American system recognises a right to social security, introduced by the Protocol of San Salvador 1988.\(^{109}\) The right to social security has been invoked to resist the diminution of social security payments in the *Five Pensioners* case.\(^{110}\) In this instance, the petitioners argued that the diminution of their pensions was a regressive measure that violated the state obligation to move progressively towards the full realisation of the right to social security.\(^{111}\) The Inter-American Court recognised that, in principle, regressive measures in the field of social security amounted to a violation of the American Convention; however, the court interpreted the obligation to achieve the progressive realisation of rights in a restrictive manner, recognising that in this field states parties enjoy an ample margin of discretion.

The American Convention (approved in 1969) also incorporates a right to own property.\(^{112}\) It was invoked to protect social security allowances in the *Saccone v Argentina* case.\(^{113}\) The Inter-American Commission recognised that contributory payments paid to retirement funds “were part of the patrimony of each of the respective contributors”.\(^{114}\) However, the contributions paid by the workers could only potentially have been returned to them. They did not constitute a tangible possession. When national rules dispose that the funds can be reduced or returned only in part, if the interpretation does not violate any of the rights protected by the American Convention, the Commission finds that it is unable to review such an interpretation.\(^{115}\)

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\(^{109}\) Articles 9 and 17, discussed above.


\(^{111}\) Plaintiff referred to General Comment no.3, The nature of States parties’ obligations, para.9.

\(^{112}\) Article 23, American Convention 1969.


The right to housing

The right to housing is part of the right to an adequate standard of living enshrined in art.25 of the UDHR and art.11 of the ICESCR; the articulation of this right is credited to the creative function of the ESCR Committee. The International Labour Organization has been focusing on housing since 1961, when it adopted Recommendation no.115 on Worker’s Housing. In 1980, Recommendation no.162 on Older Workers reminded states of the duty to eliminate discrimination in access to housing. International instruments recognise the right to adequate housing for women, minorities and children. The 2006 Convention of the Rights of Persons with Disabilities deals with housing as part of the right to accessibility, one of the innovations of the CRPD, and in the canonic provision on adequate standard of living and social protection. In a string of cases heard during the 1980s the European Court of Human Rights balanced, on the one hand, national legislation seeking to achieve social justice in the area of housing and, on the other, existing contractual relations and property rights, giving priority to the former public interest in case of conflict. This has ensured the discretion of state authorities to pursue goals of social justice in the field of housing, granted the proportionality of the means test is respected.

The 1969 American Convention on Human Rights protects the right to housing through the right to own property, mostly with regard to cases of land confiscation. The African Charter lends protection to one’s house via the right to own property, the right to health (art.16), and the right of peoples to a general satisfactory environment favourable to their development (art.24). The 2003 Protocol of the African Charter of Human and Peoples’ Rights on the Rights of Women in Africa dedicates protection to the right of elderly widows to own property inherited by the husband. Only one human rights instrument recognises the right to adequate housing per se, the European Social Charter 1996. Article 31 calls on states to take measures designed “(i) to promote access to housing of an adequate standard, (ii) to prevent and reduce homelessness with a view to its gradual elimination, and (iii) to make the price of housing accessible to those without adequate resources”. The Committee on Social Rights has read art.31 in conjunction with the second paragraph of art.23 on the social protection of older persons, urging states to provide housing suited to the needs of elderly persons, their state of health, and offer support to adapt their houses.

The European Committee of Social Rights, the supervisory committees of the ICESCR, the UN rapporteur on the right to housing and the United Nations agency for human settlements UN-Habitat have contributed to clarify the implications of the right to housing for older persons. The guiding principle is that older persons should be able to live in their homes and in houses as long as possible, if they so desire. General Comment no.4 interprets the expression “adequate housing” as comprising “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate...

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117 General Comment no.4: The right to adequate housing (art.11(1) of the Covenant), E/1992/23. On the creative function of the CESCR see Part I, above.

118 ILO, Workers’ Housing Recommendation (115), 1961, para.1 (Scope). See also “Suggestion concerning the method of application”, “3. In establishing and carrying out workers’ housing programmes, special attention should be given at the local level to—(a) the size and age and sex composition of the worker’s family…”.

119 ILO, Older Workers Recommendation (162), 1980, Section II, para.5(g): “older workers must enjoy equality of opportunity and treatment with other workers without age discrimination, including access to housing […]”.

120 CEDAW (1979), art.14.2(b).

121 ICERD (1965), art.5(e), ii.

122 CRC (1989), art.27.3.

123 CRPD (2006), art.9(a) and art.28.

124 *Janes v United Kingdom* (1986) 8 E.H.R.R. 123 and *Mellacher v Austria* (1990) 12 E.H.R.R. CD97. In the latter, the applicants complained that the implementation of legislation resulted in a reduction of the rent, which infringed on their right to property. The Court found that the aim of the legislative measure was legitimate and the measure proportionate.


location with regard to work and basic facilities—all at a reasonable cost". In addition, housing policies should consider criteria such as legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. For their part, the UN rapporteur and UN Habitat have warned that elderly persons are vulnerable to forced evictions preceding urban beautification or gentrification plans. The right to housing should include the right to live in an area, village or neighborhood of choice, what human rights activists and movements have recently labelled "right to the city".

The right to health care

Health care and the right to health care represent one of the most important areas of concern and interest for older persons and ageing societies. In its Constitutive act of 1946, the WHO defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The UDHR 1948 formulated it as "the right to a standard of living adequate for the health and well-being of himself and of his family". Twenty years later, art. 12 of the ICESCR 1966 spelt out the state obligation to progressively achieve the highest attainable standard of physical and mental health and detailed, in para.2, a series of precise steps. The right to health care is recognised in the treaties on the human rights of women, children and persons with disabilities. In particular, the CRPD articulates the right to health in five principles dealing with equality of treatment (point a), personalisation of care (point b), proximity to people's own communities (point c), health care professionals’ responsibilities and obligations (point d) and issues of non-discrimination (points e and f). Several regional human rights instruments recognise the right to health, such as the European Social Charter 1996 (art.11), the EU Charter of Fundamental Rights 2000 (art.35); the African Charter on Human and Peoples’ Rights of 1981 (art.16) and the Protocol of San Salvador 1988 (art.10). Though a typical statement of civil and political rights, the Court has interpreted the principles of the European Convention on Human Rights to decide cases on resource allocation in health care systems, under art.2; on the right to die, under art.8; on mental health care under art.5; and on reproductive rights, under art.8.

The guidelines of the international documents on ageing offer a good point of departure to assess the implications of the right to health for older persons. These documents single out three dimensions of health care in old age relevant to the rights to access and receive health care services, to respect for autonomy, and to have networks of care and assistance in place:

129 D. Rodriguez-Pinzon and C. Marín, "The International Human Rights Status of Elderly Persons" [2003] American University Int. Law Review 964, para.8(a) and (e).
130 Article 4 CRC 1989; art.11.1(f) and art.12 CEDAW 1979; art.25 CRPD (2006).
131 Article 16.2: "States parties shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick".
1. The right of access to, and provision of, health care services boils down to the obligation of states to organise accessible, adequate and basic health care services for all. This core human rights obligation is contained within art.12 and art.2 (non-discrimination) of the ICESCR. These provisions put states under the obligation to progressively remove the obstacles that hinder access to health care services, and impose the duty to take steps to make adequate health services accessible to the largest possible section of the population. Article 12 also refers to a standard of physical and mental health. Such a standard is not fixed but exists according to a number of different factors and social contexts. Applied to the context of ageing societies, art.12 is taken to indicate, first, that there should be no discrimination in the provision of health care services based on the old age of the ill person and, secondly, that the peculiar characteristics and needs of old age health care should be given consideration. With regards to the implementation of the principle of non-discrimination, General Comment no.14 contains a nuanced observation. Here, the supervisory committee of the ICESCR invites states not to allocate resources creating covert forms of discrimination in access to health. The foundering unconditional obligation to grant health care to the largest section of the population is inevitably compromised if investments disproportionately favour "expensive curative health services which are often accessible only to a small, privileged fraction of the population, than primary and preventive health care benefiting a far larger part of the population". General Comment no.6 firmly invites ageing societies to ensure, at least, periodical check-ups for both sexes, physical and psychological rehabilitative activities in elderly persons affected by chronic, degenerative diseases and care for terminally ill persons.

2. Human rights protect individual autonomy in health care decisions. The right to health is strictly related to the right to life, the right to be free from inhuman and degrading treatment, the prohibition of unjustifiable detention, and the right to private life. In the last decades, new claims to be spared avoidable pain (euthanasia) and the right to die with dignity have emerged. These claims are protected by the basic medical ethics principle of not permitting medical treatment without the explicit informed consent of the person involved. Consent epitomises a moral category of personal self-determination. As a legal notion, consent consists of an authorising act with specific procedures and formalities and responding to the demand for legal certainty in private relationships. Legal certainty requires that the consenting act is always imputable to one or several identifiable persons, who take responsibility. Accordingly, rules on consent assume that one or more consenting persons, even if legally incapacitated, exist and are identifiable. Care in practice and legal consent can collide precisely at this point, when consent must be imputed to someone at the moment when it must be decided who is entitled to give consent. Indeed, there are situations where it is difficult to draw a clear line. In the famous case Evans v United Kingdom, the Strasbourg court accepted that a legislature was entitled to draw a "bright line" rule on who is entitled


141 General Comment no.14, para.9 and 12(b) on the principle of accessibility. "Health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population, in law and in fact", and "without discrimination on any of the prohibited grounds".

142 General Comment no.14, par.18; Compare with General Comment no.3 on states' obligations, art.2 para.1. E 1991 23.

143 General Comment no.14, par.19; "... that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; that the marketing of medical equipment and medicines by third parties is controlled to prevent abuses; that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct".

144 General Comment no.14, para.25. See also General Comment no.6, paras 34 and 35.
to give consent.\textsuperscript{145} States—the court held—have a recognised interest in protecting legal certainty and the rights of third parties. However, in a joint dissenting opinion in the same case, Judges Traja and Mijovic disapproved of the "contractual approach" taken by the court. In their view the court should have considered "the specific rights in the specific situation balancing the burden and conditions imposed on each party".\textsuperscript{146}

There are other situations where it is difficult to draw a clear line between who is entitled to give consent and who is not entitled to give consent. Such issues are a reality in situations of dependency, in end-of-life decisions, and in the various daily life situations of long-term care. Under these circumstances, individual autonomy can be constrained by asymmetrical power relations,\textsuperscript{147} by physical impairments, and also fluctuating and intermittent cognitive conditions.\textsuperscript{148} Social psychologists often opine that the focus on the question of who gives consent places an excessive emphasis on the individualistic notion of autonomy over communal relationships. Greater emphasis, they contend, should be given to the development of methods for assisted decision-making or negotiated consent among, for example, the patient, families, professionals and others.\textsuperscript{149}

3. In line with the previous point, the third dimension of health care underlined by the international documents on ageing concerns is “networks of care”.\textsuperscript{150} The expression networks of care refers to private situations in which older persons live dependent on other individuals, relatives or friends, who qualify as informal carers. Under international human rights law, there is no provision on the right to be assisted.\textsuperscript{151} There exist, however, human rights that clearly go in the direction of protecting and empowering units of care. Positive international human rights law protects the family as part of the right to private life and as “the natural and fundamental group unit of society”.\textsuperscript{152} In the West, the right to private and family life has traditionally served the scope of shielding the individual and his or her family from state interference.\textsuperscript{153} The supervisory Committee of the ICESCR, however, has underlined that economic, social and cultural rights protect not only the individual, but also the family unit. On a similar chord, the preamble of the 2006 CRPD asserts that protection and assistance of persons with disabilities and their family members is necessary to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.\textsuperscript{154}

The protection and empowerment of the family as a unit of care for older persons is more explicit in African and Asian legal traditions. The African Charter on Human Rights 1981 considers it an individual duty “to preserve the harmonious development of the family and

\textsuperscript{145} Evans v United Kingdom (2008) 46 E.H.R.R. 34. Evans’ right to have children, recognised as part of her right to private life (art.8), was dependent on her former partner’s consent. The majority of the Court held that allowing Evans to override the male donor’s consent would have produced ‘new and even more intractable difficulties of arbitrariness and inconsistency’ (para.65). For a commentary, see M. Ford, "Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?" (2008) 1 Human Rights Law Review 171.


\textsuperscript{147} E. Mordini and P. De Hert, Ageing and Invisibility (The Netherlands: IOS Press, 2010), pp.198-200.

\textsuperscript{148} See P. Bartlett, O. Lewis and O. Thorold, Mental Disabilities and the European Convention on Human Rights (Leiden/Boston: Martinus Nijhoff, 2007), especially Ch.6 on capacity, pp.149–175.


\textsuperscript{151} Recall that the Old Age Death Declaration 1948, discussed in Part I, recognised a right to assistance in art.1. The AGE 2010 proposal for a Draft Convention on Older Persons in Long Term Care (LTC), discussed in Part I, is strongly inspired by the notion of assistance.

\textsuperscript{152} Article 17 of the ICCPR and art10 of the ICESCR, respectively.

\textsuperscript{153} Compare Human Rights Committee, General Comment no.16 on the right to privacy (art.17), April 8, 1988, and General Comment no.19 on the protection of family, stating that a definition of family does not exist and inviting states “to indicate in their reports the meaning given in their society to the terms ‘family’ and ‘home’”.

\textsuperscript{154} See also art.23 (Respect for home and the family).
to work for the cohesion and respect of the family”. The Arab Charter on Human Rights 1994 calls on states “to provide care and special protection for the family, mothers, children and the aged”. Arguably the most prominent recognition of older persons’ entitlement to family care flows from one of the five cardinal relationships of the Confucian legal tradition. Under the relationship of filial duty, for instance, parents have a claim to be cared for by their children; it is incumbent on East Asian governments to provide the social and economic conditions that facilitate the realisation of this right. Some Asian countries, such as mainland China, Japan and Singapore, have transposed the guanxi of filial piety into law. Others have adopted more indirect methods such as tax breaks and housing benefits that simply make care for the elderly easier, such as in Korea and Hong Kong.

The right to education and the right to work in old age

The human right to education and the human right to work vis-à-vis older persons invite states to guarantee equal treatment without discrimination on grounds of age, and to accommodate the different specific needs in work and education activities in later age.

Education as a human right is recognised in art.26 of the Universal Declaration of Human Rights 1948 prescribing education, at least in the “elementary and fundamental stages”, available and free for all. The supervisory committee to the ICESCR has specified that states parties have immediate obligations to take “deliberate, concrete and targeted” steps in this direction. Subsequently, the right to (primary) education has been incorporated in the Convention on the Rights of the Child 1989, the CEDAW 1979 and in the Convention of the Rights of Persons with Disabilities 2006. These provisions indicate that the human right to education operates qua distinction amongst its right-holders with one group of persons, the youth, falling directly within its purview. Other categories, namely the aged, fall within the general or maximal scope of the right to education, “to attain the full development of the human personality of everyone”. However, while the commitment to organise education for the youth is bracketed by explicit and detailed obligations, education for older age groups lacks such explicit recognition and orientation.

156 Arab Charter 1990 art.38.
160 Declaration of the Basic Duties of ASEAN peoples and governments (1985), art.5 para.6(a) and para.12, “to assist the aged to lead as normal a life as possible, consistent with their age, as integrated members of their family and community”. The Asian Human Rights Charter 1998 recognises that “there are particular groups who for historical or other reasons are weak and vulnerable and consequently require special protection for the equal and effective enjoyment of their human rights” and goes on to identify women (art.9), children (art.10), differently-abled persons (art.11), workers (art.12), and students (art.13), but not older persons.
161 ICESCR 1966 arts 13.1(a) and 14. Compare the Millennium Development Goals, which aims to ensure that all boys and girls complete a full course of primary schooling by 2015.
162 General Comment no.13, para.43. On the nature of states obligation under the ICESCR, see General Comment no.3.
163 CRC 1989 art.28.
164 CEDAW 1978 art.10.
165 CRPD 2006 art.24 para.2.
166 General Comment no.13, para.4.
167 Guidance can be found in the UNESCO guidelines. See UNESCO, Hamburg Declaration on Adult Learning, 1997, para.12. See also international documents on ageing such as VIPAA 1982, Recommendation no.47, Principles 1991 para.16, MIPAA 2002 para.s 36–40.
The human right to work is enshrined in art.23 of the UDHR 1948, while the obligations of states are detailed in arts 6, 7 and 8 of the ICESCR. Various ILO instruments protect access to meaningful employment, equality, free choice of employment and guarantee against dismissal. The right to work also incorporates the principle of freedom of occupation, which is the right to earn a living by employment which is freely chosen or accepted. With regards to older persons, a few ILO instruments deal explicitly with employment in old age. The most prominent document is the ILO Older Workers Recommendation 1980, which states, in point five, that “older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers”. The ILO Recommendation 1980 also recommends that older persons enjoy “equality of opportunity as regards to [...] employment of their choice”. Drawing from this point, General Comment no.6 encourages the employment of older workers in circumstances in which the best use can be made of their experience and know how, and to prepare workers in the years preceding retirement with a knowledge of the rights, obligations and opportunities in later age.

Human rights law seems to encourage the accommodation of working capacities and special needs of the ageing population. In this connection, it is interesting to point at one of the major innovations of the 2006 Convention of the Rights of Persons with Disabilities, the notion of “reasonable accommodation”. The notion of “reasonable accommodation” is based on the awareness that barriers of both attitude and environment hinder the full and effective participation in society on an equal basis of persons who are weaker or frailer compared with others who do not suffer from such afflictions. We have learnt above about the prohibition of age discrimination in regulated fields as the instruction given to the state and private parties in regulated fields. In general, the instruction espoused in reasonable accommodation would call on states to “actively search for the policy option that least restricts human rights or that contributes most to effective human rights protection and fulfilment”. Legally speaking, it would require mechanisms of monitoring and enforcing the adoption of “least restrictive measures” to accommodate diversities and capabilities.

Conclusion

This article has analysed the human rights of older persons from a legal positivistic perspective. Starting from the 2010 proposal of the Advisory Committee of the United Nations Human Rights Council or the Chung report on the necessity of a treaty of the human rights of older persons, we have attempted to assess what human rights “do” regarding older persons and how far traditional human rights, such as the right to private life and non-discrimination, the right to health, to work etc., are able to protect older persons. To do so, we have looked into legislative texts and documents, discussed cases decided by human rights courts, used the comments of supervisory committees and the interpretative work of legal doctrine, trying to remain as close as possible to the legal concept of human rights of older persons.

168 Several Human rights treaties recognize the right to work. See arts 6, 7 and 8 of the Protocol of San Salvador 1988; arts 1–6 of the European Social Charter 1996; Under the African Charter work is a right (art.15) and also a duty (art.29); art.11 of CEDAW provides that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment. The CRPD 2006 contains in art.27 a lengthy provision on “work and employment”. For an overview, see P. Alston (ed.), Labour Rights as Human Rights (Oxford: Oxford University Press, 2005).

169 See also art.11 of CEDAW, which includes “the right to free choice of profession and employment”; art.7 of the San Salvador Protocol 1988 “(b) The right of every worker to follow his vocation and to devote himself to the activity that best fulfils his expectations”.

170 See also ILO, Convention concerning Private Employment Agencies (1997), art.5, which speaks of “special services” or “targeted programmes” to assist the most disadvantaged workers in their job-seeking activities.

171 General Comment no.6 (1995), paras 23 and 24 respectively.

172 CRPD (2006), Preamble, letter (e) and art.27, point (l) on work.

This research ends without materialising a definition of older persons. In fact, the documents on ageing we have analysed seem to eschew this definitional hurdle. The group “older adults” are only defined negatively according to the criterion of chronological age. Distinctions on the ground of age concern access to pensions, health care, education and employment. Where such rights are enforced, older persons are treated as more vulnerable than younger workers, younger students and younger patients. Such distinctions are challenged by individuals or groups who attack the arbitrariness of the distinction. The existence of these challenges suggests that the category of old age is not neutral, but laden with social, economic and political factors that also contribute to give shape to the social image or construction of older persons.

One of the basic lessons we derive from non-discrimination is that any individual person should be able to defend him or herself, even if, afflicted by fading faculties and diminishing capacities, he or she is less able or equipped to do so. On the one hand, a negative duty not to treat older persons differently can go a long way to protect fit, healthy and active older persons; on the other, formal equality does not protect those who are unable to live as actively and independently. Here the notions of “inclusion”, “positive obligations” and “reasonable accommodation” seem to promote the progressive realisation of the least restrictive alternative measures.

This article has drawn attention to different areas where such notions could be made operational. Within the sphere of health, the right to be assisted and to be cared for, which emerged from the ashes of the Draft Declaration on Old Age Rights 1948, gives voice to a nuanced notion of individual autonomy as a network of dependencies which individuals cross during their lives, from cradle to grave. The analysis of the right to work and education in later life indicates how barriers of attitude and environment can hinder participation through work and education in social life. The right to housing highlights the right of older persons to have a say in decisions concerning their city and their historical living environments. In the area of violence and abuse against older persons, human rights seem to demand a balance between, on the one hand, recourse to criminal law measures in narrowly defined cases and, on the other hand, structured social policy interventions geared towards the living conditions and “risk factors” of dependent persons and their care givers. The enforcement of the right to own property on social security allowances indicates that when the “right to security in the event of old age” is accepted as part of a community’s obligations of solidarity, individuals demand it as a right in personam. These are some of the issues that the human rights of older persons bring to the surface. The authors of this article opine that with regards to a prospective treaty on the human rights of older persons it is advisable “to take a few steps back in order to jump”. The desirable protection of the weaker and more frail is not enough. The recognition of the human rights of older persons should first face the preliminary question of what really are our moral relationships to those who are our least advantaged, less well situated or less empowered. Differences in power and situation may require a more positive conception of rights and responsibilities towards them.
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