

The Human Rights of the Elderly:

An Emerging Challenge

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The human rights of the elderly¹ is a topic that is somewhat neglected. Domestically, this is a dimension that is increasingly taken into account in at least some countries, but often in a haphazard way. Internationally, the debate on the predicament of senior citizens in terms of rights is only beginning.² This is not to say that the elderly are not a concern, but that the issue is typically debated through registers, analytical or normative, other than that of human rights: medical, welfare, political, economic,³ etc.

Yet arguably the elderly raise specific issues in terms of human rights and can be said to have distinct “human rights experiences”. In other words, although all members of humanity may have the same theoretical rights, what these rights mean in any particular context is dependent on certain fundamental characteristics of one’s human condition. Being at the end of the life cycle counts as a very distinctive feature of the human experience, and the failure to recognize specific elderly needs in terms of human rights is arguably part of a problematic construction of old age.⁴ Not only that, but the elderly are the fastest growing population worldwide, and one that raises major societal and political challenges.⁵ Even though they remain a relatively small minority (around 7% of the global population), it is a very significant one that is expected to be bigger than the number of children under 5 within a decade and to double by 2040. Nor is this only a first world phenomenon: the rate of growth of the elderly population in the Global South is double the rate of that of the North (62% of the world’s seniors live in the developing world).⁶ Within the elderly, the very old (above 80) are also the fastest growing population, creating new challenges.

This chapter will seek to provide an introduction to the challenges raised by the category of humanity represented by older persons. Developing a human rights regime that is adapted to the needs of the elderly should be seen as part of a larger fragmentation of the human rights project, as the latter increasingly seeks to apply to select populations (women, children, persons with disabilities, migrant workers, indigenous peoples, sexual minorities, etc).⁷ In some ways the elderly can simply be seen as having the same human rights as all. Yet like women, persons with disabilities or children before them, specialized treatment would be a recognition that “the elderly have distinct human rights, which were not addressed specifically in the 1948 Universal Declaration of Human Rights or other relevant human rights instruments”.⁸ In one of the rare explicit mentions of this dimension, for example, the Convention on the rights of persons with disabilities requires states parties to provide “age appropriate” accommodation (article 13) and “age-sensitive” assistance and support (article 16).

The chapter will begin by giving a broad presentation of the elderly population as a distinct group in society and one that raises specific dilemmas in terms of rights (I). It will then highlight some existing domestic and international efforts to better take into account this reality (II). Its

¹ For convenience, this will be the term used. In practice, many terms are used including “seniors”, “the aged”, the “third age”, “older persons”.

² For an excellent overview, Diego Rodriguez-Pinzon & Claudia Martin, *International Human Rights Status of Elderly Persons*, *The*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 915 (2002).

³ For an example from law and economics, see RICHARD A. POSNER, *AGING AND OLD AGE* (1997).

⁴ John Williams, *When I'm Sixty Four: Lawyers, Law and Old Age*, 34 CAMBRIAN LAW REVIEW 103 (2003).

⁵ A. Kalache, A. Barreto & I. Keller, *Global ageing: The demographic revolution in all cultures and societies*, *THE CAMBRIDGE HANDBOOK OF AGE AND AGEING* 30–46 (2005).

⁶ This is in part due to the phenomenon of AIDS which is disproportionately affecting the middle-aged. M. PELAEZ & A. KALACHE, *Aging in developing countries*, 145 *AGING: CULTURE, HEALTH, AND SOCIAL CHANGE* 145 (2001).

⁷ F. Mégret, *The Disabilities Convention Human Rights of Persons with Disabilities or Disability Rights?*, 30 *HUMAN RIGHTS QUARTERLY* 494 (2008).

⁸ *Contribution from the World Health Organization*, U.N. Doc. A/CONF.157/PC/61/Add.8, 1993.

main development will consist in highlighting a few rights that raise particularly acute dilemmas in the case of the elderly (III) and suggesting some ways in which thinking about the elderly requires us to rethink some aspects of human rights (IV).

The elderly as a distinct population: some rights dilemmas

The status of the elderly is constructed by a series of continuously evolving social representations. In some societies the elderly may be viewed as the repositories of certain wisdom and guardians of social continuity; in others they may be seen as heralds of conservatism and privilege. These perceptions, in turn, shape the rights debate as it seeks to come to terms with the distinctiveness of the old as a population.

Definitional issues

Although there is always a tendency to define “old age” in non-biological, subjective terms (an “old” person can be “young,” and vice versa), there are some dangers to defining the quality of being “old” on the basis of certain qualities or characteristics commonly (but possibly wrongly) associated with the old. One may end up “essentializing” old age when the category is arguably very diverse and elastic (indeed, “the existence of definitions may feed society’s rampant ageism”).⁹ If anything, the quality of being old from a rights point of view should be associated with the particular life experience of being towards the end of the life-cycle (possibly starting around 60), although finding a cut-off date for “old age” will be difficult. The best view is probably that old age as a category lies at the intersection of certain objective and subjective criteria.

The elderly are arguably a population that is merely distinguished from the rest of the population by their age. In that, they are not unlike children, who are already the object of many specific legal regimes and their own international human rights instrument. The elderly as a population may be harder to define than children, but even with children some definitional issues have arisen at the margin (when does one exit childhood?). It should also be remarked that the quality of being “elderly” (as of being a “child”) may be culturally and geographically relative, dependent on average life expectancy, life style, etc. This is true of most groups that have been the object of specific human rights attention (e.g.: racial groups, indigenous peoples, gender, etc), and certainly no impediment to specific treatment. However, the idea of the elderly as a socially-constructed category also brings some difficulties if it is used to determine individuals’ belonging to that category, rather than the category itself (in that some may not define themselves as “elderly”, something which may deserve recognition).

It is also worth pointing out that the elderly are more a category of population than a constituted group within it, although they may to a degree act or be perceived as acting as a group through socialization and an at least objective community of interests. Seniors are an internally varied population with occasionally contrasting and even conflict priorities. The experience of old age, even of something such as elder abuse,¹⁰ can be very different depending on “gender, race and

⁹ Williams, *supra* note ___ at 105.

¹⁰ M. Patterson & K. Malley-Morrison, *A cognitive-ecological approach to elder abuse in five cultures: Human rights and education*, 32 EDUCATIONAL GERONTOLOGY 73–82 (2006); J. I. Kosberg & J. L. Garcia, *Common and unique themes on elder abuse from a world-wide perspective*, ELDER ABUSE—INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES 183–197 (1995).

class”.¹¹ They may want specific rights attention, or on the contrary insist that their rights should be construed strictly identically to those of the rest of the population. Legitimate fears about “ageist” discrimination may arise even when the issue is defining a distinct elderly group to better protect its human rights. There is a risk, for example, that in investing the elderly with certain characteristics one will end up reifying them as a group.

The Power/Vulnerability Paradox

As a population, the elderly raise a number of issues. In some ways, they can appear as a particularly powerful group in society. They may be wealthier than the rest of the population and concentrate a relatively high portion of capital. They may be very well integrated in society – benefiting in their old age from support from their descendants. They may also benefit from a culture and traditions that emphasize their accomplishments and the inherent respect in which they should be treated. The image of the elderly population, moreover, is one that is increasingly framed at least in the West in terms of independence, prosperity and leisure. Senior citizens may also concentrate a larger share of political power,¹² which may occasionally fuel critiques that the elderly are in a position to perpetuate certain of their advantages.¹³ Gerontocracy has been described as government by the elderly and there is some truth to the notion that many societies are governed by their most senior members. However, government by the elderly obviously does not necessarily mean government *for* the elderly. Recent research suggests that the elderly are also prime supporters of education expenses and not simplistically prone to support programs that benefit them at the expense of others.¹⁴

In other ways, the elderly can be seen as a particularly vulnerable segment of the population. Old age renders them more vulnerable not only to disease, senescence and death, but also to various forms of abuse and exploitation. The elderly may be in disproportionate need of support, care and services, whether provided by the state or their family. They have been shown to be particularly vulnerable in times of economic recession and restructuring, armed conflict,¹⁵ episodes of mass violence, major disasters,¹⁶ or even seasonal variation.¹⁷ They may be particularly vulnerable to certain forms of crime, including scams to rob them of their assets. In the developing world, migration of the young has weakened the family as the traditional structure of support of the aged. The old will often be a prime target for poverty, exclusion and marginalization and may suffer from negative stereotyping. This contrast between the elderly as relatively affluent and powerful and the elderly as isolated and vulnerable is one thing that

¹¹ E. P. STOLLER & R. C. GIBSON, *WORLDS OF DIFFERENCE: INEQUALITY IN THE AGING EXPERIENCE* (1999).

¹² M. S. Tepe, P. Vanhuysse & M. Carmel, *Are Aging OECD Welfare States on the Path to the Politics of Gerontocracy? Evidence from 18 Democracies, 1980-2002*, ; GL MADDOX, *Will Senior Power Become a Reality?*, *AGING INTO THE 21ST CENTURY: MIDDLE-AGERS TODAY* 185 (1978).

¹³ Madonna Harrington Meyer, Debra Street & Jill Quadagno, *THE IMPACT OF FAMILY STATUS ON INCOME SECURITY AND HEALTH CARE IN OLD AGE: A COMPARISON OF WESTERN NATIONS*, 14 *INTERNATIONAL JOURNAL OF SOCIOLOGY AND SOCIAL POLICY* 53 - 83 (1994).

¹⁴ D. STREET & JS COSSMAN, *Greatest generation or greedy geezers? Social spending preferences and the elderly*, 53 *SOCIAL PROBLEMS* 75-96 (2006). The evidence suggests, for example, that the elderly are almost indistinguishable from other age cohorts in terms of their attitude towards old age issues. C. L. DAY, *WHAT OLDER AMERICANS THINK: INTEREST GROUPS AND AGING POLICY* (1990).

¹⁵ E. B. Ngo, *When disasters and age collide: Reviewing vulnerability of the elderly*, 2 *NATURAL HAZARDS REVIEW* 80-89 (2001).

¹⁷ P. Wilkinson et al., *Vulnerability to winter mortality in elderly people in Britain: population based study*, 329 *BRITISH MEDICAL JOURNAL* 647 (2004).

arguably sets apart this group from others (e.g.: children, which are more naturally seen as mostly vulnerable).

Inter-generational Justice

Finally, the elderly may find themselves at the heart of increasingly strong debates about inter-generational justice. Although “deep” inter-generational justice will occasionally involve debates about the duties of the living vis-à-vis the yet to be born, the debate is more commonly about the duties of the old towards the young and vice versa. The relationship between elderly policy and inter-generational justice has been particularly recognized by the European Union.¹⁸

The growing relative number of elderly and their increasing overall needs, combined with the shrinking of the young is putting social protection systems under strain and encouraging the perception that the elderly benefit disproportionately from the state’s resources.¹⁹ It may prompt demands to reduce benefits afforded to the elderly, that they give up jobs badly needed by the young (or paradoxically, that they work longer), that they pay more taxes, that they be disenfranchised, or even that some health resources be diverted away from them to the young. Such debates have an old history. Some utilitarian and economic views would seem to militate strongly against full respect for the rights of the elderly. For example, Christopher Callahan has argued that older people should be excluded from social citizenship, and that society’s resources should be targeted towards the young who can comparatively benefit more from them.²⁰ The elderly would lose the full rights associated with citizenship, but should still be morally entitled to care from younger members of society.

This sort of reasoning has been attacked on a variety of grounds, especially in the health sector.²¹ Apart from the fact that it may not yield the economic advantages anticipated, it seems to fail to take elderly rights seriously, to rely on a reductionist of the contribution of the elderly to society (i.e.: assessed in terms of its economic impact), and is ageist and discriminatory in essence. It may involve unacceptable forms of compulsion and arbitrariness. However, the argument remains a lively one in both health and philosophical circles, and distributive justice issues arise that cannot be dismissed out of hand by rights rhetoric, especially in conditions of scarcity that mandate that certain choices be made (dialysis, organ transplant, etc).²²

Conversely, a major concern in some societies may be the treatment of the elderly by the young, and indeed the vulnerability of the former to the latter. Apart from the oft-heard complaint that the young have “lost respect” for the old, there is no doubt that, confronted with an ageing population creating a greater economic and social burden on the relatively younger, tensions will arise. This relational element between the elderly and the rest of the population constitutes a particularly dynamic aspect of their status.

¹⁸ European Commission, Green Paper “Confronting Demographic Change: A New Solidarity between the Generations”, 16th March 2005.

¹⁹ Are We Overpaying Grandpa? - Economix Blog - NYTimes.com, , <http://economix.blogs.nytimes.com/2010/02/24/are-we-overpaying-grandpa/> (last visited Mar 14, 2010).

²⁰ D. Callahan, *Terminating treatment: age as a standard*, 17 THE HASTINGS CENTER REPORT 21-25 (1987). Also N. S. Jecker, *Disenfranchising the elderly from life-extending medical care.*, 2 PUBLIC AFFAIRS QUARTERLY 51 (1988).

²¹ R. W. Hunt, *A critique of using age to ration health care.*, 19 BRITISH MEDICAL JOURNAL 19 (1993).

²² R. M. Veatch, *How age should matter: justice as the basis for limiting care to the elderly*, BIOETHICS: AN ANTHOLOGY (2006).

Existing efforts and instruments

Domestically, issues involving the welfare of the elderly may occasionally be litigated under a human or civil rights angle. For example, in the US legislation like the Age Discrimination Act set the stage for several waves of civil rights based litigation, and recent work has emphasized how rights issues are arguably raised in many areas of elderly experience.²³ In Canada, litigation has focused on discrimination issues against the elderly in the wake of the adoption of the Charter of rights. A more consciously human rights angle has often been the consequence of domestic implementation of international instruments, such as the UK Human Rights Act. In some countries, certain rights of the elderly are enshrined constitutionally.

The principal universal international human rights instruments do not contain any elderly specific provisions, except perhaps for the International Covenant on Economic and Social Rights' reference to a right to "social insurance" which is sometimes understood to cover pension rights. It is at the regional level that one finds a few scattered references. For example, article 25 of the Charter of Fundamental Rights of the European Union "recognizes and respects the rights of the elderly to live a life of dignity and independence and to participate in social and cultural life". The Revised European Social Charter sets out a right to social protection for the elderly in broad terms.²⁴ Article 18(4) of the African Charter stipulates that the aged shall "have the right to special measures of protecting in keeping with their physical and moral needs". Notwithstanding the scarcity and relatively idiosyncratic character of these references, various international institutions have gradually incorporated elderly concerns as part of the monitoring and enforcement of international human rights instruments.

The shift to a rights framework has been a slow and gradual one and is still incomplete. The 1982 World Assembly on Ageing adopted a "Vienna International Plan of Action on Ageing" which was subsequently endorsed by the General Assembly. Although that document "solemnly affirmed (the states parties') belief that the fundamental and inalienable rights enshrined in the Universal Declaration of Human Rights apply fully and undiminishedly to the aging" and many of its recommendations were relevant to human rights, it could hardly be described as a rights instrument per se. The 1991 UN Principles for Older Persons, which mention human rights twice in the Preamble and once in relation to the provision of care, began to change this. However, the overarching focus on concepts such as "independence," "participation," "care," "self-fulfillment" and "dignity" also fell short of what one might expect from a human rights instrument proper. The Committee on Economic, Social and Cultural Rights issued a General Comment on the rights of older persons, in which it deplored the fact that states did not "provide any information in a systematic way on the situation of older persons with regard to compliance with the Covenant".²⁵ This is probably one of the most high profile signals that the condition of the elderly is an issue for mainstream treaty bodies, although it is notable that the Human Rights Committee has not produced a similar General Comment. The more recent Madrid International Plan of Action on Ageing²⁶ which updates the Vienna version is notable for a greater focus on human rights. "The full realization of all human rights and fundamental freedoms of all older persons," as well as "Ensuring the full enjoyment of economic, social and cultural rights, and

²³ Nina A Kohn, *Outliving Civil Rights*, 86 WASHINGTON UNIVERSITY LAW REVIEW 1053 (2008).

²⁴ Article 23.

²⁵ CESCR, The economic, social and cultural rights of older persons, General comment 6, 08/12/95, para. 14.

²⁶ A. Sidorenko & A. Walker, *The Madrid International Plan of Action on Ageing: from conception to implementation*, 24 AGEING AND SOCIETY 147-165 (2004).

civil and political rights of persons and the elimination of all forms of violence and discrimination against older persons” are identified as some of its most prominent goals.

A number of private international law instruments are also particularly relevant to the elderly, such as the 2000 Hague Convention on the International Protection of Adults. The Convention aims to improve the protection in international situations of adults who are not able to safeguard their own interests, and its adoption was seen to be particularly necessary in light of such ailments as Alzheimer’s disease. It was clearly influenced by emerging rights concern for older persons.²⁷

The rights condition of the elderly: some specificities

Limiting oneself to existing domestic and international approaches is problematic because the point is that these instruments generally fail to take into account the whole range of human rights of the elderly. A preferable approach is to begin with the actual rights experience of the elderly.

It is worth recalling that the elderly have been targeted, as a group, as part of the commission of some of the most horrendous atrocities. Although the elderly are not as such a protected group under the Genocide Convention, there is no doubt that the Holocaust was preceded by, among other things, a campaign of “euthanasia”²⁸ that was specifically directed at the old.²⁹ The campaign was presented as one of “mercy death.” It involved the killing of 70, 000 elderly by gas, from 1939 to 1941, as well as less systematic forms of killing until the final days of World War II. A key element in deciding to eliminate some was their lack of contribution to the national economy and the need to allocate homes and resources to injured soldiers. All in all, about 200, 000 are estimated to have died.³⁰ It may also be mentioned that the Khmer Rouge implemented policies that typically targeted the elderly as “residues” of another era.

There is a tendency to see elderly rights as mostly economic and social rights. Whilst it is clear that the elderly have such rights and that they raise specific concerns, the strong argument for taking into account elderly specificity is that they may experience violations for almost the whole range of available rights.

Right to life

The elderly’s right to life may be particularly vulnerable. There are a few references to this in international instruments, including the prohibition on imposing the death penalty to the elderly in article 4(5) of the American Convention. The death penalty has been particularly questioned in the case of the very old, in a context where the population on death row in the US has aged significantly (more than 10% are over 55). In 2006, for example, California executed Clarence Ray Allen, a nearly deaf, blind, diabetic and wheel-chair bound 76 year old and the oldest person ever executed. Not long before, he had been “resuscitated” from a heart attack.

²⁷ Aimee R Fagan, *Analysis of the Convention on the International Protection of Adults*, An, 10 ELDER LAW JOURNAL 334 (2002).

²⁸ A. Michalsen & K. Reinhart, “Euthanasia”: a confusing term, abused under the Nazi regime and misused in present end-of-life debate, 32 INTENSIVE CARE MEDICINE 1304-1310 (2006).

²⁹ H. Friedlander, *The origins of Nazi genocide: From euthanasia to the final solution*, NEW YORK: CHAPEL HILL PUBLISHERS (1995).

³⁰ H. G. GALLAGHER, BY TRUST BETRAYED: PATIENTS, PHYSICIANS, AND THE LICENSE TO KILL IN THE THIRD REICH 139 (1990).

It is understood that, despite the apparent sacredness of their lives in many societies, the killing of the elderly is in fact an old phenomenon historically.³¹ The elderly are occasionally the victims of abuse and neglect that can lead to their deaths,³² not to mention directly killed by care givers preying on them.³³ Moreover, proposals to explicitly “ration health care” vis-à-vis the elderly have been made, possibly withholding treatment beyond a certain age.³⁴ Authors such as Alan Williams, for example, have argued against “the vain pursuit of immortality” and suggested that “a reasonable limit has to be set on the demands we can properly make on our fellow citizens to keep us going a bit longer”.³⁵

In the midst of this somber possibility, the issue of euthanasia complicates the debate. Even though it does not only concern the elderly, it may be particularly relevant for them because of old age. Old patients may either be vulnerable to decisions to withdraw care from them,³⁶ or may actually seek to refuse life-sustaining treatment.³⁷ Debates on health rationing often contemplate an explicit link with life termination.³⁸ The problem of euthanasia is still often formulated within the categories of criminal law and/or medical ethics rather than human rights, although this has begun to change.³⁹ Cases such as *Pretty v. UK*⁴⁰ which was heard by the European Court of Human rights (and did not involve an elderly person) have raised the issue in stark fashion. The debate is of course a complex one which human rights fails to bear on decisively, the more so since the right to life can be understood as standing both against (on the basis of the sanctity of life) and in support (on the basis of autonomy and freedom of thought) of euthanasia. At the very least however human rights foreground the need of very significant safeguards to regulate end of life, even as important personal decisions need to be respected.

Freedom from torture and inhumane treatment

Although it is not clear what might constitute torture for the elderly that would not constitute torture for the general population, there is certainly a sense of the increased vulnerability of people in old age, particularly to cruel or inhumane treatment. Human rights can be a powerful way of framing issues of elderly abuse.⁴¹ Violence against the elderly is the more obvious form of abuse that they may experience, but abuse may also involve more discreet forms of neglect (e.g.: malnutrition, insufficient medical care) and be of a predominantly psychological nature (intimidation, humiliation). Treatment that affects the dignity of the elderly will often have

³¹ MIKE BROGDEN, *GERONTICIDE: KILLING THE ELDERLY* (2001).

³² Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 *JAMA* 428-432 (1998).

³³ There have been a number of cases in recent years involving the killing of elderly and extremely vulnerable patients in homes. See for example *Nurse who killed four elderly patients jailed for life* | Society | The Guardian, <http://www.guardian.co.uk/society/2008/mar/05/nhs.ukcrime> (last visited Mar 15, 2010).

³⁴ N. DANIELS, *JUST HEALTH CARE* (1985).

³⁵ Alan Williams, *The rationing debate: Rationing health care by age: The case for*, 314 *BMJ* 820 (1997).

³⁶ L Doyal & D Wilsher, *Withholding and withdrawing life sustaining treatment from elderly people: towards formal guidelines*, 308 *BMJ* 1689-1692 (1994).

³⁷ G. J. Annas & L. H. Glantz, *The right of elderly patients to refuse life-sustaining treatment*, *THE MILBANK QUARTERLY* 95-162 (1986).

³⁸ M. P. Battin, *Age rationing and the just distribution of health care: Is there a duty to die?*, 97 *ETHICS* 317-340 (1987). See also, J. M. HUMBER & R. F. ALMEDER, *IS THERE A DUTY TO DIE?* (2000).

³⁹ G. Zdenkowski, *International Covenant on Civil and Political Rights and Euthanasia*, *The*, 20 *UNSWLJ* 170 (1997); R. Ren & Y. Cao, *Euthanasia from Right to Life Perspective*, 3 *WWW.CCSENET.ORG/ASS.HTML* 35 (2007).

⁴⁰ *Pretty v. the United Kingdom*, Application no. 2346/02, Judgment, Strasbourg, April 29, 2002.

⁴¹ J. IFE, *HUMAN RIGHTS AND SOCIAL WORK: TOWARDS RIGHTS-BASED PRACTICE* (2001).

strong symbolic connotations, and involve forms of infantilization (e.g.: making the old wear diapers systematically; doing things for them; leaving them in areas from which they cannot move on their own). Sexual abuse of the elderly may be rampant in some environments.⁴² The use of restraints against the elderly in institutional contexts is also an issue that has attracted attention. Calls have been made to make sure that the use of restraints is closely embedded in human rights protections to minimize the potential for abuse.⁴³

The concept of dignity here may be key in assessing the inhumanity of behavior specifically for the elderly.⁴⁴ For example, the British Human Rights Institute tells of a nursing home in London that had a practice of placing all residents in wheelchairs, regardless of whether they had trouble walking or not. This obviously limited their mobility and their ability to make decisions for themselves, in particular about when they wanted to go to the bathroom. Following an assessment in which human rights considerations were pointed out and the practice was criticized for impinging on dignity and autonomy, the practice was discontinued.⁴⁵

Freedom from arbitrary detention

The issue of arbitrary detention when it comes to the elderly occurs in specific circumstances when the elderly are interned in institutions of care against their will, or even when they are interned in institutions when independent living arrangements would be available and suitable. Whilst placing some old persons in institutional settings may be legitimate in some cases, there is also a potential for abuse. Opening up ways of challenging such detention seems required by human rights, and some instruments mention institutions for the elderly as being relevant.⁴⁶

There have been a number of cases in which individuals have challenged their confinement on human rights grounds. For example, in the case of *HM v. Switzerland*, the applicant, an 84 year old woman, challenged her placement in a residential home (unsuccessfully in this case). In *JE v DE*, a British case, a wife sought and obtained a declaration that a County Council had deprived her husband, who was 76 and suffering from dementia, of his liberty under article 5 of the ECHR.⁴⁷ Although the Court recognized that the intentions of the Council had been benign, it found that the detention was prolonged and against the continuous wishes of the husband who sought to be reunited with his wife, and therefore did trigger the a priori application of article 5. Some US lawyers have also urged elder law attorneys, following some leading disability rights cases,⁴⁸ to see decisions to place the elderly in institutions rather than in community settings as fundamentally implicating civil rights. Lawyers should be prepared to “work aggressively to prevent unwanted confinement” and not “stereotype clients by assuming that certain impairments or functional losses make institutionalization a necessity”.⁴⁹

⁴² Katharine Jeary, *Sexual abuse of elderly people: would we rather not know the details?*, 6 THE JOURNAL OF ADULT PROTECTION 21-30 (2004).

⁴³ Humber et Almeder, *supra* note ____.

⁴⁴ L. Nordenfelt, *Dignity and the care of the elderly*, 6 MEDICINE, HEALTH CARE AND PHILOSOPHY 103–110 (2003).

⁴⁵ British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2nd ed, 2008), p 15.

⁴⁶ See PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS (Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008).

⁴⁷ [2006] EWHC 3459 (Fam).

⁴⁸ Particularly *Olmstead v. L.C. ex rel. Zimring*

⁴⁹ Harriet McBryde Johnson & Lesly Bowers, *Civil Rights and Long-Term Care: Advocacy in the Wake of Olmstead v. L.C. ex Rel. Zimring*, 10 ELDER LAW JOURNAL 453, 460 (2002).

Right to a fair and expeditious judicial determination

The vast majority of elderly case law, as well documented by Rodriguez-Pinzo and Martin,⁵⁰ has focused on litigation on pension rights, which might typically be denied to the elderly following arbitrary administrative procedures. The elderly involved in those cases have insisted that such issues should be judicially determined and should conform to certain standards of due process. Due process guarantees have also been considered to apply to legal processes that significantly affect the elderly, such as conservatorship⁵¹ and guardianship⁵² proceedings, where the elderly are often not heard or represented.

Although the right to a fair trial is the same for all, the requirement that trials – civil or criminal – be reasonably speedy has been interpreted in light of the old age of some of the defendants or claimants. The ECHR, for example, takes into account the stakes involved in litigation, and the risks associated with the fact that it may be protracted.⁵³ In other words, the fact that the elderly may have less of their lives ahead of them has been considered relevant in assessing whether proceedings were unduly delayed. This has been particularly true in social security cases. For example, in the *Jablonska v. Poland* case, which involved a woman who was 71 years old when the litigated started, the Court pointed out that “given her great age and bad health (...) the excessive length of the proceedings had put a severe emotional and physical strain on her (...) the Polish courts should have displayed particular diligence in handling her case ». ⁵⁴ Even though proceedings have obviously not always been considered unduly lengthy merely on account of the claimant’s age, it is in itself significant that this has been considered a relevant factor.

Right to family life

Recommendation 29 of the Madrid International Plan of Action on Ageing “encourages Governments and non-governmental organizations to establish social services to support the whole family when there are elderly people at home and to implement measures especially for low-income families who wish to keep elderly people at home”. The right to family life has achieved a quite striking prominence in a series of recent cases involving the elderly that are characteristic of some of the challenges to come. It is estimated that in UK care homes, one in 10 residents is still married, often in marriages that have lasted 50 years or more. Moreover, the elderly may be particularly dependent on family life, including access to their children and grand children. A problem arises when elderly couples are separated, for example because for medical reasons one is eligible or needs to be placed in an institution to which the other is not accepted.⁵⁵

⁵⁰ Rodriguez-Pinzon et Martin, *supra* note ___ at 927-934.

⁵¹ Tricia M York, *Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee*, 36 UNIVERSITY OF MEMPHIS LAW REVIEW 491 (2005).

⁵² Israel Doron, *Aging in the Shadow of the Law -- The Case of Elder Guardianship in Israel*, 16 JOURNAL OF AGING & SOCIAL POLICY 59 (2004).

⁵³ SÜSSMANN v. GERMANY [1996 – Grand Chamber]

⁵⁴ See also DEWICKA v. POLAND [2000], para. 55 (« The Court agrees that what was at stake in the litigation in issue was undoubtedly of crucial importance to the applicant. Indeed, her very great age, her disability and the fact that the outcome of the case was of vital significance for her basic human needs, in particular, the need to maintain essential contact with the outside world, required that the domestic courts show special diligence in handling her case. »)

⁵⁵ novanewsnow.com > County of Annapolis > Elderly couple forced apart by red tape, , <http://www.novanewsnow.com/article-i129927-Elderly-couple-forced-apart-by-red-tape.html> (last visited F v 28, 2010). Heartache of elderly couple forced to live apart after 51 years of marriage | Mail Online, ,

Policies are in place in a number of states that fail to accommodate the needs of elderly couples in these situations and end up separating them, with crushing emotional and psychological impact. There is also a risk that the elderly will be placed in institutions that are too distant from their families to allow them to maintain meaningful family ties.

Although these issues are typically handled by welfare services, there is an increasing tendency to frame them as human rights issues involving the right to family life.⁵⁶ For example, the British Institute of Human Rights documents a case in which a couple who had lived together for 65 years were reunited after a successful campaign launched by the family and various human rights experts against a local council which had placed him into a residential care home but denied her acceptance.⁵⁷ The greater rights focus has arguably already led to some reappraisals of policy.⁵⁸ Measures intended to better ensure the elderly's right to family life also include some proposals that family members caring for elderly relatives should be able to take leave from work without losing benefits or even claim paid leave.

Right to privacy

There is an increasing realization that insufficient thought may have gone into protecting the rights to privacy of the elderly. Older persons may, for example, face obstacles to having a normal sex life⁵⁹ because they are the object of excessive video or GPS surveillance.⁶⁰ In institutional and care contexts, the elderly may be particularly vulnerable to forms of abuse that target their intimacy,⁶¹ even as certain measures are justified to protect them. But there may be all kinds of implications to even the best intended of policies. For example, elder abuse reporting laws have been criticized in cases where “the involuntary intrusion of mandatory reporting on (older persons’) ability to control their own lives will all too often be negatively compounded by a further deprivation of liberty through institutionalization”.⁶² Nina Kohn has argued that in the US context some state actions “limit older adults’ substantive due process rights by criminalizing certain forms of consensual sexual behavior; others undermine older adults’ informational privacy rights by requiring the doctors, attorneys, priests, or other confidants to report suspected abuse or neglect to the state”.⁶³ Behind these encroachments on rights lie certain prejudices about sexual activity between older members of society which is “apt to be perceived as abnormal or

<http://www.dailymail.co.uk/news/article-408815/Heartache-elderly-couple-forced-live-apart-51-years-marriage.html> (last visited Fév 28, 2010).

⁵⁶ Naill Hunter, "HSE Keeping Elderly Couple Apart", online: Irishhealth.com <<http://www.irishhealth.com/article.html?id=11204>>.

⁵⁷ The Human Rights Act - Changing Lives.pdf (Objet application/pdf), , <http://www.bih.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf> (last visited Fév 28, 2010).

⁵⁸ Rosa Prince, *Elderly couples 'can stay together in care'*, TELEGRAPH.CO.UK, Mars 3, 2008, <http://www.telegraph.co.uk/news/uknews/1580556/Elderly-couples-can-stay-together-in-care.html> (last visited Fév 28, 2010).

⁵⁹ Rosofsky, Ira, *Elderly have right to sex -- even at nursing homes*, MIAMI HERALD, Septembre 8, 2009.

⁶⁰ Anna Essén, *The two facets of electronic care surveillance: An exploration of the views of older people who live with monitoring devices*, 67 SOCIAL SCIENCE & MEDICINE 128-136 (2008).

⁶¹ Chryssoula Lemonidou et al., *Nurses' and elderly patients' perceptions regarding autonomy, privacy and informed consent in nursing interventions in Greece*, 12 REVIEWS IN CLINICAL GERONTOLOGY (2003), <http://ktisis.cut.ac.cy/jspui/handle/10488/965> (last visited Mar 13, 2010).

⁶² Lawrence R Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of the Older Adults*, 16 FAMILY LAW QUARTERLY 69, 89 (1982).

⁶³ Kohn, *supra* note ____.

even pathological”, even as the role of sexuality in ameliorating the health of older persons has become better understood. Better protection of the right to privacy in nursing homes entails specific protection,⁶⁴ to ensure that privacy is not be limited without good cause, only in a way that is strictly necessary for the goal sought, and not without providing some sort of remedy to patients.

Political rights

Proposals that the elderly be disenfranchised are not unheard of, generally on the basis that the elderly are too powerful, too conservative, too self-interested, or will not pay the bill of the policies they vote for.⁶⁵ Although disenfranchisement has hardly ever been implemented, certain policies of disenfranchising the incompetent (e.g.: when an individual enters guardianship) disproportionately affect the elderly and may be abused, especially if the elderly are unaware that disenfranchisement may result.⁶⁶ Disenfranchisement has been criticized as a crude way of dealing with the legitimate issue of age representation in the electorate give the diversity of alternatives that would not involve something as radical and arbitrary.⁶⁷

On the other hand, is a countervailing push to ensure that the elderly are not prevented from voting, not simply actively but for example through lack of access to voting stations. The Commission on the Status of Women has noted that long queues of voters ... may be most uncomfortable for women voters, particularly the elderly ». ⁶⁸ Special regimes have been put in place in some countries to make sure that the elderly (like the disabled) are not effectively deprived of their right to vote.⁶⁹ More generally, the participation of the elderly in society has been promoted as a key to preventing their exclusion. The UN Principles, for example, encourage older persons to form specific movements or associations. “Empowerment” of the elderly over their lives, including but not restricted to key medical and life-style decisions, is also an attempt to break beyond the bounds of formal political participation.⁷⁰

Economic and Social Rights

As has been noted, the CESCR authored a General Comment which predictably emphasizes the need to “pay particular attention to promoting and protecting the economic, social and cultural rights of older persons”.⁷¹ The “right to social security” is often presented as particularly crucial

⁶⁴ For example, the Texas Human Resources Code anticipates that “Any treatments or personal care should be given in private, not in front of an open door” (§ 102.003).

⁶⁵ D. J. Stewart, *Disenfranchise the old*, NEW REPUBLIC 22-29.

⁶⁶ K. K. Roy, *Sleeping watchdogs of personal liberty: state laws disenfranchising the elderly*, 11 ELDER LJ 109 (2003).

⁶⁷ Philippe Van Parijs, *The Disfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice*, 27 PHILOSOPHY AND PUBLIC AFFAIRS 292-333 (1998).

⁶⁸ Commission on the Status of Women, Forty-eighth session, New York, 1-12 March 2004, available at <http://www.un.org/womenwatch/osagi/meetings/2004/CSW48Panel/PD1-Amal%20Sabbagh.pdf>

⁶⁹ J. A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER LJ 453 (2005); N. A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065 (2007); M. Schrauben, *Ensuring the Fundamental Right to Vote for Elderly Citizens in the United States*, 9 TM COOLEY J. PRAC. & CLINICAL L. 307 (2006).

⁷⁰ L. A. Fenge, *Empowerment and community care-projecting the voice of older people*, 23 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 427-439 (2001); R. Schindler, *Empowering the Aged--A Postmodern Approach*, 49 THE INTERNATIONAL JOURNAL OF AGING AND HUMAN DEVELOPMENT 165-177 (1999).

⁷¹ General Comment, para. 13.

to the elderly.⁷² Domestically, several constitutions guarantee it,⁷³ whilst internationally the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides that “everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence”. At the very least, and in accordance with the ILO social security conventions, states parties should “establish general regimes of compulsory old-age insurance”.⁷⁴ However, the Committee has also gone as far as to suggest that State parties to the ICESCR should, “within the limits of available resources”, “institute non-contributory old-age benefits or other assistance for all persons ... who find themselves without resources on attaining an age specified in national legislation.” Especially in countries where the AIDS epidemic has left some grandparents as the only care givers of large families, it has been suggested that “government should introduce non-contributory old age benefits to enable all the elderly to have access to basic life-sustaining goods and services”.⁷⁵

The right to work has also been highlighted as justifying that work not be denied solely on the basis of age (this issue is further discussed below in the discrimination context), at least before the issue of retirement arises. The CESCR has urged states to implement “retirement preparation programmes ... to prepare older workers to cope with their new situation”.⁷⁶ The right to an “adequate standard of living” has been understood in relation to the elderly as being strongly correlated to the principle of autonomy which is the first one among the UN Principles for Older Persons. The Vienna International Plan of Action stresses the particular needs of the elderly in terms of housing. Housing “must be viewed as more than mere shelter”, and “in addition to the physical, it has psychological and social significance which should be taken into account”.⁷⁷ Allowing the old to live in their home for as long as possible is thus arguably an emerging human right entitlement. Finally, proposals to “ration health care” vis-à-vis the elderly,⁷⁸ even if they do not affect the right to life as such, would seem indefensible in positive human rights law, although some hard decisions may need to be taken when resources are clearly finite.⁷⁹

Some Cross-Cutting Issues Raised by Elderly Rights

As with most populations with complex needs, the obligations imposed on states by international human rights instruments tend to be quite broad. As the CESCR noted, the fulfillment of such

⁷² M. Scheinin, *The right to social security*, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK. 2ND EDITION. DORDRECHT: KLUWER LAW INTERNATIONAL (2001).

⁷³ For example, article 50 of the Spanish constitution (“The public authorities shall guarantee, through adequate and periodically updated pensions, a sufficient income for citizens in old age”); article 45. 4 of the Irish constitution (“The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”).

⁷⁴ Convention No. 102 concerning Social Security (Minimum Standards) (1952) and Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967).

⁷⁵ N. Madzingira, *Poverty and ageing in Zimbabwe*, 12 JOURNAL OF SOCIAL DEVELOPMENT IN AFRICA 5-20, 18 (1997).

⁷⁶ General Comment, para. 24.

⁷⁷ Recommendation 19.

⁷⁸ Daniels, *supra* note ____.

⁷⁹ H. Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name*, 26 HOUSTON LAW REVIEW 813 (1989).

obligations includes “the need to determine the nature and scope of problems within a State through regular monitoring, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation and the need to ensure the relevant budget support or, as appropriate, to request international cooperation”.⁸⁰ In effect, elderly rights are and will probably become even more a way of raising a number of crucial and sensitive issues about rights.

Discrimination and the problem of ageism

Although the right to equality is a distinct right, the problem of discrimination against the aged is also a much broader conceptual and social problem that deserves to be analyzed from multiple angles. Discrimination against the aged is typically associated with certain “ageist” trends in society that may portray the elderly in a negative light.⁸¹ Ageism has been defined as the view that “people cease to be people, cease to be the same people or become people of a distinct and inferior kind, by virtue of having lived a specified number of years.”⁸² Whilst it has been compared to sexism and racism,⁸³ it is also a more subtle form of discrimination, involving as it does the passage through a transitional status in the life cycle by potentially all human beings (one, in addition, to which most aspire).

Ageism can quite evident in popular culture and a certain glorification of youth.⁸⁴ It is a phenomenon arguably accentuated by industrialization, modernization and globalization which corrode traditional respect for the elderly, even as they lead to social and family dislocation. Ageism may be accentuated by societies’ prevalent individualism and consumerism, and a tendency to discount the value that its older members can make to society given their perceived non-productive status.⁸⁵ Finally, it is a set of attitudes that may have been made worse in the last decades by the extremely rapid development of technologies and the difficulty of some among the senior population to keep up with changes (e.g.: the increasing digital divide between generations).⁸⁶ One of the results may be a consequent devaluation of the elderlies’ know-how which had traditionally provided them with a strong sense of social relevance.

Ageism may make the old particularly vulnerable to abuse.⁸⁷ As a result of discrimination, the elderly may be denied access to health care, voting, work, education, etc, on the basis of their age. The labor market is one area where older persons face significant obstacles,⁸⁸ and where mandatory retirement laws have put issues of inter-generational justice in sharp focus. Old age is also a condition that must be seen in relation to a number of other causes for discrimination with which it intersects, particularly gender (older women outnumber older men) or indigenous origin. For example, the CESCR considers that “States parties should pay particular attention to older

⁸⁰ General Comment, para. 18.

⁸¹ L. ANDERSSON, *CULTURAL GERONTOLOGY* (2002).

⁸² J. Johnson & B. Bytheway, *Ageism: concept and definition*, *AGEING AND LATER LIFE*, 28 (1993).

⁸³ R. N. Butler, *Age-ism: Another form of bigotry*, 9 *THE GERONTOLOGIST* 243-246 (1969).

⁸⁴ A. BLAIKIE, *AGEING AND POPULAR CULTURE* (1999).

⁸⁵ P. Townsend, *Ageism and social policy*, *AGEING AND SOCIAL POLICY*. ALDERSHOT: GOWER 15-44 (1986).

⁸⁶ J. M. Kiel, *The digital divide: Internet and e-mail use by the elderly*, 30 *INFORMATICS FOR HEALTH AND SOCIAL CARE* 19-23 (2005).

⁸⁷ A. Phelan, *Elder abuse, ageism, human rights and citizenship: implications for nursing discourse*, 15 *NURSING INQUIRY* 320-329 (2008).

⁸⁸ E. Drury, *Older workers in the European Community: Pervasive discrimination, little awareness*, 20 *AGEING INTERNATIONAL* 12-16 (1993); D. Neumark, *The Age Discrimination in Employment Act and the Challenge of Population Aging*, 31 *RESEARCH ON AGING* 41 (2009).

women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations”⁸⁹.

The main international human rights instruments typically do not mention age per se as a ground of discrimination. However, as the ECSCR put it “Rather than being seen as an intentional exclusion, this omission 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”.⁹⁰ This is confirmed by the fact that the main human rights instruments are in reality quite open-ended about discrimination, and mention the possibility of discrimination on the grounds of “other status”. Moreover, the Convention on the Rights of Persons with Disability, one that may be of relevance to many in within the elderly population, expresses concern in its Preamble about the fate of elderly persons with disabilities and urges states to adopt measures to combat prejudices, including those based on age (article 8). Article 13 of the European Communities Treaty had also expressly prohibited discrimination in relation to age, as does article 21 of the Charter on Fundamental Rights of the European Union. Moreover specific legislation has increasingly been adopted domestically, for example in the US, prohibiting discrimination on the basis of age in the context of employment.⁹¹

In dealing with the problem of discrimination against the elderly, one paradox is that the very creation of a category of elderly human rights might reinforce some of the problems it is supposed to alleviate. In this respect, just as some among persons with disabilities do not want to be seen as members of that category, some older persons may understandably resist being defined, even marginally, in relation to their age. The challenge is to ensure that the need to take into account the specific needs of the elderly in terms of rights does not lead to the creation of a sort of “rights ghetto,” that artificially reinforces the distinctiveness of the elderly. For the cure not to be worse than the ill, it needs to be established clearly that any elderly specific approach is a complement to the normal and unchallengeable full enjoyment of their rights.

Typically discrimination will arise in relation to a number of guaranteed rights, such as have been mentioned above, but may also be a self-standing issue in relation to a certain treatment that is not per se rights sensitive. Especially in advanced economies, many of the cases that have been litigated by the elderly under human rights grounds involved claims challenging mandatory retirement ages as being discriminatory. This is one area where considerations of intergenerational justice can be strong: mandatory retirement is presented as a way of making employment available for the young. The assumption, which is a deeply ingrained one, is that work is scarce and that retirement will sooner or later free up positions.

Of course, some elderly may be very happy with mandatory retirement, and see it as a way of protecting them from a never ending life of work, especially when mandatory retirement is accompanied by a pensions system. On the one hand, it is generally understood that work is a defining element of the human condition, and that only strong arguments would militate against denying someone the opportunity to work merely on the basis of their age (although the argument that there is no obligation by the state to provide work beyond a certain age may be easier to make). There is evidence that retirement can be a traumatizing life experience, one that

⁸⁹ General Comment, para. 20.

⁹⁰ General Comment, para. 11.

⁹¹ The Age Discrimination in Employment Act was adopted in 1967, and was subsequently amended in 1986 in a way that clearly limited mandatory retirement clauses. See P. H. Schuck, *Graying of Civil Rights Law: The Age Discrimination Act of 1975*, *The*, 89 YALE LJ 27 (1979).

is sometimes linked to feelings of uselessness and loss of control among the ageing population. Conversely, there is some evidence that “work based” approaches to care for the elderly can be crucial in fostering a sense of higher self-esteem and empowerment.⁹²

Some have criticized the basic economic reasoning behind mandatory retirement (i.e.: that it frees up employment for the young). In circumstances where life expectancy increases constantly, one judge has pointed out that “an ‘elite’ group of people can afford to retire, but the adverse effects of mandatory retirement are most painfully felt by the poor. Women are particularly affected as they are less likely to have adequate pensions”.⁹³ Others insist that, especially given that only a minority will want to continue to work in old age, to deny them that possibility altogether is incompatible with basic freedoms. Gradually, some states have at least moderated mandatory retirement laws, partly for economic reasons, but also on the basis of civil rights arguments that “put simply, it is discriminatory to forcibly retire people who do not wish to retire”.⁹⁴ The CESCR has encouraged states to “expedite” the elimination of what it describes as “areas in which discrimination continues to be tolerated”, such as mandatory retirement ages.⁹⁵ This remains a contentious issue in some countries, especially in Europe, although a leading British elder rights NGO has brought a partly successful challenge of such laws before the European Court of Justice.⁹⁶

However, differential treatment (in the employment field or any other) is only discriminatory to the extent that it cannot be justified by a legitimate policy goal to which the practice is rationally and proportionally related. Some policies, in this respect, have been faulted for relying on generalizations about the elderly when individual assessments would have been possible.⁹⁷ Certainly the correlation that is often implicitly made between ageing and declining working efficiency is highly questionable if it is not accompanied by individualized assessment.⁹⁸ Others have simply been found to have no justification.⁹⁹ The situation is different if the age limit is justifiable on account of certain characteristics of a profession, although some courts have been criticized for considering too willingly that some elderly workers would be unfit for certain jobs.¹⁰⁰ The question as it has been raised before a number of domestic jurisdictions, therefore, is whether a mandatory retirement age is really a necessary and proportional measure (e.g.: given

⁹² P. K. Kam, *Empowering elderly people: A community work approach*, 31 COMMUNITY DEVELOPMENT JOURNAL 230 (1996).

⁹³ L'Heureux-Dubé J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

⁹⁴ J. McCallum, *Australian mandatory retirement challenged*, 2 JOURNAL OF AGING & SOCIAL POLICY 183-200, 197 (1990); D. MacGregor, *Neglecting Elders in the Workplace: Civil Society Organizations, Ageism, and Mandatory Retirement*, 25 CANADIAN JOURNAL ON AGING 243-246 (2006).

⁹⁵ General Comment, para. 12.

⁹⁶ CJEC, Judgment of the Court, In Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* 5 March 2009.

⁹⁷ See the dissenting opinions of L'Heureux-Dubé and McLachlin in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, noting that while “the university's stated objectives are pressing and substantial”, there was no “rational connection between its objective of preserving the tenure system and its discriminatory policy” since “peer evaluation” was available to assess teachers, and that this would have been preferable to simply relying on their age. The judges also pointed out that “the argument that mandatory retirement at a fixed age allows the university to open positions to younger academics (...) does not stand up to scrutiny. It is based on the false premise that older workers are uniformly less productive and original than their younger colleagues”.

⁹⁸ M. LEVINE, *AGE DISCRIMINATION AND THE MANDATORY RETIREMENT CONTROVERSY* (1988).

⁹⁹ *Taylor v United Kingdom* Case-382/98, 16 December 1999 (the European Court of Justice ruled that the lower-age threshold for a winter fuel benefit discriminated against elderly men).

¹⁰⁰ T. R. Klassen & C. T. Gillin, *The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement*, 18 CANADIAN JOURNAL ON AGING 259-76 (1999).

that most people will be quite happy to retire anyhow). Generally, courts have refused to strike out mandatory retirement policies that seemed to be justified by the need to manage worker mass, preserve labor market flexibility, or renew staff (especially in areas such as universities where younger members may bring new perspectives).¹⁰¹

It is also worth emphasizing that, as with all equality jurisprudence, equality may mean quite different things in different circumstances: equal treatment when there is no particular valid reason to differentiate, but also possibly different treatment to offset the effect of de facto disparities. As one author put it, “what is required is not equal treatment but recognition of their fundamental inequality.”¹⁰² Certainly, the elderly will at times be in strong need of economic and medical support, along with specialized forms of care to respond to the particular changes they confront. At a certain level, a rights policy for the elderly may require group specific rights and instruments, and even some forms of positive discrimination (for example, subsidized or free social services for certain categories of retirees).

Furthermore, as with other issues of rights discrimination, states have a duty to combat “ageist” prejudices and discrimination. CEDAW was the first treaty to impose such a broad obligation, which has a societal and proactive dimension that goes beyond ensuring that discrimination does not occur in specific cases. States are asked to promote a certain image of the equal value and even positive contributions that the elderly can make to society.

Changing the focus: care institutions, the private sector, the family and... the globe

One of the consequences of taking into account the specific challenges of the elderly in terms of rights is a refocusing on a range of intermediary bodies. The role of collective bargaining by trade unions in relation to potentially discriminatory mandatory retirement ages, for example, has been explored.¹⁰³ Although the elderly may be at risk of abuse from the state, they are also quite likely to be under the care of public and private institutions, some steps removed from the state itself. As far as public institutions are concerned, one trend has seen states adopt specific human rights instruments in nursing homes (e.g.: the US Residents’ Bill of Rights, the California Welfare and Institutions Code). As part of their “obligation to protect”¹⁰⁴ States should also ensure that individuals within its jurisdiction do not experience rights violations from third parties. This is particularly important in the case of the elderly, especially in the face of attempts to exclude the liability of private care institutions. For example, the British government has intervened to stress that private providers of care on behalf of a local authority should be considered “public authorities” for the purposes of the Human Rights Act.¹⁰⁵ Moreover, it has

¹⁰¹ See, for example, in Canada, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (emphasizing that mandatory retirement is “intimately tied to the tenure system which undergirds the specific and necessary ambience of university life and ensures continuing faculty renewal, a necessary process in enabling universities to be centres of excellence on the cutting edge of new discoveries and ideas. It ensures a continuing, and necessary, infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people.”); *Dickson v. University of Alberta*, [1992] 2 S.C.R. 1103.

¹⁰² Brogden, *supra* note ___ at 194.

¹⁰³ In Germany, for example, mandatory retirement has been considered legal precisely because it is part of collective bargaining. S. Simitis, *Denationalizing labour law: The case of age discrimination*, 15 COMP. LAB. LJ 321 (1993).

¹⁰⁴ J. W. Nickel, *How human rights generate duties to protect and provide*, 15 HUMAN RIGHTS QUARTERLY 77-86 (1993).

¹⁰⁵ *R (on the application of Johnson and others) v London Borough of Havering*.

made it clear that it will extend the Human Rights Act to individuals placed in privately-run nursing homes.

Attention to the plight of the elderly may also help reassess the scope of the state's human rights obligations, and the responsibilities of the family.¹⁰⁶ One reason for failing to take elderly rights sufficiently seriously is a tendency to see the old as often withdrawing into "private" life towards the end of their lives, and an assumption that they will be taken care of by their relatives. The term "abuse" itself is richly connoted with the implication that "abuse" is something fundamentally different from "public" cruel and inhuman treatment (or even semi-public criminal behavior). In that respect, the elderly may not be in that different a position conceptually than that which feminists have criticized as being that of women traditionally, i.e.: in a situation of relative social, political and economic "invisibility".¹⁰⁷ Some forms of abuse – for example by grandchildren against their grandparents – may be so intensely "private" as to being typically ignored by public authorities.¹⁰⁸

Laws that penalize abuse directly at the hands of relatives may make sense of part of the state's duty to protect individuals from violations by third parties, including in the private. However, laws may typically be more reluctant to impose positive obligations on such relatives (e.g.: children) to take care of the old. Some states have clearer laws imposing a number of filial obligations of care on children (i.e.: an obligation not to abuse "by neglect"), but such laws may be difficult to enforce in a context of evaporating solidarities, mobility, and care outsourcing.¹⁰⁹ Moreover, it does not deal with the fact that the elderly may not have relatives, or that the state may be liable for elderly abuse and neglect whether or not they have such relatives. Subject to a standard of reasonableness (for example, protecting the elderly cannot justify groundless invasions of privacy), the state is to make sure that the elderly should be protected. In some cases, this might extend to protecting the elderly against forms of self-neglect.¹¹⁰

Finally, an increasingly apparent dimension of ageing is its transnational, even global character. The experience of ageing today is much more fragmented and pluralist than it once was. Whether it is elderly refugees or Western retirees in the Global South, the emergence of such instruments as the Hague Convention on the Protection of Adults is evidence of a shift in scale. National and welfare models of ageing focused on the state framework, and were based on forms of national solidarity.¹¹¹ International organizations, multinational corporations, pension funds, diasporas, networks are all becoming part of the experience of and response to old age. Dealing effectively with the problem will thus require more global and coordinated governance, even as new opportunities for global exclusion of the old arise. The Madrid Plan of Action, for example, mentions "mainstreaming ageing into global agendas" and the need "to link ageing to other frameworks for social and economic development and human rights".

¹⁰⁶ R. J. R. Levesque, *Piercing the family's private veil: Family violence, international human rights, and the cross-cultural record*, 21 LAW & POL'Y 161 (1999).

¹⁰⁷ D. Sullivan, *The public/private distinction in international human rights law*, WOMEN'S RIGHTS: HUMAN RIGHTS. INTERNATIONAL FEMINIST PERSPECTIVES.

¹⁰⁸ J. I. Kosberg & G. MacNeil, *The elder abuse of custodial grandparents: A hidden phenomenon*, dans ELDER ABUSE: SELECTED PAPERS FROM THE PRAGUE WORLD CONGRESS ON FAMILY VIOLENCE 33 (2005).

¹⁰⁹ N. DANIELS, AM I MY PARENTS' KEEPER?: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD (1988).

¹¹⁰ For example, in Norway, allowing an elderly person to self-neglect may constitute an offence by the state.

¹¹¹ C. Phillipson, *Ageism and Globalization: Citizenship and Social Rights in Transnational Settings*, CULTURAL GERONTOLOGY 45 (2002).

Conclusion: Beyond Rights Language?

Although elderly issues are increasingly framed in terms of human rights, it is far from obvious that the natural trajectory of rights informed approaches will necessarily simply involve a translation of all existing medical, social and welfare registers into rights language. In fact, this might constitute an impoverishment of the overall approach used to tackle elderly challenges. Rather, even as human rights languages intensifies some of the claims made by the elderly, it will hybridize with other normative languages. Human rights discourse is uniquely suited to “de-naturalizing” certain issues, and “re-politicizing” them. For example, contra a certain vision of the difficulties of old age as an inevitability, it might help point out that the experience of the elderly is at least as much constructed by social, economic and political factors as it is by the mere fact of old age. In other words, it is not old age that renders certain rights hard to enjoy, but a particular conception of old age that would deny the full enjoyment of their rights to the ageing. Human rights might also help politicize certain issues. For example, in countering a vision of their needs as mostly involving “state-sponsored medical care and old age pensions ... most elderly rights groups might object to such a limited concept of societies’ duties to them, preferring instead that greater attention be given to issues of autonomy and personal liberty”.¹¹² Furthermore, contra a powerful medical lobby that would reduce the problem of old age to its health dimension understood in a narrow biological sense (as decremental physical decline),¹¹³ human rights discourse might emphasize that the elderly’s health is at least as much constructed by certain political choices that can be challenged. It is, for example, the fact that society has *chosen* not to assign sufficient staff to certain institutions that makes them unable to treat the elderly with all the dignity they deserve.

At the same time, some of the limitations of human rights language are well known. Human rights set certain goals that often require extensive further interpretation to translate into state obligations; they tend to address states parties rather than the whole range of actors that might conceivably violate/promote rights; they are quite indeterminate in terms of required policies, even as policies may be crucial to protect rights. This is why treaties like the UN Disabilities Convention now include a much more richly textured mix of rights, goals, standards, best practices and the like, and profoundly restructure rights language in the process.¹¹⁴ Elderly focused instruments may come, for example, to emphasize duties as well as rights, including the duties not only of the state but of society and family members towards the elderly.¹¹⁵ Themes that have acquired prominence in the UN disability convention— such as autonomy, independence, or “reasonable accommodation” may assume a significant role in assessing elderly rights.

One concept which, despite its role in the conceptual genesis of human rights, normally stands at a respectful distance from ordinary rights implementation but which could have a particularly important incidence in the case of the elderly, is dignity. Understood as more than the sum of rights that any individual has, dignity refers to something irreducibly worthy of respect in all

¹¹² Fagan, *supra* note ___ at 336.

¹¹³ C. L. Estes & E. A. Binney, *The biomedicalization of aging: Dangers and dilemmas*, 29 THE GERONTOLOGIST 587 (1989).

¹¹⁴ F. Mégret, *The disabilities convention: towards a holistic concept of rights*, 12 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 261 (2008).

¹¹⁵ Unlike duties that might be imposed on the elderly and would weaken rights claims, duties reasonably imposed on others could be said to reinforce the rights of the elderly, at least to the extent that these rights are meaningless without corresponding obligation.

human beings.¹¹⁶ It might help, for example, resist a tendency to reduce the elderly to their belonging to that category and reaffirm the need to treat the elderly, for all their specific needs, in ways that emphasize their fundamental humanity and equality.

Going beyond a strict rights approach will also involve reassessing the positive contributions of the elderly to society in positive, non-ageist terms. The Madrid International Plan of Action for example emphasizes “changes in attitudes, policies and practices at all levels in all sectors so that the enormous potential of ageing in the twenty-first century may be fulfilled”.¹¹⁷ The elderly can be repositories of knowledge, particularly traditional knowledge, and a bridge with the past. In AIDS ridden societies, they have often emerged as principal providers for their grandchildren after the death of parents. There are many examples not only of elderly associations working on issues of specific concern to the elderly, but also of specific forms of elderly activism with more general social transformative goals.¹¹⁸ A better understanding of these contributions may go a long way to remedying some of the problem of ageism. Finally, as a global discussion on the rights of the elderly progresses, it may gain a significant North-South dimension, as attitudes to the elderly are compared and challenged.

¹¹⁶ Frédéric Mégret, *A Dignity Approach to the Rights of the Elderly*, dans HUMAN DIGNITY AND THE MOST VULNERABLE GROUPS (2009).

¹¹⁷ Para. 10.

¹¹⁸ For example the Gray Panthers (<http://www.graypanthers.org/>), the Granny Peace Brigade (<http://www.grannypeacebrigade.org/>)