Israel Doron · Ann M. Soden *Editors*

Beyond Elder Law

New Directions in Law and Aging

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Dedicated to my late mother, Hava Doron (Bloy) for her endless love.

Israel (Issi) Doron

Dedicated to my late father, James A. Soden, C.M., Q.C., for his promotion of justice and the global village and to my late sister, Dr. Lesley Soden, for her unconditional love of her fellow man.

Ann M. Soden Ad. E.

Foreword

> Retired Supreme Court of Canada Justice, the Honorable Claire L'Heureux-Dubé, approached me at this year's Quebec bar convention to say, "Ann, your Elder Law has really become something. I remember when you first introduced me to it and I questioned whether this was merely the marketing of general law to a particular clientele. And then you enlightened me."

The year of that first meeting was 2002. Inspired and mentored by the Commission on Law and Aging (Commission) of the American Bar Association (ABA) the National Elder Section of the Canadian Bar Association (CBA) had just been born and with it an immediate recognition of a new area of practice and of law in Canada. The field of Elder Law or Law and Aging, as it was also known, began in earnest.

I explained to Maître L'Heureux-Dubé that from a practice perspective we were serving older adults and those playing important roles in the lives of older adults: legal representatives, family, and other professionals. We would develop a framework for examining and understanding the impact of aging on laws, policies and practices and in so doing take account of the socio-legal and medico-legal dimensions of an aging population.

I went on to explain that lawyers had not been at the table, nor were they part of any multidisciplinary bodies examining these important questions of the day. The legal aspects of aging formed no part of the study of gerontology, for example. As lawyers we were particularly equipped to defend legal rights and the important values of older adults: *dignity*, the freedom from age discrimination; *security*, including financial and workplace security, the promise of a health care system meeting their needs and protection from abuse and exploitation; and *autonomy*, the right to be treated as independent beings, even in the presence of diminished capacity.

From an academic standpoint there were many specific legal issues affecting older adults that would benefit from multi-dimensional and cross-disciplinary research to ensure that their rights were appropriately and respectfully addressed. Some areas of laws would be fairer and more effective if they reflected the issues of aging. Others would require that ageist and age-related references which perpetuated

judgments, policies, practices and views that excessively or unnecessarily restricted older people's rights and autonomy be reformed or expunged. Certain legal terms expressed outdated social concepts justifying paternalistic interventions.

Madame L'Heureux-Dubé went on to honor us with a "Special Note" in the first text on issues and concepts in Law and Aging in Canada, *Advising the Older Client*,[1] calling upon us to remember that we were a society for all ages. In our efforts to address the issues of aging we were not to set older persons apart in some new class. We were not to ghettoize them. I had taken that admonishment to heart throughout the development and proposal of the area and will carry her words with me always.

And her most recent comment at the bar convention, a generous compliment, of course, would stay with me as well. Yes, the field had really become "something". But what had we done and become? Were we moving fast enough and on all fronts? Where were we on our arc of entry into this field? Were we just beginning or in mid-course? Were our efforts merely fragmented or were they framed? When would our mission be accomplished? What directions were we taking? Would we necessarily recede into the fabric of general law once we had accomplished our professional teaching, research and advocacy on current law and aging issues?

We had, by no means, analyzed every law and policy, advocated every needed reform or ensured the respect and sensitive application in the practice of existing law but Canadian Elder Law had certainly come of age within the space of 10 years. National and provincial professional legal associations of the CBA had been established across Canada and in its territories within its first year and continuing education conferences on substantive law and professional practice subjects took to the national stage in 2003; research institutes on law and aging have existed in British Columbia and Quebec since 2003 and 2004, respectively. Courses in Elder Law and Law and Aging are now taught at several universities in faculties of law, social work and gerontology at the baccalaureate and Masters levels; the pioneering community legal aid clinic opened in 1985 to serve Toronto seniors, the Advocacy Center for the Elderly, has been followed by *pro bono* clinics in Quebec in 2007, in British Columbia in 2008 and at Queens University Faculty of Law, Kingston, Ontario in 2010 to provide research, direct client services, public education and advocacy within these provinces. Members of the National Elder Law Section work, on behalf of the CBA and in their own right, with provincial and federal governments on a myriad of issues of aging from health care, to end-of-life issues, abuse and exploitation legislation and policy strategies, uniform law development, financial literacy, housing and care options, pensions and benefits and informal caregiver benefits.

We had learned much from legal writers and academics in the United States and from the Commission, in particular. The Commission had opened in 1979 to research, educate and advocate the legal problems of older Americans and those serving them, particularly lawyers in the public sector. The ABA had taken an

[1] Soden (2005).

unprecedented leadership role in addressing legal issues and professional practice in a multidisciplinary and integrated way and laid the foundation for the creation of the National Academy of Elder Law Attorneys (NAELA) which was established in 1988. Together with the ABA, NAELA developed a certification program for private practitioners serving older adults. Planning and eligibility for public medical services and long-term care benefits had given rise to vibrant, creative law practices, which first defined the multidisciplinary and holistic approaches of Elder Law.

It is hard to predict where Law and Aging and the practice of Elder Law will be in 10 or even 30 years in Canada, the United States and beyond. Specialized legal practitioners serving the legal and planning issues of older adults, advocating procedural fairness in the determination of incapacity, legal representation and other protective measures, and providing skilled approaches to prevention and resolution of family disputes and transitional issues in aging will continue to be in demand by an ever-expanding aging population.

The substantive law areas that many of these practitioners concentrate on within the Elder Law field vary from Wills and Estates Law, to Family Law and Health Law. There is also the holistic practice model of the Elder Law practitioner offering legal planning, later life and care planning and conflict resolution. This Elder Law practitioner touches on all of these related fields and others including such diverse areas as Housing (Real Estate) Law, Criminal Law, Tax Law, Labor Law and Administrative Law. Given their extensive skills set and understandings of medical and social issues new directions for the Elder Law practitioner beyond the practice of Elder Law include Disability Law, special needs trusts work as well as work for adult children of older clients who act as caregivers and legal representatives.

In time all practitioners in fields as diverse as Banking and Business Law will develop special knowledge and skills to sensitively deal with issues affecting their older clients. As practitioners become attuned to these issues the speculation is that we will move beyond Elder Law and that its identity will disappear into the landscape of general law.

Despite the substantial ground laid in the United States within private and public sectors of practice of Elder Law there is little evidence of any diminishing relevance of the field. The Commission reported on its thirtieth anniversary in 2009 that the field will, for the foreseeable future, continue to be "exciting and evolving for lawyers moved by goals of autonomy, dignity and quality of life for aging members of society. . .of any age."[2]

Questions still arise as to whether Elder Law is more than a practice area. It is by no means universally recognized as a discrete area of law in either the United States or Canada. Many educators, researchers and advocates within the field, however, believe that it is, albeit difficult to define. Much like the field of International Law which examines international issues across various fields of law, Elder Law or Law and Aging examines law and practice through the lens of aging. Charlie Sabatino of

[2] Bifocal (2009), at p. 109.

the Commission gave me the analogy of the field of geriatrics which touches on many specialty areas in medicine yet its practitioners understand how diseases and healing processes affect aging bodies differently than in younger people. In the same way Elder Law touches on many substantive areas but the interrelationships and dynamics of the substantive areas examined are particularly unique in the context of aging. We anticipate that recognition will continue to expand as the field further develops around the world. Elder Law is still emerging in Australia, Canada, Israel and Japan. The European Union and its Member State countries are at an earlier stage given their complex and extensive political, social and legal development in recent years.

Regardless of the advancement of recognition of this area of law there is certainly a role within the vast field of aging for analysis and advocacy of laws, policies and legal practices at local, national and international levels which promise to keep legal professionals busy for many years to come.

The practice of Elder Law and study of law and aging issues has led us in new directions beyond Elder Law. From a marketing and practice standpoint the field has injected new life into such fields of practice and of law as Family Law to examine divorce and remarriage in later life, reconstituted families, marriage and companion contracts in later life, tax, estate and care planning issues arising from separation, divorce and remarriage in May–December and December–December unions, filial obligations, grandparent access and adoption and informal caregiver legal issues. Our research on legal issues of aging has produced discoveries and led to cross-collaboration with other fields to develop enhanced legal understanding in other disciplines benefitting persons of all ages. Capacity, decision-making, and procedural fairness are but a few of the legal issues which have benefitted from partnerships and collaborations in research and advocacy in other fields.

Our practice and study of this interdisciplinary and multidimensional field has shown us how areas of law can no longer work in silos or in a piecemeal and fragmented way. One discipline informs another. The special issues of aging require timely answers, often crisis intervention involving the family and the need for efficient, sensitive solutions and preventative measures. These issues have encouraged creative problem-solving in lawyers. The successes born of new paths for problem-solving are giving a heightened relevance to the teaching of alternative dispute resolution in law schools and in continuing education courses across fields of law.

The years ahead will demand creative thinking. We are at a point in world history when the ways we learn, handle conflicts, pursue freedom, equality and security will change and creative problem-solvers will shape those changes. Canada's Chief Justice of its Supreme Court, the Honorable Beverley McLachlin,[3] has called upon lawyers to promote the law more as a framework for living together and less as a vehicle for dispute resolution. We will need people who can think in

[3] *Supra* at Note 1, p. 10.

more than one way about solutions to these unprecedented issues facing an aging population and the greying of the globe.

Those in the forefront of the field are building and will continue to build bridges through comparative, trans-systemic and interdisciplinary thinking and analysis. This text is a contribution to that development. This collection of reflections, recommendations and reports by legal advocates on aging issues from Australia, Belgium, Canada, France, Israel, the United Kingdom and the United States is an opportunity for international exchanges of ideas and strategies in areas which transcend international borders and affect all older adults: decision-making capacity, surrogate decision-making, abuse and exploitation, discrimination, end-of-life issues and ethics and mediation in family matters.

In a previous book,[4] various scholars presented different theoretical approaches to Elder Law. In this book, the contributors attempted to further develop Elder Law knowledge and to point to new and futuristic directions in guardianship law from a substitute decision-making model to a supportive decision-making one, inspired by legislation from other jurisdictions in the world. New solutions for advancing the rights of older adults and addressing abuse and neglect advocate the application and development of principles of civil rights, human rights and citizenship. Discussion of the usefulness of a global approach to the promotion of rights through an international convention on the rights of older persons will also be explored. Overall, the book proposes new directions to the future development of Elder Law.

The passion to generously share and learn from each other is evident in the realization of this work and in the collaborations to follow which it and future efforts will inspire. These directions have taken us far beyond the early visions of the practice of Elder Law.

I would like to finish by thanking all the authors for their excellent contributions to this book, and to my co-editor, Dr. Israel (Issi) Doron, for partnering with me on this project. I would like also to thank Springer Publication and Dr. Brigitte Reschke, the Executive Editor in the field of law, for their support in publishing this book.

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[4] Doron (2010).

Contents

Chapter 1
Guardianship, "Social" Citizenship and Theorising Substitute Decision-Making Law

Terry Carney

1.1 Introduction

The ancient English common law institution of personal or property guardianship of individuals with diminished competence was once entirely the province of superior courts, under prerogative powers of the Crown dating from the thirteenth century, and covering three vulnerable groups, namely, children, the mentally ill and those with intellectual disability (Carney 1982; Doron 1999, 100). It was a state protective device, governed by a best interests test and a paternalist philosophy, but financially accessible to very few. Under later statutory regimes for certain groups, entry to another status (such as involuntary mental health care), medical certification of loss of cognitive capacity, or a diagnosis of a condition (such as "senility") was often sufficient to automatically trigger imposition of a plenary order, of indefinite duration, entrusting property to the office of the public trustee, or the appointment of someone (called a "committee" originally) empowered to make decisions about personal affairs, like treatment or where to live (Beaupert et al. 2008).

In the 1970s, new philosophies of respect for individual human agency, and tailored supportive community-based service delivery, came to the fore in public (adult guardianship) and private planning instruments (durable powers and advance directives). Various combinations of initiatives emerged, reflecting in part the different cultural, social and other "traditions" of countries with regard to favouring personal autonomy, the scale of the welfare state, or the prominence of family roles (further, Doron 2002 [reviewing models from Maryland (USA), Japan, Sweden, Germany and Israel]).

From the 1960s, Western Europe began to modify its Roman law influenced models. Some countries opted for flexibility, others for a menu of legal options

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(including that of "support"), and yet others placed more weight on automatic "hierarchical list" appointments of family members in the event of incapacity (Blankman 1997). Australia was a leader in developing new accessible and "functional" approaches to adult guardianship, which were favourably received (Carney and Tait 1997). Personal planning options such as "advance directives" (initially for health) and durable powers of attorney also originated in the cross currents of emerging issues around increasing preferences for community placement of people with incapacities, rejection of dependence on authority, increasing self-confidence, and even as a reaction to unwanted medical treatment at the end of life (Sweet 2007, 826). First seeded by a 1954 Virginia statute, the device of a durable power of attorney slowly won favour with legislatures in other US jurisdictions. However as Charles Sabatino of the ABA's Commission on Law and Aging has observed, "the tipping point came in 1969 when the National Conference of Commissioners on Uniform State Laws promulgated a new Uniform Probate Code (UPC) that recognized durability if expressly provided for in the document" (US DoH&HServices 2007, 9). California was credited with passage of the first durable power for health care in 1983.

Most recently, a principle of equality of participation of people with disabilities has been endorsed in Article 12(2) of the *Convention on the Rights of Persons with Disabilities 2006* ("CRPD"),[1] fuelling support for notions of supported and shared decision-making, as developed within the disability movement in particular. These alternatives are distinguished from traditional adult guardianship in essentially not transferring any *legal* powers of decisionmaking away from the person affected, but instead authorising such things as assistance or access to personal information. This trend towards supported decision-making has been especially evident in Australia, where the Victorian Law Reform Commission is conducting a root and branch revision of adult guardianship to place greater emphasis on advance planning and supported or co–decision-making avenues in that State of the federation (VLRC 2011). Renewed attention has also focused on the extent to which domestic equal opportunity laws such as Title ll of the Americans with Disabilities Act (including the principle of the "least restrictive" alternative) may lead in the same direction on the basis that guardianship is a proscribed form of disability-based discrimination (Salzman 2010, 161).

This chapter reviews aspects of this story to determine whether the most appropriate contemporary balance points have been found between philosophical values of autonomy and paternalism, the respective roles of state and civil society,

[1] Article 12(2) provides that "States Parties shall recognize that persons with disabilities *enjoy legal capacity on an equal basis with others in all aspects of life*" [emphasis added]. Article 12(4) however stipulates that "all measures that relate to the exercise of legal capacity" shall provide for "appropriate and effective safeguards to prevent abuse in accordance with international human rights law", before going on to expressly refer to "respect[ing] the rights will and preferences of the person", freedom from "conflict of interest and undue influence", and being "proportional and tailored to the person's circumstances, apply[ing] for the shortest time possible, and . . .subject to regular review. . .".

respect for cultural values and pluralism, and tolerance of reasonable degrees of personal risk. It argues that the best way of judging such matters is against the civil citizenship goal of maximal social participation of aged citizens.

1.2 Changing Conceptions of Competence and Its Management

The concept of diminished competence varies depending on the professional disciplinary domain. From a medical perspective it is a story about cognitive ability to comprehend, remember and reason rationally. From a legal perspective it is more a question of capacity to understand information and appreciate the issues and consequences entailed in particular decisions; while from a social perspective it is about maintenance of adequate levels of social functioning.

The trajectory of policy or philosophical approaches can also be mapped in several ways. At the base, it is largely about the degree to which individual entitlements to "equality" (see e.g. CRPD, Article 12) are to be restricted in order to provide "protection" (Article 16). But equality can variously be formulated. It can be expressed as a purely *formal* concept (i.e. an "opportunity") or in more substantive terms, as an achievement of distributive equity. It can be conceived as a universal right of citizenship for all, or as a special standard for particular groups (such as the disabled aged). And it also raises notoriously complex issues about respect for diversity and the right to make poor choices (the so-called "dignity of risk").

Competence rises, and often falls, over the course of the lifecycle. In the case of very young children it is assumed that competence has not been gained; in the case of the frail aged, its loss is often a fact of life. In between there are a variety of genetic or birthing factors, or external events—such as accident trauma, stroke or mental illness—which may temporarily or permanently diminish cognitive capacities (Carney and Keyzer 2007).

Over the last half century or less, the western world has witnessed dramatic shifts in approaches to declining cognitive capacity. Factors, such as increased longevity and the size of the post-WW2 "baby-boom" generations, combine to produce ageing demographic population profiles and marked rises in the numbers of people reaching the older age brackets where the incidence of dementia increases disproportionately with advancing age (Access Economics 2003, 2010, 10).[2] The economic and social costs both to the community and to potential carers is increasing, while the tax base and the pool of family carers, especially women, is shrinking (Hancock 2002). Assumptions of provision of informal filial support for daily living needs, and paternalist approaches to managing loss of competence or a need for institutional care, no longer command wide acceptance in the West; while in Asia, reliance on family and the "firm" (Goodman and Peng 1996, 195; Takahashi 2004, 288)

[2] For the US: *2011 Alzheimer's Disease Facts and Figures*: http://www.alz.org/downloads/Facts_Figures_2011.pdf. Accessed 7 July 2011.

is also coming under increasing strain due to pressures such as economic development and population mobility (Ramesh 2004, 325).

Over the last three decades of the twentieth century, medical models of competence evolved into more sophisticated understanding of the social dimension of, and societal contribution to, functional capacity; resulting in adoption of "functional" tests of capacity (Carney 1995, Wood and Sabatino, this volume), and attempts to capture this approach in assessment tools (e.g., Newberry and Pachet 2008). Rights of self-determination of aged people to manage their lives in accordance with their own wishes and values led to passage of laws enabling the enforcement of "durable" powers of attorney over management of money and property, personal affairs, or healthcare decisions (Carney 1999). Adult guardianship laws were refashioned to introduce partial (reviewable) orders in place of plenary indefinite orders, along with various other changes, such as a presumption of capacity, adoption of the principle of the "least restrictive alternative", and incorporation of respect for the wishes and values of the person (Carney 1989). However the reformed guardianship laws still retained a number of traditional features, such as the paternalist cast through retention of the "best interests" principle, the delimiting of coverage by reference to incapacity stemming from "disability", and in paying little attention to encouraging private arranging through enduring powers, and by largely neglecting advance directives or supported decision-making (VLRC 2011).

In all of this, law necessarily reflects the views and values of the country and the times in which it is enacted (Thane 2001; Whitton 2001; Doron 2002), such as the balance struck between respect for individual autonomy (privileged in conjunction with a preference for market mechanisms over government ordering in the US) or the importance of other values such as "protection" or fostering of communal decision-making (Polivka and Moody 2001; Doron 2003, 252). Advance directives for healthcare for instance are predicated on western values and ideas of privileging personal autonomy at the expense of family or collective interests, and may not appeal in Asian countries where different values prevail (Kim et al. 2010, 116; [or for Western immigrants from those countries]), or in those countries where medical paternalism holds sway as in parts of Europe (Pascalev and Vidalis 2010, 147).

Changing values and demographics can give rise to a need for adjustments to the law, or new lines of thinking. International trends and influences also play a part, such as the 2002 Hague *Convention on the International Protection of Adults,* promoting reciprocal recognition of substitute decision-making orders between nations (Doron 2006, 63),[3] or the October 2010 *Yokohama Declaration* from the

[3] The Convention entered into force on January 2009: http://www.hcch.net/index_en.php?act=conventions.text&cid=71. Accessed 7 July 2011. To date 13 countries have signed (Cyprus, Czech Republic, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Switzerland, United Kingdom) and 6 have ratified (Estonia, Finland, France, Germany, Switzerland, UK).

first World Congress on Adult Guardianship Law.[4] Contemporary policy debates, for instance, now cannot ignore the effect of the *Convention on the Rights of Persons with Disabilities 2006*,[5] which is generally accepted as at least favouring maximal reliance on "support" for the exercise of decision-making capacity (CRPD, Article 12(3); QLRC 2008, 35), though some lawyers like Amita Dhanda and Tina Minkowitz go much further and interpret the Convention as precluding all competence-based substitute decision making such as adult guardianship laws.[6]

Of course the functional roles or *purposes* of laws do differ (Kapp 1996, 469; Doron 2003). Some laws are protective, such as common law relief from enforcement of oppressive contracts for the elderly (Lewis 2004, Chap. 4), or the protective aspect of adult guardianship (Carney and Tait 1997; Carney 2003). Social security and residential aged care funding evince "supportive" purposes, while durable powers of attorney serve mixed preventive and empowering functions (Creyke 1993; Carney 1999). For its part, "empowerment" is best represented by laws securing civic participation rights of residents in relevant decisions in aged care facilities (Howe 1997; Whitton 2001).

However, shifts in the overall pattern of principal objectives of laws for the aged (or proportionate shifts of emphasis for a particular law) are only a very crude index of changing policies and philosophies because the law on the books may not bear much relation to what happens in practice. Enduring (or durable) powers of attorney, for instance, are an excellent way of setting down advance instructions in anticipation of loss of competence. But with the best will in the world the power is only as good as the agent is both "trustworthy" and willing to accept the responsibility; and, while durable powers may *reduce* they cannot avoid family disputation, as also is true of adult guardianship (Whitton 2007).

This is not to deny that the law can be improved in some circumstances. For instance it has been suggested that one way of empowering elders in the more egregious of the family disputation situations (such as self-serving attorneys making contested nursing home placements or selling the family home for venal interests)

[4] See http://www.international-guardianship.com/yokohama-declaration.htm. Accessed 7 July 2011. The declaration maintains a role for reformed adult guardianship, subject to taking "all practicable steps" to "help" a person to make a decision, "without success": Article 3(2). In a similar vein, Article 4 opens by declaring that "every adult who lacks capacity to make a particular decision at a particular time, and is without any other means of support or representation in the decision-making process, is entitled to have a competent guardian".

[5] For a recent overview, see Kämpf (2008).

[6] Article 12(4) ambiguously uses both language consistent with competence-based substitute decision making (adult guardianship) and language espousing "supported-decision making" (Dhanda and Narayan 2007, 1198; Dhanda 2008). See also Minkowitz (2010). While arguably charting the rhetorical direction for reform of mental health laws (such as greater use of enduring powers of attorney or advance directives), neither silence nor ambiguous drafting displaces *prior explicit* language in previous international instruments (Weller 2008, 87–90). Autonomy/capacity-based legislation rather short-changes mental health patients in practice (Donnelly 2008, esp 49–51).

would be to at least require agents to advise the affected person, or others close to the person, that they plan to exercise a particular power (Kohn 2006), as already happens in certain contexts.[7] Or the law can take new forms beyond traditional appointments of substitute decisionmakers or enduring powers. Thus the US Center for Social Gerontology has championed mediation as the better approach to family disputation around such issues (Butterwick et al. 2001), while the Australian state of New South Wales (NSW) has opened decisions of *public sector* property administrators to merits review by its Administrative Decisions Tribunal ("ADT") to enable such conflicts to be more fully aired and resolved. Alone of all Australian guardianship jurisdictions, the Australian Capital Territory (ACT) requires consultation with carers and family in such matters (QLRC 2008, 59), though NSW provides for presumptive conciliation of initial applications for orders.[8]

Some of these options are hard to assess. As illustrated by the initial resistance in NSW to utilising the option of conciliation in guardianship hearings (now accounting for diversion from hearing of around a third (30%) of its caseload: NSW Legislative Council 2010, 71), some reforms may fail to win the support of stakeholders, or largely be immune to change. Thus experience with mental health conservatorship (adult guardianship) hearings in California suggests that lawyers continue to adopt "best interests" styles of legal representation despite rulings of superior courts insisting that they act on client instructions in the usual "adversarial" manner (Morris 2009). On the other hand, Australian empirical studies in the two largest jurisdictions of Victoria and NSW (Carney and Tait 1997) and another of three US States ranging from unreformed through to reformed (Moye et al. 2007) found that practices were quite responsive to well crafted legislative reforms. So-called "best practice" exemplars are a dubious basis for charting the course for reform, however.

In Alberta, Canada, the model which originally inspired several features of Australian guardianship reform, the *Dependent Adults Act* 1978, was superseded by the *Adult Guardianship and Trusteeship Act* 2008 (Alberta) from October 2009, based on the recommendations of a review (Alberta 2007). This reformed legislation is progressive in the sense that it introduces nominated supported decision-making authorisations (s 4), and court appointed co-decisionmakers (s 13) in addition to guardianship or trusteeship machinery (Alberta 2009). It shares some features of laws in Saskatchewan (Supreme court co-decisionmaker orders), Manitoba and the Yukon, or the representation agreements in British Columbia

[7] Section 72(1)(a) of the *NSW Trustee and Guardian Act 2009* (NSW) provides that the NSW trustee when exercising estate management powers in respect of a managed person "must determine whether the action is of such a nature that the person or a relative or relatives of the person should be consulted about the action".

[8] Section 66(1) of the *Guardianship Act 1987* (NSW) provides that: "The Tribunal shall not make a decision in respect of an application made to it until it has brought, or used its best endeavours to bring, the parties to a settlement". Subsection (1A) provides a dispensation where "the Tribunal considers that it is not possible, or appropriate, to attempt to bring the parties to a settlement".

(Burningham 2009; VLRC 2011, paras 7.33–7.35). The Alberta package complements other provisions for personal directives and durable powers of attorney.[9] However, consistent with North American preferences for personal responsibility over reliance on state provision, the reformed Alberta law is weaker in terms of dealing with those who for whatever reason fail to make such provision prior to their incapacity.

Moreover, while uniformity of approach may appeal to purists or academic commentators, it overlooks the need to accommodate local values, institutions and patterns of administration. Thus the US *Uniform Power of Attorney Act* of 2006, which partially addresses some of the perceived weaknesses in durable powers, was slow to win support, with only Idaho and New Mexico signing up in the first few years (Beyer 2009), rising to 10 states at the time of writing, suggesting that local values (technically termed "path-dependence") and other factors remain strong in the face of calls for "harmonisation" even *within* federal structures of government. Consequently, reciprocal recognition of laws, rather than uniformity per se, may be the more achievable policy goal between nations or even within those federations where the relevant powers over adult guardianship and durable powers are allocated to the state or provincial level of government, as is true in the USA, Canada and Australia.

In light of such diverse patterns and the variety of competing models, settling on overarching principles or determining whether (and how) the area can be theorised is quite challenging.

1.3 Principles and Models

There is a very wide spectrum of approaches for responding to the needs of those requiring substitute decision-making, ranging from social work to private purchase/provision and legal models of various types (Carney and Singer 1986).

1.4 What Are Our Policy Goals?

Before the effectiveness of options can be assessed, it is necessary to determine what social or other policy goals are sought to be advanced.

Is the policy concerned to *rectify* financial or property losses, or simply to prevent further depletion of resources? Court remedies may achieve the first of these for a privileged few, who can bear the usual costs of time and money associated with judicial process (Burns 2002, 2003), while administrative orders

[9] *Personal Directives Act* (Alberta) Ch P-6 RSA 2000 (as amended in 2006 and 2008 with effect from August and September 2009); *Powers of Attorney Act* (Alberta) Ch P-20 RSA 2000.

or adult guardianship may cheaply and best achieve the second for a much wider clientele. Is protection against all significant harm the overriding goal, or is it intended that people with cognitive impairments should retain their "dignity of risk" and ability to make "bad" choices, as is taken for granted with the non-impaired?

How much tolerance of messy outcomes is to be accorded to informal (or "extra-legal") arrangements? Or is substitute decision-making only a job for the law? Should policies directly redress deficiencies of human frailty (such as apathy about planning or lack of sufficient income or personal resources to be truly "self-actualising") by providing remedies even for such people, or should policies be premised on an equality of opportunity assumption that it is sufficient for the state to provide *options* for personal planning (such as durable powers) or avenues of appeal or complaint; meaning that those who choose not to avail themselves are unprotected, whether by deliberate choice or lack of suitable appointees?

Can it be assumed that family, friends or "community" will rally around sufficiently to render meaningful any (admirable) aspirations for reliance on community-based ideas of "supported" decision-making, or should civil society (i.e. through mobilising volunteer support) or the state (such as through funding and coordinating "community visitor/guardian" schemes) supply the shortfall for the friendless or isolated? If tailor-made personal arrangements are no longer viable due to the advanced age or social isolation of the person, should this trigger access to more impersonal and bureaucratic default guardianship from state agencies such as Public Trustees (or offices of Public Advocate), under *public* guardianship arrangements not uniformly provided for in many jurisdictions outside Australia? Or is this state of affairs the moral equivalent of having been unlucky in life, with lack of support being one's "lot in life" and thus not something to be remedied?

None of these questions have easy answers; and it may actually be unhelpful to seek their resolution within the arbitrary confines of a "field" such as elder law (cf. Doron 2006), because that field carries the baggage of possible overtones of dependence, diminished citizenship and degraded democratic rights of participation,[10] and of being an outsider or "other" not within the mainstream community of standard workers/taxpayers. More universal frames may be preferable, such as under the rubric of a right to "equality". However equality itself is a fraught or very ambiguous concept.

The "enjoy[ment of] legal capacity on an equal basis with others in all aspects of life", as expressed in Article 12(2) of CRPD, captures some of this ambiguity. Is it to be read widely as being about achievement of a *formal* legal equality which erases notions of individual *in*capacity and seeks to avoid (or eliminate) substitute decision-making; such as is facilitated under the 2009 Alberta law providing the *option* of enabling those individuals in a position to do so to authorise nominated others to *support* their realisation of what is then deemed to become "their"

[10] For a recent argument along these lines with regard to the over protectiveness, and diminution of privacy rights associated with US "elder protection" (and reporting) laws, see Kohn (2009).

decision? Or does it extend further to be read as *substantive* equality, implying state obligations of support *irrespective* of inability to nominate a support person of the person's choosing; and if so, how is this to be funded and organised? Or should Article 12(2) instead be read as an expression of *democratic* values of participatory self-government? A democratic sentiment, which substitute decision-making laws might promote by requiring presumptive regard be paid by decision-makers to any advance directive or statement, or by way of obligations of decision-makers and guardians/attorneys to consult carers or family; a notion to which we return below.

1.5 "Stepped Care" Legal Toolkits to Promote Supported Decision-Making and Equality?

In addressing such issues, John Brayley (2009) draws on the "stepped care" model for mental health care (Andrews and Tolkien II Team 2006), to propose a parallel "tool-kit" of legal avenues for people with diminished cognitive capacity.

Brayley argues that realisation of sentiments of supported decision-making at least requires provision by the state of a full spectrum of legal tools (including advocacy and supported decision-making). For otherwise, there is an almost inevitable risk of "escalation" (or paternalism by default), where the absence of a less restrictive option leaves no intermediate alternatives to making, say an overly heavy-handed guardianship order. As illustrated diagrammatically in Fig. 1.1 below covering the Australian State of South Australia, this would entail adding some new legal avenues.

As can be seen, the new tools to be placed in the legal toolkit of guardianship tribunals include: supported decision-making; "one-off" *single* decisions made by a tribunal on behalf of a person (akin to US single court transactions); private guardians assisted by *support* from the government Office of Public Advocate (OPA); and, finally, appointment of guardians backed by OPA "oversight". As explained, the rationale here is the dual one of avoiding escalation into unnecessarily restrictive options when lesser measures would suffice, and ultimately perhaps of calibrating the demand for each service with adequate ability to access it.[11] The proposal provides a more granular range of choices in place of the more binary one of making or denying guardianship, or of relying on the cruder statutory device of authorising in advance a hierarchical "default list" of substitute decision-makers such as close family. It also embodies the strong role which Australia extends to *public sector* guardianship machinery as a check and balance to review and monitor private arrangements such as durable powers.

[11] In addition to stocking the legal toolkit with the currently missing options, this model carries the potential to estimate the "demand" for each, in the same way that the Tolkein ll "stepped care" model develops optimal mental health service targets for different kinds of conditions (though with greater elasticities given the combination of medical and legal factors in play: email, John Brayley Monday, October 26, 2009).

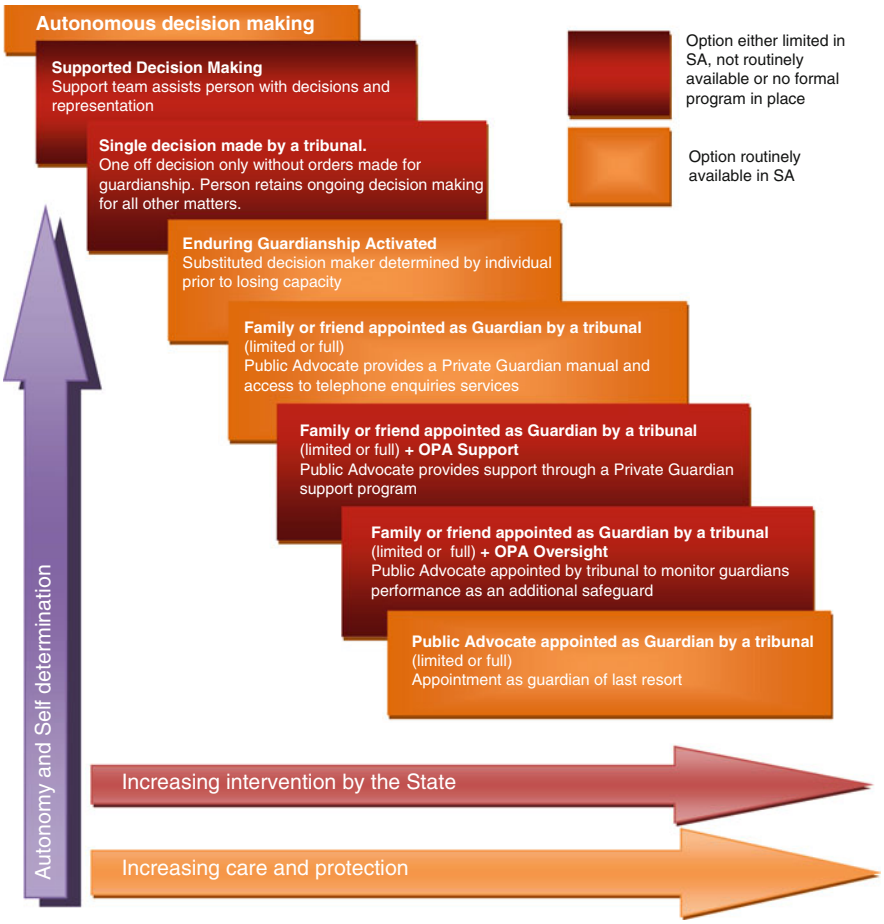

Fig. 1.1 Stepped approach to supported and substituted decision-making. Adopted from Brayley (2009)

Consistent with this idea and the experience in Canada with supported decision-making and co–decision-making (Burningham 2009), the pathbreaking Australian work of the Victorian Law Reform Commission proposes introduction of both these additional mechanisms. These would be able to be made either by a person prior to losing his or her capacity (as durable "agreements") or as "orders" made in respect of the person by a guardianship tribunal (VLRC 2011, para 7.87).

However, as with other areas of policy, the unintended consequence may not be so much the intended one of diversion of cases back down into the lower echelons of the hierarchy, but instead, of "net widening", where cases previously dealt with *less* formally (indeed perhaps entirely "informally") are unnecessarily brought up a level or two. The size of any such unintended effect of that character is of course currently unknown; and its aggregate policy position is uncertain as well (in that the

increased intrusiveness of any net widening may be off-set by the greater case "monitoring" or support that can be brought to bear). Likewise the problem of the unintended effects of allowing holders of the new instruments (or those dealing with them) to appear to have the very decision-making powers, which the law has expressly *withheld* from them; while education, registration and monitoring may mitigate this risk (cf. VLRC 2011, paras 7.113–7.116), it cannot possibly avoid the honest misunderstandings about "what power is what".

People already have but very fuzzy understanding of adult guardianship or health powers, so some level of misuse and misunderstanding is surely inevitable under a more sophisticated system.

1.6 New Legal Tools Cannot Rectify Deficits of Service Provision or Civil Society?

Of course any such new legal tools are also only as good as the service and social environment available to be worked with on behalf of the person with diminished capacity.

For instance if the state continues to maintain its traditional disability and aged care models of rigid monopoly control over access to all relevant resources and services (as in "program-based" models of service), then neither a fully autonomous citizen, nor a decision assistant, nor even a traditional plenary guardian will be able to change service provision much for the better. In such non-negotiable environments, proxy powers of negotiation are of limited or no worth. Likewise the economic welfare of a person on austere social assistance payments may receive some slight benefits from one of the array of possible sources of managerial assistance (ranging from the purely informal to nominee/representative payee or "administration" orders), but no quality of decisional assistance/exercise will redress their poverty-line subsistence.

The *agency* that can be realised for people through judicious selection of the best available legal or extra-legal tools under the wider-spectrum models such as proposed by Brayley, can really only be judged by how well it mobilises public or private resources (such as informal supports of civil society) in accordance with peoples' individual set of values and preferences (in this and other respects); but the point here is that agency can be *realised* only to the extent that resources *exist* in the external environment. Certainly, as public resourcing models switch from program-based funding to individualised cash funding allocations that can be spent to purchase services as the service *user* sees fit (for an Australian review: Fisher et al. 2010, 7–13), it can be anticipated that demand for such assistance (or "brokerage" services) will rise, not only because life becomes more complex to manage (many more hard choices to navigate),[12] but also because the field of

[12] Indeed there are similar needs for assistance in navigating the increasing complexity of financial planning and aged care services, which guardianship or administration alone may not meet (Tilse et al. 2003, 2005).

personal choice is thereby *expanded* beyond what previously may have been a very limited sphere.[13] In Australia at least, such "personalised purchasing options" are very much favoured as the basic principle to underpin new aged care service provision (Productivity Commission 2011).

But are we deluding ourselves by nomenclature changes which do not alter the underlying social substance? Is the brokerage role of a modern decisional assistant under the supported decision-making model actually just the *functional* equivalent to that of a *traditional* guardian or administrator discharging their statutory duty to first act as an advocate (or the "eyes, ears and voice") for the person they represent? Is the function undertaken any more or less onerous for the broker/advocate; or any more (or less) taxing for government or other agencies responsible for recruiting and supporting/funding their work? Putting it another way: can consumers pick the difference between a publicly-funded, arranged and facilitated "supported" decision-making program on the one hand, and a publicly-funded, arranged and facilitated "guardian/ advocate" scheme on the other?

The answer for consumers is probably "no"; however, that is not to say that the shift is not important on *other* grounds.

1.7 Re-imaging Guardianship Law?

It can be argued that at the very least a shift towards supported decision-making sends two important symbolic messages regarding: (i) rejection of avoidable paternalism; and (ii) the repositioning of the state as an *adjunct to* (or facilitator of) civil society.

The first of these has been well rehearsed by others, and encapsulates several dimensions of civil participation and dignity interests of citizens, including social isolation/disconnection when powers are transferred to someone else, and loss of dignity and self-respect due to reliance on third parties (Salzman 2010, 168–170). The second engages a neglected domain and literature: that of capacity-building and the "capabilities" view of justice that this captures (Sen 2009). But such "social realization"—or what TH Marshall famously characterised as rights of "social citizenship" through engagement in civil society (Marshall 1963)—is not without its grey areas, even if we accept that the level of desired social participation is the acid test of such policies.

Phillip Pettit's view that a person reliant on the goodwill of friends or civil society to overcome being house-bound is as unfree as a person lacking all assistance because the assistance is not "as of right", is (over vigorously) contested by Sen, in defence of Sen's position of a general concordance between freedom and "capacity". Certainly we can agree with Sen when he correctly observes that the

[13] Sen (2009, 410) calls this a focus on "assessment of social realizations, that is, on what actually happens (rather than mere appraisal of institutions and arrangements)".

first individual is in fact equally as able to achieve "social realization" (participation in a public life) as is a person with *direct* control over mobilisation of such assistance, such as through *employment* of helpers (ibid, 306–307).

However this does not mean that there are *no* important differences between the *quality of social citizenship* enjoyed by these two individuals. Indeed, as the whole history of social security policy bears witness, the stigma, demeaning of dignity, and general uncertainty associated with charitable discretion, is inferior in several ways to the "quasi-property" associated with "as-of-right" entitlements to assistance. If the state effectively opts out of responsibility for *ensuring* choice or civic participation through services and coordination, in favour of reliance on whatever voluntary assistance happens to emerge from civil society, then there is a price to pay: at the lowest the price of reliance on "charity" (even if charity of kith and kin), and at the highest, neglect (should the state not offer a back-stop service).

This is where supported decision-making risks unravelling in the absence of detailed concrete programmes for its realisation. At worst it can appear naïve in presuming that everyone has access to a ready stock of family, friends and civil volunteers. Or even that such networks can be constituted "on the cheap" (or at least less expensively than via state service provision). Of course there *are* likely to be some economic benefits in addition to the advantages associated with its location within civil society (flexibility, accommodation of individual/ local values, lessening of paternalism). But any weakening of the "guarantee" associated with state support of services must be offset on the other side of the ledger; charity is charity irrespective of any attractive contemporary disguise.

Of course the counterfactual of "reformed" guardianship is no angel either. At worst—exemplified by court-based administration in the US (or New Zealand)—the practice may fall well short of legislative aspirations (Wood 2005), such as low single digit percentages of actual restriction of guardianship to the "least restrictive" orders (Salzman 2010, 174 [citing US empirical evaluations]), or deflection of energy from the task of maximising personal autonomy, due to contamination of an overall "incompetency bias" engendered by the prior requirement to show lack of capacity (a product of a "disability pre-condition" nexus now of dubious contemporary merit). And, however phrased, at best guardianship will always entail a negative status (or legal "mindset") such as a lack of functional capacity to manage life in the absence of assistance from an order.

While the rather dismal performance of courts in failing to align practice with legislative intent was apparently avoided when purpose-designed multi-member tribunals were given carriage of the reformed guardianship laws in Australia (Carney and Tait 1997), it also remains possible that this success in realising the principles of the least restrictive alternative, partial guardianship and a functional approach has faded over time (as tribunals became more routinised and "jaded"), or that the move to single member hearings in some jurisdictions (such as Victoria's Civil and Administrative Tribunal, "VCAT") led to a reversion in outcomes for consumers more akin to the jaundiced picture reported for US reforms (Salzman 2010). The Victorian Law Reform Commission certainly saw enough "smoke" to canvass reforms of VCAT to require multi-member hearings, member training,

greater attendance of the person affected and greater informality (VLRC 2011, paras 21.161–21.203).

The evidence simply is not yet there, however, to judge conclusively one way or the other: there is smoke but not yet proof of fire. As a consequence, the choice between reformed guardianship, Canadian models of supported decision-making (representation agreements empowering someone to assist in light of the person's instructions or values), and the limbo-land of the legally recognised "mentor/friend" (as in Alberta since 2009, on the model of Sweden's "god-man" or fair friend), must all remain somewhat moot for the moment (for a summary of the options, Salzman 2010, 235–239).

1.8 Conclusion

Supported decision-making is undeniably a very promising aspiration, which ought to be incorporated to *some* degree into any contemporary reforms to laws dealing with impaired functional capacity. But the viability of the various mechanisms, the groups for whom they are most beneficial and the *mix* between such mechanisms and the well tried (if partially flawed) reformed guardianship machinery, remain open questions. As Leslie Salzman rightly observes (ibid, 240–241), these are ultimately *research* questions which need to be settled in light of *evidence* about what is and is not helpful in the lived lives of people with impaired functional capacity, and with due regard to the hard lessons of past policies which demonstrate that policies often have unintended (and sometimes surprisingly disappointing) outcomes compared to those expected.

Socio-legal research often reveals that legal tests take a different form than that intended at the operational or community level. A recent ethnographic study of substitute decision-making under Britain's new competence legislation illustrates this. Under the British law the "best-interests" of the person is the primary lodestar, operationalised through individual care-plans and a balance-sheet checklist of positive and negative impacts on the person's welfare. In practice, however, the study revealed that this legal test was transformed into one where decisions were made, not in the interests of the person concerned, but in ways which best approximated the lives that their *carers* led (Dunn et al. 2010). In evaluative terms this may or may not be a bad thing: after all, if the version of "equality" captured by Article 12(2) of the CRPD is principally to be read as an expression of *democratic* values of participatory self-government, then the outcomes here are at least reflective of the cross-section of values of carers, even if they are not tailored to the *personal* values of the individual affected, as the law intended. And how should or do we choose between autonomy and democratic plurality anyway?

Crafting laws and institutions, which give effect to either substitute or supported decision-making or deciding how far to go in the direction of reforms shifting the emphasis towards "support", remain complex and highly nuanced issues. Citizenship rights of participation in social, economic and civil life on the part of

individuals with impaired functional capacity to realise their own choices, plans and desires ultimately boil down to how things work "on the ground", and what we think of the (often mixed) outcomes which result. Such choices for older people with impaired functional abilities are no different to those in other areas of social policy and human endeavour in this respect. The best we can do, it is suggested here, is to marshall the evidence and debate which is *least imperfect* of the policy options at the disposal of the law.

The civil social-citizenship goal of maximal social participation by aged citizens through "supported decision-making" as they lose cognitive capacity, then, is certainly quite appealing. It resonates with contemporary "capability" theories of justice. However all countries should be mindful of the need to craft laws, institutions and programmes in light both of domestic legal architecture and values, and evidence-based assessments of competing legal or other policy instruments.

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Chapter 2
A Civil Rights Approach to Elder Law

Nina A. Kohn

2.1 Introduction

The study and development of public policy focused on older adults has historically been dominated by the medical sciences, related fields such as psychology and social work, and other social sciences that examine group behavior and structure such as sociology and anthropology.[1] The legal field and its approach to analyzing public policy, by comparison, have yet to play a significant role in shaping the field of gerontology.[2] This has created an environment in which governmental treatment of older adults has been framed primarily as a social welfare concern, and in which the implications of such treatment for older adults' civil rights are typically under-appreciated or even unrecognized.

This chapter argues that incorporating a civil rights perspective into the study of gerontology would not only better inform the study of aging, but would also help improve aging-related laws and policies. Such a perspective would contribute to the discourse over aging and old age policy by identifying and describing how laws and policies impact civil rights (i.e., the rights individuals have by virtue of their membership or presence in a particular polity). In this manner, it would complement a variety of other legal perspectives that can be applied to gerontology such as a human rights perspective,[3] a feminist perspective,[4] a therapeutic justice

[1] *See* Doron (2006) [hereinafter Doron, *Elder Law*].

[2] *See id.*

[3] *See* Prof. Helen Meenan, Chap. 4 in this book.

[4] *See* Dayton (2009).

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perspective,[5] or a law and economics perspective.[6] Like these other normative perspectives,[7] a civil rights perspective reveals a particular set of concerns and suggests a particular set of strategies for addressing those concerns.

The chapter proceeds with three major sections. Section 2.2 describes the civil rights concerns facing older adults. It then provides a theoretical overview of how the legal field could promote elder-friendly legal reform by explicitly labeling those concerns in the language of rights. Section 2.3 discusses specific examples of how applying a civil rights perspective has and could affect specific legal regimes and policy choices. Finally, Sect. 2.4 describes the special role that elder law practitioners and scholars can play in bringing this perspective to the field of gerontology and to the discourse concerning aging-related laws and policies.

2.2 The Value of the Civil Rights Perspective

Older adults experience a wide range of civil rights concerns. Some of these are the direct result of their chronological age. A major concern in many countries is age discrimination in employment, which ranges from mandatory retirement policies, to discrimination in hiring, to on-the-job age-related harassment.[8] Age discrimination occurs in other contexts as well. For example, older adults may be denied access to certain forms of efficacious medical care as a result of their advanced age.[9] Other

[5] *See* Kapp (2009).

[6] *See* Kaplan (2009).

[7] The civil rights perspective described in this chapter, by comparison, is not capable of providing a comprehensive, descriptive view of elder law, such as that provided by the Multi-Dimensional Model of Elder Law described by Doron. *See* Doron (2003) (originating the model). *See also* Doron and Kohn (2010) (most recently refining the model).

[8] Such discrimination occurs even in those countries which provide formal legal protections from age discrimination, such as the United States where the Age Discrimination in Employment Act protects most older workers from being subjected to adverse employment actions on the basis of age. *See* U.S. Equal Employment Opportunity Commission, Age Discrimination in Employment Act FY 1997-FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (presenting data on age discrimination claims made pursuant to the ADEA from 1997 through 2010, and showing that there was a significant increase in both the number of claims and the number of successful claims during that time period); Press Release, EEOC, EEOC Hearing Highlights "Devastating Impact" of Age Discrimination (July 15, 2009) *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-15-09.cfm (reporting on a EEOC hearing at which experts reported on the problem of age discrimination in employment in the U.S.; a transcript of the hearing is available at http://www.eeoc.gov/eeoc/meetings/7-15-09/index.cfm.

[9] *See* Williams (2009) (discussing evidence of physicians in the United States, Canada, and the United Kingdom discriminating against older adults by providing reduced access to certain forms of efficacious health care to older patients); Kane and Kane (2005) (discussing both overt and subtle forms of age discrimination in health care, including the exclusion of older patients from clinical trials, low reimbursement rates for geriatrics, differential treatment with regard to long-term care, the over-use of do-not-resuscitate orders with older adults, and health care professionals distancing themselves from older patients); Whitton (1997) (discussing ageism in the health care profession in the United States).

less recognized forms of age discrimination include those stemming from overly paternalistic legal regimes. In the United States, new state laws aimed at combating elder abuse and neglect can significantly undermine older adults' civil rights. For example, as discussed in the next section, mandatory elder abuse reporting statutes in the United States can deny older adults the right to engage in confidential communications with doctors, nurses, clergy members, attorneys, and even spouses once they reach a statutorily specified age.

Other civil rights issues experienced by older adults are triggered by age-related phenomena, although not directly by chronological age. Older adults can experience significant civil rights problems as a result of being or becoming disabled, or as a result of being perceived as disabled. They may be denied the right to live in certain housing arrangements because of actual or perceived disabilities. Frail older adults may find their basic needs neglected by caregivers both in institutional care settings and in community-based settings. Those with cognitive capacity concerns may find themselves subjected to plenary guardianships that strip them of the right to make any meaningful decisions about their own lives and bodies, instead of limited guardianships that would allow them to retain a portion of their decision-making capacity. In many cases, these problems appear to be the result of explicit or implicit ageism which fosters discriminatory and overly paternalistic treatment of older persons.[10]

Recognizing these civil rights concerns as civil rights issues—and publicly labeling them as such—has the potential to change how governments and societies treat older adults. Most directly, bringing a civil rights perspective to the analysis of the laws and policies affecting older adults has direct legal value in that it may reveal that some of these laws and policies conflict with legally protected rights. This, in turn, can pave the way for successful court-based challenges of statutes and regulations that unlawfully undermine older adults' civil rights, and thereby lead to more elder-friendly legal regimes.

The power of applying a civil rights lens to elder policy issues, however, extends far beyond the courts. Perhaps most importantly, applying a civil rights perspective has the potential to influence whether a given policy is deemed desirable by policymakers. The fundamental principle of liberalism is that individual freedom is to be treated as the default, and that therefore those who would restrict individual freedom bear the burden of justifying such restrictions.[11] In the Westernized world, a world in which societies have largely accepted a liberal conception of the role of the state, the fact that a public policy restricts an individual's liberty is therefore of significant consequence. Specifically, where a proposed law or policy undermines individual liberty, the onus will generally be on supporters of the proposal to justify that infringement.

[10] There is a rich body of literature discussing the phenomenon of ageism. *See*, *e.g.*, Palmore (1999).

[11] *See* Stanford Encyclopedia of Philosophy (2007), for the definition of "Liberalism".

Where that individual liberty interest rises to the level of an individual "right"—that is, one recognized as protected under the law—the proponent will generally be expected to make an even greater showing of justification. In the political discourse of the United States, for example, "rights" have historically functioned as trump cards. The writings of American theorist Ronald Dworkin both exemplify and describe this tendency. Dworkin explains that if something is a "right" it means that "it is worth paying the incremental cost in social policy or efficiency" required to prevent an invasion of that right.[12] Thus, it is inappropriate to balance a "right" against a competing interest because this type of balancing approach would be anathema to the very concept of a "right."[13]

This elevated treatment of rights means that employing the rhetoric of rights can create political power. Cloaking an argument in rights-based terms is a vibrant and powerful form of argumentation both in policy-making circles and in the public discourse.[14] The rhetorical power of rights language is particularly robust where framed in the language of a nation's core legal rights. In the United States, for example, labeling something as a *constitutionally protected* right further enhances its perceived value and inviolability. As Larry Kramer has written, "the ability to tie an argument to the [United States] Constitution is critical in constitutional politics, and the stronger or more persuasive the connection, the greater one's claim to legitimacy in public debate."[15] Similarly, in Canada, the perceived strength of a class-based claim can be enhanced by framing it in terms of rights granted by the Canadian Charter of Rights and Freedoms. Indeed, the adoption of the Charter has been credited with increasing both the prevalence and power of rights-based rhetoric in Canadian society and politics.[16]

The rhetorical power of rights does not necessarily depend on the receptiveness of courts to that rhetoric. There is political value in framing arguments in rights language even where a rights-based legal challenge would be unsuccessful. This is

[12] Dworkin (1978).

[13] *Id.* at 200.

[14] This is true despite the fact that such rhetoric is attacked by intellectuals on both the left and the right. Martha Minow summarized the United States' experience with this two-sided attack in 1987, writing: Rights are under attack. Some conservatives criticize the expansion of rights for lacking a legitimate basis, for contributing to adversariness and social conflict, or for undermining respect for law. Some left-leaning scholars criticize rights because they are incoherent and indeterminate, or because they fail to promote community and responsibility. Whatever the reason, rights criticism abounds. Minow (1987).

[15] Kramer (2006). *Accord* Glendon (1991) (discussing how legal language shapes public opinion in the United States and arguing that people in the United States view legal norms, and especially those grounded in the United States Constitution, as "expressions of minimal common values").

[16] This effect has been the subject of significant criticism. *See, e.g.,* Macfarlane (2008) (stating that the adoption of the Charter has caused rights claims to "assume a particularly pronounced stature" and has encouraged the framing of political claims in rights language, and providing an overview of the resulting concerns); Hiebert (1993) (exploring concerns that the Charter prompted the increased use of "rights language" and a "rights must be paramount" view of Canadian politics).

because rights-based arguments can gain traction and help generate political support for a social cause even if those arguments would not prevail in a court of law.[17]

Moreover, the political value of a civil rights perspective is not limited to its rhetorical value. Publically identifying policies as affecting individual liberties and rights affects not only the perceived desirability of those policies, but also human behavior. As Martha Minow has explained, recognizing rights—even if that recognition is not formal or condoned by authority—can give rise to "rights consciousness."[18] This, in turn, allows individuals and groups to imagine and act in light of rights that have neither been enforced nor even formally recognized.[19] Thus, educating the public about the rights of older adults may encourage individual behaviors that are more respectful and supportive of older adults' rights than they would otherwise be.[20] It may also encourage political behavior and political organizing around aging issues.

This ability to affect behavior is critically important in the elder law context. Even Western countries that have experienced waves of civil rights movements have yet to witness a clear civil rights movement for older adults. In the United States, civil rights movements have been central to the country's political discourse for over half a century, starting with the fight for equal rights for racial minorities, and then moving to the struggle for women's rights, the disability rights movement, and the more recent push for the rights of lesbian, gay, bisexual, and transgender individuals. However, despite experiencing pervasive ageism and continuing age discrimination, older adults in the United States have yet to engage in the type of collective action that could fairly be said to rise to the level of a rights-based movement.[21] Rather, advocacy efforts have been led by service providers and

[17] *See* Kramer, *supra* note 15, at 1445 ("[T]o say that a social movement must appeal by arguments that are recognizably legal in form is not to say that these arguments will satisfy a court, or even a lawyer or law professor . . .. Popular understandings of what constitutes a proper or persuasive legal argument may diverge from those of the profession . . .."). *See also* Schwartz (2001) ("[T]he presence of rights in a constitution [does not] require[] that they be *judicially* enforceable for them to be meaningful. There is also *political* enforceability. An obligation that is constitutionally mandated will have more persuasive force in debates over budget and other priorities than something that is completely discretionary with the legislature."). *Cf.* Mark Tushnet, Why the Constitution Matters (2010) (taking this argument one step further by arguing that the primary value of the United States' Constitution is that it creates a structure for the country's politics).

[18] *See* Minow, *supra* note 14, at 1867.

[19] *Id.*

[20] *Cf.* Doron and Apter (2010) (discussing the potential of an international rights convention, such as a proposed convention on the rights of older persons, to raise awareness about the plight of targeted groups).

[21] Perhaps the closest the United States has come to such a mobilization is the pension movement led by Dr. Francis Townsend in response to the Great Depression. *See* Amenta (2006) (describing the pension movement and reporting that two million people joined Townsend clubs and even more participated in movement activities such as rallies and meetings).

professionals,[22] and have therefore focused primarily on obtaining benefits and services for older adults.[23] While this has resulted in significant advances in entitlement programs and aging-related services, it has failed to create a constituency for protecting or enhancing older adults' negative liberties and their rights vis-à-vis service providers.[24]

A key barrier to the emergence of an elder rights movement is that older adults do not have a cohesive group identity. Older adults are a diverse group with varied backgrounds, interests, and objectives. As Frédéric Mégret has described, "the elderly are more a *category* of population than a constituted group within it."[25] In part because of their differences, older adults frequently do not identify with one another and have historically not been a cohesive political force.[26] Even when they do identify with one another, their age-based identity is typically secondary to other, previously adopted identities such as those based on family, religion, occupation, and political affiliation.[27] Moreover, some older adults actively resist being categorized based on their age,[28] perhaps reflecting society's preference for youth and concerns about the negative stereotypes associated with aging. This lack of a common identity, in turn, reduces the likelihood of older adults engaging in civic activism or voting behavior based on common interests.

Framing issues facing older adults in the language of rights, however, could foster a sense of shared interest and identity which, in turn, could encourage the mobilization of older adults to advocate for group interests.[29] Specifically, rights-conscious behavior could make the rights concerns facing older adults appear more salient and important—and thus prompt greater understanding among older adults of their common interests and the common threats that they face. Since people are more likely to engage in social action when they perceive that their interests are

[22] *See* Hudson (2004) (expressing concern that the professionalization of aging interest groups may have displaced citizen advocacy on aging issues); Wolf and Pillemer (1989) (comparing aging-related advocacy efforts to domestic violence related advocacy efforts, in which there has been a significant activist component); Moody (1988) (arguing the agenda for old age advocacy is "defined and dominated by professionals").

[23] *See* Kohn (2010a) [hereinafter Kohn, *Fostering*].

[24] For a longer discussion of this point, please see *id.*

[25] Mégret (2011).

[26] *See* Lynch (2005) (explaining that older adults in the United States have generally not acted as a cohesive voting bloc); Binstock (2007) (discussing data showing that older people do not form a voting bloc in the United States and analyzing why they do not do so).

[27] Pratt (1995) (noting that elder empowerment, and membership organizations for the elderly, are challenged by the fact that the strongest group attachments are typically those formed earlier in life and thus older people "reach old age with their primary affiliations . . . already firmly fixed").

[28] *Cf.* Mégret, *supra* note 25, at 44–45 (commenting that some older adults may "insist that their rights should be construed strictly identically to those of the rest of the population . . . even when the issue is defining a distinct elderly group to better protect its human rights.").

[29] This argument is developed in greater depth in Kohn, *Fostering*, *supra* note 23.

threatened, this could facilitate social action.[30] In addition, by making rights concerns seem tangible and legitimate, such framing could make achieving related reforms seem more feasible. This too could facilitate social action because people tend to be more willing to engage in political action that they believe will be successful.

In short, by recognizing when laws and policies undermine civil rights, the legal field has the potential to change the underlying assessment of those laws and policies by the courts, as well as among policymakers and the public. In contrast, by failing to recognize or acknowledge such rights burdens, the legal field creates an environment in which it is relatively easy for political bodies and other entities to create and enforce policies and laws that undermine older adults' liberties without robust justification.

2.3 Applying the Civil Rights Perspective

To better understand the instrumental value of a civil rights perspective, it is useful to consider how applying such a perspective can affect specific laws and policies.

Such a perspective has, at times, been a useful tool for legal advocates seeking to use the courts to challenge policies that undermine older adults' civil rights. Lawyers in Canada and Israel, for example, have successfully attacked certain forms of age discrimination in employment by framing that discrimination in terms of their countries' core civil rights. In a landmark 1987 decision, the Israeli Supreme Court held that a governmental agency's policy requiring women to retire at age 60 and men to retire at age 65 was an impermissible violation of a basic principle in Israeli law: that of equality.[31] Similarly, Section 15 of the Canadian Charter of Rights and Freedoms which guarantees individuals equal treatment by the state without discrimination (and which explicitly prohibits age discrimination) is beginning to be successfully employed to invalidate mandatory retirement policies. Specifically, although the Canadian Supreme Court has repeatedly upheld mandatory retirement policies,[32] several lower tribunals have found certain

[30] *Cf.* Lynch, *supra* note 26, at 102 (suggesting that members of the baby boom generation in the United States will be more likely to mobilize to promote common goals if they perceive their common economic interest to be threatened by, for example, threats to the U.S. Social Security or Medicare systems).

[31] HCJ 104/87 Nevo v. Nat'l Labour Court et al. 44(4) PD 749 (Isr.).

[32] The leading case was *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229 (Can.). In *McKinney*, the Court held that the Canadian Charter of Rights and Freedoms neither directly barred a university from imposing a mandatory retirement policy on university employees, nor did it prohibit the Province of Ontario from applying a Human Rights Code that denied protection from mandatory retirement only to those age 65 and over. For an excellent discussion of *McKinney* and other Canadian Supreme Court mandatory retirement cases prior to the reform of the Ontario Human Rights Code, see generally Klassen and Gillin (2005).

mandatory retirement policies to be in violation of Section 15.[33] In addition, the Canadian Supreme Court relied on Section 15 to invalidate a law restricting unemployment insurance benefits to persons under age 65.[34]

There are also times where the civil rights approach has advanced law reform objectives in the absence of court intervention. The Canadian province of Ontario's process of reforming its provincial law related to mandatory retirement provides a good case study of how a rights-based approach to elder law can be a powerful tool for such law reform. In 2001, the Ontario Human Rights Commission published a report entitled "Time for Action: Advancing Human Rights for Older Ontarians." The report detailed the ways in which the province of Ontario's legal system engaged in age discrimination and labeled this discrimination as a human rights issue. Among its most significant findings was the conclusion that mandatory retirement policies were discriminatory and akin to other clearly prohibited forms of discrimination, such as discrimination on the basis of race, sex, or disability.[35] According to the report, "[m]andatory retirement is age discrimination. Making a decision solely on the basis of age, and not on the basis of a person's ability to perform the essential duties of the job, is a form of unequal treatment."[36] The report called on the Province to reform its human rights code in order to remove an exception that permitted age discrimination in employment where employees were 65 years of age or older. The report noted that "[a]s a society, we would not find it acceptable to terminate someone's employment in such a fashion if the reason were related to another ground in the [Ontario Human Rights] *Code* such as race, sex or disability. Therefore, there are significant public policy reasons to re-examine mandatory retirement at this time to determine whether the arguments based on social utility should continue to justify what is otherwise a discriminatory practice."[37]

The report, which was followed by the Commission developing a formal policy on discrimination against older people, became a powerful catalyst for legal reform.[38] The report's classification of age discrimination in employment as a rights issue was seized upon by the local media and by political actors,[39] and

[33] *See* Vilven & Kelly v. Air Canada, 2009 CHRT 24 (Can.); CKY-TV v. Commc'ns Energy & Paperworkers Union of Canada, Local 816, 2009 MBQB 252 (Can.); Assn. of Justices of the Peace of Ontario v. Ontario, [2008] 92 O.R. (3d) 16.

[34] Tétreault-Gadoury v. Canada, [1991] 2 S.C.R. 22 (Can.).

[35] Ontario Human Rights Commission (2001).

[36] *Id.*

[37] *Id.*

[38] *Accord Assn. of Justices of the Peace*, 92 O.R. (3d) at ¶ 45 (describing the Commission's work as leading "a sea change in the attitude to mandatory retirement in Ontario"); Klassen and Gillin, *supra* note 31, at 50.

[39] The author's review of Canadian newspapers' coverage of the report and the issue of mandatory retirement subsequent to the report found substantial coverage of the issue, and significant discussion of mandatory retirement as an issue of workers' and older adults' "rights". *See also* Ontario Human Rights Commission (2005) (noting that the Report "has been referenced in other reports and by media, both nationally and internationally").

within a few years the Ontario Human Rights Code had been revised to prohibit age discrimination. The report's identification of mandatory retirement as a rights concern appears to have been critical to the law reform process. Identifying the issue in rights terms both elevated the cause and made the issues more salient to the public. The human rights terminology, for example, facilitated a poster campaign led by the Commission in partnership with the Canadian Association of Retired Persons (CARP), the "centerpiece" of which was "a series of posters featuring persons with stickers on their foreheads stating a 'Best Before' age with the tag line, 'Nobody has a shelf life. Stop age discrimination now. It's illegal, and it's just plain wrong.'"[40] Across Ontario, the issue was readily picked up by the media. News stories and editorials portraying mandatory retirement as discrimination and as a deprivation of older adults' rights proliferated. This paved the way for a bipartisan embrace of legislation revising the Code as advocated by the Commission.[41]

The Ontario experience shows the political and rhetorical power of identifying burdens on older adults in rights-based terms. In particular, it is illustrative of the fact that such identification can have a powerful effect even where such arguments would fail—and or even have failed—in a court of law. Prior to the revision of the Ontario Human Rights Code, there were repeated, unsuccessful attempts to bring court challenges to mandatory retirement policies on the grounds that such policies violated the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code.[42]

There is great potential for a civil rights lens to have a similar impact in other locales and with respect to other issues. In the United States, for example, such an approach has the potential to fundamentally change the nation's response to the problem of elder abuse and neglect.

Over the past two decades, the United States has seen tremendous growth in legislation designed to protect older adults from abuse and neglect. Unfortunately, a significant portion of this legislation has resulted in limiting older adults' rights based on their chronological age.[43] For example, almost all states in the United

[40] *See id.* at 12.

[41] The Conservative-led government of Ontario introduced a bill to end mandatory retirement in May 2003. The bill died when a new election was called and the Conservative government was defeated. After coming to power, the Liberal government introduced and passed a parallel bill that became effective December 12, 2006. *Cf.* Munro (2005) (expressing surprise that both parties embraced the issue).

[42] *See, e.g., McKinney*, 3 S.C.R. 229; Charles v. Canada (Attorney General), 1995 CarswellOnt 1037, Ontario Court of Justice (General Division) (unsuccessfully challenging the mandatory retirement of judges as a violation of the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms).

[43] *See generally* Kohn (2009) [hereinafter Kohn, *Outliving*] (discussing the civil rights impacts of elder abuse reporting statutes and new criminal codes aimed at combating elder sexual abuse); Kohn (2012) (also discussing the civil rights impact of laws designed to criminalize elder financial exploitation effectuated through "undue influence").

States have adopted statutes requiring elder abuse to be reported to the state.[44] The broadest such statutes require reports about all suspected victims of a statutorily specified triggering age, regardless of whether the alleged victim has diminished mental capacity or any other characteristics indicating unusual vulnerability, regardless of the relationship between the would-be reporter and the alleged victim, and regardless of whether a report would even be in the alleged victim's interest. An example is the state of Rhode Island's statute that requires "[a]ny person who has reasonable cause to believe that any person sixty (60) years of age or older has been abused, neglected, or exploited, or is self-neglecting" to report it to the State.[45] Similarly, Texas requires anyone with reason to believe that a person age 65 or older is being subjected to abuse, neglect, or exploitation to report that belief to the state.[46] To clarify the requirement, Texas' statutory code explicitly states mandated reporters include those "whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional."[47] Other states use the chronological age of an alleged victim as one of two or more factors that trigger the duty to report otherwise confidential information about suspected abuse or neglect to the state.[48] Yet others do not directly make chronological age a factor triggering the duty to report, but indirectly make it a factor by allowing "infirmities" or "impairments" associated with "age" or "aging" to trigger statutory reporting duties.[49]

Mandatory elder mistreatment reporting schemes have been subject to extensive criticism, but that criticism has done little to deter states from adopting or strengthening these schemes.[50] A key reason for this appears to be that such criticisms have been almost entirely focused on functional grounds (e.g., that such laws are ineffective or counterproductive) and moral grounds (e.g., that such laws undermine older adults' autonomy and dignity, are ageist, or conflict with pre-existing ethical norms). Such critiques have almost uniformly failed to describe the burdens such statutes impose on older adults in terms of individual rights.[51] For example, scholars criticizing mandatory reporting schemes for undermining older adults' autonomy have generally failed to consider that such autonomy limitations may not only raise moral, ethical, or efficiency concerns, but may also violate privacy rights protected by the United States Constitution.[52] As such, current critiques of mandatory elder mistreatment reporting schemes generally fail to fully appreciate and describe the negative impacts of such schemes, and therefore have diminished political and rhetorical strength.

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[44] Previously, reporting was only mandatory when abuse occurred in certain residential facilities, including nursing homes.

[45] *See* R.I. Gen Laws Sect. 42-66-8 (Supp. 2010).

[46] *See* Tex. Hum. Res. Code Ann. Sects. 48.002(a)(1), 48.051 (West Supp. 2010).

[47] Section 48.051(c).

[48] *See* Kohn, *Outliving*, *supra* note 43, at 1063–1064.

[49] *See id.* at 1063.

[50] *See id.* at 1065–1067.

[51] *See id.*

[52] *See id.*

A rights-based critique of such statutes, by comparison, has significantly greater potential to affect policy choices related to elder abuse. One reason for this is that such a critique provides a more complete—and far more problematic—picture of their impacts. For example, as the author has explored at length in an earlier work, it reveals that such statutes may violate a constitutionally protected right to informational privacy—that is, the right to control the acquisition or dissemination of information about oneself.[53] It also suggests that at least a subset of such laws may violate the 14th Amendment of the United States Constitution in so far as that Amendment guarantees equal protection of law.[54]

A rights-based critique of mandatory elder abuse reporting statutes could significantly impact policy choices due to the political and rhetorical weight such a critique could carry even if such statutes were not found legally impermissible in a court of law. When the impact that such laws have on older adults' autonomy is described only in ethical and moral terms, and not identified as a rights concern, it is easier for policymakers to dismiss this impact by treating it merely as one of many factors to be considered in determining the relative wisdom of such statutes.

The potential of a rights-based approach to change United States elder abuse policy is further suggested by the experience of the state of Wisconsin. In 2006, Wisconsin adopted an unusual mandatory reporting policy. Most reporting schemes in the United States require reporting as long as the victim fits into a statutorily defined category of person and the reporter has a reasonable suspicion of mistreatment. However, unless a third party is at risk,[55] Wisconsin only requires reporting where two additional conditions are satisfied: (1) the alleged victim is at imminent risk of serious harm, and (2) the alleged victim cannot "make an informed judgment about whether to report the risk."[56] Thus, the Wisconsin approach invades alleged victims' privacy interests only where the state has a very strong interest in doing so.

Wisconsin's rights-protective approach to elder abuse reporting appears to be attributable, at least in part, to the rights-consciousness of those who drafted it. The law was drafted by experts with extensive knowledge of domestic violence issues who recognized that a significant portion of elder abuse is also domestic violence.[57] Consistent with this background, the framers were accustomed to a victims' rights approach to abuse intervention and embraced a victim empowerment model for

[53] For a full exploration of why such statutes could and should be found unconstitutional on informational privacy grounds see Kohn, *Outliving*, *supra* note 42, at 1067–1087.

[54] For a full exploration of why such statutes could and should be found unconstitutional on equal protection grounds, see generally Kohn (2010b).

[55] *See* wis. Stat. Ann. Sect. 46.90(4) (West Supp. 2010).

[56] *See id.*

[57] Interview with Jane Raymond, Advocacy & Protection Systems Developer, Wisconsin Department of Health & Family Services (Aug. 11, 2008); Interview with Betsy Abramson, Wisconsin attorney involved in drafting the 2006 reforms (Aug. 13, 2008).

responding to such abuse.[58] By contrast, other states' mandatory elder abuse reporting laws tend to be modeled on child abuse reporting statutes.[59] Looking at elder mistreatment policy through a rights lens—as Wisconsin did—makes the heavily paternalistic approaches developed to address abuse of children seem inappropriate when applied to address elder abuse. Whereas children lack full legal rights,[60] the subjects of elder abuse reporting include persons with full legal rights: competent, adult citizens. Thus, Wisconsin's experience suggests that a rights-based approach can affect the frames of reference that policymakers employ when designing policies related to older adults, and thereby result in more rights-protective policies.

These two case studies—Ontario's experience with mandatory retirement for older workers and Wisconsin's experience with mandatory reporting for elder abuse—provide brief examples of how identifying rights issues affecting older adults and using the language of rights to describe those affects has the potential to shape and inform aging policy.

It is important to recognize, however, that the impact of this lens will naturally vary from country to country and culture to culture. Both the nature and magnitude of the impact of using a civil rights lens may be diminished in other countries without an individual rights-based tradition. The specific language, and specific rights discussed, can also be expected to vary based on locale. In some countries, the language of "civil rights"—that is, rights granted by the state—will be most powerful. In the United States, civil rights language has particular resonance due, in part, to the storied history of the country's civil rights movements. In other countries, appeals may be stronger if they use the terminology of "human rights"—that is, rights that an individual has by virtue of being a human being—even when talking about rights that derive in totality or in part from the state.

[58] The state was explicit about its decision to incorporate domestic violence concepts and victim empowerment strategies into its statutory approach to addressing elder abuse. *See* Abramson (2006) (summarizing the state's approach to elder abuse made available by the state, and stating that elder abuse and domestic violence are the result of the same factors); Div. of Disability and Elder Servs., Dep't of Health and Family Servs., State of Wis., Ddes Info Memo 2004–03 at 5 (June 22, 2004), *available at* http://dhs.wisconsin.gov/dsl_info/InfoMemos/DDES/CY_2004/InfoMemo2004-03.htm ("The rationale for an entity to potentially not report an incident of domestic violence in later life to an external agency is based on the need for victim safety (trusting the victim to know what is best for him/her) and the principles of self-determination and empowerment.").

[59] *See* Kohn, *Outliving*, *supra* note 43, at 1057–1058, 1108.

[60] Children in the U.S. have fewer legal rights than adults, and those rights are generally seen by the courts as deserving less protection from government intrusion. *See, e.g.,* Hodgson v. Minnesota, 497 U.S. 417, 482 (1990) (Kennedy, J., concurring) ("The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent."); Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

The Ontario experience with mandatory retirement, for example, gained strength from the language of human rights even though it in fact focused on rights granted by the polity.[61]

2.4 The Role of the Legal Field

The previous sections have described the importance and potential impact of viewing policies related to aging through a civil rights lens. The legal field has a critical role to play in helping to realize this potential. The core competency of legal experts—whether they are legal academics or legal practitioners—is to identify and explain legal rules and entitlements. Indeed, in defining legal "competence," the American Bar Association's Model Rules of Professional Conduct states that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[62] It is this ability to recognize and characterize the legal issues at play in a situation that gives legal experts a unique skill set and distinguishes them from other types of professionals.[63]

Unfortunately, to date, the legal field has been largely absent from the study of gerontology. This absence partially reflects the fact that the legal field has only recently begun to recognize aging issues as relevant to its work, and that recognition has largely been limited to the emergence of elder law as a specialized area of practice. By contrast, legal scholars are only at the early stages of considering the possibility that elder law could be a distinct legal discipline worthy of theoretical and doctrinal analysis. Historically, elder law scholarship has tended to eschew traditional doctrinal legal analysis. Rather, when older adults' interests are aided or undermined by policy choices, the tendency even among legal academics specializing in elder law has been to focus their analyses on the ethical, practical, or moral implications of those choices. The result has been a significant contribution to the legal literature in the form of scholarship that has brought non-traditional

[61] From the beginning of its mandatory retirement law reform efforts, the Ontario Commission on Human Rights focused its analysis on the interaction between age discrimination and Ontarians' legal rights. Due to the nature of the Commission's charge, however, these rights were sometimes called "human rights." Similarly, the author's review of newspaper coverage of the reform of the Ontario Human Rights Code to eliminate protection for mandatory retirement policies found that this coverage reported the issue as one involving unspecified rights, worker's rights, and human rights—but did not use the phrase "civil rights" even when clearly discussing such rights.

[62] Model Rules of Prof'l Conduct R. 1.1 cmt. 2 (2010).

[63] This explains why law school exams traditionally focus on "issue spotting" questions, and helps explain why lawyers are often criticized for an "overly legal" approach to problem-solving. *Cf.* Kruse (2010) ("Although reducing a client to nothing more than a bundle of legal interests is problematic, legal issue-spotting is a core competency of lawyering and a necessary component of virtually all legal representation.").

and interdisciplinary perspectives to the study of law. However, this tendency has had the unfortunate unintended consequence of missing an opportunity to adequately inform the field of gerontology about more traditional legal concerns raised by laws and policies affecting older adults.

The absence of the legal field from the study of gerontology also reflects the fact that elder law practitioners typically do not perceive their work as concerning civil rights. Elder law practice involves, albeit at times indirectly, many civil rights issues. Elder law practices typically focus on assisting clients with planning for later-in-life needs through document drafting and client counseling. These tasks can have significant civil rights implications even though they are not traditionally considered to be civil rights-oriented by either attorneys or their clients. For example, executing advance directives can promote older adults' self-determination because such documents allow them to specify who may act as their surrogate, to guide that surrogate's decision-making process, and even to avoid guardianship. Similarly, elder law attorneys can facilitate clients' control over their care and lifestyle by counseling them on structuring their resources in light of potential long-term care needs. Nevertheless, despite the frequent involvement of civil rights issues, neither the practice of elder law, nor the legal substance of elder law issues, is typically described in civil rights terms by either academics or practitioners. For example, the United States-based National Elder Law Foundation (NELF) specifies twelve substantive areas of law about which elder law attorneys must be knowledgeable in order to receive the organization's certification as an elder law specialist.[64] The term "rights" is mentioned in only one of these areas—that related to housing and long-term care.[65] Accordingly, although the legal field has a critical role to play in identifying these types of civil rights concerns as civil rights concerns, doing so will require a departure from current prevailing tendencies among elder law academics and practitioners.

By stepping up to the challenge of viewing aging issues through a civil rights lens—and acting in light of that perspective—the legal field will fulfill Israel Doron's 2006 call for the field of elder law not to confine itself to a specialized area of practice, but rather to "become an integral part of gerontological science" by contributing "legal knowledge, methodology and philosophy to . . . the gerontological imagination."[66] In making that call, Doron implicitly acknowledged that part of the value of the legal field's contribution to gerontology would be that the legal field would bring civil rights discourse into gerontology.[67]

[64] *See* National Elder Law Foundation. The National Elder Law Foundation Board of Certification Program Rules and Regulations Regarding Certification of Elder Law Attorneys, http://www.nelf.org/becoming-certified/rules-and-regulations (last visited July 2011).

[65] *See id.*

[66] *See* Doron, *Elder Law, supra* note 1, at 64.

[67] *See id.* at 64–65.

2.5 Conclusion

Older adults face a myriad of civil rights concerns. Accordingly, applying a civil rights lens to aging issues facilitates an understanding of both the practice and legal substance of the field of elder law. It also facilitates legal reform by paving the way for new court-based legal challenges, by diminishing the perceived desirability of policy choices that undermine rights, and by harnessing the power of rights rhetoric to change political behavior. Thus, by contributing a civil rights perspective to gerontological imagination, the legal field could make a significant contribution to the study and design of aging-related policies.

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Chapter 3
The Conceptualization of Legal Capacity of Older Persons in Western Law

Charles P. Sabatino and Erica Wood

In Western jurisprudence, the concept of capacity is a legal presumption. It rests upon the assumption that each of us, at adulthood, is best able to decide what is in our best interest, and that we ought to be left alone to pursue our own choices (Sabatino and Basinger 2000).

Incapacity is a term that defines when a state may take actions to shatter this presumption and limit the individual's right to make decisions about his or her person or property based on disability. Guardianship or conservatorship is the process in which this determination is normally made. Conceptually, incapacity may be seen as a legal fiction. This means that it is a construct treated as a fact, whether or not it is really so, because it is recognized as having utility. Here, we are referring to legal incapacity, and not clinical or *de facto* incapacity.[1]

Taking the U.S. law as a primary reference point, this chapter will review the evolution of the concept of incapacity as a legal fiction with profound consequences to individual rights, and will offer a comprehensive yet practical framework for making judicial determinations of capacity. The chapter also will examine how capacity is conceptualized in the practice of law, in which lawyers must make assessments of client capacity to engage in legal transactions—again with practical steps lawyers can take to respond effectively to capacity concerns. Finally, we will consider the "supported decision-making" framework moving away from an "all or nothing" approach to capacity assessment and decision-making and toward a more flexible model—an approach increasingly recognized in European law and

[1] Traditionally, in the U.S., the word "incompetency" was used for legal determinations and the word "incapacity" for clinical determinations—which in turn could be primary evidence for any legal determinations. However, recently most state laws in the U.S. have discarded the term "incompetency" in favor of "incapacity" it avoids the "all or nothing" connotation of "incompetency" as well as other historical baggage of the term.

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embedded in the United Nations Convention on the Rights of Persons with Disabilities. We will conclude with reflections on next steps in the conceptualization of capacity as a trigger for a range of support mechanisms and social interventions affecting individual rights and quality of life.

Much of the content in this chapter is drawn and integrated from previous works of the authors in collaboration with others, most notably three capacity assessment handbooks—for lawyers, judges, and psychologists respectively—published jointly by the American Bar Association Commission on Law and Aging and the American Psychological Association (ABA/APA 2005, 2006, 2008).

3.1 Incapacity As a Legal Fiction

Labeling the concept of capacity and incapacity a legal fiction does not mean that the concept lacks reality, legitimacy or consequence. To the contrary, as Prof. Lon Fuller (1967) demonstrated in his classic treatise, legal fictions exist to meet sometimes very powerful social needs and values, and such fictions can have far-reaching consequences. One of the most notorious and consequential legal fictions was incorporated into the U.S. Constitution. The concept of slaves as chattels was a legal fiction with painfully real consequences until the passage of the 13th Amendment. Another largely moribund legal fiction proclaimed husband and wife to be one, the fiction that effectively restrained the independent status of women, especially with respect to property matters, for generations. Other legal fictions sometimes serve simply as "convenient shorthand." For example, the fiction of "corporate personality" serves as an abbreviation for a cluster of legal rights and obligations that would be bothersome to spell out repeatedly in discourse.

Why do we need the legal fiction of incapacity? The answer may be fairly straightforward: because we need a trigger to tell us when a state legitimately may intrude into an individual's affairs and take action to limit an individual's rights to make decisions about his or her own person or property. The action may be beneficent and supportive, but it is still an incursion of the state's authority into the individual's affairs. The underpinning of this legal fiction is the doctrine of *parens patriae*—the obligation of the sovereign to care for the vulnerable and less fortunate (Wood 2005, p. 19). Even though the roots of *parens patriae* go back centuries in our legal system, there is nothing about the doctrine that pinpoints exactly when the doctrine should "kick in" and permit state intervention into an individual's affairs.

That is where definitions of incapacity become important. They are the triggers determined by society. Recognizing incapacity as a legal fiction is important, precisely because a fiction is determined by prevailing values, knowledge, and even the economic and political spirit of the time. In other words, the criteria or elements needed to establish legal incapacity are products of society's prevailing beliefs concerning individual autonomy and social order, tempered by the restraint of legal precedent. Just as societal values and needs have evolved over time, so will the legal criteria for capacity and incapacity. Doron (2002) vividly demonstrates

this dynamic in his comparative study of guardianship in five countries. Yet, at any point in historical time, we tend to reify capacity and to make it a static "thing" to be discovered. As one keen observer notes, "Capacity is a shifting network of values and circumstances" (Margulies 1994).

3.2 The Evolution of the Concept (Legal Fiction) of Incapacity

The law of guardianship has evolved extensively from its English roots. Originally, the law required a finding that the alleged incapacitated person's status was that of an "idiot," "lunatic," "person of unsound mind," or "spendthrift." The determination of this status was made by a jury of common men and, if found, reduced the putative ward to the legal status of an infant. (Doron 2002, p. 100) By the early twentieth century, the status-based test of incapacity began a shift towards a medicalized model of "incompetency," ostensibly based on more objective, scientifically-based medical and functional criteria. However, the criteria were so broadly and vaguely enumerated in state laws that they potentially affected a much larger swath of the public. By the 1960s, a common paradigm for the definition of incapacity under guardianship laws was a two-pronged test that required: (1) a finding of some sort of a disabling condition; and (2) a finding that such condition caused a functional inability to adequately manage one's personal or financial affairs (Anderer 1990). Disabling conditions, which were described by a variety of labels used in state laws with little consistency among them, included the following (Anderer 1990, pp. 4–6):

- Mental illness
- Mental retardation
- Developmental disability
- Chronic use of drugs or chronic intoxication
- Physical illness
- Physical disability
- Mental deficiency/ mental disability/ mental condition/ mental infirmity
- Weakness of mind
- Advanced age or infirmities of aging
- Or other cause

The breadth of these supposed disabilities was both daunting and lacking in precision. Especially noteworthy is the equating of age with pathology by the inclusion of "advanced age" as a qualifying condition. A 1990 survey of state law found 15 States had included advanced age as a disabling condition that could justify guardianship. (Anderer 1990, p. 6) Not surprisingly, such amorphous and discriminatory labels invited overly subjective and arbitrary judicial determinations. Indeed, some early reviews of guardianship in the 1970s and 1980s contained blistering critiques of state laws as "insensitive to the needs of the

elderly" and "vague and overreaching" (Regan 1972, pp. 603–604). One early study of guardianship bluntly concluded that guardianship meets the needs of the guardians and others rather than the needs of vulnerable wards and that it should simply be abolished. (Alexander and Lewin 1972) Incrementally, states sought to instill greater objectivity into their tests by refining both prongs so that they were less label-driven, more finely tuned, and more focused on how an individual functions in society. For example, most states eventually removed the pejorative term "advanced age" from the first prong of the test.[2]

Likewise, the second prong of the test—a functional inability to manage one's affairs—has been honed by many states to focus more precisely on the ability to provide for one's "essential needs" such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety."[3] Some states articulated essential needs in the negative, requiring a finding that the person's inability endangers their health or serious injury, illness, or disease are likely to occur. The essential needs and endangerment criteria raise the threshold for finding that the person is incapable of caring for himself or herself, but they do not eliminate the possibility of unrestrained speculation by judges.

In more recent years, advances in neurology and cognitive sciences have substantially impacted the approach of guardianship law to questions of capacity. "Cognitive functioning" tests have emerged in the majority of states to supplement or replace one or both prongs of the traditional test. Indeed, the Uniform Law Commission (1997), the most prestigious body of drafters of model state laws in the U.S., approved a revised *Uniform Guardianship and Protective Proceedings Act* in 1997 in which a cognitive functioning test entirely replaced the disabling condition language in the definition of incapacity:

> "Incapacitated person" means an individual who, for reasons other than being a minor, is *unable to receive and evaluate information or make or communicate decisions to such an extent* that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance (Section 102(5)).

These three tests—disabling condition, dysfunctional behavior, and cognitive functioning—have been used by states in a variety of ways. Some combine all three. And, since the 1980s, most states have also added one more critical threshold requirement for guardianship intervention—a finding that the guardianship is "necessary" to provide for the essential needs of the individual (i.e., there are no other feasible options) or that the imposition of a guardianship is "the least restrictive alternative" (Sabatino and Basinger 2000). This criterion is vital to distinguishing clinical incapacity, best determined by thorough clinical evaluation, from a finding of legal incapacity justifying the appointment of a guardian or

[2] Only three states still include age in their definition of disabling condition as of 2010: Ala. Stat. Sect. 26-2A-20(8) (West 2009); Miss. Code Ann Sect. 93-13-251 (West 2009); S.C. Code Sect. 62-5-101 (2009). [CHARLIE—I checked these three statutes and this is still correct.]

[3] *See, e.g.*, Idaho Code Sect. 15-5-101(a)(1) (1999); Minn. Stat. Ann. Sect. 525.54, subd. 2 (West 1998); N.H. Rev. Stat. Ann. Sect. 464-A:2(XI) (1999).

conservator. The latter is justified only when there is no other alternative that will sufficiently meet the needs of the alleged incapacitated person.

Consider a simple example of the importance of the "necessity" criterion. Mr. Burns suffers from advanced Alzheimer's and is unquestionably totally dependent on others to manage his affairs. An adult child files a guardianship petition for purposes of financial management of his property. However, upon investigation, the court finds that Mr. Burns had appointed a financial agent under a durable power of attorney before onset of his illness. It further finds that the agent, another adult child, was properly handling his father's finances. The court would have to reject the petition and refrain from finding Mr. Burns legally incapacitated because, without more information, there is no necessity for court intervention to manage his financial affairs. A less restrictive alternative, the durable power of attorney, was in place and working adequately.

The statutory evolution of the definition of incapacity has undergone one other vitally important change in approach. Virtually all states in the last forty years have recognized that capacity is not always an all or nothing phenomenon. They have enacted language allowing for "limited guardianship" in which the guardian is assigned only those duties and powers that the individual is incapable of exercising. Thus, judges, as well as lawyers who draft proposed court orders, need to understand and identify those specific areas in which the person cannot function and requires assistance. Under the principle of the least restrictive alternative, the objective is to leave as much in the hands of the individual as possible. Though embedded soundly in statute, evidence suggests that in the U.S. actual use of limited guardianship still remains the exception rather than the norm. (Frolik 2002) Outside the U.S., particularly in selected European countries, models of "shared decision-making" that maximize autonomy are similar in concept to limited guardianship (see Sect. 3.6 below). Moreover, the 2010 Yokohama Declaration by the World Congress on Adult Guardianship Law recognizes the essence of limited guardianship in providing that "capacity is both 'issue specific' and 'time specific'" and that "measures of protection should not be all-embracing. . ."

3.3 Turning Concepts into Practice: A Framework for Courts

Given the evolution of the capacity concept in U.S. state guardianship statutes, how are courts to make a determination in practice? How are judges, guided by statute, to make that most difficult of pronouncements triggering state intervention into the private life of a vulnerable individual—whose abilities may be affected by time of day, medication, mood and environment? (Boyer 1999). There is no "bright line" dividing capacity from incapacity—no "capaci-meter" to turn to (Kapp 2003, pp. 292–294).

In 2006, the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges

produced a handbook for judges on capacity assessment of older adults in guardianship proceedings (ABA/APA 2006). The Handbook aimed to offer judges practical tools for capacity assessment. It is based on "six pillars of capacity assessment" that can inform each step in the guardianship process. The "six pillars" rely on the same four factors used in most U.S. state guardianship statutes, and include two additional elements which are not criteria of diminished capacity, but rather critical considerations for determining appropriate interventions—specifically, the individual's values and preferences, and the consideration of the means to enhance the individual's capacity. The six pillars are examined below (ABA/APA 2006; Wood 2010), in the context of an example derived from a 2006 guardianship case, with facts embellished:

> Harriet at age 86 hired Anne to cook and do housework. Harriet told her son that Anne "does everything for me" and was very appreciative. Anne began to provide personal care and help with bills. On his occasional visits, Harriet's son noticed that his mother's memory was failing, and that she sometimes had difficulty expressing herself. When he learned that Harriet had met with her attorney to make changes in her will, leaving a sizable portion of her estate to Anne, he became very alarmed and filed a petition for guardianship. At the hearing, the judge heard evidence from Harriet's physician, a court visitor, and a psychologist with experience in conducting capacity evaluations.

Pillar 1. Medical Condition. One element for judicial consideration is the specific disorder causing the alleged diminished capacity—for instance stroke, traumatic brain injury, bipolar disorders, Parkinson's disease, Alzheimer's disease and more. Ideally, in addition to the diagnosis, the evidence would include a clinician's opinion on the prognosis as well as the severity of the condition. It is important that temporary, reversible conditions not become the basis for a permanent guardianship appointment. For example, the effect of medications and drug interactions, malnutrition, depression, grief or stress, transfer trauma, and delirium (such as from a urinary tract infection or dehydration) can cause confusion but may be addressed with appropriate treatment or accommodations. Moreover, it is important to note that the identification of various "medical conditions" is not always an exact science, and sometimes a diagnosis such as "Alzheimer's" can be taken in and of itself as a basis for—or synonymous with "incapacity."

In the example, Harriet's doctor reported that he had administered a brief mental examination, which showed mild to moderate cognitive impairment. Based on that, he ordered a CAT scan, which showed that Harriet had experienced a series of small strokes. He also noted that Harriet took five medications including an antidepressant and an anti-inflammatory drug, but he did not specifically note any side effects that might bear on capacity.

Pillar 2. Cognition. Cognition concerns the functions of the brain involved in mental processes such as thinking, reasoning, remembering, and problem solving. Cognitive functioning includes "alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight. Neurological as well as psychiatric or mood disorders may impact information processing." (ABA/APA 2006, p. 4). The judges Handbook appendix lists a range of screening tests for evaluation of cognitive impairment (ABA/APA 2006, App. pp. 48–49; as well as "common neuropsychological domains" that clinicians might use to evaluate cognitive

capacity (such as appearance, attention, communication, understanding, executive functioning) (ABA/APA 2006 App. pp. 50–52). The often widely used "Mini-Mental Status Examination" (MMSE)—a brief test for cognitive abilities with a maximum score of 30—may be a quick mental status screen to indicate the need for further evaluation, but it is not a comprehensive test for determining decisional capacity (ABA/APA 2005, pp. 21–22). There is an unfortunate tendency for broad over-reliance on the outcomes of tests such as the MMSE, even though it may not yield information relevant to evaluating specific abilities.

In the case example, Harriet's doctor had administered the MMSE and found that Harriet had some degree of impairment. Psychologist Sands had visited Harriet and spent two hours conversing with her and conducting a formal evaluation. He observed that her speech was somewhat disjointed. In the interview he found her generally aware of her family and finances, and noted that she spontaneously expressed her positive feelings about Anne. He tested her memory and reasoning. He concluded that she had mild to moderate expressive aphasia, a difficulty in retrieving words and organizing information, as well as some degree of dementia. He also had interviewed several friends and acquaintances who did not think Harriet was cognitively impaired, as she was able to carry on a brief casual conversation.

Pillar 3. Everyday Functioning. Everyday functioning is perhaps the most critical assessment element. What can the person do or not do to function in society and take care of him or herself? Can the person benefit from assistance or adaptations if needed?

Clinicians divide everyday functioning into the "activities of daily living (ADLs—grooming, toileting, eating, transferring, dressing) and the "instrumental activities of daily living (IADLs—such as using the telephone, doing laundry and housework, shopping, taking medications, arranging transportation, preparing meals). They use both informal means, such as observation and interview, and formal testing to assess functioning (ABA/APA 2006, App. pp. 53–54).

In Harriet's case, the court visitor reported that when he came to the house, it was tidy. Anne had helped her get dressed and gave her a breakfast bar. Harriet did not give direct responses to the visitor's questions about where she grew up and about her family, but volunteered that Anne helped her with everything she needed. She knew her address and phone number. She knew she had a checking account but not the amount in the account. She knew she had gone to the attorney about her will, and said Anne had called her a taxi to get there. When the visitor asked Harriet for some tea, Harriet initially looked confused, but eventually was able to boil the water and make the tea. The visitor's report to court stated that Harriet had recognized the need for assistance in hiring Anne, and that with Anne's help, Harriet appeared able to continue living in her home. The visitor questioned whether Harriet might be vulnerable to undue influence.

Pillar 4. Values and Preferences. A 1982 U.S. Presidential Commission report on bioethics maintained that having a set of values or goals and making choices consistent with these values is a key factor in decision-making capacity (President's Commission 1982). In addition, a Comment to the ABA Model Rule on "Client with Diminished Capacity" of the Association's *Model Rules of Professional Conduct* states that "consistency of a decision with known long-term commitments

and values" is an element in assessment of capacity (ABA Model Rules). Questions about values would get at what makes life meaningful for the person—what is important *to you*? (see Karel et al. 2004). The growing concept in the U.S. disability field known as "person-centered planning" takes this "important to you" concept a step further (see Sect. 3.6 below).

The psychologist asked Harriet what was most important to her, and what she likes to do. She responded, "I'm fine here." When he asked how she likes to spend her time, she said she likes to "sit here with Anne I guess." When he asked who she likes to talk with in making decisions, she named both her son and Anne. When he asked about things important in her past life, she mumbled that she didn't know.

Pillar 5. Risk of Harm and Level of Supervision. "Guardianship represents an inherent tension between protection and autonomy, between rights and needs. The risk factor will help to tilt the scales one way or another" (Wood 2010, p. 10). The degree, extent and likelihood of risk will be factors in determining the level of supervision needed. An assessment must ask: What are the physical, social, and financial risks? Does the person understand the risks and appreciate the consequences of risky behavior.

In Harriet's case, the court visitor report alluded to the risk of undue influence by Anne. Is Anne taking advantage of Harriet, and is Harriet able to understand that Anne may have mixed motives? That the change in her will affects her son? That she has become quite dependent on Anne and that there may be a risk of abuse or neglect?

Pillar 6. Means to Enhance Capacity. Instead of asking, "does the person have capacity," consider asking "does the person have capacity with support?" The Handbook recommends finding ways to augment questionable capacity through accommodations, interventions and communication techniques.

In Harriet's case, could a review of her medications, their interactions and their effect on cognition be helpful? Are there other people or activities that might broaden her experience? Could the visitor go back on a different day or at a different time to see if Harriet's functioning changes? Could questions to Anne be better phrased or broken into steps? Could information on her past interests given by her son be useful in opening the door to more communication?

3.4 Procedural Due Process and Limited Orders: Essential Safeguards

The "six pillars of capacity assessment" give judges a schema—a checklist to review with each variously-abled individual who comes before the court. But the decision sometimes is a tough one, always with drastic consequences. "In thousands of courts around the nation every week," wrote the Associated Press in its landmark 1987 review of U.S. guardianship (Associated Press 1987, p. 1), "a few minutes of routine and the stroke of a judge's pen are all that it takes to strip an old man or woman of basic rights."

Hopefully, judges will begin to factor into their "routine" a consideration of evidence in each of the six pillars, but in the end there is no simple formula to make the determination. The judges' Handbook recommends that if there are minimal or no incapacities, the judges should dismiss the petition and urge use of less restrictive alternatives such as advance directives for health care and financial powers of attorney. If there are severe diminishments of capacity in all areas, the judge could order plenary ("full") guardianship. But often the evidence will fall somewhere between these extremes, and the judge could use the observations and tests in the clinical evaluation report, based on the capacity elements, to fashion a limited guardianship order that removes rights only in those areas in which capacity clearly is lacking (see Frolik 2002).

In the real world, coming to a full or limited guardianship decision that preserves as much autonomy as possible for a person with diminished abilities is "messy" (Sabatino and Basinger 2000, p. 138). In the end, Harriet may need at least a conservator (guardian of property), but there may or may not be a way to limit the rights lost or else preserve and promote autonomy through a carefully constructed guardianship plan. Harriet's case is like many in that it presents no clear-cut capacity scenario.

What is clear, however, is that in Harriet's case before the court—as with other guardianship cases—procedural protections are critical to best examine what evidence exists and direct the courts attention toward what it means. Harriet needed not only a thorough evaluation and a careful visitor report assessing all available options, but a notice of the guardianship proceeding in language she could understand, an opportunity to be present at the hearing, legal representation to ensure her voice before the court, an opportunity to cross examine witnesses, and a standard of proof that requires clear and convincing evidence for a determination of incapacity. Indeed, while statutes may present substantive standards for capacity evaluation, "the more important protection for questionably competent individuals is procedure, not substance" and substantive standards may accomplish little "unless procedural rights are realistically recognized and enforced" (Sabatino 1996, p. 25).

3.5 Evolution of Capacity in the Context of Legal Transactions

When mental capacity is an issue in guardianship or any other litigation, the U.S. relies on an adversarial process before a trier of fact to reach a conclusion. The role of lawyers for the parties in this context is clear—to garner the best evidence and make the best case they can for their client's side. In the transactional setting in which most lawyers function—advising clients, preparing documents, completing transactions of all kinds—the role of the lawyer in assessing capacity has been less clear.

Lawyers are not trained as mental health professionals, and a law degree by itself provides no training in screening clients' capacity. Yet, lawyers have to make these judgments all the time. Taking on a new client necessitates first that the lawyer believes the client has the capacity to enter into the client-lawyer relationship, a contractual agreement. And then, the completion of any legal transaction for which the lawyer is hired presumes that the client has the level of capacity needed to complete the transaction. Fortunately, the lawyer starts with a legal and ethical presumption that any adult client has capacity, and it is only when sufficient evidence undermining that presumption comes to light that additional challenges and obligations arise.

The challenges include knowing what signs of incapacity might justify consultation with a mental health professional, or even full evaluation of the client if the client consents. In the end, the decision to proceed with a legal transaction desired by the client is on the lawyer's shoulders. And if the transaction is challenged later based on the lack of capacity, the lawyer may need to account for his or her counseling processes and facts known at the time of the transaction. To flesh out the dimensions of the lawyer's role, it is useful first to examine the ethical parameters in which U.S. lawyers must operate with respect to diminished capacity of clients, and second, to consider the range of transaction-specific definitions of capacity in American law.

3.5.1 Professional/Ethical Obligations of Lawyers

The American Bar Association Center for Professional Responsibility (2002) promulgates the Model Rules of Professional Conduct (MRPC) as a model for state bars. As revised in 2002, the Model Rules acknowledge lawyers' assessment functions for the first time, and indeed, suggest a duty to make informal capacity judgments in certain cases. Specifically, MRPC Rule 1.14, titled *Clients with Diminished Capacity*, quoted in full below, addresses three aspects of the lawyer's role. The first part of the rule states the imperative of maintaining a normal client-lawyer relationship to the extent reasonably possible. The second part confers discretion to take protective action if the lawyer reasonably believes three criteria are met: (1) the client has diminished capacity; (2) the client is at risk of substantial harm unless action is taken; and (3) the client cannot adequately act in the client's own interest. The third part provides limited discretion to reveal confidential information to the extent necessary to protect the client's interests when protective action is merited.

3.5.1.1 MRPC 1.14: Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental

impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Prior to 2002, the rule referred to a "client under a disability" rather than "client with diminished capacity" and the term "capacity" appeared nowhere in the rule. With the acknowledgement that lawyers do indeed have a role in screening for diminished capacity, the need for guidance in how to carry out this role became vital, because the presence of diminished capacity is one of the essential triggers that can lead to a decision to take protective action. Even though taking protective action is permissive and not mandatory under the rule, the stakes of taking protective action versus inaction can be high financially, emotionally, and legally.

Comment 6 to new Rule 1.14 attempts to gives at least some guidance in assessing capacity, although the rule itself does not define capacity or incapacity.

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

These factors were first elucidated by Margulies (1994) in a values-based ethical analysis of representing seniors with diminished capacity. The factors also serve as natural targets of discussion for lawyers in client counseling. Even when capacity is not in question, the client's reasoning behind a decision is important to understand. As guidance for identifying diminished capacity, the factors do have some clinical clinically relevance, but they do not amount to a capacity screening test by themselves.

Other lawyer resources have emerged in direct response to the revisions in the ethical rules. Prominent among them is a handbook for lawyers jointly published by the American Bar Association and the American Psychological Association Commission on Law and Aging (ABA/APA 2005), *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*. Lawyer resources such as the handbook help to fill in the conceptual background and to offer systematic steps—including a worksheet for systematically recording clinically relevant observations—in making assessments of capacity. Lawyers cannot be expected to

take on the role of clinicians. But they can systematically screen for capacity at least at a preliminary level.

3.5.2 Legal Attempts to Define Transactional Capacities

Outside the more global assessments of capacity in guardianship proceedings, American law has always recognized situation-specific standards of capacity, depending on the particular event or transaction—such as the capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution, and so on. A finding of incapacity in any of these matters could nullify or prevent a given legal act.

Law in U.S. states also presumes that adults possess the capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship or conservatorship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof. Depending on the specific transaction or decision at issue, as well as the jurisdiction in which one is located, legal capacity may have multiple definitions, set out in either state statutory and/or case law. (Frolik and Radford 2006) Lawyers must be familiar with the specific state-based standards.

The following descriptions represent commonly articulated capacity standards for particular kinds of transactions:

Testamentary Capacity. To execute a valid will, one must have sufficient mental capacity (1) to know the "natural objects of one's bounty," (2) to generally comprehend the kind and character of one's property, (3) to understand the nature and effect of the act, and (4) to make a disposition of one's property according to some plan formed in his or her mind (American Jurisprudence 2d 2011C, Sect. 63). The legal catchphrase "natural objects of one's bounty" simply refers to those who naturally have a legal or moral claim to benefit from the property left by the testator.

The archaic terminology that the testator must be of "sound mind" is still commonly used, too, but serves merely as a shorthand phrase for more detailed criteria. A testator who generally possesses the elements of testamentary capacity may also have that capacity negated by the existence of an "insane delusion" (i.e., irrational perceptions of particular person or events") if the delusion materially affects the will (American Jurisprudence 2d 2011C, Sect. 76).

Donative Capacity. Capacity to make a gift has been defined to require that a donor have "the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor." (Restatement 3rd of Property 2003, Sect. 8.1)

Contractual Capacity. In determining an individual's capacity to execute a contract, courts generally assess whether the party has sufficient mental capacity to understand the nature and consequences of the transaction and agree to its provisions. (American Jurisprudence 2d 2011A, Sect. 28) Since subject matter

and complexity of a contract can vary dramatically, the test for capacity must be scalable to the complexity of the transaction. In other words, a contract to engage in a leveraged buyout of a major corporation requires a higher level of mental capacity than a contract to clean your home's windows.

Capacity to Convey Real Property. To execute a deed, a grantor typically must have "sufficient mental capacity to retain in his memory. . .the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration." (American Jurisprudence 2d 2011B, Sect. 23)

Capacity to Execute a Durable Power of Attorney. The standard of capacity for creating a power of attorney has typically been equated with the capacity to contract, even though a power of attorney is not technically a contract. (Frolik and Radford 2006)

Decisional Capacity in Health Care. Capacity to make a health care decision is defined by statute in most states under their health care advance directives laws. Typical of these legal definitions is the following from the Uniform Health Care Decisions Act (Uniform Law Commission 1993):

> "Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision. (Section 1)

State health decisions laws generally delegate to clinicians the task of determining a patient's capacity to make medical treatment decisions. Lawyers are more commonly faced with the question of whether a client has the capacity to execute an advance directive for health care or to establish a client's capacity to make a particular health care decision when a dispute over the issue arises. The capacity needed to appoint a health care agent is not the same as that needed to make a particular health care decision, for it does not require an understanding and appreciation of the significant benefits, risks, and alternatives to a proposed health care treatment in light of the person's current health care condition. The capacity needed is more general.

One state, Utah, has articulated a standard in statute, requiring that: "the adult understands the consequences of appointing a particular person as agent" (Utah Code Ann. §75-2a-103 West (2011). The definition is supplemented by factors that should be considered when determining whether an adult has the capacity to appoint a health care agent:

(a) Whether the adult has expressed over time an intent to appoint the same person as agent;
(b) Whether the choice of agent is consistent with past relationships and patterns of behavior between the adult and the prospective agent, or, if inconsistent, whether there is a reasonable justification for the change; and
(c) Whether the adult's expression of the intent to appoint the agent occurs at times when, or in settings where, the adult has the greatest ability to make and communicate decisions (Utah Code Ann. §75-2a-105 West (2011).

Financial Capacity. Financial capacity can be describe as the ability to manage one's financial affairs in a manner consistent with personal self-interest and values (Marson and Hebert 2008). It is generally assessed in the legal context by examining the nature of the particular transaction that is being challenged or scrutinized, whether it be contractual, donative, or otherwise. A broader notion of financial capacity as a day-to-day component of independent living—for example, paying for groceries or paying one's rent—generally receives scrutiny only as a basis for guardianship or conservatorship proceedings and is thus subject to the variety of guardianship criteria described earlier.

Capacity to Consent to Sexual Relations. The mental capacity necessary to consent to sexual relations lacks a universally accepted standard. State law is quite variable and has evolved primarily in criminal prosecutions of mentally capable individuals who have had sexual relations with someone intellectually challenged. According to Reed (1997), the majority of cases interpret "mental incapacity" to mean that the person cannot understand the nature of sexual conduct—that is, the person does not know either the physiological aspects of sex, or the possible consequences of sexual activity, such as pregnancy and the contraction of sexually transmitted diseases. A handful of states require that, in addition to understanding the nature of the sexual act involved and its consequences, the person must also appreciate the moral dimensions of the decision to engage in sexual conduct, although the individual is free to act inconsistently with these notions of morality.

Other Legal Capacities. Any legal act that becomes the subject of a legal dispute over mental capacity inevitably spurs courts to articulate, to some extent, criteria for the specific capacity, often based on clinical expert testimony, but often not. Courts deal with these issues only when a specific dispute comes before them. Examples of other capacities include capacity to drive, to marry, to stand trial, to sue and be sued, to engage in mediation, or to vote. Lawyers who provide counsel to families and individuals face these issues with difficulty and often without much guidance. The ABA/APA capacity assessment handbook series (ABA/APA 2005, 2006, 2008) grew out of the recognition that practical guidance was lacking not only for lawyers, but also for judges, and for mental health professionals who become involved in legal determinations of capacity in connection with specific transactions as well as in guardianship proceedings.

3.5.3 Differences Between Legal and Clinical Approaches

Historically, legal and clinical notions of capacity were essentially one and the same. The law simply used a medical model, defining capacity in clinical terms or relying on clinicians to make determinations. Over time, clinical and legal concepts of capacity were recognized as separate. However, considerable confusion often arises concerning the difference between the two approaches. Originally, a threshold distinction was made in terminology, with the law empowered to make findings

of "incompetency" while clinicians made findings of "incapacity." That distinction in terminology no longer holds true as most states have discarded the term "incompetency" in statute and have replaced it with task-specific terminology of incapacity. But even with the merging of terminology, there are significant differences in concept between the legal and clinical, so in discussing capacity, it is important to be clear whether one is addressing *legal* incapacity or *clinical* incapacity. The ABA/APA handbooks describe three characteristic differences between legal and clinical approaches to incapacity:

> One is that the focus on particular "transactions" in the law is parallel in many respects to what psychologists would characterize as functional "domains," although clinical domains are much more finely articulated.
>
> Two, the law tends to ask about capacity for specific transactions in a binary fashion—i.e., is capacity present or lacking—somewhat like an on/off switch. Clinicians are more oriented toward understanding capacities as variable continuums in which there may be no bright line between the presence or absence of capacity. While the law is warming up to the variable continuum notion, the transactional focus of the legal question still pushes for a binary yes or no answer.
>
> Third, legal definitions of transactional capacity tend to follow a fairly simple conceptual template: can the individual understand the nature and effect of (fill in the task) and perform whatever the essential function is necessary to implement the task? Thus, they tend to articulate tests that are sound in principle but not necessarily helpful in parsing the operational cognitive, behavioral, or emotional abilities necessary to meet the standard. Clinical assessment fills in that detail but must be clearly linked to the relevant legal standard. (ABA/APA 2008, p. 22)

Suppose, for example, that a jurisdiction's test for capacity to enter a contract is that the individual possesses sufficient mental capacity to understand the nature and consequences of the transaction and agree to its provisions. Conceptually, the definition is understandable by both legal and clinical professionals. However, for clinicians, the test necessitates examination through clinical interview and data collection of multi-dimensional cognitive and emotional domains, including comprehension ability, short-term and long-term memory, reasoning ability (i.e., contrasting risks and benefits and relating them to personal values and preferences), executive function, auditory comprehension, as well as psychiatric, emotional, and social factors that many impact capacity to enter into a contractual agreement (ABA/APA 2008, p. 53). Lawyers and the courts need sufficient knowledge and skills to make sense of the clinical input and to use it as an aid to making the ultimate determination of legal capacity.

3.5.4 Working with Clinical Experts

In representing clients in legal transactions, lawyers may need to turn to clinicians for help in capacity assessment if the lawyer's preliminary screening raises material questions about capacity. Indeed, the Comment to the ABA ethics Rule 1.14 on Clients with Diminished Capacity states: "In determining the client's diminished capacity ... the lawyer may seek guidance from an appropriate diagnostician" (ABA Model Rules 2002). The key is in knowing when to seek clinical help, and how to make a referral and best communicate with a clinician about the case (see ABA/APA 2005, pp. 31–36).

Certainly not all clients should be referred for clinical evaluation. Not only is it costly, time consuming, and frequently unnecessary, but it can also damage the trust in the lawyer-client relationship. However, if the lawyer's preliminary screening finds more than mild or substantial problems with capacity, a professional consultation or referral is advisable. Additionally, if family conflict is in the picture, the lawyer may seek a professional assessment in anticipation of future litigation such as a will contest.

Clinical experts can be valuable resources. They can clarify the possible causes, particular areas and severity of diminished capacity. They can offer suggestions for support and accommodation for identified weaknesses, and can highlight the need for protective action; or, they may simply affirm the client's capacity, which is critical to going forward with the legal transaction. Ultimately, though, the judgment about the client's capacity for the particular transaction is *for the lawyer to make*. The lawyer can use the clinical assessment as key and sometimes critical evidence "but still needs to 'look behind' the [clinical] report and make an independent judgment taking all factors into account" (ABA/APA 2005, p. 34).

Lawyers may seek help from a range of clinicians including physicians, geriatricians, psychologists, psychiatrists, neurologists, or geriatric assessment teams. The most important qualification is experience and knowledge in capacity assessment—which not all clinical professionals have. Lawyers may look to clinicians for two levels of assistance. First, an informal consultation is a discussion with a clinical expert about a case without the need for client identification, consent, or referral. Second, a formal referral for evaluation requires client consent if possible for the referral and the evaluation—or at the very least, assent.

Careful lawyer attention to making a full and informed referral will bear the best results. The lawyer's referral must clearly state the reason the evaluation is needed, the nature of the legal transaction at hand, information on the client's background and condition and on the client's values and preferences if known (see ABA/APA 2005, p. 36). On receiving the clinician's report, additional communication with the expert may help to highlight key points. The lawyer can then use the report to substantiate the validity of a legal transaction, as evidence in a court proceeding, or as advice to improve the client's functioning.

3.6 Growing International Perspective on Reframing Incapacity: From Supplanting Decisions to Supporting Decisions

The foregoing discussion of capacity rests on certain Western jurisprudential assumptions: First, that each of us, at adulthood, can make decisions for ourselves. Second, an individual's capacity may be diminished, causing difficulties with decision-making about self-care, medical treatment, property, and about legal transactions. Third, the legal-judicial system can determine whether someone has sufficient capacity for a specific legal task or for overall self care. And fourth, if the legal-judicial system determines capacity is lacking, the right to make decisions can be transferred to a surrogate. The surrogate then becomes empowered with the legal right and duty to make specified decisions—while the individual becomes "unpowered" or "unpersoned" (Bayles and McCartney 1987). The system envisions that there is a trigger point, defined by the legal fiction of incapacity, at which the state steps in—in the form of a guardian—and the fundamental rights of the individual are lost.

These jurisprudential concepts on capacity have been challenged in a growing number of countries (see below) and most notably in 2006 by a landmark international legal document: the United Nations Convention on the Rights of Persons with Disabilities. The Convention is based on the principle that all persons with disabilities have a right to "full and effective participation and inclusion in society" (U.N. Convention 2006, Article 3 (c)). Article 12.1 of the Convention states that "persons with disabilities have the right to recognition everywhere as persons before the law;" and Article 12.2 provides that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." To activate these concepts, Article 12.3 requires "States Parties [to] take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

The Convention's provisions on capacity represent a sharp break with existing guardianship law in many nations. Instead of focusing on the lack of capacity and the appointment of a surrogate, the Convention focuses on how to support individuals in exercising their right to make decisions. Under the Convention, there is no "incapacity" —rather, some persons with disabilities need support in decision-making, and some need more support than others. It is the duty of States to "do what they can to support those individuals and introduce safeguards against abuse of such support. Support could take the form of one trusted person or a network of people; it might be necessary on one occasion or always" (Kanter 2009, p. 563; also see Lawson 2007, pp. 595–597).

The Convention's call for a "supported decision-making" model is in line with a recent article on surrogate decision-making and the Americans with Disabilities Act (Salzman 2010). In the article Salzman argues that "we generally accept the notion of supplanting, rather than assisting, the decision-making process" (Salzman 2010, p. 165). She points out that if an individual has a surrogate decision-maker, the

person is less likely to interact with others, and that over time this becomes isolating, and results in a self-perception of helplessness and loss of control. She asserts that such "state-sanctioned isolation" could violate the ADA mandate of integration that requires public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" (28C.F.R. 35.130(d)). Salzman attempts to "re-conceptualize" guardianships as "a violation of the integration mandate because they fail to provide assistance with decision making in the least restrictive 'setting'" (Salzman 2010, p. 194). The article asserts that supported decision-making models should be seen as a less restrictive form of assistance with personal and property management than current guardianship law—even with recent guardianship reforms that seek to maximize autonomy through limited orders and through recognition of the person's values and preferences.

Formal supported decision-making models have been developed in a growing number of nations. Such models must provide procedures for appointing a support person, designating who could serve in such a role, identifying who would qualify for such assistance, and circumstances under which the support person could make decisions without the person's consent if necessary (Salzman 2010, p. 234). These models move away from the traditional Western jurisprudential concepts of "incapacity" and "surrogate decision-making" toward shared decision-making approaches.

For example, in Germany traditional adult guardianship law recently has been replaced by a system of "care and assistance." Under this schema, a caretaker is appointed when a court finds a person unable to take care of some or all of his or her affairs. A court is to tailor the order to set out the specific responsibilities of the caretaker. "A significant element of this reform is the fact that the person does not lose his or her legal status or any other legal rights. Even though it is the duty of the caretaker to represent the person... or if the court so order, to provide consent for a legal action to be valid, the person retains the legal capacity to enter into contracts or manage his or her own legal affairs" (Doron 2002, p. 379). Sweden has a two-tiered system of decision-making assistance—a "god-man" appointed by a local court with the consent of the individual, who requires the person's consent for transactions; and an "administrator" who acts as a surrogate decision-maker similar to a guardian (Doron 1999, p. 384; Salzman 2010, p. 33). Finally, British Colombia, Canada, enacted a "Representation Agreement Act" under which "an adult can enter into a 'representation agreement' with a trusted person (or support network) who is empowered either to assist that individual in making and communicating [decisions] or to make decisions for him or her" (Salzman 2010, p. 237 citing R.S.B.C., ch. 405, pt. 3, Sec 26 (1996)). The idea is something like a power of attorney, but without strict requirements for "capacity," and including the requirement that the representative consult with the person to the extent possible.

Such models are still emergent, and may require further scrutiny, as they continue to be operationalized, to prevent abuse. But clearly a shift is underway internationally in guardianship law toward the supported decision-making end of

the spectrum. This trend is in accord with the related idea of "person-centered planning" that arose from the disability field in the U.S. and Canada—in which support persons "think about the quality of life from the perspective of the person [who is being supported]" (Smull 2010). It is a process for continual listening and focusing on what is important to a person. It aims to make "the person's activities, services and supports ... based on his or her dreams, interests, preferences, strengths and capacities" (Schwartz et al. 2000, p. 238). It puts the person rather than the service system at the center, offering support to act on the person's own priorities to the extent possible.

3.7 Conceptualizing Legal Capacity: Looking Ahead

The concept of "capacity" in the guardianship context first evolved from the outmoded "status based incompetency" model through several stages to a broader construct encompassing cognitive and functional abilities as well as risk and values. At the same time, lawyers faced with issues of a client's diminished capacity in the context of specific legal transactions now have some guidance on factors to consider and ways to work with clinical professionals in assessment.

In the United States, the capacity trigger for state intervention as well as the nature of the intervention still rest primarily on a model of supplanting autonomy rather than supporting it. The six pillars of capacity promoted by the ABA/APA (2008) suggests that the U.S. model may be transitioning toward the supportive model, because two of the pillars call for examination of the individual's values and preferences as well as strategies for enhancing the individual's capacities. In comparison, certain European countries and Canada have made more definitive gains in that direction.

The reality is that the socio-legal models we create for the benefit of those members of society with diminished capacities and special needs are not easy to craft theoretically or practically, and they will never stop evolving. As Terry Carney (2012) describes in his companion article, it is a balancing act "between philosophical values of autonomy and paternalism, the respective roles of state and civil society, respect for cultural values and pluralism, and tolerance of reasonable degrees of personal risk." Yesterday's formulations of the right balance will not work today, nor will today's necessarily work for tomorrow, nor will it work for every culture. Today's new gold standard—supported decision-making, aimed at maximal social participation—is still in a formative stage and, as with any model, is dependent on the availability of adequate resources for its implementation. While it dramatically changes the way we conceptualize state intervention into the lives of vulnerable individuals, it still requires a trigger for activating state-sponsored support in whatever form it takes. The evolving "fiction" of diminished capacity is likely to provide the theoretical base for that trigger for some time to come.

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Chapter 4
Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand?

Helen Meenan

4.1 Prologue

This chapter aims to capture this moment in time for seemingly distinct bodies of law namely, elder rights, age discrimination and human rights, in the European Union (EU). In some jurisdictions, perhaps these fields would not seem so alien to one another but in the English speaking Member States of the European Union, the United Kingdom and Ireland, they do. Standing back and appraising these fields of law, reveals that discrimination and human rights sometimes inhabit the same human rights instrument and, discrimination, human rights and elder rights sometimes inhabit the same fundamental rights instruments and social charters. Standing back also enables comparisons to be made between avenues to justice for age discrimination victims and those seeking to assert human rights for older persons. In the EU, age discrimination, human rights and elder rights are often separate and sometimes together, depending on their source and function. This need not be such a daunting idea. There is also change afoot that may close some normative and implementation gaps and build more bridges between these fields of law. Once adopted, EU age discrimination law beyond employment can help build an extra bridge between discrimination law on the one hand and elder rights on the other. Indirectly, it promises to make a serious contribution to elder law (as distinct from elder rights) which strictly speaking falls within the remit of the individual EU Member States at this point in time.

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4.2 Introduction

> The future of elder law should include much more emphasis on issues of age discrimination in employment, in credit and in housing.[1]

Rebecca Morgan wrote these words in the predecessor to this volume and they are welcome words indeed.[2] If elder law is described as "the particular manner in which any aspect of law touches the lives of older persons",[3] surely age discrimination must be a branch on the elder law tree? If, in general, elder law encompasses later life planning, guardianship, capacity, powers of attorney and so forth, heretofore it has not connoted employment. This may go a long way to explaining why we do not readily think of age discrimination when we think of elder law. Frequently, age discrimination legislation only covers employment or, where protection outside employment exists, it frequently follows sometime after the employment field. The combined effects of demographic ageing and the international credit crisis mean that older workers may need to work for longer to finance their extra years in a climate of increased financial uncertainty, even for those who saved and planned prudently.[4,5] The time may now be right to widen our lens to include age discrimination within and outside employment in our understanding of elder law and of possible legal tools to assist the ageing and older people.

It is fair to say there are differing legal strengths and weaknesses on both sides of the Atlantic. Elder law has traditionally been far more advanced, cohesive and better understood in the USA, Canada and as far away as Australia than in the UK and Ireland. This situation is improving, especially in the UK. It is also fair to say that the USA led the development of age discrimination in employment law, decades before it was tackled by the European Union (EU). However, EU anti-discrimination law, from where most national age discrimination laws emanate, has been described as having "some of the most comprehensive and far reaching anti-discrimination legislation to be found anywhere in the world"[6] and that is even before the adoption of the proposed EU Directive which will extend anti-discrimination law beyond

[1] Morgan (2009) (hereafter, *Theories on Law and Ageing*) at p. 153.

[2] Morgan is not alone, M.B.Kapp identifies age discrimination as a legal field affecting elders, for future attention, "Those areas most ripe for future TJ analyses of effectiveness for intended beneficiaries include: regulations prohibiting age-based discrimination in employment, housing, insurance, and other matters…" in *Theories on Law and Ageing*, supra at pp. 42–43. Note TJ stands for therapeutic jurisprudence.

[3] Morgan (2009), supra at p. 145.

[4] Governments too may need elders to work to postpone paying their state pensions. The English Government has recently proposed increasing the retirement age to 66 years by 2020.

[5] Dagmar Schiek explores reasons for banning age discrimination in employment in Schiek (2011), pp. 777–799 at pp. 780–784.

[6] European Commission, Non-Discrimination and Equal Opportunities for All—a framework Strategy, COM(2005) 244 final, p. 1.

employment for religion or belief, disability, age or sexual orientation (the Goods and Services Directive).[7]

4.3 Discrimination and Human Rights Together and Separate in Europe

When we consider age discrimination, human rights or elder rights in Europe, a number of international conventions and instruments may already be of assistance to each of these fields. This chapter will attempt a survey of the most relevant conventions and charters viewed particularly, from inside the European Union.

1. The 27 Member States of the EU[8] are subject to three principal sources of human rights and non-discrimination: the Council of Europe with its ECHR and other instruments, the EU with its various Treaties, which together with secondary legislation (typically in the form of Directives) protect a growing number of grounds from discrimination across a growing number of fields and the recent EU Charter of Fundamental Rights (the EU Charter), which became legally binding in 2009.[9] The EU Charter incorporates rights and principles from the ECHR, fundamental rights and anti-discrimination rights, among others from a variety of sources. It is a collection of all the rights enjoyed by citizens of the EU and all the fundamental rights enjoyed by residents of the EU. It has the same legal value as the Treaties of the EU.[10] Importantly, it contains rights of the elderly for the first time in a European Union instrument.
2. Among other things, this survey will reveal normative or implementation gaps which reflect similar gaps already identified elsewhere in relation to age rights in international law.[11] Even within the EU, some Member States may not have accepted certain clauses in charters or conventions, which are a source of rights that they adhere to by virtue of their Membership of the EU. The resulting gaps may be smaller than those at the international level but exist nonetheless in the areas that

[7] European Commission, "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation", COM(2008) 426 final.

[8] They are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom.

[9] This was made possible by the Lisbon Treaty which came into force in 2009.

[10] Article 6.1, Treaty of the European Union.

[11] See Judge (2009) at pp. 10–13. United Nations Department of Economic and social Affairs Division for Social Policy and Development Programme on Ageing (2009), Bonn, Germany at pp. 13–16.

fall within a purely national law context. However, EU anti-discrimination law and EU fundamental rights largely offer a universal source of rights to EU citizens.

3. This chapter will reveal that within the EU, age discrimination is comparatively well protected by contrast with age discrimination under the ECHR. Closer examination will reveal that protection from age discrimination in the EU is in fact more complex, with some opportunities for Member States to avoid legislating against age discrimination for certain occupations and allowing for objective justification of age discrimination in other circumstances. Despite this, the naming and inclusion of age in EU anti-discrimination law at the same time as other newer grounds, was a triumph. This contrasts with the ECHR where age is an unnamed ground of discrimination.
4. Unlike international conventions and the ECHR, age discrimination and elder rights enjoy greater visibility in other Council of Europe Charters and in the most relevant EU instruments, discussed herein. Visibility of both age discrimination and elder rights is a welcome virtue. Visibility of rights must logically come before promotion, awareness and protection. It is the starting point.
5. The EU will soon close some gaps by acceding to the ECHR.[12] The most practical consequence of EU accession will be that the ECtHR will be the final court for human rights cases concerning the ECHR in Europe and in the EU. Heretofore cases heard by the ECJ involving human rights inspired by the ECHR but which fell within a field of EU law, could not be appealed to the ECtHR. Nor could the ECtHR find the EU or its institutions in breach of the ECHR.[13]

Above all this chapter aims to highlight that there is a vast amount of rights available to age discrimination claimants or older people within the EU. Apart from the three categories mentioned above we have elder law which remains very much a matter for EU Member States to regulate at their own level, if at all.[14] Despite any normative or implementation gaps, we may ask if there might also be some overlap between any of these areas? The most obvious would be age discrimination legislation outside employment. For older people this is the field most likely to lie in any intersection between age discrimination, human rights and elder rights. After all the right not to be discriminated against is, a human right in the ECHR and a fundamental right in the EU Charter.

From the elder law side (which is a matter for the national laws of EU Member States), good advance legal preparation for old age will assist with planning, crisis management, good family relations and empowerment of the older person but to

[12] Article 6.2 TEU provides that the EU shall accede to the ECHR and Protocol 14 to the ECHR, which entered into force on 1 June 2010, provides for accession by the EU. The Council of Europe and the EU are now in the process of drafting an accession agreement.

[13] See for example, case no. 24833/94, *Matthews v UK*, judgment of the European Court of Human Rights, 18 February 1999.

[14] Here elder law refers to domestic elder law and is distinguished from private international law, for example the Convention on the International Protection of Adults. EU Member States are generally free to sign and ratify international conventions in their own right.

what extent does it assist in the face of bad or discriminatory service delivery by a public hospital[15] or a care home in particular?[16] Here we see a role for discrimination law (where it exists) as a tool for tackling discriminatory service delivery. There is also a role for human rights for poor or degrading service delivery and to fight issues such as the devastation caused by local authorities placing older couples in separate care homes.[17] Medical and residential care for older people, are very live issues in the UK, at the time of writing. In truth at this early stage of slowly building an elder rights' culture in this part of the world, we appear to need at least four pillars[18] of law for older people. That anti-discrimination law ought to be part of the picture, was reinforced by the UN High Commissioner for Human Rights, Navi Pillay when she said, "Non-discrimination is paramount to the human rights agenda; however, old age has yet to be featured prominently as one of the grounds of discrimination at legislative and policy levels. Positive measures are necessary to eradicate discrimination and exclusion of older persons and to ensure access to services according to needs".[19]

Thankfully within EU law, age is a named anti-discrimination ground both in hard legislation for the employment field and in the proposed Goods and Services Directive. By virtue of visibility, clear anti-discrimination prohibitions and concepts and the requirement of effective sanctions in the Employment Directive, which had to be transposed into national laws by 2006 at the latest, for age discrimination, EU law is responsible for giving individuals a clear route to redress in their local courts. So far this only covers the employment field except for those EU Member States that already have their own laws, prohibiting age discrimination outside employment.

4.4 The ECHR and Council of Europe: A Natural Starting Point

Within the context of the European Union, the European Convention on Human Rights and Fundamental Freedoms (ECHR) is a natural place to begin. That is because it was drawn up within the aegis of the Council of Europe, an older supranational organisation than the EU with 47 state parties, including all 27 EU Member States. Indeed signing the ECHR is a *de facto* requirement of joining the European Union. This section is devoted to the most relevant Conventions, Charters and Protocols emanating from the Council of Europe. It is well known that the ECHR

[15] Parliamentary and Health Service Ombudsman (2011).

[16] See for example Martin (2011a), front page and p. 4, Martin (2011b) at p. 30 and Care Quality Commission (2011).

[17] Womack (2006), p. 8 and Brooks (2009), p. 43.

[18] This refers to elder law, elder rights, age discrimination and human rights.

[19] From Statement by the UN High Commissioner for human Rights, Navi Pillay, to mark the International Day of Older Persons, 1 October 2010, available at http://www.globalaging.org/agingwatch/Articles/unhumanright.htm

includes a prohibition on discrimination and various human rights that can potentially be utilised by older people, among others. Interestingly, neither category mentions age or the elderly. While certain rights such as, the Right to life (Article 2), prohibition of torture (Article 3), and the Right to respect for private and family life (Article 8) can be envisaged for older people, many of the rights listed, being civil and political in nature, are of no obvious use to the field of elder rights.[20]

Article 14 contains the Prohibition of Discrimination and reads as follows, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The very wording of this provision is immediately instructive; age may benefit as a ground embraced by the term "such as . . ." in this open list and this was confirmed by the ECtHR in 2010.[21] However, the fact that age is missing from the list may be symbolic of the time when the ECHR was drafted and there was less awareness of ageing, ageism[22] and age discrimination, compared with today.

It is also apparent that the non-discrimination prohibition can only be engaged once another ECHR right has been infringed although there is some authority that mere engagement of another right may pass the required threshold.[23] Age has been classified as a non-choice ground by Wintemute who explains how this affects its ability to benefit from quite a few Convention rights, that is those involving the making of a choice such as, Freedom of thought, conscience and religion.[24] Age therefore does not benefit from Article 14 as easily as a choice ground would. Moreover, De Schutter reminds us that age discrimination is likely to concern employment and access to goods, facilities and services and social rights for which no right exists in the ECHR.[25] Thus clever "lawyering" is required to rely on the ECHR on behalf of a client concerned with age discrimination. Thus far it seems that assertion of other rights through more straightforward provisions of the ECHR is easier than the two-step method for discrimination in Article 14 ECHR.

[20] On a very rare occasion, elders may benefit from human rights that fall under the category of civil or political rights, see for example, *Farbtuhs v Latvia*, no. 4672/02, ECtHR Judgment 2 December 2004. A violation of Article 3 ECHR was found where an 86-year-old applicant in poor health had been sentenced for his part in detentions ordered by Stalin in 1940–1941. Mr Farbtuhs claimed his imprisonment would amount to inhuman and degrading treatment on grounds of his age and health.

[21] See, Fundamental Rights Agency of the European Union and European Court of Human Rights (2011) at p. 102, where ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010 is discussed. No violation of Article 14 ECHR was ultimately found in that case.

[22] Dr Robert Butler coined the term "ageism" in 1968, to describe the prejudices and stereotypes encountered by older people, long after the ECHR was drafted.

[23] See Grief (2002), HR/3-HR/5 and De Schutter's report for the European Commission, de Schutter (2005a) at p. 21.

[24] Wintemute (2004)at pp. 370, 372, 373.

[25] de Schutter (2005b) at p.21.

4.5 The ECHR System

In Article 1 ECHR, the High Contracting Parties (State Parties) "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Thus, in the first place the State parties have agreed to secure those rights and freedoms. Where the ECHR is breached, an individual or other State Party may make an application to the ECtHR. An individual applicant comprises a person, non-governmental organisation or group of individuals who claim to be the victim of a violation of the ECHR or its Protocols by a State Party to the ECHR.[26] Such an individual will apply to the ECtHR directly only when the State in question is a party to the ECHR but has not ratified it and implemented the ECHR in national law, or when the State has implemented the ECHR and the applicant has exhausted all national remedies.[27] Whether the applicant is an individual or another State several steps are involved. Firstly, the applicant must seek to have the application declared admissible. Secondly, when admissible and the merits of the case have been examined, the Court has powers to seek a friendly settlement between the parties. If none is forthcoming, the application may proceed to a Chamber for judgment or may be referred to the Grand Chamber where it must be accepted or rejected once again. If the matter is resolved at an earlier stage before a Chamber or at a later stage before the Grand Chamber, a Committee of Ministers has the power to supervise the execution of a judgment.[28] Judgments are binding and State Parties are obliged to comply with them.[29] If the outcome of an ECtHR hearing is a finding of a violation of the ECHR by a State Party, then the Court may order that "just satisfaction"[30] be paid, this is a form of compensation which may cover both pecuniary and non-pecuniary losses.[31,32] In some cases the State may be required to amend its legislation to conform to the ECHR.[33]

[26] Article 34 ECHR.

[27] Article 35.1. However, the ECtHR does not act as a court of appeal from national courts. See European Court of Human Rights, *The ECHR in 50 Questions FAQ* (Provisional Edition, December 2010) Available at www.ECHR.coe.int Point, 20, p. 7 and point 26, p. 9.

[28] Article 38, ECHR.

[29] *The ECHR in 50 Questions* op cit., point 38, p. 10.

[30] Article 41, ECHR.

[31] It is worth noting that the State parties to the ECHR undertake "to abide by the final judgment of the Court in any case to which they are parties", Article 46.1.

[32] The Court also has power to grant interim measures where the applicant is at serious risk of physical danger, see *The ECHR in 50 Questions* op cit point 33, p.10 and finally, the Court can also give an advisory opinion on a question of interpretation of the ECHR, Article 32.2 ECHR and Article 47, Protocol 11 to the ECHR.

[33] Point 41, p. 11.

4.6 Relevant Points for Older People

The wording of Article 14 ECHR would indicate that discrimination is something which the Convention prohibits rather than being a right which is protected. While this distinction may not make much difference, it also seems clear that the prohibition on discrimination does not amount to a right to equality. For an older applicant or their advocate, the fact that Article 14 cannot operate independently of another Convention right or prohibition renders it a somewhat awkward route to combat discrimination. This is compounded by the fact that age is a non-choice ground and therefore it is more likely to engage rights and freedoms that are not protected by the Convention, as stated above. Article 14 is a less than obvious choice for combating age discrimination. However, when least expected, other provisions of the ECHR can at least be invoked in support of vulnerable older people and this route is not without potential.

One such example comes from the UK which adopted the Human Rights Act (HRA) in 1998 in order to implement most of the ECHR into national law. The HRA, like the ECHR, is only addressed to the State and its bodies. This led to problems where a local authority sub-contracted nursing home care to the private sector. In 2007 the House of Lords ruled in *YL v Birmingham City Council*[34] that the HRA did not apply to the care of an older person who the city council had placed in a private care home. The case turned on whether the private home was performing "functions of a public nature" within the meaning of the HRA.[35] Mrs YL, who suffered from Alzheimer's disease, was fighting her eviction from her care home, on the basis that it would lead to a deterioration in her condition and would make it very difficult for her husband and family to visit her.[36] She argued that the move would be an infringement of her human rights and sought a declaration that her care home performed a public function and therefore fell within the HRA. The harsh outcome in this case was mitigated by two sympathetic dissenting judgments[37] and general disapproval which led to the adoption of S. 145 of the Health and Social Care Act 2008.[38]

This provision effectively reversed the *YL* decision for state-funded users of private care homes. While the human rights gap exposed in *YL* has apparently been closed by legislation, the question of what legal or moral standard will apply to privately funded users in the same care homes, appeared to have been left open.

[34] [2007] UKHL 27, [2008] 1 A.C. 95. For a discussion of this case see, among others, Palmer (2008) pp. 141–152.

[35] S. 6(3)(b).

[36] See para. 47 of Baroness Hale's dissenting judgment, in the *YL Case* supra. The human right in view was Article 8 the right to respect for private and family life.

[37] Those of Baronness Hale and Lord Bingham.

[38] See for example, Robins (2007). See also Joint Committee on Human Rights—Eighth Report, Session 2007–2008, *Legislative Scrutiny: Health and Social Care Bill*, House of Lords Publications on the Internet, House of Commons Publications on the Internet, at paras. 1.6–1.18.

Baroness Hale, one of the dissenting judges expressed the view that, "There may be other residents in the home for whom the public have not assumed responsibility. They may not have a remedy against the home under the Human Rights Act... But they will undoubtedly benefit from the human rights values which must already infuse the home's practices...". This appears to have been taken up by the Joint Committee on Human Rights, which later reported on the Human Rights of Older People in Healthcare in 2007, and noted that, "By adopting this framework and the accompanying human rights approach to decision-making and delivery of services, the services themselves should be improved for everyone".[39] The question remains whether this approach on its own, is adequate for the other vulnerable older people who just happen to pay for their own care?

More recently, further provisions of the UK's Equality Act 2010, have come into force. These include a public sector equality duty (PSED) on public bodies to eliminate conduct prohibited by the Act, to advance equality and foster good relations between people who share a characteristic and those who do not.[40] Crucially, this Act extends the PSED to "A person who is not a public authority but who exercises public functions".[41] The Act clarifies that a public function is a function of a public nature for the purposes of the HRA.[42] Altogether this will be invaluable for older people receiving publicly–funded healthcare or residential care in the UK, as the Joint Committee on Human Rights had already reported "strong evidence ... of historic and embedded ageism within healthcare for older people are important factors in the failure to respect and protect the human rights of older people".[43] Here, a direct link was made between ageism and the human rights of older persons. It is therefore not surprising that their Report also recommended there should be a positive duty on providers of health and residential care to promote equality for older people[44] and that "the current prohibition on age discrimination in the workplace be extended to the provision of goods, facilities and services, so as to encompass (amongst other activities) the provision of healthcare".[45]

The extension of age discrimination legislation beyond the workplace is now due to come into force in 2012 in the UK.[46] Since the *YL* case and certainly up to the

[39] Eighteenth Report of Session 2006–2007, HL 156-I/HC 378-I at para. 84.

[40] S. 149 (1) and (3)-(6).

[41] S. 149(2).

[42] S.150(5).

[43] Para. 59.

[44] Para. 64.

[45] Idem.

[46] By virtue of the Equality Act 2010, this also introduced a provision to deal with combined discrimination on dual characteristics in S. 14, the British government has decided not to take this provision forword.

time of writing, concern over the mistreatment of older people in care homes[47] and in hospitals has grown and has been the subject of other reports.[48] It is remarkable that this should be so against the background of feverish, well-publicised updating and broadening of human rights and equality provisions. The tide appears to be turning slowly in favour of older people. In the UK poor elder care receives considerable attention in the media which was quick to highlight some years ago that human rights law seemed to be failing the elderly.[49] More recently, the media has helped to publicise the elderly as targets of human rights protection.[50] However, it is still early days and the new provisions need time to take root and feed into training and practice. They will not do so in a vacuum but against a background that may include a voluntary human rights approach. This has much to recommend it in terms of the right kind of mindset for the care and healthcare of older people and indeed the care of people of all ages.

4.7 A Human Rights Approach

A proactive human rights approach inspired by the ECHR and adopted by its addressees may well have certain advantages over sporadic, uncertain, reactive claims against public service providers, whether speaking of discrimination or human rights. A voluntary human rights approach appears to have borne fruit in the UK where the Equality and Human Rights Commission of England and Wales (EHRC) published a report in 2009 of a human rights inquiry, to establish how far a human rights culture was embedded in service delivery by public authorities. The Inquiry found that a human rights approach had been successfully adopted by a number of health trusts and other public bodies.[51] This approach went beyond mere compliance towards improved service delivery, and more proactive and inclusive approaches where service users could participate in decision-making.[52] The public bodies in question had, in essence, voluntarily used a human rights approach to change institutional culture. The Inquiry ultimately recommended *inter alia* that human rights should be mainstreamed into the work of all those who provide relevant public services and into the decision-making processes, policies, procedures and activities of community and voluntary groups as well.[53] It recommended that the

[47] Rose (2007), Bosely (2010) and Daily Mail Dignity for the Elderly (2011) at p.2.

[48] See for example, Parliamentary and Health Service Ombudsman (2011).

[49] BBC News, *Human rights law 'fails elderly'*, 2/08/2005.

[50] Referring to plans to extend the HRA to cover publicly funded users of private care homes, see, Thomson and Sylvester (2007).

[51] *Human Rights Inquiry*, *Report of the Equality and Human Rights Commission*, June 2009, see Chap. 3, 'The Impact of Human Rights on Public Services', in particular, available at http://www.equalityhumanrights.com/uploaded_files/hri_report.pdf.

[52] Ibid and at p. 142.

[53] Ibid at p. 143 and p. 145.

Government consult on whether a statutory duty should be placed on public authorities to take human rights into account before implementing new policies.[54] This Inquiry demonstrates that human rights are already improving important public services in the UK.[55] A human rights approach appears to add value to the existing legal framework and there may well be an argument that it is implicit in the ECHR, as Article 1 ECHR places a duty on governments to secure all the rights and freedoms in the ECHR to everyone in their jurisdiction. By contrast, the HRA states, "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".[56] This would appear to create a base of compliance only in the form of a prohibition on public authorities, leaving much scope for a voluntary human rights approach and for some kind of duty to secure rights under Article 1 ECHR.

4.8 Protocol 12 and Solutions to Article 14 ECHR

Some long-established shortcomings with Article 14 ECHR's role as an anti-discrimination tool have been alluded to above. In 2005, Protocol 12 ECHR entered into force and contains a much broader anti-discrimination scope than Article 14.[57] Importantly it contains an independent right to non-discrimination but not a right to equality. Article 1(1), Protocol 12 reads as follows, "The enjoyment of any right *set forth by law* shall be secured without discrimination on any ground such as …" (emphasis added). It proceeds to list the same grounds as Article 14 and therefore once again does not specify age. The Protocol immediately promises benefits over Article 14 in that it is not restricted to discrimination in conjunction with breach of another Convention right. The protection of enjoyment of any right set forth by law may be of further benefit to older people, especially as this may also embrace international law.[58] The ECtHR had previously acknowledged that certain forms of discrimination could not be brought within the ambit of Article 14 and that then draft Protocol 12 to the ECHR would enable those to be examined.[59] This helps us

[54] At p. 149.

[55] A previous report delivered not long before this Inquiry found that a culture of respect for human rights had mostly failed to take root in public authorities in England, Scotland and Wales, see Donald et al. (2008).

[56] Article 6(1).

[57] Para. 33.

[58] See para. 29. The report is available at, www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm#EXPLANATORY REPORT. Note also the discussion by Khaliq (2001) at p. 458.

[59] Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, parliamentary Assembly Doc. 8608, 5 January 2000, paras. 3 and 4, available at http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc00/EDOC8608.htm.

to rationalise the roles of each provision. Protocol 12 was intended to operate concurrently with Article 14 and not to replace it, although there is additionally an area of overlap between them.[60] The advantages of Protocol 12 over Article 14 ECHR include its freestanding nature, its far wider scope and the fact that any positive obligation under Article 1 thereof might even include some element of state responsibility in relations between private persons.[61] According to the Commentary accompanying Protocol 12, while limited, this might involve, "relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc)…"[62] Thus there may be a role for Protocol 12 in discrimination in access to goods and services for older people and others, ahead of any tailor made discrimination law for this field or beyond the limits of the scope of such law.

One of the greatest benefits to older people, may actually come from Article 1 (2), Protocol 12 which "guarantees that no-one shall be discriminated against on any ground by any public authority". The Explanatory Report to Protocol 12 confirms that discretionary powers, acts or omissions of public authorities are all in view.[63] There are some predictable restrictions to Article 1(2), however. According to the Explanatory Report, both Article 1(1) and 1(2) are subject to the possibility of objective justification. This extract helps to clarify the limits of the right to non-discrimination,

> distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, it should be recalled that under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background…[64]

4.9 The Sting in the Tail

The ECHR and Protocol 12 both require signature and ratification in national law to have full effect within the State Party. Only 19 of all the 27 EU Member States have signed Protocol 12. Of those only seven have signed *and* ratified it, namely Cyprus,

[60] Paras. 32 and 33, *Explanatory Report* op cit.

[61] Explanatory Report Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, at paras. 24–26.

[62] Idem at paras. 27–28, note, it is understood that purely private matters would not be affected.

[63] At para. 22.

[64] At para. 19.

Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain. While signature of the ECHR is a *de facto* requirement to join the EU,[65] unanimous signature and ratification of its protocols, is only compulsory for procedural and institutional protocols. Protocols adding further rights for protection such as, Protocol 12 are optional for any State party. There is the possibility of a gap in protection from discrimination in some EU Member States compared to others, should all remaining EU Member States not sign and ratify Protocol 12 ECHR. The UK has neither signed nor ratified Protocol 12 and has voiced a number of objections to signing it.[66] In 2009, the ECtHR decided its first and so far only case under Protocol 12, in *Sejdić and Finci v. Bosnia and Herzegovina* and found that racial discrimination had taken place.[67]

4.10 The European Social Charter

The issue of non-signature and/or non-ratification also raises its head for EU Member States that are party to the European Social Charter (ESC) 1961, another human rights' instrument of the Council of Europe. The ESC guarantees a number of social rights under the broad headings of Housing, Health (including, accessible, effective health care facilities for the entire population), Education, Employment, Social Protection, Movement of Persons (including the right of family reunion) and non-discrimination,[68] which did not include age as a named ground. In 1996 the ESC was revised and the Revised European Social Charter (RESC) came into effect in 1999 and was intended to gradually replace the ESC.[69] The RESC contains 31 rights and principles including a new right in Article 23, "The right of elderly

[65] Note Article 49 Treaty on European Union requires an applicant state to respect and promote a range of values set out in Article 2 thereof, including human rights.

[66] Not least that '"Rights set forth by law" may extend to obligations under other international human rights instruments to which the UK is a party", Joint Committee on Human Rights Seventeenth Report, Session 2004/05, prepared 31/3/05 see at, www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.htm. This is curious given that it is referring to instruments which it has already signed. Presumably the UK was referring to clauses that it had not accepted within such instruments.

[67] When two people of Jewish and Roma origin complained that they could not stand for election, [GC] (Nos. 27996/06 and 34836/06), 22 December 2009.

[68] This contained two limbs: the first deals with equal pay between women and men in employment, the second guaranteed all nationals and foreigners legally resident or working in the territory that rights in the Charter shall apply regardless of seven named grounds of discrimination.

[69] Note as stated in the Preamble to the RESC.

persons to social protection".[70] However, a large number of rights appear to have a broad enough application to encompass older people as well. For example, they commence with "Everyone has the right to . . ." "Anyone. . ." "All workers. . ." or "Workers". Thus there may also be a degree of overlap with Article 23[71] which in any event is not concerned with age discrimination in employment.[72]

Apart from a right to non-discrimination on grounds of sex, there is no general non-discrimination clause in the main body of the RESC. Instead Article E secures the enjoyment of any right set forth in the RESC without discrimination on an open list of grounds which does not contain age but is preceded by familiar terminology, "on any ground such as". There is some evidence that age is encompassed by this provision.[73]

4.11 RESC Acceptance, Ratification and Redress

Out of the 47 State parties of the Council of Europe, 43 have ratified at least one version of the European Social Charter. However, at the time of writing only 30 States have ratified the RESC[74] and, of the 27 EU Member States, only 18 have ratified the RESC. The ESC permits Member States not to accept certain articles, provided they accept a certain number overall. According to the Explanatory

[70] With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
  a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
  b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;
- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
  a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
  b. the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

[71] However, it seems clear from the text of Article 23 that it mainly refers to post-retirement elders.

[72] This is examined under Article 1(2) concerning non-discrimination in employment, see for example Council of Europe, European Committee of Social Rights *European Social Charter (revised) Conclusions 2009*, at p. 70.

[73] See Frequently Asked Questions, 2, available at http://www.coe.int/T/F/Droits_de_l'Homme/Cse/FAQ_eng.asp.

[74] On 10 May 2010, Montenegro's ratification took effect and it became the thirtieth state to ratify the RESC.

Report, States must accept not less than 16 articles. Thus, 7 EU Member States have not accepted Article 23 RESC on rights of the elderly. Article 23 is one of the non-hardcore provisions, which may reduce its chances of being accepted, as Member States must accept six of the nine hardcore provisions.[75] Article 23 does not appear to confer rights directly on older people but the European Committee of Social Rights[76] reads it as requiring the provision of adequate resources for the elderly and requiring the introduction of age discrimination legislation to protect them.[77] This is a distinct advantage over Article 14 ECHR, Protocol 12 ECHR and Rights of the Elderly in the EU Charter below.

Unlike the ECHR, which operates through judicial mechanisms, relying on national courts and ultimately on the ECtHR, the ESC ensures compliance through two separate non-judicial avenues. The RESC's main compliance mechanism is through States reporting on compliance with the ESC and the Committee of Social Rights reaching conclusions on these reports. If a Member State does not comply, a recommendation to change law or practice may ensue. The other avenue is a collective complaint procedure which has been in effect since 1998.[78] There are four categories of non-governmental organisations (NGOs) entitled to lodge complaints with an emphasis on employer and employee organisations. However, organisations with a consultative status with the Council of Europe and national NGOs are included for countries that have accepted this possibility.[79] Once a complaint is declared admissible, it is followed by a public hearing before a Committee of Independent Experts, which produces a report. The Committee of Ministers may then adopt a resolution and recommend certain measures by the State to conform to the ESC.

It might be easy to dismiss the ESC and RESC as their profile is lower than that of the ECHR; however, their compliance procedures add something useful and different to existing approaches. Their focus is on collective rights, state reporting and collective complaints rather than primarily individual complaints.[80] There are also indications that the RESC is growing in profile and importance.[81] At the

[75] See paras. 122–123 Explanatory Report, available at http://conventions.coe.int/Treaty/en/Reports/Html/163.htm.

[76] This committee assesses the conformity of State parties with the ESC.

[77] See, EU Network of Independent Experts on Fundamental Rights, *Report of the Situation of Fundamental Rights in the European Union and its Member States in 2005*, at p. 205, available at http://cridho.cpdr.ucl.ac.be/documents/Download.Rep/Reports2005/CFR-CDFConclusions2006-EN.pdf.

[78] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints Strasbourg, 9.XI.1995.

[79] Idem, at Article 2 but only if the Member State recognises them for this purpose.

[80] Although the ECHR allows for both.

[81] Note remarks on the importance of the RESC, of Terry Davis, Secretary General Council of Europe, Address to the seminar, 'The European Social Charter: the next 10 years', Strasbourg, 3 May 2006. Seminar to mark the tenth anniversary of the European Social Charter (revised) remarks.

conference to celebrate the tenth anniversary of the RESC in 2006, Colm O'Cinneide remarked that, "Only through effective implementation of the Charter will we achieve an indivisibility of protection between social and civil-political rights".[82] Furthermore, they are important as together with the ECHR they underpin a number of rights in the European Union Charter of Fundamental Rights (the EU Charter).

4.12 The Charter of Fundamental Rights of the European Union

The EU Charter, initially drawn up and proclaimed into life in 2000, was intended to gather together all the rights that are available to individuals in the EU, whether from EU law or international conventions, in a single instrument. An updated version of the EU Charter is now legally binding and came into force at the same time as the Lisbon Treaty[83] in 2009.[84,85] Viviane Reding, Vice-President of the European Commission,[86] has described the EU Charter as, "the most modern codification of fundamental rights in the world. . ."[87] The Preamble to the Charter states that the EU places the individual at the heart of its activities and that "it is

[82] Colm O'Cinneide, General Rapporteur, Strasbourg 3 May 2006 www.coe.int/t/dghl/monitoring/socialcharter/Presentation/10Anniversary/OCinneadeGeneralReport10Anniv_en.asp.

[83] Formally known as, the Treaty on the Functioning of the European Union, signed at Lisbon on 13 December 2007 and entered into force on 1 December 2009, OJ [2007] C 306 Vol. 50 17 December 2007, also available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

[84] The new version of the Charter was proclaimed at Strasbourg on 12 December 2007, the most recent version is published in [2010] OJ C 83/389 and is also available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF.

[85] The legal status of the Charter is now confirmed in Article 6(1) of the Treaty on European Union as amended by the Lisbon Treaty, "The Union recognises the rights, freedoms and principles set out in the Charter . . . which shall have the same legal value as the Treaties". For a brief history of the Charter and the Lisbon Treaty, see Piris (2010), pp. 147–154 and pp. 158–160.

[86] She is also the European Commissioner for Justice, Fundamental Rights and Citizenship.

[87] Viviane Reding continues, "The Charter entrenches all the rights found in the European Convention on Human Rights. . . The Charter, however, goes further and also enshrines other rights and principles, including economic and social rights resulting from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. In the Charter, we also find the so-called 'third generation' fundamental rights, such as data protection, guarantees on bioethics and on good and transparent administration. And Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the Convention. Often it will go beyond. . ." speaking at, 'Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention on Human Rights', High Level Conference on the Future of the European Court of Human Rights, Interlaken, 18 February 2010.

necessary to strengthen the protection of fundamental rights ... by making those rights more visible in a Charter". The Charter makes it clear that its provisions are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law.[88] Thus in areas that fall outside the purview of the EU Treaties, Member States are not legally bound by the Charter and their actions may well be judged by other treaty bodies in accordance with other European and international instruments to the extent to which they have accepted or ratified their provisions.[89]

Importantly, the Charter must now be respected at each stage of law-making in the EU.[90,91] This is a clear and central role for the Charter; it has also been used as a tool of interpretation by the European Court of Justice even before it became legally binding.[92] The Charter does not contain or create any remedies or legal actions. Rights contained within it are only actionable if they are justiciable elsewhere in EU law. In any event, there are very restricted opportunities in EU law for an individual to bring a direct[93] or any action before the ECJ. The most important mechanism involving the individual is in fact the preliminary ruling procedure[94] where it is the national court that refers a question of interpretation of EU law in a case before it,[95] to the ECJ, whose judgement is delivered back to the national judge to apply judiciously to the facts of case. Discrimination cases generally arrive in the ECJ by means of this procedure. The Charter is divided into seven chapters. Article 21, Non-discrimination and Article 25, Rights of the Elderly are contained within the Equality Chapter and shall be examined below.

Meanwhile, in 2011 the EU ratified the UN Convention on Rights of Persons with Disabilities. This is the first time the EU has become a party to an international human rights treaty. It is unlikely that this Convention (or the ECHR in due course) will be the last. It is difficult to speculate on whether a future UN Treaty on rights of older persons would be signed and ratified by the EU given that so much of elder

[88] Article 51.

[89] However, signing the ECHR is enough to enable individuals to bring actions before the ECtHR. Ratification of the ECHR enables the matter to commence and potentially be disposed of in national courts.

[90] European Commission, 2010 *Report on the Application of the EU Charter of Fundamental Rights*, COM(2011) 160 final, at p. 2.

[91] The European Commission has committed itself to producing an annual report on its enforcement see, Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF.

[92] See for example, Case C-173/99 *The Queen v Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),* (2001) ECR I-4881.

[93] See for example Article 263 Lisbon Treaty concerning the review of legality of acts of EU institutions; an individual must first prove that he has legal standing.

[94] Article 267 Lisbon Treaty.

[95] Where an interpretation is essential to resolve the national case.

care, elder law and elder rights traditionally appeared to fall outside the EU Treaties. Only time will tell, if this will be resolved in light of the recent Rights of the Elderly contained in the EU Charter, which now has the same weight as the EU Treaties and in light of the commitment to fight age discrimination, evidenced by EU age discrimination legislation.[96] The EU will also be affected by rapid demographic ageing.[97] An international convention on rights of older persons signed by the majority or, all its Member States in the first place, would be a boon for older people and would provide clarity and guidance to those who provide care or medical assistance to them, in particular.

4.13 Age Discrimination and Rights of the Elderly in the EU Charter on Fundamental Rights

Looking at discrimination and rights of the elderly in the EU Charter, we depart from some of the trends that we have found in human rights instruments of the Council of Europe for instance, non-denomination of age in discrimination provisions. In addition non-discrimination and human rights in EU instruments apply to all EU Member States without the opportunity to sign and then not ratify them, or to select only certain hard-core clauses, for example,[98] as we have seen in the Council of Europe instruments discussed above.[99] That is because the entry into force of all EC and EU Treaties, including the Lisbon Treaty and the EU Charter, depends on ratification by all EU Member States. Moreover, EU anti-discrimination Directives apply to all Member States. Thus at this point in time, the EU instruments under discussion arguably support the universality and indivisibility of human rights more than the Council of Europe instruments discussed above. However, the assertion of rights under EU non-discrimination law may be more difficult for a third country national (TCN) residing in the EU[100] than for TCNs asserting their rights under Article 14 ECHR or Protocol 12.[101]

[96] For the EU's competence to enter into agreements with international organisations, see Articles 216–218, Lisbon Treaty.

[97] See among others, Commission Communication of 12 October 2006 "The demographic future of Europe – From challenge to opportunity" [COM(2006) 571 final available at, http://europa.eu/legislation_summaries/employment_and_social_policy/situation_in_europe/c10160_en.htm

[98] The RESC, for instance.

[99] However, we shall see that some of the EU non-discrimination Directives give opportunities to Member States not to apply a small number of provisions e.g. not to apply age provisions to armed forces.

[100] See Article 3(2) of the Employment Equality Directive and the Race Equality Directive, respectively and see the Preamble to these Directives.

[101] The rights and freedoms in the ECHR apply to everyone within the jurisdiction of the state party, see Article 1 ECHR. Similarly, Protocol 12 also applies to everyone.

Some terminology in the EU Charter is confusing.[102] The term "rights" within the Charter, encompasses rights and, also principles, which may have to be implemented; and certain Articles may contain elements of both rights and principles.[103] Article 21(1) is the main discrimination clause of the Charter and contains a broad prohibition against discrimination and appears to take the form of a right rather than a principle. It reads, "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".[104] This includes, but goes well beyond, the six grounds, including age, that are contained in Article 19 Lisbon Treaty (LT) (and its predecessor Article 13 EC Treaty).[105] Here we find both choice and non-choice discrimination grounds together, but only some enjoy a law-making base in the LT and hard law protecting them. The remaining grounds contained in Article 21.1 are mainly based on Article 14 ECHR and have no law-making base in EU law. For this to occur however, Article 19 LT would first need to be amended to name the additional grounds and then existing discrimination legislation would need to be amended or new legislation adopted. Thus the EU Charter, an instrument of certain legal weight and considerable importance, which embraces all EU fundamental and human rights from whatever source, is not without its own apparent gaps.

This is very different from the apparent priority in the ECHR for so-called choice grounds compared with non-choice grounds. Both do better within the corpus of EU anti-discrimination law. This, however, also reflects the organic development of EU anti-discrimination law, which has by now a long enough history of protecting non-choice anti-discrimination grounds, starting with sex (and nationality)[106] followed much later by race. These reflected a real need at different stages when they were adopted in the European Economic Community and later when it evolved into the EU. The grounds in Article 21 of the Charter are drawn from three sources including, Article 13 EC and Article 14 ECHR.[107] Article 13 EC was introduced by the Treaty of Amsterdam 1997 and permits the Council of the European Union voting unanimously, to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[102] The Explanations that accompany the Charter are invaluable.

[103] See the Charter's Explanations on Article 52(5) which state, "In some cases, an article of the Charter may contain both elements of a right and a principle, e.g. Articles 23, 33 and 34", available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF.

[104] Article 21(2) prohibits discrimination based on nationality in accordance with the EC Treaty, as amended.

[105] The six grounds are sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

[106] Largely, in the context of the right to free movement of people.

[107] The third source is Article 11 of the Convention on Human Rights and Biomedicine and pertains to genetic heritage.

This was re-numbered as Article 19 in the LT.[108] While sex has traditionally been dealt with comprehensively elsewhere in the EC Treaty and secondary legislation, two Directives adopted in 2000 on the heels of Article 13 EC have provided the first avenue to litigation and redress for the remaining grounds.[109] They are discussed below. Meanwhile, the Explanations of the Charter clarify the status of the rights in the Charter that are drawn only from Article 14 ECHR.[110]

Article 25 of the Charter contains the rights of the elderly, "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life". Recognising and respecting the rights of the elderly suggests that Article 25 contains a right in the form of a principle.[111] It is also arguable that Article 25 contains a social right; therefore it is more like a programmatic right than a right that may be justiciable elsewhere in EU law.[112] This may also be supported by the nature of the sources for this article which the Explanations reveal as Article 23 of the RESC[113] and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. This recalls the dichotomy that the EU Member States that have not accepted Article 23 RESC on rights of the elderly only respect it within the sphere of implementation of EU law and not within a purely national law context.

Early academic debates concerning the borderline between rights and principles in the Charter,[114] which is very relevant for the rights of the elderly, have now been resolved.[115] The Explanations accompanying the Charter explain that "subjective rights shall be respected, whereas principles shall be observed. . .**Principles** may be

[108] Article 19 LT also contains some amendments on legislative technique for example, Article 19 improves the role of the European Parliament from a consultative one under Article 13 EC to a consenting role.

[109] Note however, Council Directive 2004/113 EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L373/37, 21 December 2004, which was adopted under Article 13 EC.

[110] Article 52.3, Charter provides "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

[111] Meenan (2007), op cit. at pp. 64–65.

[112] Idem.

[113] As noted above, only a small number of EU Member States have accepted this provision.

[114] See Meenan (2007) pp. 39–82 at pp. 53–57 and pp. 65–68, where a number of academic opinions are discussed.

[115] The adopted 2007 version of the Charter and the revised Explanations which accompany it see, for example, Article 52 Scope of guaranteed rights, to which Article 52(4)–52(7) have been added. Note Article 52(5) in particular, "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts in the ruling on their legality".

adopted through legislative or executive acts… accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. **They do not however give rise to direct claims for positive action by the Union's institutions or Member State authorities**". (emphasis added) In summary, no provision in the Charter is directly justiciable by an individual in the EU, not least because the Charter is addressed to the EU institutions, bodies and agencies and Member States solely in the implementation of EU law. Rights of the elderly are really principles and they are not justiciable elsewhere in EU law. Thus, rights of the elderly in the EU Charter do not appear to create or reiterate any cause of action in EU or national courts. Nor for that matter is there any judicial complaint mechanism elsewhere the Charter.[116]

So far we have seen quite a number of general rights which older people (in addition to others) may access, elder rights, human rights, anti-discrimination and equality rights in the EU. We also see an attempt in the EUCFR to bring all of these together for the first time in a single code. It would be understandable for the non-lawyer in particular to be bewildered by the range of rights, differing approaches and quirks of each system. This is not to mention the varying legislative and implementation gaps which are partly remedied through membership of the EU. However, each source and system arguably brings something to the table and may produce different strengths for different stages and challenges throughout the life course. Against this background, EU age anti-discrimination law provides visibility, universality, protection, and enforcement of rights to nearly all within EU borders, notwithstanding opportunities for objective justification and derogation which are not uncommon in EU law.

4.14 Age Discrimination in EU Law

The Treaty of Amsterdam revolutionised and revitalised EU discrimination law in 1997. Prior to this, European law[117] recognised two grounds of discrimination, sex and nationality, that had been contained in the original EEC[118] Treaty 1957 and for which a large body of secondary legislation and case law had already built up. Age was one of five new anti-discrimination grounds for which Article 13 EC (now Article 19 Lisbon Treaty) was merely a law-making base and thus conferred no direct rights or avenues of recourse on the individual citizen. It was by no means

[116] Article 43 of the Charter however permits EU citizens to petition the European Ombudsman, in limited circumstances "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role".

[117] Referring to the law of the European Community later referred to as the law of the European Union.

[118] European Economic Community.

certain that age would be included in the first wave of legislation adopted under that provision. During the drafting of the Amsterdam Treaty and later when the European Commission was deciding on priorities for anti-discrimination legislation, age had a lower profile than some of its fellow family of newer grounds, especially race[119] and disability.[120] This lower profile for age in European Union policy and soft law reflected a pretty erratic picture for protection from age discrimination across EU Member States. There was generally little or nothing in the way of constitutional protection from age discrimination. Countries that banned age limits in recruitment did not necessarily outlaw discrimination within employment, for example.[121] This picture began to change in the late 1990s when Ireland adopted comprehensive discrimination law in employment protecting nine grounds, including age.[122] This was quickly followed by Irish law protecting the same nine grounds from discrimination outside employment.[123] These laws were a useful model, though not the only model, for EU discrimination laws adopted in 2000.

In 2000 the Council of the European Union adopted two Directives under Article 13 EC. It was predictable, given racial and political unrest in certain parts of the EU, that the first of these was the Race Directive,[124] which prohibits discrimination on grounds of racial or ethnic origin in employment, vocational guidance and training, working conditions, membership of employers', workers' and professional associations. The Race Directive goes further than the employment field and applies to discrimination in social protection, including, social security and healthcare, social advantages, education and access to and supply of goods and services available to the public, including housing. Thus race became the first Article 13 anti-discrimination ground in EU law to be protected beyond employment. In 2000 the Council adopted the Employment Equality Directive[125] which establishes a general framework for equal treatment on grounds of religion or belief, disability, age and sexual orientation in employment and occupation.

The Employment Directive covers the same material scope as the Race Directive as regards employment and vocational training and shares the same basic structure prohibiting direct and indirect discrimination, harassment, instructions to

[119] For a discussion of the history and rationale for the Race Directive see Bell (2007) infra at pp. 178–183.

[120] For a discussion of the profile of age among the Article 13 grounds see, Meenan (forthcoming).

[121] For an early picture of national age discrimination laws across European countries including a much smaller European Union, see Age Discrimination in Europe (1994), pp. 13–16.

[122] The Employment Equality Act, 1998, since amended.

[123] The Equal Status Act 2000, note this Act and the Employment Equality Act 1998 were amended by the Equality Act 2004 largely in order to comply with the Employment Equality Directive and Race Directive, both adopted in 2000.

[124] Council Directive 2000/43 of 29 June 2000 implementing the principle of Equal treatment between persons irrespective of racial or ethnic origin OJ 2000, L 180/22.

[125] Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

discriminate, and requiring, Member States to protect employees from victimisation. Each Directive provides for the possibility of objective justification of indirect discrimination, genuine occupational requirements and permits Member States to adopt positive action measures and requires them to lay down sanctions that are effective, proportionate and dissuasive. However, the Race Directive also requires Member States to designate a body to promote equal treatment without discrimination on grounds of race or ethnic origin. This is a major point of difference from the Employment Directive, which requires no such national body to promote equality on any of its grounds, including age.

When these Directives were adopted many academics referred to there being a hierarchy of protection in the EU, with race and sex at the pinnacle and age at the bottom.[126] This is explained primarily by the Race Directive's greater material scope and its requirement of a national promotional body. Apart from these contrasts, which were also shared by the other Article 13 grounds, by far the greatest reason for age occupying the lowest floor of the so-called hierarchy of protection are the specialist provisions of the Employment Directive, concerning age. The protection gap enjoyed by Race has been slowly narrowing, firstly with the adoption of a new Article 13 Directive in 2004, implementing the principle of equal treatment between men and women in access to and supply of goods and services (hereafter the Sex Equality in Goods and Services Directive).[127]

This Directive also requires a national body to promote sex equality but with a smaller field of protection.[128] Secondly, in 2008 the Council adopted a Proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[129] in social protection,[130] healthcare, social advantages, education, access to and supply of goods and services which are available to the public including, housing (the Goods and Services Directive). This proposal, though apparently in its final stages, has been stalled for some time. We shall see that a key "age" provision in the proposed Goods and Services Directive mirrors closely one in the Employment Equality Directive, also concerning age.

4.15 Age Within the Employment Directive

These European Directives provide for a minimum level of protection but Member States may provide a higher level of protection if they wish. On the face of the Employment Directive, age enjoys parity of esteem with the other grounds in that

[126] European Commission (2004), pp. 12–14.

[127] Directive 2004/113/EC [2004] OJ L 373/37.

[128] As it does not cover the content of media, advertising or education.

[129] 2.7.2008 COM(2008) 426 final.

[130] Including, social security.

it shares all the key common concepts with them. However, the Directive does acknowledge differences between the grounds.[131] For example, it requires the Member States to provide reasonable accommodation for disabled persons.[132] There are also other tailor-made clauses around occupational requirements.[133] It is arguable that these and other provisions help to make the Directive workable and help to house the differing grounds in the same important anti-discrimination instrument with common goals. The Directive also reflects the fact that unanimous voting by the Member States was required (under what was then Article 13 EC) for the adoption of legislation, thus some provisions have been informed by compromise. Some of these issues are evident in the Recitals to the Directive, which explain the rationale for the Directive and key provisions. The key Recitals for age are:

> Recital 14 "This directive shall be without prejudice to national provisions laying down retirement ages".

There was considerable academic debate as to the meaning of this short Recital and what bearing it had on the increasingly important issue of retirement ages.[134] The European Court of Justice's second judgment on age and the Employment Directive provided an excellent early opportunity to interpret it. In *Palacios de la Villa v Cortefiel Servivios SA*,[135] a case on the legality of the mandatory retirement age of 65 in Spanish collective agreements, the ECJ interpreted Recital 14 as stating that the Directive does not affect the Member States' choice of retirement ages. However, this does not prevent the Directive from applying to the conditions of termination of employment when the chosen retirement age has been reached[136] as, they prevent "his future participation in the labour force".[137]

This judgment was helpful as retirement is not mentioned in the body of the Directive but dismissal is; therefore, for the purposes of these cases the question is whether the conditions for dismissal at 65 (or at the given retirement age) fall within

[131] Barry Fitzpatrick captures the heart of this process when he states, "It is necessary when approaching new equality grounds, to take an integrated but differentiated approach integrated in the sense that many of the legal definitions (and practical implications) of new grounds are common to those of pre-existing grounds, but also differentiated in that each new ground presents issues and controversies which are particular to that ground. The latter perspective is not to endorse a hierarchy of inequality but rather to acknowledge the differences between them". Barry Fitzpatrick in Meenan (2007), op cit. at p. 313.

[132] At Article 5.

[133] For example, Member States may keep legislation permitting a difference of treatment on grounds of religion or belief where the ethos of the church or organisation requires it for the nature of the occupation involved, provided any difference in treatment does not justify discrimination on another ground, Article 4(2).

[134] Some of the interpretations are referred to in Meenan (2007), at p. 303.

[135] Case C-411/05 [2007] ECR I-8531.

[136] At para. 44.

[137] Para. 45.

the purview of the Directive. In *Palacios de la Villa* we also see the ECJ refer again to the likely *future* impact of a measure on older workers. In *Mangold v Rudiger Helm*, the ECJ's first judgment on age under the Directive, the ECJ was very moved by the future impact of a German rule that permitted employers to award fixed-term contracts to all workers over 52, an indefinite number of times, without objective reason. In deciding that the rule exceeded what was appropriate and necessary to achieve its legitimate labour policy aim it stated,

> This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its member's working life of being excluded from the benefit of stable employment.[138]

There is a sense that the Court is alive to the potential for older workers to be pawned off with work or working conditions that might not be so acceptable to other workers. A more recent judgment in *Ole Andersen v Region Syddanmark*[139] continues this theme. The ECJ referring to a Danish law that prevented older workers who were entitled to an old age pension, from accepting severance pay and deferring their pension in order to seek new employment, stated that "the measure at issue … thus forces workers to accept an old-age pension which is lower than the pension which they would be entitled to if they were to remain in employment for more years, leading to a significant reduction in their income in the long term".[140]

The *Mangold* case was also important as the ECJ declared that the principle of non-discrimination on grounds of age was already a general principle of European Union law.[141] While this was indeed news and was criticised by some writers[142] and even a small number of Advocates General of the ECJ in later cases,[143] it helped to raise the profile of age in EU non-discrimination law and to resolve the case in hand. In *Seda Kucudeveci*, the ECJ has since confirmed that the principle of non-discrimination on grounds of age is a general principle of EU law which is given effect in the Employment Directive.[144]

> Recital 17 "This directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities".

[138] Case C-144/04 [2005] ECR I-9981. Para. 64.

[139] Full title, *Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, Case C-499/08, [2011] ECR not yet reported.

[140] Para. 46.

[141] Paras. 74 and 75.

[142] See for example Eriksson (2009) at pp. 734–735 and at footnotes 30 and 31.

[143] See for instance Opinion of Mazak AG in *Palacios de la Villa*, op. Cit., at paras. 83–97.

[144] Case 555/07 [2010] ECR I-365. Paras. 20–21.

This Recital sheds some light on the limits of discrimination law for all the grounds in the Directive. The person applying for or performing the job must be able to do it. Despite much academic argument on the merits of transferring reasonable accommodation to other grounds,[145] this has not happened at EU level. In any event, Recital 18 swiftly builds on the issue of capability as follows,

> This Directive does not require in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

In *Colin Wolf v Stadt Frankfurt am Main*,[146] the ECJ referred *inter alia* to Recital 18[147] in deciding that a maximum recruitment age of 30 was essential for intermediate career fire-fighters in Frankfurt, Germany. Moreover, this requirement did not exceed what was necessary and appropriate in light of the aims of the operational capacity and proper functioning of the fire service. The Court decided that physical fitness was a genuine occupational requirement of that job and was a characteristic related to age. It was significant in this case that the German Government produced scientific data from studies in industrial and sports medicine as evidence that respiratory capacity, musculature and endurance diminish with age.[148] The Court noted that the German Government was not contradicted on this evidence, which led it to conclude that "very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities".[149] This contrasted with other judgments where a certain age was chosen, with no evidence to support it, such as *Mangold* when the age at which older workers could be awarded a fixed term contract instead of an indefinite contract of employment, was gradually reduced to 52 years.

In *The Queen on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*[150] (hereafter Age Concern England), the Court gave its views on the level of discretion left to Member States, "in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion... Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough . . . and do not constitute evidence on the basis of which it

[145] *Critical review of academic literature*, op cit. at p. 20.
[146] Case C-229/08 [2010] ECR I-1.
[147] Paras. 38 and 39.
[148] Para. 41.
[149] Idem.
[150] Case C-388/07 [2009] ECR I-1569.

could reasonably be considered that the means chosen are suitable for achieving the aim".[151]

Recital 19 builds on Recitals 17 and 18,

> Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces...[152]

Some Recitals are given more concrete expression in the main body of a Directive just as Article 3(4) of the Directive elaborates on Recital 19,

> Member States may provide that this Directive, in so far as it relates to discrimination on grounds of disability and age, shall not apply to the armed forces.

In reality only six EU Member States including the UK and Ireland, have made an express exemption for their armed forces from age and disability provisions of the Directive,[153] while some other Member States kept in place the age and capability requirements of their armed forces in their regulations without declaring an exemption for them.[154]

4.16 The Most Intriguing Age Provisions

Recital 25 reads as follows,

> The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

This Recital acknowledges that apart from essential characteristics of a job catered for by the device of genuine occupational requirements, there may be occasions when a difference in treatment on grounds of age may be legitimate. We shall see that this occurs when a Member State is pursuing legitimate employment policy, labour market and vocational training objectives. This Recital also acknowledges the widespread use of age across the EU as a work and man-power organisational tool in employment law and policy, employment contracts, collective agreements and vocational training. It helps to highlight a very great difference between age and all other grounds in the Article 13 Directives, namely, that it has traditionally been acceptable

[151] Para. 51, see also *Mangold, Palacios de la Villa* op cit. and *Rosenbladt*, Case C-45/09 [2011] IRLR 51 [2011] ECR not yet reported.

[152] This Recital was inserted at the request of the United Kingdom.

[153] European Commission, (2011) at pp. 55–56.

[154] Idem.

to make employment laws and employment decisions based on a given age far more often and, in a wider range of circumstances, than for other grounds.

Bell and Waddington remind us that there are occasions when anti-discrimination grounds are relevant to perform a job or use a service or good.[155] In this regard, they differentiate between a ground such as sex in the context of pregnancy, which may affect *availability* to perform a job, use a service or good, or age and disability, which may be relevant in limiting *ability* to perform a job, use a service or good. However, they argue, "Some of the grounds covered by EC equality law can be regarded as truly irrelevant to the employment/access decision in that they have no effect on the ability or availability to perform work or use services or goods. This is arguably the case for gender (as opposed to sex), race and ethnic origin, and sexual orientation".[156] This helps to highlight how acceptable it is to use age as a "relevant" characteristic in these domains. However, a deeper or different scrutiny might make us more wary of blithely accepting age rules/decisions as the norm or as acceptable. The Article 13 Directives do not cater for cases of multiple or intersectional discrimination. One danger of permitting differences in treatment for workers of a certain age or age group is that they may damage one particular sub-group more than another. We may enquire if a rule affects older women more than older men or whether it affects older workers with caring responsibilities more than older workers without caring responsibilities, for example. Even though being a carer is not protected by EU discrimination law, it may be in some EU Member States and further scrutiny may give rise to fresh information about the profile of those most affected by the age-based rule. Recital 25 also serves to remind us that the 27 EU Member States are a heterogeneous group and the employment provisions in each Member State may reflect their different contexts and challenges. It also introduces us to the idea that some age discrimination may be justifiable.

Article 6 of the Employment Directive gives practical expression to the ideas in Recital 25 and is entitled *Justification of differences of treatment on grounds of age*. Article 6.1 permits Member States to provide that differences of treatment based on age will not be discrimination, "if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and the means of achieving that aim are appropriate and necessary". It then gives examples of permissible differences in treatment.[157] Article 6 is unique in the Article 13

[155] Bell and Waddington (2003), pp. 349–369.

[156] Bell and Waddington (2003), op cit. At footnote 62 they clarify that access is being used in this context to signify access to goods and services.

[157] "Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for

Directives that are in force, as it provides an additional method for justifying only one ground of discrimination, namely age. When the Directive was first drafted, Article 6 was originally understood as justifying direct age discrimination only.[158] It now seems to be understood in some quarters, as also capable of justifying indirect discrimination.[159] It would appear that there may well be an additional means of justifying both direct and indirect age discrimination in EU law, to the opportunity for objectively justifying indirect discrimination which is available to all grounds in the Directive.[160] Numhauser-Henning reminds us that the traditional view is that direct discrimination may never be justified but has reported on an increasing trend in EU law towards justifications for direct discrimination.[161]

There are three necessary steps to justifying age discrimination in line with Article 6.1. First, is there a difference in treatment based on age? Second, is there a legitimate objective which objectively and reasonably justifies the difference in treatment based on age? Third, are the means used to achieve the objective appropriate and necessary? Article 6.1 is vague, inelegant and seemingly, open-ended. It attracted a fair amount of criticism, particularly in the early days of the Directive when the debate centred on the hierarchy of protection referred to above. However, technically speaking, despite any flaws it appeared to work as a testing mechanism in *Mangold* which was the first case to apply it. Much may depend though on how generous the ECJ is in accepting a legitimate aim put forth by a Member State. At the time of writing, a recent judgment *Georgiev*[162] showed the ECJ bending over backwards to indicate what legitimate aims might be imputed to the regulation of compulsory retirement of university professors in Bulgaria and that it might be prepared to accept in that context.

The Court reiterated[163] that even when an aim is not clear from the legislation,[164] this does not mean the legislation does not pursue a legitimate aim. It

recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement".

[158] The Proposal for the Directive referring to Article 5 (now Article 6), states "... This Article provides a non-exhaustive list of differences of treatment on grounds of age which shall not constitute direct discrimination, provided they are objectively justified..." European Commission, COM(1999) 565 final, Brussels, 25.11.1999 at p. 10.

[159] See European Commission (2011) at p. 23 which clearly states that Article 6 permits justification of direct and indirect age discrimination. Note discussion of the borderline between direct and indirect age discrimination in the context of Article 6 in Meenan(2003) at pp. 20–21.

[160] Article 2(b)(i). Note also Article 2(b)(ii) in relation to appropriate measures to be taken by employers in relation to persons with a particular disability.

[161] Numhauser-Henning at pp. 173–174.

[162] *Vasil Ivanov Georgiev v Tehnichesi universitet – Sofia, filial Plovdiv* Joined Cases C-250/09 and C-268/09 ECR not yet reported.

[163] Referring to three decided cases under Article 6, *Palacios de la Villa, Age Concern England* op cit. and Case C-341/08 *Petersen*.

[164] Or from the case file in this case.

is important to identify the aim in order to assess its compatibility with the Directive.[165] While this is a job for the national court, the ECJ, after the general submissions of the university, the Bulgarian Government and the more specific submissions of other governments and the European Commission, indicated that a legitimate aim linked to employment and labour market policy, "such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations"[166] might be appropriate.

Gerhard Fuchs, Peter Kohler v Land Hessen,[167] concerned the compulsory retirement of state prosecutors at the age of 65 in one region of Germany. Mr Fuchs and Mr Kohler applied to work beyond 65 which they were permitted to request, until the age of 68, if it is in the interests of the civil service. Their request was rejected on appeal. However, the German court doubted that compulsory retirement at age 65 was compatible with the Employment Directive, especially as that age was chosen when the view was that fitness for work declined after that age. When current research showed that fitness for work varies from person to person, the legislature raised the retirement age to 67 for other federal civil servants and private sector employees.[168] The ECJ was asked whether the Employment Directive precluded this law if it has one or more of the following aims, "the creation of a 'favourable age structure', planning of staff departures, promotion of civil servants, prevent of disputes or achieving budgetary savings".[169] All parties agreed that the compulsory retirement at 65 created a difference of treatment on grounds of age.

The ECJ then examined if there was a legitimate aim for the rule. Although none was clearly stated in the legislation, the ECJ was prepared to accept those[170] put forward by the national court and concluded that "the aim of establishing an age structure that balances young and old civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy".[171] However, the national court was concerned that the measure met the interests of the employer rather than the public interest as required by Article 6(1) of the Directive. Furthermore, could the fact that the measure was adopted by a single region of Germany for only some of its staff, render it, not in the public interest? The ECJ found that the aims in this case, which take account of the

[165] Para. 43.

[166] Para. 68.

[167] Case C-159/10, C-160/10, Judgment 21 July 2011.

[168] Para. 24.

[169] Para. 32.

[170] Note budgetary savings is absent.

[171] Para. 50.

interests of the civil service, may be regarded as being aims of public interest as they were motivated by ensuring a high-quality service and were related to employment and labour market policy.[172] Nor did the fact that it was adopted at regional level prevent it from pursuing a legitimate aim in line with Article 6(1).[173]

The ECJ then addressed whether the rule was appropriate and necessary to achieve the legitimate aims? It recalled that Member States enjoy a broad discretion in the means used to achieve their aims, but they may not frustrate the principle of non-discrimination on grounds of age, which must be read in light of the right to engage in work recognised in Article 15(1) of the EU Charter of Fundamental Rights. Moreover, attention must be paid to the participation of older workers in the workforce.[174] The ECJ also recalled the *Palacios de la Villa* case where it accepted the compulsory retirement of certain older workers in Spain as encouraging recruitment and not unduly prejudicing older workers if they are entitled to a reasonable pension.[175] It decided that the rule affecting Mr Fuchs and Mr Kohler did not exceed what was appropriate and necessary as they retired on a full pension, with a possibility of working until 68 if they request it and it is in the interests of the civil service.[176] As regards the aim of budgetary considerations, it clarified that while they can underpin a Member State's social policy they cannot constitute a legitimate aim within the meaning of Article 6(1) of the Directive.[177]

The second question referred to the ECJ in this case revisited the issue raised in *Age Concern England* of what evidence is required to demonstrate that a measure is appropriate and necessary to achieve a legitimate aim. In *Age Concern England* the ECJ made clear that "mere generalisations" indicating that a measure was likely to contribute to employment policy would not be enough and the Directive imposed a burden on Member States of establishing to a high standard of proof the legitimacy of their aim. In *Fuchs* the ECJ adds to this saying that the evidence supporting the choice of measure may include verifiable data but also forecasts, which by their nature, may be uncertain.[178] The third question addressed the inconsistency of requiring state prosecutors to retire at 65 while raising the retirement age to 67 for certain other employees. The ECJ decided that the law at issue did not lack

[172] The ECJ pointed out in para. 52 that in *Age Concern England* op cit. at para. 46 that It had already clarified that aims are 'legitimate' if they have a public interest distinguishable from purely individual reasons particular to the employer's situation but it could not be ruled out that a national rule may, in pursuing that aim recognise a certain flexibility for employers.

[173] Para. 55.

[174] Paras. 61–63.

[175] Para. 66, the ECJ also referred to the *Rosenbladt* case op cit. in support of this point.

[176] Paras. 67–68.

[177] Para 74.

[178] Paras. 78–82. In the end it is for the national court to assess under the rules of national law, the probative value of the evidence which could also include statistical evidence.

coherence because it was possible for prosecutors to request to continue working until 68; the fact that the retirement age for different German employees had been increased to 67 did not render the other rule invalid.[179]

The joined Cases of *Sabine Hennigs v Eisenbahn-Bundesant* and *Land Berlin v Alexander Mai*[180] concerned two public sector employees in Germany and the determination of their pay according to a collective agreement called, BAT. Under the BAT, initial pay on taking up a position was decided by the age of the applicant. Thereafter classification on each pay grade depended on the job performed by the employee but within each group his basic salary was determined according to his age and every two years his basic pay moved up to the next age group. However, complicated provisions applied for employees who joined after the month in which they reached 31 or 35 years of age, whereby only half of the period from that birthday to their present age was included. Thus, entirely comparable workers could receive very different pay according to when their thirty first or thirty fifth birthdays fell. The German court sought interpretation on whether the principle of non-discrimination on grounds of age contained in article 21 of the EU Charter as given expression in the Employment Directive, must be interpreted as precluding a measure in a collective agreement which provides that within each salary group, the basic pay step is calculated by reference to an employee's age?

In the first place the ECJ clarified that the social partners may like Member States provide for differences in treatment on grounds of age further to Article 6(1) of the Directive, and enjoy the same discretion as Member States in their choice of aim and means of achieving it. They too must comply with the Directive. The German court stated that the higher pay of older workers was justified by their longer professional experience and rewards loyalty to the firm. Lower courts that had heard this case regarded the higher pay of older employees on their appointment based on age and regardless of experience, as compensation for their greater financial needs.[181] This aspect was rejected by the ECJ, it had not been shown that there was a direct correlation between the age of employees and their financial needs.[182] However, the basic aim of rewarding experience was a legitimate one within the meaning of Article 6(1).

However, the ECJ found that the BAT went beyond what was appropriate and necessary to achieve this aim as it could result in awarding an older employee with no experience a sum equivalent to a younger employee with considerable experience. The principle of non-discrimination on grounds of age must be interpreted as precluding a rule which provides that the basic pay on appointment, of a public sector employee is determined by reference to his age.[183] *Sabine Hennigs* also

[179] Paras. 92–98.

[180] Cases C-297/10 and C-298/10, Judgment 8 September 2011, not yet reported.

[181] Paras. 69–70.

[182] Para. 70.

[183] Para. 78.

concerned the BAT but she was transferred to a new pay scheme that did not rely on age categories for the calculation of pay but relied on objective criteria. The question was whether transitional arrangements, whereby initial pay was based on pay under the old discriminatory system was precluded by EU law? The ECJ found that even though this arrangement discriminated according to age, it aimed to avoid losses of income for existing older employees and enabled the social partners to switch to the new objective pay scheme.[184] Moreover, the arrangements were transitional and temporary and the discriminatory effects would disappear in time.

One of the most factually interesting age cases to date is, *Prigge and others v Deutsche Lufthansa*,[185] where a German court sought a ruling as to whether Articles 2(5) (the protection *inter alia* of health), 4(1) (GDOQs) and 6(1) of the Employment Directive precluded a national age limit of 60 for airline pilots for reasons of air safety, established in collective agreements. Under German rules many airline pilots' employment contracts were automatically terminated at age 60. However, Germany also subscribed to international legislation which permitted pilots to fly over the age of 60 and up to the age of 64 if, they were part of a multi-pilot crew and were the only pilot on the crew who had attained age 60. Pilots aged 65 were no longer allowed to fly in commercial air transport. Interestingly, other German rules contained in different collective agreements did not set an age limit of 60 for pilots.[186]

The ECJ established that the Directive applied to the clause in the collective agreement as it concerned the employment conditions of pilots and they experienced less favourable treatment, than younger pilots. It decided that the Directive must be interpreted in light of the rule's objectives of guaranteeing air traffic safety and the protection of health. However, in light of the national and international law which permitted pilots to fly above the age of 60, the "age 60 rule" in the collective agreement was not "necessary" to achieve the objective of the protection of health.[187] Article 4(1) permits Member States to provide for a difference in treatment based on a characteristic related to any of the protected grounds if, it constitutes a "genuine and determining" occupational requirement (GDOQ) provided the objective is legitimate and the requirement is proportionate. The ECJ stated that it is essential that airline pilots have particular physical capabilities and that it was "also undeniable that those capabilities diminish with age" therefore, possessing particular physical capabilities may be considered as a GDOQ for airline pilots and that the possession of such capabilities is related to age.[188] Once again the rule failed for inconsistency with international and national legislation. The ECJ could find no apparent reason from the information given or presented to it, why

[184] 95–99.

[185] Case C-447/09, Judgment 13 September 2011, not yet reported.

[186] These rules even applied to other companies in the Deutsche Lufthansa group, see para. 30 of the Judgment.

[187] Para. 63.

[188] Para. 67.

pilots could no longer fly above the age of 60 even with some restrictions. For these reasons the rule was a disproportionate requirement within the meaning of Article 4(1) of the Directive. Finally, the ECJ decided that the "age 60 rule" could not be tested under Article 6(1) as the aim of air safety does not fall within the aims allowed by it which refer to employment policy and related objectives.[189]

Of the fourteen judgments so far delivered by the ECJ, thirteen arose from referrals by a national court or tribunal seeking interpretation[190] on whether certain national rules fall within the Directive and may be justifiable in light of Article 6.1.[191] However, three of these were decided by the ECJ primarily by relying on other provisions in the Directive namely, Article 4(1) concerning genuine occupational requirements in *Wolf* and Article 2(5)[192] concerning public health of patients in *Petersen* and the compulsory retirement age of dentists. The ECJ decided the *Prigge* case under both Articles 4(1) and 2(5) as noted above. It is surprising how many age references there are compared to all other grounds in Article 19, Lisbon Treaty except sex. Sex has been protected in EC law since the late 1950s therefore it has a head start of half a century and concerns roughly half the population. So far, the number of discrimination cases decided by the ECJ on grounds of age generally dwarfs by a ratio of up to 14 to 1,[193] the number of cases on the remaining Article 19 grounds.

Many explanations for this phenomenon are possible. First and foremost, is the long-standing widespread use of chronological age across the EU Member States, in employment and training. The most common instances concern recruitment ages, retirement ages, fixed term contracts for older workers and calculation of service periods for younger and older workers. Second, workers of any age do not feel the same need for privacy as a victim of sexual orientation or religious discrimination might. Third, regular media coverage of age cases at EU and national levels helps to spread knowledge of age discrimination law. Fourth, growing public awareness of our longer lives, later pensions, smaller public purse and the increased financial insecurity of our times may encourage older workers to fight back against unfair employment decisions, more than they would have done before the Directive, when few EU Member States had their own age discrimination law or unfair dismissal rights for those working after retirement age. However, it may now be prudent to

[189] Para. 82.

[190] This follows the preliminary ruling procedure, a well worn path in European law whereby a national court refers a question for interpretation of European law to the ECJ. The interpretation is then sent back to the national court which applies it to the case before it, Article 267 (TFEU) (ex Article 234 EC).

[191] The other case, *Susanne Bulicke v Deutsche Buro Service GmbH*, Case C-246/09, concerned Articles 8 and 9 of Dir. 2000/78.

[192] Article 2(5) provides "This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others".

[193] Depending on the ground.

re-evaluate the culture of acceptance of age as a "relevant" characteristic in the workplace, in light of our much longer lives and, our more unpredictable ability to finance them. Do age limits which long pre-date the Directive, and may well be outdated, stand up to scrutiny against our extra years in generally better health?

4.17 Monitoring and Compliance

The European Commission is required by the Employment and Race Directives to report on their application in the Member States every five years.[194] This has revealed that most of the rules containing age distinctions were maintained as they were prior to the Employment Directive. Furthermore, only a few Member States had comprehensively surveyed their measures with age distinctions for compatibility with the Directive.[195] This is required by the compliance provision, Article 16. Due to the prevalence of age restrictions, age would benefit from the compliance requirements in Article 16 more than other grounds would.[196] Perhaps some age discrimination references heard by the ECJ could have been avoided if Member States had tested their measures containing age distinctions for compliance with the Directive. However, it is also arguable that only the most obviously flagrant provisions might have been caught by this method. This early body of judgments is probably very necessary for guidance to national courts and may also be helpful to any Member who may contemplate a late review of their age laws for compliance with the Directive, in particular but not exclusively, Article 6(1).

4.18 Looking to the Future in the EU

Despite a slow start compared with other jurisdictions, the EU compensated for time lost by most of its Member States, with its Employment Directive in 2000 which required its Member States to outlaw age discrimination in employment. As a body of law, EU anti-discrimination law is probably not perfect but it is dynamic, sophisticated and reflects better than ever, the diversity of the European population. The processes under which it is conceived and monitored are now reasonably

[194] Article 19, Directive 2000/78.

[195] European Commission (2011), pp. 93–96.

[196] Article 16 requires Member States to take measures to ensure that, "(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished; (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be declared null and void or are amended".

reflective and consultative. It still leaves a significant role for the ordinary individual to play their part in developing judicial interpretation of EU law, by means of the preliminary ruling procedure whereby their small case may be referred by their national court to the ECJ. It seems that many ordinary people are bringing age claims in their local courts.

Of potentially greater excitement in the context of this chapter as a whole is the prospect of the Goods and Services Directive. It is similar to the Employment and the Race Directives especially in the forms of discrimination it prohibits, remedies and enforcement. It applies to all persons in the public and private sectors in relation to social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public including, housing.[197] One of the great advantages of this draft Directive is that it requires the Member States to designate a body for the promotion of equal treatment on all of its protected grounds.[198] This provision will help to close the gap in the so-called hierarchy of protection between race and sex and the remaining Article 19 grounds, even further. Race and sex have enjoyed the benefit of such a body both inside and outside employment for some time already. However, it would leave another gap. Religion or belief, age, disability and sexual orientation would be without a promotional equal treatment body for employment and vocational training. A Member State is still free to designate that any of its promotional bodies also cover any field it wishes. This has occurred in Ireland where all grounds are covered inside and outside employment and in the UK, the Equality and Human Rights Commission (EHRC) has a similar statutory responsibility.[199]

4.19 EU Law and Justifying Age Discrimination Outside Employment

The proposal for the Goods and Services Directive contains two permissible exclusions from age discrimination law. The first Article 2.6 corresponds roughly with Article 6.1 of the Employment Directive and provides as follows,

> . . . Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In

[197] Article 3.

[198] Article 12, such a body must provide independent assistance to victims of discrimination, conduct independent surveys on discrimination and publish independent reports and make recommendations on any issue relating to such discrimination.

[199] "to promote equality, to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected' grounds – age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment", see the EHRC website at, www.equalityhumanrights.com/about-us/.

> particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

This provision is immediately far more concise and, for that, more elegant than Article 6 of the Employment Directive. The Explanatory Memorandum (contained in the Proposal for the Directive),[200] provides the following guidance, "as exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required".

The second permitted exclusion is contained in Article 2.7,

> . . .in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate statistical data.

The Explanatory Memorandum clarifies that this refers to insurance and banking services and is in recognition of the fact that age and disability may be essential for the assessment of risk for some products and therefore of price. It argues that if insurers are not allowed to take age and disability into account at all, then additional costs would have to be borne by the rest of the pool of those insured, which would result in higher overall costs and lower availability of cover for consumers.[201] We will have to wait and see if, even at this late stage this provision remains in the Directive when it is adopted. Doubt is cast by a recent judgment of the ECJ in *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*,[202] concerning the Sex Equality in Goods and Services Directive[203] and the use of sex in calculating insurance premiums and benefits. This Directive permitted a derogation from its own rule that gender must not be used as a factor in calculating insurance premiums after 21 December 2007.[204] The ECJ decided that taking sex into account in this way was in principle discriminatory despite the fact that the Directive allowed Member States to progressively phase out this practice.[205] The problem for the ECJ was that no time limit was effectively put on this possibility and the ECJ declared the provision invalid from 21 December 2012.[206]

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[200] At p. 8.

[201] P. 8.

[202] Case C-236/09, Judgment 1 March 2011.

[203] Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

[204] The derogation allowed Member States to charge different premiums to men and women, if calculations are based on reliable, regularly updated data available to the public. It must now cease from 21 December 2012, on the basis that otherwise there was a risk that EU law would allow the derogation from the principle of equal treatment between men and women, to persist indefinitely, see para. 31 of the judgment.

[205] Article 5(2).

[206] The derogation pulled against another provision in the Directive which required Member States to abolish such practices by 21 December 2007, see Article 5(1).

In the meantime, it is well worth noting a positive recent development. The Lisbon Treaty introduced a broad mainstreaming provision for all the Article 19 grounds, Article 10, "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[207] Writing about mainstreaming in EU policy, Jo Shaw previously reflected "it is none the less hard to see a more authoritative expression of a public desire to eradicate discrimination than Article III-118 CT provides. On the other hand the dangerously open terms of the text provide little in themselves".[208] Despite this regret, Article 10 is a major advance for EU equality law. In varying degrees and methods, mainstreaming for disability, gender and race already existed in the EU. This provision contributes toward greater equality among the Article 19 grounds and as a real tool to combat discrimination at the level of EU governance.

4.20 Conclusion

The Goods and Services Directive, once adopted may bring us closer to Rebecca Morgan's and others' vision of the place and usefulness of age discrimination law to the sphere of elder law. The problems of the *YL* case in the UK highlight potential gaps in human rights protection for individuals who benefit from the ECHR. How could human rights or age discrimination assist a self-funding care home resident? One example might be where a private home caters both for recuperating or rehabilitating adults (of different ages) and also provides residential care for older people[209] and the elder care is of a lower or negligent standard. If the home provides care to a blend of private and publicly-funded persons then human rights values may help to provide guidance as to what is an acceptable level of care. After all, the only difference between who benefits from human rights protection and who does not, is who is paying for their care not even, where the care takes place at least in the UK. Age discrimination legislation might not have helped in Mrs YL's particular case but might do so in the situation described, above. It is difficult to imagine age discrimination helping older couples that are placed in separate care homes.

At the end of this chapter, the question remains which avenue do you choose to pursue a human rights claim, an elder rights or an age discrimination claim if you are an EU citizen? That will depend on further questions being answered. These will likely include. Who will the action be against? If a private party then more likely than not, human rights is not viable. What are you hoping to achieve? Is it a matter of personal compensation or persuading a State to rectify law or practice? The former may point to human rights or age discrimination (depending on the issue). The latter

[207] Article 10.

[208] Discussing the draft predecessor to Article 10.

[209] This kind of home is not uncommon in Ireland, for example.

may point to the ESC/RESC. Who is taking the claim? Individuals are likely to favour human rights or EU discrimination law however, the ECHR and RESC can conceive of group complaints which are not, apart from any role for campaigning and promotional bodies, a feature of EU anti-discrimination law. The ECJ often amalgamates cases with identical legal issues but this is not the same thing.

The EU Charter acts as a standard of behaviour and interpretation for EU Member States when they are implementing EU law. It also serves as a compendium, showing the citizens all rights available to them, but redress, when any is available, will be located elsewhere in the large corpus of EU law. Thus far, elder rights in EU law are really principles and have no redress mechanisms, as they begin and end with the EU Charter and are not found elsewhere in EU treaties, nor have they been implemented into legislative acts. However, given the interpretive and guiding role of the Charter and their novelty in EU law, there may be scope for Article 25 of the Charter to yet have more influence and potential than we imagine. Discrimination within the ECHR may be envisaged in a narrow range of issues for clients concerned with fields mainly outside employment, against the state or a state body. For clients concerned with age discrimination in employment or training, the clearest path to redress appears to be EU age discrimination law as implemented in the national law of Member States. An action may be brought against a private or public employer. In due course, EU age discrimination protection in goods and services will also have the clear advantage of being addressed to private and public purveyors of goods and services.

Implementation gaps are a fact of life. This is amply demonstrated by EU Member States that are bound by international, Council of Europe and other treaties by virtue of their membership of the EU, but pick and choose what to sign, accept and ratify in their purely national capacity. Arguably, this is their prerogative. What is very clear is that there is an apparent abundance of rights available to elders in the EU, whether speaking of age discrimination, human rights or rights of the elderly. How to pull them all together so that they make sense for older people and their attorneys is one of the present challenges. Another challenge is identifying any remaining spaces between the available rights at their different levels. What is interesting is that we have often treated so many fields as being separate when discrimination and human rights often inhabit the same convention or instrument and in the case of the EU Charter the right to equality and rights of the elderly are housed together in the equality chapter. Any historic separateness now seems increasingly artificial. The right not to be discriminated against is a human right. The more overarching right to dignity which underpins so much of European human rights and national human rights culture is acknowledged in relation to both Council of Europe and EU instruments.[210] This is an obvious right and value to guide the care and welfare of

[210] Note however, Article 1, EU Charter of Fundamental Rights, Human Dignity, "Human dignity is inviolable. It must be respected and protected". The Explanations op cit., explain *inter alia* that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected even where a right is restricted". Note the reference to dignity in Article 25 Rights of the elderly.

older persons. Reasons of space and its frequently un-enumerated quality made the right to dignity unsuitable for exploration in this particular chapter, but it too needs to be examined further when considering the future of elder law.

Age has benefited from a stage of productive and inclusive activity in EU equality law and fundamental rights. However, at this point in time the rights of the elderly in the EU Charter remain to be fully explored. In the EU and arguably also in the UK, we are living in an exciting era of equality and human rights. It would be a shame if age's place at these various tables were compromised in the hands of legal practitioners through lack of awareness, knowledge, training or will. Education in all its meanings at all stages of life for the public, lawyers, governments and students is the key.

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Chapter 5
Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations

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Whether it is in the context of advising a client on estate and life planning, the preparation of a will, a power of attorney,[1] *an advance directive or around the time of the coming into effect of these instruments and in the manner of their performance or in the resolution of family and caregiver conflicts around life transitions, including living arrangements, guardianship, and medical decision-making, lawyers often have to deal with family members in an array of situations raising important ethical considerations for the practitioner and important opportunities to clarify and define rights, wishes and values of the older client, to explain legal responsibilities of caregivers and legal representatives, to prevent mistakes from happening and to resolve problems before they lead to litigation.*

The emotional and legal costs of litigation are high. No fiercer fights are fought than by family who feel wronged by a parent or family member whether justified or not. Families may be torn apart and millions of dollars wasted. Experiences in dealing more effectively with these issues, and other aging concerns, which are at the core of the practice of Elder Law, have taken us beyond Elder Law to develop standards of practice having application to the representation of clients of all ages, to innovate new applications of ethics and alternative dispute resolution, to apply collaborative and integrated approaches to problem solving and planning, and to foster better understandings and a new cultural shift to openness and communication with family in succession, incapacity and end-of-life planning.

The aging of society and the longer life spans of older adults means that generations are linked together for more years than ever before in history.[2] *Great-grandparents are still alive in many families and relationships between grandparents and grandchildren are diverse and expanding, while at the same time there are fewer children, siblings and cousins in many families. Another trend is the rate of divorce, re-marriage and co-habitation in old age. This phenomenon has produced a complex set of intergenerational relations within*

[1] A "power of attorney" herein refers to and includes, from time to time, general, specific, continuing, enduring and durable powers of attorney of whatever nature and all other legal documents executed by a capable person wherein another is appointed to act as legal representative for that person for some stated purpose(s) while the latter is competent and/or incompetent.

[2] Bengston et al. (2002).

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biological and reconstituted families.[3] *While levels of solidarity or closeness across generations have been retained a good deal of conflict has been observed.*[4]
Sociologists have posited that the parent–child and other family relationships have dimensions both of solidarity, characterized by closeness and support, and of conflict, characterized by tension and disagreement. There is an evolving third construct at the intersection of these two: ambivalence.[5] *Whether relations are positive, negative or ambivalent there is no doubt family life can be complex, contradictory and uniquely challenging as one ages. If one is able to successfully meet these challenges a unique strength arises. If not realized, one is left vulnerable and open to ongoing disruption in one's life.*[6]

5.1 Ethical Issues Involved in Representation by a Lawyer When Family and Others Seek to be Involved[7]

> Why am I left in the waiting room? Your parent, an elder relative or disabled adult child is getting legal advice. Shouldn't you be included? After all, you might be very involved in helping him or her with important matters. Perhaps you even arranged this appointment.[8]

Family members may be very involved in the legal concerns of an older person and may even have a stake in the outcome. While family and friend involvement is very important they need to be helped to understand the ethical obligations that lawyers are required to follow.

It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common in married couples. However, there are several reasons why lawyers always need to meet with the client alone for at least part of the case evaluation process. The lawyer will need to explain to the family member or friend his professional duties to his client of loyalty, confidentiality and avoidance of conflicts of interest.

It is important to understand that many of the present generation of older clients (unless they were previously engaged in a profession or business) find a visit to a lawyer's office intimidating. Many will have had little experience with lawyers during their lives. Very often the subject matter of the interview is emotionally laden, as the issues requiring the client's interaction with counsel deal with mortality or potential loss of independence. Extra care is needed to ensure the client's comfort so that communication can proceed uninhibited.

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[3] It will not be possible in this chapter to explore the vast array of emerging family law issues arising from later-life divorce, re-marriage, cohabitation and grand-parenting.

[4] Lowenstein and Bengtson (2003).

[5] Supra note 2.

[6] Gibson and Hartley (2006).

[7] This section includes extracts from Soden (2005) with permission of the publisher.

[8] Extract from the ethics brochure, "Understanding the Four C's of Elder Law Ethics?" prepared by Wake Forest University, School of Law,and adapted by the American Bar Association, Commission on Law and Aging.

Some older clients may have the support of a third party, normally a family member, in the course of representation, starting with the initial interview. A competent but dependent client or one with some diminishing mental capacity may rely on another person to articulate his or her wishes. The lawyer must ensure that the client's decisions are free and enlightened and that the client is not subject to undue influence. For this reason the lawyer must provide adequate time, in an appropriate setting, to interview the client alone, preferably on more than one occasion, to confirm capacity, freedom from undue influence, and the goals of representation.

In addition to traditional estate and later life planning, lawyers, accountants, health care, and other service professionals sometimes enter the lives of their clients at crucial moments where timely action is often necessary. The professional is privileged to have intimate contact with clients and their families, and is uniquely placed to identify current or future needs before those needs would otherwise be identified or addressed. Because of their status lawyers and other professionals enjoy a high degree of respect, deference, and compliance. This special trust and special power carries a heightened responsibility to see that neither is abused.

Special responsibilities and ethical principles include guarding against such subtle abuses as paternalism and ageism towards the older client. A paternalistic attitude leads one to substitute one's own judgment of what one feels is in the client's best interests, and then to convince the client of this view. Benign ageism is a generalized view of older and disabled persons as frail, vulnerable and requiring protection. The autonomy of a physically frail or vulnerable person, but one who is otherwise capable, or of the mentally impaired person, are at times co-opted in the name of expediency when a professional fails to zealously advocate the least intrusion upon a person's rights of independence and self-determination. Information provided with the client's consent by family members, while useful and well-intended in most instances, can be misleading when imbued with an attitude of overprotection. In addition, legal and other professionals often unintentionally err on the side of protecting against risk, rather than supporting autonomy.

> A doctor has evaluated a client as having the onset of dementia and in need of financial and asset protection because of the potential of exploitation or dissipation of assets. The client has no power of attorney. In addition to considering the advisability and need for the opening of a limited guardianship or taking of other appropriate protective measures, questions involving a move to a long-term or other care facility, sale of one's home, the ability, notwithstanding diminishment of capacity, to execute powers of attorney for finances and for healthcare, and a (testamentary and living) will, come into play which will have an important impact on the dignity, self-determination and quality of life of the client. The lawyer will be called upon to advocate the wishes of his client in many regards, and, where appropriate, with the assistance of multidisciplinary professionals. Ethically and professionally the lawyer would be failing his older client if he were to take the family's side in what they believe to be in the older client's best interests.

Being a competent legal advisor demands more than a strict technical knowledge of the law. A lawyer serving an older or disabled client will frequently be called upon to assume the additional roles of advisor, counselor, drafter, supporter, reinforcer, and friend. The older client will depend on the lawyer to deal with

needs that exceed the strictly "legal," and the lawyer has to be sensitive to these needs. For example, a family in the midst of a dispute over a nursing home placement at the time of later life planning may present a superficial legal problem, but one with deep psychological roots and intergenerational dimensions. The lawyer has to evaluate these roots and factors as well as the legal issues.[9]

Elder law lawyers have had to alter the parameters of their practices to facilitate and resolve legal and non-legal planning and concerns. The circle of close family members and friends of older clients has dramatically diminished often with the result that there are no close relatives on whom to rely. Additionally resources are often disparate and difficult to access. But it is also the case that older clients are more willing to defer to an independent counselor than to involve family. This attitude may be due to a desire to retain independence and control over all aspects of their affairs or not to be subject to their children's advice and directives until their wishes and decisions are fully formulated with legal counsel. Maintaining some distance from family during the initial legal counseling also has the distinct advantage for the lawyer of avoiding potential conflicts of interest and ethical dilemmas. Family and friends are less likely to be accused of undue influence over the older person or that they unjustly benefitted from decisions that were made if they too maintain their distance during legal consultation. Involving family at a second stage, with representation, to inform them of decisions and to invite their views as to certain matters is quite appropriate.

Having assessed the issues the client is faced with, the lawyer has to choose wisely whether to act as zealous advocate, counselor, peacemaker or problem-solver. He may be faced with conflicting values and interests in deciding what roles to play. Technical mastery of the law and zealous advocacy may not be the best options in serving the client, particularly the older client, needing simplified, efficient and sensitive solutions to the issues and problems he is faced with. It is lawyers in practice who make most of the judgments in law, not judges in courts. They are accordingly entrusted with the great responsibility to do right by and for their client. A lawyer's judgments about what advice to give his client and what role he should play require not just specialized skills for the task at hand but faithfulness to the client's goals. He has to be sure that he is not being directed or influenced by anyone else's goals, including a family member's, and that his client is fully and freely consenting to a proposed course of action. The lawyer must explain the ramifications of what he is proposing, the legal restrictions and time involved and be sure the client can understand the options, risks and solutions proposed.

The lawyer is called upon in all fields, but no more acutely than in the field of Elder Law, to exercise sound ethical and practical judgment in representing his client. Elder Law lawyers are regularly called to deal with multifaceted problems, sometimes chaotic and fragmented. They must identify and confirm early on who

[9] Supra note 7, Piccini-Roy (2005).

the client is in the case and to whom they consequently owe their duties of loyalty and confidentiality.

Professional ethics is not a subject separate from other facets of professional activity, but rather is interwoven into every aspect of acting professionally and goes to the very heart of a lawyer's desire to deal sensitively with family members and obligation to serve clients competently and loyally, particularly clients in vulnerable circumstances and those with diminished capacity.

5.1.1 Representing the Client with Diminished Capacity

One phenomenon which is correlated to, though not caused by, older age is dementia. The label implies no specific cause or pathological process, nor is it an inevitable part of normal aging. While prevalence of dementia increases with age, a substantial majority of older adults, even into great old age, never suffer from any cognitive impairment, or, alternatively, its presence or degree does not adversely affect the normal activities of their daily lives. Physical frailty or disability should never be confused with incapacity nor should mental illness be confused with incapacity. To associate incapacity with aging or with disability is fallacious and discriminatory, but when it is present in a client the lawyer requires appropriate knowledge and ethical standards.

The most obvious ethical dilemmas for a lawyer arise when an older client has diminished mental capacity. A person with diminished capacity may be totally incapable without legal capacity at all or have diminished capacity but be capable of making binding decisions for some matters and not others.

It is long settled that capacity is task-specific and time-specific.[10] A client may suffer cognitive deficits in some domains but remain intact in others. Some clients may exhibit poor orientation regarding date or time, but be well aware of how they want to distribute their estates. Conversely, some clients with significant cognitive deficits may appear cognitively intact owing to their abilities to revert to overlearned behavior, such as appropriate social graces or past business experience.

The standard against which capacity should be measured is the standard set by the individual's own habitual or considered standards of behavior and values, rather than against conventional standards held by others. Without knowledge of this personal frame of reference, in addition to assessment of one's circumstances and the level of risk to one's person and property, as the case may be, involved in the decision or transaction at hand, capacity judgments have insufficient anchor and are liable to be based on someone else's judgment of the propriety of certain behavior, clothed in the clinical language of incapacity.[11]

When a lawyer does not know a client, greater inquiry is clearly required. However, such inquiry need only be related to the task or transaction in question.

[10] Sabatino (2000).

[11] Silberfeld and Fish (1994) at 47–48.

Careful inquiry involves being able to answer the question: is the decision consistent with which the client is? Looking into values, standards, and the subjective frame of reference of the client may help confirm that a particular decision, which might otherwise be considered ill-advised or lacking in good judgment on the part of the client, is consistent with that person's character and goals, and not an evidence of incapacity or undue influence.

Sometimes it is simply by developing a rapport that a lawyer can appreciate and understand a client with some cognitive impairment. More fully understanding the client's values, lifestyle and corroborating the client's wishes and capacity may also involve communicating with family. The lawyer must obtain the client's prior consent and should verify independently, where possible, that the family member is a trusted and objective observer whose values and standards are consistent with the client's. The lawyer should be wary of receiving all his information from one family member and carefully verify expert evaluations submitted from this perspective. It is far too often the case in respect of medical and psychosocial assessments that the entire history of the client, sometimes recorded over several years, has been provided from the perspective of one family member. A great danger in an incapacity assessment is that eccentric, stubborn, abnormal, risk-taking behavior, as sometimes perceived by members of one's family, will be confused with incapacity.

If a lawyer is unsure about a client's mental capacity, it is imperative that the lawyer have a solid process to follow in order to ensure a client's capacity before taking any instructions. There are some obvious warning signs which should trigger this necessary process. They include: (a) arrangements for the initial meeting with a client are made by someone other than the client; and (b) another person accompanies the client to the meeting and is involved in the meeting with phrases like, "What I think mom wants to do with her money is. . . ."

Any such reasonable doubt as to incapacity for the task at hand should be resolved in favor of seeking the client's consent to an independent professional evaluation to remove any questions or concerns about a future challenge. Such an assessment of free and informed consent might be corroborated by the client's chartered accountant or even another lawyer. It need not be by a medical professional, absent any known cognitive diminishment, subject to the nature of the transaction. The verification of a proposed *inter vivos* gift to charity, for example, might be susceptible to challenge by the family arising solely from the fact that it represents a substantial portion of a client's assets. On the other hand a challenge could be avoided or successfully defended if an assessment of the client's informed consent were made by an appropriate professional demonstrating that the gift was both consistent with the client's values, reasonable in relation to his all-over holdings and in line with his tax and succession planning.

Although it appears that the initial problem for the lawyer representing the client with diminished capacity is ethical, more fundamentally it is practical. How does one maintain a normal relationship?

Different legal acts require different degrees of capacity. Even an incapacitated client may have the capacity to enter into a lawyer-client relationship. The

relationship may have to be restricted or modified as the result of diminished capacity, (for example, a client can be given less information or given information in smaller doses), but the framework remains the same.[12] Nevertheless the ability to communicate with a client with diminished capacity might be severely hampered by the client's dementia. This may occur at the outset, with the passage of time with a long-standing client or even over the course of a single mandate. Although the lawyer can explain, can the client continue to understand? Can the client reach an informed decision, if able to reach a decision at all? If the client's mental incapacity is severe and protective action is needed to safeguard the client's health or safety, loyalty can be severely compromised if the lawyer initiates protective action for the client.

The ethical dilemma arising from the duty of loyalty to a client who cannot initially form, nor during the course of representation maintain, a lawyer-client relationship is difficult to grapple with but essential to be dealt with. To arrange for any assistance from a third party, including family, or for protective action, including an evaluation, without the consent of a client would violate duties of loyalty and confidentiality, unless formal leave is granted.

The guiding ethical principles of professional assessment and intervention are always: to presume capacity; to maximize client capacities; to intrude to the least extent possible on a client's decision-making and autonomy when some measure of protective action is recommended; to promote the prior expressed competent wishes of the client with diminished capacity, to the extent known or knowable, in default of which, to promote the client's known or knowable values and standards, and finally, when values and standards are unknown, to advocate a "best interests" or "reasonable person" standard. There is also the connected but subsidiary ethical goal of fostering community resources and family connections to assist and support the cognitively impaired client so that he remains secure yet involved and assisted in decision-making to the extent of any residual capacity.[13]

5.1.2 Determining Who the Client Is: Dangers of Joint or Multiple Representations

Lawyers, who work with clients with diminished capacity, or clients who are competent but have physical disabilities or frailties, frequently interact with the family members of these clients.

> Consider the former client who becomes partially incapable and contacts the lawyer for help in dealing with situations presented by the incapacity, including the naming of a legal representative under a power of attorney. He arrives at the lawyer's office with, or the meeting is set up by, the person who seeks to be named as attorney or proxy.

[12] Fleming and Morgan (2001) at 741–742.

[13] Sabatino (2000), supra note 10, at 502–503.

> Consider the family of a former client, currently incapable, who seeks the advice and services of a lawyer to take some protective action for their incapable relative.
>
> Consider the new or former client with some diminished capacity who may need representation in contesting a capacity assessment or guardianship proceeding because the proceedings are premature or the proposal guardian undesired and/or inappropriate.
>
> Consider the individual requiring protection in virtue of a private or public limited or full guardianship who simply wants to know that his due process rights have been protected and that his voice will be heard in legal proceedings or other procedures, whether contested or not.

Such cases present some important ethical issues for the lawyer. In addition to determining in every case who his client is and to whom he owes the duty of loyalty, how long might the lawyer represent a client with diminishing capacity without seeking formal court appointment as legal counsel and the appointment of a guardian *ad litem* for his client? Is joint representation ever possible in cases where legal representation, capacity and civil rights are at issue? Does the law, or will the court, in all cases ensure the person facing protective proceedings is represented by legal counsel?

The lawyer must clarify for all involved, as early as possible, to whom the lawyer owes the duty of loyalty and what the implications for confidentiality and decision-making are. The lawyer must also be aware of confidentiality and conflict of interest issues which should not be breached.

In avoiding conflicts of interest, the lawyer's duty to protect the client's best interests extends beyond the apparent resolution of the immediate problem. When drafting a trust, a power of attorney or taking a protective action, a lawyer should be ethically obligated to assure that formal authority is not being transferred to another person who turns out to have a conflict of interest with the older person. In such a situation the lawyer could potentially violate his fiduciary duties to the client. The nature and extent of these due diligence and monitoring duties, though evident, are unclear.

While most lawyers understand that there are difficulties inherent in simultaneous representation or sequential representation of multiple clients, they may sometimes forget that there are actually two separate issues at work in joint representation: the actual interests of the clients may be opposite and there is the need to maintain confidentiality of both clients' communications. These can usually be resolved by competent clients agreeing that confidences will be shared before the lawyer can agree to act, and by using waivers of conflict and confidentiality provisions.[14]

Clients with mild cognitive impairment may, with adequate information and sufficient explanation, understand the nature of the waiver of conflict and confidentiality; however, any doubt about the ability of the client to waive confidentiality or conflict requirements should be resolved against such a waiver and that will usually make it very difficult for a lawyer to represent a client with some incapacity

[14] Fleming and Morgan (2001), supra note 12 at 761.

and any other individual in connection with the same or a related matter.[15] Careful attention to the nature of the case and the potential for conflict must also be considered in connection with all cases of joint representation.

Even in a situation in which a waiver has been understood and validly consented to by a client who is still capable of giving a valid consent, the waiver will not protect if a conflict, which has not been or cannot be waived, arises later. In such a case the lawyer, due principally to the privileged communications he has been privy to during the joint representation, will have no option but to withdraw from representation of *all* parties, and, in particular, from the representation of the client when he needs the continued representation most urgently.[16]

When a former client is no longer capable of forming a lawyer-client relationship, the lawyer may have learned personal, as opposed to generally known, information from his former client over the course of a previous representation. That information could be used to the disadvantage of the former client in the course of representing the children or parent, as the case may be, of an older person.

The lawyer may be approached by a member of the family or friend who seeks to be named as private guardian for an incapable adult. The reputedly incapable person may even be a former client. The lawyer may accept to represent the friend or family member while the person whose capacity, autonomy and protection are at issue, remains unrepresented. Lawyers involved in such a family situation, even a harmonious one, may delude themselves into believing that they can indirectly represent the incapable person's interests but this paternalistic attitude is not consistent with professional ethical obligations.

Representation of the incapable older adult whose civil rights are at stake is not universally legislated. Where it exists by statute, it may be facultative. There is a continued resistance by courts and families to recognize the need for legal counsel, driven by paternalistic attitudes and the perception that there will be duplication of process and of legal fees. Recognition of minors' rights to legal counsel in the family law context went through these growing pains years ago and is now broadly accepted.

This author advocates that representation by legal counsel be prescribed by statute in all instances where loss or transfer of a person's civil rights is at stake, except where the court determines that the person's refusal of legal counsel is reasonable in the circumstances. This would ensure due process under the law and, in particular, respect for the public order rule of *audi alteram partem* for the incapable or reputedly incapable person.

The ethical problems inherent in legal representation of clients who are vulnerable or who have diminished capacity are substantial and perplexing. While formal ethical rules require the lawyer to maintain a normal relationship, this will often be difficult in the real world. The client's limited ability to make good legal decisions,

[15] Fleming and Morgan (2001), supra note 12 at 762.

[16] Fleming and Morgan (2001), supra note 12 at 778.

coupled with the possibility of shifting capacity and a strong paternalistic tradition, make representation of this client more difficult.

Such issues as when to withdraw from representation, when to consult with another lawyer, when to seek court approval for representation, and when, how and for whom to take protective action are matters that need elaboration and refinement within the law and further guidance from practice advisors.

In order to protect the client's legal interests and the lawyer's professional standing, the best course of action for an Elder Law lawyer is to act as an advocate for the older client's wishes and to avoid the possibility of conflicts of interest or disclosure of confidential communication by representing more than one member or, indeed, any member of a family in a case where the civil rights and the integrity of the older person are at the heart of the representation.

The need to rigorously respect ethical obligations need not conflict with the avoidance of conflicts of interest, misunderstandings and future challenges by family within properly elaborated later life and succession planning and elder transitions. The involvement of family in such cases is sequential and complementary. The client's wishes and goals are assessed by and with his legal counsel and then as part of the planning process the client explains or discusses, as the case may be, his choices and approaches with his family in the presence of his legal counsel and/or another professional who is there to assist and attest to decisions.

5.2 Planning, Prevention and Settlement of Disputes: The Protections Offered by Informal and Formal Family Meetings and Mediation

> . . .Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. . .
>
> From Notes for a Law Lecture, Abraham Lincoln, July 1, 1850

Mediation embraces a broad range of processes to assist parties in resolving conflicts outside or within the courtroom setting. The key feature of all forms of mediation is a neutral facilitator, usually, although not necessarily, a trained mediator, who assists parties in framing issues, communicating, developing mutually acceptable agreements and solutions relating to legal and non-legal issues that all parties can accept. Because mediation implies informed consent, self-determination and equal decision-making ability it has been considered inappropriate when the client has diminished capacity and there is necessarily a power imbalance. The fact that an adult has diminished capacity does not automatically mean that he does not retain the ability to express wishes, make decisions or enter into agreements with the aid of an attorney. Mediation need not jeopardize legal rights at the expense of preserving relationships and purchasing peace. The adult should be adequately represented by

skilled legal counsel or a party knowledgeable about the legal rights and duties of the parties when diminished capacity is present or disputes or abuse are at issue.[17]

Mediation may be used where a variety of aging issues are a factor in an existing dispute situation (an attorney has made a contested nursing home placement or is intending to sell the family home for self-interest or contrary to the older person's wishes, values and means)[18] or as a structured informational session with a view to preventing potential conflicts amongst family and caregivers. In planning meetings the issues do not entail the resolution of disputes but rather the conveying of information and the seeking of opinions. The presence of a neutral party establishes authority, transparency and facilitates communication and understandings of more complicated, unknown or undiscussed matters. Even when a family is harmonious there may still be some elements of concern or doubt around issues and intentions in light of past family history.

A neutral facilitator is essential. In many informally mediated family planning meetings around estate, later life planning, elder transitions and end-of-life issues, this party may be the client's social worker or doctor or the latter can be present to help a certified mediator or facilitator to maintain neutrality by expanding on general information.[19] The family may also accept, to simplify matters, that the meeting be simply led by the client's legal counsel, as the meeting will have been called at the client's request. In all cases minutes of the meeting and any agreements reached, where applicable, should be circulated following the meeting to those in attendance and to those invited but absent. Finding solutions which are tailored to the needs and wishes of the client, and using the opportunity to provide education about the rights of the client and responsibilities of caregivers and attorneys or substitute decision-makers, ensures that the parties invited to the session are more likely to abide by conclusions.[20]

Of course, mediation may also be used in conflicts which do not directly involve the older person such as communication amongst adult children where there are shared legal, financial and health care decision-making responsibilities, staff conflict and quality of care in long-term care or in estate settlement issues.[21]

The one area of great concern is abuse, neglect and exploitation of older persons. Most experts advocate that mediation and facilitation are not appropriate in cases of abuse. However, where cases of abuse do not involve physical violence or are not egregious, e.g. the case involves some degree of correctable neglect or innocent denial of rights or caregiver stress resulting in verbally abusive outbursts[22] or where there is financial exploitation which may respond to restorative justice and other

[17] Park et al. (1992), at 639.

[18] Butterwick et al. (2001).

[19] Larsen and Thorpe (2006), 301.

[20] Wood (2001) at 811–812.

[21] Foxmen and Mariani (2010), 17.

[22] Mariani and Begler (2008) at 277.

measures of restitution, mediation may be quite appropriate. The session must be appropriately structured to ensure that there are no solutions which are contrary to the older person's free will. In addition to representation by legal counsel, appropriate safety measures should also be in place in such cases which may include adult protective services and other arrangements for monitoring and follow-up by professionals and others in the family and community to ensure protection from reprisals. The person must not be placed in a situation where they can be at increased risk following the session when returning to the home of an abuser upon whom they are dependant.

An important and growing use of mediation in resolving adult guardianship cases has been pioneered by the Center for Social Gerontology in the United States since 1991.[23] While capacity or the degree of incapacity of an adult is not itself susceptible to mediation it may be the central issue in a contested adult guardianship case. Issues of capacity may be resolved prior to mediation and thereby obviate the need for mediation and adult guardianship proceedings altogether[24] or require determination by the court where there are opposing medical experts. However, other matters, notably conflicting opinions by siblings wanting to have "custody" of a parent or by the client who opposes the appointment of the guardian, may well be resolved by mediation even while the contestation of incapacity is later taken to the court for determination.[25]

The adult with limited capacity who contests the guardianship will require adequate representation, support and advice and may require other accommodations such as multiple sessions, appropriate timing and an adapted venue for such sessions, as well as accommodations for hearing and visual impairments.[26] If it appears that his expressed wishes will not prevail in the mediation session, these matters should proceed to adjudication before the court with its attendant procedural and substantive safeguards.[27]

The intervention of lawyers and courts need not be slow, expensive and intimidating provided the roles of these latter are, in the future, sensitively and efficiently adapted and utilized. They need not be a last resort if developed as integral partners in intervention and in the continuum of access to justice.

The opposing party or parties may be unwilling to meet or to mediate and be hardened in their determination to pursue litigation. Power imbalances may be too great. However, it is hoped that mediation in contested adult guardianship cases becomes a mandatory first step in the process. If the court refers the parties to mediation upon the filing of the petition, the parties may resolve in advance many of the disputes that surround the appointment of a guardian, provide education to the

[23] Larsen and Thorpe (2006), supra note 19 at 310; Radford (2001–2002) at 617.

[24] Gary (1997) at 414.

[25] Wood (2001), supra note 20 at 801.

[26] Radford (2001–2002), supra note 23 at 651–652.

[27] Sabatino and Basinger (2000) at 137; Radford (2001–2002) supra note 23 at 664.

guardian and may even devise a framework that may make guardianship unnecessary. Early intervention[28] within or without the court system in the form of mediation may not only offer information, education and coping strategies but address tensions and issues before emotional positions become entrenched and escalate into combat.

Of course where the older person is unable to participate because he lacks requisite capacity, even with the assistance of counsel,[29] mediation is inappropriate.[30]

The following examples illustrate the variety of uses of mediation and facilitated meetings and the multiple opportunities for the resolution of issues which respectfully recognize relational dynamics, family history and the continuing roles and status of family members in an older client's life.

5.2.1 The Family Meeting in Planning and Dispute Avoidance

Estate and life planning begins with detailed planning. Many of the issues in the planning process can be better understood and hence wishes are more likely to be respected when legatees under a will, executors, attorneys, proxies and other family members having legal or other interest in being involved are brought into the process for their opinions and information. Where the distribution of assets under a will and the administration of one's estate during life and upon death is more complex, where there is to be unequal treatment of children or where there is a history of disagreement, resentment, jealousy or distance in a family, a family conference meeting ("family meeting") and agreement[31] of understandings are recommended.

> Mrs. Bruce is a recent 80-year old widow who owns her own house and has about $500,000 in savings. She has two children, a son who is successful and a daughter, a single mother, who has always struggled financially. Mrs. Bruce intends to leave the house which she owns free and clear and most of her savings to her daughter. She did not intend to tell her son. They had always had a very good relationship and she expected he would understand the needs of his sister and the good intentions of his mother. Mrs. Bruce was surprised when her accountant told her it might be perceived that she was disinheriting her son. The financial advisor recommended a professionally facilitated family meeting at which Mrs. Bruce could explain her plans to her two children.
>
> Her son said he would like two things from his mother's estate: his father's coin collection and some portion of her savings towards an education fund for his children. Mrs. Bruce said she had intended to sell the coin collection and put the proceeds of sale into savings but was happy to know this collection held a sentimental attachment for her son. She also set up a trust fund for the education of the grandchildren. The son had no problem with the balance of his mother's estate being left to his sister. She would be provided for

[28] Radford (2001–2002), supra note 23 at 612.

[29] Gary (1997), supra note 24 at 432.

[30] Wood and Karp (1994) at 57.

[31] Hull (2005).

and not be dependent on him and his children's university educational fund would be in place. Mrs. Bruce's daughter was happy that her future financial worries were taken care of.

It is difficult to convince clients about the potential of problems arising as the result of estate and incapacity planning. Yet we know how one's planning instruments can become the subjects of litigation due not just to poor drafting, the nature of the assets, or a lack of expert advice but far too often, because of family secrets and vulnerabilities or family members who are acrimonious.

Many people do not like to talk about death, dying and dementia. The following subjects also make clients naturally uncomfortable: extramarital affairs, family business issues, spendthrift legatees, family concerns with sons and daughters in-law, special needs beneficiaries and unequal treatment of children. But there needs to be a shift in how we think of estate and later life planning and a change in attitude and culture. The plans can no longer be developed from the top down. They are most successful when developed from the bottom up. There is less likelihood that family members will challenge a will or a power of attorney when they have learned the reasons for the distribution of property or for the naming of certain representatives and have the opportunity of expressing their opinions.

Another example might be a gift of money that a parent has made to one child towards the purchase price of a house and has not informed other members of the family. If the gift is not documented and if the parent's remaining assets are not sufficient to provide an equivalent amount to the remaining children, it could cause a succession issue. There may or may not be grounds for a challenge to the parent's free will or capacity in such a case but the potential of a bitter sibling fight alleging that the "gift" was really intended as a loan repayable to the parent's estate.

A family meeting allows the client to address both the distribution of his or her estate and naming of representatives as well as any emotional issues that may arise around these decisions. Reactions are often driven by feelings. This is especially true when one person is treated differently or receives less than another in an estate. The family meeting process is an excellent way to avoid a legacy of bad feelings and resentment.

Not all of the family may agree to attend the meeting and perhaps there will not be unanimity at the end of the day by those in attendance. The meeting should nevertheless be held and any missing members informed of the agreement of understandings reached by those present even if they will not sign it. While the agreement will not prevent a disgruntled member from laying a challenge or claim, the notes of the client and his lawyer will demonstrate the lengths to which the client went to satisfy everyone, without forfeiting his or her goals. The meeting and the agreement will bear witness to the client's capacity and free and informed consent.

The family meeting can assist with developing family transitions. Conflicts can arise with respect to older family members who are in transition, with respect to care, housing and legal representation (e.g. under a power of attorney or guardianship and in end-of-life decision-making). Family members want to do what is best for their relatives but as a group are sometimes at odds about the best means of arriving at consensus, which respects their family member's right to consent, if capable, or which

respects previously expressed competent wishes. Learning to facilitate multi-party decision-making and building conflict resolution skills, including mediation and conciliation, will be very helpful when working with families.

This kind of meeting before a family is in crisis can strengthen ties and enable all family members to deal with changing relationships in an older family member's life and with the realities of the situation. It allows sibling rivalries to be addressed at a time when everyone is calm and thoughtful, reflective decisions can be made. Meetings may also involve geriatricians, financial advisers and social workers, as needed and desired, these latter acting as experts and facilitators or informal mediators of situations, in appropriate cases.

Mediation, whether formal or informal, offers a confidential process, a less expensive and less time-consuming route for dispute prevention and resolution, allowing parties more control over the resolution. It can preserve family dynamics, particularly those which may be tenuous and strained, and is frequently a favored route for older persons.

> A divorced father has lived with a woman for thirteen years with whom he has had a wonderful life. He now has moderate dementia. He wants to stay at home and his common law spouse, still a top executive in the workforce, wants to care for him with the assistance of public and private caregivers during the weekdays. The man was a successful professional who had lived a high life and had significant debts when this woman came into his life. She agreed that they become a couple and that he come to live with her provided he paid off all of his debts which he did by selling his one remaining asset, his country home. He has five sons, two living at a distance and two with a history of psychological problems.

The woman visited an Elder Law lawyer seeking information as to her role and responsibilities as the legal representative of her spouse. It was immediately clear to the lawyer that the party who needed representation was the spouse with dementia. The woman recognized and accepted that the lawyer would represent her husband. Her spouse was visited alone by the attorney and a second visit was held later with his spouse. At the suggestion of the lawyer he gave the lawyer a mandate to represent him in a planning meeting with his children so that they would be informed of his plans and decisions, his wife's role, and the children's roles in his life. It was recommended that the social worker who had assessed the man's psychosocial status be invited to the family meeting as a neutral third party to explain his social, economic and psychological challenges and needs now and in the future and how these might be best organized in accordance with his wishes and choices. Legal counsel would explain the legal duties of a legal representative, the representative's measures to ensure transparency and accountability, what each spouse would pay for, details about his plan of care, end-of-life wishes and even funeral arrangements.

All sons participated in the meeting, two by Skype. As anticipated by legal counsel who had recommended the meeting as an important preventative measure, the sons did have questions and initial suspicions that their father's common law spouse might appropriate their anticipated inheritance, given her extensive powers as financial administrator of the affairs of their father. A review of the facts, the law,

the generous undertakings of the spouse and information from the social worker dispelled these notions. The client did not discuss his Will although he had left all he had to his common law spouse, save for specific legacies of pieces of art to his sons. Discussion of his estate plan was not necessary, in the circumstances, as the man agreed, reluctantly initially, that his legal counsel convey to his children that after paying his extensive debts all he had left was a very small life pension from his former firm, enough with careful financial planning with his accountant, to pay for his caregivers. His spouse would assume all household expenses and all food costs. He additionally had an amount of savings whose capital value had diminished incrementally over the last several years, leaving a little cushion for anticipated future care needs and final expenses.

Reassurances of the importance of the sons' continuing and increased participation in the life of their father were made by the father, a man previously inaccessible to his sons during his busy professional life. The client was also able to confirm that he wanted his common-law spouse to care for him. He explained that he was ready to go into long-term care if ever his care at home became too difficult for his spouse or too expensive, and further explained, with assistance, his wishes and values about care at the end of his life and his funeral arrangements. Minutes of the family meeting were prepared by legal counsel and circulated by the father's spouse to members of the family.

While the holding of such a meeting had involved embracing cultural and attitudinal change on the part of this man and his spouse, a departure from the tradition of keeping private one's personal life and plans, all parties had appreciated the results. The family meeting was important to the promotion of rights, strengthening of family ties and the avoidance of suspicions, criticisms and disputes which would indirectly but inevitably affect the client during his lifetime and potentially his wishes and property distribution following his death.

Unlike mediation in which the goal is to reach a negotiated agreement, which reflects the best interests of all parties or aids in reaching mutually acceptable agreements, the family planning meeting may employ a mediator or other neutral third party but the decisions will have already been made by the older family member in advance of the meeting in consultation with his legal counsel or advisor, the meeting serving to report on wishes and decisions. It is certainly possible for a family member in attendance to suggest something which had not previously been contemplated by the client (e.g. in explaining his estate planning arrangements in a family meeting the parent may learn that not all his children want to inherit the family cottage. This information may provide the opportunity to leave the cottage to those who want it and provide a method to compensate the others for their share of its value as at the testator's death. It may also allow for the broad lines of a property management agreement to be agreed to amongst those who want the cottage.) The client could then take these matters under advisement, depending on the complexity of the issue, and convene a second meeting to inform the family of his final decisions.

5.2.2 *Use of Informal Mediation in the Early Resolution of a Dispute*

Family discord may often be resolved by timely intervention and education.

> A father of three adult children remarried thirty years ago. The woman mistrusts the children and the children never warmed to her, although they know their father loves and relies on her. The father now has moderate Alzheimer's disease and is in a residential care facility. His wife, herself under treatments for cancer, cannot care for him at home. The wife has told the residence to control the father's outings and to have the children call her to organize and approve the timing of their visits. The nursing staff has complied. The children are also told by the residence that they can have no information about the evolution of the father's conditions, mentally and physically, because the wife legally represents the husband. They do not want to hear about their father's conditions from his wife because they do not trust her. The wife wishes to sell the matrimonial home and has instituted legal proceedings to seek court authorization to do so. The banking power of attorney she holds is not sufficient for the purpose and her husband is no longer capable of executing an enduring general or specific power of attorney. The husband, with the assistance of his children, has called legal counsel to contest this unilateral move by his wife as he maintains he has been incorrectly assessed as incapable and has not been consulted on the intended sale.

The father's attorney recognized at their first meeting that the father had substantial residual capacity and arranged for a revaluation of his capacity. The attorney confirmed the client's desire that his wife to be his legal representative and principal caregiver, notwithstanding being upset with her for doing things behind his back, and that he wanted his children to be informed and actively involved in his life. He wanted the residence to inform his children about his health whenever they wished for information and for his wife to understand that he could make his own decisions about visits and outings while respecting his wife's daily scheduled visits and subject to informing the residence. The social worker assigned to the residence was contacted and a meeting was planned to settle any misunderstandings and discord amongst the parties. The wife's lawyer who had been mandated to obtain a court order to sell their home was cooperative. He understood that a settlement of the husband's concerns would ensure a smooth and uncontested court hearing on the issue of the sale.

By the time of the meeting the client's physical condition had declined further causing additional cognitive decline. He now recognized his need for full assistance and support. In advance of the meeting he advised his attorney that he no longer was angry with his wife, would not contest the sale of the house, was prepared to stay in the residence if visits continued with the same frequency as they had in the past and confirmed his acceptance of his wife handling all financial affairs for him subject to regularly accounting to him. This was reported at the meeting.

In the meeting the wife and her confidant, her brother, also learned from both lawyers and the social worker that the husband had rights and wishes which were always to be promoted, despite diminishment of capacity and despite her role as his representative. He was able to and should continue to make his own decisions about with whom and when he wanted to visit with family and as to when he felt up to

going out. The client confirmed his choice of his wife as his representative and that his wishes were to be respected. He told the residence social worker that he wanted his children to be kept informed always and a note to that effect was placed in the residence file. The wife, having let down her defenses with the resolution and confirmation of her role, agreed to let everyone know that the children were to be kept informed of their father's mental and physical health. Emphasis was also placed on the important continuing role of the children in the life of their father.

The residence, the wife and the children were all educated about the client's wishes and legal rights and all discord was dispelled in a timely fashion, clearing the way for an uncontested judicial authorization to sell the client's real estate, ensuring his on-going involvement in his own decision-making and the harmonious involvement of his children and wife in his daily life. The attorney sent minutes of the meeting to all parties and scheduled follow-up to ensure these agreements and understandings were being respected.

Had any attempt been made at the meeting to change the client's principal wishes and positions as explained to his attorney in advance of the meeting there would have been need for a further meeting so that counsel could determine whether his client was freely consenting to any change of position. The client acting alone might unknowingly give up statutory rights or solutions might not conform to the law. The disputes or other issues regarding transitions should always be settled with attention to and full knowledge of the identifiable rights of the older client, even those which a client may wish to waive.

5.2.3 Court Mediation in an Adult Guardianship Case

Even where mediation has been initially refused by the parties there is still the opportunity to convert a court hearing into a mediated session to inform, educate and resolve emotional issues underpinning contestations within a procedurally protective context.

> A nephew had acted as investment advisor and had annually filed income taxes for his maiden aunt and her sister for over twenty-five years. The nephew had always been paid for his financial services in the past at the insistence of his two aunts. Her sister had died and the surviving aunt now had moderate dementia. The nephew had been named a number of years ago as her attorney under enduring powers of attorney for finances and for health care decision-making. As she declined, she complained to other family members that her nephew had had her declared incapable by a doctor and placed her in a terrible residence where she could not talk to anyone because they were all unable to communicate.
>
> Some of the members of the family, moved by their relative's complaints, and by nature suspicious, believed the nephew's only interest was his aunt's money and that he had influenced his aunt to name him as attorney at a time when she was already in decline. Further it was felt by some that the nephew did not have any sensitivity to the aunt's dislike of the residence she was in. These family members filed a judicial opposition to the nephew's continued representation. The aunt's one remaining elderly sister, living at a distance, proposed that she be named as her sister's legal guardian while other family members advocated the Public Guardian and Trustee. The family members were not

represented by legal counsel and had refused to participate in any informational or mediated meeting. The matter inevitably proceeded to court.

The aunt was represented by legal counsel who was appointed by the court prior to the hearing as *amicus curiae* to ensure transparency as there was some doubt as to the ability of the aunt to fully communicate with or adequately instruct legal counsel on all issues. Her condition had, however, stabilized now that she was in a residence, receiving her medication on a regular basis and no longer self-administering. She confirmed to counsel her confidence in her nephew and her desire that only he represent her. She further confirmed that the staff at the residence did treat her well and that the food was good. The reason she declined to participate in activities and to socialize was that she had always been a solitary person throughout her life.

In responding to the family's concerns the nephew had hired a social worker to evaluate the care and reputation of the residence, his aunt's satisfaction with the residence and whether she might be better served elsewhere or in other ways. The social worker confirmed that the residence was one of the best and came highly recommended to the nephew by nurses and social workers previously involved with the aunt when she was at home. The nephew also engaged a chartered public accountant to audit his financial management from the time he began handling his aunt's daily affairs and had asked his aunt if he could communicate it and future periodic audits to the concerned members of the family. She declined the disclosure.

The sole issue before the court was to determine whether probative evidence of mismanagement of finances or of care by the nephew existed. No such evidence was produced. That being the case judgment would have issued summarily from the bench dismissing the family's motion.

However, legal counsel to the aunt explained to the judge the suspicions held by the family, particularly by her sister who had sent a letter to the court, about the aunt's suspected incapacity at the time she appointed her nephew, the concerns about money he had received in the past and what he might pay himself in the future, and the aunt's apparent unhappiness with her residence. Because the sister was not present in court the judge had initially dismissed her letter as immaterial but legal counsel prevailed upon the judge to continue the hearing as a mediated session led by the judge during which experts already in the court would answer all concerns and allegations raised by the family and the sister, in particular. The answers would be heard by the judge as mediator and then become part of the court record available to the family who were not present. In so doing the doubts and disputes would be silenced and the aunt would cease to be at the eye of a continuing family storm.

The aunt's geriatrician testified as to her capacity at the time of executing the powers of attorney, the social worker spoke of the aunt's good care at one of the city's top residences and of the aunt's satisfaction with the residence. The social worker further confirmed she would remain as case manager to the aunt to ensure her on-going satisfaction and level of activity. The role of the nephew as legal representative was explained by the judge mediator as one which was required to be performed gratuitously by a family member in the absence of a clause providing for remuneration under the powers of attorney and that the nephew was required to

render an accounting to the Estate of the aunt upon her death or earlier termination of the nephew's mandate. Self-dealing was against the law. The judgment and the transcript were sent to the family members.

The court in question had no jurisdiction to oblige the parties to mediate but increasingly welcomed counsel's recommendations of mediation or of facilitated informational meetings as part of or in place of an adjudicated process. In this particular case, given the distance of the elderly sister, the general entrenchment of positions by family members, had these issues not been addressed in the presence of a neutral legal authority the fuelling of discontent would likely have continued and been visited upon the very person who required peace in her life, the aunt. This family was prepared to listen to what was said in court.

There is no substitute for effective communication amongst family members. While there is no guarantee of success, those who work through their plans and potential disagreements together in a timely manner with a professional mediator and other specialized professionals, as needed, are more likely to protect their assets and choices and avoid litigation.

5.3 The Informal Caregiver's Legal Issues for Caregiving

> Each of us is, will be or has been a caregiver at some time in our lives.
> Ann Soden, 2005
>
> Traditionally, the majority of informal caregivers have been family members but this has changed over the last twenty years. Families no longer live as close to one another. These trends mean there are fewer family members to share care, and may explain the growing number of friends and neighbors now providing, in particular, hospice palliative care. Family and informal caregivers play a key role in hospice palliative and end-of-life care, and their role continues to evolve. The tasks that informal caregivers are asked to take on is changing and is influenced by a number of factors, including larger social, demographic and economic trends, the unique experience associated with caring for someone who has dementia or is at the end of life, as well as changes in health policy and services.
>
> The age of the informal and family and other caregiver can have serious implications. More informal caregiving is falling on older, frailer spouses, partners, and siblings, and on older children who may themselves have age-related health problems.
>
> There is a lack of policies that focus specifically on the multiple needs of the family or informal health care assistants/caregivers.
>
> Extract from a speech by Sharon Baxter**,** Executive Director, Canadian Hospice Palliative Care Association, May 5, 2005

Family and other caregivers are the cornerstone and default safety net system within the contemporary long-term-care system, providing much of the assistance to individuals who have difficulties in performing activities of daily living or are faced with terminal illness or end-of-life other care and want to remain in a non-institutional environment. Care from adult children and spouses, in particular, significantly reduces nursing home admissions for older people.

In the industrialized world taking care of parents has been considered a normal and expected phase of life. However, if baby boomers cannot expect that the same

level of government benefits and state support will be provided to them, will the multigenerational family increasingly to be relied upon as their default safety net for care when the former are themselves stretched to the limit to provide for themselves and their families?[32] In the western hemisphere assumptions about the provision of filial support for daily living needs no longer have wide acceptance. Economic and social costs both to society and to potential caregivers is increasing, while the tax base and the pool of family caregivers, especially women, is shrinking. And in Asia, reliance on family[33] is also suffering due to pressures of economic development and population mobility.[34]

Yet with care reverting to the community and the home, families are facing an increased demand to care for loved ones with little formal support or education. Thousands of families and others, including friends and volunteer caregivers, work through chronic care and end-of-life challenges daily with no formal training. They are not accountable to standards of conduct or of practice of professionals but play a key role in our health-care system by providing nursing and end-of-life care and often acting in critical and chronic situations as substitute decision-makers with little experience or guidance.

We know that most people want to be cared for at home as long as possible. This will require holistic changes in how health services are delivered and supported, as family and caregivers take on a wider range of tasks including clinical, ethical and legal responsibilities.

Those who provide care do not identify themselves as caregivers but rather as sons and daughters, parents, spouse, grandparents, siblings, friends, neighbors and loved ones. It is in this spirit that the term "caregiver" refers not only to people related to the care recipient by blood or marriage, but also to others with whom the care recipient has a close emotional relationship.

Nevertheless, in many circumstances, the extent of one's legal rights or responsibilities will depend on whether one strictly meets the applicable definition of family member contained in relevant statutes, regulations and case law.

5.3.1 Is There a Duty to Care?

A basic issue for many caregivers confronted with long-term-care or end-of-life needs is whether there exists a legally enforceable obligation on their part to provide caregiving assistance to the individual (for instance, when an individual at risk prefers to remain in her own home rather than entering a nursing home). Although strong arguments may support a moral duty in this situation no law

[32] Hancock (2002).

[33] Goodman and Peng (1996); Takahashi (2004).

[34] Ramesh (2004).

compels family members to personally provide direct, hands-on care to dependent relatives.

While hands-on care is not prescribed by law, many jurisdictions have provided by statute for a parent to claim support from their adult child.[35] Filial support obligations have the potential to enable any parent in need to directly claim support from their child, stepchild, grandchild, and, at least indirectly, from their child's spouse.

Filial support legislation has been little used. As the population ages, and the average life span increases, this little-known area of law may become fertile ground for two groups of litigants: first, governments seeking to recover the cost of caring for older citizens; second, older persons struggling to preserve their quality of life.

Various reasons help explain the infrequent recourse to filial support legislation: older parents are reluctant to bring legal action against their children, many adult children continue to voluntarily provide care and support for their older parents, and many third parties who would otherwise bring applications for support for those older parents for whom they care, are ineligible to apply. These laws continue to be important as an expression of values, "assum[ing] and perpetuat[ing] a familist philosophy" about the older person's role within the family and society at large. The ideal model of family relationships and obligations expressed in such legislation may no longer be a true reflection of society's values and structure. And yet, the parental support obligation may be one of the only avenues for ensuring that aging parents do not grow old in poverty[36].

5.3.2 Legal and Ethical Standards of Care

While parents are legally obligated to care for their minor children, caregivers of dependent adults are people who have chosen this role. This means that they legally could have chosen to decline, albeit that for many caregivers the role is often thrust upon them without any meaningful choice.

[35] In Canada this filial support obligation historically existed in the *Civil Code of Quebec*, and was introduced in most Canadian jurisdictions about the time of the Depression in the 1930s as a response to the government's difficulty providing for the older members of the population. In effect the statutory obligation, where enacted, has rarely been employed in modern times because of the availability of direct health care in virtue of Canada's universal health insurance and indirect health care available in long-term care institutions at a cost not exceeding one's federal pension. However in *Burgess v. Burgess*, [1994] O.J. No. 4004 (Ontario Prov. Div.), Mr. Justice Fisher stated he believed the Ontario provisions were added, "to allow the State to make well-off children pay for parents in nursing homes rather than the State paying for them." Indeed the judge remarked, "the effect of [statutory filial support obligations] is far more sweeping."

[36] Supra note 7, Bala (2005).

The duties of the caregiver and the lack of government support for families in the context of caregiving may be much more complex, though, from legal, ethical and psychological perspectives. Once a person has undertaken the caregiver role, then human rights legislation, relevant statutes and the common law, make it illegal, as a form of mistreatment, abuse or neglect, for the caregiver to willfully ignore the basic needs of or, otherwise through acts or omissions, to endanger the dependent person, including, in certain cases, witnessing physical mistreatment by professionals and volunteers and failing to act.

Decisions a caregiver may make which are based upon a consideration for the care recipient's best interests in a good-faith effort to weigh the burdens versus the benefits of a particular medical treatment or other types of intervention when the care recipient's wishes and values are not known or are not possible to obtain, should not be considered mistreatment.

For example, part of the caregiver's role in palliative care at the end of life is knowing when it is medically advisable to stop feeding a person who is dying; when to reduce medication, if at all; how to advocate and manage pain; and what therapies or standard procedures to discontinue (e.g. taking one's temperature, blood pressure, respiration and pulse). Families are often made to feel guilty about stopping these procedures. When the care recipient's wishes are not known or are not possible to obtain in the circumstances, the prudent caregiver should consult the health care team, or the ethics committee of the institution, if applicable, particularly in situations of family disagreement.

When a person agrees (tacitly or expressly) to undertake the caregiving role, both the caregiver and the care recipient have certain expectations as to what their relationship will involve. Since each party makes at least implied (and, in some cases, express) promises about his or her own end of the bargain, their relationship may be characterized as a contract. It behooves both the caregiver and care recipient to reach as clear an understanding as possible, as early as possible, about their mutual expectations and commitments. This understanding may be altered continually, of course, as the needs and capacities of the respective parties evolve over time.

Occasionally an undertaking to care is made conditional upon or in consideration of the transfer of property, commonly referred to as a "care agreement" or upon a gift of money. Whether it is called a care agreement or by any other name, essentially a contract for services is being proposed. Both parties should seek expert legal and accounting counsel and carefully consider with these specialists whether such an agreement or contract is ethical, fair and appropriate in the circumstances. If it is not, it may be set aside or its obligations reduced because of undue influence by the care recipient or on the basis of unconscionability (exploitation).

Finally, while the law does not impose direct caregiving responsibilities on families, a family may insist on participating in caregiving for a disabled or ill relative even when that person objects. Families have neither a duty nor a right to be involved, as long as those individuals who object to the family providing direct services to them are capable of making and expressing their own autonomous decisions.

Informal family caregivers frequently act as legal representatives for financial[37] and health care decision-making. They require not just medical information and understandings but legal knowledge about the nature of their fiduciary duties and health care responsibilities in order to perform their roles in accordance with the law, their contract, if one exists, and the wishes of the person they represent. They need to understand their duties, including the duty to understand, respect, support and advocate the right of the care recipient represented to make all decisions he is capable of.

Caregivers are often under significant stresses created by the burdens of balancing many aspects of their lives. Important supports, including appropriate respite care for at-home caregivers, tax credits, paid compassionate leave and other compensation for those caregivers in the workplace are urgently needed.

Family matters. But families never expected to have to deal with many of these issues and are unprepared for them: caregiving, mental and physical impairments of family members, end-of-life decisions, elder care, housing transitions and the need for resilience and support in the face of crises. These important family issues are global phenomena requiring thoughtful social and economic policies, action and education.

5.4 Conclusion

> As new conditions arise…the law instead of being fixed and static becomes a living, changeable entity shaped to satisfy the needs of society.
>
> The Honorable Brian Dickson, former Chief Justice of Canada (1973–1990)

Older adults, as well as other disenfranchised groups such as women, the poor and immigrants, do not recognize that their most pressing problems are legal problems. And their most pressing problems are frequently not recognized as legal by courts. Older persons' concepts of justice and of the most appropriate remedies for achieving justice differ from those of many judges and lawyers.[38]

The examination of the proper role of law and the practice of law in the context of aging has challenged us to construct new concepts of law and practice and to facilitate the diverse ways this demographic lives, navigates and negotiates their everyday relations. It has led us to develop new ways of securing justice adapted to this clientele. In so doing we now address the legal and non-legal[39] challenges of aging and see them as part of the same whole and endeavor to promote more efficient human solutions to the rights-based issues of this population.

Our work is far from done. We can draft the best rules, the best procedural safeguards, but if they are not applied or applied in a paternalistic fashion and if

[37] Tilse et al. (2005).

[38] McGuire and Macdonald (1996) at 550–551.

[39] Gary (1997) supra note 24 at 400 and 413.

people are unable to access the law or cannot do so in a timely fashion and in a format which conforms to their sense of how justice is to be achieved, then it is all for naught. Refining ethical, creative and cost-effective solutions for our clients, guided by equitable laws, will continue to be the mission for Elder Law and beyond.

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Chapter 6
International Elder Law: The Future of Elder Law

Israel Doron and Benny Spanier

6.1 Introduction

> "So we're off to the Hague, are we?"
> "You may be, Mr Rumpole, but the
> court of Human Rights sits in Strasbourg."
> "Of course! That's the one I meant."[1]

Ms. Carson was born in 1931, and lived all her adult life in Britain. Throughout her working years, she paid her social security taxes as required. In 1990, she became a resident of South Africa, after immigrating there. Between 1989 and 1999, Ms. Carson continued to pay her social security payments in Britain, even though she was not required to do so, in order to continue to accrue her pension rights. In 2000, she became eligible for a weekly pension payment of GBP 67.50. However, since that time, the amount was not updated and remained at its nominal level. Had it been updated from time to time, as was done for all older people living in Britain, she would now be receiving GBP 95 per week. Till 2010, Ms. Carson lost 28% of the value of her pension allowance. She believed that her rights had been violated and she had suffered discrimination. She sued the British government with the demand to update her pension as was customary for all older persons living in

[1] The immortal barrister Horace Rumpole confuses between several courts in Europe, and needs a bit of help. From: Mortimer (1996).

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Britain. Her lawsuit was rejected by all the courts in Britain.[2] Therefore, she appealed to the European Court of Human Rights, on the grounds that she had been discriminated against relative to all other older people in Britain. The European Court rejected her lawsuit in the court of first instance and upon appeal.[3]

Ms. Carson's story is an example of a growing global reality that combines law and older people rights. In this new legal reality, international law is increasingly facing a situation in which it intervenes to protect the rights of older persons. In many cases, older persons find that not only do their personal stories involve aspects of international law, but sometimes, the only remedy for their legal claims lies in the international arena.

Indeed, international law and old age are not foreign to one another. They are, in fact, intertwined for many different reasons. In his article "From national to international elder law,"[4] Doron presented a four-element model to support his argument for the need to develop the field of international elder law:

As Doron explained in his article, each of the boxes, or "squares," in Fig. 6.1 reflects a set of issues according to intersection of law, aging, and globalization. Square 1 focuses on issues relating neither to law nor to aging but rather on issues relating to the general social phenomenon of globalization; Square 2 focuses on issues relating to the general social phenomenon of aging but not to law, i.e., global aging; Square 3 focuses on issues relating to law but not specifically to aging, i.e. the globalization of law; and finally, Square 4 focuses on issues relating both to law and to aging, i.e., the need for elder law at the international level.

Doron argued that:

> [T]he time has come to begin developing the various features of elder law that relate to international law. This means that the dialogue on elder law should branch out in different directions that share an international and global view of the field. This dialogue should embrace the different aspects of international legal practice, including public, private, and comparative international law.[5]

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[2] See: High Court ruling: *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), which was handed down on May 22, 2002.; The ruling of the Court of Appeal, *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, which was handed down on June 17, 2003; The ruling of the House of Lords: *R (Carson and Reynolds) v. Secretary of State for Work and Pensions* [2005] UKHL 37, which was handed down on May 26, 2005; for a comprehensive review of the issue of the right to a pension allowance in case of residence outside the state's borders, see: Golan and Doron (2007) [in Hebrew] (hereinafter: "Residency"). About the phenomenon of elder immigration and "exporting" pension rights, see at 645–649. For comparative research on the possibility of "exporting" pension rights in different countries, see at 696–698.

[3] Carson et al. v The United Kingdom (2010) ECtHR Application no. 42184/05. The facts are based on the ruling which was handed down on March 16, 2010 in the court of appeal (Grand Chamber) of the European Court of Human Rights (hereinafter: The European Court of Human Rights, the European Court or the ECtHR).

[4] Doron (2005) (Hereinafter: From national to international).

[5] *Id*. at 44.

AGING / LAW	Non-Aging	Aging
Non-Legal	1. Globalization	2. Global aging
Legal	3. Legal Globalization	4. International elder law

(Source:From national to international, *supra* n.4, at 45

Fig. 6.1 The four elements of the argument for international elder law

In this chapter, we would like to focus directly on the particular directions that elder law should be developed in the future in the field of international law. More specifically, three different fields of international elder law will be discussed: Public-international elder law; private-international elder law; and comparative international elder law.

6.2 Public-International Elder Law

Public-International elder law as it has been developed in recent decades can be divided into three groups: "hard law," "soft law" and international case law. We will discuss these three groups separately.

6.2.1 "Hard Law" and the Need for a Specific Convention on the Rights of Older Persons

Interpretation of existing international covenants is the first kind of "hard law." When rights of the older persons are mentioned in existing international covenants, they are usually presented as part of rights that apply fully to all members of society and not specifically for them. However, rights of older persons can be found by reading the international covenants in a more focused way.[6] In other words, this refers to "legislation" in which "elder rights" in international law is expressed by means of expansive interpretation of international human rights conventions that do

[6] *See:* Rodriguez-Pinzon and Martin (2003) (Hereinafter : Rodriguez-Pinzon).

not explicitly mention older persons' rights as such. A salient example of this can be found in the interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[7]

In 1966, the United Nations General Assembly held discussions intended to establish all human rights in one binding convention (the "International Bill of Human Rights"), as a continuation to the Universal Declaration of Human Rights.[8] In the end, the General Assembly adopted two conventions: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). In creating the two conventions, two human rights norms were effectively created: The first is the norm of civil and political rights, and the second is the norm of economic and social rights.[9] The reason for creating these two legal norms have occupied generations of researchers.[10] For our purposes, however, it is important that each of the covenants address different rights, and that states have a different level of commitment to realize them.[11] Among the rights mentioned in the ICESCR, we note, for example, the right to health,[12] social security,[13] and the right to education.[14] However, the rights of older persons, as a separate or unique population, are not in fact found in

[7] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (Entered into force Jan 3, 1976) (hereinafter: ICESCR or the International Covenant on Economic, Social and Cultural Rights).

[8] Rosenne (2004) (Hereinafter: ROSENNE) at 217–218; see: Dennis and Stewart (2004) (Hereinafter: *Justiiciability*).

[9] Van Boven (2010) (hereinafter: Van Boven). Article 2 of the ICCPR requires the states to ensure that the rights are preserved. The equivalent article of the ICESCR instructs the states to take steps to fulfill their obligations. Another difference between the covenants is the fact that the civil rights are "negative," meaning that the state must refrain from infringing upon them. The economic and social rights are "positive," and the states must invest means in their realization. Moreover, the civil rights do not entail an economic cost, whereas the economic and social rights require significant investments; see: Churchill and Khalig (2007) (Hereinafter: Churchill), who argue that there is no real enforceability for economic and social rights, as opposed to civil rights; and see Eide (1989) about the difference between the two groups of rights.

[10] Koch (2009) (hereinafter: Koch). Three main reasons can be presented for the creation of two levels of rights. The first is the historical background for the creation of the rights—three levels of human rights (human rights, social rights and community rights). The second reason is political/ideological—the creation of the covenants during the Cold War, and the importance that each side attached to the different rights and rejecting the rights of the other side. The last reason is related to skepticism as to the possibility of realizing the economic rights (positive rights). See also: Justiciability, *supra* note 8, at 476–480. Another significant difference between the rights is their enforceability. The civil rights are enforceable, whereas the economic and social rights are not, and do not exist in practice; see also, for example: Rosas (1995); ROSENNE, *supra* n. 8, at 217–219; Van Boven, *supra* n. 10, at 174–183.

[11] Justiciability, *supra* n. 8, at 476–485.

[12] ICESCR, *supra* n. 7, Article 12.

[13] *Id.* at Article 9.

[14] *Id.* at Article 13.

the covenant. Over the years the struggle has increased to recognize and extend a binding and enforceable status to the economic and social rights as well. For the purpose of the rights of older persons, the struggle is to create an international legal norm that will constitute part of the International Covenant on Economic, Social and Cultural Rights.[15]

In 1995, the United Nations Committee on Economic, Social and Cultural Rights passed a resolution entitled General Comment No. 6. This resolution dealing with elder rights reviews the conferences and resolutions passed until Comment No. 6, and determines the following:

> 10. The International Covenant on Economic, Social and Cultural Rights does not contain any explicit reference to the rights of older persons,. . .Nevertheless, in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognized in the Covenant. This approach is also fully reflected in the Vienna International Plan of Action on Ageing. Moreover, in so far as respect for the rights of older persons requires special measures to be taken States parties are required by the Covenant to do so to the maximum of their available resources.[16]

In effect, General Comment No. 6 synchronizes the 1966 resolution with a series of resolutions passed in subsequent years by the UN, which deal with elder rights.[17] The resolution interprets and elucidates the manner in which the articles of the ICESCR should be read, with regard to rights of older persons.[18] This is how the following rights set out in the covenant are read, with an emphasis on their implementation with regard to older persons: Equality between men and women,[19] the right to work,[20] the right to social security,[21] protection of the family,[22] the right

[15] Koch, *supra* n. 10, at 10.

[16] See: Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 6, 10, UN Doc. E/C.12/1995/16/Rev.1, at Article 10 (1995) (Hereinafter : General Comment No. 6).

[17] *Id.* at Article 4–5. Following are the resolutions mentioned, among others, in General Comment No. 6: Vienna International Plan of Action on Ageing, 26 July-6 August 1982, U.N. A/RES/37/51 (3 December 1982) (hereinafter: Vienna International Plan of Action on Ageing); see the plan itself: Report of the World Assembly on Ageing, Vienna, 26 July-6 August 1982, U.N. Sales No. E.82.1.16 (1982), available at: www.un.org/ageing/Vienna_intlplanofaction.htm. (Last visited May 2011); United Nations Principles for Older Persons, G.A. res. 46/91, Annex, U.N. Doc. A/RES/46/91 (1991) (hereinafter: Principles for Older Persons). A document of an applied nature, which places at its center the five basic rights of elderly persons that arise from the ICESCR.

[18] General Comment No. 6, *supra* 16, at Article 20–42.

[19] *Id.* at Articles 20–21. "Equal rights of men and women", The states are called upon to place an emphasis on the rights of women who have spent most of their lives caring for their families without going to work, and are liable to find themselves without sources of income in old age.

[20] *Id.* at Articles 22–25. "Rights relating to work", The right to earn a dignified living.

[21] *Id.* at Articles 26–30. "Right to social security", The states are called upon to ensure proper social security for all elderly persons, and reference is made to resolutions passed by the International Labor Organization on this matter.

[22] *Id.* at Article 31. "Protection of the family", Calls upon the states to strengthen the family as a basis for protection and support of the elderly.

to dignified subsistence,[23] the right to physical and mental health,[24] and the right to education and culture.[25] In other words, General Comment No. 6 established older persons' rights by "interpreting" the provisions of the International Covenant on Economic, Social and Cultural Rights as an existing right, despite the lack of explicit textual reference to older persons as such.[26]

Along with the attempt to develop public international law with regard to older persons on the global level, an attempt was also made to develop this field on the international-regional level as well. One can point, for example, to Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which states that every person has a right to certain safeguards in old age.[27] Or Article 18 of the Banjul Charter on Human and Peoples' Rights, which guarantees that older persons will have the right to special safeguards consistent with their own needs.[28] Another example can be found in Article 23 of the European Social Charter (Revised).[29] There the covenant encourages states to take steps, either directly or in cooperation with public or private organizations, "to enable elderly persons to remain full members of society for as long as possible."[30]

Finally, one of the most significant and developed recognition of older persons' rights could be found in Article 25 of the Charter of Fundamental Rights of the European Union:

> The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.[31]

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[23] *Id.* at Articles 32–33. "Right to an adequate standard of living", Appeals to the states to ensure that the elderly have the ability and possibility to obtain food, water, clothing, housing and health care that will enable them a dignified subsistence. The Comment calls to view the term "housing" in the broader sense, i.e. to enable independent living and provide psychological assistance and support for strengthening the elderly person in his own home (As Recommendations 19 to 24 of the Vienna International Plan of Action on Ageing).

[24] *Id.* at Articles 34–35. "Right to physical and mental health".

[25] *Id.* at Articles 36–42. "Right to education and culture".

[26] See: Rodriguez-Pinzon and Martin (2003), *supra* n. 6, at 952.

[27] See: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,("Protocol of San Salvador"), O.A.S. Treaty Series No. 69 (1988), (entered into force November 16, 1999), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

[28] Banjul *Charter on Human and Peoples' Rights* Article 18, para. 4 (June 27, 1981), 21 I.L.M. 58, 60 (1982).

[29] European Social Charter (Revised), (entered into force Jan 7, 1999, E.T.S. 163) (hereinafter: European Social Charter or ESC).

[30] *Id.* at Article 23.

[31] Charter of Fundamental Rights of the European Union (2010/C 83/02) (Hereinafter: Charter of Fundamental Rights), which was amendment to the European Union – Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008/C 115/01 (signed on 13 December 2007 in Lisbon, entered into force on 1 December 2009), Article 6(1).

Obviously, one would think that the next stop of the "hard law," and the third kind (after interpretation of classic human rights covenants, and regional instruments), would be an international convention specifically crafted for the rights of older persons. Indeed, one of the key questions that public international elder law has faced in recent years is a debate around the question, whether there is a need for an international convention for the rights of older persons.[32]

As noted by Doron and Apter, there are various reasons that can fully explain the new initiative to establish an "older-persons' specific" human-rights convention.[33] Probably, this is a combination of several factors, including increased awareness of the legal consequences of global ageing,[34] the successful completion of the International Convention on the Rights of Persons with Disabilities (2007), (which opened the door for the "next group" in human rights conventions); or grass-roots initiatives from international NGOs such as AGE-UK or IFA—International Federation on Aging, whose members were looking to advance more internationally-binding instruments that can be used at the local/national level.

One of the important factors in this realm was the development of empirical legal knowledge that revealed the existence of an international normative gap in the sphere of rights of older persons. For example, Rodriguez-Pinzon and Martin conducted a broad review of existing international mechanisms that address the rights of older persons and concluded that:

> A strategy to have a comprehensive legal instrument on elderly rights is missing at the international level in both universal and regional systems. There are very few provisions in international law that directly address elderly rights. There are isolated efforts by certain international bodies to systematically refer to the rights of the elderly when interpreting their corresponding conventions . . .
>
> However, there is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly rights convention in place. It is in fact the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.[35]

Following this new empirical finding, Kwong-Leung Tang and Jik-Joen Lee[36] further developed a well-supported conceptual support for an international convention for the rights of older persons:

> As far as the rights of the older people are concerned, there is a gap in the existing legal provisions. An international convention that recognizes the specific rights of all older persons and is clearly applicable to older people as citizens of signatory states will be important for older people to assert their rights in the national arena.

[32] See Rodriguez-Pinzon, *supra* note 6; Tang and Lee, 2006; Doron, *supra* note 4; UN Expert Group, 2009.

[33] Doron and Apter (2010a) (Hereinafter: *The Debate*). See also Doron and Apter (2010b).

[34] See: From national to international, *supra* n. 4, at 48–51.

[35] Rodriguez-Pinzon, *supra* n. 6, at 1008.

[36] Tang and Lee (2006).

It is not surprising then, that the supporters of an international convention have concluded that such a convention can be an important step forward in empowering older persons around the world. As described by Tang and Lee:

> Overall, the convention would define older people's rights as human rights and demonstrate that the abrogation of human rights is not acceptable. It would stipulate positive obligations on nations to realize equality and the enjoyment of rights by older people. The treaty would considerably expand the concept of human rights protection for older people, since it would not be only about refraining from doing harm or placing negative obligations on the participating states, but would also lay down norms in order to assist older people to attain a status comparable with that of the rest of the population. To achieve these goals, national governments would be required to ensure that the rights set forth in the convention were reflected in their national legislation.[37]

As a result of these empirical and conceptual argumentations, the UN took upon itself to further examine the available legal avenues to advance the rights of older persons. An Expert Meeting Group was held in Bonn, on April 2009,[38] which, after in-depth debates, recommended advancing of an international convention. Specifically, it argued that:

> A convention on the rights of older persons would add additional weight in furthering, deepening and more precisely defining the rights of older persons. A convention would create obligatory and binding international law. Similar to the adoption of various other human rights instruments, member states would undertake a threefold commitment when adopting such a convention: to respect, to protect and to fulfill the rights enshrined in the relevant text.[39]

Following these recommendations, on July 2010 the UN Secretary General issued a follow-up report on the Second World Assembly on Aging that was presented before the UN General Assembly.[40] The UN process culminated on December 21, 2010, when the UN General Assembly adopted resolution 65/182,[41] establishing an "open-ended working group on strengthening the protection of the human rights of older persons." The role of this working group is to consider the existing international framework for the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.[42] At the time of writing this chapter, the UN working group only started its meetings, and no resolutions or recommendations have been made. However, there is no doubt that the outcome of this working group will be of great importance for the future development of a specific convention for the rights of older persons.

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[37] Ibid, at 1143

[38] UN Expert Group (2009).

[39] *Ibid.*

[40] UN General Assembly: Report of the Secretary-General. (2010). *Follow Up to the Second World Assembly on Ageing: Comprehensive Overview*. UN: A/65/157.

[41] UN General Assembly (2011).

[42] See the working group's website, which includes protocols and other relevant materials: http://social.un.org/ageing-working-group/index.shtml. Last visited May 3, 2011

In summary, we have discussed three categories of hard international law. The first interprets existing international covenants while applying them to elder persons; the second is the regional specific treaty that includes particular references to the rights of older persons; and the last is the recent international move to establish a new international covenant (still in the discussion stage) that will directly address the specific needs and rights of older persons. This is a dynamic time, and it will be interesting to follow up in the next few years, to discover how all three categories of this "hard law" approach to international elder law will be further developed.

6.2.2 "Soft-Law"

International rights of older persons can be found not only in "hard law," but also in international "soft law" which is the main and most important judicial norm in the field of international elder law today. "Soft law" can indicate a variety of legal arrangements that are not included in the recognized formal frameworks of agreements, conventions or rulings of international forums.[43] The reason for the creation of soft international law in general stems from the states' need to forge relationships and agreements that do not reach the level of "hardness" of conventional international law. Studies identify a number of possible reasons for this. One explanation is the creation of a mechanism in which many states can create a common denominator on a matter that involves many parties and varying interests. Soft law facilitates cooperation between the parties and finding a common denominator.[44] A second explanation views soft law as a "gradual" legal mechanism of guiding behavior with a view to the future.[45] States are inclined to accept soft law because they know that in the future it will become "hard." They seek to take advantage of the time in which the convention is non-coercive in order to organize and adapt themselves to a situation in which the convention will have enforcement power.[46]

[43] See the following for possible definitions: Baxter (1980) (hereinafter: Baxter); Gold (1983) (hereinafter: Gold); Chinkin (1989) (hereinafter: Chinkin); Boyle (1999) (hereinafter: Boyle); The Debate, *supra* n. 33 at 590–591.

[44] See: Gersen and Posner (2008–2009) (hereinafter: Posner). In the opinion of the authors, conventional international law is based on the consent and will of two states or a small number of states to enter into a binding agreement. However, when the issue under discussion has many parties and participants (for example: Agreements on the environment, climate change and so forth), the chances of reaching a binding agreement are low, due to the large number of parties and interests. Soft law, in the form of a non-binding convention, enables states to undertake the commitment. This effectively constitutes a non-threatening treaty framework, which enables dialogue and agreements between many parties and interests.

[45] See: Posner, *supra* n. 44, at 625. See also: Guzman and Meyer (2010) (hereinafter: Guzman).

[46] See: Posner, *supra* n. 44, at 586–587. The authors speak about soft law as guiding behavior in domestic law in the US and in international law. States discussing the acceptance of a soft law convention do not know what the chances are that the non-binding convention will subsequently become a regular and binding treaty, and what their ability to fulfill the treaty will be. Experience shows that soft-law conventions will harden over the years and become binding. Therefore, soft law serves as a kind of signal and declaration of intentions, the entry into which is done gradually and provides the state with an adjustment period.

Three definitions may be proposed, in such a way that if even one of them is fulfilled, the legal norm on the issue of older persons can be defined as soft law.[47] One case is that the law in question is not binding law.[48] In other words, if the agreements are non-binding and do not include enforcement measures, the norm will be considered soft law. A second case is that the legal norm comprises general norms and principles but not laws. In this case, it is the language of the convention that determines whether we are talking about soft law. A situation is possible in which a particular convention will have one section that is soft law and another section that is a binding conventional norm.[49] The third case refers to a legal norm that is not subject to simple enforcement. This refers mainly to conventions dealing with many issues and consisting of many articles, which is difficult to enforce as an integral whole.[50]

As noted in the scholarly literature, "soft law"—while not binding on the formal level—has been proven to play an important role in determining customary international law.[51] Through its specificity, soft-international law can act as a guide for policy matters. This is especially true on the international level, where flexibility and diversity is needed—here, "soft law" in the form of detailed yet unbinding legal formulas, stands a better chance of being adopted in local policies. For example, the work of UNHCR in setting standards for the treatment of older refugees—while having no formally binding status—has effectively captured the vulnerability of persons in emergencies, as well as provided useful guidance on how to respond best to the needs of older persons in crisis situations

Rights of older persons in soft public international law began to take shape at the beginning of the 1980s,[52] starting from the Vienna International Plan of Action on Ageing, which the UN General Assembly adopted in 1983.[53] The plan includes 62 recommendations for action aimed at aiding and ensuring the subsistence and rights of older persons. The recommendations addressed the main issues of health, nutrition, housing, social services, preventing unemployment, and education.[54] This plan constituted a milestone in the development of elder rights on the

[47] Boyle, *supra* n. 43, at 901–902. The article discusses the relationship between a "soft law" norm and the "treaty law" norm in international law.

[48] *Id.* at 901.

[49] *Id.* at 902. He cites as an example the Convention on Climate Change, which includes both soft law and treaty norms.

[50] *Id.*

[51] See: *The Debate*, *supra* n. 33, at 590–591; Gold, *supra n.43, at* 443–445 (1983); Boyle, *supra* n. 43, at 901–902

[52] Doron and Mewhinney (2007); The Debate, *supra* n. 33 at 590; Rodriguez-Pinzon, *supra* n. 6, at 917; General Comment No. 6, *supra* n. 16, at Article 4.

[53] Vienna International Plan on Ageing, *supra* n. 17; Rodriguez-Pinzon, *supra* n. 6, at 947. The plan was adopted unanimously by 124 states at the World Assembly on Ageing.

[54] General Comment No. 6, *supra* n. 16, at Article 4; Rodriguez-Pinzon, *supra* n. 6, at 947; The Debate, *supra* n. 33, at 590.

international level, but had no binding legal validity, and served only as a kind of document of recommendations.

In 1991, the UN issued the United Nations Principles for Older Persons.[55] The document was divided into five principles: The first principle is independence, and includes the right to food, shelter, clothing, health and the right to work and education.[56] The second principle is care. Older persons have the right to receive proper care, whether they live at home, in an institution or anywhere else.[57] The third principle is participation. The idea is to enable older persons to take part and share in the public sphere, so that they can be partners to decisions that pertain to them and help shape the face of society in general.[58] The fourth principle is self-fulfillment. This refers to the possibility of self-realization and personal development, by enabling older persons to enjoy full access to educational and cultural systems.[59] The last principle deals with elder dignity. The idea is to enable older persons to lead an independent life, without being exploited or suffering from discrimination or abuse.[60] Here too, we see a resolution that has no binding legal validity, is not enforceable, and has importance on a declarative level only.

Two additional important documents were issued in 1992. First, the UN General Assembly adopted a plan with eight targets for international action until 2001 on the matter of older persons.[61] The second document was the Proclamation on Aging.[62] This document was issued on the occasion of the tenth anniversary of the Vienna International Plan of Action on Ageing.[63] It urges, among other things, the states to support older women who spent most of their lives caring for the home and family and to ensure for them a dignified old age.[64] The document encourages men to continue to lead a productive life even after retirement.[65] The proclamation attaches importance to encouraging, supporting and strengthening families, which serve as a basis and support for the elder population.[66] The proclamation calls upon the states of the world to strengthen their cooperation with regard to research and knowledge on aging and older persons.[67]

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[55] Principles for Older Persons, *supra* n. 17; General Comment No. 6, *supra* n. 16, at Article 5; Rodriguez-Pinzon, *supra* n. 6, at 948; The Debate Around, *supra* n. 33, at 590.

[56] Principles for Older Persons, *supra* n. 17, at Articles 1–6.

[57] *Id*. at Articles 10–14.

[58] *Id*. at Articles 7–9.

[59] *Id*. at Articles 15–16.

[60] *Id*. at Articles 17–18; Rodriguez-Pinzon, *supra* n. 6, at 948.

[61] Implementation of the International Plan of Action on Aging: Integration of Older Persons in Development, U.N. Doc. A/RES/47/86 (1992).

[62] Proclamation on Aging, U.N. Doc. A/RES/47/5 (1992) (Hereinafter: Proclamation on Aging).

[63] Vienna International Plan on Ageing , *supra* n. Articles 17.

[64] Proclamation on Aging, *supra* n. 62 at Article 2 (h).

[65] *Id*. at Article 2 (i).

[66] *Id*. at Article 2 (k).

[67] Id. at Article 2 (o); General Comment No. 6, *supra* n. 16, at Article 7; Rodriguez-Pinzon, *supra* n. 6, at 948–949.

The most important landmark, as of today, in the field of developing "soft" elder rights was carried out during the Madrid Assembly of April 2002, with the support of all 159 UN member states (at the time).[68] Specifically, it should be taken into account that the focus of the 2002 Madrid Assembly shifted the existing policy framework regarding the rights of older persons considerably: it promoted the view of aging from the perspective of both developing and developed countries. An intergenerational policy approach that pays attention to all age groups with the objective of creating a society for all ages and a shift from developing policies for older persons toward the inclusion of older persons in the policymaking process were major outcomes of the Madrid Assembly. We can say that there is almost no sphere of social interest concerning the older population that is not covered by the very detailed existing international documents. If the Madrid Plan of Action is taken seriously and implemented properly, there will be no need for any new international convention. However, if the Madrid Plan of Action is not taken seriously, there is no reason to expect that another international document will be treated any differently.

Another element of soft law that must be mentioned is the activity of international organizations that promote elder rights in their field. For example, the International Labor Organization (ILO), in various conventions, has addressed specific issues relating to the older population, such as minimum standards of social security,[69] and old age benefits. Furthermore, the organization issued a recommendation to act to prevent discrimination against older workers in terms of their employment, social security, and retirement conditions.[70] The ILO also passed resolutions to refrain from discrimination against older workers with regard to vocational training, and to prevent discrimination against women who began to work at a later age, having been previously engaged in managing the household.[71] It is important to see that despite the organization's activity, it too does not have a convention, proclamation, or plan that deals specifically with the older population.[72]

Some may view soft law regarding the older population, in effect, as a type of weak law that lacks enforcement powers.[73] But others will find an advantage in this.

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[68] See: Madrid International Plan of Action on Ageing, U.N. Doc A/CONF.197/9 (2002) (Hereinafter: Madrid International Plan).

[69] See: International Labour Organization, *Social Security (Minimum Standards) Convention* (June 28, 1952), ILO. Doc. C102, http://www.ilo.org/ilolex/cgi-lex/convde.pl?C102 (accessed July 1, 2004) (Last visited May 3, 2011).

[70] See: ILO: Older Workers Recommendation, 1980 (No. 162).

[71] See: ILO: Convention No.142, Convention No.156; Rodriguez-Pinzon, *supra* n. 6, at 951.

[72] Rodriguez-Pinzon, *supra* n. 6, at 951.

[73] Baxter, *supra* n. 43, at 550, writes: "We may start this examination on 'soft' or 'weak' law. . ..."; and see: Boyle, *supra* n. 43 at 911–912, who regards soft law as a possibility of creating an entire system that is parallel to conventional law—a soft law system that is not normatively binding. He considers such a framework to be more comfortable for enforcement and conflict resolution.

For them, soft law offers many options for implementation at the international level. It will be easier for states to accept these non-binding norms, and this will make it possible to advance issues at the international level. On the matter of elder rights, if they are composed of soft law, there is hope that states will be willing to accept these norms with greater ease.[74]

6.2.3 International Case Law

Along with the three streams of elder rights the "hard" law, interpretation of international convention, and "soft" law, another element that has developed in international law is case law created by international tribunals that have begun to address human rights in general and elder rights in particular. Between 1922 and 1960, the International Court of Justice in The Hague was the only international court for resolving international conflicts. Since then, the number of such courts and forums has grown. Some are the product of international UN conventions on human rights, and some were set up by virtue of regional conventions.[75] The greatest change has taken place in Europe, and it combines an unprecedented political and economic union; a union in which states waive, of their own free will, symbols of sovereignty (local currency, law) in favor of creating a binding multinational framework.[76] Among other things, this framework has also created an advanced and sophisticated legal system.[77] The union has many reasons, one of which was the desire to unify and raise norms with regard to safeguarding human rights.[78] On the matter of elder rights, we can distinguish between two possible types of discussions. In one, a disputed question related to older persons is discussed in public international law between states. In the other case, which is the product of the past decades, older persons as individuals bring claims against states within the framework of public international law.[79]

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[74] The Debate, *supra* n. 33, at 590–591.

[75] Higgins (2001) (hereinafter: Higgins); see listing of courts and forums that have evolved in the past decades: Greer (2010) (hereinafter: Greer). Among others, the following courts can be noted: The European Court of Human Rights, the European Court of Justice, the International Tribunal for the Law of the Sea, the World Trade Organization, the International Labor Organization, the International Criminal Court, the regional courts in America and Africa and more.

[76] Rosenne, *supra* n. 8, at 454.

[77] *Id.* at 454–455.

[78] Goldhaber (2007) (hereinafter: Goldhaber).

[79] Rosenne, *supra* n. 8, at 455; Goldhaber, *supra* n. 78, at 3–4. In the first case, the example is the discussions being held on the matter of the elderly in the UN's International Court of Justice (see below). In this case, the discussion is between states only. The second salient case is the European Court of Human Rights (see below).

6.2.3.1 Elder Rights in Inter-State Law

Elder rights, when discussed in courts and international forums between states, are marked by the fact that states are the litigating parties that come before the courts and forums.[80] This group includes, among others: The International Court of Justice (ICJ) in The Hague,[81] the International Committee on Economic, Social and Cultural Rights (CESCR),[82] the European Committee of Social Rights (ECSR) and the Inter-American Commission on Human Rights (IACHR).[83] Non-governmental organizations (NGOs) can also come before some of these courts and international forums.[84]

The European Committee of Social Rights is the committee charged with implementing the European Social Charter.[85] Complaints and appearances before the committee are only possible for a closed list of labor organizations and non-governmental organizations. Older persons themselves cannot appear before the committee. The European Committee of Social Rights has discussed a small number of cases to date. The committee lacks enforcement powers and its recommendations regarding the deviation of states from the ESC are turned over to the Committee of Ministers of the Council of Europe for enforcement.[86]

In the decision on the matter of the International Federation of Human Rights Leagues (IFHR) v. Ireland,[87] the IFHR sued the Irish government on behalf of

[80] The committees mentioned below are not courts. However, these committees conduct, in different forms, procedures of inquiry and clarification. Such inquiries are also conducted on issues related to elderly persons.

[81] Hereinafter: ICJ.

[82] Hereinafter: CESCR. This is an international body of primary importance for examining and monitoring the development and implementation of Economic, Social and Cultural Rights . By virtue of being a UN committee, it has a broad picture placed before it, and holds the authority to report to the Economic and Social Council. The committee is subordinate to the UN General Assembly. It does not accept complaints from individuals, and its main power lies in reporting. See: Scheinin (1995) (hereinafter: Scheinin).

[83] Hereinafter: IACHR. Filing claims with the Inter-American Court of Human Rights is under the authority of the Inter-American Commission on Human Rights, and only after exhausting the procedures with the states against which the claims are filed.

[84] One notable example is the court of the International Labor Organization (ILO). Individuals can file complaints only against organizations that are members of the ILO. The authority of the court and tribunals applies to its member organizations, and it discusses complaints among the members.

[85] ESC, *supra* n. 29, Article 23.

[86] Churchill, *supra* n. 9, at 229. At 221–224, they report that until 2006, 34 complaints were discussed regarding nine states out of the 14 that ratified the ESC. Their argument is that the Council of Ministers is mainly motivated by political considerations, and there is no meaningful enforcement of the ESC in case of violations. The reporting system works effectively, and the main problem that requires a solution is finding a more effective enforcement system.; see as well: Koch, *supra* n. 10, at 292. Until January 1, 2009, 53 cases were discussed by the committee. This is a small number relative to the number of cases discussed by the European Court of Human Rights (see below).

[87] International Federation of Human Rights Leagues (IFHR) v. Ireland Application No. 42/2007 (3/6/2008) (hereinafter: International Federation v. Ireland).

a group of Irish pensioners, who did not live in Ireland on a permanent basis. Their argument was that during visits to Ireland, they were not entitled to free rides on public transportation, like all other pensioners living in Ireland. Their right to a free ride was denied to them solely because they had chosen not to live in Ireland during the retirement period. The committee that discussed the complaint found that Ireland had not deviated from the provisions of the ESC, and that the state had discretion as to the manner of implementing the budget and its distribution among the citizens. Despite the fact that the discussion pertained, among other things, to Article 23 (the rights of the elderly), the committee did not assign any weight to the plaintiffs' place of residence and lifestyle or their needs as older persons. In effect, the committee ignored the older population as a unique group with special sensitivities and needs.[88]

6.2.3.2 Older Persons in International Law as Having Independent *Locus Standi*

Opening the gates of international courts to individual complaints is part of the process of transforming the courts and committees of international organizations into a significant tool for the defense of human rights.[89] A number of international bodies enable individuals to file complaints with them. Five of the committees on the UN Economic and Social Council enable such a procedure.[90] The committees are: The Human Rights Committee (HRC),[91] the Committee on the Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Rights of Persons with Disabilities (CRPD).[92] In these cases, complaints are submitted to the committees, which conduct an investigation. The complaints discussed by the committees are those submitted by individuals against states that have ratified the consent to discuss individual complaints. The committees summarize and formulate their position on the basis of the complaints, the parties' responses, and an inquiry. Conclusions and recommendations are ultimately submitted to the Economic and Social Council, and in any case the

[88] *Id*. at Article 19–20, 31–32.

[89] Goldhaber, *supra* n. 78, at 6; Rosenne, *supra* n. 8, at 455; see also: www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics (Last visited July 11, 2011). Until December 2010, 57,400 complaints were filed with the European Court of Human Rights, a 10% increase from the previous year. 80% of the complaints come from states of the former Soviet bloc.

[90] Smith (2010) (hereinafter: Rhona). Explains in a clear and concise manner the existing committees within the overall picture of the UN committees.

[91] Not to be confused with the Human Rights Council.

[92] Rhona, *supra* n. 91, at 66–79. Listing of the committees, their roles and their manner of operation.

decisions are non-binding.[93] The committees do not carry out, as a matter of routine, a process of litigation (as in the adversary system). For our purposes, it is important to emphasize that older persons who file complaints with the committees can do so only on the basis of articles in the conventions according to which the committees operate, and which were violated (discrimination against women, torture, racism and so forth). Complaints are not submitted to these committees on violations of articles prohibiting discrimination against older, persons as such. The reason for this is simple: No such articles exist in these conventions. On the individual-complaint level, the central European legal instance that over the years has become a leading world instance with regard to human rights is the European Court of Human Rights. The court belongs to the European Council and was founded on July 21, 1951.[94] From its founding until 1998, the court handed down only 837 rulings. Between 2003 and 2007, the court gave 4,000 rulings. In September 2008, the court handed down its 10,000th ruling. At present, over 100,000 cases are being handled by the court, and every year 50,000 cases are added.[95] This demonstrates the court's scope of activity and its status. The court's jurisdiction applies to the 47 states that are members of the Council of Europe, from Vladivostok (Russia) in the east to Reykjavik (Iceland) in the west. Some 800 million people, speaking 28 languages, fall under the court's jurisdiction.[96] It examines the claims in light of the wording of the European Convention on Human Rights, and by virtue of this, the court also has the authority to discuss individual complaints.[97]

The ECtHR made its unique breakthrough of the individual complains in the international sphere in November 1998.[98] The court summarized the process that brought it to its unique position today:

> . . .the Court would stress that although the Convention right to individual application was originally intended as an optional part of the system of protection, it has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention. . .. right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.[99]

In summary, it would appear that looking forward, we can expect a significant increase in the use that older persons will make of international courts and tribunals

[93] Justiciability, *supra* n. 8, at 467. The authors show that enforcement is weak mainly due to the fear that states will not join (ratify) the protocols enabling individual complaints. If there is an aggressive enforcement against the states, they will refrain from ratification or will withdraw after having ratified.

[94] Rosenne, *supra* n. 8, at 92.

[95] For all data cited here, see: Deutsch and Wolfrum (2009); see also: www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics (Last visited July 11, 2011).

[96] Goldhaber, *supra* n. 78, at 6.

[97] *Id.*

[98] See: Egli (2007–2008); Reiss (2009); Wildhaber (2006–2007).

[99] Mamatkulov & Askarov v. Turkey, (2005) ECtHR Application nos. 46827/99 & 46951/99, article 122.

to further their rights. We can also expect to see the development of a new legal theory of judicial precedents that will focus on the status and rights of older persons throughout the world, a legal theory that will trickle down and become binding for the courts in the various states as well. Here too, we are talking about an important development that is only at the start of its path, and it will be important to follow the precedent-setting rulings on the matter.

6.3 Private International Elder Law

Private law problems that arise from factual situations connected with more than one country are commonly encountered in the modern world. As described by Doron, in a globalized and aging world, older persons travel, move, and migrate from one country to another for a variety of purposes and contemplated or actual durations.[100] To achieve reasonably satisfactory resolutions that arise from these situations, legal systems have adopted special rules that form the legal discipline known as conflict of laws and private international law.[101] Like any other rule in a country's private law, rules of conflict may be coordinated with those of other countries by means of international treaties.

Although international private law is relevant to the aging population in various respects, perhaps the most common area is that of wills and inheritance. This area regulates the allocation of property after a person's death and the degree to which the person is free to decide what will happen to that property, which gives rise to many legal questions at the international level. A relatively simple question is whether the country within whose boundaries the person's property is found should honor a will made in a different country. An example of a more complex issue is the status of a will that was drawn up in one country and signed in another, and whose provisions are required to be carried out in a third country. Such questions can only receive a legal solution by means of private international law.

Every legal system is free to define its own legal responses to questions like these. On the international level, however, there are a number of conventions that attempt to establish standardized practices in areas of private international law applicable to older persons. These conventions were drawn up by the Hague Conference on Private International Law, an organization comprising fifty-six member nations.[102] The purpose of this body is to unify the rules of private international law[103] by drafting multilateral treaties known as Hague Conventions.[104] Some of the conventions deal

[100] See: From national to international, *supra* n. 4, at 48–51.

[101] *See generally* Stone (1995).

[102] Fagan (2002) (hereinafter: Fagan).

[103] Hague Conference on Private international Law, *Statute of the Hague Conference on Private International Law*, http://hcch.net/index.en.php?act=conventions.text&cid=29 (entered into force July 15, 2004) (last visited July 11, 2011).

[104] Fagan, *supra* n. 110 at 337.

specifically with legal issues of concern to older persons: testamentary dispositions,[105] international estate administration,[106] succession to estates,[107] and trusts.[108] There is also the Fourth Report of the Private International Law Committee, which provides a universal basis in this field and was adopted by many countries around the world and incorporated into their legal systems.[109]

An important recent development in this field is the Convention on the International Protection of Adults, which "applies to the protection in international situations of adults who, by reason of impairment or insufficiency of their personal facilities, are not in a position to protect their interests."[110] The convention "aims to shield the vulnerable members of society by determining which state — that of their citizenship or of their current residence — may assert jurisdiction over them."[111] While not explicitly stated, it is clear that this convention is of "significant, if not primary, relevance to the elderly."[112]

According to the convention, it is the adult's country of habitual residence that has the jurisdiction to take measures for protecting the adult's person and property.[113] However, as Fagan notes, the convention recognizes some exceptions, such as the jurisdiction to take emergency or temporary measures of protection.[114] The actual protective authority is broad, and includes "the determination of incapacity and the institution of a protective regime," "the placement of the adult in an establishment or other place where protection can be provided," and "the authorization of a specific intervention for the protection of the person or property of the

[105] Hague Conference on Private International Law, *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, http://www.hcch.net/index_en.php?act=conventions.text&cid=40 (Oct 5, 1961) (last visited July 11, 2011).

[106] *Convention Concerning the International Administration of the Estates of Deceased Persons*, http://www.hcch.net/index_en.php?act=conventions.text&cid=83 (Oct 2, 1973) (last visited July 11, 2011).

[107] *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, http://www.hcch.net/index_en.php?act=conventions.text&cid=62 (Aug 1, 1989) (last visited July 11, 2011).

[108] *Convention on the Law Applicable to Trusts and on Their Recognition*, http://www.hcch.net/index_en.php?act=conventions.text&cid=59 (July 1, 1985) (last visited July 11, 2011).

[109] Private Int'l. L. Comm., *Formal Validity of Wills*, *Fourth Report of the Private International Law Committee* (1958). See also Stone (1995) at 374 (noting that thirty-eight countries have incorporated the Report into their legal systems).

[110] *Convention on the International Protection of Adults*, Article 1, para. 1, http://www.hcch.net/e/conventions/text35e.html (Jan 13, 2000) (last visited); *see generally* Paul Lagarde, *Convention of 13 January 2000 on the International Protection of Adults, Explanatory Report*, http://www.hcch.net/index.en.php?act=conventions.text&cid=71 (Jan 5, 2000) (last visited July 11, 2011).

[111] Fagan, *supra n. 110, at* 331.

[112] *Id.* at 339.

[113] *Convention on the International Protection of Adults*, supra n. 118, at Article 1, para. 5.

[114] Fagan, *supra* n. 110, at 340–341 (citing *Convention on the International Protection of Adults*, *supra* n. 118 at Article 10, para. 1; Article 11, para. 1).

adult," including matters such as "a surgical operation or the sale of an asset."[115] Most importantly, the convention makes it possible to respect (within certain limits) legal documents such as advance directives, living wills, and durable powers of attorney, so that the wishes of older persons will be honored in case of incapacity, even outside their own country.[116]

An example of the complicated judicial norm regarding older persons may be found in the following case. A Greek pensioner was treated for a chronic heart complaint while traveling in Germany. The ECJ judgment declared that EU pensioners traveling in member states other than their home country have the right to medical treatment with costs borne by the home country.[117] The Court wrote that a Greek pensioner treated for a chronic heart complaint while traveling in Germany should have been recompensed by his own country.[118] The court added that such treatment is not to be "limited solely to cases where the treatment provided has become necessary because of a sudden illness" but should also include cases of "a pre-existent pathology of which [the patient] is aware, such as chronic illness."

6.4 Comparative Elder Law

"Globalization brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact."[119] Naturally, this trend also encourages the development of comparative elder law. It should be noted that comparisons between legal systems can broaden horizons. Comparative research enables us to consider legal solutions that our own system has not contemplated, to weigh the advantages and disadvantages of our own system against those of other approaches discovered in the course of research,[120] and to better understand our own system. The ability to identify an identical lineage, or similar basic principles, helps us single out the universal cornerstones of the legal system and better interpret

[115] Fagan, *supra* n. 110, at 341 (citing Lagarde, at 31; *see also Convention on the International Protection of Adults*, supra n.118, at Article 3).

[116] Fagan, *supra* n. 110, at at 347 (analyzing the success or failure of the convention in achieving this goal).

[117] Case C-326/00, *Idryma Koinonikon Asfaliseon (IKA) v. Vasileios Ioannidis*, 2003 E.C.R. I-1703 (available at: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-326%2F00&datefs=2003-02-25&datefe=&nomusuel=&domaine=&mots=&resmax=100) (last visited July 11, 2011).

[118] *Id.* at para. 55.

[119] Gerber (2001).

[120] *See generally* Haris (2001) (Hebrew); Bogdan (1994); Schlesinger et al. (1998); Zweigert and Kötz (1998).

the law on the basis of wider knowledge.[121] An understanding of foreign systems of law enables us to provide solutions for clients who encounter legal difficulties in other countries. Finally, comparative research facilitates dialogues between societies and, to a certain extent, encourages international cooperation and mutual understanding.[122]

At the present time, unfortunately, there is relatively little literature in the field of elder law that makes use of comparative methodology. Thus, there is considerable room for development, both with respect to the general advantages mentioned above as well as at a more advanced level: the ability to use the comparative method to discern and analyze the more profound social aspects of old age.

One example of a long-known use of comparative law is legal reform. Legal systems have always been learned, or simply copied. It is natural, in any process of legal change, to make a comparative examination of what is happening in the field in the outside world.[123] It would likewise be natural that in the field of elder law, in which there is a constantly growing demand for legal change and reform of existing laws, one should turn to comparative international law for solutions.

Despite the very limited amount of comparative research in elder law to date, a slow increase has recently become discernible. There is more detailed research in elder guardianship,[124] family responsibility,[125] long-term care for old people,[126] and the right to a dignified death.[127] The increasing awareness of the importance of comparative international law has also affected education and professional training. For example, the National Academy of Elder Law Attorneys (NAELA) founded in 1988, has organized comparative international panels in several of its professional conferences,[128] such as the Wake Forest University School of Law course offered in Italy in 2003 devoted entirely to the comparative aspects of elder law.[129]

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[121] Haris, *supra* n. 128; *see generally* Bogdan, *supra* n. 132, at 28–32; de Cruz (1999) (describing how the judges of the European Court of Justice draw upon their experience from various traditions to resolve legal issues that present themselves in this international forum).

[122] Haris, *supra* n. 128 *See also* Cruz, *supra* n. 129, at 24–26 (encouraging the use of "common core research" to discern the "highest common factor[] of substantive law" across international legal systems).

[123] Cruz, *supra* n. 129, at 20–21 (providing several examples of nations' engaging in comparative studies and borrowing of foreign laws).

[124] *See generally* Doron (2002) (comparing guardianship law reform internationally).

[125] *See generally* Moskowitz (2002) (comparing major nations' filial responsibility laws).

[126] *See generally* Glendinning et al. (1997).

[127] Little (1997) (comparing physician-assisted suicide in the Northern Territory, Australia; the Netherlands; and Oregon, United States); *see also* de Cruz (2001) (summarizing and comparing advance-directive and physician-assisted suicide laws in several countries).

[128] National Academy of Elder Law Attorneys, http://www.naela.org/ (Last visited June 30, 2004).

[129] *Wake Forest University Comparative Law Summer Program*, http://www.wfu.edu/users/palmitar/LawSchoolPrograms/Venice-Summer-Program/Brochure2003/Academic-life.html (Last visited June 30, 2004).

The studies and activities mentioned above have implications for social and legal policy, and offer a deeper understanding of the field, as well as the ability to forecast possible future developments. Recognition of the importance of the international aspects of elder law will intensify the use of comparative law tools and enable the field to develop with the aid of international cooperation.

6.5 Conclusion

Doron has already argued that the extension of elder law into international law holds great promise, and will make possible new areas of cooperation. It can release great creative potential and facilitate the formulation of legal solutions that have hitherto been impossible. It proffers a vision of old age from the perspective of universal law, one that crosses frontiers and unites cultures. Finally, it is an expression of the "maturation" of the field of elder law, reflective of many other fields that, at one stage or another, have undergone a process of internationalization.[130]

The ability to realize this vision in practice depends primarily on the ability to create an awareness of the need to do so. One key purpose of this chapter has been to promote an understanding among those who work in elder law that they should raise their sights from the local to the international level. Only understanding, consciousness, and internalization of the need to bring about a change in thought will eventually bring about the required reforms. We present here Doron's recommendations in two fields[131]:

6.5.1 Increased International Cooperation

The international aspects of elder law cannot be developed without international cooperation. This must be promoted at various levels and in different contexts. Thus, for instance, at the academic level, cooperation between scholars at academic research centers the world over is a natural development. This can take place in a number of ways: joint research projects, exchange of scholars, conferences and workshops, and a whole host of academic activities. The same applies to the professional level as well.[132] There is already a great deal of international cooperation among lawyers, so it is reasonable to suppose that they will expand this cooperation to find legal solutions to the international problems of their older

[130] *See generally* Dyer (1997); Kinney (2001).

[131] From National to International, *supra* n. 4, at 66–67.

[132] *See generally* Gerber, *supra* n. 127, at 955 (noting that "[g]lobalization … changes the relationships between legal professionals in ways that influence the processing and transmission of legal information").

clients. Such cooperation should take place both among individual lawyers or law firms, and among professional organizations. Professional organizations, which are today more involved and active in matters of elder law than in the past, should increase the degree of their international cooperation and should educate and encourage professional cooperation among lawyers as individuals.

In this connection, it should be noted that rising importance of nongovernmental organizations (NGOs) heralds a fundamental change in international law. Although gerontological organizations conduct a lively and dynamic international dialogue,[133] in the field of elder law, cooperation and dialog between NGOs is extremely limited.[134]

6.5.2 *International "Legislation"*

As noted previously, there is a major lacuna in international law: the absence of a charter of rights for the older population. There is no justification for the fact that, whereas other underprivileged groups have been granted internationally recognized charters of rights, older persons have no such document bearing obligatory legal validity. This is a badge of shame for all those who are active in the field of elder law; it is in part the expression of inactivity and the lack of consciousness of the need for international action to promote the rights of older persons. It may be that the most important challenge in international elder law is the framing of an international charter that defines the fundamental rights of old people the world over. Such a document, in addition to its obligatory legal status, would have great educational, symbolic, and political value and would serve to advance the rights and improve the status of older persons all over the globe. Moreover, international and regional organizations should publish papers, covenants, and detailed international agreements as a basis for the specific rights of older persons. Legal instruments such as these would bring about change throughout the field of elder law at both the national and the international levels.[135]

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[133] *See e.g.* International Association of Gerontology, *welcome* http://www.sfu.ca/iag/ (Last visited June 30, 2004); International Federation on Ageing, http://www.ifa-fiv.org/en/accueil.aspx (Last visited June 30, 2004).

[134] From National to International, *supra* n. 4, at 66–67; in many countries there already exist associations and NGOs that promote the law as an instrument for social change among the old. In the United States, the Legal Counsel for the Elderly gives legal aid to old people in need on behalf of AARP. *See generally* http://www.aarp.org/lce/ (Last visited May 11, 2004). The Advocacy Centre for the Elderly in Toronto, Canada, and Law in Services of the Elderly in Israel serve similar functions. *See generally* http://www.advocacycentreelderly.org/index.htm (Last visited March 19, 2011) and http://www.elderlaw.org.il (*select* English) (Last visited May 11, 2011). These organizations work on the local level, and have scarcely any international cooperation between them.

[135] *Id.* at 67.

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Chapter 7
A European Approach to Developing the Field of Law and Ageing

Albert Evrard sj and Clémence Lacour

7.1 Introduction

Does a European approach exist to developing the field of Law and Ageing? The issue has become significant in Europe.[1] For approximately 20 years the spectrum of legal questions related to ageing has grown broader, so that an integrated perspective on Law and Gerontology must be developed as well as a field of Law and Ageing.[2]

We wish to set out herein an awareness for the need to develop Law and Ageing (Burgelin and Gridel 1999; Stevens 2005; Benzimra-Hazan 2010); some initiatives that are being taken which are changing the European context, including the concept of citizenship at both the national (Member States) and European Union levels as a good way to deal with each older person as a legal subject holding human rights (Macleod 2007; European Union 2009; Van Bueren 2009; Michel 2009;

[1] This text is written from the perspective of Civil Law in Belgium and France. Some of the statements in this chapter may be applied to other 25 Member States of the European Union. All references in this text are taken without modifications from official translations of the European Union services.

[2] Given the legal principles of the rights and the need for protection in our society, we wonder why older persons are considered "latecomers" when compared to the young, women, disabled and animals. One of the reasons older persons are considered "last served" is probably that we only consider the protective aspect. Thus, we advise to take into account their entire legal position, not only as victim, defendant, contractually vulnerable or suffering the law but also as perpetrator, plaintiff, dominant contracting party and empowered under the law.

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Pettiti 2010; United Nations Programme on Ageing and IAG 2003)[3]; and finally, to point to research projects we expect to undertake in the future.

In order to develop this, we would like to focus in this chapter on current laws and actions of the European Union which have been under-developed until now[4] without, however, underestimating laws as they exist in Member States and recommendations and decisions of the Council of Europe[5] (headquartered in Strasburg, France).

It will be important for the reader to keep in mind that the European Union which began in 1951 (European Coal and Steel Community) and in 1957 (European Atomic Energy Community and European Economic Community under the Treaties of Rome and Italy) as an integration of six (6) countries for principally political and economic reasons has gradually grown to twenty-seven (27) member nation states (Member States). Each Member State, in addition to its current laws, has adopted many European laws and policies. The European Union itself had its own jurisdictions and competences clearly determined for the first time in 2007 (Treaty of Lisbon). The integration and harmonization of law at the Member State and European Union levels, and the deliberation of new laws and policies have been and will continue to be a great challenge (Dony 2008; Clergerie et al. 2010). Consideration must also be given to the fact that the expanse of continental Europe is rather uncertain in economical, political, cultural, social and human areas. This is without mentioning the large diversity of customs and habits, the concept of the family and the position of older persons within it, life standards, as well as legal systems and traditions of rights and freedoms and their implementation. Moreover, some Member State countries have strong national identities and characters which do not lend themselves to an easy, clear, equal, consistent and uniform continental or "Union" sense of belonging.

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[3] Decision of the Council of April 19th 2007 establishing, for the period of 2007–2013, *a specific program on Fundamental Rights and Citizenship in the framework of the General Program "Fundamental Rights and Justice"*, Decision 2007/252/EC., *O.J.E.U.,* L.110, April 27th 2007.

[4] This chapter uses the Treaty of the European Union (herein after called TEU) and the Treaty on the Functioning of the European Union (herein after called TFEU) introduced by the Treaty of Lisbon, signed on December 13th 2007 in Lisbon and entered into force on January 1st 2009 (Article 6 TEU). As stated in Article 1 Sect. 3 TEU: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value (. . .)".

[5] About the Council of Europe, we refer to the bibliography and to some documents: Draft of Recommandation of the Parliamentary Assembly 9805 of May 13th 2003, *Les tendances en matière de population et leur sensibilité à certaines mesures politiques;* Res.2008/2209 (INI) of February 19th 2009, *La santé mentale*; Recommandation 1796 (2007). *The situation of elderly persons in Europe*; Recommandation CM/Rec (2009)6, *Le vieillissement et le handicap au 21e siècle: cadres durables permettant une meilleure qualité de vie dans une société inclusive*. See website: http://assembly.coe.int. An example of cooperation between the European Union and the Council of Europe is the joint European Union- Council of Europe *Programme on The protection and the promotion by national human rights structures of the rights of elderly people*, started in 2009 (Council of Europe, LHRCB/NHRS (2009) 7).

We will be unable to discuss further herein the complexities of the European demographic,[6] geographical, political, legal, social and cultural mosaic[7] and the complex integration process within the European Union that makes use of its own growing European law (Jolivet 2002; Dony 2008; Eurostat 2010; Clergerie et al. 2010; Grossi 2011). In addition there are two other issues which will not been discussed: the fact that the field has to be seen as trans-systemic, interdisciplinary, across areas of law and other disciplines dealing with ageing, and as multidimensional in its practice. Secondly, there is a need to clarify vocabulary and definitions relevant to the field and across the European Union.

In the European legal context, we intend to restrict our examination to exploring some principles of European law through its primary sources: treaties and their equivalent, some statutes and general principles of law.[8] We would also like to refer to case law from the Court of Justice of the European Union (CJEU- Luxembourg) and the European Court of Human Rights (ECHR- Council of Europe- Strasbourg) in order to show the convergence between both of these regional judicial institutions and to verify the effectiveness of older persons' rights. Such a limited overview of principles and sources requires reference to and exploration of further principles and sources.[9] However, this must be left for future research.

Consequently, we would like to present a kind of snapshot of European Law and Ageing issues and directions commensurate with (I) the European legal dimension and policy context and (II) the concept of citizenship as it intersects with the development of human rights in ageing issues within the European Union context.

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[6] The European Union population consisted of approximately 522 million inhabitants in 2007. The demographic ageing process is common everywhere but not evenly distributed amongst the EU 27 Member States or the 47 Council of Europe Member States and nor within each country. Communication from the Commission. Green Paper *Confronting Demographic Change: a New Solidarity Between the Generations,* COM(2005) 94 final (not published in the Official Journal) and the Commission Communication of October 12th 2006 *The Demographic Future of Europe – From challenge to Opportunity*, COM(2006) 571 final (not published in the Official Journal).

[7] See Article 3 Sect. 3 al. 4 TEU: "It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Article 4 Sect. 2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

[8] Article 1 al. 3 TEU: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community".

[9] We specially refer to the secondary sources quoted in Article 288 TFEU: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force".

7.2 European Law and Ageing

In addition to a national and a multilateral approach by Member States, the European Union provides us with a good example of a third approach which is an integrative one. Being a *sui generis* integration process governed by its own system of law, the European Union[10] promotes and employs legal principles,[11] concepts and techniques in relation to ageing from the Member States (for example, principles of equality and non-discrimination,[12] subsidiarity and proportionality[13]).

The European Union, an atypical actor on the international scene, has been able to pursue policies having direct effect on the daily life of all the citizens of the many Member States.[14] Law is the preferred means to attain the objectives of the Union (legislative acts such as regulations, directives and decisions are compulsory and have the same binding effect as Member State laws[15]). In such a context, older persons are beneficiaries of laws enacted by the 27 Member States. This suggests that there is a large and rich area for future research, exploring the effectiveness of laws concerning access to and exercise of rights and freedoms by older persons, the improvement of existing laws and the enactment of new laws. This also suggests the exploration of the particular and changing European legal order and of the links amongst its 27 national legal frameworks (Monjal 2008; Sudre 2009; Michel 2009).

[10] Article 3 TEU: "6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. Article 4 TEU: "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". Within the Union, 27 Member States having at the moment divested themselves of some parts of their traditionally national sovereignty, have progressively empower a new legal person, the European Union. The corresponding competences and financial taxes are given to this new subject within the International Community and its Member States, National Governmental Organizations and recognized National Non Governmental Organizations (Naskou-Perakki 2010; Clergerie et al. 2010; Dony 2008).

[11] Article 6 TEU: "3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[12] *Inter alia* Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". See also Article 9 TEU.

[13] Article 5 TEU: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (. . .)"; see also Article 12 TEU.

[14] Article 13 TEU: "The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions".

[15] Article 288 TFEU.

7.2.1 An Integration Process in Expansion

The building of the European Union and its integration process is not made any easier to understand due to continuous diachronic and synchronic[16] expansion in all directions and in every way. It is part of the complexity of Law and Ageing, as an emerging field at the European level.[17]

Some elements needing further legal study with regard to expansion of the goals of the Union and the means taken to achieve these goals can be pointed to. These goals and means show a firm commitment to better understanding and consideration of *older persons* within the Union as, *inter alia,* patients, care recipients and as consumers of goods and services, generally and of special needs, particularly.[18]

The outdated perception of older persons as not contributing to the wealth of the Union Market has probably pushed the broader issue of the well-being of older persons into the background. We certainly need to better understand the impact and needs of older persons on and in relation to the main goals of the Union which include[19]: "the internal market",[20] "sustainable development", a "balanced economic growth and price stability [and] a highly competitive social market economy, aiming at full employment and social progress"; the role of ageing and issues for older adults on "the promotion of scientific and technological advance"[21]; and the

[16] The diachronic dimension refers to a step-by-step chronological perspective. Synchronic dimension refers to the analysis of the evolution of a concept or an institution through time.

[17] We refer to the Communication from the Commission to the Council and the European Parliament of March 18th 2002: *Europe's response to World ageing. Promoting economic and social progress in an ageing world. A contribution of the European Commission to the Second World Assembly on Ageing*, COM (2002)143 final (not published in the Official Journal).

[18] European Commission, *Commission Staff Working Document ex-ante evaluation accompanying document to the decision of the European parliament and the Council on the European Year for Active Ageing (2012)* of September 6th 2010, SEC (2010) 1002 final, 2–4. It refers to active ageing in employment, in volunteering, ageing, urban and home infrastructures accessible and supportive in autonomous living, and social contacts and activities, 3, 6–11.

[19] Article 3 TEU: "3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

[20] The position is centred on the workers or former workers (Articles 45 and 46 TFEU) and family in a broad sense to understand thus including ascendant (Article 48 TFUE) (Clergerie et al. 2010). See also Article 21 TFEU.

[21] See for example, the Decision No 742/2008/EC of the European Parliament and of the Council of July 9, 2008 on *the Community's participation in a research and development program undertaken by several Member States aimed at enhancing the quality of life of older people through the use of new information and communication technologies*.

impact of older adults on the study of "social exclusion and discrimination", "social justice and protection, equality between women and men, solidarity between generations"[22] and on the protection of the "rights of the child".[23] These Union objectives also speak to "economic, social and territorial cohesion" as an element of "solidarity among Member States". We need to evaluate these needs, the full potential of older persons within this order and the ways to respect the "rich cultural linguistic diversity" of Europe, through the memory and experiences of older persons. How to ensure "that Europe's cultural heritage is safeguarded and enhanced" must also be addressed.[24]

7.2.2 *Evolution and Expansion of the Goals of the European Union*

There has been an evolution of the goals in the European Union. This process, initially and principally an economic one, has extended to the social arena over the past 13 years (Van Bueren 2009; Sunga 2010; Clergerie et al. 2010).[25] This includes a progressive integration of issues concerning older persons based on common values such as security and intergenerational solidarity (Sapir 2006; Age Platform 2010; Clergerie et al. 2010). "Old Age" has been increasingly considered under the same heading with "people with disabilities" as a "target group".[26] Now, many "shared competences" between the Union and the Member States are important issues for ageing: (a) the internal market; (b) social policy; (c) economic, social and territorial cohesion; (d) agriculture and fisheries; (e) the environment; (f) consumer

[22] This point primarily deals with flexible working hours and security of revenues contained in the concept of "flexicurity" in order to allow relatives and family members to care for older family members. Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions du 10 mai 2007 intituled *Promouvoir la solidarité entre les générations* COM(2007) 244 final (not published in the Official Journal).

[23] In relation to the promotion and protection of the rights of the child, the role of older members of the family and other adult relatives or neighbours would be of significant importance.

[24] European Commission, *Commission Staff Working Document ex-ante evaluation* . . ., 8–11.

[25] One of the first initiatives of the Commission or the Council takes place in the year 1982. See the Council 82/857/CEE of December 10th 1982 relative to: *[les] principes d'une politique communautaire de l'âge de la retraite*, *E.C.O.J.*, L 357 of 18 December 1982 (more development on the initiatives of the European Union bodies in Blázquez Martín 2006; Rodríguez and Echezarreta 2001; Rodríguez-Pinsón and Martin 2003). The year 1999 (International Year of Older Persons) marked a turning point. At that time, the European Union ceased to consider the greying of Europe as an exclusively national social issue.

[26] The following information is given on the website of the European Union when the search terms are used: "employment and social policy. Social measures for target groups: disability and old age". It is important to recall that old age is not synonymous with disability.

protection; (g) transportation; (. . .); (j) the area "of freedom, security and justice"; and (k) common safety concerns in public health matters; (. . .).[27]

In this context, the jurisdiction of two of the main decision-making bodies of the Union is of great interest in relation to the concerns of older persons[28]: the European Union Council and the European Union Commission (Age Platform 2010; Rodríguez and Echezarreta 2001).

The Council is the main decision-making entity of the Union. It acts in the field through the work of its Committee of Permanent Representative (COREPER) and principally the preparatory work of the Social Committee and the Employment Committee[29] in its configuration of Employment, Social Policy, Health and Consumer Affairs councils. It deals with matters such as the promotion amongst Member States of common goals through harmonization of laws and policies and the coordination of specific national laws and policies such as the prevention of physical or mental illness and the legal protection of the consumer. The Council also contributes to the setting of recommendations to the 27 Member States for the harmonization of employment and social security policies and for activities of promotion and coordination within the Council (Age Platform 2010; Dony 2008; Clergerie et al. 2010).[30]

[27] Article 4. 2 TFEU. For the determination of social policy, the basic concepts refers to the "fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers". Also Articles 153. 1 and 2 and 156 TFEU.

[28] Article 13 TEU : "1. (. . .) The Union's institutions shall be: the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as "the Commission"), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. (. . .)". Obviously, further research should cover the activity of all the bodies (Parliament, Articles 14 TEU; 223–235 TFEU); the European Council (Article 15 TEU) and specially the advances made in the development of social, regional and research policies. Further research should also cover the activity of other institutions of the European Union.

[29] Article 16 TEU: "1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties. 2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote. 3. The Council shall act by a qualified majority except where the Treaties provide otherwise". See also Articles 237–243 TFEU; "(. . .) 6. The Council shall meet in different configurations, (. . .). The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. 7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council". See also Article 240 Sect. 1 TFEU. The Council is not to be confused with the European Council (Article 15 TEU).

[30] Article 151 TFEU: "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to

The Commission is the main executive body of the European Union.[31] It applies the policies of the Council concerning older persons and has its own policy initiatives. Thus the Commissioner in charge of Economic and Monetary Affairs deals with the impact of ageing on national public finances. The Commissioner in charge of the Internal Market and Services deals with long-term care services. The Commissioner for Employment, Social Affairs and Inclusion also sees to long-term care services through the reform of policies relating to older workers and as to pensions. The same Commissioner is also active in some programme policies such as the fight against abuse and neglect of older adults, poverty amongst older persons and isolation, with special attention paid to the situation of older women. Such orientations are reflected in existing community programmes and budgets (Clergerie et al. 2010; Age Platform 2010).[32]

As examples of the recent evolution, we can underscore the role of the Commissioner responsible for Fundamental Rights, Citizenship and Justice who is working

lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action".

[31] Article 17 TEU: "1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. 2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide".

[32] European Commission, *Commission Staff Working Document ex-ante evaluation* . . ., 19–20. The Commission refers to the activities of the DG Empl (analysis and studies of the social situation, demographics and the family; industrial relations and collective bargaining; information and training measures for workers' organisations); the European Social Fund (priority to promote active ageing; the Progress program (employment, social protection and inclusion, working conditions, non-discrimination, gender equality); DG Eac (adult education- Grundvig program and voluntary activities); DG Sanco (health programs); DG Infso (ICT; "Ageing Well in the Information Society"); DG Regio (European Regional Development Fund- infrastructures for : lifelong learning; information and communication technologies; provision of key services in demographic decline areas and restructuring of social service facilities and care services for older persons; education including e-learning for all ages, within the framework of human capital enhancement); DG Move (urban mobility, protection of vulnerable road users including older persons, passenger rights of travelling persons with disabilities and reduced mobility); DG Rtd (7th Framework programme for research and development); Agencies (Dublin Foundation for Living and Working Conditions; European Agency for Safety and Health at Work; European Centre for the Development of Vocational Training).

on age non-discrimination, gender issues in ageing, the protection of older consumers, the fight against abuse and neglect of older adults, and the role played by the Commissioner responsible for Health and Consumers who is also dealing with the rights of the consumer, ageing in health and strategies against Alzheimer's disease in connection with the Pact on Mental Health (European Union 2009; Age Platform 2010; Dony 2008; Clergerie et al. 2010).[33]

"Old Age" proposals through the Commission's initiative follow very complicated procedures before a decision to adopt is made under European law.[34] In short, a proposal must first be drafted by the appropriate commissioner on the basis of a legal policy decision. Secondly, a consultative process starts with the drafting of a "Green Paper", *in casu*, on ageing and the regular consultation of some advisory groups.[35] Then, based on the results of this broad consultation, the commissioner's staff drafts a legislative proposal called a "White Paper". After discussions and verification by various services (legal and political), the proposal is placed on the table (in short, becomes an item in the agenda of the College of Commissioners) for adoption (Age Platform 2010; Dony 2008; Clergerie et al. 2010). It is important to note that the approval of the Parliament and the Council is needed on ageing issues, such as economic services, research, culture, education, employment, transport, promotion of health care policies, fundamental rights, equality based on age and elimination of discrimination, social exclusion, isolation and poverty. It is part of a better democratic process within the Union.

Further research would go deeper into the legal norms set by both bodies and would also disclose the role of other organs and institutions of the Union (the Parliament, Court of Justice of the European Union,[36] consultative bodies, Committee of the Regions and the Ombudsperson) in the creation of rules in relation to ageing.[37] Finally, we suggest that further research is needed on the determination of

[33] European Commission, *Commission Staff Working Document ex-ante evaluation* . . ., 13. Previous evaluation results by DG Empl: the 1993 European Year for Older People; the 1997 European Year against Racism; the 1999 International Year for Older Persons; the 2003 European Year of People with Disabilities, the 2006 European Year of Workers Mobility and the 2007 European Year on Equal Opportunities for All. The DG also used the reports on the 2010 European Year on Social Exclusion and Poverty and the 2011 European Year of Voluntary Activities Promoting Active Citizenship.

[34] Article 289.1 TFEU: "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294". See also Article 294 for the entire description of the procedure.

[35] Such as: the European Health Policy and the Pension Forum, the advisory group on e-health, the advisory group on e-inclusion and Digital Literacy (Age Platform 2010).

[36] Article 19 TEU: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed (. . .)". The Court ensures the respect of the provisions of the European Charter of Fundamental Rights of the European Union.

[37] Council Decision of November 26th 1990, *Premier programme d'action communautaire en faveur des personnes âgées*, *O.J.* L 028 of February 2nd 1991.

older persons' rights which takes into account the work of the European Union Agency for Fundamental Rights (EUAFR) which observes and collects data on the evolution of human rights in Europe, in collaboration with "civil society", including NGOs[38] and the Council of Europe (headquartered in Strasburg, France).[39]

7.2.3 *Evolution and Expansion of Methods of Working Within the European Union*

A second expansion refers to the means taken to achieve the goals of the Union. In addition to the usual instruments resulting from the treaties of the Union, including binding regulations about universal care services (private and public social services within the internal market, equality in employment, cross-border health care, etc.) and the European Social Funds sustaining economic and social cohesion,[40] the Lisbon Treaty of 2007 provides other mechanisms. For example, the citizen's right of initiative (Article 11 TEU) empowers any group of one million signatories to ask the Commission to propose an EU law advancing older persons' rights and freedoms, and provides for privileged status and new opportunities to private organizations and lobbies of older persons paying special attention to advocate on issues of ageing.[41]

[38] The term "civil society" refers to specific role of private associations, universities, intermediary groups such as trade unions, pension funds and associations of retired people, charity groups, independent experts, etc. In ageing issues, there is a crucial need for participation by these associations and groups. See Articles 300 and 302 TFEU.

[39] See in this regard, the Regulation of the Council of 15 February 2007 establishing the European Union Agency for Fundamental Rights (EUAFR), 168/2007/EC. See also Article 25 TFEU providing a triennial rapport of the Commission to the Parliament, the Council and the Economic and Social Committee on citizenship within the Union. It refers to the treaty of Lisbon, to Articles 1 al 3 TEU and 335 TFEU. We also refer to the Communication from the Commission to the Council and the European Parliament of 18 March 2002: *Europe's response to World ageing. Promoting economic and social progress in an ageing world. A contribution of the European Commission to the Second World Assembly on Ageing*, COM (2002)143 final (Not published in the Official Journal).

[40] European Commission, *Commission Staff Working Document ex-ante evaluation*. . ., 4–6: "The treaty of Lisbon mentions for the first time solidarity between generations as a goal of the European Union (Article 3.3)".

[41] At the European level, Associations like FIAPA, Help Age, HTA, ILC, FERPA, EURAG, Age Concern or the Age Platform take a decisive role in the progress of Law and Ageing, its promotion as well as its determination. They decisively act at every level (the European Union bodies and institutions such as the Council, the Parliament, the Commission, various committees and the national institutions as well) lobbying for their own members and declaring actions in favour of all older persons. They also participate in the main social and political research programmes, namely those financed by European Union research funds. For example, research programs: DAPHNE III (2007–2013) in the field of elder abuse and neglect; PROGRESS, FELICE (Future Elderly Living Conditions in Europe), SHARE (Survey of Health, Ageing and Retirement in Europe), AGIR (Ageing, Health and Retirement in Europe), PROCARE (Providing Integrated Health and Social

Other instruments are used too. They belong to a continual and creative stream of a political nature. For example, since 1982 a European parliamentary intergroup of 40 members on Ageing and Intergenerational Solidarity is active in the field (Age Platform 2010) and since 2005 there is an Intergroup Urban-Logement comprised of 72 members (IUL) out of the 736 Members of the European Parliament.

Another example shows a diachronic evolution. Since 2001, important steps made in the field of ageing employ totally new legal and political forms of cooperation such as the Open Method of Coordination (OMC) for social protection and social inclusion. The OMC is a non-compulsory technical process using comparative skills and the exchange of best practices and information as a coordination method: "It is applied in policy areas where the European Union has limited competence according to the European Union treaties but where Member States feel there is an added value in working together at the European level" (Monjal 2008; Age Platform 2010; Clergerie et al. 2010). The OMC has to be seen within the framework of the "Lisbon Strategy", a 10-year plan (2000–2010) with ambitious aims such as the reform of the European social system, the fight against social exclusion, the support of social cohesion and the promotion of a society of information for all and its necessary extension which includes the "Europe 2020 Strategy", the "European Employment Strategy" (to support a higher rate of older workers), the "Together for Health Strategy" (2008–2013) which promotes healthy ageing and the "2010 Initiative" and corresponding National Action Plans (NAP) prepared on the basis of an European Union standard framework (Réseau européen

Care for Older Persons), OASIS (Old Age and Autonomy in Europe), MERI (research on the life and situation of older women in Europe), URBACT II (2007–2013) in the field of sustainable and social urban development, INTERREG IV (2007–2013) in the field of adapted housing. Finally theses associations show initiatives in the *soft law* through Charters appearing in various countries. For example: France: *Charte des Droits et Libertés des Personnes Âgées en Situation de Handicap ou de Dépendance* at the level of the French National Foundation of Gerontology (FNG), translated into more than 6 languages ; Italy: *Carta dei diritti della persona anziana* implemented at the level of a retirement homes under a regional decree; On the level of Europe: *European Charter of the Rights and Freedoms of Older Persons Accommodated in Homes by* the European Association for Directors of Residential Care Homes for the Elderly (EDE); *Progetto di carta rivendicativa: I diritti dei pensionati e delle persone anziane* (FERPA - European Federation of Retired persons and old people); *EuRAG Carta per gli anziani. Dichiarazione dei diritti e delle responsabilità delle persone anziane* (EuRAG - European Federation of Older Persons); *European Charter of the Rights and Responsibilities of Older People in Need of Long-term Care and Assistance* (Age Platform) and on the international level: *Declaration of the Rights of Older Persons* (ILC - International Longevity Center USA). These private initiatives are sometimes encouraged or supported by governmental Agencies. Such a movement encourages a study of the affirmation of rights, responsibilities and freedoms promoting the respect of older persons and of best practices for professionals involved in care and social services. It also suggests a study of the transformation of these *soft law* initiatives into *hard law* in relation to the situation of older workers, for example (Abrahamson 2009); the situation of older persons in need of long term care; the living conditions of older persons living in retirement homes, and finally the situation of retired persons in general.

des services à la personne à finalité sociale 2008; European Union 2009).[42] In short, the trend is towards advancing shared European values on issues of ageing notably health and dignified ageing (Commission Européenne- DG Empl 2008).[43]

7.3 Citizenship as an Essential Concept in the Development of European Law and Ageing

The evolution of European policy and legal context and the growing awareness and commitment of the European Member States around issues involving older persons leads us to focus on the consistency and the effectiveness of rights, freedoms and duties related to ageing using the concept of citizenship. We need to affirm the common conception of the older person as a legal person benefiting from the rights of dignity and integrity of the person due to all human beings. In so doing we broaden the dimension for study and application of these rights.

Such a human rights approach would apply the "legal principles dimension" as a central element of a "multi-dimensional model of Elder Law" (Doron 2009). For example, "A human rights approach offers the opportunity to move the debate on from a medico-legal dilemma to one focussed on [the] dignity and rights (. . .)" (Macleod 2007; Jolivet 2002; United Nations Programme on Ageing and IAG 2003). This way of proceeding will contribute to fruitful research in the field of Law and Ageing. Principles of human rights have lead to the identification of future research fields on age discrimination in insurance and financial sectors, in matters as diverse as credit, travel, funerals, and housing (United Nations Programme on Ageing and IAG 2003; Van Bueren 2009).

In many respects the European Union recognition of the fundamental rights of all of its citizens under the Charter of Fundamental Rights of the European Union and specific provisions addressing older persons follow this approach (Rodríguez-Pinsón and Martin 2003; Clergerie et al. 2010).[44] A second primary source of law in

[42] European Commission, *Commission Staff Working Document ex-ante evaluation. . .*, 5–8. The principal challenges listed are: early retirement; combating isolation of older persons through active participation and ill health in old age.

[43] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 July 2008, *A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion*, COM(2008) 418 final (not published in the Official Journal).

[44] Charter of Fundamental Rights of the European Union, doc. 2000/C 364/01, *O.J.E.C.*, 18.12.2000, C.364/1., Article 25 under the heading *rights of the elderly*: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life"; Praesidium, CHARTE 4473/00 CONVENT 49, explanation of Article 25: "The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom, established the major principles on which the European labour law model is based and shaped the development of the European social

the European Union is Article 12 of the TEU that lays the democratic foundation for the protection of fundamental rights in the European legal order through the actions of the Member State parliaments.[45] Both sources of law set forth the universal and indivisible values of the Union - human dignity, liberty, equality and solidarity and the central place of the human being in Union initiatives involving the concept of citizenship and the dimension of responsibility to future generations (Michel 2009; Dony 2008).[46]

Thus, a comprehensive and multidimensional approach to the defense and promotion of the dignity of each older person depends on detailed studies of the different sources of European law mentioned above. This offers the advantage of cross-national, regional and international perspectives which will enhance and extend Law and Ageing.[47] It also opens up research on how laws and policies impact the "everyday" lives of older persons. Another branch of research would be to measure the substance and the effectiveness of the respect for fundamental human rights as seen through the lens of principles of legal autonomy and protection. This will contribute to a better understanding of the present evolution of the legal status of older persons through their dual citizenship in the European Union

model in the following decade". Specific provisions deal with old workers under the title "Elderly persons": Articles 24 and 25. "The European Social Charter, Article 23: "The right of elderly persons to social protection" (ETS, n° 163). Website: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp. The foregoing Charter is based upon the Revised European Social Charter (1996) and the Community Charter of the Fundamental Social Rights of Workers (1989). We do not know why the draftsmen of the Charter of Fundamental Rights of the European Union did not modify the term "elderly" taken from this to use "older person" or "adult person" (Borgetto and Lafore 2005).

[45] Article 12 TEU : "National Parliaments contribute actively to the good functioning of the Union: (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality; (. . .) (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union". Through the parliamentary action, a democratic check and balance process works on both levels of Member States and European Union.

[46] Charter of Fundamental Rights of the European Union, *op.cit.*, Preamble Sect. 6: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations." See Article 3 Sect. 3 al. 2 TEU: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

[47] Charter of Fundamental Rights of the European Union, *op. cit.*, Preamble Sect. 5: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

and within individual Member States. In this connection, a further study of the UN Treaty Body System and the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) would be a useful complement to the activity of other committees like the European Committee of Social Rights on issues of abuse and neglect of older persons (Evrard 2005).[48]

7.3.1 Older Persons and Member State Citizenship

In 1991, one of the first French PhD theses in Law and Ageing presented a study of the constitutional laws and proposed legal framework for the 12 Member States of the European Economic Union of the time (Delpérée 1991). Mme. Delpérée identified the rights, freedoms and duties existing under Member State constitutions directly connected to older citizens. Since then, the European Union has expanded. Following in her footsteps a comparative breakdown of the constitutions and legislation needs to be carried out in the field of social rights and also in the areas of economic, cultural, civil, political and developmental rights for the 27 Member States using standard sociological methodology to evaluate and compare the existence of norms.[49]

Even a cursory glance at the present constitutions shows promising territory to mine. Social rights under these constitutions usually have various expressions and varying content attesting to a slow evolution from the more paternalistic idea of social "assistance and compensation of something lost" to "integration and participation" centred on needs expressed by older persons themselves (Pettiti 2010; Leenhardt 2011). The legal implications of such a social rights evolution will need to be studied taking into account the evolution of constitutional texts and

[48] Websites: UN Treaty body system: http://www2.ohchr.org/english/bodies/treaty/index.htm, European CPT: http://www.cpt.coe.int/en/docspublic.htm (visited 23 March 2011). With respect to the Revised European Social Charter, we refer in this book to the chapter of Israel Doron, Benny Spanier, "International Elder Law: The Future of Elder Law".

[49] Only English official versions of the Constitutions have been used. The recent unusual references in rare constitutions to "generations" (Belgium) and "new generations" (Sweden) are remarkable evidence that ageing is viewed as a part of the domain of sustainable development domain. This recognition reinforces the so-called "third generation" of human rights. Thus, in the field of ageing, rights of development appear next to the classical division of civil, political and economic, social and cultural rights (Evrard 2005). See in this book, the chapter of Israel Doron, Benny Spanier, "International Elder Law: The Future of Elder Law". In this connection, the European Union has developed the concept of "future generations" or "solidarity between generations" (Plateforme Indicateurs 2004). See the Charter of Fundamental Rights of the European Union, *op. cit.,* Preamble Sect. 6: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations" and Article 3 Sect. 3 al. 2 TEU: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

their implementation as well through the reporting system of the European Revised Social Charter (hereinafter referred to as the "European Social Charter"), and compulsory European Union sources of law. In short, Article 23 of the European Social Charter, in large part, meets the rights of older persons (Harper, ISSA Report 2010; Commission Européenne 2008),[50] in combination with Protocol n°12 of the European Convention which develops, in turn, a prohibition of all forms of discrimination, specifically, on the grounds of age.[51] In this regard, the orientations of the European Union are further confirmed by the results of a large and important study on pensions and on social and health care (Pettiti 2010).[52] The risk is that age and disability may be automatically coupled together in this massive area of the Union's activity (Van Bueren 2009).[53]

On matters of "assistance and compensation" in Member State constitutions, it is natural to make references to: "the right to health care services", "social security" and "social assistance" (Belgium, Bulgaria, Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Lithuania, Latvia, Hungary, Poland, Portugal, Romania, Slovenia, Finland, Sweden), "social and medical aid" and "medical care" (Bulgaria, Lithuania, Latvia, Hungary, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden), "the right to receive suitable means of existence from society", (France, Belgium, Ireland, Greece, Spain, Italy, Malta, The Netherlands, Portugal, Romania, Slovakia, Sweden) and "the right to the highest level possible of physical and mental health" (Hungary, Finland). However, traditionally, Member States have developed community social and health care with a view to maintaining older persons at home. This approach promotes the circulation of service providers and contacts to and from the

[50] For some authors important steps have been taken to filling some gaps in the understanding of the problems and needs of older persons (Backes et al. 2006; Réseau européen des services à la personne à finalité sociale 2008; European Commission, *Research UE* 2011). Nevertheless, a recent example shows the lack of legal approaches to ageing issues. The EU-funded "European Research Area on Ageing 1 and 2" (ERA-AGE 1 and 2), including the FLARE Postdoctoral Fellowship and the ERA-nets, try to face the fragmentation of the European Research on Ageing issues (European Commission, *Research UE* 2011): "The action that Europe – and the EU in particular – takes now and in the future will have a profound impact on the region's social and economic spheres. The ERA-AGE 2 (European Research Area on Ageing 2) ERA-NET will help Europe meet the ageing challenge by consolidating research resources and expertise, and optimising the impact of research on policy, practice and product development. The solid cooperation developed by ERA-AGE 2 will enable Europe to respond to the ageing question that concerns and affects everyone". See the website: http://ec.europa.eu/research/fp7/index_en.cfm?pg=eranet-prECOJects&mode=search#prECOJects.

[51] This convention refers to the conventions within the Council of Europe. Article 23 of the Social Charter partly covers other provisions of the Charter: Article 11 (protection of health), Article 12 (social security), Article 13 (social and medical assistance), Article 14 (social services benefits). The 12th Protocol has not entered into force.

[52] It refers again to the above mentioned research programs and their results: SHARE (Survey of Health, Ageing and Retirement in Europe) and AGIR (Ageing, Health and Retirement in Europe) and some other research programs.

[53] European Commission, *Commission Staff Working Document ex-ante evaluation*. . ., 7, 9.

home where the older person lives and clearly reflects an implementation of the European Union policy of social inclusion and cohesion. In this respect the "integration [or "inclusion]" and participation" approach seems to overlap with this attention to social and health care.

Some other aspects are important to emphasize in the constitutional texts of Member States. First, the major reference to the non-discrimination principle[54] and the sacrosanct constitutional principle of equality of all citizens[55] before the law stimulates the application of all rights to ageing issues under both approaches.

Second, some specific rights remain understudied although present in some Member State constitutions: "the right to decent accommodation" (Belgium, Spain, Poland, Portugal, Slovenia, Finland, Sweden); "the right to the protection of a healthy environment" (Belgium, Bulgaria, Spain, Sweden) which is in the same category as "the right to the conditions necessary to development" (France, Portugal); "the right to cultural and social fulfilment" (Belgium, Portugal) which is in line with the "right to rest and leisure" (France, Bulgaria, Spain); "the right to legal aid" (Belgium, Bulgaria) and the duty of Member States to guarantee education and the "protection of consumers" (Spain).

Future research should also start to address contractual issues such as housing contracts, credit, care contracts and institutional care agreements, in order to give full scope to the concept of domicile, residence, the principle of choice of residence, the right to choose one's general medical practitioner, nurse and pharmacist, and the development of legal rights related to tenancy and domicile in care facilities. With regard to the "the right to employment and to the free choice of an occupation" it is of the utmost importance to develop some research on anti-discriminatory legislation, on solidarity between workers of different generations, on flexibility in work time, and on reforms of the pensions and benefits system in order to encourage workers to enter and remain in the labour market (Stehlíkovà 2008).

Third, some constitutional provisions pave the way for new research on rights of participation: "the right to make effective complaints" (Belgium, Czech Republic), the activity of an Ombudsperson, the right to petition (Van Bueren 2009) and the principle of "justice and charity" (Ireland). In the same line, further studies are

[54] Constitutional texts refer to age or other grounds or status. Czech Republic (Article 3), Germany (Article 3), Estonia (Article 12), Spain (Article 14), Italia (Article 3), Cyprus, (Article 28), Malta (Article 32), The Netherlands (Article 1), Austria (Article 7), Poland (Articles 32, 68), Portugal (Article 13), Slovenia (Article 14), Slovakia (Article 12), Finland (Article 6), Sweden (Article 2); United Kingdom (Article 14).

[55] We refer to the present Constitution of France (Preamble, Sect. 3), Belgium (Article 10), Czech Republic (Article 1), Germany (Article 3), Estonia (Articles 9 and 12); Ireland (Article 40), Greece (Article 4), Spain (Article 14); Italia (Article 3), Cyprus (Article 28), Lithuania (Article 29), Latvia (Article 91), Luxemburg (Article 10 bis), Hungary (Article 66), Malta (Articles 32, 39), The Netherlands (Article 1), Austria (Article 7), Poland (Article 32), Portugal (Article 13), Romania (Article 16), Slovenia (Article 14), Slovakia (Article 12), Finland (Art 6), Sweden (Article 2). The Charter of Fundamental Rights of the European Union recognizes the *rights of the elderly* (Article 25) in a chapter devoted to the equality principle.

needed on access to administration and the effectiveness and transparency of administrative acts which give effect to the capacity to remain an active citizen in old age.

At present, social, economic and cultural rights derived from legal provisions and treaties still form a major area in legal research. In addition, it is necessary to include an examination of decisions (declaratory judgments) interpreting and applying the law. A methodical examination of Member States' case law material involving older persons in all legal contexts and situations will demonstrate their legal status as interpreted by the courts.[56] Such a titanic research programme presupposes technical adaptations in order to access raw data. In that regard Law and Ageing researchers urgently require adapted key-words in official case law and tribunal databases. This obviously raises the general problem of vocabulary and the necessity of feedback to the systems.[57]

Given the importance of the economic Internal Market in the European Union, research into the field of social and economic rights is in inverse proportion to interest in civil, cultural and political rights (Evrard 2005; Van Bueren 2009). There is a need for a well-balanced range of research on civil, cultural and political rights of older persons on the level of "participation and integration", identified as "the right to personal development" (Germany, Estonia, Greece, Portugal, Romania) or the "right to self determination" (Leenhardt 2011), voting rights, access to public buildings and transport, access to educational services; integration and participation in social, economic and political life (Greece) and access to judicial services.

[56] Branches of law usually refer to constitutional law, civil law, contract and obligations, family law, criminal law, administrative law, tax law, labour law, social law, international law, European law. Legal sources refer in the main to constitutions, laws, decrees, court decisions, customs and doctrines. Comparative law traditionally distinguishes French (Belgium, The Netherlands, Luxemburg, commonly referred to as the Benelux, Italy, Romania and Spain), German (Germany, Austria, Greece, Portugal, Slovakia) and Scandinavian (Sweden, Denmark) Civil Law traditions. The other Member States belong to mixed Civil Law systems or to mixed Civil and Socialist Law systems. Common Law countries are: England and Wales, Northern Ireland and Ireland. Mixed Civil and Common Law countries are: Scotland, Malta, Cyprus. It is part of the complexity of the European context. Considering that the basic problems are largely the same among European older persons such as isolation (mostly older women (over 80 years)), malnutrition, dehydration, substandard accommodations, inadequate clothing, poverty, frailty, dependency, limited or no access to the legal system and for many older and adult persons a low level of income in very old age, we anticipate that every law system, despite the differences of legal traditions, will find an appropriate legal response to the needs of older and adult persons.

[57] For example, this concerns, in Belgium and France, the organization of the Prosecution Office and the Office of the Clerk of the Court in order to register lodged complaints. A second aspect concerns the appointment of some leading magistrates pushing administrations, city or national police forces and services to act in favour of old victims or perpetrators. A serious legal approach to all forms of violence involving old persons cannot start without some adaptations. This problem also concerns the civil divisions of each tribunal and court, in particular, family law, employment and bankruptcy sections, as well as the Justices of the Peace and their equivalent.

7.3.2 Older Persons and European Union Citizenship

Who is an *older person* in the Union context? Originally, the European Union definition of older persons referred to the work status of the citizen. Today, European Union citizens (*workers*) and non-European Union citizens (*migrant workers*) having residence in the European Union, enjoy, to a large extent, the same economic and social rights.[58] The definitions of the terms *workers* and *migrant workers* include all "dependants" of the family. Among them, we find "the ascendants",[59] that is to say, the older persons of the workers' family. Similar provisions exist within the framework of European legislation on family entry and settlement[60] and in Member States legislation. This aspect of the relationship with the outside world of the Union accords with other treaty definitions of older persons at regional and international levels (Evrard 2005).[61] This large section of European Union law certainly requires more consideration and further research on the sensitive context of migration.[62]

Certainly the question of the worker or the former worker status of an older person has to be understood within the context of the economical aims of the European Union (Article 3 TEU Sect. 3).[63] But flowing from the fundamental

[58] About the social rights, see Articles 45 and 48 TFEU.

[59] See Article 18 TFEU; Article 10- 1b of the Regulation 1612/68/EC of the Council of 15 October 1968, *O.J.E.C.,* L. 257, 19 October 1968.

[60] See the Directive 86/2003/EC of the Council of September 22nd 2003, *O.J.E.C.*, L. 251, October 3rd 2003 and the Directive 109/2003/EC of the Council of November 25th 2003, *O.J.E.C.*, L. 16, January 23rd 2004.

[61] For example, the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/RES/45.158 of December 18th 1990, entered into force on July 1st 2003, Articles 1 and 4.

[62] Another section of the relationship with non-Member States (Third States) concerns the promotion and development of human rights within the frame of commercial or non-commercial agreements (Clergerie et al. 2010). Ageing issues have also to be studied in this context. Article 3 Sect. 5 TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"; see also Articles 8 TEU and 220 and 221 TFEU. They refer to the Generalised System of Preferences (GSP) providing "a preferential access to the European market to 176 developing countries and territories" and a very preferential arrangement for "49 of the Least Developed Countries" (LDCs) (Sunga 2010). About the cooperation with developing countries, see Commission Communication of May 21st 1999: *Towards a Europe for All Ages - Promoting prosperity and Intergenerational Solidarity*, COM (99) 221 final. (Not published in the Official Journal).

[63] Article 3 TEU: "3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and

changes within the European Union from a purely economic Union, older persons are no longer defined by their labour status. They have become citizens at the Member State and Union levels.[64] The concept of citizenship now extends to civil, political and cultural rights and beyond solely social and economic ones.[65]

Older persons, as others, are now citizens of both the Member State and the European Union levels, resulting in a reciprocal reinforcement of rights and freedoms at both levels within the European Union collective "area of freedom, security and justice"[66] settled by treaties. In addition, the cooperative work within the Council of Europe of all European Union Member States also reinforces the concept of citizenship (Garcia 2008).[67]

European Union citizenship includes some rights having an impact on the individual situation of each older person. For example, we would like to emphasize the urgent need, at the Member State and European levels, to study the effectiveness of this treaty-based "area of freedom, security and justice" in the everyday lives of older persons. Respecting "freedom" we would like to suggest an in-depth study of the main European Union proclaimed freedoms.[68] And as to "security and justice" we would like to examine the following issues : the reality of equality of each

technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced (. . .)".

[64] Article 20 TEU: "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship (. . .)".

[65] Civil Rights: Articles 20–24 TFEU: the rights to move; the right to vote and to stand as a candidate in European or municipal elections; the right to diplomatic and consular protection; the right to petition [Article 227 TFEU]; the right to apply to the European ombudsman and to address to any institution of the European Union [Article 228 Sect. 1. al. 1 TFEU].

[66] See also Articles 3 Sect. 5 and 9 TEU; Charter of Fundamental Rights of the European Union, *op.cit*., Preamble, Sect. 2 gives the outline: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice"; see also Article 12 TEU for the role of the national parliaments in this context and Articles 67–89 TFEU.

[67] See, for example, the joint European Union- Council of Europe Program on *The protection and the promotion by national human rights structures of the rights of elderly people* started in 2009 (Council of Europe, LHRCB/NHRS (2009) 7).

[68] Article 3 TEU: "1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. (. . .)"; Article 20 Sect. 2 TFEU: "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (. . .)". See also Article 26 Sect. 2 TFEU.

citizen[69]; the awareness of rights and recourses within the European Union by older citizens[70] as part of the effectiveness of their rights, duties and freedoms; the role of NGOs, lobbies and associations in ageing matters[71]; the role of the parliaments of the individual Member States in the decision-making process of the European Union[72]; the attention that could be paid to the protection of older persons and their individual rights as consumers[73]; their protection with regard to public health[74]; and the prevalence of serious criminal offenses related to older persons as a European Union phenomenon.[75]

7.3.2.1 Decisions of the European Courts

The case law material of both the Court of Justice of the European Communities and the European Court of Human Rights confirms the central role of equality of economic and social rights and of principles of non-discrimination.[76] However, with the help of European case law, we would like to put forward other directions for future research.

A search of the more recent decisions of the European Court of Justice[77] shows that judgments involving older persons deal principally with discriminatory situations on grounds of age questioning controversial attitudes by employers (non-payment of pension allowances, termination of contracts and appropriateness of differing criteria for age groups in various professional activities).[78] Although at

[69] Article 9 TEU: "(. . .) In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".

[70] Article 10 TEU: "3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen"; see also Article 20 Sect. 2 b), Article 22 TFEU: the right to vote and to stand as candidates in elections.

[71] Article 11 Sect. 2 TEU: "2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society." The Pressure Groups or lobbies pertaining to the *civil society* are now called *interest representatives*. On March 21st 2007, the Commission adopted the Communication on the follow up to the Green Paper 'European transparency Initiative' (COM (2007)127) and launched in Spring 2008 a voluntary register for *interest representatives*. The CONECCS database is therefore closed. (See website: http://europa.eu/transparency-register/index_en.htm).

[72] Article 12 TEU.

[73] Article 169 TFEU.

[74] Article 168 TFEU.

[75] Article 88 TFEU.

[76] See in this book the chapter of Helen Meenan (Chap. 4).

[77] Article 19 TEU: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

[78] Judgment of 12 October 2010, case *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen, v. Region Syddanmark* (C-499/08); Judgment of 12 October 2010, case *Gisela Rosenbladt*

the present time no judgment has dealt with the legal protection under Article 25 of the Charter of Fundamental Rights of the European Union (*rights of the elderly*), it is clear that judges will give meaning to its content and implementation in the future.

Finally, looking at the actions of the European Court of Human Rights which does not have jurisdiction to interpret the Charter of Fundamental Rights of the European Union, but which has nevertheless dealt positively in asserting the equal rights of older persons as human beings, we note that its judgments reflect, to some extent, the same legal issues due to proactive judicial interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms despite the absence of clear provisions (Pettiti 2010).

When we examine the decisions of the last 6 years,[79] within a first level of cases, the European Court of Human Rights deals with pension allowances (Articles 6 Sect. 1—due process of law and social protection)[80] and the questionable legal issues surrounding the principle of discrimination (Article 14 and Article 1 Protocol I—discrimination).[81]

On a second level of cases, the legal issues concern violence and abuse and neglect related to older persons, primarily older prisoners and witnesses (Article 3—prohibition of torture, inhuman or degrading treatment), and the right to denounce shortcoming in nursing care (Article 10 – freedom of expression).[82] This again allows for a comparative observation of the reports of the European

v. Oellerking Gebäudereinigungsges. mbH (C-45/09); Judgment of 18 November 2010, cases *Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv* (Joined Cases C-250/09 and C-268/09); Judgment of 12 January 2010, case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and* others (C-341/08); Judgment of 5 May 2009, case *The Queen on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (C-388/07); Judgment of 18 December 2007, case *Habelt, Möser and Wachter v. Deutsche Rentenversicherung Bund* (Joined Cases C-396/05, C-419/05 and C-450/05); Judgment of 22 May 2005, case *Werner Mangold v. Rüdiger Helm* (Case C-144/04).

[79] For a broader examination of the European case law (Evrard 2005).

[80] Judgment of 19 June 2008, case *Ichtigiaroglou v. Greece* (n°12045/06); Judgment of 5 June 2008, case *Lambadaridou v. Greece*, (n°42150/06); Judgment of 21 December 2006, case *Žehelj v. Slovenia* (n°67447/01); Judgment of 15 January 2008, case *Opalko v. Poland*, (n° 4064/03).

[81] Judgment of 16 March 2010, case *Carson and others v. United Kingdom*, (n°42184/05); Judgment of 10 May 2007, case *Runkee et White v. United Kingdom*, (n°42949/98 et 53134/99); Judgment of 12 April 2006, case *Stec & others v. United Kingdom* (n°65731/01 and 65900/01); Judgment of 22 August 2006, case *Walker v. United Kingdom* (n° 37212/02); Judgment of 6 November 2008, case *Kokkinis v. Greece* (n°45769/06); Judgment of 4 December 2008, case *Reveliotis v. Greece* (n°48775/06); Judgment of 29 October 2009, case *Si Amer v. France* (n°29137/06).

[82] Judgment of 28 September 2006, case *Andandonskiy v. Russia* (n° 24015/02); Judgment of 17 September 2009, case *Enea v. Italia* (n° 74912/01); Judgment of 28 September 2010, case *Mangouras v. Spain* (12050/04); Judgment of 15 December 2005, case *Barry v. Ireland* (18273/04); Judgment of 3 June 2010, case *Konashevskaya & others v. Russia* (n° 3009/07); Judgment of 7 January 2010, case *Stoyan Mitev c. Bulgaria* (n°60922/00). Judgment of 21 July 2011, case *Heinisch v. Germany* (no 28274/08).

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Evrard 2005).

Finally, in our opinion, in both European courts the judgments have to be further studied in order to determine the effectiveness of access to justice by older persons. Such research should include, for example, the age of the plaintiff, the delays involved in the proceedings,[83] the gender perspective (to identify plaintiffs and to deal with sexual identity issues),[84] the terms of the older plaintiff's legal aid, where applicable, the recourses required as a precondition to instituting a proceeding and finally, procedural compliance. As a final assessment we underscore that there are not presently many decisions involving older persons as plaintiffs coming before the European Union Court. Older persons are, in most cases, appearing as intervenants in cases which are presented for a preliminary (declaratory) ruling. On the other hand, older plaintiffs may and do file complaints directly before the European Court of Human Rights. These latter are largely individuals aged 63–93 years old.

7.4 Conclusion

An overview of Law and Ageing in Europe is a difficult exercise because of the complex social, political, economic and legal framework which is reflected in ageing issues. Nevertheless, some features show that a conceptual base exists around citizenship which is rooted in a legal and complementary vision of the older person as a human being by Member States and the European Union. We are situated at the intersection of national and European law developments in the field of ageing and a growing awareness of ageing by Member States, by European Union bodies and by society in general. Such an expansion needs a solid base of accurate information so that Law and Ageing becomes an integral part of other scientific pursuits. It is a matter of urgency in the changing demographic and social context of the European continent. We are confident that Law and Ageing will be accepted as an identifiable and specific domain of law practice, research and education.

[83] European Court of Justice: Dismissal by reason of retirement, Judgment of 5 May 2009, case *The Queen on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (C-388/07); European Human Rights Court: Judgment of 15 May 2008, case *Mikhayelenko v. Ukraine* (n° 18389/03); Judgment of 9 October 2008, case *Orlova v. Russia* (n° 21088/06); Judgment 15 July 2010, case *Saikova v. Russia* (n° 25270/06), Judgment 8 April 2008, case *Sirc v. Slovenia* (n° 44580/98); In all the decisions satisfaction based on Article 6 Sect. 1 (reasonable deadlines) in combination or not with Article 13 (absence of effective remedies) of the European Convention for the Protection of Human Rights.

[84] European Court of Justice: Judgment of 29 March 2009, case *European Commission v. Greece* (C-559/07); European Human Rights Court: Judgment of 8 January 2009, case *Schlumpf v. Swizerland* (n° 29002/06).

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Chapter 8
Elder Abuse: A Human Rights Agenda for the Future

Jonathan Herring

8.1 Introduction

Only relatively recently has elder abuse has been recognised by governments as a major social problem. For too long it has been hidden and ignored.[1] Even now it has been accepted as an issue requiring state attention, many countries are still struggling to find the correct legal response. Elder abuse, it has been claimed, has reached the position domestic violence did several decades ago.[2] There is now an acceptance of the problem and that something needs to be done, but there is much dispute over what the correct response is.

In developing a legal response to elder abuse it will be argued that the starting point must be that older people have a fundamental human right to protection from abuse. That obliges the state to put in place legal and social structures to combat elder abuse. We will see, though, that there are dangers that the protective measures may themselves be abusive and may fail to give due weight to rights of autonomy.

Although this chapter will focus on the legal responses to Elder Abuse it must be recognised that the problem is caused by broader social attitudes towards older people and a range of societal practices. It is only in tackling these that elder abuse can be effectively challenged. As the Toronto Declaration on the Global Prevention of Elder Abuse puts it:

> Ultimately elder abuse will only be successfully prevented if a culture that nurtures intergenerational solidarity and rejects violence is developed.[3]

[1] House of Commons Health Committee, *Elder Abuse* (The Stationery Office, 2004), at 1.

[2] District Judge Marilyn Mornington, *Responding to Elder Abuse* (Age Concern, 2004).

[3] World Health Organisation (2002).

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8.2 Defining Elder Abuse and Discussing Its Extent

A whole chapter could be written on the correct definition of elder abuse. There is ample discussion elsewhere[4] and so I will be very brief. There is no standard definition of elder abuse.[5] The abuse of older people can take many forms. It can involve sexual abuse,[6] financial abuse, misuse of medication, physical abuse, neglect and humiliating behaviour.[7] It can be carried out by relatives, carers, friends or strangers.[8] As it covers such a wide range of behaviour it is not surprising that a single definition cannot be agreed upon.[9] Any definition that could seek to cover all the forms of abuse is likely to be vacuous or overly narrow. This is not to argue against seeking definitions of elder abuse, but is to argue against a single definition.[10] As Phillipson and Biggs argue

> Attempts to define and map the extent of elder abuse indicate that it should not be seen as a single monolithic phenomenon, but that it takes a variety of forms in different settings and in different kinds of relationships.[11]

The World Health Organisation has adopted the following definition[12]:

> 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.

There are certainly problems with this definition,[13] but it is useful as a broad basis for discussion. It still leaves open the question of at what age a person becomes an "older person". In the US where states have enacted legislation specifically to address elder abuse they have tended to use 60 or 65.[14] Given the argument developed below that a central part of elder abuse is ageism and the disadvantages our society imposes on old age, a preferable approach is that an older person is someone subject to the social disadvantages and prejudicial attitudes that can attach to old age. The difficulty with such an approach is that it does not readily transmit into a statutory formulation.

[4] E.g. Dixon et al. (2010).

[5] Brammer and Biggs (1998).

[6] Hawks (2006).

[7] House of Commons Health Committee, *Elder Abuse* (The Stationery Office, 2004), at 1.

[8] McCreadie (2002).

[9] McCreadie (1996).

[10] For a discussion of the benefits of a single definition see O'Connor and Rowe (2005).

[11] Phillipson and Biggs (1995), at 202.

[12] World Health Organisation (2002).

[13] There is, for example, no requirement that the act is unjustified.

[14] Brandl and Meuer (2001).

In the UK Government's report *No Secrets*[15] this definition is used:

> Abuse is a violation of an individual's human and civil rights by any other person or persons. Abuse may consist of a single act or repeated acts. It may be physical, verbal, or psychological, it may be an act of neglect or an omission to act, or it may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent. Abuse can occur in any relationship and may result in significant harm to, or exploitation of, the person subjected to it.

One benefit of this definition is that it gives it a degree of clarity, because by referring to human rights, it ties into the vast quantity of analysis on the nature of human rights. Even if that does not necessarily produce certainty, at least it means that we are clear about what the issues are. For lawyers it also provides a form of language which is readily transmittable into legal argument.[16]

Michelle Madden Dempsey's instructive article[17] on the meaning of domestic violence can be useful in this context. She separates out three elements of domestic violence: violence, domesticity[18] and structural inequality within the relationship.[19] She argues that:

> Domestic violence has two senses. In its strong sense, domestic violence reflects the intersection of violence, domesticity, and structural inequality. In its weak sense, domestic violence reflects only the intersection of violence and domesticity.

This approach could be adapted for elder abuse. The strongest (most serious) forms of elder abuse are likely to reflect a combination of violence, domesticity and an abusive relationship. Weaker forms of elder abuse might include non-violent forms of abuse; or one off incidents of abuse which are not found in the context of an unequal relationship. The benefit of this analysis is that it enables us to break down more clearly the forms of abusive behaviour into significant categories. It also helps brings out the multiple wrongs that can be part of elder abuse.[20]

8.3 Statistics

Again, I can be brief as there is extensive literature on the statistics concerning elder abuse. In the UK we now have the benefit of a major recent study of elder abuse carried out for Comic Relief and the Department of Health.[21] It found that 2.6% of

[15] Department of Health (2000).

[16] Dixon et al. (2010).

[17] Madden Dempsey (2006). See also Madden Dempsey (2009a).

[18] This includes the location of the violence (the home) and the relationship between the parties (an intimate or familial one).

[19] She defines these (at 314) as 'social structures that sustain or perpetuate the uneven distribution of social power'. See also Johnson (1995).

[20] For further discussion, including some concerns with the detail of that approach see Herring (2011a).

[21] O'Keeffe et al. (2008). See also Mowlam et al. (2008) and Cooper et al. (2008).

people aged 66 or over who were living in their own private household reported mistreatment[22] involving a family member, close friend or care worker in the past year. If the sample is an accurate reflection of the wider UK older population it would mean 227,000 people aged over 66 suffering mistreatment in a given year. The figures rise if incidents involving neighbours or acquaintances are included to 4% or 342,400 people.[23] Three quarters of those interviewed said that the effect of mistreatment was either serious or very serious. The researchers believed these figures to be on the conservative side as they did not include care home residents in their survey and some of those most vulnerable to abuse lacked the capacity to take part. Also, even among those interviewed there may have been those who, for a variety of reasons, did not wish to disclose abuse.[24] Another UK survey found that a quarter of younger people knew an older person who was suffering neglect or mistreatment.[25]

A recent literature review looking at evidence of elder abuse around the world concluded that 6% of older people had suffered significant abuse in the last month. 5.6% of older couples had experienced physical violence in their relationships. 25% of older people had suffered significant psychological abuse.[26] There can be no doubt that elder abuse is prevalent and a major blight on the lives of many older people.

8.4 A Rights Based Approach

In this chapter I will use the rights as set out in the European Convention on Human Rights as the basis for my argument that elder abuse is a serious violation of a person's human rights.[27] However, similar rights can be found in most Human Rights documents and no doubt the arguments developed here can readily be adapted for other jurisdictions.

8.4.1 The Right to Life: Article 2

Article 2 not only prohibits the state from intentionally and unlawfully taking life. It requires the state to take appropriate steps to safeguard the lives of people living

[22] The report explains (at 3) "'mistreatment' is used to describe both abuse and neglect. There are four types of abuse: psychological, physical and sexual abuse (sometimes referred to collectively as 'interpersonal abuse') and financial abuse."

[23] O'Keeffe et al. (2008), at 4.

[24] Ibid, para. 7.4

[25] Hussein et al. (2007).

[26] Cooper et al. (2008).

[27] Choudhry and Herring (2006).

within the jurisdiction.[28] This requires there to be effective criminal law to deter violent crimes and an effective mechanism for law enforcement. In some cases this extends to taking specific measures to protect individuals whose life is at risk in the hand of another.[29] That obligation must be interpreted in a way so that the burden on the state is not disproportionate or impossible.[30] In *Opuz v Turkey* it was explained:

> For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[31]

Of course, only the most extreme cases of elder abuse are likely to give rise to right to life issues.

8.4.2 The Right Not to Suffer Torture and Inhuman or Degrading Treatment: Article 3

Serious elder abuse could constitute an infringement of the right to protection from inhuman or degrading treatment under article 3 of the ECHR:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Of the three kinds of prohibited conduct, torture is seen as worse than inhuman or degrading treatment.[32] The phrase "inhuman treatment" in article 3 includes actual bodily harm or intense physical or mental suffering.[33] "Degrading treatment" includes conduct which humiliates or debases an individual; or shows a lack of respect for, or diminishes, human dignity. It also includes conduct which arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[34] In considering whether treatment is "degrading" the Court will have regard to whether its object was to humiliate and debase the victim and the effect on the victim. Hence corporal punishment can fall within this category, even if the physical injuries caused are relatively minor.[35] Clearly serious physical

[28] *L.C.B. v. the United Kingdom*, 9 June 1998, Sect. 36, *Reports* 1998-III.

[29] *Osman v. the United Kingdom*, 28 October 1998, Sect. 115, *Reports* 1998-VIII.

[30] *Opuz v Turkey* [2009] ECHR 33401/02.

[31] Para. 129.

[32] *Ilascu and others v. Moldova and Russia* [GC], no. 48787/99, 08 July 2004, para. 440.

[33] *Ireland v. the United Kingdom* 2 EHRR 25.

[34] See *Price v. the United Kingdom*, no. 33394/96, paras. 24–30 and *Valasînas v. Lithuania* [2001] ECHR 479.

[35] *Campbell and Cosans v. UK* (1982) 4 EHRR 293; *Tyrer v. UK* (1978) 2 EHRR 1.

assaults will fall into this category. But less serious incidents, especially when occurring over a prolonged period of time can too. In *Pretty v UK*[36] it was held that "fear, anguish *or* inferiority" could be involved in degrading treatment. Depression, learned helplessness and alienation, post-traumatic stress disorder, guilt and denial have been cited as resulting from elder abuse.[37] This suggests that an on-going relationship in which the older person is subject to a series of incidents, which seen individually might appear minor, could amount to a breach of article 3. A lack of respect of a person's humanity can be included.[38] In serious cases persistent infantilisation and emotional abuse could, therefore, fall within article 3.

Article 3 not only prohibits the state from inflicting torture or inhuman or degrading treatment on its citizens it also requires the state to protect one citizen from torture or inhuman or degrading treatment at the hands of another.[39] A state will infringe an individual's right under article 3 if it is aware that she or he is suffering the necessary degree of abuse at the hands of another and fails to take reasonable[40] or adequate[41] or effective[42] steps to protect that individual.[43] There is a particular obligation on the state to protect the article 3 rights of vulnerable people, such as children.[44] The obligations imposed on the state include ensuring that there is an effective legal deterrent to protect victims from abuse; to ensure that there is proper legal investigation and prosecution of any infringement of the individual rights; and where necessary to intervene and remove a victim from a position where she or he is suffering conduct which is prohibited by article 3.[45] Hence states have been found to infringe article 3 when they have been aware that children are being abused but have not taken steps to protect them[46]; where the law on sexual assault required proof that the victim had physically resisted the sexual assault[47]; and where the police failed to properly investigate or take steps to prosecute men alleged to have committed sexual assaults.[48] These obligations arise in cases of elder abuse, just as they do in cases of child abuse or domestic violence.

[36] *Pretty v. UK*, [2002] ECHR 423, at para. 52
[37] Wolf (1997).
[38] *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A, no. 58, para. 22.
[39] *A v UK* [1998] 3 FCR 597, *E v UK* [2002] 3 FCR 700.
[40] *Z v UK* [2001] 2 FCR 246.
[41] *A v UK* [1998] 3 FCR 597, para. 24.
[42] *Z v UK* [2001] 2 FCR 246, para. 73.
[43] *E v UK* [2002] 3 FCR 700.
[44] A v UK [1998] 3 FCR 597, para. 20.
[45] See Choudhry and Herring (2010), ch. 8 and 9.
[46] *E v UK* [2002] 3 FCR 700.
[47] *MC v Bulgaria* (2005) 40 EHRR 20.
[48] *MC v Bulgaria* (2005) 40 EHRR 20.

The recent decision in *Opuz v Turkey*[49] is particularly revealing. There a woman who was in a violent relationship with her husband complained to the police on several occasions about domestic violence against her and her mother (who lived with the couple). However, each occasion she subsequently withdrew her complaint and the police halted intervention. Tragically her mother was killed by the husband and the woman seriously injured. The woman complained that the state had failed to protect her and her mother's rights. The state claimed it was proper to stop proceedings when the complaints were withdrawn. The Court found against the state and explained:

> In the Court's opinion, it does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. [the man]. Instead, they seem to have given exclusive weight to the need to refrain from interfering in what they perceived to be a "family matter" . . .. Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints.[50]

This makes it clear that it is insufficient for the state simply to rely on the victim's withdrawal of a complaint or a failure to complain as a justification for non-intervention in cases where rights under articles 2 or 3 are concerned.

The right under article 3 is an absolute one.[51] Unlike many of the other rights mentioned in the European Convention there are no circumstances in which it is permissible for the state to infringe this right. This makes it clear that the rights of another party cannot justify an infringement of someone's article 3 rights. So, for example, it cannot be successfully argued that a family's right of privacy justifies non-intervention by the state if that non-intervention is an infringement of one family member's article 3 rights. Indeed, and perhaps this is more controversial, it is suggested that other rights of the victim cannot justify an infringement of article 3. In other words, in an elder abuse case the state cannot justify its failure to protect a victim's article 3 rights by referring to that person's right to respect for private life.[52] Of course, the fact that the older person is "happy" with the abuse might mean it falls short of amounting to inhuman or degrading treatment in borderline cases. However, where it does not, I would argue that article 3 is automatically engaged. Further, it should be emphasised that although article 3 is drafted in absolute terms the state's obligations towards its citizens in respect of article 3 are only to take *reasonable* measures to protect an individual's article 3 rights.[53] Again, where a victim of abuse is "happy" with being in the abusive relationship

[49] [2009] ECHR 33401/02.

[50] Para. 143.

[51] Addo and Grief (1998).

[52] Although the state may argue that the victim's views make it unreasonable for the state to intervene.

[53] *E v UK* [2002] 3 FCR 700.

that may mean that it is not reasonable to expect the state to intervene. However, I would argue that would be very rare where the victim is facing inhuman or degrading treatment.

8.4.3 Article 8: The Right to Respect for Private and Family Life

Article 8 of the ECHR states that

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Included within the right to respect for private life is the right to bodily integrity and this includes "psychological integrity" and "a right to personal development, and the right to establish and develop relationships with other human beings and the outside world". Like article 3, article 8 has been interpreted to mean that not only must the state not infringe someone's bodily or psychological integrity, but also the state must ensure that one person's integrity is not interfered with at the hands of another. In other words it is not just a "negative right" inhibiting state intrusion into a citizen's private life, it places "positive obligations" on the state to intervene to protect individuals.[54] However, unlike article 3, this is a qualified right. It is permissible for the state to fail to respect an individual's right to respect for private life under article 8(1) if paragraph 2 is satisfied. So, if the level of abuse is not sufficient to engage article 3 but falls within article 8 then it is necessary to balance the article 8 rights and interests of other parties. It would therefore be possible to make an argument that the rights of the abuser, or perhaps even the victim, justify the state in not intervening in an article 8 case.

So, how can these competing rights and interests under article 8 be balanced? Rachel Taylor and I[55] have suggested that in a case of clashing rights the court should look at the values underpinning the right.[56] In the case of Article 8 the underlying value is that of autonomy: the right to pursue your vision of the "good life". A judge could then consider the extent to which the proposed order would constitute a blight on each of the party's opportunities to live the good life and make

[54] Choudhry and Herring (2007).

[55] Herring and Taylor (2006); Choudhry and Fenwick (2005).

[56] This seeks to develop a dicta of Lord in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1AC 593 at para. 17, which refers to the need to consider the values underlying the right when considering cases of clashing rights.

the order which causes the least blight. Applying that in this context I would argue although removing the victim from elder abuse from an abusive carer will infringe the carer's autonomy, it will do so to a much lesser extent than leaving the victim to suffer abuse would do. But what if the victim does not want the assistance?

Here there is a balance between protecting the current autonomous wish of the victim, with the increase in autonomy they may experience if they were removed from the abuse. Many victims in these cases have conflicting wishes. They want to remain in the relationship, but they want the abuse to stop. In such a case it is not easy to determine what is promoting their autonomy. It is not possible to respect these two conflicting desires. I suggest that where the abuse is low level, the infringement on autonomy in remaining in the relationship will be limited. John Williams[57] discusses a hypothetical case of a son stealing £10 from his mother now and then. There autonomy is only infringed a small bit by the abuse. If however the relationship consisted of persistent emotional abuse, the interference in her autonomy in removing her from the relationship may be less than allowing her to remain in it. It must be remembered that being in an abusive relationship is itself undermining of autonomy. Leaving a person to suffer abuse, when he/she does not want to be protected, is not necessarily justified in the name of autonomy. Shortly I will set out a proposal as to how the law should balance the interests in well-being and autonomy.

8.4.4 Article 14: The Right to Protection from Discrimination

Article 14 of the ECHR states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although age is not included in the list of prohibited grounds of discrimination, the words "such as" indicates that this is not a closed list. Indeed the European Court of Human Rights has shown itself willing to add to the list.[58] It is generally accepted that age is included within the ambit of Article 14.[59] The article is not a "stand alone" right and can only apply when one of the other rights in the convention is interfered with. In this context the argument can be made that a failure to provide an effective protection against elder abuse not only amounts to an interference in a person's article 3 or 8 rights, it does so in a way which amounts to age discrimination. The argument would be that failure to have an effective legal

[57] Williams (2008).

[58] For example, *Da Silva Mouta v Portugal* (2001) 31 EHRR 47 added sexual orientation to the list.

[59] *Rutherford (No 2) v Secretary of State for Trade and Industry* [2006] UKHL 19.

response to elder abuse has a particular impact on older people and hence discriminates against them on the basis of age. The rights under Article 14 are not absolute rights and interference with them can be justified if there are reasonable and objective grounds. However, the courts have been very reluctant to find a justification for discrimination.[60]

There is more to say about how elder abuse should be regarded as a serious form of age discrimination. First, elder abuse reflects and reinforces attitudes about older people.[61] They are seen as doddery and confused, with limited awareness of what is going on. This makes it easy to downplay the impact of crimes upon them. As we shall discuss later, much abuse in the home is (inaccurately) put down to "carer stress". Ageism as a cause of abuse can be most apparent in maltreatment in care homes. Research has demonstrated that abusive behaviour in a nursing home is often normalized and can easily come to be regarded as "standard treatment". Thus the use of force against uncooperative older people is accepted as necessary for the "smooth running" of the home. Older people in some residential settings are seen as a waste of space, incapable of feeling. The routines and bureaucracy of the nursing home, sometimes seem to count for more than the interests of the individual residents. Even where there are not such overly hostile attitudes many older people in residential settings are seen as needing "looking after" and infantilized in a way which perpetuates and enables the abuse itself.[62] For example, "baby talk" or overtly insulting terms are demeaning.[63] Often abusive behaviour is not even recognized as such and is dismissed as "what she wants" or "she doesn't mind because she doesn't really know what's going on". Even very serious incidents of abuse tend to be seen as "one offs" rather than reflected broader attitudes towards older people. At worst it may be labelled "bad practice".[64] But their treatment is often but a reflection of broader ageist attitudes within society and the social structures that set the social position of care homes.[65]

Second, the state's failure to tackle age discrimination means it has a particular responsibility to combat the disadvantages that fall on older people. Ageism causes a lack of social inclusion[66]; dependency on others; lack of access to information and remedies and all of these can contribute to the social circumstances that enable elder abuse to take place.[67] As the state has done so little to deal with these issues and has allowed the circumstances in which elder abuse flourishes, its obligation to tackle elder abuse is enhanced.

[60] For further discussion see Choudhry and Herring (2010), chapter 2.
[61] CPS (2010).
[62] Salari (2006).
[63] Giles et al. (1993).
[64] Fitzgerald (2006).
[65] Royal College of Psychiatrists (2000).
[66] Schuyler and Liang (2006).
[67] Department of Health (2005).

Third, age discrimination has made it particularly difficult to combat elder abuse. Research has demonstrated that social structure and attitudes towards the elderly marginalize them[68] and this encourages and enables the abuse to take place.[69] The lack of alternative facilities for older people both in terms of housing and social support can make escaping from the abuse as terrifying as the abuse itself. Financial barriers to seeking help or leaving the relationship can be even greater among older women than younger victims of domestic violence.[70] Ageism works hard to keep older people in their homes or a few specific public places. This means that more time is spent at home and therefore the opportunity for intimate abuse is increased.

Finally, given the majority of victims of elder abuse are women the failure to protect them amounts to sex discrimination.[71] Hence we can see interaction of both ageism and patriarchy in creating and reinforcing the structures that enable abuse to take place become obvious.[72] A proper understanding of elder abuse thus requires not only an appreciation of ageism and sexism, but also the way the two intersect.[73] Other forces may also be at play and will also need to be examined: racism,[74] homophobia and disability discrimination can all impact on a case of elder abuse.[75]

These arguments, I suggest, demonstrate that elder abuse is an aspect of broader ageist practices and attitudes in our society. Article 14 with its requirement to ensure that there is no discrimination in the exercise of rights, compels the state to ensure that it combats elder abuse. Particularly strong arguments are, therefore, required to justify the state in not intervening to protect victims of elder abuse.

8.4.5 A Summary of a Rights Based Approach

So, where does this analysis get us? First, cases of very serious abuse are likely to reach the level of article 2 or 3. Then, there is an obligation on the state to protect victims and to ensure there are legal remedies available. This means there needs to be an effective set of criminal offences and civil remedies available. Further the state has a duty to take reasonable steps to protect people from this abuse. This requires a public law of protection from elder abuse of the kind we have in relation to child abuse, as discussed above. Duties are imposed on the state, so far as is

[68] Quinn and Tomita (1986).

[69] Social Exclusion Unit (2005).

[70] Straka and Montminy (2006).

[71] But see Pritchard (2001).

[72] Whittaker (1996).

[73] See Madden Dempsey (2009b), chapter 7, for an excellent discussion of the intersection of different forces in the context of domestic violence.

[74] Aitken and Griffin (1996), chapter 3.

[75] Turell (2000); Levit (2002).

reasonable, to protect older people from abuse. In deciding what intervention is reasonable account must be taken of the wishes of the older person and what alternative provisions are available. I have argued above that where the abuse has reached the level of engaging article 3 only in exceptional cases should the wishes of the older person mean it is not reasonable to intervene.

Second, where the abuse is at a lower level article 8 is likely to be involved. There is an obligation on the state to put in place remedies under the criminal and civil laws to protect older people from that level abuse. However, where the older person does not want intervention, her rights of autonomy come into play. As just discussed this can involve a delicate balancing exercise in protecting autonomy rights of the victim and their rights of protection from violence, and the rights of the abuser. In cases of minor levels of abuse, this may mean non-intervention is appropriate. However, in more serious cases the balancing of the rights will mean that intervention will be required.

Third, the requirement of the state to ensure that there is no discrimination on the basis of age, strengthens the obligation of the state to ensure there is further adequate protection of the rights infringed in cases of elder abuse.

8.5 Putting a Rights Based Approach into Practice

This section will set out the practical consequences of adopting the kinds of rights based approach advocated above.

8.5.1 An Obligation to Protect on State Authorities

Adopting a rights-based approach will require the state to ensure that older people are protected from abuse.[76] This requires a clear set of duties on local authorities to investigate, intervene and protect older people who are being, or are at risk of, abuse. English law is revealing in this regard. It is remarkable in that although local authorities are under an obligation to investigate cases of child abuse and must act to protect children from abuse,[77] there is no equivalent obligation in relation to older people. Indeed the complete set of obligations on local authorities to protect children is found in an impressive array of statutory provisions, explained at length in plenty of academic commentary. The obligations in relation to older people

[76] Manthorpe (2006).

[77] See Herring (2010), chapter 10 for a detailed discussion.

would be minute.[78] Indeed it is revealing that in recent English cases the courts have been driven to use the inherent jurisdiction to protect older people from abuse due to the lack of statutory provision. There is a clear need to have, as the Law Commission have proposed,[79] duties on social services authorities to make enquiries where there is reason to believe a vulnerable adult in the area is suffering or is likely to suffer significant harm; a power to gain access to premises where it is believed a person at risk is living; the power to arrange a medical examination; the power to arrange the removal of the vulnerable person from the home; and the power to apply for temporary and long term protection orders.[80]

This duty to protect must rest alongside the duty to respect autonomy. Seeking the correct balance between protection of well-being and protection of autonomy is tricky in this area, as in any other.[81] History teaches us that in the name of "protection" great harms have been done. But, it should be remembered too that in the name of "protecting private choices" great harm has been done (think of the approach to domestic violence until recent years). In balancing the need to protect and the need to respect autonomy we need to be particularly wary of intervening in cases unless there is significant harm. Even then care must be taken to ensure weight is attached to the views of the victim in determining the appropriate response. I will seek to develop a more concrete proposal along those lines shortly.

8.5.2 Institutional Abuse

There has been some debate over whether elder abuse is more prevalent in domestic settings or in institutional ones.[82] Some investigations into the problem appear to see the problem as a primarily domestic one.[83] In England, a review of findings of inquiries under the 1984 Registered Homes Act found "chilling evidence"[84] that those living in care were more at risk than those in the community.[85] There is increasing evidence of abuse of older people in care homes.[86] At the most extreme

[78] National Health Service and Community Care Act 1990, section 47 gives a right to be assessed if one is in need and Mental Health Act 1983, s. 135 gives an approved social worker the right to apply to move to a place of safety a person suffering from a mental disorder. But neither of these offer effective protection in most cases of elder abuse: Williams (2008).

[79] Law Commission (1997).

[80] See also Action on Elder Abuse (2008).

[81] Dunn and Foster (2010).

[82] The Care Standards Act 2000 saw the terms 'nursing homes' and 'residential homes' replaced by 'care homes' for institutions.

[83] Biggs (1996a).

[84] Glendenning (1993).

[85] See also Royal College of Psychiatrists (2000).

[86] Payne and Fletcher (2005); Thobaben and Duncan (2003).

it has been claimed that in nursing homes we are seeing widespread "geronticide".[87] A more moderate view is that the really important issue is not so much the occasional act of violence against older people in care homes, as the atmosphere they have. One report into institutional care claimed that "the predominant culture is one of warehousing older citizens".[88] Another spoke of "deadly institutionalisation".[89] The Royal College of Psychiatrists have suggested that abuse "is a common part of institutional life."[90]

A human rights approach would require regular, thorough and effective inspections of all care homes. These would be seeking to uncover not only serious abuse, but the kind of "ignorance, unthinking and ageism"[91] which can made life in a care home so appalling. As argued above a de-humanising regime will interfere with article 8 rights and that might be a care home characterised by infantilisation and mindless routine, as well as one involving abuse of a physical kind.

8.5.3 The Power to Remove Older People from Abuse

There needs to be a statutory framework for when an older person can be removed by the state authorities from a situation, without their consent. The key issue would be setting the threshold at which state intervention to protect an older person will take place. I would argue in favour of the following provision:

'An older person can be taken into the care of a local authority if
(a) the older person concerned is suffering or is likely to suffer, significant harm; and
(b) that the harm, or likelihood of harm, is attributable to –

(i) the care given to the older person, or likely to be given to him or her if the order were not made, not being what it would be reasonable to expect a carer to give to him or her'

(c) removal will be in the best interests of older person.

Looking at this proposal in more detail there are a number of points to bring out.

First, state intervention would only be justified if there was significant harm. Proof of lower levels of harm would be insufficient. This provides an important bulwark against an overly paternalistic approach. There are good reasons to set the level here. First, we must recall that the provision of residential care for older people is far from satisfactory in many cases and inevitably impacts on the rights of self-determination, as we have seen in this chapter.[92] In the absence of significant

[87] Brogden (2001).
[88] Royal College of Psychiatrists (2000).
[89] Terry (1997).
[90] Royal College of Psychiatrists (2000), at 6.
[91] Royal College of Psychiatrists (2000).
[92] Wanlass (2006).

harm it is unlikely that removal will put the victim in a better position than she was. Second, it should be recalled that we are dealing with cases where the older person has not chosen to be taken into care. So there needs to be extremely good reasons to override their wishes, or to make up for their lack of consent. This, I suggest, strikes the correct balance between the protection of rights of autonomy and the rights of protection. As argued earlier leaving a person in an abusive relationship will undermine their autonomy and their well-being. Notice too the requirement that the removal should be in the best interests of the older person. This allows for a consideration of the impact on the victim of abuse of removal against their wishes. It may be that in a few cases the distress caused to them will be so great and so long-lasting that leaving them in the abuse will better promote their welfare than removing them.

Second, my proposal only applies when the harm suffered by the older person is due to the level of care that is provided being below the standard expected.[93] This is important in ensuring that the older person is not removed from the care of their carers, if the real cause of the older person's harm is the lack of social support. The current law in England reveals the dangers of not including a provision of this kind. *B Borough Council v S*,[94] a ninety year old man who lacked capacity was removed from his home where he had been living with his wife for nearly 70 years. The local authority took the view she was no longer able to care for him and sought to place him in a care home. His wife opposed the move. Charles J upheld the move as being in the best interests of Mr S. He accepted that the orders amounted to a substantial interference in the couple's family life, but rejected an analogy with cases concerning the removal of a new born child from a mother, where the courts have required there to be "extraordinarily compelling evidence" before justifying the removal of the child.[95] It was sufficient that it was found to be in his best interests to be removed. While, this approach was probably the only one open to the judge given that he was acting under the inherent jurisdiction which is rooted in the best interests principle, it is deeply concerning. That a couple can be separated after nearly seventy years of marriage without even proof of significant harm seem an inadequate safeguard of human rights. This case demonstrates the need for ensuring that the root cause of the difficulties lie in the lack of care, rather than elsewhere.

Third, and most significantly, my provision does not directly mention the wishes of the individual. However, it does offer some protection to autonomy interests. First, in requiring there to be significant harm before intervention is justified, this shows that there needs to be a very good reason based in welfare to justify overriding their autonomy. Second, their wishes would, however, be relevant in assessing their best interests. Indeed, the wishes of an individual are a central element in an assessment of their best interests.[96] However, to some that may be

[93] Herring (2000).

[94] [2006] EWHC 2584 (Fam).

[95] For example, *Re M (Care Proceedings: Judicial Review)* [2003] EWHC 850 (Admin).

[96] See Herring (2011b).

insufficient. Older people's rights to choose how to wish their lives should be respected, whether or not they are the victims of elder abuse.[97] I would argue that the rights analysis above provides the correct balance. In cases of abuse which amounts to an interference of article 3 rights, intervention is required, whatever the views of the victim. In cases of a less serious kind, but which involve article 8, the kind of balancing exercise referred to earlier must be carried out. As mentioned above, it should be remembered that abusive relationships are undermining of autonomy and can impact on an individual's assessment of their well-being. In cases of serious abuse we are justified in questioning the extent to which the victim is capable of exercising autonomy and the extent to which their autonomy will be restricted in the future.

8.6 The Need for a Specific Crime

Many cases of elder abuse will be covered by the standard criminal law on murder, assault, sexual offences and theft. However, I would argue that there is a need for a specific offence of elder abuse, or an "age hate" crime. Many countries have a range of racially or religiously aggravated offences.[98] Such crimes are typically justified on the basis of this kind of argument:

> Beyond the impact of the individual hate, hate crime is a powerful poison in society. It emphasises and sensitises feelings of difference rather than focusing on what is shared in common. It breeds mistrust and suspicion, alienation and envy. It promotes isolation and exclusion and sets up barriers to communication.[99]

These recognise that where an assault is aggravated by hostility to race or religion a particular wrong is done. But in many countries there is no equivalent for an assault motivated by hatred of age abuse.[100] Crimes of "age hate" are generally recognised. In the UK's Crown Prosecution Service's *Crimes Against Older People—CPS Prosecution Policy* it is stated:

> We understand that racist crime has a link to racism as a prejudicial set of ideas; just as sexual crime or domestic violence has a link to sexism and the application of power and control. Some crimes against the older person have a link to ageism as a prejudicial set of ideas. The CPS acknowledges that ageism may provide the backdrop where crimes against older people are tolerated.[101]

Crimes which are motivated by hostility to age can strike fear into older people in the community. It exacerbates existing ageist attitudes about older people. But crimes of elder abuse, will not always be characterised by the kind of manifestation

[97] Pritchard (2000).

[98] Crime and Disorder Act 1998, sections 28–32.

[99] Metropolitan Police (2000), 21.

[100] CPS (2008), para. 11.

[101] Para. 3.2.

of hatred apparent in race hate crimes, however. Nevertheless I would argue that there is a very distinctive wrong in crimes of elder abuse which should be recognised by the criminal law.

So, what if anything, is distinctive about elder abuse?[102] What marks elder abuse from other types of abuse is that the defendant in committing the crime has exploited the disadvantages older people suffer as a result of ageism or that the defendant has expressed negative attitudes towards older people through his or her action, and thereby reinforced ageist attitudes. This argument has some similarities with the claims made about domestic violence. Much writing on domestic violence has highlighted the fact that domestic violence occurs and is tolerated because of attitudes towards women and violence towards women.[103] Domestic violence is seen as both a reflection of, and a reinforcement of, wider social attitudes about women.[104] It has also been argued that for many perpetrators of violence the key factor is the ability to exercise control over a vulnerable person rather than the ability to undertake violent behaviour. Parallels can be drawn with regard to elder abuse. Indeed in many cases of violent elder abuse, it is simply the continuation of a historically violent relationship.[105] The wrong of elder abuse, therefore, involves a particular wrong to society: it helps perpetuate age discrimination and adds to the disadvantages faced by older people. Further, it manifests a particular wrong against the victim in that it takes advantage of the social disadvantages faced by older people to perpetuate the crimes.

8.7 Barriers to Moving Forward

In this final section I address two barriers to moving forward against elder abuse: the "carer stress" explanation for elder abuse and debate over whether elder abuse should be regarded as simply part of the law on protection of vulnerable adults.

8.7.1 The "Carer Stress" Explanation of Elder Abuse

Elder abuse has been seen by many as a particularly tricky issue because it is usually caused by "caregiver stress".[106] In the exhaustion and despair that caring can bring, the carer has lashed out in anger or frustration. In such a case legal

[102] There has been some debate over whether the focus should be on the abuse of vulnerable adults or elder abuse: Slater (2005).

[103] See Burton (2008), chapter 1 for a brief summary.

[104] Herring (2010) chapter 6 for further discussion.

[105] Walsh et al. (1999).

[106] For a detailed discussion, from which the following is drawn, see Herring (2011c).

intervention is unlikely to help. Carers are not to be held responsible for the abuse. To remove an older person from their care is unlikely to assist the older person and is unlikely to be what they want. The horrors of the nursing home are likely to be even worse than the unpleasantness of the occasional slap from the stressed carer. The solution lies, therefore, it is said, in offering support and advice to carers, rather than intrusive legal intervention. This is a matter for delicate social work intervention, rather than heavy handed law. I will argue against such an approach.

In the public imagination elder abuse is popularly regarded as caused by carer stress.[107] This claim has been described by academic specialists in the field as a "persistent characterization"[108] and "widely accepted".[109] A good example of the carer stress explanation is the following statement from an influential organisation in the United States, the National Centre on Elder Abuse:[110]

> Although it is known that in 90% of all reported elder abuse cases, the abuser is a family member, it is not known how many of these abusive family members are also caregivers. Researchers have estimated that anywhere from five to twenty-three per cent of all caregivers are physically abusive. Most agree that abuse is related to the stresses associated with providing care.

Despite its hold on the public imagination and the emphasis placed on it during the early years of research into elder abuse, most recent studies downplay the relevance of carer stress as a cause of elder abuse. There is now a substantial body of research suggesting that caregiver stress plays a very minor role in causing elder abuse.[111] This is certainly not to say that the evidence suggests that carers do not suffer stress, quite the opposite. It is clear that caring is extraordinarily hard work.[112] But there is no evidence that the stresses of caring are linked to abuse in any significant way.

Seeing elder abuse as caused by caregiving stress has a number of significant consequences. The caregiver stress model easily leads to blaming the older person, rather than the perpetrator, for the abuse. It suggests that the best response to elder abuse would be to offer support and assistance to the carer, and medical support to the dependent, rather than offering protection or services to the person being abused.[113] It also ignores the fact that a significant portion of "elder abuse" is in fact domestic violence that has been going on for a considerable time. The carer stress model sanitises elder abuse as a sad situation, rather than recognising it as a grave interference in human rights.[114] It pigeon holes elder abuse into a specific

[107] Pritchard (2007).

[108] National Center on Elder Abuse (2002), at 3.

[109] Bennet et al. (1997), at 54.

[110] National Center on Elder Abuse (2002) at 3.

[111] Brandl and Cook-Daniels (2002); Bergeron (2001). Brandl and Raymond (1997); Bennet et al. (1997).

[112] Gainey and Payne (2006).

[113] Bergeron (2001).

[114] Herring and Choudhry (2006).

category of its own, rather than seeing it as part of the broader picture of prevailing violence against women. Also, the caregiver stress explanation hides all the wider social factors which contribute to the practice, perpetuation and lack of recognition of elder abuse. In particular, it disguises the significance of ageism and patriarchy.[115]

None of this discussion should downplay the importance of offering extensive support to carers. Relieving the stress of caring is a good thing in itself, even arguably a right.[116] My point is simply that reducing stress for carers will not lead to an ending of elder abuse because it will not tackle its root cause.

8.7.2 Vulnerable Adults

As mentioned English law has no particular legal interventions directed towards elder abuse. Instead, the Government has preferred to focus on protection of vulnerable adults, rather than specifically older adults. The goal of the Department of Health in this area is to provide protection for all "vulnerable adults".[117] No distinction is drawn between the abuse of those who are vulnerable through age, disability or homelessness. The Department of Health defines a vulnerable person as one:

> who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.[118]

This approach, then, does not regard elder abuse as a unique conceptual category; but sees it as merely an aspect of the broader category of abuse of vulnerable people. Indeed it excludes from its approach the abuse of older people who are not vulnerable.[119]

There are clear benefits to doing this. The issues surrounding abuse of vulnerable adults of whatever age are similar. It might be thought that there is much more in common between a case of abuse involving an older person lacking capacity and a case of abuse of a younger person also lacking capacity, than with a case where an older victim is fully competent. Indeed, it has been claimed that older people are not

[115] Whittaker (1996) at 78.

[116] See Herring (2008).

[117] Department of Health (2002), para. 2.3 suggested all vulnerable people should be covered by an overarching approach. Previously, Department of Health (1993) had focussed specifically on elder abuse. For discussions of the changing approach see Slater (2005).

[118] Department of Health (2002), at para. 2.3

[119] It might be argued that being the victim of abuse automatically renders a person vulnerable, but there seems no reason why this is necessarily so, if the incident has no likelihood of repetition and has no lasting effects.

abused because they are older but because they are vulnerable.[120] Vulnerability, rather than age, is therefore the distinguishing feature. Further, providing professionals working in the area one set of guidance dealing with all forms of abuse against vulnerable people is likely to lead to a welcome reduction of paperwork and promote a coherence of approach. It avoids what might otherwise be difficult overlaps between, for example, protocols dealing with the abuse of disabled people and those dealing with the abuse of older people. A strong case can, therefore, certainly be made for treating elder abuse as an aspect of the wider problem of abuse of vulnerable adults.

However, I think that there are greater advantages in considering elder abuse as a unique category. So what, if anything, may be unique about elder abuse? The answer lies in the explanation for why elder abuse occurs and why it has for so long not been acknowledged as a problem. Much writing on domestic violence has highlighted the fact that domestic violence occurs and is tolerated because of attitudes towards women and violence towards women.[121] A similar point can be said about violence against older people. Elder abuse reflects and reinforces attitudes about older people in a way which interacts with the attitudes about them. Many of the victims are women and then we see the interaction of both ageism and sexism in creating and reinforcing the structures that enable abuse to take place. Hence it is argued that the maltreatment of an older person may not be related in truth to their vulnerability but be a reflection of the attitudes of an individual, organisation or society towards older people in general, and older women in particular. Also, to treat elder abuse as just a sub-set of abuse of the vulnerable is to ignore the fact that non-vulnerable older people can suffer elder abuse on account of ageist attitudes and practices.

8.8 Conclusion

Elder abuse is not a single phenomenon; it is complex. It can encompass a complex range of behaviours: longstanding domestic violence; abuse of caregivers by care recipients[122]; community harassment[123]; an inhibiting fear of violence in public spaces[124]; retaliation by adults of abuse they suffered as children[125]; and abuse of grandparents by grandchildren they are caring for.[126] It must be tackled on many fronts. As I have argued above, these are all bolstered by patriarchal and ageist

[120] House of Commons Health Committee (2004), evidence 163.
[121] See Burton (2008), chapter 1 for a brief summary.
[122] Phillips et al. (2000).
[123] Biggs (1996b).
[124] Meyer and Post (2006).
[125] Campbell Reay and Browne (2001).
[126] Kosberg and MacNeil (2005).

power structures, when providing practical assistance in individual care responses will need to be tailored to the circumstances of the individual case.[127]

Nevertheless despite the complexity, this chapter has provided, I hope, some structure for moving the legal response forward. I have argued that the starting point must be to recognise that elder abuse constitutes a grave interference in the rights of older people and one which amounts to, and perpetuates age discrimination. Recognition of these rights compels a state response. This requires both ensuring there is a legal framework to provide protection and that it is used to combat elder abuse. In doing so there needs to be a balance between rights of protection and rights of autonomy. This chapter has outlined some more specific reforms it might entail. The road to an effective legal response to elder abuse has been a long one, but hopefully its destination is not far away. Far more difficult will be reaching a society in which the causes of elder abuse, ageism and the social disadvantages of older people, are removed.[128]

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[127] Herring (2009).

[128] Doron et al. (2004).

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Chapter 9
Aid in Dying: United States and Around the World

Ann Murphy

9.1 Introduction

The ability to take one's own life was seemingly acceptable until approximately 400 BCE when it is reported that Greek philosopher Socrates condemned the practice. Plato recorded that Socrates believed that individuals were the property of the gods and their individual lives did not belong to them.[1] Plato declared the practice of suicide "disgraceful" and recommended the "perpetrators" be buried in unmarked graves. This practice was followed by Jewish leaders, who refused to allow suicide victims to be buried in "hallowed ground." The refusal of a "proper burial" was followed by Christians until as recently as 1983. Aristotle, in the 300s BCE believed suicide was harm to the state, as the state was denied the labor and productivity of the individual.

In the 1200s CE, priest and philosopher Thomas Aquinas indicated that suicide was a sin against god. In the Middle Ages, not only was the individual refused a proper burial, his or her property was confiscated. Additionally, his or her body may have been dragged through the streets and the corpse otherwise abused.[2] In the 1600s English poet, priest and lawyer John Donne was one of the first persons to defend the act of suicide. He was followed in this conviction in the 1700s by two Frenchmen, philosopher Charles Montesquieu and writer and philosopher Francois Voltaire.

[1] See *Suicide*, Stanford Encyclopedia of Philosophy; and Baton Rouge Crisis Intervention Center, *The History of Suicide*, Jacob Crouch Foundation. See also: Brody (1989), p. 15.

[2] Id.

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The Hippocratic Oath, taken by physicians and reportedly created by Greek philosopher Hippocrates in approximately the 400s BCE contains the following language: "I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan."

In the United States and parts of Europe, suicide was a crime, punishable by imprisonment and oddly enough, death. It was not until the "Suicide Act of 1961" that the act of suicide was decriminalized in the U.K.[3] There continues to be "criminal liability for complicity in another's suicide" in the UK, however. This is true of most of the states in the United States as well.

In the United States, suicide was a criminal offense in many states until very recently. It is no longer a crime in the United States, but assisting the suicide of another is illegal in most U.S. states and in at least one state, even "encouraging" suicide is a criminal offense.[4] Note that the states individually control the laws on suicide, assisted suicide and aid in dying. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the U.S. Supreme Court recognized that each individual state legislature had the duty and opportunity to determine its particular state's rules on aid in dying.

Most organized religions oppose suicide and aid in dying. Suicide is forbidden under Judaism, Christianity, Islam, and Hinduism (although one may fast to death in the Hindu faith).[5] Buddhism does not condemn suicide.

The United States Supreme Court did however recognize the right to die in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) and Americans are now allowed to choose whether they would like to be free of feeding tubes and breathing apparatus when there is no hope of recovery. By executing an "Advance Health Care Directive," individuals may designate a person to make health care decisions for them should they be unable to do so, and/or the individual may make his or her wishes known with respect to artificial hydration and respiration. This is a refusal of life-sustaining treatment rather than any type of aid in dying.

The Catholic Church opposes aid in dying and on June 16, 2011 the United States Conference of Catholic Bishops issued a statement on physician-assisted suicide titled "To Live Each Day With Dignity: A Statement on Physician-Assisted Suicide."[6]

[3] 1961 CHAPTER 60 9 and 10 Eliz 2, see http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60.

[4] See *State Laws on Assisted Suicide*, at: http://euthanasia.procon.org/view.resource.php?resourceID=000132; and the California law at: California Penal Code, Section 401. See also Hall (1996), footnote 23.

[5] See BBC, Euthanasia and Suicide—Judaism, Buddhism, Hinduism; and Salahi (2004) and Kennedy (2000).

[6] http://www.usccb.org/toliveeachday/bishops-statement-physician-assisted-suicide.pdf; and see Neumann (2011).

9.2 Aid in Dying in the United States

Undoubtedly most Americans became familiar with aid in dying, particularly physician aid in dying through Jacob (Jack) Kevorkian who was nicknamed by some as "Dr. Death."[7] He advocated for physician-assisted suicide[8] and by his own count, assisted 130 individuals to end their lives. Dr. Kevorkian, a pathologist practicing in Michigan, created what he called a "suicide machine or the Mercitron." He was charged with murder and subsequently acquitted numerous times, and had his license to practice revoked by both the states of Michigan and California.[9] Approximately two weeks after Michigan voters rejected a provision to legalize physician assisted death, on November 22, 1998 Dr. Kevorkian appeared on the popular television show "60 Minutes," watched by approximately 22 million viewers.[10] He had earlier provided a videotape of himself administering a lethal dose of Secobarbital Sodium (marketed as Seconal), potassium chloride, and a muscle relaxant to Thomas Youk, who suffered from Amyotrophic Lateral Sclerosis (ALS, commonly known as "Lou Gehrig's Disease"). He was charged with the murder of Mr. Youk and was convicted by a Michigan jury in 1999 of second-degree murder and the delivery of a controlled substance. He received a sentence of 10–25 years in prison, but was released in 2007 after serving over 8 years. He agreed as a condition of his release not to offer advice to any other person about aid in dying.[11] Dr. Kevorkian died on June 3, 2011 at the age of 83 of natural causes (thrombosis caused by liver cancer).

It should be noted that in 1990, the United States Congress enacted the "Patient Self-Determination Act," effective on December 1, 1991. The law requires institutions that receive Federal funds to inform patients about Advance Health Care Directives, which then allow patients to refuse certain medical treatments. Additionally, palliative care is often used for individuals who are suffering from pain in their last days of life. The National Hospice and Palliative Care Organization defines palliative care as "treatment that enhances comfort and improves the quality of an individual's life during the last phase of life." The Catholic Church does not

[7] Interestingly, Dr. Kevorkian received the nickname "Doctor Death" in 1956, long before he assisted any patients with death. It was his article entitled "The Fundus Oculi and the Determination of Death" that earned him the name. The article was published in the American Journal of Pathology in December 1956.

[8] Though originally known by the terminology "physician-assisted suicide" advocates now use the term "aid in dying," while opponents generally use the term "euthanasia."

[9] For a brief history of Dr. Jack Kevorkian's life, see http://www.pbs.org/wgbh/pages/frontline/kevorkian/chronology.html. For a "Kevorkian Chronology," see Nightingale Alliance Euthanasia Opposition, at http://www.nightingalealliance.org/cgi-bin/home.pl?article=120.

[10] See Fields-Meyer (1998). Mr. Youk had earlier died on September 17, 1998.

[11] In 2010, HBO aired a film by Barry Levinson entitled "You Don't Know Jack" about Dr. Kevorkian. Al Pacino, who played him, received both a Golden Globe award and an Emmy award for his portrayal.

oppose (and in fact even encourages) palliative care.[12] In fact, the Church even sanctions the use of palliative sedation to relieve pain, and explains the "doctrine of double effect" as the following:

> In palliative sedation, the act itself must be good or at least neutral (administering pain medications or sedation); the intention of the act is to produce a good effect (relief of pain or suffering), although a harmful effect (death) is foreseeable in some cases; the harmful effect of the act must not be the means to the good effect (death is not the means to relieve suffering); and the good effect must outweigh or balance the harmful effect (principle of proportionality).[13]

Some supporters of aid in death have argued that there is no real distinction between palliative sedation and physician-aided death. Those opposed argue that the "desired outcome of physician-assisted suicide and euthanasia is patient death. In contrast, the desired outcome of PS [palliative sedation] is relief of patient suffering through sedation, with the possible risk of hastening death."[14]

One other option is the "voluntary cessation of eating and drinking."[15] Under this approach, death will generally occur within one to three weeks. Under terminal sedation, the median time until death is one to five days. According to the statistics gathered under the Oregon law (see below—Oregon Public Health Division statistics), the median time between the ingestion of medication and unconsciousness was five minutes, and the median time between the ingestion of medication and death was 25 minutes.

9.2.1 Oregon Law

Oregon was the first state in the United States to enact an aid in dying law.[16] On November 8, 1994, the citizens of the state of Oregon approved Ballot Measure 16. The measure was titled "Oregon Death with Dignity Act." Under the Oregon Constitution, laws may be passed and the constitution may be amended by initiative of the people of the state, independent of legislative action.[17] According to the Oregon State Bar Association, the initiative process was a "direct democracy" idea developed in Switzerland. The vote on the death with dignity measure was extremely close—627,980 votes in favor (51.3%) and 596,018 votes in opposition (48.7%).

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[12] See, for example, http://www.usccb.org/prolife/programs/rlp/03rlgloth.shtml.

[13] Bruce et al. (2006).

[14] Olsen et al. (2010).

[15] Kahn et al. (2003).

[16] Prior to passage, both the states of Washington (Ballot Initiative 119—defeated by a vote of 54% to 46%) and California (Proposition 161—defeated by a vote of 54% to 46%) voted on but did not pass aid in dying laws.

[17] Oregon Constitution, Article IV, Section 1 (2).

How did this measure appear on the ballot? According to Professor Valerie J. Vollmar of Willamette University College of Law in Oregon, the measure was a "grass-roots effort" of interested individuals, physicians, and lawyers.[18] It was opposed by the American Medical Association, Right to Life groups, most religious groups (in particular the United States Council of Catholic Bishops), certain disability groups, and general opponents of euthanasia. The American Medical Association's Code of Medical Ethics, Section 2.211, adopted by the House of Delegates in 1994 states the following:

> Physician-assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.

Supporters of the measure were "socially liberal Christian and Jewish religious denominations," civil rights groups and some organizations representing the rights of the terminally ill.[19]

Arguments in favor of aid in dying include the following: personal autonomy, medical science advances that have outpaced pain relief and quality of life care, equitable treatment for all of those near death, honesty (aid in dying was in fact occurring but was not reported), the rights of individuals versus the state, and compassion in end of life care. Arguments against are the following, among others: the sanctity of life, religious beliefs that only a higher power should decide when the end comes, the fallibility of the medical profession (the person may in fact not be near death), individuals will not necessarily wish for death but will be encouraged (by family and by the state) to request death, the effect of depression on any decision, the disabled and aged will be targeted, physicians "must do no harm," and aid in dying is an act of murder.[20]

The first actual legal death under the Death with Dignity Act did not occur until March 24, 1998, due to a number of legal measures pursued after the vote. The original measure was designed to take effect 30 days after the election, or December 8, 1994. Instead, the United States District Court for the District of Oregon issued a temporary restraining order on December 7, 1994 against the measure (*Lee v. Oregon*, 869F. Supp. 1491 (D. Or. 1994)). The injunction was made permanent by the District Court (Chief Judge Hogan) on August 3, 1995 (*Lee v. State of Oregon*, 891F. Supp. 1439 (D. Or. 1995)). The plaintiffs in *Lee* were specific physicians, a number of terminally ill patients, and two residential care facilities, all located in Oregon. The plaintiffs alleged that the measure violated the equal protection clause and their due process rights under the Fourteenth Amendment to the United States Constitution, their free exercise of religion and freedom of association rights under the First Amendment to the United States Constitution,

[18] Professor Vollmar has a website entitled "Physician-Assisted Death," located at: http://www.willamette.edu/wucl/faculty/profiles/vollmar_pad/index.php.

[19] Masci (2007).

[20] For an excellent resource, see *Ethics in Medicine, Physician-Aid-in-Dying*, the University of Washington School of Medicine, at http://depts.washington.edu/bioethx/topics/pad.html#ques5.

and their statutory rights under the Americans with Disabilities Act of 1990 and the Religious Freedom Restoration Act of 1993.[21]

The United States Court of Appeals for the Ninth Circuit issued its opinion in *Lee v. State of Oregon* on February 27, 1997. The Court found that the federal courts did not have jurisdiction to "entertain Plaintiffs' claims" and the case was vacated and remanded with instructions to dismiss the case. In particular, the Court found that the plaintiffs lacked standing to bring the claims. The United States Supreme Court denied certiorari in *Lee v. Harcleroad*, 522 U.S. 927 (1997) on October 14, 1997.

There were two significant developments during the pendency of the *Lee* case. First, the United States Supreme Court decided two cases, *Washington v. Glucksberg*, 521 U.S. 702 (June 26, 1997), and *Vacco v. Quill*, 521 U.S. 793 (June 26, 1997). Both cases concerned state criminal statutes which made it a crime to assist another to commit suicide (a New York law and a Washington law). Second, the Oregon legislature passed HB 2954—a bill to send Measure 51 to the voters of the state of Oregon to repeal the Death with Dignity Act (DWDA).

Both the *Glucksberg* and *Quill* cases involved constitutional challenges to the particular states' criminal bans on physician-assisted suicide. In *Glucksberg*, the issue was whether a Washington ban violated the Fourteenth Amendment's *Due Process Clause*, and in *Quill* the issue was whether the New York ban violated the Fourteenth Amendment's *Equal Protection Clause*. The U.S. Supreme Court issued unanimous opinions in both cases and found that neither the Due Process Clause nor the Equal Protection Clause was violated. It upheld the constitutionality of the bans. There were 41 amicus curiae (Friend of the Court) briefs filed supporting the New York and Washington laws, and 19 amicus briefs in opposition to the ban (supporting the decriminalization of assisted suicide).[22]

In his majority opinion, Justice Rehnquist relied heavily on the American Bar Association (AMA) brief.[23] He rejected Harvard law professor Lawrence Tribe's argument that essentially there was no distinction between removing life support (found constitutional in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990)) and physician-assisted death. Professor Tribe was one of the attorneys for Timothy Quill and the other physicians who challenged the law.

There was a bit of a bright spot for supporters of physician-assisted suicide—in the language of the majority opinion (Rehnquist) and the concurring opinions of Justices O'Connor, Souter and Breyer. The opinions cited the "deeply rooted" ban on assisted suicide, but the holding permitted the "debate to continue, as it should in a democratic society." In the majority opinion, Justice Rehnquist stated, "Americans are engaged in an earnest and profound debate about the morality,

[21] *Lee v. State of Oregon*, 107F. 3d 1382 (9th Cir. 1997), vacating and remanding *Lee v. State of Oregon*, 891F. Supp. 1429 (D. Or. 1995), cert. den. *Lee v. Harcleroad*, 522 U.S. 927 (Oct. 14, 1997).

[22] Coleson (1997), pp. 3–99.

[23] See Palmer (1998).

legality, and practicality of physician-assisted suicide." In his concurring opinion, Justice Breyer stated the following:

> But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity."

Most notably, in Justice O'Connor's concurring opinion, she stated the following: "There is no dispute that dying patients in . . .New York can obtain palliative care, even when doing so would hasten their deaths."

The second development that occurred during the pendency of the *Lee* case was a movement by the Oregon legislature to prevent the Oregon law from taking effect. The legislature was motivated, it said, by what it saw as fatal flaws of the Act as passed by the people, including the allegation that oral suicide attempts fail and patients suffer immeasurably. Measure 51 was sent to the voters on October 15, 1997 and a special election was held on November 4, 1997. Supporters of the repeal, including Physicians for Compassionate Care, the U.S. Conference of Catholic Bishops,[24] the Oregon Medical Association, and Oregon Right to Life cited a study done in the Netherlands which showed that complications arose in 20% of the oral barbiturate cases.[25] Opponents of the repeal, including Oregon Governor Kitzhaber (himself a former emergency room physician), Physicians for Death with Dignity, a local millionaire, and George Soros (a Hungarian-American businessman), countered that there was no credible evidence that patients would suffer from vomiting, convulsions, or other symptoms when the correct dose of oral medication was taken. They also cited reports that indicated that individual physicians and psychiatrists, when surveyed individually, supported aid in dying. Final spending reports on the Measure indicated that the Yes on 51 Campaign (repeal of DWDA) spent $4,077,882 and the opponents of repeal (Oregon Right to Die) spent $966,000. The election was the third most expensive ballot measure in Oregon history, according to Professor Vollmar.

Measure 51 was defeated by a 60% to 40% margin and the DWDA went into effect. The current law is Oregon Revised Statutes, Sections 127.800 through 127.995.[26] The "Safeguards" provisions of the law are at ORS 127.815 through 127.880 and include (among other things) a requirement that the patient have a life expectancy of less than six months, must be 18 or older, an Oregon resident, evaluated by at least two physicians, be free of psychiatric or psychological disorders or depression that impairs judgment, make a written request, wait for the prescription, and wait for a specific amount of time between the request and the ingesting of the medication to end his or her life. There is a "Guidebook for Health

[24] The U.S. Conference of Catholic Bishops have issued a report by F. Michael Gloth, III, M.D., entitled *Physician-assisted Suicide: the Wrong Approach to End of Life Care*.

[25] An excellent history of the Measure as well as arguments both in favor and in opposition is available at: http://www.leg.state.or.us/comm/commsrvs/51final.pdf.

[26] Available at: http://www.leg.state.or.us/ors/127.html.

Care Professionals" available through the Oregon Health Sciences University website.

The challenges to the law were not yet finished. Two Republican congressmen, neither from the state of Oregon reported the Oregon law to the U.S. Drug Enforcement Administration (the DEA, part of the U.S. Department of Justice) and they asked the DEA to investigate whether doctors who prescribed the medication would face penalties under the Controlled Substances Act (CSA).[27] In December of 1997, the answer came back "yes" in the view of DEA Chief Constantine. The U.S. Attorney General at the time, Janet Reno agreed to review the opinion. Attorney General Reno had earlier determined (in 1994) that the law did not violate the CSA. On June 5, 1998, she sent a letter to Representative Henry Hyde of Illinois and stated the following: "The Department has reviewed the issue thoroughly and has concluded that adverse action against a physician who has assisted in a suicide in full compliance with the Oregon Act would not be authorized by the CSA." She was quick to specify however that the President did not support the Act and that no federal funds could be used in connection with the Act.

On November 7, 2000, George Bush was elected President of the United States. Attorney General Janet Reno's last day in office was January 20, 2001, the date Bush was sworn in as President. President Bush appointed John Ashcroft as Attorney General and he took office on February 2, 2001. On November 9, 2001, Attorney General Ashcroft issued a directive (the "Ashcroft Directive") by which he determined that dispensing medicine under the Oregon DWDA was not a "legitimate medical purpose" under the Controlled Substances Act (CSA).[28] Incidentally, Ashcroft was formerly a Senator who while in office introduced legislation to amend the CSA to prohibit physicians from prescribing medication for assisted death.[29] According to Ashcroft, any physician who wrote a prescription for the medication under the DWDA could be held liable for civil and criminal penalties.

The State of Oregon challenged the Ashcroft Directive and successfully obtained a permanent injunction against the enforcement of it. A lawsuit began (filed by a doctor, pharmacist, terminally ill patients and the State of Oregon itself) and ultimately the issue was heard before the United States Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006). The name of the case was *Gonzales* because Alberto Gonzales succeeded Ashcroft on February 3, 2005 as Attorney General of the United States.

The Supreme Court analyzed the case as an administrative law case, despite the invitation to decide the case based only upon a state's rights versus the federal government's rights. The majority considered the three levels of deference to the

[27] See Gonzales v. Oregon, 546 U.S. 243 (2006), p. 253.

[28] See Goodman (2007).

[29] For an excellent discussion of this issue, see The Pew Forum on Religion and Public Life, *Supreme Court's Decision in Gonzales v. Oregon: High Court Rejects Federal Regulation of Physician-Assisted Suicide*, January 2006.

administrative rule, *Auer* deference, *Chevron* deference, and *Skidmore* deference. It determined, in a 6 to 3 decision that *Skidmore* deference applied, and the government failed to show the necessary "persuasive" standard. The Court noted that the purpose of the Controlled Substances Act was to regulate illicit drugs, addiction and drug abuse. The Court concluded that the Attorney General exceeded his authority. The Oregon law remained in effect.

There was, however, one more challenge to the DWDA. In March 2011, nine Republican Oregon House of Representatives members introduced House Bill 2016 before the Oregon legislature. The bill never received a hearing due to lack of support, but it would have required any terminally ill individual to undergo counseling and have a psychiatrist or psychologist determine that the person did not suffer from depression or a psychological disorder in order to use the Act.

In March 2011, the Oregon Public Health Division released a Summary of the DWDA's results over the earlier 13 years.[30] As of the end of 2010, a total of 821 prescriptions were written under the DWDA and 525 (64%) of those patients died from ingesting the medication. Most of the individuals were over the age of 65, the vast majority were white (Caucasian) and well-educated. The majority of those who used the DWDA had cancer or amyotrophic lateral sclerosis (ALS, commonly known as "Lou Gehrig's Disease"). During the previous 13 years, there were three "failed ingestions"—two of those in the year 2010, both of which involved regurgitation. Ninety-six percent of the cases reported no complications. Most of the individuals had some form of health insurance. In most cases, the prescribing physician was not present at the time of death. The most common reasons given for ingesting the medication were loss of autonomy, the decreasing ability to participate in activities and the loss of dignity. Slightly more males used the DWDA than females, and most of the individuals were married. A great majority were in hospice care at the time of death. Interestingly, 94% had informed their families of their decision.[31]

It is undoubtedly obvious from the above discussion that individuals and groups both within Oregon and within the entire United States hold very strong and differing opinions on the issue of aid in dying. Thus far, no state has had as tortuous a path to aid in dying as the State of Oregon has had. A film on the Oregon DWDA titled "How to Die in Oregon" by Peter D. Richardson won the 2011 Sundance Film Festival Grand Jury Prize: Documentary. Only two other states have legalized aid in dying—the States of Washington and Montana.

9.2.2 Washington Law

On November 4, 2008, the citizens of Washington approved Initiative 1000 by nearly a 20% margin. The Washington DWDA went into effect on March 5, 2009 (RCW 70.245) and is modeled on the Oregon DWDA, again with significant safeguards.

[30] See: CD Summary, Oregon Public Health Division, Oregon Health Authority (2011).

[31] For all of these data, see: Oregon Public Health Division (1998–2010).

The former governor of Washington, Booth Gardner (who has Parkinson's disease) filed the Initiative. The Seattle Times newspaper reported that the supporters of the Initiative raised $4.9 million (with the largest contributor being former governor Gardner) and the opposition groups raised $1.6 million (most of that from Catholic groups). The Washington State Medical Association opposed the Initiative. Interestingly, former governor Gardner's condition would not qualify under the Initiative as his condition does not meet the requirements for the statute.

A woman with pancreatic cancer became the first person to use the DWDA and according to data collected for 2009, medication was dispensed to 63 individuals and 36 died after ingestion.[32] In 2010, medicine was dispensed to 87 individuals and 51 died after ingestion. Groups against the initiative were the "Coalition Against Assisted Suicide," formed by Democratic State Senator Prentice, a former nurse; the disability-rights group "Not Dead Yet;" and the "Christian Medical Association." The Christian Medical Association cited a "Dutch medical study" which indicated that Dutch doctors administered lethal injections to approximately 1000 patients who never consented to the medication.[33] This is dubious at best, as this action if taken would have been murder under the laws of the Netherlands. There was no constitutional challenge to the Washington law, although it has not been without criticism.[34]

9.2.3 Montana Law

On the last day of the year 2009, the Montana Supreme Court decided *Baxter v. State of Montana*, 2009 MT 449, 224 P. 3d 1211 (2009), and the Court determined that if a terminally ill patient consents, a physician who prescribes medication to end the patient's life is immune from prosecution for homicide. The Montana Supreme Court rephrased part of the issue on appeal as do "competent, terminally ill patients have a constitutional right to die with dignity?" The Montana Supreme Court specifically stated the following:

> The Montana Rights of the Terminally Ill Act indicates legislative respect for a patient's autonomous right to decide if and how he will receive medical treatment at the end of his life. The Terminally Ill Act explicitly shields physicians from liability for acting in accordance with a patient's end-of-life wishes, even if the physician must actively pull the plug on a patient's ventilator or withhold treatment that will keep him alive.

This was undoubtedly the most far-reaching and dramatic language issued to date on aid in dying. In 2011, there were two bills that were "tabled" (failed to move

[32] See statistics reported by the Washington State Department of Health, available at: http://www.doh.wa.gov/dwda/.

[33] Jones (2008).

[34] See, for example, Dore (2010).

past the Committee and to a vote) that would have legislatively reversed the decision of the Montana Supreme Court.[35] Interestingly, the legislature also tabled Senator Blewett's bill (SB 167) that would have provided for certain procedural safeguards similar to those that appear in the Oregon and the Washington laws.[36]

9.3 Aid in Dying in Countries Other Than the United States

Relatively few countries have legalized aid in dying, physician-assisted suicide or euthanasia for terminally ill adults. Each jurisdiction that does allow the practice has its own precise guidelines and procedures. Switzerland has allowed aid in dying since 1937, although there is no specific statute allowing the practice.[37] It is the only jurisdiction to date that allows foreigners to avail themselves of their law. This practice has been criticized, most recently when renowned British conductor Sir Edward Downes and his wife ended their lives at a suicide clinic outside of Zurich. Sir Edward himself was in relatively good health at age 85, but his wife was facing terminal cancer. Several articles appeared in London papers comparing the couple to a modern day *Romeo & Juliet*.[38] This and the case of British citizen Craig Ewert, who had ALS and traveled to Switzerland to end his life, sparked international debate over residency requirements. The documentary "The Suicide Tourist" tells the story of Mr. Ewert.[39] All other nations have strict residency requirements which forbid foreigners from entering their borders to use their aid in dying laws.

Approximately 60 years after Switzerland first allowed aid in dying, another jurisdiction followed suit. It was then that the State of Oregon passed its Death with Dignity Act, That same year, the Constitutional Court of Colombia allowed "mercy killing."[40] In 1999, Albania had also legalized assisted suicide, but only if three or more family members consent.

The Netherlands and Belgium both legalized assisted suicide in 2002. In actuality, beginning in 1990 in the Netherlands, prosecution of a physician assisting in a suicide was "unlikely if a doctor complies with the Guidelines on euthanasia and physician assisted suicide set out in the non-prosecution agreement between the Dutch Ministry of Justice and the Royal Dutch Medical Association."[41] Certain procedural requirements were agreed to by the Ministry of Justice and the Medical

[35] See Blewett and Barrett (2011).

[36] See http://data.opi.mt.gov/bills/2011/billhtml/SB0167.htm. This was tabled by Committee on February 10, 2011.

[37] Ebbott (2010).

[38] *See* Mendick and Randhawa (2009).

[39] See PBS, Frontline, *The Suicide Tourist*, available at: http://www.pbs.org/wgbh/pages/frontline/suicidetourist/.

[40] See http://medlaw.oxfordjournals.org/content/17/2/183.short?rss=1.

[41] Cohen-Almagor (2001–2002).

Association, including that "euthanasia must be a last resort," and the patient request had to be free and voluntary, and the patient was suffering unbearably and there was no prospect of improvement. In 2002, the Netherlands enacted the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act." Under the Act, physicians who assist a patient in dying are required to report their action to a review board to ensure that all the legal requirements (patient is terminally ill, has repeatedly requested euthanasia, is fully aware of their condition, and has consulted with at least two physicians) have been met. The law prohibits physicians from assisting anyone under the age of twelve in ending their lives, and those between twelve and sixteen must have parental consent. Patients are allowed to administer the lethal dose of medication themselves, but must have a doctor in attendance, both to ensure that the medicine is taken by the person for whom it is intended and to ensure no errors are made.

Belgium does not use the term "assisted suicide," instead preferring the term "euthanasia," which is defined as intentionally ending the life of someone at that person's request. Belgium has fewer regulations than the Netherlands, but physicians are still required to report after assisting a patient to die. These reports are reviewed by a committee to determine whether the death complied with the procedures required by law. If two-thirds of the committee members believe the laws have not been complied with, the case will be referred for criminal prosecution. A report published in *Medical Care* analyzing Belgium's euthanasia statistics since 2002 concluded that "patients who died by euthanasia were more often younger, men, had cancer, and died at home, compared with all deaths in the population."[42]

Luxembourg also legalized assisted suicide in 2008, after earlier initiatives failed due to monarchy opposition. In 2008, Luxembourg's constitution was amended to alter the powers that the royals had in lawmaking, and assisted suicide was legalized several months later.

9.3.1 Countries Where Aid in Dying Is Criminalized Behavior

There are also a number of nations where physician assisted suicide is not only disapproved of, but the act results in serious criminal sanctions. Norway, for example, authorizes murder charges or accessory to murder charges for those who assist someone in ending their life. In 2000, a prominent Norwegian physician was found guilty of "willful murder" after assisting a patient suffering from multiple sclerosis to end her life. Recently a commission voted against de-criminalizing assisted suicide by a vote of 5-2.

Italy also penalizes assisting someone in ending his or her life. Several high-profile right-to-die cases in recent years have led to intense debate over the legalization of assisted suicide, as well as the role of autonomous decision-making in

[42] Smets et al. (2009).

end-of-life care. The 2009 case of Eluana Englaro, a young woman who was in a persistent vegetative state for 17 years following a car accident, spurred Prime Minister Silvio Berlusconi to propose emergency legislation that would have made it illegal for caregivers to remove feeding tubes and hydration from patients in vegetative states. Eulana's father had fought for years in Italy's courts for a dignified end to his daughter's life, and she passed away several days after her feeding tube was finally removed. The case brings to mind the United States cases of Karen Ann Quinlan and Terri Schiavo both of which caused intense debate and significant and lengthy litigation. Prime Minister Berlusconi's legislation was never passed, as it was deemed to be unconstitutional and in contradiction to an earlier Italian Court ruling that gave Mr. Englaro permission to remove his daughter's feeding tube. Mr. Englaro had convinced the Court that his daughter would not want to live her life attached to machines. The Vatican decried her death, stating that it would "still be regarded as a crime."[43] Mr. Englaro, along with thirteen other people accused of assisting in Eulana's death (primarily doctors and nurses at the nursing home in which she died) faced a murder investigation. The investigation was terminated in 2010 without the filing of formal charges. Italy does not have legislation governing living wills, and Prime Minister Berlusconi has been vocal in his promises that, if any such legislation were to pass, it would have to be very restrictive and not allow the removal of hydration or nutrition assistance, nor any type of euthanasia. The debate was re-ignited in November 2010, when famed 95-year-old film director Mario Monicelli committed suicide by jumping from his fifth floor hospital window in Rome. Reports stated that Mr. Monicelli was fighting terminal prostate and pancreatic cancer.[44] Known as "the father of Italian comedy," Mr. Monicelli's suicide immediately following the Englaro case has reignited the debate over assisted suicide in Italy.

Physician assisted suicide is also illegal in Australia and New Zealand. Australia's Northern Territory at one point legalized aid in dying by its Rights of the Terminally Ill Act of 1995; however, only four people used the law before it was repealed in 1997. Dr. Philip Nitschke, an Australian physician and the founder of Exit International (an international euthanasia advocacy group) assisted in these deaths. While the Rights of the Terminally Ill Act was repealed, it appears that decriminalization of assisted suicide may soon happen in Australia. In 2005, a nurse who helped her ailing parents die was sentenced to several years in prison, but the judge suspended the sentence because he found that imprisoning her would violate public policy. In July 2010, Tasmania's Attorney General Lara Giddings spoke optimistically about legal reform under the next 4 years of the Labour-Green Party's government, which would include a privately-backed bill that aimed to legalize euthanasia. This bill is not expected to be presented to Parliament until

[43] Owen (2009).

[44] *See Italian Cinema Great Mario Monicelli Kills* Himself, BBC NEWS, Nov. 30, 2010. Available at: http://www.bbc.co.uk/news/world-europe-11873511.

late 2011, but its existence suggests that Australian attitudes toward so-called euthanasia are shifting.

In England and Wales, the Suicide Act of 1961 criminalizes assisting someone to end his or her life, and authorizes a prison term of up to 14 years. However, more recently a number of Britons have aided relatives in traveling abroad to take advantage of aid in dying laws in other jurisdictions. Thus far, no arrests have been made. In 2008, noting the inconsistencies between the language of the law and the lack of criminal prosecutions, West Yorkshire political activist Debbie Purdy filed a lawsuit seeking clarification. Specifically, she asked whether her husband Omar would face criminal sanctions if he aided her in traveling to Zurich to end her life. She had experienced a lengthy battle with multiple sclerosis.

Her main argument was that the Director of Public Prosecutions was violating her human rights by failing to clarify ambiguities on how the Suicide Act of 1961 was actually enforced. In September 2009 she prevailed when the Director of Public Prosecutions published new guidelines to clarify when relatives or caregivers are likely to be prosecuted under the law. While assisted suicide still remains illegal, "the general approach we've taken [with the new guidelines] is to try to steer a careful course to protect the vulnerable from those who might gain from hastening their death but also identifying those cases where no one thinks it's in the public interest to prosecute."[45] The new guidelines take into account factors such as whether the terminally ill person requested suicide of their own volition (i.e., instead of being coerced), whether the relatives or caretakers who assisted them stood to benefit financially from their death, and whether the person was fully able to understand their medical diagnosis and had considered alternatives and consequences to their actions.

9.3.2 New Legislation: The "Out of Free Will" Movement

While countries like England and Italy are proposing legislation that narrows or clarifies their laws regarding assisted suicide, at least one country is seeking to broaden its laws. In the Netherlands, a Dutch citizens group is pushing a movement called "Out of Free Will." This movement calls for legislation that would allow those who are over the age of 70 and who believe they have lived a "complete life" to end their lives with medical assistance. As of this date, aid in dying is authorized only under very limited conditions—when death is imminent. This is true of the Netherlands as well. Aid in dying is only allowed by Dutch law when the patient is terminally ill and experiencing "hopeless and unbearable" suffering.

This proposed change (Out of Free Will) would allow any person over 70 years of age, regardless of their health, who has expressed an "explicit, logical and

[45] *New Guidance on Assisted Suicide*, BBC NEWS, Sept. 20, 2009. Available at: http://news.bbc.co.uk/2/hi/uk_news/8265304.stm.

consistent" wish to end his or her life.[46] The rationale behind this movement is that elderly citizens should have the right to end their lives in a dignified manner, especially in the event they feel that the quality of their life is deteriorating. The drawbacks of aging, which include extensive and extended health problems, declining independence, the deaths of friends and family members, leave many seniors feeling helpless and vulnerable. Hédy D'Ancona, a 72-year-old feminist, former Minister, and avid supporter of the initiative stated that worrying about what the future held and feeling powerless over when and how she would die "took some of the enjoyment out of what was otherwise a pleasurable phase of her life." The "Out of Free Will" movement is viewed as creating a new medical niche, where certified caregivers, spiritual advisors, psychologists, nurses, and other specialists will assist patients in gently ending their lives. Many opponents of assisted suicide and euthanasia base their position on a "slippery slope" argument. Under this theory, once aid in dying is approved for terminally ill patients, its scope may spread toward those with disabilities, those who are mentally ill, and those who are viewed as burdens to their families. This will send the message that these people are not valuable members of society. There is also the concern over coercion, that elderly or terminally ill people may be manipulated by family members or caregivers into taking their own lives. Dutch legal scholar Eugéne Sutorius, another avid supporter of the Out of Free Will movement, does not deny the legitimacy of these concerns, but states that a legal and transparent system of aid in death will help determine that deaths are voluntary and consistent with each patient's wishes. Additionally, many elderly people already take their own lives, sometimes by violent means; having a safe method and trained assistant will eliminate a large part of the risk of any error that might occur in taking one's own life. He also points to when the Netherlands first approved physician-assisted suicide for the terminally ill and states "it was thought to be the first step onto a slippery slope that would lead the medical profession to lose its integrity. But I have seen nothing of the kind happen."

9.4 Conclusion

Undoubtedly the debate about aid in dying will continue both in the United States and in other countries. The aging of the population is at an unprecedented level.[47] Additionally, the prevalence of chronic diseases and of individuals surviving many years with these diseases will only intensify the debate.[48] Hopefully this debate will be productive and we will keep uppermost in our mind the value of our aged population. Discussion should continue on this ethical, moral and health issue.

[46] Jensma (2010).

[47] See http://www.un.org/esa/population/publications/worldageing19502050/; and http://www.un.org/esa/population/publications/WPA2009/WPA2009_WorkingPaper.pdf.

[48] See: http://www.cdc.gov/chronicdisease/resources/publications/aag/aging.htm.

The debate seems to center around individual autonomy versus societal religious values. At present there appears to be no objection to procedurally protective aid in dying provisions with the exception of religious objections. Of course it is essential that our societies protect their weakest members—in particular the elderly and those with physical disabilities. Procedural provisions such as those contained in the laws of the Netherlands, Oregon, Washington and other areas protect those who have no interest in aid in dying. Vigilance is absolutely essential to guard against an individual being coaxed into requesting assistance by relatives or by their own belief that they are becoming a burden to society, friends and family. We do not want to push someone to the precipice.

The decrease in those following a particular religion combined with the aging of the population will undoubtedly result in an increase in the demand for aid in dying. The physical capacity of our own bodies has not kept pace with advances in medical technology and individuals should be entitled to choose whether they would like to suffer and let nature take its course, or whether to end their life when there is no hope of healing. Given the worldwide "silver tsunami" difficult decisions need to be made about aid in dying worldwide.[49]

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[49] http://www.seniorsworldchronicle.com/2010/02/world-silver-tsunami.html.

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