

What difference would a New Convention Make to the Lives of Older People?

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1. Research question and methodology

1.1 Research question

What difference, if any, would a new convention on the rights of older persons make to the lives of older people?

1.2. Methodology

This brief focuses on the existing legal literature on international human rights law, with a particular focus on international human rights treaties. To understand the potential benefits, lack thereof, or harms from such a treaty we refer to experiences with CRC¹ and CEDAW.

Due to time and financial constraints the brief is based solely on secondary literature. Further research involving interview analysis with key persons in the field, as well as a comparative empirical study would be beneficial. As it turned out, most existing legal literature is not empirically based, but rather adopts a conceptual value-based analysis. Nevertheless, it is still valuable, as legal progress can not be empirically “measured” without considering values and politics².

2. Detailed Analysis

2.1. Describing the spectrum

When approaching the question of what difference a new international convention for older people's rights may make to the lives of older people, three potential arguments are found in the literature. These are as follows:

1. It will actually make harm and reduce existing rights (the “**negative**” approach);
2. It will not make any difference (the “**neutral**” approach);
3. It will improve the rights and status of older persons (the “**positive**” approach).

Within the existing literature, one can find support for each of these different options, which are described below:

2.2. The Negative Approach: The convention will cause harm

This approach argues that human rights treaties are a compromise³, and while the goals are ambitious, the results are often disappointing and counterproductive. Some argue that this is the case with CEDAW, as it failed in eradicating global discrimination against women⁴. More specifically, this approach argues that:

International conventions creates “superficial” equality: The lack of emphasis on women's participation in CEDAW implementation resulted in “superficial” equality, as no “true” equality could be achieved without consulting the targeted group. If drafters were unaware to the true realities of women's life, all they could have achieved was their own sense of equality, a far cry from the real needs of women. Feminists argue that CEDAW ignores past discrimination, and that women face unique realities⁵. The danger is that states would only comply with CEDAW, ensuring “superficial” equality, rather than focusing on remedying past wrongs.

International conventions are “blind” to multi-culturalism: The imposition of western values, via CEDAW, can erode local traditions better suited to protect women in traditional societies. This was the case in Fiji concerning the response to rape⁶. When CEDAW conflicts with local religious law, unlimited/insensitive adoption can breach cultural sovereignty, and could possibly lead to a backlash reaction at local women⁷.

International conventions pay a “price” in political compromise: Drafting choices can prove fatal to any human rights treaty. Great criticism has been directed at the decision by CEDAW’s drafter’s to ignore honor killings due to political pressure⁸, focusing only on domestic violence. This choice could potentially be disastrous as it both legitimizes such acts, allowing member states (which ratified the treaty) to ignore them⁹,

Failure to enforce international conventions is dangerous: The CRC wished to create standards for children’s rights, enhancing their international status¹⁰. Research on CRC’s effectiveness¹¹, concerning for example Ugandan child soldiers, proved that the failure to enforce it against warring parties legitimized child soldier recruitment¹². If violations of international rules go unpunished – as is the case with CRC - this sends a message that the illegal actions are permissible¹³.

Disputing the moral values of “rights” based conventions: US scholars argue that CRC provides excessive autonomy for children, allowing them to make independent decisions traditionally made by parents. The danger is that the child would lose the ability to acquire decision making skills from her/his parents¹⁴, greatly endangering domestic family values¹⁵.

The price of legal “generalizations”: The CRC aimed to be universal, avoiding particularities. This resulted in similar treatment of “normal” and “high risk” children¹⁶. Even though the Optional Protocol focuses on child soldiers, they are not given tools to protect themselves without reliance on adults to access resources¹⁷. This is worrisome if the CRC signifies the end of the discussion on children’s rights.

Partial Summary: The Negative Approach: CEDAW/CRC experiences show that despite good intentions, there is support for the argument that both conventions inhibited women’s and children’s rights rather than advanced them, due to political compromises and defective implementation. Whilst future drafters of a treaty on older people’s rights can act differently, it is possible [Jacqui?] that such a treaty could cause more harm than good, due to similar reasons.

2.3. The Convention will make no difference

This approach does not necessarily dispute the potential symbolic [Jacqui?] importance of international conventions, however it argues that in reality, international human rights treaties are not implemented and enforced. Therefore, whilst CEDAW can be seen as an important international development in promoting women’s rights in terms of what it signifies/symbolizes [Jacqui?], in reality on the ground it made little, if any, difference¹⁸. More specifically, this approach argues that:

Without local will no real change is made: some scholars argue that without domestic political will, enforcement and change are impossible, especially in countries where women have no voice. The receipt of foreign aid to fund programs for women’s rights would not help, as such aid could be abused by local government, and so again the effect would be minimal¹⁹.

Reservations as a tool to “empty” the convention: Some CEDAW member states entered wide reservations to the treaty, thereby reducing any impact of the treaty²⁰. The so called “Islamic reservation” to the CEDAW non discrimination provisions argued that it violates Islamic law, stating that the latter would override CEDAW²¹. In such states, like Algeria²², discriminatory provisions remained, and CEDAW was not implemented²³.

Opposing domestic culture overrides treaties: Even if CEDAW is ratified without reservation, this does not necessarily promote change on its own. For example in Nigeria, 20 years after ratification, local customs still prevent implementation²⁴, while in Nepal, discriminatory laws remained for at least for 14 years afterwards²⁵. Sometimes CEDAW has also failed in first world countries, like Japan, where traditional discriminatory practices still prevail²⁶.

Implementing legislation does not guarantee change: Likewise, CRC presents gaps between its goal, to globally protect children’s rights²⁷, and the results. Even if a state ratifies a treaty and implements it, the targeted group can remain unaffected. In

Guatemala child labor was still prevalent in 1998 (8 years after ratification), despite legislation, due to a weak judicial system and no political will²⁸. This proves that without serious domestic elements, other than legislation, international treaties have minimal effect.

International treaties can also be ineffective in non-reserving member states: In the UK, from the time of ratification in 1991 until 2004 there was little change in children's rights in education and child poverty²⁹. This example is noteworthy since despite the four UK CRC reservations, none were regarding these issues, and therefore even if a "first-world" state ratifies the convention, it is still possible for nothing to really change.

Partial Summary: The Neutral Approach: CEDAW and CRC have been crafted as "sensitive" treaties in terms of "cultural" issues. This could be why reports indicate that there has not been significant impact on the targeted populations, and if a Convention on the rights of older people is drafted in a similar way could likewise mean that it will have little impact.

2.4. The Convention will improve the rights of older persons

This approach argues that despite criticism, international human rights convention do have an overall positive effect. The positive and declaratory value in international treaties can be determined by looking at the long term effect of a human rights treaty, and at the reporting and complaint mechanisms³⁰. More specifically:

2.4.1. The positive overall effect of treaties

The argument is that treaties positively affect targeted groups. Governments' statements supporting UN declarations, or GA resolutions, are less effective, as they do not necessarily reflect domestic policy. And so are not translated into either legislation or domestic steps which correspond with such "soft" international proclamations³¹. This is unlike treaties and conventions which result in corresponding policy and implementing legislation, benefitting the targeted populations³². A study into the "practical" effectiveness of human rights treaties found that while some member states were less likely to comply with treaty requirements, the added value of human rights treaties, makes enacting them worthy³³. This is the indirect declaratory value³⁴.

Treaties positively impact human lives: CRC sought to globally transform children's rights³⁵. At least normatively, CRC changed international instruments and discourse about children's rights³⁶, as reflected in the resulting world-wide domestic legislation³⁷. One example is the Colombian legislation to reduce numbers of child soldiers. This legislation failed, but nevertheless it provided a base for further action³⁸. Some even argue that the CRC created a global consensus on children's rights³⁹, turning it to customary international law⁴⁰.

Specific human rights treaties create new dimensions: CEDAW also attempted to eradicate "private" discrimination against women⁴¹. This is significant as it added a new dimension to states' obligations. Even if women continue to be "privately" discriminated against, the recognition that private actors must refrain from discriminatory practices is of great value⁴². General ICCPR provisions ignored this type of discrimination, and CEDAW complements it in a manner which could have never been solely done with ICCPR interpretation

Specific treaties are a useful advocacy tool: Although CEDAW has not revolutionized women's rights legislation in member states, it has provided NGOs with an important tool for advocacy of women's rights, also due to NGO participation in the drafting process⁴³. Scholars argue that without CEDAW, NGOs' promotion of recognition of women's rights would not have been as effective⁴⁴.

Reservations do not necessarily negate the positive impact of human rights treaties: Admittedly, CEDAW has drawn a large number of reservations. However, it is still widely recognized that CEDAW positively influenced international customary

international law⁴⁵. Much like the CRC, CEDAW created a foundation for a “global legality” of women’s rights, essential for the global promotion such rights⁴⁶.

2.4.2. The positive effect of reporting and complaint mechanisms – CRC/CEDAW

The relatively effective enforcement mechanisms contained in treaties are: country reporting, enhancing monitoring of compliance and internal discussion in member states, and individual complaint mechanisms.

We will now examine these elements in CEDAW and CRC for their potential added value⁴⁷.

Reporting advances treaty effectiveness: Member states report to the CEDAW Committee on compliance and implementation difficulties⁴⁸. Some argue that reporting is ineffective as the Committee can not conduct independent investigations or impose sanctions⁴⁹. However, this can be resolved if NGOs fill in the blanks⁵⁰, the monitoring body engages in independently collecting data⁵¹, and international organizations act upon the recommendations of the monitoring bodies⁵². In Bangladesh, NGOs took an active role in the reporting process and this resulted in a much more comprehensive report and the improvement in women’s rights⁵³.

Reporting facilitates treaties as “mainstreaming” tools of domestic international discourse: Like CEDAW, CRC requires states to report on implementation⁵⁴. As with CEDAW, the reporting system has drawbacks, but the benefits outweigh them. In reporting, government representatives engage in a beneficial dialogue with the CRC monitoring body and internal domestic discussions, highlighting implementation failures⁵⁵. This creates discourse on global human rights, facilitating a global exchange of ideas.

Instituting an individual complaint mechanism to enhance enforcement of human rights treaties: The CEDAW Optional Protocol (OP) allows women and NGOs to file individual complaints to the CEDAW Committee while enhancing the independent inquiry powers of the Committee⁵⁶. Many scholars view it as a means of enhancing compliance and establishing enforcement mechanisms⁵⁷.

2.4.3. The positive use of the CEDAW and the CRC in domestic litigation

International treaties are helpful tool in litigation in domestic and international tribunals. While the use of human rights treaties in international tribunals is natural, the use of such instruments in the domestic realm is much more recent, and can be utilized for criminal prosecutions, administrative proceedings and civil suits for reparations⁵⁸. The more relevant and interesting question is whether this could also be the case for a future Convention on the rights of older persons, and we will now consider CEDAW and CRC for possible answers.

Human rights treaties can be a powerful litigation tool: A UK CEDAW legal impact study revealed few cases citing the treaty⁵⁹. This could be due to the lack of domestic CEDAW incorporation, but it is probable that the courts were unaware of the treaty’s relevance. When the treaty is presented to the court, decisions usually refer to it⁶⁰, sometimes impacting the outcome. In other countries, like Canada, it is referred to as a means of support to a decision, but not as a determinative factor⁶¹, If parties, and NGOs engaged in strategic litigation rely on the treaty it would eventually reach legal prominence, truly impacting women’s lives.

Treaties affect member, and non member, states: The US is not a CEDAW or CRC member, but both are relevant in the US. Courts use the treaties for interpretation, resulting in actual real (de-facto) effectiveness⁶². Gaps in enforcement can be resolved by using the treaty as a platform for making domestic legal claims⁶³, or by states wishing to protect administrative decisions arising from international obligations⁶⁴.

2.4.4. Other Positive Considerations

International Conventions as “educational” tools: The conventions are tools to educate people and to raise awareness to the plight of the targeted groups. This

would be true even if at the pre-ratification stage if international players use the proposed treaty when discussing the rights of the targeted groups⁶⁵.

The treaty as an “anti-ageist” global policy: Ageism, labeling of older people as incompetent merely for their age⁶⁶, is a prominent social phenomena, like sexism or anti-Semitism⁶⁷. Deciding not to support an treaty on older people’s rights, can be interpreted as yet another discriminatory behavior ignoring the unique situation of older persons. Establishing such a treaty would be a strong anti-ageism, anti-discriminatory and mainstreaming tool.

3. Discussion & Recommendations

An attempt to provide a clear and obvious answer to this project's question is impossible: existing literature does not provide such an answer. Nevertheless, a few general "themes" can be identified:

3.1. Lack of clear evidence

A proper policy should be “evidence-based”. Unfortunately, our literature review did not find sufficient empirical evidence to answer the question of the positive or negative “net worth” of CEDAW and CRC. Even when impact studies are conducted, they do not point at definite results, and usually show negative, neutral, and positive results all together as was the case with the Turkey CEDAW impact study. Women’s rights in Turkey have improved overall since CEDAW ratification, but at the same time honor killings continue (and, as indicated, no enforcement leads to legitimacy of wrongful acts)⁶⁸. Yet, the lack of evidence should not deter us from drafting a treaty for older people’s rights or adopting a positive or negative position towards it. While it is important to have supportive data when making policy, sometimes ideological perspectives can prevail, and decisions have to be made without full empirical knowledge⁶⁹.

3.2. The unknown variables: the future Convention’s shape and content

Success or failure of the convention will ultimately depend on unknown variables: the drafting process, its actual value-content and the implementation and enforcement tools. Shaping and forming of each element will positively or negatively affect the treaty’s actual impact. Emphasis must also be given to active NGO participation in the drafting, as well as to allowing representatives of older persons from across the world to be heard. For example, NGO participation in the drafting of the Convention on the Rights of People with Disabilities, as part of the working group, had great impact on the content of the Convention, as it allowed for a “voice” for the disabled in the process, and in one case prevented the break up of negotiations⁷⁰.

The enforcement mechanisms are equally important. A peer review system should be considered alongside a complaint and reporting mechanism. Peer review allows member states to supervise each other’s compliance, alongside an international monitoring body. Under the OECD Anti-Bribery Convention mechanism, member states file a self-evaluation report, later examined by the other member states, including an on-site visit⁷¹. It is now clear that the process succeeded in developing elevated governance norms⁷². The involvement of the states in the monitoring process created a sense of shared responsibility, fostering cooperation and global exchange of ideas⁷³.

3.3. The potential advantage

Any future treaty on older people’s rights will have one significant advantage over existing conventions: it can learn from past mistakes and ensure its success. The

drafters must consider the factors which support the negative and neutral approaches and attempt to correct them. By doing so, a future convention of older people's rights would not only improve the lives of older persons, but could also constitute a model for future treaties. This would bring older persons rights to the forefront of human rights discourse, even if the treaty does not solve all problems. Moreover, it is symbolic that whilst most other disadvantaged and excluded groups (children, women, disabled) are legally "internationally recognized", older people have been left behind. According to Doron⁷⁴, this reflects gerontological ignorance to law, and the need for the development of jurisprudential gerontology as a tool for social change. Thus, an treaty on older people's rights can serve as an important turning point in recruiting legal institutions in becoming an effective tool in the struggle of emancipating the older population.

3.4. The Bottom Line

It is our view that if the proper process is adopted – weighing all of the considerations - the positive potential overrides the negative. We do not hold that without a treaty for the rights of older persons, they could not be afforded with rights, or that the treaty would be a panacea. However we do hold that based on past experience, such a treaty could serve as a solid foundation for a process which eventually would bring true positive change to older persons around the world, especially in regions and countries that lack existing legal mechanisms to provide fundamental human rights for their older populations. Finally, it can potentially become a powerful tool for the inclusion and integration of "rights discourse" in national and global social policies towards the older population.

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- ⁶³ Naomi Cahn, *Special Issue on Legal Representation of Children: Responses to the Conference: Representing Children and International Norms*, 6 NEV. L.J. 1232, 1235 (2006).
- ⁶⁴ For cases where the court upheld administrative actions due to international commitments in the field of international environmental law see: Carl Bruch, *Is International Environmental Law Really "Law"? An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 433-437 (2006).
- ⁶⁵ Continued reference could also of course encourage the ratification of the treaty. See Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of "Workfare"*, 33 COLUM. J.L. & SOC. PROBS. 393, 400 (2000).
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- ⁶⁷ All considered as forms of labeling and categorization based on prejudice and bias against those who are "different" from what the world perceivers as the norm. See Ronald Chen, Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106, 1163 (2004).
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- ⁶⁹ This is similar to the understanding that true comparative law analysis is not a comparison between "numerical" values of legislation, cases, and writings but rather an understanding of the different ideas at the foundation of the different legal theories. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 281 (1999).
- ⁷⁰ Janet E. Lord, *NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities*, 10 ILSA J INT'L & COMP L 311, 314-318 (2004).
- ⁷¹ For a description of the process see OECD Anti-Bribery Working Group site: http://www.oecd.org/document/5/0,3343,en_2649_34859_35430021_1_1_1_1,00.html
- ⁷² The OECD follow up reports on progress in the implementation of the OECD Convention can be also be found on the OECD Anti-Bribery Working Group: http://www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html.
- ⁷³ Roberto de Michele, *Symposium: The Follow-Up Mechanism of the Inter-American Convention Against Corruption: A Preliminary Assessment: Is the Glass Half Empty?*, 10 SW. J.L. & TRADE AM. 295, 318 (2004).

⁷⁴ See: Israel Doron, *Elder Law: Current Issues and Future Frontiers*. EUROPEAN JOURNAL ON AGEING, 3(1), 60-66 (2006); See also Israel Doron, *Bringing Law to the Gerontological Stage*. INTERNATIONAL JOURNAL OF AGEING AND HUMAN DEVELOPMENT, 62(3), 237-254 (2006).