

## **International Symposium on the Rights of Older People**

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**Background briefing paper**

### **The Protection of the Human Rights of Older Persons in Europe: A legal perspective**

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## **1. Executive Summary**

This report enquires as to

(a) the contributions European human rights laws and jurisprudence offer the United Nations in relation to any proposed global treaty on the rights of older persons

And as an alternative/complementary approach

(b) whether there is scope for a separate regional European treaty on the rights of older persons because a number of global United Nations human rights treaties such as the International Covenant on Economic, Social and Cultural Rights are complemented by regional treaties which are more able to reflect the particular concerns of Europe and impose higher standards for older persons living in Europe.

## **2. Methodology**

The consultant has analysed the laws, policies and judgements of two of Europe's regional organisation the Council of Europe and the European Union.

In relation to the Council of Europe the consultant has examined the jurisprudence of the European Court of Human Rights, European Social Charter Committee, the treaties adopted by the Council of Europe and the recommendations of the Parliamentary Assembly and the documents of the Committee of Ministers.

In relation to the European Union the consultant has examined the adopted and draft treaties and charters, the directives and the jurisprudence of the European Court of Justice.

As the consultant has had over twenty years experience of drafting treaties and international laws at the United Nations and of working with the Council of Europe, the report also includes advice as to strategy.

## **3. Five Key Findings**

To improve the protection of the rights of older persons within Europe energies would be best concentrated on developing a strategy focussing on the United Nations and the Council of Europe and not on the European Union. A strategy ought to include 5 elements

- a) lobbying for the ratification by all Council of Europe states , including the United Kingdom, to ratify Protocol 12 of the European Convention. Protocol 12 is a self-standing prohibition of all forms of discrimination including age.
- b) lobbying for the ratification by all Council of Europe states , including the United Kingdom, to ratify the revised European Social Charter including the right to petition
- c) although there is much room for improvement of the protection of the rights of older persons within the European Union, the Council of Europe would be more attune to improvement than the European Union and therefore energies ought not to be focused on improving the

principal directive.

- d) for the consortium of concerned non-governmental organisations to develop a strategy (including presenting a draft treaty) so that key Member States are able to lobby for the Council of Europe to adopt a Council of Europe Convention on the Rights of Older Persons
- e) for the consortium of concerned non-governmental organisations to develop a strategy (including presenting a draft treaty) so that key Member States are able to lobby for the United Nations to adopt a United Nations Convention on the Rights of Older Persons

The research and detailed analysis which supports these five key findings are set out below.

#### **4. A New Treaty and the Image of Older Persons in Europe**

The main benefit flowing from a new United Nations or European Convention on the Rights of Older Persons is that it would transform the image of older persons from the passive and in need to entitled and participatory. This has happened with children post the Convention on the Rights of the Child and is slowly beginning to occur with the more recent Convention on the Rights of Persons with Disabilities. Although it is essential to protect the rights of vulnerable older persons, it is also equally important to protect their participation rights. Older persons need to be able to participate in decisions which affect their own autonomy both on a personal basis and in relation to older people generally. Their rights are violated both because they are regarded as being more vulnerable and therefore unable to make effective complaints and because they are not consulted when policies are formulated. The emphasis on both international and European law and policy has been on the provision rights (eg pension and social care) without equally emphasising the participation rights.

It is for example notable in the EU Directive <sup>1</sup> that age and disability were twinned together and that much of the European standards emphasise social care without giving equal emphasis to older persons as citizens.

Within Europe there is a wide range of continuing discriminations in spite of the European treaties protecting human rights. These have a particular impact also on women because the majority of older persons living in Europe are women. Health care services are fundamentally important to older persons yet free breast screening is only available women below specific ages, 59 in Poland and 69 in Cyprus. <sup>2</sup> Any proposed International Convention on the Rights of Older Persons would need to take the specific aspects of gender discrimination and older persons into account.

Older persons are rarely able to develop their skills through universities with state scholarships only open to people under a certain age.<sup>3</sup> Again this is linked to an erroneous image of older persons which does not include the capacity for individual self- development.

Discrimination in insurance and financial services also needs to be considered as in many countries the insurance industry uses age as a general factor in considering risk so that in Lithuania some travel insurance for older persons costs double of that of younger persons. Financial credit such as mortgages are also not available in some European states above a certain age and this affects the right to housing.

The invisibility of older persons living in Europe extends to the access and design of technology including the design of public buildings, public transport and the use of mobile phones.

Of fundamental importance also is the violations of a wide range of rights of older persons living in care homes, both private and public. Any international convention ought to take into account not only the responsibilities of governments but also the continued legal responsibility of governments where services have been privatised.

## **5. Detailed Analysis**

### **5.1 The Protection of Older Persons under existing European and United Nations Human Rights Treaties**

#### **5.1.1 Rights of Older Persons in the Council of Europe – present status and future prospects – European Social Charter**

Article 23 of the European Social Charter, which is reproduced below enshrines the most wide-ranging of protection of the human rights of older persons but it alone is insufficient, as it does not also enshrine a dynamic contributory image of older persons.

Article 23 – The right of elderly persons to social protection

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

Article 23 of the Revised European Social Charter <sup>1</sup> represents significant progress. Article 23 is the first binding human rights treaty provision to specifically protect the general rights of older persons. Most of the other provisions in international law are either non-binding such as the UN Principles for Older Persons 1991 and the Madrid International Plan of Action on Ageing 2002) or merely focus on one aspect of ageing (such as article 25 of the Universal Declaration of Human Rights or )It overlaps with other provisions of the Charter which protect older persons as members of the general population, such as, inter alia, Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance) and Article 14 (Right to benefit from social welfare services).

Article 23 requires states to take “appropriate measures” to ensure the effective exercise of the right of older persons to social protection. The Governmental Committee points out that the concept of what is considered to be appropriate in this respect may change over time in line with a changing approach in society related to ageing and a new and progressive notion of what life should be for older persons. In any event, under article 23 states are required to make focused and planned provision in accordance with the specific needs of elderly persons.

Under Article 23 states shall enact non-discrimination legislation (or similar legislation) at least in certain domains protecting persons against discrimination on grounds of age. Under Article 24 (Right to protection in cases of termination of employment) states should take adequate measures to ensure protection for all workers against dismissal on grounds of age.

The Governmental Committee emphasises that one of the primary objectives of article 23 is to enable older persons to remain full members of society and to grant them the right to take part in society’s various fields of activity. This applies irrespective of whether the elderly person is working or retired, living in an institution or not. To this end, elderly persons shall be afforded adequate resources to lead a decent life and play an active part in public, social and cultural life. They shall be granted an effective right to benefit from corresponding services and facilities as well as to be informed about their opportunities to make use of them. Under Article 23 older persons shall be granted a right to adequate health care and the services necessitated.

As regards older persons living in institutions, the Governmental Committee recalls that it has been established under article 23 that they must be guaranteed the right to appropriate care and adequate services, the right to privacy, the right to personal dignity, the right to participate in decisions concerning the living conditions in the institution, the protection of property, the right to maintain personal contact with persons close to them and the right to complain about treatment and care in institutions. All institutions should be licensed to inspection or to any other mechanism which ensures, in particular, that the quality of care delivered is adequate.

Article 23 does not purport to encompass the same range of rights as an entire treaty thus it does not provide any detail on how states are to facilitate the participation of older persons nor does it provide detail on access to transport.

#### **5.1.1.1 Recommendation**

As a minimum energies ought to be directed towards securing ratification of the revised European Social Charter. In addition it is important that all Member States are persuaded to grant the right to petition under the European Social Charter. This

would mean that if an older person did not win in his or her case in the national courts, the older person would be able to bring the complaint to the European Social Charter Committee, the body responsible for implementing the European Social Charter.

Such a campaign could be done exclusively by non governmental organisations working with older persons or in conjunction with other civil society organisations working with a range of socio-economic issues.

#### **5.1.1.2 Strategy**

Any strategy which has as its goal a new European and/or a United Nations Convention is likely to encounter opposition from some states and from some in civil society. It is, for example, clear from some of the responses of the Committee of Ministers to Parliamentary Assembly Recommendation 1796 (2000) that some states will argue that a regional or international treaty is unnecessary for European states. They will argue that article 23 is sufficiently broad and therefore that a new treaty would be unnecessary for European states.

To counter such opposition briefings could be organised by the consortium of concerned organisations pointing out that, as valuable a provision as article 23 is, it does not purport to be a comprehensive summary of all of the legitimate entitlements of older persons living in Europe. Examples would be given of where article 23 falls short.

#### **5.1.2 Rights of Older Persons in the Council of Europe – present status and future prospects – European Convention on Human Rights**

The European Convention on Human Rights has been used by older persons seeking to protect their rights with mixed success. Of particular relevance has been article 2 (the right to life), article 8 (respect for family life) and article 14 (non-discrimination). In addition there is the more recent Protocol 12 which also protects against discrimination but is much more wide ranging as in contrast to article 14 does not need to be combined with a violation of one of the other rights in the Convention.

Cases concerning the right to life concern euthanasia or the ending by an older person of his or her own life. For the reasons set out below it is not recommended that any proposed new Convention contains provisions on euthanasia. The right to life has been used successfully after a 63 year old woman suffering from euthanasia was left unattended in a Bulgarian care home and subsequently disappeared.<sup>4</sup>

The prohibition on torture, inhuman and degrading treatment and punishment in article 3 of the European Convention on Human Rights also has a relevance for older persons. The European Court of Human Rights has stated that where an older person requires repeated intense treatment for cancer it is a violation of the older person's rights if the person continues to be held in prison or detention.<sup>5</sup>

Article 8 protecting respect for private and family life is also particularly relevant for older persons in relation to the right of grandparents to have access to their grandchildren

There have also been a number of cases concerning sex discrimination of both genders and the provision of state pensions.<sup>6</sup> If the court finds the distinction 'reasonably and objectively justified' then it will find the state to have acted in accordance with the European Convention on Human Rights

### **5.1.2.1 Recommendation**

The European Convention on Human Rights is not an age centred treaty and therefore does not provide adequate protection for the rights of older persons. It is not recommended that scarce energies and resources be put into developing a test case strategy on the rights of older persons in Europe.

### **5.1.3 Rights of Older Persons in the European Union: present status and future prospects**

It was not until the Treaty of Amsterdam 1997 entered into force <sup>7</sup>that the prohibited grounds of discrimination within the European Union were extended to expressly include age. Article 13 provides that action may be taken 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

The first action taken was in the form of Directive 2000/78<sup>8</sup>, the purpose of which was 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment or occupation, with a view to putting into effect in the Member States the principle of equal treatment'. In the reasons given for adopting the Directive the European Council said that 'The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people. It is notable that the Council thought it necessary to provide expressly for the social and economic needs of older persons in addition to the general expression: 'of combating every form of discrimination'. The Council also referred to the 'older workers' and the need 'to increase their participation in the labour force'.

The Employment Guidelines for 2000 agreed by the European Council <sup>8</sup>stressed the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasised the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

Although the Directive provides that '... any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community', it is far short of a general prohibition on age discrimination. To begin with, it is limited to issues surrounding 'employment or occupation'. In addition the Directive 'does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment'.

Age alone is generally not a permitted ground for refusing employment, it is a permissible ground for terminating employment, and it is left to the states to decide what ages that should be, as 'This Directive shall be without prejudice to national provisions laying down retirement ages'.

There is also a general provision for derogations from the prohibition on age discrimination for legitimate reasons and done proportionately, and there is a separate provision for the armed forces '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. The Member States which make that choice must define the scope of that derogation'.

The general provision for derogation is in Article 2, paragraph 2(a)(i), allowing age discrimination when – 'that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. This exception applies regarding genuine occupational qualifications<sup>9</sup> as well as other differences in treatment on the grounds of age. Such differences in treatment are permissible when they are objectively and reasonably justified by a legitimate labour market aim.

The Directive includes a series of mechanisms to ensure effective remedies are triggered in the event of discrimination. These mechanisms rely primarily on:

- Improvement of legal protection by reinforcing access to justice or to conciliation procedures (both in the form of individual access and by empowering organisations to exercise this right on behalf of a victim).
- Shifting the burden of proof: once facts have been established from which it may be presumed that there has been discrimination, the burden of proof lies with the defendant, in compliance with Directive 97/80 and the case law of the Court of Justice in the case of sex discrimination.
- Protection of victims of discrimination against reprisals, and notably dismissal.
- Dissemination of adequate information on the Directive's provisions (once adopted) to vocational training and educational bodies and within the workplace.
- Discriminatory national provisions must be abolished or declared null and void.

Sanctions will be imposed by Member States in the event of infringement of the principle of 'equal treatment'. Member States must report to the Commission within two years of the entry into force of the Directive and then every five years, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on its application. The Directive includes an impact assessment form in respect of companies and in particular small and medium enterprises.

#### **5.1.3.1 Recommendation**

The Directive is clearly a first, and tentative step, towards implementing the provisions of the Treaty on age discrimination. If the EU Constitution were to be adopted, that would pave the way for more vigorous legislation in the form of a new and improved Directive on Age Discrimination, but it is unlikely that the Constitution will be adopted in the near future, and adoption of the alternative Treaty of Lisbon is by no means certain.<sup>10</sup> Hence prospects for an improved Directive are unlikely in the immediate future. If campaigning for an improved directive were to be commenced (and see my advice above) below as to where to best focus energy and limited resources) an improved Directive could be adopted to expand the fields in which age discrimination is prohibited beyond employment. It could also retract the provision allowing states to set mandatory retirement ages, and it may reverse the ruling in Palacios de la Villa approving mandatory retirement ages. It could also be used to grasp the definitional nettle.

## **5.2 Selected Treaty Provisions which would need to be included in any United Nations or European Convention on the Rights of Older Persons**

Specific groups of older persons in Europe are already able to benefit from existing UN treaties on the rights of refugees, persons with disabilities and women as they

live in states which are party to human rights treaties, however, consideration of older persons in these treaties, although it varies from treaty to treaty, has been relatively marginal.

### **5.2.1 Definition of Older Persons**

Attempts at drafting a United Nations or European treaty need not get enmeshed in defining older persons. Had we insisted on a watertight definition of the child (in the UN Convention on the Rights of the Child) agreement on a treaty would never have been achieved. Guidance can be provided in the article defining older persons with a discretion for states as to the exact minimum qualifying age.

It would be easier within a regional European treaty to achieve consensus on the definition of older persons, perhaps with flexible provisions for lower (or higher) ages depending on mental and physical capacity for particular purposes,<sup>11</sup> much as the Convention on the Rights of the Child allows. A default age for definition probably would be sixty or sixty-five, to harmonise with many existing retirement ages. It might, however, be set at seventy, in keeping with increased longevity in Europe in contrast with states such as Mozambique and Swaziland in sub-Saharan Africa.

### **5.2.2 The Right to Dignity**

Strangely the right to dignity is a right not found in the European Convention on Human Rights and it is not found in the European Social Charter except in relation to the rights of workers.<sup>12</sup> However, it is included expressly in the European Union's Charter of Fundamental Rights (see above).

The right to dignity ought to be a fundamental principle of any treaty on the rights of older persons. It could be developed as a new principle of international and regional law in relation to older persons. It is found in the Preamble to the new UN Convention on Persons with Disabilities<sup>13</sup> and in specific rights as well as cited as one of the general principles of the Convention.<sup>14</sup>

### **5.2.3 Prohibition of Discrimination**

The prohibition on discrimination has two prongs.

Firstly a treaty would require the prohibition of all arbitrary and unjustifiable discrimination against older persons in the application of their rights.

Secondly a treaty would require the prohibition of discrimination against particular groups of vulnerable older persons including migrants, refugees, those with disabilities.

### **5.2.4 The Right to Life**

This is likely to be most controversial of rights to be included in a Convention on the Rights of Older Persons because it will inevitably raise the issue of euthanasia. It is recommended that any proposed treaty does not specifically address euthanasia or the right to terminate one's own life as it will be impossible to reach a universal agreement. Euthanasia is an issue similar to abortion in terms of countries holding different deeply held beliefs. In the Convention on the Rights of the Child states agreed that the Convention would not contain an article on abortion in order to arrive at a much needed treaty. The same approach would be necessary in relation to euthanasia and a Convention on the Rights of the Older.

### **5.2.5 National Constitutional Provisions Protecting Older Persons**

Twelve European states have national constitutional provisions protecting the rights of older persons. These range from the right to state assistance in 'the case of old

age' as in the Estonian Constitution<sup>15</sup> which is a very general right to the more specific and welcome provisions in the Constitutions of Spain<sup>16</sup> and Portugal.<sup>17</sup> Spain guarantees the right to adequate and periodically updated pensions and a sufficient income for old age. Spain also guarantees the welfare of older persons through providing a system of social services which provides for health, housing, culture and leisure. Portugal guarantees the rights of older persons to economic security and to housing conditions and to the conditions of family and community life which prevent their isolation and allows them to participate in community life.

### **5.2.6 Recommendation**

If the consortium of concerned organisations decides to lobby for a new international or regional treaty Portugal and Spain ought to be approached to enlist their support as their constitutions contains some of the key provisions which should be found in an international or regional treaty.

## **6. Conclusion**

There is an urgent need for a comprehensive International Convention on the Rights of Older Persons as well as a separate European Convention on the Rights of Older Persons. These would protect the civil, political, economic, social and cultural rights of older persons.

Having a global and a regional treaty is common. Many treaties have a global and a regional counterpart (such as the International Covenant on Civil and Political Rights 1966 and the European Convention on Human Rights 1954)

In developing its strategy concerned organisations ought to consult those who have had direct experience of human rights treaty drafting, as this would mean that some obstacles could be removed before they arise.

Some who would oppose an international convention may seek to argue that such a convention would be limited in its usefulness because the position of older persons in Europe is very different from older persons living in other parts of the world. For example, far fewer older persons in Europe are responsible for bringing up their grandchildren than in sub-Saharan Africa and there is a difference in the degrees of poverty and level of social services in Europe than in many parts of south Asia. Such an argument should not be used to defeat an international convention as we heard similar arguments about differences in the rights of children and it was still possible to adopt an international convention which has had a significant impact in improving the lives of millions.

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<sup>1</sup> See below

<sup>2</sup> As of 2004.

<sup>3</sup> In the Netherlands and Germany state scholarships are only open to those under 30 and in the UK there is an age limit of 54 on the student loan system see The European Older People's Platform, December 2004.

<sup>4</sup> *Dodov v Bulgaria* Case no. 59548/00, 2008

<sup>5</sup> *Mouisel v France* Case no. 67263/01 2003

<sup>6</sup> See for example *Runkee and White v United Kingdom* Case nos 42949/98 and 53134 /99 3007

<sup>7</sup> 1 May 1999

<sup>8</sup> Helsinki on 10 and 11 December 1999

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<sup>10</sup> The same also applies to the **Charter of Fundamental Rights of the European Union** in which article 25 of the Charter provides that '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'.

<sup>11</sup> The inter-American Convention on Human Rights for example prohibits the execution of anyone over the age of seventy.

<sup>12</sup> Art 26 Revised European Social Charter

<sup>13</sup> Paragraph Preamble.

<sup>14</sup> Art.3.

<sup>15</sup> Art 28

<sup>16</sup> Art 50

<sup>17</sup> Art 72.