

Older people, discrimination and citizenship: What specific insights in light of disability law on the national and international level?

Personnes âgées, discriminations et citoyenneté : quels enjeux juridiques spécifiques à la lumière du droit du handicap au niveau national et international ?

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Résumé de l'article

Notre étude commence par envisager la complexité de l'âgisme en droit pour comprendre dans quelle mesure les normes légales existantes sont insuffisantes pour saisir les stéréotypes liés à l'âge et les discriminations individuelles et systémiques qui en découlent. Selon la jurisprudence européenne et nationale, l'âge est un critère ambivalent du droit de la non-discrimination et masque la complexité de la discrimination fondée sur l'âge. La portée de la Convention onusienne relative aux droits des personnes handicapées couvre une partie des défis que rencontrent les personnes âgées en termes de droit mais la Convention illustre aussi la façon dont une norme internationale peut receler une dimension transformative afin de mieux comprendre les caractéristiques du handicap mais pas de l'âge. Le concept de discrimination fondée sur le handicap peut, à son tour, enrichir la façon de penser la discrimination de façon relationnelle. Pour démontrer les limites du cadre juridique international relatif aux droits humains des personnes âgées, notre étude s'attarde ensuite précisément sur le droit de vote qui illustre les défis de la discrimination fondée sur l'âge au regard de la citoyenneté et de la pleine participation des personnes âgées au processus démocratique, justifiant le besoin d'adopter une convention internationale plus adaptée, exclusivement destinée aux personnes vieillissantes.

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Résumé : Notre étude commence par envisager la complexité de l'âgisme en droit pour comprendre dans quelle mesure les normes légales existantes sont insuffisantes pour saisir les stéréotypes liés à l'âge et les discriminations individuelles et systémiques qui en découlent. Selon la jurisprudence européenne et nationale, l'âge est un critère ambivalent du droit de la non-discrimination et masque la complexité de la discrimination fondée sur l'âge. La portée de la Convention onusienne relative aux droits des personnes handicapées couvre une partie des défis que rencontrent les personnes âgées en termes de droit mais la Convention illustre aussi la façon dont une norme internationale peut receler une dimension transformative afin de mieux comprendre les caractéristiques du handicap mais pas de l'âge. Le concept de discrimination fondée sur le handicap peut, à son tour, enrichir la façon de penser la discrimination de façon relationnelle. Pour démontrer les limites du cadre juridique international relatif aux droits humains des personnes âgées, notre étude s'attarde ensuite précisément sur le droit de vote qui illustre les défis de la discrimination fondée sur l'âge au regard de la citoyenneté et de la pleine participation des personnes âgées au processus démocratique, justifiant le besoin d'adopter une convention internationale plus adaptée, exclusivement destinée aux personnes vieillissantes.

Mots-clés : Convention ; Age ; Droits ; Discrimination ; Handicap ; Vote

Abstract: Our research first delves into the complexity of ageism in law to understand to what extent the existing legal norms are sufficient to encounter the stereotypes linked to old age and the individual as well as systemic discrimination which ensues. According to European and national case law, age is an ambiguous ground of discrimination law and masks the complexity of age discrimination. It seems the scope of the UN Convention on the Rights of People with disabilities overlaps with some difficulties of older people in terms of rights but the CRPD also illustrates how an international convention can be a game changer, creating an impetus to gain insight on the particular characteristics of disability, but not age. The concept of disability discrimination has in turn enriched the way we think of discrimination in a more



relational way. In order to prove the inadequacies of the current international legal framework on the human rights of older people, the second part of our study will illustrate how the right to vote exemplifies the challenges of age discrimination in terms of citizenship and full participation of older people in the democratic process, demonstrating the need to adopt a tailored international convention for older individuals.

Keywords: Convention; Age; Rights; Discrimination; Disability; Vote



Introduction

Older people are not always perceived as a distinct category in law but more as an “amorphous” group which is comprised of a certain number of generations of individuals: some at the end of their career and others at the end of their life. Consequently, it sounds rather counterintuitive to wish to determine more rigorously in law whether those more advanced in age deserve a specific legal treatment in order to vindicate their rights at the national and international level. Correctly identifying the contours of age is part of the problem. In this paper, we will not cover discrimination based on youth although, with today’s climate change and following the Covid crisis, this is an important but separate legal issue (Mercat-Bruns, Pallarès-Castany, 2016). This being said, intergenerational conflict can be one of the causes of ageism (Chauvel, *Le destin des générations*, 2010). Research on age and aging is extensive and the question of age discrimination is never absent in explicit titles: “What should we do with our elderly?” (Capuano, 2018). If age is difficult to grasp, aging as a process is not simpler to apprehend and this might also be one of the reasons the risk of ageism stems from false representations and ignorance of the process itself. In societies where visuals are at the heart of the digital world, prejudicial appearances associated to age can also be duplicated and intensify stigma in all spheres of life (employment, housing, health and education) (Post, 2001).

Once our research in its first part delves into the complexity of ageism in law, the question is to what extent the existing legal norms are sufficient to encounter the stereotypes linked to old age and the individual as well as systemic discrimination which ensues. According to European and national case law, age is an ambiguous ground of discrimination law and masks the complexity of age discrimination and the exclusion of older individuals (I). Does the UN Convention on the Rights of People with Disabilities (CRPD) help to decipher the challenges of age bias? It seems its scope overlaps with some difficulties of older people in terms of rights but the CRPD also illustrates how an international convention can be a game changer, creating an impetus to gain insight on the particular characteristics of disability, but not age. The concept of disability discrimination has in turn enriched the way we think of discrimination in a more relational way.

In order to prove the inadequacies of the current international legal framework on the human rights of older people, the second part of our study will illustrate how the right to vote exemplifies the challenges of age discrimination in terms of citizenship and full participation of older people in the democratic process (II), demonstrating the need to adopt a tailored international convention for older individuals. Construing age discrimination in a more comprehensive way might lead to transformative change and a finer understanding of inequalities embedded in economic, social, political and cultural life, since aging potentially affects all individuals.



1. Ageism in light of ableism: what specific legal challenges?

In 1968, Dr. Robert Butler coined the term “ageism” to explain the recurring biases against older individuals (Achenbaum, 2015). Butler made the analogy with racism and sexism which drove the Civil Rights movement. Ableism was reflected in the adoption of the Americans with Disability Act in 1990 which developed the key notion of reasonable accommodation (Colker, 2005) and was followed with norms encompassing this social model of disability such as the European directive (Directive 2000/78/EC, 2000) and the UN Convention on the Rights of People with Disabilities (CRPD, 2006). This innovative concept in antidiscrimination law meant that the lack of positive steps to include people with disabilities was a form of discrimination itself because the majority of able-bodied people “make the difference” by deciding on the framework in which relationships at work, for housing or access to goods and service are constructed (Minow, 1990). Our goal is to measure whether drawing from a European perspective and international perspective, ageism also withholds unique characteristics (A) and might gain from a similar international legal recognition of the specific challenges it entails (B).

A. The particularities of ageism in light of current legal norms: age as an ambiguous category masking the effect of bias

In the same way as disability, old age is a category based on a social construction which is already visible in legal provisions of most welfare states (Mercat-Bruns, 2001). It is a criterium to award benefits seen as benevolent, justifying legitimate differences of treatment such as pension rights, housing benefits, tax breaks or senior discounts. However, behind the proliferation of exceptions to age discrimination, apparent in legislative frameworks, the same for disability for that matter (Directive 2000/78, art. 6 and 7), which are geared to “protect” older people lies an ambiguous category, contingent on its use as either an “objective” factor to measure the advance in age or a simple proxy to presume forms of vulnerability (long term unemployment). Age is perceived much less as a subjective indicator of the skewed representation, the stigma at the heart of antidiscrimination law (Goffman, 1963) and its individual and group effects. This lack of reflection in the legal norms on the risks and causes of social exclusion linked to aging (1) are less present in disability law which created a new paradigm of inclusion entrenched in rules to root out the causes of ableism in the structures that perpetuate its existence (Bagenstos, 2021) (2).

A blanket approach to functional age masking the complexity of ageism

It is clear, for example, in the legislative history of the Age Discrimination in Employment Act in the United States (ADEA) in 1967 but also in the EU norms banning age discrimination (Directive 2000/78) that the focus of the norms was



to limit the effects of age as a marker of the passage of time and its economic impact in the labor market for instance. No prior discussion on the unique character of ageism can be found in the production of these examples of statutory frameworks. In the United States, the ADEA was the result of a report made by the Secretary of Labor Wirtz following the adoption of the Civil Rights Act in 1964 on the high long-term unemployment of older workers despite the 60s economic boom linked, among other things, to age limits in hiring (U.S. Dept. of Labor, 1965). There was no real discussion in the American legislative history around the contours of ageism.

In Europe, similarly, there was no definition of 'age' in law. Article 19 TFEU refers directly to the prohibition of age discrimination without defining it: 'without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

There are no definitions of age either in the open-ended list of categories of article 21 of the EU Charter of fundamental rights and articles 2 and 6 of the Directive 2000/78 (art. 2 and 6, recitals 8 and 25). Only the Netherlands and Austria define the age category through case law as referring "to the lifetime spent. Age is a protected ground if people are discriminated against on the basis of the fact that they are perceived as too young or too old in certain circumstances without justification." (Schiek and al., 2008). However, the EU from the start, and member states as well (Mercat-Bruns, 2016), focused on a more *functional* view of age linked to how to deal with the vulnerabilities associated to age, beyond a reflection on its social and biological meaning: "The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 explain that the goal of forbidding age discrimination was to 'foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups... Also emphasised was 'the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force' (Directive 2000/78, Recital 8).

Thus advanced age was accepted at face value as an economic indicator of a risk in employment, without considering that the category raises a series of combined presumptions that should have been fleshed out from the beginning. The implications of this formal ignorance of the complexity of age as a biological marker or social construct which operates at the individual and group level is unintentionally reinforced by the fact the CJEU gave extra weight *ab initio* to the prohibition of age discrimination as a uniform principle in the *Mangold* case applying in horizontal disputes between private individuals (Case C-144/04, 2005). In this case, which focused on older workers, this highly normative and symbolic value set a blanket standard of judicial scrutiny applied to all ages, anchoring a uniform perception of the ground, that masks the whole spectrum of situations behind the meaning of age (C-88/08 Hütter, 2009).



The challenge of confronting ageism in law contrasts with the outcome-oriented perspective to ableism in the CRPD

A reflection is essential on the challenge facing any legal mechanism as it tries to grasp a representation of systematic effects of age without really apprehending ageism. Implementation of the CRPD has created the impetus, sometimes with difficulty, to cut to the chase and States having to deal with the causes and effects of ableism and hierarchy of impairments as a barrier to inclusion (Harpur, 2019).

Age is often confused with aging and the process of aging is much more complex. This explains the existence of age discrimination and the subjective and objective dimensions of age as a social construct which leaves space for bias linked to ignorance and systematic cognitive and explicit or implicit associations. The different causes of aging are in reality both endogenous to each human being linked to different medical theories (Cefu, 2011) and exogenous since the body is subject to an array of abuses which eventually take their toll, linked to context. So the rate of aging varies from one person to another and chronological age is more an indicator of the possible consequences of aging at certain stages of life (Eyraud, 2013). Age reflects the risks of degradation associated with aging in terms of physical health for employment, for example, with no automatic causal effect of age which explains why some States adopted a legislation banning age discrimination in the 1950s (Friedman, 1982). This complexity of aging explains why *subjective* stereotypes are associated to young and old age. Some authors draw the opposition conclusion of the risk of reduced performance at a certain age and negate the legitimacy of age discrimination legislation (Issacharoff and Harris, 1997). This already demonstrated the ambiguous perception of the particular nature of age discrimination.

Age also ends up constituting a useful proxy for access to seniority, training or pension rights for example. Since benefits offered by social security and employment policies have often been tied to age for economic reasons. In this respect, age is then seen as a more *objective* criterium, but this has had an impact on the cost, the job security or the value associated to the inclusion of young and older people in different spheres of life (access to education, health, housing and employment).

This economic analysis of age is reflected in the law and was explicit in disregarding age cohorts as deserving, like racial or gender groups, the consideration of a “suspect class” and the highest judicial scrutiny on the constitutional level. The United States Supreme Court decided early on that age was not a suspect class in the case *Massachusetts Board of Retirement v. Murgia*: older workers are not an “insular historically disenfranchised minority” like racial minorities. The Court held the mandatory retirement of police officers in Massachusetts was justified based on the rational state interest in the statute of protecting citizens for security reasons. The State did not have to prove it had a compelling interest in systematically excluding older police officers who already had to submit to regular medical examinations after the age of 40. There was no violation of a fundamental right such as the

standard used for racial categorizations linked to affirmative action (Regents of the University of California v. **Bakke** (1978). The Supreme Court also avoided having to prove what exact age cohort was eligible for protection (Eglit, 1981).

However, this is problematic with regard to the recognition of ageism in the law in two respects. First, this means that older people are not seen as suffering from the same bias, creating a hierarchy of discrimination according to the category (sex, race, age). This might be true in the United States but in a global world, in light of the diverse culture of UN member states, this is a western view which ignores how old people are, conversely, awarded more respect than other minority groups in other regions of the world, justifying an international protection. This perspective also negates that intersectional discrimination which happens when two or more categories operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination and stereotyping (Crenshaw, 1989): for instance, bias towards older immigrants, older women or older people with disabilities (Atrey, 2020).

Whereas, European cases on disability discrimination show the direct influence of the CRPD to help understand more deeply the causes and effects of ableism, fleshing out both the complex contours of the category of disability and the need to expand the enforcement of reasonable accommodation to eliminate barriers to full participation in society. The European Union ratified the CRPD as a Regional Integration Organisation (EU Press Release, 2011). Indeed, under the impetus of the CRPD, the EU Court of Justice (CJEU) has played a more pedagogical role focused on the meaning of the ground, as witnessed in cases that expanded the social view of disability, the structural goal of antidiscrimination law and the quest for dignity. The Court directly cites in its inspirational sources, the international framework in a joint case for example in 2013: under article 1 of the UN convention, 'the purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.' The Court then cites the extensive pragmatic view of disability which encompasses all stereotypes linked to exclusion: "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The effort to explain disability in a relational way in the CRPD influences the European Court (CJEU) which can then extend ways to provide reasonable accommodation reflecting the wide arrays of barriers in refusal of worktime flexibility for example: "under the fourth indent of Article 2 of the Convention: "reasonable accommodation" means necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." (HK Denmark V Ring and HC-335/11 and C-337/11 HK Denmark v. Werge, recital 4 and 5).

This EU case law on disability reflects how UN Convention can play as a model for a more fine-tuned interpretation and enforcement of national and European disability law.



B. The inadequacies of current instruments and the potential contribution of a UN Convention on the rights of older people

It is noted that as long as ageism is not awarded the same specific UN protection against discrimination in the same way as disability, enforcement of the prohibition of age discrimination will only be a side issue covered insufficiently through case law (1). Moreover, it will not be recognized symbolically as a priority in this age of pandemics and the scope of ageism in society across the board, individually and structurally, will not be fully taken into account (2) through a more tailored enforcement of legal norms on age discrimination around the world (3).

Incidental reference to ageism in current EU case law on exceptions to age discrimination

Most litigation on age discrimination, including on the EU level, is focused on the application of exceptions to direct discrimination and not on instances where age is directly or indirectly mobilized as a ground illegally. In other words, the judges are often considering the legitimacy and proportionality of differential treatment linked to advanced age in employment and retirement policies (ie-mandatory retirement, Directive 2000/78, art. 6) or age as an essential and determining requirement for the job (because of the nature of the job physically requires a younger person, Directive 2000/78, art. 4). This means ageism is only considered through the narrow view of what is acceptable as formal differences of treatment in the law and collective bargaining agreements and not more directly how stereotypes can condition acts, practices and informal norms such as workplace evaluation schemes, outside of State norms.

For example, in the *Petersen* case, the Court considered a preliminary ruling requested from the German labour courts (CJEU *Petersen* C-341/08). It concerned an exception in the form of an age limit of 68 after which panel dentists providing public care under German health insurance system lost their authorization to continue this work. However, this age limit did not apply to dentists in private practice (non-panelist dentists) who were not subject to any upper age limit (the patients were no longer covered by social insurance). In applying article 6 (Directive 2000/78), the CJEU first determined that there was a legitimate aim of protecting health of patients obtaining care as general experience indicated that dentists “suffered a decline in performance after the relevant date” and the age limit served to open up new places on the panel providing public care to young dentists. This presumption of the German government on the systematic decline in work performance after a certain age is not considered, from the beginning, through the prism of possible stereotypes and ageism. The age bias in the rule was only uncovered when the German government admitted that, at the hearing, without being contradicted, that the age limit at issue in the main proceedings did not apply in regions in which there was a shortage of (younger) panel dentists (those covered by the health insurance). The Court notes the disparity in the rule: “article 2(5) of the Directive defining discrimination must be interpreted as

precluding a national measure, such as that at issue in the main proceedings, setting a maximum age for practicing as a panel dentist, in this case 68 years, where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists – ie private dentists not covered by health insurance (*Petersen*, § 78). The rule excluding dentists over 68 from being covered by health insurance is ignored when there is a shortage of dentists in certain regions. Hence, the Court smokes out the incoherence of the enforcement of this age limit which is contingent to access to a pool of panelist dentists. If the “legitimate” aim is to protect the health of patients, the Court, through the proportionality test, which looks at the necessary and appropriate means to achieve the goal of the law, cannot accept that, in certain circumstance of shortage of staff, the decline of performance is no longer presumed and this variable frame of mind shows the pretextual nature of the selective process based on age.

This example shows how the revelation of age bias is only incidental if a rule is incoherent in its application. The CJEU Court first shows total deference with regard to the legitimacy of the German exception to discrimination even if the aim of a law is based on prejudicial representation of underperformance of older workers without statistical evidence in order to facilitate the recruitment of younger workers. If there was a legal recognition of a UN Convention for rights of older people, presumption of age bias even embedded in the law would be suspicious and give rise to more detailed justifications and evidence before being considered as legitimate.

A narrower view of remedies for age discrimination in national law

This mitigated view of age bias as less serious is also striking in French national case law on age discrimination. In a surprising decision, the French Supreme Court decided that remedies for age discrimination are awarded, once unemployment or other benefits received between the time of the dismissal of the older worker and the time of the Court decision, have been deducted. To justify this rule, the Supreme Court makes a sweeping assertion with little foundation: it rules that “the principle of age discrimination is not a fundamental liberty”. This claim is based on the fact that other forms of discrimination are presumed more important, deserving higher remedies like discrimination linked to the fundamental freedom of union activity.

The adoption of a UN Convention on the rights of older persons could have a very useful impact. First it would allow more questioning on the hierarchy between grounds of discrimination to consider the prejudicial harm produced by discrimination based on age in the same way as harm stemming from sex or racial discrimination. In practice, this might lead to better legal safeguards in case of litigation, limiting caps on remedies for age discrimination. Furthermore, it would entail the same international recognition awarded to different forms of freedom (self-determination, freedom of expression...).



Moreover, without the adoption of an international norm on the rights of older people, there is no global pedagogy on the scope of age discrimination as a structural issue and an individual barrier to inclusion. The CRPD has changed the paradigm on how disability is based on a social model rather than a medical model. The fight for the elimination of age discrimination has, to this day, no comprehensive norm on the international level which conveys a specific meaning to intergenerational equity, fundamental rights of more vulnerable older persons in institutions or requiring home care, democratic representation of older individuals or debiasing through awareness raising.

Considering the gaps and limits of the current legal frameworks on age discrimination on a national or European level for example, it is useful to reflect whether the proposals of the UN working group geared towards older people's rights could be a way forward.

Insights on a new international instrument to further human rights of older persons

Established by resolution 65/182 of the General Assembly in 2010, the Open-Ended Working Group on Ageing, was mandated to discuss the possible adoption of an international instrument to promote the human rights of older person. A subsequent resolution in 2013 details the scope of a new comprehensive and integral legal international instrument to promote and protect the rights and dignity of older persons.

The most striking highlights of this on-going proposal are the fact it builds on an analogy with similar frameworks which condemn discrimination (Universal Declaration of human rights condemning discrimination). It recognizes the stakes behind a global norm with increasing number of older people especially in the developed countries. The 2013 resolution emphasizes the need to cover intersectional discrimination including older women in a precarious situation. The working group has taken stock of the effect of the pandemic on the plight of older people whose vulnerability in case of contamination has been exacerbated with issues of access to health care and continued employment. UN Resolutions are determined to foster empowerment by recalling the need to recognize the continuing contribution of older people (through lifelong learning) outside of the goal of protection underlying human rights law. The international instrument also reflects the will both to mainstream policies for older people within general social policies such as housing, employment, access to goods and services and at the same time, an international convention would make explicit reference to age in the law. This would facilitate any movement which tries to relegate age discrimination to a lower standard of judicial scrutiny.

The impetus for normative change also is drawn not only from the reports of the Open-ended Working Group on Ageing, but also from the report of the United Nations High Commissioner for Human Rights on the human rights situation of older persons, in which it is stated that dedicated measures to

strengthen the international protection regime for older persons are called for without further delay, including a new dedicated international instrument (UN, E/2012/51). The High Commissioner's report of 2012 justifies the need for a comprehensive norm for older people arguing the challenges they face that relate equally to civil, cultural, economic, political and social rights.

The particular asset of adopting an international convention on the human rights of older people in light of the existing International Convention for the Rights of People with Disabilities is to distinguish on the one hand the common ground between disability and age discrimination linked to the physical and mental barriers to inclusion that old people and people with disabilities can encounter and on the other hand, the wide diversity of challenges specifically linked to aging (ageism, intergenerational conflict, long term unemployment, specific intersectional discrimination against older women and older immigrants...). The publication of the report on the last session of the Working group on Ageing in April 2022 is particularly insightful on the continued impetus to address improvements within the existing legal framework and possibly explore the need for a new more tailored text benefiting older persons.

First the Open-ended Working Group on Ageing in 2022 both presented measures to enhance the promotion and protection of the human rights and dignity of older persons, such as best practices, lessons learned and possible content for a multilateral legal instrument, as appropriate, in order to enable it to fulfil its existing mandate of strengthening the protection of the human rights of older persons.

Along these lines, during the 12th session, several Member States and most of the other participants highlighted that the existing human rights framework for older persons provided fragmented and inconsistent coverage of their human rights, both in law and in practice, and stressed the need for an international legally binding instrument that specifically addressed the existing legal gaps to fully protect their rights. At a regional level, some Member States highlighted the importance of the Inter-American Convention on Protecting the Human Rights of Older Persons in strengthening the protection of their human rights. Some other delegations referred to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons. Other Member States underscored the importance of the Madrid International Plan of Action on Ageing as a road map to promote age-inclusive implementation of the 2030 Agenda and the attainment of the Sustainable Development Goals and referred to the need to further implement the existing international legal framework.

With regard to "Access to justice", panellists highlighted the inconsistent and limited coverage of access to justice for older persons in the existing frameworks and the need for specific standards to be developed in order to guarantee access to justice for older persons that reflect the principles of equality and non-discrimination, participation, autonomy and independence. In this context, the Inter-American Convention on Protecting the Human Rights of Older Persons, in particular its articles 30 and 31, was identified as an example of good practice for how a comprehensive provision to ensure full access to justice for older persons could be conceived. During the discussion, several



speakers identified age discrimination and ageism in policy norms and practices as an overarching challenge and protection gap for older persons to claim their legal rights and access to justice. Timely proceedings, physical access and barriers created by digital technology were also among the challenges identified. Legal capacity and supported decision-making were considered essential to empower older persons and to ensure their autonomy and exercise of their human rights. Participants also emphasized the need to develop normative standards that facilitated the development of older persons-specific legal assistance programmes and services.

Other challenges and barriers included inadequate housing and living environments for healthy ageing, social isolation and loneliness among older persons, and the consequences of the digital divide that disproportionately affected older persons, inter alia. It was also stressed that the COVID-19 pandemic had shed light on and often exacerbated such challenges. Ageism and age discrimination were identified by several panellists, delegations and other speakers as a key challenge in this context. Speakers indicated that older persons subject to intersecting discriminations, on the basis of gender, disabilities, race and other factors, were more at risk of experiencing economic insecurity. Some participants advocated for the adoption of an international legally binding instrument on the rights of older persons as the **best** means to protect and guarantee their right to contribute to **sustainable development**.

During the discussion on the way forward, a delegation announced that a group of Member States would create a cross-regional **informal core group** to work during the intersessional period with the main objective of preparing a draft decision to be submitted for the consideration of the Working Group at its thirteenth session in 2023. The draft decision could contain a proposal for the establishment of an intersessional Working Group with the objective of preparing and **presenting a draft text determining the main gaps in the international human rights system for older persons, which would be the basis for the further negotiations of instruments and measures to close these gaps by Member States and Observers in the Working Group**.

In this regard, some delegations referred again to the findings contained in the update to the **2012 analytical outcome study on the normative standards in international human rights law in relation to older persons, prepared by OHCHR**. It was indicated that that document would serve as a **good basis to guide further discussions of the Working Group**, towards the fulfilment of its mandate, identifying possible gaps in the international system for the protection of the human rights of older persons and possible ways to address them.

While some delegations acknowledged the value of the Madrid International Plan of Action on Ageing as a road map for age-inclusive policies and measures to protect the well-being of older persons, they stressed the need for a more comprehensive international legally binding instrument that fully protected the human rights of older persons.

Regarding the selection of the focus areas for the thirteenth session of the **Working Group on Ageing, to be held in 2023**, following informal consultations with Member States and Observer States by the Bureau during the intersessional period, the Working Group made an oral decision to select the areas of **“Right to health and access to health services” and “Social inclusion”**.

All in all, continued concrete dialogue is in process at different national, regional and international levels, on current gaps regarding normative instruments and brainstorming on appropriate new legal tools or actions. A closer look at the right to vote can be therefore useful, notwithstanding the slow progression in the adoption of a comprehensive international instrument promoting the rights of older persons in a non-discriminatory way.

2. Older people’s right to vote from an antidiscrimination perspective

An examination of the citizenship rights of older people, in particular voting rights, requires making a distinction between enjoying and exercising the right to vote. This does not mean that they are opposites: in both cases, the risk of discrimination is always possible. The right to vote is undoubtedly a human right the enjoyment of which is increasingly considered to be universal and based on strict equality between individuals. However, caution remains necessary in the face of ageist attitudes, with some people readily suggesting that voting rights for older people should be limited (A). Yet it is when exercising their right to vote that older people are most likely to come up against obstacles, which calls for action against indirect and intersectional discrimination (B).

A. Concerns as to the enjoyment of a human right: towards the recognition of a universal human right?

The right to vote is not traditionally considered to be a universal human right. This is because the notion of citizen and human are different. If we take the example of France, over the course of history, citizens have come to mean people who pay their dues, are nationals, of legal age, not under guardianship, and free of convictions, etc. (1). The tendency is to extend the scope of those entitled to this right (by lowering the legal age, including for certain non-nationals or removing forms of incapacities). This shift is driven by discrimination law, and in particular based on the International Convention on the Rights of Persons with Disabilities. The result is that older people cannot be deprived of the right to vote (2). However, the full citizenship of older people is still threatened (3).

The right to vote is unanimously recognized by legal instruments for the protection of human rights, without discrimination

Such is the case at an international level, for example, with article 21 of the Universal Declaration of Human Rights of 1948, and article 25 of the International Covenant on Civil and Political Rights of 1966, which states that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 (...) to vote and to be elected ...”. At European level, Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 establishes the right to free elections (Article 3). In France, the Constitution of 4 October 1958 stipulates that voters are, “All French citizens of either sex who have reached their majority and are in possession of their civil and political rights” (article 3).

This formulation of the French constitutional text reveals that numerous people are excluded from the right to vote based on their nationality, dignity, and capacity. The capacity requirement explains why only adult people are allowed to vote. Until 2019, it also justified restrictions to the right to vote of adults under guardianship. The electoral code initially established that adults under guardianship were automatically ineligible to vote (article L5 of the French Electoral Code). In 2005, the legislator put a stop to this automatic ineligibility: while maintaining the principle of prohibition, judges henceforth had the right, exceptionally to authorize adults under guardianship to vote (Law No. 2005-102 of 11 February 2005 for the equality of rights and opportunities). In 2007, the law went one step further by requiring that judges systematically rule on the maintenance or withdrawal of the right to vote (Law No. 2007-308 of 5 March 2007 on the reform of the legal protection of adults, article 12). Nevertheless, in the vast majority of cases (83%), the right to vote was withdrawn (Caron-Dégliše, 2018, p. 64).

Reform based on the antidiscrimination paradigm

Yet, older people make up a significant proportion of people under legal guardianship (58.4% of those under guardianship are aged over 60, and 45.7% are over 70, Ministry of Justice). Therefore, this automatic, then possible, exclusion from the right to vote for people under guardianship could be analysed as both a direct discrimination of these protected adults (Devandas Aguilar, 2019) and an indirect discrimination of older people. The Monitoring Committee of the International Convention on the Rights of Persons with Disabilities of 2006 made the following enlightening interpretation of article 29 of the treaty: “an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability (...) ... [it recommended] the urgent adoption of legislative measures to ensure that persons with disabilities, *including persons who are currently under guardianship or trusteeship*, can exercise their right to vote and participate in public life, on an equal basis with others” (CRPD, 2013, §9.4). At the national level in France, human rights protection bodies followed suit (DDD

2016, CNCDH 2017). In particular, the National Consultative Commission on Human Rights, responsible for ensuring the respect of the Convention in France, based its 2017 recommendation on this interpretation to call for a repeal of Article L.5 of the French Electoral Code. This was achieved with the law of 23 March 2019 (article 11 of Law No. 2019-222 of 23 March 2019 programming the justice reform).

Yet it was not self-evident that the principle of non-discrimination would prevent some countries from depriving certain people with disabilities from voting. In its decision of 20 May 2010 on *Alajos Kiss vs. Hungary*, the European Court of Human Rights decided that removing the voting rights of a person under guardianship could be considered as pursuing a legitimate aim. That aim is to guarantee that only citizens capable of assessing the consequences of their votes should participate in elections. However, it has also been held that the removal of the right to vote should not be automatic (ECHR 6 October 2005, *Hirst vs. United Kingdom*, req. No. 74025/01). The actual capacities of the person under guardianship should be taken into consideration. Thus, a blanket ban would be disproportionate and breach article 3 of Protocol 1 to the ECHR (ECHR, 2 February 2021, *Strøbye & Roselind vs Denmark*; CHR, General Observation No.25, 1996, §4).

However, if the objective of the French Electoral Code really were to ensure that voters are capable of voting with discernment, then to avoid being discriminatory, the text should concern all voters and not only adults under guardianship. All individuals would therefore have their faculties assessed before enjoying the right to vote.

The principle of antidiscrimination is the driving force behind the reform of French law and extended the scope of beneficiaries of the right to vote. The result was a change in the right to vote. In this regard, Camille Aynès points out that the reform, “does not reestablish the fundamental principles of citizenship (...), quite the opposite, it invites us to rethink citizenship”. It moves away from the prevailing since view the French Revolution that sees citizenship as contingent to “a requirement of morality and a requirement of capacity”. The vote is no longer simply a democratic tool, a means to an end, but a right.

The functional view of voting is however still valid when it comes to eligibility. This explains why people under guardianship and tutorship remain ineligible (Article L 200 of the French Electoral Code).

Propensity to be ageist

Although a minimum age is required to be able to vote, no maximum age is established. Moreover, as shown above, the unfavorable treatment likely to affect older people under guardianship has been abolished. Yet the law tends to restrict the civic participation of older people. First, in terms of eligibility: proposals to establish a maximum eligible age (75 years old, 70, etc.) have been put forth based on an argument of renewing the political class and

ensuring that the political situation reflects professional and social spheres (French Senate 2000 and 2018, Ministry for Youth and Sports 2015, p. 56). Secondly, in terms of the vote: rather than depriving older people of the right to vote, the idea has emerged to balance their vote. During the French presidential election of 2022, critics pointed out the disproportionate number of older people in the electorate. The reasons are both demographic (imbalances in the age pyramid) and socio-political (older people tend to vote more than younger people: whereas only 58% of 18-24-year-olds voted in the first round of the presidential election, 77% of the over-70s voted, and 88% of 60-69-year-olds, Ipsos 2022). Consequently, some denounce the overrepresentation of older people behind political choices. To remedy the situation fueled by the idea of intergenerational conflict, critics have picked up on an idea that first emerged in the United States following the reelection of Ronald Reagan as Governor of California (Stewart 1970). Votes should be balanced to reflect the amount of time that voters have left to experience the consequences of their vote. In other words, it should depend on voters' age. While the argument is intellectually stimulating (Poama, Volaçu 2021), it comes down to challenging the principle of one person, one vote, in other words formal equality, to the detriment of older people, which is clearly a form of ageism.

This is precisely where an international convention on older people could prove useful. It would raise awareness of stereotypes and discrimination based on old age and make this type of proposal difficult.

B. Barriers to exercising the right to vote: the remedy of reasonable accommodation

For the time being, regardless of their legal status, older people have the right to vote. Nonetheless are they capable of exercising that right? The obstacles are numerous (1) and the challenges complex. While solutions have been conceived in the disability field (2) they are currently insufficiently applied to issues stemming from old age (3).

Numerous barriers curtailing the right to vote

People who are physically or mentally diminished by illness, disability, or age have the right to vote, but can encounter difficulties in exercising this right (Caron-Dégliise, 2018, p. 64). In the run-up to elections, nothing guarantees that persons are signed up on the electoral register. It is easy to imagine that when old people leave their homes to go and live in nursing homes, they do not think to sign up on the electoral register of their new place of residence (Lucas, 2022 forthcoming). If they do, the bureaucracy involved may be complex. Older people may also be physically impaired (eyesight, dexterity, mobility) and encounter various difficulties in voting: getting to the polling station, moving around it, entering the booth, distinguishing the ballot papers,

putting the chosen ballot into the envelope and then the envelope into the box, signing. Older people can also suffer from cognitive disorders that make it hard for them to make decisions (Desjeux, 2020, p. 19).

The French Electoral Code attempts to respond to physical obstacles with accessibility measures. For example, in polling stations, booths must be accessible to people in wheelchairs (Article D 56-2 of the French Electoral Code). Similarly, election propaganda sent to people's homes allows voters to prepare their ballot with assistance if needed (Lucas). Proxy voting can also be a solution for people who have difficulty getting around. The rules involved are strict, but have been made more flexible (place of establishment and duration of validity of the proxy) to the benefit of older people. In exceptional cases of serious illness or infirmity, police officers can visit the home of people wishing to give their proxy to vote (Circular of 6 April 2021 on voting by proxy). In addition, the validity of the proxy, which is in principle limited to one election, can be extended to one year (Article R 74 of the French Electoral Code).

Complex challenges overcome through reasonable accommodation

We can see that French electoral law attempts to adapt certain rules relating to voting operations with the aim of making it easier to vote for a large number of people. However, this attempt to adjust comes up against several democratic requirements. Since voting must be personal and secret, the law adopts a very cautious approach to assisting voters. Physically impaired older people can request assistance (in voting booths for example) from the person of their choice. However, since 2019, concerning adults under guardianship, the person assisting them cannot be either their guardian or conservator or a member of the staff of the nursing home (Article L 64 of the French Electoral Code). Nor can these people hold a proxy for the wards (Article L 72-1 of the French Electoral Code). The legislator has a clear and legitimate objective which is to avoid an influence being exerted on a vulnerable person, or even a fraud taking place without their knowing (Council of State, 2018). Yet it may be difficult for isolated older people to find trustworthy individuals to support them outside that circle.

For its part, international law promotes non-discrimination and inclusion of people with disabilities to enable them to effectively exercise their political rights. Given the definition of disabled people in the Convention on the Rights of Persons with Disabilities, older people can fall into this category when they "have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1). As a result, states have to act in two different ways. The first involves general measures, in other words, implementing "voting procedures, facilities and materials [which are] appropriate, accessible and easy to understand and use" (CRPD, 2014, §43). The second is through providing "reasonable accommodation to individual persons with disabilities and support[ing] measures based on the individual

requirements of persons with disabilities to participate in political and public life” (CRPD, 2018, §70), unless it constitutes a “disproportionate or undue burden” (CRPD, 2014, §34). In a nutshell, states must consider accessibility to voting in both a general way and on a case-by-case basis, by putting in place reasonable accommodations to assist individuals facing obstacles.

The Committee on the Rights of Persons with Disabilities has to date received four individual complaints alleging a violation of article 29 (participation in political and public life). Two of the cases involved difficulties encountered by disabled people in exercising their right to vote: in 2013 against Hungary (CRPD, 2013) and in 2018 against Australia. In the case of Fiona Given vs Australia, the applicant had cerebral palsy, limiting her muscular control and dexterity. She used a wheelchair for mobility and a speech-generating device for communication. Her disability meant that she was “unable to mark a ballot, and fold and deposit it in a ballot box without live assistance, which would compromise the secrecy of her vote” (CRPD 2018, §2.3). She in fact refused possible assistance from the person accompanying her in order to maintain the secrecy of her vote. The Committee therefore found a “failure to provide the author with access to an electronic voting platform already available in the State party” (§8.2), which would have “enabled her to cast her vote without having to reveal her voting intention to another person” (§8.10).

A specific international convention on rights for older people?

As pointed out above, the legal instruments in place to support people with disabilities could serve older people. However, they have not been retained by the CRPD. The Committee only rarely considers them in its individual communications and general comments. Whatever the case, while some problems are common to disabled and older people, the 2006 Convention does not cover all of the questions related to ageing. As a result, an international convention specifically concerning older people could be an interesting option.

As mentioned, the United Nations have made a step in this direction with the creation of a Working Group on Ageing (General Assembly 2010) with a mandate to consider “the existing international framework of the human rights of older persons and the move towards has not gathered a large consensus (General Assembly 2012) including in France (CNCDH, 2013).

To date, the output of this working group features few developments centered on political rights. It has simply been underlined that the general objective is to “empower older persons to become active and integrated actors in society and to allow them to fully enjoy their human rights, regardless of their age” (Working Group on Ageing, 2016), which includes, “participation in the public life and in decision-making processes”.

This kind of international treaty could nevertheless act to benefit the rights of older people. Similar to what exists in the disability field, it would promote the establishment of protective bodies at a national level. A particular example is

the Conseil National Consultatif des Personnes Handicapées (French advisory council for persons with disabilities). At the time of the French presidential election in 2022, the council analyzed the campaigns of the different candidates in terms of accessibility for persons with disabilities. Such a treaty would undeniably give visibility (currently cruelly lacking) to the question of voting by older people, in particular the most vulnerable living in nursing homes (National Assembly, 2020).

Since 2019, older people in France cannot be deprived of the right to vote due to a physical or mental impairment. However, in the absence of accommodation, this right risks being ineffective for the most frail elderly people. This conclusion tends to find some echo in the observation made by Professor David Noguéro, who labeled the 2019 reform as “populist” (Noguero, 2019).

Conclusion

This study has purported to demonstrate that, in light of the scope of the CRPD and its transformative impact on antidiscrimination law, the adoption of a similar international instrument for the elderly might not only revisit and bolster the enforcement of specific rights of older people in their political, social, economic, cultural life (Masferrer & Garcia-Sanchez, 2016) but might contribute to a better understanding of some of the current trends of antidiscrimination law in terms of hierarchy of grounds or application of remedies for instance. Moreover, a “holistic” view of rights of older people (UN Resolution, 2011) offers a more comprehensive view of the need for an equal representation of the elderly and the specific context in which their rights should be vindicated. The current reports of the Open-Ended Working Group on Ageing, supported by the UN, illustrate this on-going and difficult reflection.

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