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# Introduction to the Norma Elder Law Research Environment

## Different Approaches to Elder Law

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ANN NUMHAUSER-HENNING (ED)

THE NORMA ELDER LAW WORKSHOP | LUND, 19 MARCH 2013





Ann Numhauser-Henning (ed)

# Introduction to the Norma Elder Law Research Environment

Different Approaches to Elder Law

The Norma Elder Law Workshop

Lund, 19 March 2013

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# Preface

In 2012, the Elder Law Research Environment within the Norma Research Programme at the Faculty of Law at Lund University began its work, with generous funding from Ragnar Söderberg's Foundation and the Marianne and Marcus Wallenberg Foundation, respectively. The general aim of the project is to establish Elder Law as a new research discipline – first and foremost in Sweden and the other Nordic countries, but also in Europe, as we are 'lagging behind' the US and the Anglo-Saxon world in this area. This book is the result of a semi-internal workshop held at the Old Bishop's House in Lund in March 2013. The workshop was financed by a *Lund University Guest Professorship* through Professor Titti Mattsson. On this occasion, the Elder Law Research Environment's work was put in perspective by *Guest Professor Nancy Dowd*, and discussed throughout the day under the heading 'Different Approaches to Elder Law'. I am deeply grateful to Nancy for sharing her knowledge and expertise with us so generously, and for her contribution to this book as well. It is hoped that this volume will serve as an introduction not only to the Norma Elder Law Research Environment, but also to some extent to Elder Law research more generally. To this end, the book also contains an extensive bibliography of relevance for Elder Law studies.

Lund, May 2013

*Ann Numhauser-Henning*





# Notes on Contributors

**Martina Axmin** is a Doctoral Candidate in EU Law at the Faculty of Law, Lund University, since October 2012. Her research concerns EU law and social security law, in particular the right to health care in an EU context. Before she became a member of the Norma Elder Law Research Environment, she worked at the Administrative Court in Malmö and at the Swedish Social Insurance Office.

**Nancy Dowd** is Professor of Civil Law at the Levin College of Law, University of Florida. Dowd is also David Levin Chair in Family Law and Director, Center on Children and Families, University of Florida Levin College of Law, and Guest Professor at Lund University 2013. Her current research concerns masculinities and Feminist Legal Theory as well as equal treatment and identities issues.

**Emma Holm** is Doctor of EU Law, Lund University. She has been a member of the Norma Research Programme since 1998, when she started work as a research assistant to the late Professor Anna Christensen. Holm also works as Judge Referee at the Supreme Administrative Court. The focus of her research is EU law and social security benefits and the impact of European Union citizenship. She is participating in the European Commission's Network for Training and Reporting on European Social Security (trESS).

**Mirjam Katzin** is a Doctoral Candidate in Social Welfare Law at the Faculty of Law, Lund University, since May 2013. Her research project concerns the privatization of the Swedish elder care. The analysis will focus the changing role of the individual in the elder care system and the impact of changes in social rights of the elderly, through study of legal changes in Swedish elder care on regulatory, organizational and implementation levels.

**Titti Mattsson** is Professor of Public Law at the Faculty of Law, Lund University, and a member of the Norma Research Programme. Her research

primarily concerns child law issues, but also covers elder law, health law, social law and family law. Several of her projects have dealt with different rights for foster children and youth in residential care. Another field of research for Mattsson involves issues related to government. Mattsson is an expert to the Swedish Children's Ombudsmen and the Chair of the Nordic Council of Ministers' Committee on Bioethics.

**Per Norberg** is Assistant Professor of Private Law at the Faculty of Law, Lund University, and a member of the Norma Research Programme. His research interests are labour law, housing law, gender equality law and social security law. Norberg is a member of the European Commission's Network of Legal Experts on Discrimination. Norberg is involved in the steering group of a network of lawyers and economists interested in issues of wage discrimination.

**Ann Numhauser-Henning** is Professor of Private Law at the Faculty of Law, Lund University. She is the former Pro-Vice Chancellor of Lund University and is currently the coordinator of the Norma Research Programme and its research environment on elder law. Numhauser-Henning has written widely on labour law, especially employment law and non-discrimination law. She is a member of the European Commission's Network of Legal Experts on Equal Treatment between Men and Women, the European Commission's Network of Legal Experts for Training and Reporting on European Social Security (trESS), and the European Commission's European Labour Law Network (ELLN, Scientific Committee).

**Hanna Pettersson** currently holds a post-doc position within the Norma Elder Law Research Environment. She is also a Doctor of Private Law at Lund University. Her doctoral thesis concerns discrimination of part-time and fixed-term employees in relation to both labour law and social security law.

**Eva Ryrstedt** is Professor of Private Law at the Faculty of Law, Lund University, and a member of the Norma Research Programme. She often conducts her research in the interface between social welfare law and family law, and has published widely on various family law issues. A current research theme for her is elder law. Ryrstedt is also writing a new Commentary to the Marriage Code in Sweden and commentaries to different parts of the Children and Parents' Code. She is part of comparative

and international research networks and collaborations, and has published her research results in monographs and anthologies, as well as in international and national journals.

**Mia Rönnmar** is Professor of Private Law at the Faculty of Law, Lund University, and a member of the Norma Research Programme and the ReMarkLab research programme. Rönnmar specializes in Swedish, comparative and EU labour law and industrial relations. She is the Editor-in-Chief of the *International and Comparative Labour Law and Industrial Relations Journal* and the Swedish national expert in the European Commission's European Labour Law Network (ELLN).

**Jenny Julén Votinius** is Associate Senior Lecturer in Private Law at the Faculty of Law, Lund University, and a member of the Norma Research Programme. She conducts research within the fields of labour law, EU law and social security law. Her research to a large extent has been directed towards questions of discrimination and gender relations. Currently she is involved in a project funded by the EU, which aims at a comparative critical analysis of how the level and nature of security provided for by labour law in the European countries has changed in the times of the financial crisis.



# Conceptualizing Elder Law

*Nancy E Dowd*

## Foreword and reflections

Naming and defining an area of law can demarcate boundaries, limit thinking and reinscribe old inequalities. Or, it can do something quite different: be deliberately ambiguous, amorphous, subject to change, open to challenge and re-identification. It can invite dialogue that problematizes the area, encourages disagreement, and reaches across disciplinary lines. The Norma Elder Law Project, an exploration of the field of elder law within the Law Faculty of Lund University, conceptualizes this area of law in this creative, expansive, dynamic way.

The combination of vulnerabilities and identities theories offer two valuable (but not exclusive) theoretical frameworks for considering approaches to elder law. Vulnerabilities theory focuses on the shared human condition of vulnerability as well as the particularity of its individual manifestations.<sup>1</sup> It scrutinizes the assets brought to bear on those vulnerabilities, and the state policies that foster asset building and resilience (or to the contrary, undermine or ignore asset building), and the equal distribution of state assistance (or the justification of unequal distribution as just and fair).<sup>2</sup> Identities theories focus on common bases for individual and group

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<sup>1</sup> See generally M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1; M Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251. For an overview of vulnerability work, see Resources: Vulnerability and the Human Condition, Emory University, [web.gs.emory.edu/vulnerability/resources/index.html](http://web.gs.emory.edu/vulnerability/resources/index.html).

<sup>2</sup> Fineman, *supra* note 1, 'Anchoring Equality', 13–15.

discrimination and privilege, and systemic and institutional manifestations of those axes of inequality.<sup>3</sup> Identities theory, in combination with vulnerabilities theory's focus on cross cutting common vulnerabilities and individualized vulnerabilities, reinforces the importance of being careful to identify groups of elders who may experience or be situated differently with respect to age, aging, and the context of culture, community, and subordination. This is the identities part within shared vulnerabilities.

To this end, it is essential to gather the demographics of this population, however defined, and refine those demographics and needs in ways that do not hide subgroups or particularity within elders. In addition, identities analysis would suggest gathering as well the cultural view of elders, particularly, the stereotypes associated with aging that may inhibit life choices, as an essential frame in addition to data and statistics carefully gathered to expose differences as well as common circumstances.<sup>4</sup> Within the project of elder law it is very important to focus on and make visible the myths versus the realities of elders, however defined.<sup>5</sup> This might include a developmental focus much like that we have productively used for children, to explore the stages and processes of development at this stage in the life cycle.<sup>6</sup>

A second contribution of vulnerabilities analysis to conceptualizing elder law is to remember that this includes positive aspects, not just negative aspects, assets as well as weaknesses. While it might be tempting to see elders as quintessentially vulnerable, that would potentially play into damaging stereotypes about aging. As Fineman has argued, vulnerabilities is not a negative, it is rather a statement of the human condition and it includes

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<sup>3</sup> FR Cooper, 'Experiencing Equality as Oppression: Why Vulnerabilities Cannot Replace Identities', 13–19 (unpublished paper, on file with author, presented September 2012).

<sup>4</sup> On the power of stereotypes see R Cook, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia, Pennsylvania Press, 2011).

<sup>5</sup> See, for example, N Knauer, "'Gen Silent': Advocating for LGBT Elders' (2012) 19 *Elder Law Journal* 289.

<sup>6</sup> Developmental approaches to legal analysis of children has begun to impact fields such as juvenile justice as well as other areas of family law. See generally N Dowd (ed), *Justice for Kids: Keeping Kids Out of the Juvenile Justice System* (New York, New York University Press, 2012).

positive vulnerabilities.<sup>7</sup> This position is again reinforced by identity theory's concept of the necessity of recognizing the value of identity-associated characteristics, displacing the centrality of cultural norms that reinforce hierarchy but also to truly value multicultural, diverse identities, communities, and cultures.<sup>8</sup> An example of positive vulnerability is the plaintiff in one of the same sex marriage cases currently pending before the U.S. Supreme Court.<sup>9</sup> Edith Windsor presents a different face to lesbian relationships and marriage, the face of age rather than of youth, a lifetime of lived relationship and personal sexual identity vulnerability, but those very aspects of her identity contributed to an incredible relationship and expectations of mutual support.<sup>10</sup> Indeed, in relationship partners are critically, positively vulnerability as a basis for connection and care.<sup>11</sup> Her example presents a stark picture of the unresponsive state, unsupportive of this long term relationship, but even worse, a punitive, undermining state, by virtue of refusing to recognize her marriage and thus demanding payment of high estate taxes upon the death of her partner. This face of one of the most critical same sex marriage cases demonstrates the power of elders and the contradiction of assumptions about who they are and how they have lived their lives.

A third piece essential to consider within vulnerabilities analysis is to be mindful of who is the assumed norm. Will the reference point be the most familiar (by identity factors) or the individual most at the margin. Various critiques of identities analysis remind us that we have to be careful that essentialism does not creep into our analysis, privileging among elders those who are the most familiar, those who are the most like the scholars and lawyers who engage in this area of law.<sup>12</sup> The American experience of the

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<sup>7</sup> Fineman, supra note 1, 'Responsive State', 8–9.

<sup>8</sup> Cooper, supra note 3, 'Experiencing Equality'.

<sup>9</sup> United States v. Windsor 699 F.3d 169 (2d Cir. 2012), cert granted, United States Supreme Court, case 12–37. Also pending before the Court is a second same sex marriage case, Hollingworth v. Perry, case 12–144.

<sup>10</sup> United States v. Windsor, supra note 9.

<sup>11</sup> See generally B Brown, *I Thought It Was Just Me (But it Isn't): Telling the Truth about Perfectionism, Inadequacy and Power* (New York, Gotham Books, 2007).

<sup>12</sup> See eg as antiessentialism critique, N Dowd and M Jacobs (eds), *Feminist Legal Theory: An Anti-Essentialist Reader* (New York, New York University Press, 2003); T Modood, 'Anti-



development of elder law is a good example of this. It has been driven by lawyers who at least initially served either high income elders engaged in end of life planning, or low income elders in need of greater state assistance.<sup>13</sup> The identities analysis perspective also tells us of the importance of intersectionality, of being mindful of the interaction of critical vulnerabilities or identity characteristics.<sup>14</sup> How does race, class, gender, sexual orientation play a role, or do we render those invisible; does age erase or minimize in a way that is potentially very revolutionary?

An example of this is income issues, and the impact of income on housing and medical needs. These needs will differ greatly based on high or low income; may differ also based on race because of the high correlation between race and income (and even with high income, disproportionate care); and may differ based on gender (due to the differential earning patterns of women and men). Thus, income and related issues are affected by identity, not just the shared vulnerability of whether any particularly elder will have sufficient income to meet their needs (although even that vulnerability is not shared at all by the very wealthy).

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Essentialism, Multiculturalism, and the Recognition of Religious Groups' (1998) 6 *Journal of Political Philosophy* 378.

<sup>13</sup> For resources on U.S. conceptions of elder law, see generally P Banks, 'A New Age and a New Court for Older Litigants' (2010) 22 *Experience* 12; 'Bibliography: Gerontology and the law: A Selected Annotated Bibliography (2006–2008 Update)' (2010) 84 *Southern California Law Review* 251; M Fineman, "'Elderly" as Vulnerable; Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71; L Frolik, 'The Developing Field of Elder Law Redux: Ten Years After' (2002) *Elder Law Journal* 10; SJ Hemp and CR Nyberg, 'Elder Law: A Guide to Key Resources' (1995) 3 *Elder Law Journal* 1; AH Hook and T Begley Jr, 'Lawyering for Older Clients: A New Paradigm' (2006) 1 *National Academy of Elder Law Attorneys Journal* 269; N Kohn and ED Spurge, 'Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field' (2010) 59 *Journal of Legal Education* 414; B Krooks, *Helping Elder Law Clients During a Changing Environment and Struggling Economy* (Aspatore, 2011); CC Reaves, 'My Approach to Teaching Elder Law' (2010) 40 *Stetson Law Review* 301; PH Schuck, 'The Golden Age of Aging, and its Discontents' (2010) 18 *Elder Law Journal* 25.

<sup>14</sup> On intersectionality, see eg, FR Cooper and AC McGinley (eds), *Masculinities and the Law. A Multidimensional Approach* (New York, New York University Press, 2012).

Finally, vulnerabilities analysis focuses particularly on state policies and institutions, and the exercise of state power, with the goal of a responsive state. It demands that unequal or differentiated state action be justified.<sup>15</sup> This approach may be particularly useful in terms of intergenerational comparisons and claims on state resources. Although children and many elders are dependent, the state treats their dependencies very differently. The American model is one of greater support of the elderly than of children. The demographic challenge of the next several decades poses the question of whether one generation should be responsible for another as less younger citizens are available to support older citizens, but that question must be asked in terms of overall state support.<sup>16</sup>

## Workshop themes

Professor Ann Numhauser-Henning presents a frame of reference for the Norma Project that includes both European Union and Swedish points of reference.<sup>17</sup> Immediately apparent from this perspective is the stark difference between the American setting<sup>18</sup> and the Swedish/EU setting, grounded in the scope and understanding of the social welfare state in the European context.<sup>19</sup> The genesis, then, of elder law is quite different because of this. One might be tempted to think that therefore the roads part here and there is little to compare. But one would be wrong, because the policy

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<sup>15</sup> Fineman, 'Anchoring Equality', supra note 1, 14.

<sup>16</sup> For statistics on the American demographics, see [census.gov/population/socdemo/agebrief.html](http://census.gov/population/socdemo/agebrief.html) and [www.aoa.gov/AoARoot/Aging\\_Statistics/\\_redirects/Aging\\_Stats.aspx](http://www.aoa.gov/AoARoot/Aging_Statistics/_redirects/Aging_Stats.aspx).

<sup>17</sup> Ann Numhauser-Henning in this volume.

<sup>18</sup> In the U.S. elder law has been defined in large measure by practicing lawyers who have responded to the needs of elders (defined as those over age 60–65) for legal counseling related to issues unique to this phase of the life course. Practitioners brought this field to the law schools, who responded in most schools with a single course in Elder Law, often taught by adjunct faculty. The field has been less well developed as an academic area of research and scholarship, although it has benefitted from the insights and practical experience of practitioners. Clearly, however, there are huge policy areas that are pressing particularly as the baby boomer generation triggers a demographic emphasis on elder issues in all countries.

<sup>19</sup> One of the attendees at the conference, Niklas Selberg, also suggested adding constitutional law.

issues, as further explored below, are quite similar. In addition, the debate between state care and privatization is present in both. Irrespective of geographic or social location, the policy areas demand interdisciplinary conversation, particularly but not exclusively, between law and medicine. In addition, they benefit from international comparison and reference as well to international human rights frameworks.

Professor Numhauser-Henning presents alternative ideological frameworks to think about elder law. These are critical, in my view, to the elder law project because they challenge the framework for policy.<sup>20</sup> In addition to vulnerabilities and identities analyses, she explores critical legal positivism, law as normative patterns, and antidiscrimination theory. A theoretical focus similarly informs Professor Titti Mattsson's exploration of elder's rights of dignity and integrity within a rapidly changing society, and the implications for private and public contexts. Her interrogation of elder policies with this critical lens focuses on actual implementation and the link to these vital rights in several contexts.

The papers that follow are organized under three frameworks: empowerment of workers; empowerment of citizens and empowerment of migrants.

What emerges from the papers on workers is the critical interrelation between the employment/labor law system and the pension/retirement system. Numhauser-Henning explores compulsory retirement, and the interrelation of the structure of both systems in constructing a norm of when work ends and retirement begins. She also adds to this analysis the principle of non discrimination on the basis of age, which seems directly contrary to the notion of compulsory retirement. Yet, as she points out, forced retirement has passed muster in the EU. One of the intriguing aspects of the nondiscrimination principle is that age discrimination can begin as early as 40,<sup>21</sup> which would bring the definition of elder considerably lower

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<sup>20</sup> One additional theoretical model suggested at the conference was the work of Iris Marion Young. See generally IM Young, *Inclusion and Democracy* (Oxford, Oxford University Press, 2002); IM Young and M Nussbaum, *Responsibility for Justice* (Oxford, Oxford University Press, 2013).

<sup>21</sup> For example, the American Age Discrimination Act, the ADEA, demarcates 40 as the beginning age for the protected class.

than it might be if we define elder by 'retirement age', which might be 60–65 by law or custom.

Jenny Julén Votinius reinforces the importance of the question of what age constitutes the triggering boundary of elders, and the link to earlier stages and ages in work life, citing two EU efforts to help elders, one beginning at age 45, the second at age 55.<sup>22</sup> More significantly, she reminds us of the importance of the intersection of age and gender, and the necessity of intersectional analysis to achieve the goals of serving elders. If the life patterns of older women and men are different then this difference is place to begin, she argues, to implement the EU's new focus on intersectionality.

Focusing on work also raises issues of intergenerational opportunity, particularly balancing the rights of younger persons to enter and achieve in the work force, as against the rights of older workers to continue working, unlimited by an arbitrary age of retirement. Both might lay claim to the value and defining meaning of work. If elders want to engage in meaningful work, in 'active aging', then what does that mean?<sup>23</sup> The concept of 'active aging', as Pettersson points out, appears to prioritize continued employment in the reconceptualization of aging.<sup>24</sup> On the other hand, if work generates an entitlement to not work, to retire, then that requires careful planning for a system that can sustain elders without placing an undue burden on those who work to sustain the retirement system. In addition, it is clear that the sufficiency of income and the degree of income security has a significant impact on the decision to retire and/or the decision to return to work full or part time.

All of these issues are linked to images of work and retirement, complicated by the reality of increasing life spans. As Per Norberg pointed out, we must question worker expectations about what they will receive at retirement (and who is responsible for funding retirement).<sup>25</sup> As he points out, 50% of current children in Sweden can expect to live to be 100. He also reminds us that two other interlocking systems are unemployment and sickness/illness

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<sup>22</sup> Jenny Julén Votinius in this volume.

<sup>23</sup> Mia Rönnmar in this volume.

<sup>24</sup> Hanna Pettersson in this volume.

<sup>25</sup> Per Norberg in this volume.

systems, all of which can come into play for older workers and generate significant forces on actions. Moreover, the portability of pensions, consistent with EU commitment to the free movement of persons, raises additional complex issues.<sup>26</sup>

The family law implications of elder law are multiple. Professor Eva Rystedt's research and research agenda provides a fascinating insight into this process.<sup>27</sup> Marriage is not just for the young; nor is cohabitation or divorce. In addition, the families affected by elders are increasingly complicated by the trends of family life – more cohabitation, divorce, remarriage, relationships among children that are step, half, etc. Her exploration of marriage and divorce when capacity is affected, and requires a guardian or trustee, reminds us that emotional relationships continue all through life. This suggests the importance of a dialogue between elder law and many existing well developed areas of law including family law, employment law, health law, criminal law, etc. Our imagination of who we are talking about likely excludes elders. What happens when we include them? In family law, for example, it might make prenuptial agreements not just an option but far more persuasive as a planning tool for marriage.

Another example is health law. Surely this will be a major component of elder law.<sup>28</sup> Even though health care delivery and payment is different, some of the health care issues are the same. The shift to privatization, marketization, and more choice is a significant change in the relationship of citizens and the state, as noted by Mirjam Katzin.<sup>29</sup> With the far more frequent movement of people, the shift of elders from one country to another raises transnational questions about how these costs will be borne. End of life issues, what care should be a matter of right, mental health issues of dementia and Alzheimer's, also are all issues in common. In addition, the dialogue generated by elder law refocuses attention back to health law as a whole.

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<sup>26</sup> Emma Holm in this volume.

<sup>27</sup> Eva Rystedt in this volume.

<sup>28</sup> Martina Axmin in this volume.

<sup>29</sup> Mirjam Katzin in this volume.

These explorations are a rich exploration of a complex subject. They reinforce the importance of identity factors as critical to the analysis, and that it is essential to bring the most marginalized elders to the center, to insure policies focus on their needs. At the same time, the identity characteristics of elders are unique among other identity groups for their relative privilege and political power. Their character seems to shift, in addition, depending on what area of law we are talking about: work, retirement, health. The scope of who is included in the category, indeed, is not yet clear. This very provisional nature of elder law as explored by the Norma Project is its greatest strength, along with the intellect and dedication of its associated faculty, as demonstrated in the papers in this volume.



# An Introduction to Elder Law and the Normative Elder Law Research Environment

*Ann Numhauser-Henning*

## 1. Elder law – facing one of the grand challenges of our time

The demographic transition resulting from an increasingly ageing population is one of the most important challenges<sup>1</sup> of our time and threatens economic sustainability in terms of employment, pensions and health care systems, as well as overall social cohesion in terms of intergenerational solidarity. The phenomenon is often labelled ‘the greying of the globe’<sup>2</sup> but it is certainly true also for Europe and the European Union (EU).

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<sup>1</sup> Demographic ageing is labelled one of a number of ‘grand challenges’, compare [www.se2009.eu/polopoly\\_fs/1.8460!menu/file/lund\\_declaration\\_final\\_version\\_9-july.pdf](http://www.se2009.eu/polopoly_fs/1.8460!menu/file/lund_declaration_final_version_9-july.pdf), subscribed to by 350 researchers, funders, business representatives and politicians at the Swedish Presidency’s New Worlds New Solutions conference in July 2009, and acknowledged by the Council. [www.ue.eu.int/uedocs/cms\\_data/docs/pressdata/en/intm/110310.pdf](http://www.ue.eu.int/uedocs/cms_data/docs/pressdata/en/intm/110310.pdf).

<sup>2</sup> Compare A Soden in I Doron and A Soden (eds), *Beyond Elder Law, New Directions in Law and Ageing*, (Heidelberg, Springer, 2012) xi.



The 2012 Ageing Report<sup>3</sup> presents a picture, from an EU point of view, of the economic developments that could result from an ageing population in a ‘no-policy change’ scenario, and details the expenditure projections covering pensions, health care, long-term care, education and unemployment transfers for all Member States. The period 2015–2035 will be crucial, as the post-war generation (the ‘baby-boom generation’) will reach pensionable age. Social sustainability requires increased labour-market participation for healthy, elderly individuals who live an active and independent life. – On average, age-related public expenditures are expected to increase by 4.1% to around 29% of GDP, and public pension expenditure by 1.5% to nearly 13% of GDP by 2060. There is, however, a significant disparity across EU Member States. The overall scenario is that fertility rates are expected to increase slightly from 1.59 in 2010 to 1.71 in 2060<sup>4</sup>, whereas life expectancy during the same period will increase by about 8 years for men and 6.5 years for women. This and the continued but decelerating inward migration to the EU will result in a slight increase of the total EU population up to 2040, and a decline thereafter. By 2060, the share of young people (0–14) will remain fairly constant, while the group of those aged 15–64 will become considerably smaller (a reduction from 67% to 56%). Those aged 65 and above will represent a much larger share of the population (rising from 17% to 30%). The number of persons aged 80 and above will come close to the group of 0–14 year olds (rising from 5% to 12%). The economic dependency ratio (persons aged 65 or above relative to those aged 15–64) will thus double, shifting from four working-age persons for every person over 65 to only two working-age persons. Work participation rates are expected to increase significantly – most notably among workers aged 55–64 years and women – and unemployment rates are expected to decrease and converge with structural unemployment rates. Female employment and the employment rate of older workers are projected to reach a steady state as early as 2022 – thereafter, the ageing effect will dominate. Total factor

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<sup>3</sup> The 2012 Ageing Report: Economic and budgetary projections for the EU 27 Member States (2010–2060), Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG), European Economy 2/2012. See also, for instance, ‘Active Ageing and solidarity between generations, A statistical portrait of the European Union 2012’, *Eurostat Statistical books*, 2012 ed.

<sup>4</sup> A fertility rate of 2.1 is necessary for the population to reproduce itself.

productivity is assumed to converge into a long-term historical EU average of 1%. It is also anticipated that labour productivity growth will become the sole source of potential output growth in both the EU and the Euro zone, starting to converge into a labour productivity growth rate of 1.5%.

Intergenerational conflict is one of the threats that may well be an outcome of this demographic trend. As was already indicated above, the dependency ratio is expected to increase dramatically in the years to come. Not only has longevity increased by about 5 years since the 1960s; entry into working life after previous studies has risen by about five years, whereas the exit from working life has occurred five years earlier than before. Add to this the fact that economic crisis has made labour-market entry for young people increasingly difficult, making youth unemployment a serious problem which is also the focus of EU policies.<sup>5</sup> At the same time, according to the EU Treaty (EUT) and its Article 3, solidarity between generations is a goal for the Union. There is also Article 25 in the European Union Charter of Fundamental Rights, which declares that ‘the Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life’, as well as the general ban in Article 21 on discrimination on the grounds of (among other factors) age. It is only natural that the key is to support active ageing across all aspects of life – not only concerning employment but also with regard to community and family activities. Independence is thought to be the solution and active ageing means offering better support to older people in all areas of life. Such a development certainly calls for a change in attitude – from downright ‘ageism’<sup>6</sup> to one that focuses on the potentials of the older age groups. ‘Older people have to be empowered to remain active as workers, consumers, carers, volunteers and citizens.’<sup>7</sup>

In the EU perspective, the threats of an increasingly ageing population have, of course, had important repercussions at political as well as policy level. I only just touched upon such expressions at Treaty level. The worries and

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<sup>5</sup> Compare the Commission’s Communication on the ‘Youth Employment Initiative’, COM(2013) 144 final.

<sup>6</sup> Compare A Road Map for European Ageing Research, FUTURAGE, October 2012 40.

<sup>7</sup> The EU Contribution to Active Ageing and Solidarity between Generations, Brochure by the EU, June 2012 3.

ambitions are also reflected in numerous decisions and policy documents. The European Union declared 2012 ‘The year of Active Ageing and Solidarity between Generations’<sup>8</sup>, with the overall purpose to ‘promote active ageing and to better mobilize the potential of the rapidly growing population in their late 50s and above. Active ageing means creating better opportunities and working conditions for the participation of older workers in the labour market, combating social exclusion through fostering active participation in society and encouraging healthy ageing.’ These ambitions are also reflected in the ‘Europe 2020’ strategy<sup>9</sup> and the employment guidelines of 2010<sup>10</sup>. The EU 2020 Strategy thus focuses on meeting the challenge of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. A goal is set to have an employment rate of 75% for all 20- to 64-year-olds in 2020 and at least 20 million fewer people in or at risk of poverty and social exclusion. According to Employment Guidelines 7 and 8, Member States are urged to increase labour-market participation of individuals 50 and older by introducing policies of active ageing based on new forms of work organisation and lifelong learning. Guideline 10 underlines the importance of effective social security and integration policies to empower individuals and prevent social exclusion. – Increased labour market participation by people aged 55+ is only one aspect — albeit a very important one — of active ageing, and the EU 2020 Strategy was accompanied by a number of so-called flagship initiatives relating to different aspects of the importance of active ageing. In addition to ‘An Agenda for new skills and jobs: A European contribution towards full employment’ from 23 November 2010<sup>11</sup>, these include ‘A digital agenda for Europe’ of 26 August 2010,<sup>12</sup> ‘A European platform

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<sup>8</sup> Decision 940/2011/EU 14 September 2011 by the European Parliament and the Council, *OJ L* 246.

<sup>9</sup> COM(2010) 2020 final.

<sup>10</sup> Council decision 2010/707/EU of 21 October 2010, later extended to 2011, 2012, compare Council decision 2012/238/EU of 26 April 2012.

<sup>11</sup> COM(2010) 682 final.

<sup>12</sup> COM(2010) 245 final/2.

against poverty and social exclusion’ of 16 December 2010<sup>13</sup> and ‘The Innovation Union’ of 6 October 2010.<sup>14</sup>

## 2. Elder law as a research area within and outside the Norma Research Programme

### 2.1. Introductory remarks

There are thus considerable economic and instrumental interests behind the EU’s recent ambitions to promote active ageing. No doubt, the aspect of human rights also plays a role in this regard, as reflected in the EU Charter of Fundamental Rights and its articles on a right to non-discrimination and social inclusion for the elderly – and this despite the lack of an international convention specifically addressing the rights of older people.<sup>15</sup> This ‘double bind’<sup>16</sup> behind the ambitions regarding active ageing reflects what has been referred to as the ‘individual v societal dichotomy’ of elder law.<sup>17</sup>

Ageing society thus implies new challenges to research – not only in terms of Elder Law but more generally. In the EU, the European Research Area (ERA), is a unified research area open to the world and based on the internal market, designed to strengthen the scientific and technological aspects of the Union and its Member States as well as their competitiveness and their capacity to collectively address grand challenges.<sup>18</sup> An integrated part of ERA is ERA-AGE, the European Research Area in Ageing, introduced in

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<sup>13</sup> COM(2010) 758 final.

<sup>14</sup> COM(2010) 546 final.

<sup>15</sup> Compare I Doron and B Spanier, ‘International Elder Law: The Future of Elder Law’ in I Doron and A Soden (eds), *Beyond Elder Law* (Heidelberg, Springer, 2012) 125. See also A Neal, ‘“Active Ageing” and the Limits of Labour Law’ in F Hendrickx (ed), *Active Ageing and Labour Law. Contributions in Honour of Roger Blanpain* (Antwerp, Intersentia, 2012).

<sup>16</sup> F Hendrickx, ‘Age and European Employment Discrimination Law’ in F Hendrickx (ed), *Active Ageing and Labour Law. Contributions in Honour of Roger Blanpain* (Antwerp, Intersentia, 2012).

<sup>17</sup> I Doron, ‘A Multi-Dimensional Model of Elder Law’ in I Doron, (ed), *Theories of Law and Ageing* (Heidelberg, Springer, 2009) 70.

<sup>18</sup> Compare ERA Communication, 17 July 2012.

two steps (2005–2008 and 2009–2012). Following the post-doctoral fellowship programme, FLARE, the first joint research programmes in the ageing field were launched in 2011 – the Joint Programming Initiative ‘More Years, Better Lives – The Potential and Challenges of Demographic Change’<sup>19</sup> and the ERA-AGE 2 call on ‘Active and Healthy Ageing across the Life Course’. There is also the FUTURAGE ‘Road Map for European Ageing Research’<sup>20</sup>, where the major priorities of future European ageing research were set out following consultations involving all major stakeholder groups such as policy makers, practitioners, business people, older people and their NGOs, as well as scientists. Age-related research has thus already become an important part of the seventh framework programme for research and technological development (FP7 2007–13) and is presumed to be even more important in the Horizon 2020 programme (2014–20).<sup>21</sup>

Research of special relevance to an ageing society is thus rapidly becoming increasingly important and also frequent in contemporary science. As will soon be developed here, ‘Elder Law’ as such is not really a new

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<sup>19</sup> See further the ‘Vision Paper of the Joint Programming Initiative More Years, Better Lives: the Potential and Challenges of Demographic Change’, February 2011. The initiative ‘More Years, Better Lives’ comprises five different ‘work packages’: Health & Performance, Social Systems & Welfare, Work & Productivity, Education & Learning, and Housing, Urban-rural Development & Mobility. ERA-Age 2 has a broad scope targeting not only biological, clinical, behavioural and environmental factors, but also the exploration of societal responses to increased longevity emphasizing both social inclusion and sustainability, and also refers to the new initiative ‘The European Innovation partnership for Active and Healthy Ageing’ and its goal to increase healthy life expectancy by 2 years by 2020.

<sup>20</sup> A Road Map for European Ageing Research, FUTURAGE, October 2011. The major priorities are: healthy ageing for more life in years, maintaining and regaining mental capacity, inclusion and participation in the community and in the labour market, guaranteeing the quality and sustainability of social protection systems, ageing well at home and in community environments, unequal ageing and age-related inequalities, and bio-gerontology. The FUTURAGE Road Map suggested eight fundamental assumptions concerning age research: it should be characterized by multi-disciplinarity, active user involvement, a life-course perspective, a person-environmental perspective, diversity, intergenerational relationships, knowledge exchange and technological innovation.

<sup>21</sup> Compare the Commission’s Communication ‘Horizon 2020 – The Framework Programme for Research and Innovation’, COM(2011) 808 final, expecting to ‘turn innovative ideas into breakthroughs’ in order to address, among other social challenges, the one of active ageing.

phenomenon; rather, as a concept – and even more so as a legal discipline – it still has a surprisingly modest presence in the European context.<sup>22</sup> Against the developments only just sketched above, my own research group, the Norma Research Programme<sup>23</sup>, took an initiative in 2011 to create a new research environment in Elder Law at the Law Faculty of Lund University, Sweden, in order to establish this research at national as well as European level.<sup>24</sup> This chapter is an attempt to articulate some of the endeavours of this enterprise, which acknowledges ‘the importance of scientific research as the driver of innovations in public policy’.<sup>25</sup>

Elder Law as a legal research area is comparable in many ways to Women’s Law (later to become Feminist Law) or Child Law. Whereas legal studies and research traditionally have been categorised by the area of regulation – such as labour law, family law, public law, and so on – the legal material here is structured from an external perspective, ie the interest or functioning in the view of – in our case – old(-er) people.

Who are, then, old or elderly people? These notions certainly may appear less obvious than the notion of women or children. As regards today’s feminist studies, Judy Fudge has, however, described these as a ‘shift away from focusing on women as a unified category or analysis and object of study to exploring gender as a constructed, contested and differentiated social relationship’.<sup>26</sup> Women’s Law later transformed into a broader field of knowledge known as feminist scholarship in law, and this area of research is no longer restricted to questions related to the situation of women, but more generally to the gendered aspects of law and legal scholarship. As Elder Law goes, even from the start there is no absolute definition of the object of study. Age meaning ‘length of life to date’ is a continuous phenomenon, and

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<sup>22</sup> See, however, the article by A Evrard and C Lacour, ‘A European approach to Developing the Field of Law and Ageing’ in I Doron and A Soden (eds), *Beyond Elder Law* (Heidelberg, Springer, 2012) arguing for this new research area in the terms of ‘Law and Ageing’.

<sup>23</sup> See further [www.jur.lu.se/norma](http://www.jur.lu.se/norma).

<sup>24</sup> See further [www.jur.lu.se/elderlaw](http://www.jur.lu.se/elderlaw).

<sup>25</sup> The FUTURAGE Road Map (2011) 4.

<sup>26</sup> J Fudge, ‘From Women and Labour Law to Putting Gender and Law to Work’ in M Davies and V Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory*, (Aldershot, Ashgate, 2012).

‘old’ is best defined in a contextualized setting. The group of people relevant for a certain study is thus best decided by taking into consideration the area and problems concerned. The decision regarding the EU ‘Year of Active Ageing’ refers to people 55+ as the group of concern, whereas otherwise people 65+ frequently have been referred to as ‘old’ with reference to hitherto ‘normal’ pension age.<sup>27</sup> But as we all know, the concept of ‘normal’ pension age is now changing. Whereas there were hardly any ‘elderly workers’ around when elder law came into being, these older workers can be assumed to appear in the future – should active ageing strategies succeed as we now know them. There are also more specific concepts such as ‘younger old’ (65–75 years of age), ‘old’ (75–85) and ‘oldest-old’, referring to people who are 85+.<sup>28</sup> Not least the important issue of labour market integration may require us also to take age groups younger than 55+ into consideration. For instance, the U.S. Older Americans Act (introduced in 1965 but amended on several occasions) concerns people who are 40+. In social sciences, ageing, as opposed to chronological ageing, is discussed in terms of functional ageing, reflecting different facets of ageing such as biological ageing, mental ageing and social ageing.<sup>29</sup> The definition of old/older/elderly is thus contextual and must be decided on a case-by-case basis.<sup>30</sup> However, as we have learned from feminist studies, we should also not underestimate the importance of future ‘boundary work’ when defining the scope of Elder Law.

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<sup>27</sup> Compare L Frolik, ‘The Developing Field of Elder Law: A Historical Perspective’ (1993) 1 *Elder Law Journal* 2.

<sup>28</sup> L Frolik, ‘The Developing Field of Elder Law Redux: Ten Years After’ (2002) 10 *Elder Law Journal* 1.

<sup>29</sup> Compare K Nilsson, *To work or not to work in an extended working life? Factors in working and retirement decisions*, Faculty of Medicine Doctoral Dissertation Series 2013:4 (Lund, Lund University, 2012) 23 f with further references.

<sup>30</sup> For a very parallel and also well-informed discussion on the concept disability/disabled in relation to disability law, see D Surtees, ‘What can Elder Law Learn from Disability Law?’ in I Doron (ed), *Theories on Law and Ageing* (Heidelberg, Springer 2009).

## 2.2. A normative elder law framework

It is only natural that there is an emancipatory twist to the Elder Law area of research.<sup>31</sup> This becomes obvious when we compare with the central notion of active ageing as something ‘creating better opportunities and working conditions for the participation of older workers in the labour market, combating social exclusion through fostering active participation in society and encouraging healthy ageing’. This twist also comes naturally with the external perspective of elder people defining the area of studies, ie their needs and general conditions. Nevertheless, it is also appropriate here to note that unlike women, ethnic minorities and other groups, as far as old people are concerned we mainly lack an ‘elder-rights movement’. A reason put forward for this is that older adults do not have a cohesive group identity, as ‘their age-based identity is typically secondary to other, previously adopted identities such as those based on family, religion, occupation, and political affiliation’.<sup>32</sup>

The background for an emancipatory twist to Elder Law may well be sought in the rights of old people as a human right; compare Article 25 in the EU Charter of Fundamental Rights. However, we are still lacking an international convention specifically on the rights of old people, which according to Doron is ‘a major lacuna in international law’.<sup>33</sup> Previous developments are thus described as interpretations of more general human rights conventions from the point of view of the elderly, and more specific elder-rights soft-law instruments. In their argument for ‘Law and Ageing’ as a distinct domain of the law, Evrard and Lacour refer to citizenship as a conceptual base, rooted in a legal and complementary vision of the older

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<sup>31</sup> Compare Doron, ‘A Multi-Dimensional Model of Elder Law’ arguing for the ‘Empowerment Dimension’ as one of five necessary/constitutive dimensions of Elder Law, see further below.

<sup>32</sup> N Kohn, ‘A Civil Rights approach to Elder Law’ in I Doron and A Soden (eds), *Beyond Elder Law* (Heidelberg, Springer, 2012) 24. The article is a powerful argument for a civil-rights approach in Elder Law to overcome its hitherto legal weakness in terms of social welfare.

<sup>33</sup> Doron and Spanier, ‘International Elder Law: The Future of Elder Law’ 146. See further also I Doron, ‘From national to international elder law’ (2005) 1 *J Int Aging Law Pol* 44 and note 16.



person as a human being<sup>34</sup> – an elder-rights or human-rights perspective as it seems, well in harmony with the theories of both Fineman and Tuori, referred to below.

A theory of reference for the Norma Elder Law Programme more generally and with regard to its emancipatory character is thus American Law Professor Martha Fineman's 'Vulnerability Theory'.<sup>35</sup> According to this theory, vulnerability is a universal human condition which characterises the relationship between the individual and the State – it is the State's duty to guarantee the equality of opportunities and decent living conditions which follow from the idea of the equal value of all persons. Moreover, the theory of Fineman tends to draw our attention to laws in the social dimension and the welfare society.<sup>36</sup> The theory leads to an emphasis on the duty on society to provide the resources and institutions necessary to overcome the dependency and shortcomings which characterize human life. Fineman recently published an article dealing specifically with vulnerability of the elderly.<sup>37</sup> Vulnerability must not be equated with harm, any more than age inevitably means loss of capacity – it also presents opportunities for innovation, growth, creativity and fulfilment. 'A responsive state must ensure that its institutions provide meaningful access and opportunity to accumulate resources across the life-course and be vigilant that some individuals or groups of individuals are not unduly privileged or disadvantaged'.<sup>38</sup> U.S. reality, to a greater extent than European reality, is based on the premise that individuals are responsible for their own welfare,

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<sup>34</sup> Evrard and Lacour, 'A European approach to Developing the Field of Law and Ageing' 170.

<sup>35</sup> M Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251.

<sup>36</sup> Compare the Norma Research Programme [www.jur.lu.se/norma](http://www.jur.lu.se/norma).

<sup>37</sup> M Fineman "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(2) *Elder Law Journal* 71. Compare also M Hall, 'Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable' in I Doron (ed), *Theories of Law and Ageing* (Heidelberg, Springer 2009). Hall tries to overcome the presumptions of weakness and incapacity frequently associated with the concept of vulnerability, arguing that equity theory provides a coherent and sophisticated theoretical model for understanding vulnerability as both situational and relational, as opposed to the capacity/autonomy duality.

<sup>38</sup> Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' 102.

and imposes expectations of self-sufficiency and independence on rich and poor, advantaged and disadvantaged alike – also with regard to the elderly. Notwithstanding, negative assumptions around (weakened) capacity and capability among the elderly mix here with positive assumptions based on contributions, earnings and property rights. Fineman describes historical change in the relationship between old age and the ability to work and the reflection of this relationship in U.S. social security, which could result in intergenerational and, potentially, ethnic conflict. Fineman sees an individualized system of privatized insurance as a possible answer to this in a society giving preference to the ‘liberal subject’ before social rights. Vulnerability in this U.S. society is rather perceived as a result of ‘bad choices’ and a lack of control. Fineman, on the other hand, argues that vulnerability is a universal condition positioned as the polar opposite of the liberal subject. She further argues that ‘dependency’, too, is universal and merely a physical or developmental aspect of the human condition – not a failure on the part of the individual or the family. Dependency ‘has been assumed to attach to the elderly as a group’ and is also assigned to the private sphere in contrast to the liberal subject ‘who dominates the public sphere’. According to Fineman, the political subject must be developed in a more inclusive manner ‘to reflect aspects of the human condition that are currently ignored or vilified’, as the liberal subject reflects only ‘one of a range of developmental stages that an actual human individual passes through in the course of a “normal” lifespan’.<sup>39</sup>

Kaarlo Tuori’s theory on Critical Legal Positivism<sup>40</sup> is also of interest to us. According to Tuori, a basic assumption of the individual as free and autonomous is central to the deep structures of the law as we know it.<sup>41</sup> At

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<sup>39</sup> Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ 117. Fineman also addresses the recent risk of discourse going from ‘socialisation’ and the spreading of risks to a more individual approach. The conclusion is that ‘risk is a stigmatizing term in much the same way that vulnerability is when it is applied to populations’ (137). The conclusion is that ‘A vulnerability approach is an integrated approach to society, not one of either separate spheres or competing generations’ (140).

<sup>40</sup> K Tuori, *Critical Legal Positivism* (Aldershot, Ashgate, 2002).

<sup>41</sup> Tuori, *Critical Legal Positivism*. See also H Pettersson, *Frihet från underordning – en kritisk rättsvetenskaplig studie av diskriminering av deltidsarbetande och visstidsanställda* (Malmö, Bokbox, 2012).

first glance, this assumption of freedom and autonomy may seem contradictory to the vulnerability theory, but the two different views can be unified by the critical approach. A basic assumption of the individual as free and autonomous does not imply that this is also the actual state of the law at other levels; many normative interventions aspire precisely to overcome this discrepancy between the ultimate goal of the law and legal and social realities.

Both Fineman's and Tuori's theories and their universal character, which makes vulnerability and individual freedom and autonomy a basic legal structure applicable to all human beings, offer a way to confront the accusation that Elder Law is 'inherently paternalistic'<sup>42</sup> and thus what has been called 'the paternalism v autonomy dichotomy'<sup>43</sup> of Elder Law.<sup>44</sup>

### 2.3. Elder law in a development perspective

Elder Law as it is described in American doctrine is about a mainly applied or practice-oriented approach characterized by a concept such as 'counselling'. In 1993, Professor Lawrence Frolik, with a background from the Pittsburgh School of Law, the University of Nebraska and Harvard Law School, and one of the founders of Elder Law as a separate discipline, wrote a basic article about the early developments of Elder Law for the very first number of the Elder Law Journal.<sup>45</sup> In this article, Frolik describes Elder Law as a product of two occurrences: the development of the legal profession as a continuously more specialized area on the one hand, and on the other hand changes making legal education being more inclusive (women and second-career students) and pragmatic; all of this in combination with the needs of an increasing elderly population. These developments 'explain' the utterly applicative perspective in Elder Law as developed in the U.S. However, Frolik also points to the development of

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<sup>42</sup> Compare Doron's Preface in Doron, *Theories on Law and Ageing*.

<sup>43</sup> Doron, 'A Multi-Dimensional Model of Elder Law'.

<sup>44</sup> Compare also Bichenbach's and others' *universalism* as a model to conceptualize abilities in disability law and, possibly, also Elder Law, see Surtees, 'What can Elder Law Learn from Disability Law?' with further references.

<sup>45</sup> Frolik, 'The Developing Field of Elder Law: A Historical Perspective'.

legal science as such towards 'law as social science rather than a self-contained doctrinal entity'.<sup>46</sup> The focus of Elder Law had thus become the needs of the elderly as a social group rather than specific legal problems – linking to sociology, gerontology, geriatrics, political science, and economics. In another article – ten years later – Frolik again examines Elder Law.<sup>47</sup> Although here Frolik describes the broadening of Elder Law to 'late life legal planning', the applicative character of Elder Law as a professional 'practice' is still evident.<sup>48</sup>

Among later scholars we find Israel Doron, a Professor of Law at Haifa University, Israel. In a 2006 article he describes Elder Law up to that point so as to give a 'broad and rich analysis of current developments from a positivist approach, though feminist and therapeutic approaches up to "law and economics' approach" all attempt to implement known legal theories to the gerontological experience'.<sup>49</sup> He identifies three central future research fronts for Elder Law: (1) the international Elder Law arena, (2) the municipal Elder Law arena, and finally, (3) the jurisprudential gerontology arena.<sup>50</sup> Insights about legal regulation, methodology and philosophy are apt to enrich gerontology, according to Doron, at the same time that applied Elder Law requires knowledge well beyond law. Also according to Doron, the emphasis on Elder Law as an integrated part of gerontological studies implies a character of applied law in Elder Law – together with social workers, psychologists and different groups of public servants and caregivers. There is also a focus on the difference between 'law in the books' and

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<sup>46</sup> Frolik, 'The Developing Field of Elder Law: A Historical Perspective' 15. Frolik categorizes Elder Law as (1) health-related issues and (2) economic aspects such as income/benefits and real estate management, including heritage. The National Academy of Elder Law Attorneys (NAELA) was founded in 1988 and in 1993 already had more than 2,000 members.

<sup>47</sup> Frolik, 'The Developing Field of Elder Law Redux: Ten Years After'.

<sup>48</sup> See also L. Frolik, 'Later Life Legal Planning' in: I. Doron (ed), *Theories on Law and Ageing: The Jurisprudence of Elder Law*, (Heidelberg, Springer, 2009).

<sup>49</sup> I. Doron, 'Elder Law: current issues and future frontiers' (2006) 3 *European Journal of Ageing* 60.

<sup>50</sup> Gerontology is the study of the social, psychological and biological aspects of ageing (whereas geriatrics involves the study of diseases of old people). Law in this context represents an institutionalized social aspect of aging.

‘law and reality’ – characteristic for sociology of law but also for emancipatory research.

Doron was later the editor of two books on Elder Law, both important contributions to the ‘boundary work’ of Elder Law. The first of these concentrated on theories on ‘law and ageing’.<sup>51</sup> Each chapter of the book presents a different theoretical perspective, among them Frolik’s view on Elder Law as later-life planning, Kapp’s on elder law as therapeutic jurisprudence, and Surtees’ on elder law as another branch of disability law. Doron himself presents a multi-dimensional model with five different interrelated and interconnecting legal dimensions<sup>52</sup>. Well-known theoretical perspectives such as feminism and law and economics are also applied to Elder Law in specific chapters. An overall conclusion is ‘that the challenge elder law faces in the future is to transform itself from a social control mechanism of a therapeutic state and a therapeutic jurisprudence into an emancipating, empowering, integrating assertion in an aging society’<sup>53</sup>, or, in the words of Rebecca Morgan, ‘aging is a great universal – everyone does it – every day, but everyone does it differently. No one solution, no one theory, no one-size-fits-all approach to Elder Law will serve’.<sup>54</sup>

Doron’s more recent book bears the title ‘Beyond Elder Law’.<sup>55</sup> The title is a bit disturbing for someone only just starting a research environment on Elder Law – is it already outdated? However, the foreword is reassuring in this regard – the focus of the book is rather Elder Law ‘beyond the early visions of the practice of Elder Law’.<sup>56</sup> What is again addressed is the issue of whether Elder Law is but a practice area, or whether there is more to it than that. One speculation is that ‘as practitioners become attuned to these issues

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<sup>51</sup> Doron, *Theories on Law and Ageing*.

<sup>52</sup> The first dimension is constituted by the fundamental constitutional and legal principles of the existing legal system, whether or not they contain any specifically age-related provisions. Then there is the protective dimension, the dimension of family support, the planning and preventive dimension and lastly the dimension of empowerment.

<sup>53</sup> Doron, *Theories on Law and Ageing* ix.

<sup>54</sup> R Morgan, ‘The Future of Elder Law’ in I Doron (ed), *Theories on Law and Ageing* (Heidelberg, Springer 2009).

<sup>55</sup> Doron and Soden, *Beyond Elder Law*.

<sup>56</sup> Soden, ‘Foreword’ in I Doron and A Soden (eds), *Beyond Elder Law* (Heidelberg, Springer, 2012) xi.

that we will move beyond Elder Law and that its identity will disappear into the landscape of general law'.<sup>57</sup> The forecast, however, is that 'as Elder Law touches on many substantive areas but the interrelationships and dynamics of the substantive areas examined are particularly unique in the context of ageing'<sup>58</sup>, the recognition of Elder Law will continue to expand as the field develops around the world. Different articles outline an international human rights development of Elder Law as well as Elder Rights in a European perspective. Nevertheless, despite the book's proposals of some new directions for the future developments of Elder Law, the practice perspective is still highly present!<sup>59</sup>

The explanations for the 'counselling character' of previous (mainly Anglo-Saxon) Elder Law are surely manifold. One may be that in the early days, elder law's relation to 'the grand challenge' of ageing society was less obvious, thus making the individual perspective come to the fore. Another explanation is of course the tradition of law studies and legal research as a close companion to the legal profession. Frolik thus ascribed the origins of Elder Law to the growing specialization of the legal profession in combination with the broadening of legal education to new groups.<sup>60</sup> The preconditions are also somewhat different in the U.S. society as compared to the EU and Sweden, the latter two more explicitly falling back on social welfare conceptions.<sup>61</sup> Establishing Elder Law in Europe as a new area of research in response to ageing society as such, and the strategies that go with it, makes it only natural to pay more attention to the structural implications of certain legal and societal solutions related to ageing – at the macro level, so to speak.<sup>62</sup> These differences draw attention to what has been called 'the

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<sup>57</sup> Soden, 'Foreword' ix.

<sup>58</sup> Soden, 'Foreword'.

<sup>59</sup> Compare Morgan, 'The Future of Elder Law'.

<sup>60</sup> Frolik, 'The Developing Field of Elder Law: A Historical Perspective'.

<sup>61</sup> For a parallel reasoning in relation to anti-discrimination laws, compare G de Búrca, 'The Trajectories of European and American Antidiscrimination Law' (2012) 60 *Am. J. Comp. Law* 1.

<sup>62</sup> Compare the FUTURAGE Road Map 40: to fight ageism we 'must not only focus on perceptions and individual behaviour but also seek to develop interventions to change discriminatory practices and processes at an institutional level. This is a key area for meso and macro level research', and 'to what extent is discrimination institutionalised through legislation and regulations?'

individual versus the societal dichotomy' of Elder Law.<sup>63</sup> Of course, this does not mean that the counselling approach does not also have its obvious place in European Elder Law. In this perspective it is also obvious for me that the issue of age discrimination – within and beyond employment – is a central element for Elder Law, as are elder rights and human rights for older persons.<sup>64</sup>

### 3. The Norma Elder Law Research Environment

Within the Norma Research Programme, focusing on the normative development within the social dimension and thus initiating an integrated research environment in Elder Law, the late Anna Christensen's Theory of Law as Normative Patterns in a Normative Field<sup>65</sup> has proven to be exceptionally fruitful in earlier studies. The theory implies that law can be described as basic normative patterns put into play in a normative field, and these patterns also function as normative poles in this field. Important

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<sup>63</sup> Doron, 'A Multi-Dimensional Model of Elder Law'.

<sup>64</sup> H Meenan, 'Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand?' in I Doron and A Soden (eds), *Beyond Elder Law* (Heidelberg, Springer, 2012). Here, Meenan identifies elder rights, age discrimination and human rights for older persons as distinct bodies of law, also different from Elder Law in the traditional sense. This may be so from a traditional Anglo-Saxon perspective. There may also be a reason from the EU-law point of view to keep elder rights, age discrimination and human rights for older persons separate from Elder Law, the latter falling, strictly speaking, within the remit of the individual EU Member States' competence at this point in time. But, as already Meenan argues, and with a reference to Rebecca Morgan, 'if elder law is described as "the particular manner in which any aspect of law touches the lives of older persons", surely age discrimination must be a branch of the elder law tree'. This argument also applies to elder rights and human rights for older persons. In fact, Meenan's whole article is an argument for such a broader approach to Elder Law. This is also the approach that even now seems the only reasonable one from my point of view.

<sup>65</sup> A Christensen, 'Normative Patterns and the Normative Field: A Post-liberal View on Law' in T Wilhelmsson and Hurri (eds), *From Dissonance to Sense, Welfare State Expectations, Privatisation and Private Law* (Aldershot, Ashgate, 1999). See also A Numhauser-Henning, 'Understanding Law as Normative Patterns' in A Numhauser-Henning and M Rönnmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford, Hart Publishing, 2013, forthcoming).

normative basic patterns in the legal regulation of the social dimension are the Market Functional Pattern, the pattern of Protection of Established Position and the pattern of Just Distribution. Law should be understood as a complex interplay between such normative basic patterns, which can be described but not deduced into binding legal terms. To guarantee older persons a decent life with social and cultural inclusion – compare Article 25 of the EU Charter on Fundamental Rights – is thus an important point of departure for the Norma Elder Law Research Environment, but this value is a political one and is not to be deduced from legal reasoning as such. This research approach is characterized by an emancipatory interest, too, effectuated first and foremost through the deepened understanding of the law and its inner and outer contexts being the result of such studies. The Norma Elder Law Research Environment has been initially organized in three focus areas of study: (I) Legal Empowerment of Elderly Workers, (II) Legal Empowerment of Elderly Citizens, and, (III) Legal Empowerment of Elderly Migrants.

(I) An increased participation of old people in working life is thus a crucial part of active ageing strategies as described above (Sec. 1) and of the utmost importance for sustainable societies. Key issues from a working-life perspective are thus (i) how to make people continue working until they reach pensionable age, (ii) how to make people work beyond pensionable age, and (iii) how to facilitate access to employment for older workers. The relationship of labour-market integration, the ban on age discrimination and compulsory retirement is an important research area within this focus area of the environment (Numhauser-Henning). Flexicurity is another such area (Rönnmar) as are perceptions, more generally, of ageing within labour law and complementary social security systems (Pettersson). As anti-discrimination law approaches become more important, so does intersectional discrimination, ‘mixing’ old age and other established grounds of differential treatment and making them interact concurrently (Julén Votinius).

(II) Citizens’ and social rights of old people are also crucial in effectuating the right to live in dignity and independence, and participating in social and cultural life – an express goal of the EU (Article 3 TEU). Here, fundamental rights of the mentally disabled elderly are studied in a family-law setting (Ryrstedt). Another important research area is the impact of the ‘marketization’ of elder care or the ‘automation’ of public services in the



form of E-government (Mattsson, Katzin) on the social rights of the individual coming of age in a rapidly changing society. The interaction between social security systems, pensions and the labour market is also studied (Norberg).

(III) Migration is targeted as a factor of crucial importance for the functioning of EU Member States in the years to come, and mobility within the Union is a fundamental concern for the internal market. Inward migration is thus a precondition for the functioning of labour markets as the active population of EU natives decreases. The factual as well as legal conditions of different migrant groups challenge social cohesion and the legitimacy of society as a whole. Diverging social standards between Member States are thus a severe ‘solidarity challenge’ – not only in terms of generations but for the Union as such. Mobility challenges occupational pension systems as well, as do statutory pensions and other parts of the social security system in situations of migration (Holm). The same is true for health care and long-term care systems (Axmin).

## 4. Final remark

Elder Law is thus a multidisciplinary research area with tremendous potential and possibly also societal implications. In Europe it is still in its initial phase. The future ‘boundary work’<sup>66</sup> of Elder Law in this European and a more globalized context will surely be challenging – not least considering its previously established and rather limited applied character in the Anglo-Saxon world.

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<sup>66</sup> Compare J Conaghan, ‘The Making of a Field or the Building of a Wall? Feminist Legal Studies and Law, Gender and Sexuality’ (2009) 17 *Feminist Legal Studies* 303.

# I Legal Empowerment of Elderly Workers



# Age Discrimination and Compulsory Retirement

*Ann Numhauser-Henning*

## 1. Introduction

Increased participation in the labour market by older people is an extremely important part of active ageing strategies as reflected in the policy instruments briefly presented in the introductory chapter. This is also the reason why ‘Legal Empowerment of Elder Workers’ is one of the three main initial areas of study in the Norma Elder Law Research Environment. Key issues regarding increased labour-market participation on the part of older workers are (1) how to make people continue working until they reach pensionable age, (2) how to make people work beyond pensionable age, and (3) how to facilitate access to employment for older workers. This is also my own field of study in the sub-project ‘Age Discrimination and Compulsory Retirement’, with an emphasis on the first two issues.<sup>1</sup> In an article for the European Labour Law Network<sup>2</sup> I analysed the position of elder workers in labour law more generally, whereas in other articles I have concentrated on retirement issues and their interrelation with age discrimination and

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<sup>1</sup> Compare also the FUTURAGE Road Map for European Ageing Research, October 2011, listing ‘which impacts would banning the mandatory retirement age have at micro, meso and macro level?’ among the main research questions for the future, 63.

<sup>2</sup> A Numhauser-Henning, *Labour law in a greying labour market – in need of a reconceptualisation of work and pension norms*, ELLN 5th Annual Seminar European Labour Law Network. The Hague, Netherlands 10–12 October 2012.

employment protection.<sup>3</sup> This presentation – especially Section 3 – draws upon these texts. The project will continuously follow up on the legal developments of age discrimination and compulsory retirement in the form of successive articles.

## 2. Non-discrimination and age

Age discrimination and the interrelation between employment and pensions are areas of legal research related to old people (though not in terms of elder law)<sup>4</sup>; these areas have ‘mushroomed’<sup>5</sup> lately in a European perspective. This is no doubt because a ban on discrimination on the grounds of age was introduced relatively recently into EU Law, but of course it is also a reflection of employment and ageing being at the heart of the challenge of demographic ageing.

It is only natural that age-discrimination research so far has mainly addressed the employment context, as this is hitherto the only area covered by a ban on age discrimination in EU law.<sup>6</sup> Following Article 13 of the Amsterdam Treaty (now Article 19 TFEU), giving competence to the EU institutions to undertake measures against discrimination on a variety of grounds including age (and in contrast with the previous situation where

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<sup>3</sup> A Numhauser-Henning, ‘Om avgång i samband med pension och åldersdiskriminering’ in B Nyström, Ö Edström and J Malmberg (eds), *Nedslag i den nya arbetsrätten* (Stockholm, Liber, 2012) 136; A Numhauser-Henning, *Kort normativ reflektion kring avgång med pension*, 2012 (unpublished working paper), and A Numhauser-Henning and M Rönnmar, ‘Compulsory Retirement and Age Discrimination – the Swedish Hörnfeldt Case Put in Perspective’ (forthcoming).

<sup>4</sup> Compare, however, Helen Meenan making a distinction between elder law, elder human rights, age discrimination and elder rights; H Meenan, ‘Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand?’ in I Doron and A Soden (eds), *Beyond Elder Law*, (Heidelberg, Springer, 2012).

<sup>5</sup> The term is borrowed from Dagmar Schiek, D Schiek, ‘Age Discrimination Before the ECJ – Conceptual and Theoretical Issues’ (2011) 48 *Common Market Law Review* 777.

<sup>6</sup> Compare, however, the Commission’s proposal on a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (COM(2008) 426 final), still pending in the EU legislative process.

this was limited to nationality and gender discrimination), the European Commission launched an Action Plan against discrimination in 1999. Later, two new Directives were adopted, ie the 2000/43/EC Race Directive<sup>7</sup> and the 2000/78/EC Employment Equality Directive<sup>8</sup>, respectively. Age is also among the non-discrimination grounds in the (non-exhaustive) list in Article 21 of the EU Charter on Fundamental Rights 2000, after the Lisbon Treaty a part of primary law (cf Article 6 TEU).<sup>9</sup> Age discrimination is thus regulated in the 2000/78/Equality Employment Directive<sup>10</sup>, dealing only with working-life discrimination and some closely related issues such as the membership of a trade union. Both direct and indirect discrimination is prohibited. In terms of age, however – and in contrast to other discrimination grounds<sup>11</sup> – vast possibilities exist to justify not only indirect but also direct discrimination.

As is the case with sex or gender discrimination, EU law is ‘neutral’ with regard to age – it protects individuals of all ages against age discrimination. Both from the Employment Equality Directive itself and from the CJEU case law, it follows that the scope of justifiable differential treatment may

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<sup>7</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment regardless of race or ethnic origin, [2000] OJ L180/ 22.

<sup>8</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

<sup>9</sup> Art 25, the EU Charter also contains a more general rule on the rights of the elderly to lead a life of dignity and independence, and to participate in social and cultural life, whereas Art 34.1 mentions social security and social assistance in the case of old age. Compare also the 1989 Community Charter of Fundamental Rights of Workers, referring to the protection of elderly persons, but not in an equal-treatment perspective. For a more extensive description of international developments concerning the protection of the elderly, see for instance A Neal, “Active Ageing” and the Limits of Labour Law’ in F Hendrickx (ed), *Active Ageing and Labour Law* (Antwerp, Intersentia, 2012).

<sup>10</sup> Notwithstanding, already in *Mangold v Helm*, C-144/04 [2005] ECR I-9981, the CJEU stated that the principle of non-discrimination on grounds of age is to be regarded as a general principle of EU law. German legislation making way for an unlimited series of fixed-term employments already from the age of 52 was found to be disproportionate in relation to the general aim to further employment for people 52+, and this despite the fact that the Employment Equality Directive was not yet implemented – the case involved the implementation of the Fixed-term Work Directive.

<sup>11</sup> With the exception of part-time work and fixed-term work discrimination, compare Art 4 in the Part-time Work Directive 97/81/EC, [1998] OJ L14/9, and Fixed-term Work Directive 99/70/EC, [1999] OJ L175/43, respectively.

well vary with the situation and then also with age, working both to the advantage and detriment of old people. Nevertheless, looking strictly upon both feminist law and elder law from an EU anti-discrimination law perspective, the ‘emancipatory’ character of EU law can well be questioned, as it is ‘neutral’ in its design. This does not imply, however, that a project such as mine does not have an emancipatory research interest in the perspective of old people.

This line of reasoning brings to mind the paternalistic character often said to be inherent in anti-discrimination legislation and also in elder law as such.<sup>12</sup> This is especially true with regard to disability as grounds for discrimination – being asymmetrical in nature. Inasmuch as elder law – eventually in terms of anti-discrimination – works through protective legal devices, it too has been accused of paternalism. On the other hand, the equality – or non-discrimination – approach to Elder Law is a legal approach stemming from ‘the Legal Principles Dimension’ of Elder Law, in the words of Doron.<sup>13</sup> It is universal in origin, thus offering a precise way to bridge the dichotomy between the paternalistic/autonomy divide of Elder Law. This is, of course, particularly true with regard to EU anti-discrimination law and its formally ‘neutral’ character, as it protects individuals of all ages against age discrimination. On the other hand, this may well disguise the fact that it is not only incapable of providing legal responses to the needs of the group to be protected – in our case the elderly – as anti-discrimination regulation often is, but also the fact that anti-discrimination law in this case may provide special justification precisely to the detriment of older people. The ‘individual rights approach’ (compare below), the often formal equality character and the complaints-led design of traditional anti-discrimination law are thus generally seen as qualities ‘blocking’ substantive equality from

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<sup>12</sup> Compare D Surtees, ‘What can Elder Law Learn from Disability Law?’ as well as I Doron, ‘A Multi-Dimensional Model of Elder Law’ and MJ Hall, ‘Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable’, all in I Doron (ed), *Theories on Law and Ageing. The Jurisprudence of Elder Law* (Heidelberg, Springer, 2009) 93, 59 and 107 respectively.

<sup>13</sup> Ibid.

being established.<sup>14</sup> So does the fundamentally elitist character of discrimination legislation, requiring a comparator and referring to reference norms often based on meritocracy. The scope for justification of direct discrimination, characterising the specific ban on age discrimination, makes way for traditionally accepted differential treatment with direct reference to age; this is especially frequent in labour market organisation.

The vulnerability approach – compare the introduction on Martha Fineman’s Vulnerability Theory – has been launched as an alternative to the equality approach ‘and the limited ability of equality theory’, in order to come to terms with structural and political inequalities in the real world.<sup>15</sup> Formal equality within liberal law design is thus elitist in character, and does not really challenge existing allocation of resources and power, though bans on indirect discrimination challenging existing reference norms may do so to a somewhat greater extent than those on direct discrimination.<sup>16</sup> According to this theory, vulnerability is a universal human condition that puts a responsibility on society to provide the resources and institutions necessary to overcome the dependency and shortcomings characterising human life. Non-discrimination laws are part of such an institutionalised setting and – as regards older people – provide protection within their scope of justified differential treatment on the grounds of age as well as their scope for positive action.<sup>17</sup>

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<sup>14</sup> Compare, for example, A Numhauser-Henning, ‘On Equal Treatment, Positive Action and the Significance of a Person’s Sex’ in A Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination*, (The Hague, Kluwer, 2001) 217.

<sup>15</sup> M Fineman, “‘Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *Elder Law Journal* 71.

<sup>16</sup> Compare A Christensen, ‘Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change’ in A Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination* (the Hague, Kluwer, 2001) 217.

<sup>17</sup> Compare, however, Margaret Hall arguing that ‘vulnerability’ is a stigmatising concept as it is linked to perceptions of ‘weakness’ and ‘loss of capacity’. Hall argues Equity Theory and the conceptual framework of equitable fraud to be the efficient tool in response to the material exploitation of the vulnerable but capable and thus the paternalistic/autonomy divide of Elder Law, Hall, ‘Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable’.



### 3. Compulsory retirement in an EU law setting

The central EU regulation for this sub-project is thus the Employment Equality Directive. It may thus work both to the advantage and detriment of older people. The latter is made obvious by the fact that not only situations regarding alleged age discrimination but more specifically regarding compulsory retirement have flooded the CJEU in the early 21<sup>st</sup> century.<sup>18</sup> The Employment Equality Directive does not apply to rules on retirement age in social security pension schemes and the like (cf recital 14). It does, however, apply to the termination of employment contracts.<sup>19</sup> One would therefore, at first glance, think that rules on compulsory retirement at a certain age should be contrary to the ban on age discrimination. As reflected in case law, however, this is far from the truth.<sup>20</sup> A general background motive for this— as is stated in recital 25 – is that

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<sup>18</sup> See *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05 [2007] ECR I-8531; *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07 [2009] ECR I-01569; *Rosenblatt v. Oellerking Gebäudereinigungsges mbH*, C-45/09 [2010] ECR I-09391; *Georgiev v. Technicheski Universitet, Sofia*, C-250/09 and C-268/09 [2010] I-11869; *Fuchs and Köhler v. Land Hessen*, C-159/10 and C-160/10 [2011] ECR I-00000, and, the somewhat later case the *European Commission v. Hungary*, C-286/12 [2013] ECR I-00000. There is also the Swedish case *Torsten Hörnfeldt v. Posten Meddelande AB*, C-141/11, [2012] ECR I-0000. See also *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08 [2010] ECR I-00047; *Ole Andersen v. Region Syddanmark*, C-499/08 [2010] ECR I-09343; *Prigge v. Deutsche Lufthansa AB*, C-447/09 [2011] ECR I-00000 and *Johann Odar v. Baxter Deutschland GmbH*, C-152/11 [2013] ECR I-00000.

<sup>19</sup> Compare *Palacios de la Villa* and *Age Concern England*.

<sup>20</sup> Let us take the Swedish *Hörnfeldt* case as an example. It concerned Mr Hörnfeldt who had worked on a part-time basis for the Swedish Postverket since 1989. When he reached the age of 67, his employment contract was terminated according to the Swedish ‘67-year rule’. His monthly retirement pension amounted to SEK 5,847 net – quite a low pension according to Swedish standards. He claimed that this constituted unlawful discrimination on grounds of age. In the *Hörnfeldt* case the CJEU concluded that the Employment Equality Directive does not preclude ‘a national measure, such as the Swedish 67-year rule, which allows an employer to terminate an employee’s employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as the measure is objectively and reasonably justified and constitutes an appropriate and necessary means by which to achieve that aim’.

differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

This ‘ambiguous’ position as regards differential treatment on the grounds of age is reflected in Article 6.1 of the Directive concerning the justification of such treatment. According to this Article, Member States may provide that differences of treatment on the grounds of age shall not constitute discrimination if they are ‘objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.

The legal response hitherto (by EU law and the CJEU) to what has been referred to as the ‘double bind’ in age discrimination law,<sup>21</sup> reflecting both a fundamental rights approach built on the equal treatment principle and the importance attached to age when organising society, is not too convincing. The ‘double bind’ is reflected in the application of the discrimination rules concerning age – there is a balance to be struck between the traditional ‘individual rights approach’ and a more ‘collective public interest approach’<sup>22</sup>, linking age discrimination to a larger policy context concerning not only the functioning of labour markets but also pension schemes and overall social welfare in an economic and political perspective.<sup>23</sup> As regards case law on compulsory retirement, Monika Schlachter has stated that ‘there

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<sup>21</sup> See F Hendrickx, ‘Age and European Employment Discrimination Law’ in F Hendrickx (ed), *Active Ageing and Labour Law. Contributions in Honour of Professor Roger Blanpain* (Antwerp, Intersentia 2012).

<sup>22</sup> Hendrickx, ‘Age and European Employment Discrimination Law’ 21. Hendrickx has commented that in *Hörmfeldt*, the CJEU struck a balance between the individual argument and the collective, but tilted the result in favour of the collective.

<sup>23</sup> Schiek considers the aim to protect individuals against stereotyping and the fight against differential treatment – in this case ‘ageism’ – to be the ‘original non-discrimination rationales’, Schiek, ‘Age Discrimination Before the ECJ – Conceptual and Theoretical Issues’.

are almost no limits to the discretion of Member States in adopting mandatory retirement rules'.<sup>24</sup> At the same time she is distinguishing between two separate standards when it comes to justification of differential treatment; one 'control standard' as regards more general systems for compulsory retirement, such as in the *Rosenbladt* case, and another considerably stricter standard when it comes to specific professional groups, such as in the cases *Petersen*, *Georgiev*, *Fuchs and Köhler* and, now recently, *Commission v Hungary*. Claire Kilpatrick has also pointed to the fact that in these cases, the CJEU has developed quite another framework for analysis than the one hitherto applied in sex discrimination cases – 'a looser proportionality test'.<sup>25</sup>

From an EU law perspective, it is the overall assessment of compulsory retirement in relation to the more traditional views within the 'collective public interest approach' that makes one question the acceptance of compulsory retirement. In the main, case law leaves the future challenges uncontested.

Justification standards as regards Article 6.1 of the Framework Directive are (–) rather set up according to an economic rationale – more based on the traditional synchronization of life cycles through social policy than in accordance with contemporary – and even more so future – economic demands.<sup>26</sup>

Working life is thus traditionally restricted more or less by rules on compulsory retirement at a certain age, related to public as well as occupational pension systems. However, working life has also tended to marginalise older workers, including those who have not yet reached pensionable age, thus creating unemployment and costly pre-retirement schemes. These practices are accompanied by social norms that support the functioning of such a system both in terms of 'pension norms' and discriminatory perceptions and behaviour on behalf of, among others,

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<sup>24</sup> M Schlachter, 'Mandatory Retirement and Age Discrimination under EU Law' (2011) 27 *International Journal of Comparative Labour Law and Industrial Relations* 290.

<sup>25</sup> C Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture' (2011) 40 *Industrial Law Journal*.

<sup>26</sup> Schiek, 'Age Discrimination Before the ECJ – Conceptual and Theoretical Issues' 789.

employers. The hitherto prevailing ‘pension norm’ – understood as general perceptions of when to leave working life – says that there is ‘a right and a duty to retire at a certain age’. Such normative conceptions are, of course, a major challenge to contemporary society. The ban on age discrimination is among the essential tools set out to counteract these realities.

From an EU perspective it is true that ensuring that people work until they reach the ‘normal’ pensionable age, thus preventing early retirement and other forms of premature resigning, seems to be the most important factor in making active ageing a reality.<sup>27</sup> However, this future overall scenario makes it only more important to make people today work beyond their normal pensionable age, whenever this is possible. It is thus not obvious that rules on compulsory retirement should be seen as consistent with the ban on age discrimination. In order to make people work beyond ‘normal’ pensionable age, they must have both the practical and the legal possibility to do so. On the other hand, what would a ban on compulsory retirement imply?

A frequent argument in favour of compulsory retirement, now also accepted by the CJEU, is that should there be no formalised ‘end’ to the employment relationship as one grows old, one cannot avoid situations in which employment contracts are terminated in forms which are humiliating for elderly workers.<sup>28</sup> The general rule would then imply that you terminate your working life in terms of a disqualification – a less satisfying order.

In addition, an abolition of the rule of compulsory retirement risks diminishing the employee’s employment protection before he or she reaches retirement age.<sup>29</sup> If retirement practices are to become more diffuse or individualised, there is no possibility to uphold a practice such as the one in Sweden, where as a general rule, ‘normal ageing’ does not constitute just cause for dismissal. And, employers’ incentives for age management by way of systematic work adaptation may also weaken well before retirement age.

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<sup>27</sup> According to the 2012 Ageing Report, the average labour market exit age in the EU-27 was 61.4 years in 2009 and the predicted exit age for 2060 is still ‘only’ 64.3 years.

<sup>28</sup> Hörnfeldt. Compare also Rosenblatt, Georgiev and Fuchs and Köhler.

<sup>29</sup> Compare the Swedish Government Inquiry Report on pensionable age (*Pensionsåldersutredningen*), SOU 2012:28, Ch. 17.

There is a risk that setting no upper limit to employment will cause a decrease in people aged 55+ who work, thus undermining employment protection from 'within'.

Another way to promote social sustainability as the dependency ratio increases is to successively increase the 'normal' retirement age, making people work longer, while still accepting compulsory retirement. What the 'appropriate' pensionable age is, however, is an issue currently at the core of many delicate reform processes across Europe, *inter alia* in the wake of the economic crisis, and leading to political strikes and upheaval. An important reason for these reactions is that pension rights are not only perceived of as social, political rights but also as property rights in the form of postponed income.<sup>30</sup> Such perceptions are reflected in the first part of the traditional pension norm: there is *a right* to retire at a certain age.

#### 4. Concluding remark

As it is now, there thus seems to be a 'normative alliance' between the protection of established pension rights and arguments in favour of a just distribution of 'the right to work' between generations. There is no doubt that economic crisis and high unemployment, especially among younger people, have made the achievement of active ageing policies increasingly difficult. The question is, however, how this conflict will play out as an increased dependency ratio and unsustainable pension costs become more prevalent.

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<sup>30</sup> Compare, for instance, N Eliasson, *Protection of Accrued Pension Rights. An Inquiry into Reforms of Statutory and Occupational Pension Schemes in a German, Norwegian and Swedish Context* (Lund, Juristförlaget, 2001). Compare also the case the *Commission v Hungary*, where the CJEU obiter dictum accepted a general increase in the pensionable age from 62 to 65 years of age in Hungary, meeting reasonable demands on gradual transposition rules; the judgment p 73.

# Flexicurity and the Legal Position of the Elderly

*Mia Rönnmar*

## 1. Introduction

The aim of this research project is to explore and analyse the normative development and content of Swedish employment protection regulation – with a focus on the legal position of the elderly – in light of the EU law flexicurity discourse. Employment protection and flexible employment are in focus, together with equal treatment, employability and the ban on age discrimination.

This research project started in 2013, and relates both to the research projects led by Ann Numhauser-Henning and Per Norberg within the Elder Law Research Environment on compulsory retirement and age discrimination, and sickness insurance and older workers, respectively, and to my earlier research on flexicurity and Swedish employment regulation.<sup>1</sup> There are important links between labour law and social security law – not least within the EU law flexicurity discourse – and in this research project,

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<sup>1</sup> Cf M Rönnmar, 'Protection of Established Position, Social Protection and the Legal Situation of the Elderly in the EU' in A Numhauser-Henning and M Rönnmar (eds), *Normative Patterns and Legal Developments within the Social Dimension of the EU* (Oxford, Hart, 2013, forthcoming), which constitutes a first analysis along these lines, and on which this presentation draws.

the linkages between employment protection and sickness insurance and pensions come to the fore.<sup>2</sup>

## 2. The EU law flexicurity discourse and active ageing

The rapidly ageing population in the EU and an increased number of elderly people challenge social and economic sustainability in terms of employment, pension systems and health care systems, as well as social cohesion and intergenerational solidarity. For some years, EU employment policy and labour law have been greatly influenced by a flexicurity discourse, inspired, for example, by Dutch and Danish labour market strategies and experiences. The Council has adopted Common Principles of Flexicurity, which are handled within the context of the European Employment Strategy and the Europe 2020 Strategy. The aim of flexicurity is to reduce labour market segmentation, but also to increase economic growth and Europe's competitiveness in a global perspective. Flexicurity at EU level includes flexible and reliable contractual arrangements, effective active labour market policies, reliable and adaptable systems for lifelong learning, and modern social security systems.<sup>3</sup> The EU law flexicurity discourse has been criticised for focusing predominately on labour market flexibility and deregulation. Thus, flexicurity is partly about deregulation of permanent employment, combined with the equal treatment of various forms of employment, and partly about a 'tenure track approach' and a 'ladder' of legal protection. However, the EU law flexicurity discourse and its emphasis on flexible and contractual arrangements also pose a risk of increasing the number and groups of vulnerable workers. Inclusion of these vulnerable workers – including older workers – is fundamental, not only in increasing employment and growth, but also in achieving overall stability and

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<sup>2</sup> See A Christensen, 'Normativa grundmönster i socialrätten' (1997) 78 *Retfærd* 69.

<sup>3</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

legitimacy for the EU.<sup>4</sup> Here, equal treatment and non-discrimination are important legal techniques. Consequently, the Part-Time Work<sup>5</sup>, Fixed-Term Work<sup>6</sup> and Temporary Agency Work<sup>7</sup> Directives all incorporate principles of non-discrimination and equal treatment.

Recent Treaty developments demonstrate legislators' increased emphasis on the legal situation and social protection of the elderly. The Lisbon Treaty of 2009 introduced a social market economy and solidarity between generations as main aims of the EU (cf Article 3(3) TEU). Article 25 of the EU Charter of Fundamental Rights – made legally binding by the Lisbon Treaty – establishes the rights of the elderly.<sup>8</sup>

Although life expectancy has risen, and continues to rise quite dramatically, workers are still leaving the labour market prematurely. Apart from the need to provide the elderly with adequate social protection, there is also a need to make people work beyond their pensionable age and ensure that they continue to work until they reach pensionable age; it is also necessary to facilitate access to employment for older workers.<sup>9</sup> The elderly are not easy to define as a group, at least not in terms of a single common denominator.

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<sup>4</sup> Cf Fineman on the vulnerability theory, and Fineman's argument that vulnerability is a basic human condition that characterises the relationship that must exist between the state and the individual – the state and the legal system must in some sense guarantee the equal opportunities arising from the principle that all human beings are equal; see M Fineman, 'The Vulnerable Subject and The Responsive State' (2010) 60 *Emory Law Journal*.

<sup>5</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working, concluded by UNICE, CEEP and the ETUC.

<sup>6</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work, concluded by ETUC, UNICE and CEEP.

<sup>7</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

<sup>8</sup> The Explanations relating to the EU Charter of Fundamental Rights emphasises that this Article draws on Article 23 of the European Social Charter, and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers, see *Explanations relating to the Charter of Fundamental Rights*, (2007/C 303/02). See further M Mikkola, *Social Human Rights of Europe* (Karelactio, 2010) 526.

<sup>9</sup> See A Numhauser-Henning, *Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms*, Keynote Paper on the occasion of the 5<sup>th</sup> Annual Legal Seminar European Labour Law Network 11–12 October 2012.



In discussions related to working life the elderly – older workers – are often workers 55 years or older (55 +).<sup>10</sup>

2012 was declared the Year of Active Ageing in the EU. Active ageing implies generating better opportunities and working conditions for the participation of older workers in the labour market, combating social exclusion through fostering active participation in society and encouraging healthy ageing.<sup>11</sup> The policy strategy of active ageing contains different target areas. One important target area, of specific interest for this research project, is increased labour market participation of 55 + persons.<sup>12</sup> Similar ambitions are part of the Europe 2020 Strategy and the 2010 Employment Guidelines.<sup>13</sup> The Europe 2020 Strategy is generally aimed at smart growth, sustainable growth and inclusive growth, and also aims *inter alia* at meeting the challenge of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. The ban on age discrimination – regulated in the Framework Directive<sup>14</sup> – helps to reduce ageism, and is also an important part of the strategy for active ageing.

### 3. Employment protection and older workers

In general, employment protection as such is only partly regulated at EU level (cf Article 153(1) TFEU). Article 30 of the EU Charter of Fundamental Rights states that '[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national

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<sup>10</sup> Compare Article 2 of the Commission's proposal regarding a European Year of Active Ageing (2012), COM(2012) 462 final.

<sup>11</sup> See Decision 940/2011/EU 14 September 2011 by the European Parliament and the Council, EUT L 246.

<sup>12</sup> See European Commission, *Active Ageing Report 2012* and Decision 940/2011/EU 14 September 2011 by the European Parliament and the Council, EUT L 246.

<sup>13</sup> See Communication from the Commission, *Europe 2020. A Strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, Employment Guidelines 2010 and Council Decision of 26 April 2012 on guidelines for the employment policies of the Member States.

<sup>14</sup> Council Directive 2000/78/EC of 17 November 2000 establishing a general framework for equal treatment in employment and occupation. Cf also Article 21 of the EU Charter of Fundamental Rights.

laws and practices'.<sup>15</sup> In addition, the Fixed-Term Work Directive, the 'restructuring' Directives on Transfers of Undertakings<sup>16</sup> and Collective Dismissals<sup>17</sup> and different directives on non-discrimination regulate different aspects of employment protection. Thus, employment protection regulation may, and indeed does, differ among the Member States.

Following the economic crisis, especially the sovereign debt crisis, many Member States initiated far-reaching austerity measures and deregulatory labour law reforms. These measures targeted employment protection regulation, but also collective bargaining and wage-setting and industrial relations processes. The Member States given 'bail-out' packages by the 'Troika' were particularly affected. This development has been much criticised by the ILO, trade unions and labour law scholars, for example, as regards the disrespect for fundamental rights and the strong move towards labour market flexibilisation. Deregulatory reforms affecting employment protection regulation can now be found in countries such as Greece, Portugal, Spain, Italy, the UK, Hungary and Poland.<sup>18 19</sup>

The vulnerability of older workers has characterised the formation of employment protection regulation in Sweden and many other Member States of the EU. In Sweden an important background to the first Employment Protection Act from 1974 was the need for social protection of

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<sup>15</sup> According to the Explanations relating to the EU Charter of Fundamental Rights, Article 30 draws on Article 24 of the European Social Charter. Cf *Explanations relating to the Charter of Fundamental Rights*, (2007/C 303/02). Note should also be taken of ILO Convention No 158 Termination on Employment Convention 1982.

<sup>16</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

<sup>17</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

<sup>18</sup> Cf, for example, C Barnard, 'The Financial Crisis and the Euro Plus Pact: a labour lawyer's perspective' (2012) 41 *Industrial Law Journal* 98, and S Clauwaert and I Schömann, *The crisis and national labour law reforms: a mapping exercise*, ETUI Working Paper 2012:04 (Brussels, ETUI, 2012).

<sup>19</sup> See M Rönningmar and A Numhauser-Henning, 'Swedish employment protection in times of flexicurity policies and economic crisis' (2012) 28(4) *International Journal of Comparative Labour Law and Industrial Relations* 443, for an analysis of Swedish employment protection regulation in light of the EU law flexicurity discourse, and recent developments in legislation, collective bargaining and case law.

workers made especially vulnerable as a result of advanced age or sickness, and the need to counteract a segmented labour market, with a division between young and well-educated employees on the one hand, and older, disabled and less educated employees on the other.<sup>20</sup> Thus, employment protection regulation may provide for various kinds of special protection for older workers. In Sweden, the general rule that sickness or old age does not constitute objective grounds for dismissal is of course very important as a starting point. The employer has extensive obligations to rehabilitate the employee and to adjust the working environment and the job duties or tasks. An employee can be dismissed only after such measures have been taken, and the employee can no longer perform work of any importance for the employer. The extent to which sickness or reduced working capacity constitutes objective grounds for dismissal differs among the Member States.

In addition, seniority rules offer protection for older workers in redundancy situations and make them less vulnerable. In Sweden, the statutory seniority rules imply that the order of priority and selection of employees is to be made according to the last-in-first-out principle, ie according to each employee's total period of employment with the employer (and in the event of equal periods of employment, giving priority to senior age; section 22 of the (1982:80) Employment Protection Act). In principle, the order of dismissals encompasses all employees who are in the same production unit and who are covered by the same collective agreement (redundancy unit). However, the seniority rules are 'semi-compelling', and in virtually all respects, the employer and the trade union can deviate from the statutory rules when determining the order of dismissals. The principal restriction is that the decided order of dismissals must not go against so-called good labour market practice, and be blatantly discriminatory or offensive.<sup>21</sup> –

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<sup>20</sup> See Governmental Bill Prop 1973:129 126 and B Nyström, 'Active Ageing and Labour Law in Sweden' in F Hendrickx (ed), *Active Ageing and Labour Law. Contributions in honour of Professor Roger Blanpain* (Antwerp, Intersentia, 2012).

<sup>21</sup> See Labour Court judgements AD 1983:107, AD 1996:114 and AD 2002:37. – An employer with at most ten employees may, before the order of dismissals is determined, exempt at most two employees who, in the opinion of the employer, are of particular importance for future activities, section 22 subsection 2 of the (1982:80) Employment Protection Act. See Governmental Bill Prop 1999/2000:144 and Labour Court judgement AD 2005:32. – Important to note, however, is that recent and controversial case law (Labour Court judgments AD 2009:50 and AD 2011:30) shows that an

Seniority principles can also be influential when it comes to wage-setting and working conditions, such as periods of notice and length of annual leave.

The Swedish seniority rules, and the last-in-first-out principle, are potentially indirectly age-discriminatory (with a directly age-discriminatory element, in the way in which the employee's age is decisive in situations when the period of employment of two or more employees is the same).<sup>22</sup> Perhaps surprisingly, the age-discriminatory character of the rules has not been the centre of attention in Sweden; instead, the discussion has revolved around the need for protection against arbitrary dismissals and the need for increased labour market flexibilisation. The debate has also touched upon the current problem of high youth unemployment in Sweden, and the disputed links between seniority rules and youth unemployment. There are, however, signs that seniority rules such as the ones mentioned here may be found acceptable according to EU law.<sup>23</sup>

If the employee is actually dismissed, this employee has a priority right to re-employment, a rule that facilitates access to employment for older workers. Any employment opening within nine months from the expiry of the former employment should be offered to employees dismissed by redundancy, on the condition that the employees are sufficiently qualified and have been employed for more than twelve months in total during the last three years, with the employer in question (section 25 of the (1982:80) Employment

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employer has considerable opportunities to reorganise and set aside the seniority rules, and thereby undermine the employment protection of older workers. See further Rönmar and Numhauser-Henning, 'Swedish employment protection'.

<sup>22</sup> Some directly age-discriminatory elements, such as the provision of extra protection for employees above the age of 45, were removed from the Employment Protection Act in 2007.

<sup>23</sup> See the Opinion of Advocate-General Bot in Case C-555/078 *Seda Küçükdeveci v. Swedex GmbH & Co KG*, paragraph 43. Cf also C O'Conneide, *Age Discrimination and European Law* (European Commission, 2005) 40; A Numhauser-Henning, 'Åldersdiskriminering och några anställningsskyddsrelaterade frågor' in K Ahlberg (ed), *Vänbok till Ronnie Eklund* (Uppsala, Iustus, 2010) 469 f and Governmental Bill Prop 2007/08:95 183.

Protection Act). The order of employees being offered employment is decided in accordance with the last-in-first-out principle.<sup>24</sup>

In Sweden, compulsory retirement is regulated through the ‘67 year-rule’, in sections 32a and 33 of the (1982:80) Employment Protection Act.<sup>25</sup> An employee has a right to stay in employment up until the age of 67, at which point the employer may terminate the employment relationship after one month’s notice and without having to provide objective grounds for dismissal. If the employer does not make use of this possibility, the permanent employment relationship continues; however, it does so with limited employment protection (for example, the employee has one month’s notice, and is given no right of priority in accordance with seniority rules or rules on re-employment in redundancy situations). This Swedish system has now been tried – in the recent *Hörnfeldt*<sup>26</sup> judgement – by the Court of Justice of the European Union, and found acceptable according to EU law, the ban on age discrimination and Article 6 of the Framework Directive.

#### 4. Flexible employment and older workers

There is also regulation providing for a broader scope for fixed-term work (or other forms of flexible work) for older workers. Such regulation aims at facilitating access to employment for older workers and at prolonging working life. In Sweden, short fixed-term employment was ‘normalised’ in a reform in 2007 through the introduction of general fixed-term employment. The employer is free to enter into general fixed-term employment contracts, and there is no requirement for objective reasons. However, when an employee has been employed – in a general fixed-term employment *or* as a temporary substitute – by one employer for a total of two years during the last five years, the contract is automatically converted into an indefinite permanent employment contract, section 5 subsection 2 of the (1982:80) Employment Protection Act. A long ‘catalogue’ of fixed-term employment

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<sup>24</sup> See Numhauser-Henning, *Labour Law in a Greying Labour Market* and Rönmar and Numhauser-Henning, ‘Swedish employment protection’.

<sup>25</sup> Cf, however, the Governmental Inquiry Report SOU 2013:25 from the Swedish ‘Pensionable Age Inquiry’ and its proposal to raise the pensionable age in Sweden.

<sup>26</sup> Case C-141/11 *Hörnfeldt v. Posten Meddelande AB*, not yet reported.

contracts has been replaced by general fixed-term employment, supplemented only by temporary substitute employment, seasonal employment, fixed-term employment contracts for employees above the age of 67 years, and probationary employment.<sup>27</sup> When an employee turns 67, fixed-term employment contracts may be freely entered into. This rule can also be challenged as potentially age discriminatory, and the question here is if the Court of Justice of the EU would find arguments linked to intergenerational fairness and the need to keep older workers in work longer to be legitimate aims, and the means of achieving those aims appropriate and necessary according to Article 6(1) of the Framework Directive.

The 2007 reform was challenged by Swedish trade unions through a complaint to the European Commission, which in turn declared in a formal notification followed by a reasoned opinion (in February 2013) that Sweden had failed to correctly implement the Fixed-Term Work Directive and had not adequately prohibited the abuse of successive fixed-term employment contracts. In this process, the Government put forward two different reform proposals to clarify and strengthen the prohibition of abuse of successive fixed-term employment contracts and to bring Swedish law more in line with the Fixed-Term Work Directive and EU law. Neither of these proposals has yet been turned into Governmental Bills. However, in April 2013 the Government sent an answer in response to the European Commission's reasoned opinion, and maintained that the Swedish legislation fulfilled the requirements of the Fixed-Term Work Directive, and that there was no need to take further legislative action.<sup>28</sup>

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<sup>27</sup> For further details on the regulation of fixed-term work, see M Rönmar, 'Labour Policy on Fixed-Term Work. Sweden' in T Araki and H Nakakubo (guest eds), R Blanpain (ed), *Bulletin of Comparative Labour Relations* (Alphen aan den Rijn, Kluwer Law International, 2010) 157. See also Governmental Bill Prop 2006/07:111.

<sup>28</sup> See Svar på Europeiska kommissionens motiverade yttrande angående införlivandet av direktiv 99/70/EG av den 28 juni 1999 om ramavtalet om visstidsarbete undertecknat av EFS, UNICE och CEEP (KOM:s ref SG-Greffe(2013)D/2319, ärendenummer 2007/4835).

## 5. Concluding remarks

This research project includes study of both Swedish and EU law, and much attention is focused on analysing the interplay between these levels of regulation and case law from the Swedish Labour Court and the Court of Justice of the European Union, in order to depict and discuss changes in the law. A possible, and interesting, extension of the research project would be to include a broader European perspective, along with comparative analyses of developments in other Member States of the European Union.

# Intersections of Age and Gender

*Jenny Julén Votinius*

## 1. Introduction

This project aims at exploring the position of elderly men and women in the context of labour law.<sup>1</sup> In light of the ongoing demographic change in Europe, where the proportion of older people in the labour market is rapidly increasing, the need to examine this intersection between the ‘age factor’ and the ‘gender factor’ in labour law is taking on new urgency.<sup>2</sup> A key assumption in this project is that regulatory activity that overlooks the

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<sup>1</sup> The project thus focuses the legal position of persons who are heading towards the period in life that has been called ‘the third age’. For an elaboration on this concept, and a comprehensive discussion on the adjoining concept of the fourth age, see C Gilleard and P Higgs, ‘Aging Without Agency: Theorizing the Fourth Age’ (2010) 14 *Aging & Mental Health* 121.

<sup>2</sup> On the demographic change see, for example, *The 2012 Ageing Report: Underlying Assumptions and Projection Methodologies: Joint Report* (Luxembourg, Office for Official Publications of the European Union, 2011) 94. On intersectional perspectives see, for example, M Verloo and S Walby, ‘Introduction: The Implications for Theory and Practice of Comparing the Treatment of Intersectionality in the Equality Architecture of Europe’ (2012) 19 *Social Politics* 433; J Kantola and K Nousiainen, ‘Institutionalising Intersectionality in Europe: Introducing the theme’ (2009) 11 *International Feminist Journal of Politics* 459; M Schwalbe, *Rigging the game: how inequality is reproduced in everyday life* (New York, Oxford University Press, 2008); K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *University of Chicago Legal Forum* 139; C Krekula, ‘The Intersection of Age and Gender – Reworking Gender Theory and Social Gerontology’ (2007) 55 *Current Sociology* 155.



complexity of age and gender might ultimately prove unable to provide the legal protection that was originally intended. From a labour law perspective, this means that elderly men and women are at risk of experiencing obstacles to and deteriorations in their capacities as job-seekers or employees, despite existing legislation intended to prevent such a course of events. Such impairments may be due to discrimination, but they may also have other, less obvious explanations related to unchallenged perceptions about age and gender, which permeate the organisation of work and of labour law. The research, which primarily deals with EU law and uses Sweden as the main national example, is based on an approach that age and gender are intersecting, not only in the social context that shapes the content of the law, but also in the law itself. To a certain extent, an intersectional approach has been introduced in the legal development within the EU, in the emerging discussion about the need to recognize discrimination on multiple grounds. Thus, the Commission's 2010–2015 action plan for gender equality briefly raised an ambition to explore further the question of how other grounds for discrimination, such as age, may interact with gender.<sup>3</sup> Moreover, in the proposed Directive on equal treatment outside the labour market, which is currently under consideration by the Council, discrimination on multiple grounds are recognized for the first time in a legally binding act, albeit not in the enacting terms.<sup>4</sup> Although these documents and the discussions that preceded them indicate a more nuanced

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<sup>3</sup> Commission, 'Strategy for equality between women and men 2010–2015' document drawn up on the basis of COM (2010) 491 final, SEC (2010) 1079 and SEC (2010) 1080 (Luxembourg, Publishing Office of the EU, 2011)p 32. The matter of multiple discrimination has also been raised in eg Commission, 'Green paper – Equality and non-discrimination in an enlarged Union' COM (2004) 379 final, and Commission, '*Tackling multiple discrimination: practices, policies and laws*' (Luxembourg, Publications Office, 2007).

<sup>4</sup> Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final, SEC (2008) 2180 and SEC (2008) 2181 which, in recital 13, acknowledges that women are particularly at risk of being exposed to multiple discrimination. The Parliament has suggested that the proposed Directive should be amended to explicitly prohibit multiple discrimination, European Parliament, 'Legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' (COM(2008)426) P6 TA(2009)211.

understanding of how different social hierarchical structures may interact, ie in the area of law, they are nevertheless of limited immediate importance to the discussion in this project. This is because firstly, they address only the limited issue of discrimination, and secondly, do not essentially concern the field of labour law.

## 2. Age and gender in labour law

In labour law, age and gender are not actually identified as intersecting – in legislation and case law, labour market policies or, as regards national Swedish law, the preparatory works. It is certain that in specific cases, gender and age issues may sometimes be part of the same legal matter, for example in cases regarding different retirement ages for men and women.<sup>5</sup> However, labour law does not address in a more general and comprehensive way the intersection of age and gender as a question of legal significance in its own. It is thus only separately that the ‘age factor’ and the ‘gender factor’ have been recognized as important in the labour law context.<sup>6</sup>

In terms of the ‘gender factor’, equality between men and women in working life has had a place on the social policy agenda within the EU since the 1970s, although the progress on gender issues has been slow. The lengthy process towards a realization of gender equality in EU labour law began with the Equal Pay Directive in 1975, and since then has continued through the adoption of many other legal acts.<sup>7</sup>

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<sup>5</sup> See, for example, case C-559/07 *European Commission v Greece* [2009] ECR I-47.

<sup>6</sup> Age and gender are treated separately also in the provisions on equal treatment in the European Charter of Fundamental Rights (Articles 21, 23 and 25), and in the Treaty on the Functioning of the European Union (Articles 8, 10, 19 and 157). The European Convention for the Protection of Human Rights and Fundamental Freedoms does not treat age as a ground for discrimination, cf Article 14 and protocol No 12. However, the ECtHR has concluded that ‘age’ is covered by the protection for ‘other status’ in Article 14, *Schwarz v. Switzerland* (No.25762/07) 10 June 2010.

<sup>7</sup> Directive 75/117/EEC on the equal pay for men and women (OJ L 045, 19/02/1975, p 19); Directive 76/207/EEC on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 039, 14/02/1976, p 40); Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (OJ L 14, 20.1.1998, p 6); Directive 86/378/EEC on equal treatment for

The concrete legislative results of this process are currently manifested in the recast Equal Treatment Directive, which also codifies part of the case law on sex discrimination that has been developed by the CJEU.<sup>8</sup> However, the promotion of gender equality on the labour market in the European Union has not only been carried out in legislative acts, but also in various policy documents, such as the European Employment Strategy, the Community Action Programmes on equal opportunities for men and women, and several recommendations and resolutions from the Council.<sup>9</sup> Many times, these soft-law documents express a more progressive approach than the binding law.<sup>10</sup> The most recent action plan for gender equality – mentioned above – raises the question of how to counteract discrimination on multiple grounds

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men and women in occupational social security schemes (OJ L 225, 12.08.1986, p 40). For an extensive presentation of and discussion on EU equality law, see E Ellis and P Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford, Oxford University Press, 2013).

<sup>8</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26/07/2006, p 23). Of importance for gender equality are also Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1.7, and Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by Businesseurope, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ L 68, 10/03/2010, p 68).

<sup>9</sup> Commission, 'Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth', COM (2010) 2020 final, 19; Commission, 'Strategy for Equality between Women and Men 2010–2015' COM (2010) 0491 final; Council, 'Reconciliation of Work and Family Life in the Context of Demographic Change' 11841/11 SOC 584, adopted 17 June 2011 by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO).

<sup>10</sup> Cf Petra Foubert: 'In soft law measures, the EC institutions often set themselves up as proponents of genuine sex equality in both the private and the public spheres. However, thus far, there seems to be no translation of this idea into enforceable legal measures. That fact in itself already limits the field of action for the Court of Justice', P Foubert, *The Legal Protection of the Pregnant Worker in the European Community: Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America* (The Hague, Kluwer Law International, 2002) 214. Compare McGlynn on the 2000 resolution on the balance between men and women in participation in working life and family life: 'I want to suggest that the EU's approach is actually one dominated by rhetoric and symbolism at the expense of action', C McGlynn, 'Reclaiming a Feminist Vision: the Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 *Columbia Journal of European Law* 242.

such as gender and age; this can be seen as an example of such a progressive approach.<sup>11</sup>

While the importance of gender has long since been acknowledged in EU labour law, the ‘age factor’ was fairly invisible in this legal context until the introduction of the prohibition on age discrimination in 2000, through the Employment Equality Framework Directive.<sup>12</sup> The recognition of age as grounds for discrimination coincided with a general shift within the EU, towards policies that more actively addressed the looming demographic change in Europe.<sup>13</sup> In a short time, ageing and the situation of elderly became a central component of EU agendas regarding policies for employment and economic growth.<sup>14</sup> A key concept in EU policies on age is

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<sup>11</sup> Commission, *Strategy for equality between women and men 2010–2015*, 2011.

<sup>12</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, p 16. Earlier examples of measures regarding elderly workers in the EU are few, and they all have the form of non-legally binding acts. A very early example of such a soft law act is the Council Recommendation 82/857/EEC of 10 December 1982 on the principles of a Community policy with regard to retirement age, *OJ L* 357, p 27. Cf E Ellis and P Watson, *EU Anti-Discrimination Law*, 2nd ed (Oxford, Oxford University Press, 2013); M Bell, *Anti-Discrimination Law and the European Union* (Oxford, Oxford University Press, 2002); N ten Bokum and P Bartelings (eds), *Age discrimination law in Europe*, (Alphen aan den Rijn, Kluwer Law International, 2009); H Meenan (ed), *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives* (Cambridge, Cambridge University Press 2007).

<sup>13</sup> Commission, ‘Towards a Europe for All Ages’ (Communication) COM (1999) 221 (not published in the Official Journal); Commission, ‘Europe’s response to World Ageing’ (Communication) COM (2002) 143 (not published in the Official Journal); Commission, ‘The demographic future of Europe – From challenge to opportunity’, (Communication) COM (2006) 571 final (not published in the Official Journal), Commission, ‘The demographic future of Europe – From challenge to opportunity’, (Communication) COM (2006) 571 final (not published in the Official Journal); Resolution 6226/07 of the Council of the European Union *Opportunities and challenges of demographic change in Europe*; Commission, ‘Dealing with the impact of an ageing population in the EU (2009 Ageing Report)’ (Communication) COM (2009) 180 final.

<sup>14</sup> A Walker and T Maltby, ‘Active ageing: A strategic policy solution to demographic ageing in the European Union’ (2012) 21 *International Journal of Social Welfare* 117, 122. Cf A Walker, ‘Commentary: The Emergence and Application of Active Aging in Europe’ (2008) 21 *Journal of Aging & Social Policy* 75.

active ageing.<sup>15</sup> This concept refers to a range of areas, but in effect it has been most developed in policies regarding active ageing in employment.<sup>16</sup> From the perspective taken in these policies, the relevant period of ageing starts in the *early end of a person's working life* – provided that the withdrawal from working life is related to the person's age, and not primarily to other factors. Thus, among the projects funded by the EU in order to prevent work-related problems that come with age, some are targeted at people as young as 45.<sup>17</sup> In addition, the Active Ageing Index launched by European Commission and the United Nations Economic Commission for Europe (UNECE) takes into account people from the age of 55.<sup>18</sup> Acceptance of the idea that the critical period with regards to old age and employment begins in the early end of a person's working life is reflected in the case law of CJEU on age discrimination, which mainly concerns employees from the age of just above fifty years of age and older.<sup>19</sup> It is also reflected in results

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<sup>15</sup> Cf Decision 940/2011/EU of the European Parliament and of the Council of 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012), *OJ L* 246.

<sup>16</sup> A Walker and T Maltby, 'Active ageing: A strategic policy solution to demographic ageing in the European Union'. Active ageing is thus directed towards employment, volunteering, ageing, urban and home infrastructures, accessible and supportive autonomous living, and social contacts and activities, cf Commission, 'Commission Staff Working Document ex-ante evaluation accompanying document to the decision of the European parliament and the Council on the European Year for Active Ageing (2012)' SEC (2010) 1002 final.

<sup>17</sup> See for example the French online initiative 'Fifti, pour une nouvelle dynamique professionnelle après 45 ans', co-financed by the European Social Fund.

<sup>18</sup> The index was launched in 2012 in the European Year for Active Ageing and Solidarity between Generations. European Centre Vienna, 'Active Ageing Index Concepts, Methodology and Final Results. Methodology Report Submitted to European Commission's DG Employment, Social Affairs and Inclusion, and to Population Unit' UNECE (Vienna, 2013).

<sup>19</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 on fixed-term contracts for workers over the age of 52; Case C-152/11 *Johann Odar v Baxter Deutschland GmbH*, judgment of the Court of 6 December 2012, on lower redundancy compensation for employees over 54; Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG*, judgment of the Court of 13 September 2011; and case C-286/12 *Commission v Hungary*, judgment of the Court of 6 November 2012, on termination of employment contracts at 60 and 62 years of age; Case C-499/08 *Ingeniørforeningen i Danmark for Ole Andersen v Region Syddanmark* [2010] ECR I-9343 on denial of a severance allowance to persons entitled to old age pension. Provisions on

from research on age discrimination, and on perceptions and attitudes regarding employees' age.<sup>20</sup>

### 3. The intersection of age and gender as a topic for labour law research

Today, both age and gender are established as important factors in EU labour law. Nevertheless, possible intersectional effects of these two factors are still disregarded in the legal rules, as are effects of other intersectionalities. The lack of an intersectionality perspective in EU labour law has been highlighted by scholars in legal science and political science, however mainly with regard to gender, ethnicity and disabilities.<sup>21</sup> Thus, the

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mandatory retirement at the age of 65, 67 and 68 years of age have been examined in cases C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; C-388/07 *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569; C-45/09 *Gisela Rosenblatt v Oellerking Gebäudereinigungsges. mbH*. [2010] ECR I-9391; the joint cases C-159/10 and C-160/10 *Gerhard Fuchs and Peter Köhler v Land Hessen*, judgment of the Court of 21 July 2011; C-141/11 *Torsten Hörnfeldt v Posten Meddelande AB* [2012], judgment of the Court of 5 July 2012; C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47 and joined cases C-250/09 and C-268/09 *Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Ploudiv*. [2010] ECR I-11869.

<sup>20</sup> TA Garstka, ML Hummert and NR Branscombe, 'Perceiving Age Discrimination in Response to Intergenerational Inequity (2005) 61 *Journal of Social Issues* 321; HP Van Dalen, K Henkens, J Schippers, 'Dealing with older workers in Europe: a comparative survey of employers' attitudes and actions' (2009) 19 *Journal of European Social Policy* 47. G C Gee, EK Pavalko and J Scott Long, 'Age, Cohort and Perceived Age Discrimination: Using the Life Course to Assess Self-reported Age Discrimination' (2007) 86 *Social Forces* 265. AM Ahmedab, L Andersson and M Hammarstedt, 'Does age matter for employability? A field experiment on ageism in the Swedish labour market' (2012) 19 *Applied Economics Letters* 403. D Abrams, PS Russell, C-M Vanclair and H Swift, *Ageism in Europe. Findings from the European Social Survey* (London, Age UK, 2011), A Walker and T Maltby, 'Active ageing: A strategic policy solution to demographic ageing in the European Union'.

<sup>21</sup> S Fredman, 'Positive Rights and Duties: Addressing Intersectionality' in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (New York, Routledge-Cavendish 2008); E Lombardo and

specific issue of the intersectionality of age and gender has not been specifically addressed to any greater extent in the labour law context. Nor does the scarce feminist research that stems from the elder law context deal with labour law in particular; rather, it deals with questions regarding long-time care, social security and public pension systems.<sup>22</sup> Nevertheless, the questions that have been raised in scholarship outside the discipline of legal science provide an extensive and inviting base for explorations of the intersection of age and gender in a wide range of labour law issues. This is the case, for example, with sociological findings on employers' perception of elderly workers as unwilling to develop their competences further, and as limited in technical knowledge.<sup>23</sup> Such perceptions very much overlap with gendered notions of aptitude and performance, according to which women are perceived as less active and less naturally skilled in technical matters than men. From a labour law perspective, these findings – which indicate that

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M Verloo, 'Institutionalising intersectionality in the European Union? Policy developments and contestations' (2009) 11 *International Feminist Journal of Politics* 478; M Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211. A Krizsan, H Skjeie and J Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (Basingstoke, Palgrave Macmillan, 2012). For a discussion on the inability of UK labour law to handle intersectional discrimination, with main focus on gender and ethnicity, see Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies* 65.

<sup>22</sup> AK Dayton, 'A Feminist Approach to Elder Law' in I Doron (ed), *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Berlin Heidelberg, Springer-Verlag, 2009); V Bozalek and NR Hooyman, 'Ageing and intergenerational care: Critical/political ethics of care and feminist gerontology perspectives'; TM Calasanti, and KF Slevin (eds), *Age matters: realigning feminist thinking* (New York, Routledge, 2006). The matter has also been highlighted in the refugee law context, A Edwards, 'Age and Gender Dimensions in International Refugee Law' in E Feller, V Türk, and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003).

<sup>23</sup> HP Van Dalen, K Henkens, J Schippers, 'Dealing with older workers in Europe: a comparative survey of employers' attitudes and actions' (2009) 19 *Journal of European Social Policy* 47; HP Van Dalen, K Henkens, J Schippers, 'Productivity of Older Workers: Perceptions of Employers and Employees' (2012) 36 *Population and Development Review* 309. For a more general discussion on expressions of age-related perceptions see C Krekula, 'Age Coding – on Age-based Practices of Distinction' (2009) 4 *International Journal of Ageing and Later Life* 7.

women face a double jeopardy of age and gender – are of interest in relation to legal rules whereby work-related decisions are made upon the employer's assessment of the employee's qualifications, but also in relation to professional development and lifelong learning.<sup>24</sup> Similarly, a double hazard of age and gender appears to exist in relation to the perception in working life that elderly persons are more likely than young people to leave their employments.<sup>25</sup> The very same perception – a perception of expected absence or termination – has long since been identified as an important ingredient in working life structures that discriminate against women, mainly due to the social division of care responsibilities within the family. Accordingly, women who do not have children are expected to become pregnant and therefore leave the work place temporarily or permanently, whereas women who have children are expected to disappear from work, mentally or physically, if their care responsibilities become more pressing, for example due to a child's illness.<sup>26</sup> Whereas the age-related perception that older employees are more likely to leave their employment contrasts sharply with what is generally expected of the male employee, for the female employee it instead adds to an already-established expectation to which women are subject throughout their working life. There is a need for labour law to explore the legal implications of such different expectations and perceptions of male and female employees, in relation to the perceptions of elderly persons on the labour market, not least in situations that concern

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<sup>24</sup> Cf W Loretto, C Duncan and PJ White, 'Ageism and employment. Controversies, ambiguities and younger people's perceptions' (2000) 20 *Ageing and Society* 279, 285 and 296, and J McMullin, 'Theorizing Age and Gender Relations' in S Arber and J Ginn (eds), *Connecting gender and ageing: a sociological approach* (Buckingham, Open University Press, 1995); C Itzin and C Phillipson, 'Gendered Ageism a Double Jeopardy for Women in Organizations' in C Itzin and J Newman (eds) *Gender, culture and organizational change: putting theory into practice* (London, Routledge, 1995).

<sup>25</sup> C Krekula, *Åldersdiskriminering i svenskt arbetsliv: om ålderskodningar och myter som skapar ojämlikhet* (Stockholm, The Equality Ombudsman, 2011).

<sup>26</sup> JC Williams, *Unbending gender: why family and work conflict and what to do about it* (Oxford, Oxford University Press, 2000); J Julén, 'A blessing or a ban? About the discrimination of pregnant job seekers' in A Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-discrimination* (The Hague, Kluwer, 2001); J Julén Votinius, 'On the Gendered Norm of Standard Employment in a Changing Labour Market' in J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy: the Challenge to Legal Norms* (Oxford, Hart, 2006).



discriminatory treatment. Lastly, sexual harassment is another example of an important labour law issue where the intersection of age and gender is highly relevant. The gendered dimension of this matter is obvious, and it is already well researched, but there is a need to explore this area with the added complexity of age and ageism.<sup>27</sup> Here, both masculinity studies on ageing and ageism, and feminist studies, for example on how an ageing appearance might evoke ageism in the workplace, have much to offer for a broader understanding of the social context in which the labour law rules on sexual harassment are meant to operate and make a difference.<sup>28</sup>

Questions such as these are obviously of great importance, and they will become increasingly important as the proportion of older people in working life increases. For an effective and functional protection of elderly persons in employment, legislation must rest on knowledge about underlying social conditions and about perceptions that affect the design and application of the protective rules. One task here is to integrate the intersection of age and gender in the deeper legal analysis – a task that is a challenge for both labour law and elder law.

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<sup>27</sup> Cf V Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107 *The Yale Law Journal* 1683; P McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14 *International Journal of Management Reviews* 1. For an overview of the extensive literature in social science on abuse, including sexual abuse, of elderly F Johnson, J Hogg and B Daniel, 'Abuse and protection issues across the lifespan: reviewing the literature' (2010) 9 *Social Policy and Society* 291.

<sup>28</sup> T Casalanti and N King, 'Firming the Floppy Penis. Age, Class, and Gender Relations in the Lives of Old Men' (2005) 8 *Men and Masculinities* 3. For research on how people seek to escape ageism (eg in working life) through the use of cosmetics and plastic surgery, see L Hurd Clarke, L and M Griffin, 'Visible and invisible ageing: Beauty work as a response to ageism' (2008) 28 *Ageing and Society* 653. See further L Hurd Clarke and M Griffin, 'Becoming and being gendered through the body: Older women, mothers and body image' (2007) 27 *Ageing and Society* 701, and L Hurd Clarke, *Facing age: Women growing older in anti-ageing culture* (Toronto, Rowman and Littlefield, 2010).

# Challenge or Opportunity? Perceptions of Ageing in Labour Law and Social Security Law

*Hanna Pettersson*

## 1. Introduction

The concept of older people as a social category has become an increasingly frequent theme in public debate. Political issues are often understood in terms of generational conflict, and the increasing proportion of elderly people in the population is seen as creating challenges for both the welfare state and the labour market.

Simultaneously, an alternative, more positive understanding of the position of older people in society is emerging, in contexts where labour law and social security law are used to achieve political goals. At EU level, the concept of 'active ageing' is being used, and 2012 was declared the European Year of Active Ageing. According to the decision which established the Year of Active Ageing, active ageing means creating better opportunities and working conditions that make it possible for older workers to work; trying to combat social exclusion by encouraging active participation in community life and promoting healthy ageing.<sup>1</sup> In order to meet the

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<sup>1</sup> 2010/042 (COD), Art 2.

challenges associated with the ageing population – in relation to state budgets and pension systems, as well as in relation to the social sector and elderly care – and in order to maintain solidarity between generations, it is necessary to ensure that older people continue their employment and are able to live active and independent lives as long as possible.<sup>2</sup>

Thus, threats in the form of social exclusion, generational conflicts and economic problems are contrasted against employment, health, activity and independence. Gainful employment seems to play a particularly prominent role among the specific objectives set for active ageing.<sup>3</sup> In Sweden, a survey has recently proposed several legislative changes, in labour law as well as other areas, in order to increase actual retirement age.<sup>4</sup>

This may be understood in light of the dual perspective in the discourse on active ageing. Even though the rhetoric, which also includes increasingly clear references to human rights, represents a shift from ‘threat’ toward ‘opportunity’ in terms of the perception of ageing, it is generally formulated against a background of calculations regarding future burdens on pension and health care systems, which exclusively have the character of threats.<sup>5</sup>

The aim of my research project is to investigate whether and how this change of perspective affects older people as a legal category. In order to achieve this end, two specific legal issues are studied: 1) labour law understandings of connections between age and work ability in relation to employment protection, and 2) the possibility for employees to combine work with responsibility for older relatives.

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<sup>2</sup> COM (2010) 462 final, 2.

<sup>3</sup> The Swedish pension reform, as well as proposals of an increased retirement age, from the late 1990s, are early legal expressions of a clearly formulated need to keep the population in paid work well into old age. See A Numhauser-Henning, ‘Rätt att gå vid 67?’ in A Numhauser-Henning (ed), *Normativa perspektiv: festskrift till Anna Christensen* (Lund, Juristförlaget, 2000) 278ff.

<sup>4</sup> SOU 2013:25 *Åtgärder för ett längre arbetsliv*.

<sup>5</sup> AC Neal, ‘Active Ageing and the Limits of Labour Law’ in F Hendrickx (ed) *Active Ageing and Labour Law. Contributions in Honour of Professor Roger Blanpain* (Antwerp, Intersentia, 2012) 44.

## 2. The elderly as a legal category and the impact of ageing

Martha Albertson Fineman discusses legal approaches to older citizens in North America, based on the concept of vulnerability. According to Fineman, elderly people have previously been understood as exclusively vulnerable, in a sense that relates vulnerability only to weakness and inability. When trying to break with this approach, however, a far-reaching legal myth of ‘the autonomous subject’ stands in the way of more constructive perspectives on ageing and its significance. This myth makes legislators and others, who are striving to increase the status of the elderly, tend to deny every conceivable link between ageing and dependency. The dependency and vulnerability which may affect some – but not all – elderly people is linked to illness or disability, while healthy older people without disabilities are portrayed as completely independent and autonomous.<sup>6</sup> According to Fineman, vulnerability and dependence should rather be recognized as universal parts of the human condition.

Fineman’s description of the constructed opposition between vulnerability and autonomy is reminiscent of the dichotomy between active ageing and the elderly/ageing as a burden, as discussed above in relation to both the EU and Sweden. By analysing legislation, legislative history and case law, this project will examine whether such a dichotomy also prevails in the legal areas examined here.

## 3. Legal understandings of the significance of age in relation to employment

Age has a unique position in relation to the requirement of just cause for dismissal in the Swedish Act on Employment Protection (*lag (1982:80) om anställningsskydd; LAS*). Unlike reduced working capacity and poor work

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<sup>6</sup> MA Fineman, “‘Elderly’ as Vulnerable; Rethinking the Nature of Individual and Societal Responsibility” (2012) 20 *Elder Law Journal* 71, 91.

performance for other reasons<sup>7</sup>, age-related reduction of the capacity to work is not accepted as just cause for dismissal. Exceptions should be made only if an age-related reduction of work capacity is both persistent and so far-reaching that the employee can no longer perform any work relevant to the employer.

When interpreting the rules on just cause for dismissal, it is thus necessary to assess the importance of the age of the employee. How is a legal decision-maker to identify situations where age is legally relevant? How is the impact of age to be assessed in these situations? How has the strengthened employment protection of older employees been motivated in preparatory works and case law, and what approach to older employees is reflected in these justifications? Which, if any, changes have occurred in these contexts?

The situation of older people in the labour market was an important concern when Swedish legislation on employment protection was created.<sup>8</sup> The preparatory works of the 1974 Employment Protection Act strongly emphasize the need to avoid the development of two separate labour markets, 'one for younger, well-educated workers and one for the elderly, disabled and poorly educated'. Clearly, advanced age was understood as an impediment in working life at this time. On the other hand, the legislator also stressed that working life must be able to accommodate older workers, and that employers should take significant responsibility in this regard. Reduction of working capacity was considered normal among ageing workers, but according to the legislator, this should lead to the work situation being adapted to the situation of older employees. Special devices in the workplace, as well as transfer of older workers to less demanding jobs were mentioned in the preparatory works from 1973.

This relates to what is still considered to be the underlying idea of the strong employment protection for older workers, namely that employers should not organize their activities so that workers' capacities are used only during their

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<sup>7</sup> Another factor, which occupies the same kind of special position regarding just cause for dismissal, is health problems.

<sup>8</sup> SOU 1973:7 *Trygghet i anställningen*. The first Act on Employment Protection, from 1974, was preceded by a law which created employment protection for older workers (*lag (1971:199) om anställningsskydd för vissa arbetstagare*).

most productive years, and then leave ageing employees without protection. Arguments of this type can already be found in Swedish ‘labour law’ regulation from the early 19th century.<sup>9</sup>

The strengthened employment protection associated with age stays in effect until the employee reaches the age of 67. In fact, there is an explicit provision on the worker’s right to remain in employment up to age 67 (LAS §32a).<sup>10</sup> At the age of 67, the level of employment protection is drastically reduced. If the employer wants to terminate the employment when the employee turns 67, no dismissal is necessary (LAS §33). If employment is not terminated at the age of 67, however, a certain level of employment protection will apply, but at a significantly weaker level than for workers under the age of 67.

Thus, from the age of 67, it is the actual age of the employee – regardless of his/her working capacity and accomplishments – that determines the scope of employment protection, and decreases it sharply. Part of the reason can be found in the pension system, as people who are older than 67 are expected not to be dependent on employment for their subsistence.<sup>11</sup>

The second reason is in fact the strengthened employment protection for older workers under the age of 67, which was mentioned above. If this strengthened employment protection was indefinitely applicable, it would, according to the legislator, lead to ‘unpleasant court processes on senility and other types of unfitness’ as grounds for dismissal.<sup>12</sup> Employers would

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<sup>9</sup> J Malmberg, *Anställningsskyddet och pensionsåldern*, report to the Retirement Survey (S 2011:05) 11.

<sup>10</sup> Here, perspectives have changed over time; in the law from 1974 the position of the employee was formulated as an obligation to leave employment at the age of 67 (H Lindström and N Bruun, ‘Åldersdiskriminering, pensionspolitik och lagen om anställningsskydd’ (2003–04) *Juridisk Tidskrift* 702). However, the real meaning of the right to work until the age of 67 has been called into question, since the regulation is applied in a context of requirements for an effective, adaptable and adequately trained – rather than mature and experienced – workforce (Numhauser-Henning, ‘Rätt att gå’, 301).

<sup>11</sup> A Numhauser-Henning, ‘Om avgång i samband med pension och åldersdiskriminering’ in B Nyström, Ö Edström and J Malmberg (eds), *Nedslag i den nya arbetsrätten* (Malmö, Liber, 2012) 155ff.

<sup>12</sup> Malmberg, *Anställningsskyddet och pensionsåldern* 14.

then have to argue for reduced working capacity in each individual case, and many workers would risk being discarded as ‘useless’ after a long working life.<sup>13</sup>

Against this background, warnings have been raised regarding an abolishment of the 67-year limit, or a change to 69 years. The categorical 67-year limit has also been questioned from an EU law perspective; however, the *Hörnfeldt*<sup>14</sup> case seems to have made such concerns unnecessary.<sup>15</sup> Furthermore, as mentioned earlier, there is a strong desire to extend working life, both at EU level and in Sweden and other countries. In Sweden, the Retirement Age Survey recently proposed a new 69-year limit, which would start applying in 2016.<sup>16</sup> In the light of this, arguments against such an increased age limit deserve to be examined thoroughly. For example, it has been argued that today's strong employment protection for older workers who are younger than 67 would be threatened if the 67-year limit was abolished, and that the argument of insufficient work capacity as just cause for dismissal would become more viable, even in relation to older workers under the age of 67. In this case, the result could be a principle to the effect that ‘full productivity’, regardless of age, would mean entitlement to continued employment, while employer incentives to adapt the working conditions to the situation of (not ‘fully productive’) older workers would decrease.<sup>17</sup>

Against this background, there are strong reasons to study the perception of older workers in today's legal materials, in order to study whether it is actually limited to regarding older employees as either ‘active’ workers – which may mean adapting to high demands on productivity and adaptability – or as workers with reduced working capacity. In addition, are any alternatives to this dichotomy represented within the legal world view? Are qualities like experience and knowledge ever linked to older employees and given a value that justifies special legal protection for this occupational category?

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<sup>13</sup> Numhauser-Henning, ‘Om avgång i samband med pension’ 163.

<sup>14</sup> *Torsten Hörnfeldt v Posten Meddelande AB*, C-141/11, [2012] ECR I-0000.

<sup>15</sup> Malmberg, *Anställningsskyddet och pensionsåldern* 15f.

<sup>16</sup> SOU 2013:25.

<sup>17</sup> Malmberg, *Anställningsskyddet och pensionsåldern* 15f.

In connection with employment protection, the principle of seniority will also be discussed. The principle of seniority is considered a general doctrine in Swedish labour law. This principle, with the content that rights of employees are strengthened as employment time increases, is reflected in the case law of the Labour Court regarding dismissal for personal reasons. In other words, the principle does not primarily concern older employees, but naturally, employees with great seniority often belong to the older part of the workforce. By examining legal reasoning regarding the principle of seniority in case law and legal doctrine, views on older employees as legal subjects and views on the importance of ageing will be further elucidated.

#### 4. Balance between work and responsibilities for elderly relatives

A second area which is studied in order to shed light on the legal approach to older people concerns the legal possibilities for employees to adjust their working situation in order to combine employment with private responsibilities for older relatives. Unlike responsibilities for (one's own) children, this is a subject that so far has gained little attention in the context of labour and social security law. In recent years, this issue has been repeatedly raised in political discourse as a problem. Several proposals have been made to introduce a counterpart to temporary parental benefit for workers who need to take time off for temporarily supporting an elderly parent or other relative, but so far with no results.

One aim of the project is to examine whether this discrepancy between different types of private responsibilities is related to views of older people and ageing. Undoubtedly, other factors play important roles, many of which are reflected in political discourse. These include concerns that the responsibility for health and elderly care would start to move from the public sector to individuals, and that the workload of women in particular would increase. Despite this, general approaches to older people may still have some significance for the 'obvious' difference in the perception of relationships to children and relationships to older relatives, as reflected in the legal regulation.

Which legal options are available for employees who need to adapt their employment to their responsibilities for elderly relatives, and which legal



approaches to elderly people emerge in the context in which these opportunities arise? Some right to leave for employees caring for elderly relatives is conferred by the Act on leave for family care (*lagen (1988:1465) om ledighet för närstående vård*). This right is directly linked to the regulation in the Social Insurance Code (*socialförsäkringsbalken (2010:110)*) c 47. These provisions do not specifically regard older people, but there are several references to elderly people in the relevant documents. According to this Act, the right to leave requires that the person to be cared for is suffering from a severe illness, which involves a significant threat to the person's life. The National Board of Health guidelines on the application of the law (SOSFS 1989:14) states that the Act seeks to improve the quality of life for seriously ill people and their families, especially in the phase known as the end of life.

Legislation on family care not only affects the legal position of employees, but also the legal position of the people who are cared for by their relatives. From this perspective as well, it is interesting to examine perceptions of the elderly as legal subjects, and whether any changes have occurred in this regard. For example, when the Social Insurance Code was introduced, an explicit requirement for consent given by the person to receive care was added to the regulation. In addition to specific legislation on care for relatives, the general labour and social insurance law context will be examined. For example, it has been suggested that if applied thoroughly, the concept of indirect discrimination could provide protection against labour market exclusion and disadvantages for employees with considerable care responsibilities.<sup>18</sup>

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<sup>18</sup> C O'Brien, 'Equality's False Summits: New Varieties of Disability Discrimination, "Excessive" Equal Treatment and Economically Constricted Horizons' (2011) 36 *European Law Review* 26, 49f.

## II Legal Empowerment of Elderly Citizens



# Civil Rights of the Elderly in a Family Law Setting<sup>1</sup>

*Eva Ryrstedt*

## 1. Introduction

My main interest in the family law part of the Elder Law Research Environment<sup>2</sup> within the Norma Research Programme<sup>3</sup> lies in issues regarding legal empowerment and civil rights. The need for this focus is perhaps evident, as the family law setting with regard to the elderly innately involves problems connected to mental disabilities.

The elderly comprise an important group in society, but at the same time are often marginalized. Society is changing because the group of elderly persons is constantly growing, and is also getting healthier as a rule. However, old age is still perceived as entailing sickness and dependency. This may lead to elderly persons feeling excluded from eg family life,<sup>4</sup> which should be an arena as important to the elderly as it is to younger persons. However, being part of a family does not entail the same components as it did earlier, which may add to this feeling of exclusion. For example, the

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<sup>1</sup> This article is based on E Ryrstedt, 'Hjälp eller stjälp; en studie av godmans- och förvaltarinstituten; särskilt om äktenskap', *work in progress*.

<sup>2</sup> [www.jur.lu/elderlaw](http://www.jur.lu/elderlaw). The Elder Law Research Environment is funded by the Ragnar Söderberg's Foundation and the Marianne and Marcus Wallenberg Foundation.

<sup>3</sup> [www.jur.lu.se/norma](http://www.jur.lu.se/norma).

<sup>4</sup> Proposal for a decision of the European Parliament and of the Council on the European Year for Active Ageing (2012), 2. Cf also Decision 940/2011/EU 14 September 2011 by the European Parliament and the Council, OJ 246.

reconstruction of families that now often takes place has led to a redefinition of the concept of family.<sup>5</sup> Nowadays such a reconstruction can also occur rather late in life. Thus, old notions of the elderly are no longer consistent with reality. However, increasing age may pose threats of mental disabilities; as a concept; late-life mental disabilities can obstruct the perception of the elderly in relation to their civil rights – a theme that will run through the whole project.

In discussing rights of the mentally disabled elderly, I am using the example of the entering into and ending of a marriage. It is an interesting example as it is often the focus of the reconstruction of a family, and this article is planned to be published as my first on this subject; the rest of the project will also be published as articles. A theme (like the first one) is closely connected with the legal effect of elderly's cohabitation out of wedlock, which will be my next area of focus and where mental disabilities also play an important role, as it does throughout the study. Thereafter I plan to study heirs' interests in the property of elderly relatives; my examination will primarily involve looking at whether or not this interest is legitimate. This part of the study includes the part of succession law which deals with the conflict between a spouse and children from another relationship. As in the rest of the project, my interest lies in the definition of civil rights of the mentally disabled elderly in relation to their need for protection. Lastly, I plan to conduct a comparative study between Australia and Sweden on review of the representatives of mentally disabled elderly persons and how these countries safeguard the rights of the elderly.

## 2. Civil rights of the elderly as the setting for the project

In addressing issues of elderly persons with mental disabilities and their rights, an obvious starting point is how to help them in different matters, while also safeguarding their civil rights. A problem which surfaces in this case is how to define and understand those rights. Are the rights of mentally

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<sup>5</sup> See further, E Ryrstedt, 'The Challenge of New Families' (2010) 19 *Columbia Journal of Gender and Law* 1076.

disabled elderly persons to be defined in the perspective of the view on children who need protection? Or are the rights instead to be defined in the same perspective as when children are seen as participants with a certain capability?<sup>6</sup> In this context, Fineman's Vulnerability Theory is also a theory of great interest<sup>7</sup> – 'using it to define the very meaning of what it means to be human'.<sup>8</sup>

To compare children and elderly persons with mental disabilities can of course appear disrespectful and diminishing. At the same time, however, many of the issues concerning different rights seem to be the same. Accepting such a similarity might therefore be fruitful in defining the mentally disabled elderly's rights in the perspective of their need of protection, as well as their capacity to legally act and make their own decisions.

Furthermore, regarding the representation of both mentally disabled elderly persons and children, the fact that their representative often is a family member with his or her own interests within the family makes this definition even more difficult to establish. Here, the issue seems to be the difficulty in determining what is in the best interests of elderly persons with mental disabilities, much in the same way as it is difficult to determine what is in the best interests of the child. A complicating factor in the determination of the best interest of mentally disabled elderly is the extent to which their own wishes are to be weighed into the equation, much in the same way as children's wishes should be a part of the concept of 'the best interests of the child'. Yet another factor is the current perception of the

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<sup>6</sup> For children, in the context of needing protection or being able to participate, A Hollander, 'Att tillvarata barnets rätt och bästa' in A Hollander, R Nygren, and L Olsen (eds.), *Barn och rätt* (Uppsala, Iustus, 2004) 58, with further references. See also E Ryrstedt, 'The Child's Right to Speak in the Process of Determining Matters of Custody, Residence or Access' in M Martín-Casals and J Ribot Igualada (eds), *The Role of Self-Determination in the Modernisation of Family Law in Europe* (Girona, Documenta Universitaria, 2006), 223.

<sup>7</sup> M Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251. See further also M Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 101.

<sup>8</sup> M Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 266.

family; the person representing an elderly person plays an important role in the definition of mentally disabled elderly's civil rights. Instead of it being obvious that community is guiding the family, individualised and opposed interests are accepted – something that will be addressed further. The effect of individual interests is enhanced, as the traditional concept of the nuclear family continues to weaken.

Yet again the comparison between children and mentally disabled elderly persons is striking in its similarities, although these similarities may well be difficult to accept. Formally, however, the difference is notable because a child does not have legal capacity to act, while an elderly person with mental disabilities often does – at least as a starting point. Nevertheless, it must be stressed that for mentally disabled elderly persons, this capacity is often a capacity in name only.

### 3. The theory of law as normative patterns in a normative field

When working with the issues above, the Theory of Law as Normative Patterns in a Normative Field<sup>9</sup> proves to be a well-chosen tool, as the theory provides means to understand what the 'trigger' is for how the law works in a specific area. The theory suggests that different basic normative patterns compete within a normative field. The basic normative patterns are thus normally opposed to each other, as they emanate from moral customs. These patterns thus determine not only formal legislation but also how people act legally, as well as how they act in everyday life.<sup>10</sup>

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<sup>9</sup> As developed by A Christensen, see eg 'Konflikt eller harmoni: två normativa strukturer' in *Rättigheter. Politisk filosofi* (Stehag, 1988); *Normative Development within the Social Dimension*, Norma 1996:1 (Lund, Norma, 1996); 'Polycentricity and normative patterns' in H Pedersen and H Zahle (eds), *Legal polycentricity: consequences of pluralism in law* (Aldershot, Ashgate, 1995); see also A Numhauser-Henning, 'Understanding Law as Normative Patterns' in A Numhauser-Henning and M Rönmar, (eds) *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford, Hart Publishing, 2013, forthcoming).

<sup>10</sup> A Christensen, *Hemrätt i hyreshuset* (Stockholm, Norstedt, 1994) 2.

As I found in my doctoral thesis, the normative Pattern of Community is opposed to Economical Independence with Individual Ownership within the field of marriage and cohabitation.<sup>11</sup> The earlier perception of the family as a status relation led to the Community Pattern, while societal development, leading to a more individualised perception of the family, was the base for the patterns of Economical Independence with Individual Ownership.<sup>12</sup> Other interesting patterns in the area I am addressing here are the Protection of Established Position and the Market Functional Pattern.

The Pattern of Protection of Established Position is a very old pattern; it protects a party who has rightfully gained proprietary rights to a certain possession, in order for the party not to be deprived of the property without just cause.<sup>13</sup> The Market Functional Pattern, on the other hand, promotes change; thus it is a prerequisite in the modern market economy. It entails a right for the owner of a certain possession to freely dispose of it.<sup>14</sup> Even though the pattern of Protection of Established Position is now rather weak within the fields of marital law and law on cohabitants,<sup>15</sup> it might still be detected there.<sup>16</sup> The Market Functional Pattern is also closely associated with the Pattern of Economical Independence with Individual Ownership.<sup>17</sup>

Other parts of family law are based on the same underlying societal foundations and developments as marital and cohabitation laws. The patterns of community and economic independence with individual ownership are thus also the most frequent ones which manifest themselves in the area of the elderly.

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<sup>11</sup> E Ryrstedt, *Bodelning och bostad. Ekonomisk självständighet eller gemenskap* (Lund, Juristförlaget i Lund, 1998) 18 and 383–443.

<sup>12</sup> Compare Ryrstedt, *Bodelning och bostad* 15.

<sup>13</sup> A Christensen, 'Skydd för etablerad position – ett normativt grundmönster' (1996) *Tidskrift för Retsvetenskap* 528.

<sup>14</sup> Christensen, 'Skydd för etablerad position' 529. See also A Christensen, *Hemrätt i hyreshuset* 21–22. See A Numhauser-Henning, *Rätten till fäderneslandet*, (Lund, Juristförlaget i Lund, 1988) 31 and 151, for the concept the Market Functional Ownership Pattern.

<sup>15</sup> See for Established Position within family law further Christensen, 'Skydd för etablerad position' 528 and 559–564.

<sup>16</sup> Ryrstedt, *Bodelning och bostad* 199 and 241.

<sup>17</sup> Ryrstedt, *Bodelning och bostad* 19.



## 4. Legal support and help for the mentally disabled elderly

Often an elderly person needing help gets this assistance from a family member, who acts through a power of attorney given by the elderly person. To help the elderly person in this manner to legally act encompasses an array of different problems, all of which need to be addressed.

Furthermore, in Sweden the two institutes of guardian ad litem (*god man*) and trustee (*förvaltare*) are designated to help safeguard the interests of elderly afflicted by some kind of disability. My interest in this project focuses on the mental disabilities that often affect the elderly.

The main difference between these two institutes is that the assigning of a guardian ad litem does not as such affect the elderly person's own legal ability to act. On the contrary, the guardian ad litem normally has to get consent from the principal to be able to legally act on his or her behalf.<sup>18</sup> In addition, even if the principal is unable to take care of himself or herself, or his or her property, a trustee is not to be assigned if the assigning of a guardian ad litem is sufficient, or if the principal can get help in another, less invasive way.<sup>19</sup> Having a trustee affects the principal much more than having a guardian ad litem would, especially as it means that the trustee, with a few exceptions and within the assignment, is the one who has the ability to legally act on behalf of the principal. The principal is thus limited to conducting legal acts only if the trustee gives his or her consent.<sup>20</sup>

There are several different issues regarding the above-mentioned institutes assigned to help eg mentally disabled elderly persons. The most prominent difficulties seem to be related to the principal's personal sphere. There can be a conflict between what seems to be in the best interests of the principal and what the principal wants. Another part of the problem can be that the guardian ad litem or the trustee may have interests contrary to those of the principal. Furthermore, there is the question of how much information to give to the principal in order for him or her to make an 'informed' decision.

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<sup>18</sup> Chapter 11 Section 5 Föräldrabalk (1949:381) (FB) (Children and Parents' Code).

<sup>19</sup> Chapter 11 Section 7 Children and Parents' Code.

<sup>20</sup> Chapter 11 Sections 9 and 10 Children and Parents' Code.

When the principal is helped by a guardian ad litem, it is still – as stated above – normally the principal who has the sole legal ability to act. In those cases the principal's wishes guide the action, from a formal point of view. However, from a more practical point of view, a principal needing a guardian ad litem may be confused and not able to understand the issue, have a different point of view at different times, or may forget what he or she decided and consented to yesterday. Here the issue to a large extent is what is to be required from such a principal's consent to act – and as stated above, what is required of the information forming the basis for the principal's decision. In answering that question, it is important to relate the principal's wishes to various civil rights, in the effort of interpreting them and implementing according to the regulation.

The problem with a principal's wishes appears to be less difficult when the principal is helped by a trustee. In those cases, as stated above, the trustee has the sole ability to legally act within the assignment. Thus the principal's own wishes do not have the same legal impact in deciding whether or not a certain legal action is to be taken. Here, however, the demands on civil rights have an even more precarious position, since the principal's consent is not a prerequisite for the trustee to legally act. The issue in these cases will be determined to a large degree be the impact human rights have, and what they mean in the context of a principal who may not at all be expected to be able to form what is considered to be a valid opinion.

## 5. Mentally disabled elderly and marriage

An example of the problematic issues connected to the principal personal sphere is thus the entering and ending of a marriage. The entering of a marriage demands that the parties themselves consent to the marriage – even if there may be situations where their consent can be deemed invalid. The ending of a marriage, on the other hand, may be achieved by a trustee, or with the help of a guardian ad litem.

Seen from the perspective of the development of family law, the most important function of marriage today seems to be the emotional function,<sup>21</sup> which appears as even more significant for the elderly – as the importance of other functions has diminished. As noted in the preparatory works, this function is not stable, even though it is unifying and built on community. On the contrary, it depends on the affection being reciprocal.<sup>22</sup>

The focus of the contractual part of the marriage in contemporary marriage is voluntariness, both regarding the entering into and the ending of a marriage – yet the contract does not seem to constitute the normative structure of a marriage. Instead the contract seems to conflict with the status relationship that still is part of the marriage.<sup>23</sup> The result, however, is that the contract in the aspect of the entering into and ending the marriage prevails, and that voluntariness leads to the entering into of a marriage built on the parties' free will, and the ending of a marriage is built on each party's independent will.

Is then the entering into of a marriage more important than the ending of it? Could it be that the prevailing notion of marriage as a status relationship gives it this effulgence of importance, leading to a party having to be able to give his or her valid consent for the marriage to be effective? And why does not the ending of a marriage demand the same from the parties as the entering did? Why can divorce be achieved 'by proxy'? Is it simply because each party has the right to divorce – a right that cannot be carried out in some cases – unless the guardian ad litem or the trustee helps the principal, through more or less stepping into his or her shoes? And in that case – what about the civil rights in relation to a divorce? In the first-mentioned case, the principal has to consent to the divorce, but as argued above, such consent might not be given with any insight. In the second case, the trustee may act independently, second-guessing what the principal might want in a best-case scenario.

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<sup>21</sup> Cf SOU 1972:41, *Familj och äktenskap* I 74.

<sup>22</sup> Cf SOU 1972:41 76.

<sup>23</sup> Cf Ryrstedt, *Bodelning och bostad* 34. Cf further L Svensäter, *Anställning och upphovsrätt: om det enskilda anställningsförhållandets reglering och dess grunder samt om konsekvenserna av att framställda resultat omfattas av 1§ upphovsrättslagen* (Stockholm, Norstedts, 1991) 14–15 about the impact general rules have on a relationship.

Furthermore, the statements above must be put in the context of today's individualised perspective of the family, as well as the fact that families are no longer constructed as they were before. Today a family may consist of persons who are not even related, such as a stepson living with his stepfather. The help a principal receives has always been under threat of influence by the appointed guardian's or trustee's own interests and position in the family – or by the impact other family members have on the guardian ad litem or trustee. In today's families, this might be even more evident, because how inheritance will be arranged is no longer as clear-cut as it has been. When the emotional function of a marriage is superimposed on the context of the individualised perspective of the family, the problem of rights of the elderly appears clearly to us.



# A Right to Active Ageing for All? On the Status of the Elderly in Social Services and Health Care

*Titti Mattsson*

## 1. Introduction

The EU's ambitions are expressed in the Europe 2020 Strategy and highlight the importance of people remaining healthy and active in old age. Last year, 2012, was 'The European Year for Active Ageing'. The intention was to support Member States in promoting different components of active ageing. One such component is the right of elderly people to live in dignity and independence by participating in social and cultural life. Here, not only do fundamental human rights come to the fore, but also the adaptation of crucial societal functions to the conditions of the elderly, and sustainable systems for the care of elderly citizens. In my project, the overall issue is how the status of the elderly and their right to dignity and integrity appear under the current regulatory framework, and how these components correspond with reasonable legal security and the responsibility of society to provide social services and health care. Which legal tools are made available to the elderly, and are these tools acceptable from a rule-of-law perspective? The focus is on the impact of the elderly's position and participation in a rapidly changing society, in both a private and a public setting. The areas of study chosen to highlight this overall issue are family structures, e-government and innovation. The project is a part of the focus area 'Legal empowerment of elderly citizens'.

## 2. The right to dignity and integrity

A basic principle in international documents on human rights is that the right to dignity and integrity is the same regardless of age. In the first chapter of the EU Charter on Fundamental Rights 2000, which after the Lisbon Treaty became a part of primary law, it is stated that the dignity and integrity of all persons must be respected and protected by the States.<sup>1</sup> In terms of the recognition and respect of the rights of the elderly to lead a life of dignity and independence, this is further emphasised in Article 25. Another, related, fundamental principle is the right to self-determination. For example, the first Article of the 1966 United Nations International Covenant on Economic, Social and Cultural Rights states that all persons have the right to self-determination. This includes public care and service by the State. In Sweden, as in the rest of Europe, social services and health care are based on the person's consent. In addition, personal choices and individual influences on the care and service to be received are increasingly dominating the agenda for how to increase quality of life in relation to public service.

This increasing emphasis on choice and individual influence creates demands on each individual's participation and activity. However, due to age-related changes, many elderly people may have difficulties in expressing their opinion when communicating with authorities in important matters concerning their own person. At the same time, increasing age presents many people with a number of difficult decisions to relate to, such as choice of housing, care and assistance. In addition, both Sweden and the rest of Europe have experienced increasing computerisation – a development which can create exclusion, particularly for the older part of the population. The support provided by other reliable persons is of great importance for control, dignity and well-being.<sup>2</sup> The legal design currently in place seldom accounts

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<sup>1</sup> Articles 1 and 3.

<sup>2</sup> H Jönsson and T Harnett, 'Anhörigas roll som ställföreträdare i äldreomsorgen' in L Broström and M Johansson (eds), *Ställföreträdarskap i vård och omsorg* (Malmö, Gleerups förlag, 2012); U Melin Emilsson, 'The Role of Social Work in Cross-Professional teamwork: Examples from Older people's team in England' (2013) 43 *British Journal of Social Work* 116.

for the large group of people who lack this ability to actively shape their lives or agree to receive support or service.

My foremost interest is in different potential problems with the participation right versus public responsibility, and interrelation of the participation right with the rights to dignity, integrity and active aging. In part, I will draw upon some of my earlier research on children and the law. This research concerns for example the problem of the gap between principle and practice concerning child participation according to the Convention on the Rights of the Child. International and national research indicates that it is difficult to implement child participation rights in practice. In several articles I discuss the legislative need for specially adjusted procedural tools for children.<sup>3</sup> Although the problem is different in an elder law context, I think that some common concepts in child and elder law – such as vulnerability, age and capacity – may be fruitful to discuss in this broader setting. For example, in one article I discuss whether it is reasonable, using information on the current practice of the Swedish Ombudsperson for Children and the arguments that preceded that institution, to argue for a national Ombudsperson for the elderly.<sup>4</sup>

### 3. Family and the elderly

Active ageing often requires the authorities to use targeted measures. The focus here is on the public responsibility to supply social services and health

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<sup>3</sup> See for example T Mattsson, 'Participation and Flexibility for All? A Study of Modern Family Structures and Children's Rights' in A Numhauser-Henning and M Rönmar (eds.), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (London, Hart Publishing, 2013, forthcoming) 117; T Mattsson, 'Child Participation in the Decision-Making Process. Some reflections on a dialogical approach for children's recognition' in K Nordlöf (ed), *The 2010 International Conference on Children in Law* (Cambridge, Cambridge Scholars Publishing, 2012) 101; T Mattsson, *Ungas delaktighet. Exemplet institutionsvård*, SiS Forskningsrapport 2 (Stockholm, Statens institutionsstyrelse, 2008).

<sup>4</sup> T Mattsson, 'National Ombudsperson for the Elderly – A solution for a more responsive welfare state?' (to be published in 2013); conference paper with the same title presented at the Nordic workshop 'Vulnerability as a basis for justice and equality in the Nordic countries' in Oslo August 14–15, 2012.



care to the elderly, and on how responsibility for implementing older persons' rights to active ageing is designed, with focus on the family. Generally speaking, this responsibility is divided into responsibility within the family and a public responsibility. Family responsibility is sparsely regulated in Sweden, whereas care given by relatives is regulated in the Social Services Act. Municipal healthcare and social care for the elderly, however, are expressed in the laws on healthcare and in the Social Services Act. The right to family is protected in the European Convention on Human Rights, Article 8, and includes all ages. However, the understanding and the scope of this protection for elderly to form and keep their family are not clear. To what extent does the public responsibility include the right to maintain and protect the family of the elderly?

In November 2012, in the Social Services Act, a provision came into force for the right to grow old together as a couple.<sup>5</sup> The section regulates the possibility for spouses and partners to live together in special housing. The assessment should take place regardless of whether the other spouse or partner is in need of special accommodations. The purpose of this section is to assist elderly people permanently living together in private housing, and to continue to do so even when one of the persons has needs that require special public accommodation for service and care.<sup>6</sup>

This provision reflects an emphasis on worthy and good family living conditions for active aging. Elderly care should aim to support older people in living their lives on their own terms and conditions.<sup>7</sup> One question is this: to what extent does Article 8 in the European Convention protect the right to family for elderly? It is hoped that an analysis of the rulings by the European Court of Human Rights will give some insight in this matter. Another question is whether a shift has taken place in the perception of older people and the right to family under Swedish law. It is interesting to analyse this question by studying recent legislation and court practice, and also taking a family sociological approach.

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<sup>5</sup> Chapter 4 Section 1.

<sup>6</sup> Ds 2011:33 *Rätten att få åldras tillsammans – en fråga om skälighet, värdighet och välbefinnande i äldreomsorgen*.

<sup>7</sup> T Mattsson, 'Rätten att få åldras tillsammans – en fråga om skälig levnadsnivå' *Blendow Lexnova*, November 2012.

The concept of family is changing in society today. Modern family issues in legislation and in the media (gender-neutral relations, biological, genetic and social bonds with children et cetera) reflect a changing focus towards issues concerning the forms and functions of families. We live in a time when our understanding of the family as a stable core construction in our lives is being challenged. The so-called nuclear family in its traditional form, with family members remaining in stable roles as long as they live, is no longer the only formation for adults and children in many countries. What impact does this development have for regulations regarding the elderly, partnership and family? My interest lies mainly in whether the increasing acceptance of different family structures in society also has an impact for elderly persons, and particularly in relation to public regulation and practices concerning care and assistance for the elderly and their families.

#### 4. E-government and the elderly

Lately, many Swedish municipalities have started providing social services and health care electronically, and models for e-services have also been developed. E-services can be in the form of an electronic communication channel for individuals, authorities and municipalities cooperating on individual cases, but can also include other electronic communication, including more or less automated decision making. Today there are numerous e-services that individuals use regularly. For example, many local counties provide e-services for renewing prescriptions, for cancelling appointments, and for ordering various kinds of certificates from the local authorities. Some municipalities have also developed automatic decision-making processes for certain kinds of social services. The EU views e-government as a means to improve public services and democratic processes.<sup>8</sup> For example, the European Union ministers responsible for e-government policy have issued the 'Ministerial Declaration on eGovernment', to articulate a common vision and the objectives and priorities for 2011 to 2015. The perception is that e-government should no longer be regarded as an internal matter for national authorities, but as a

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<sup>8</sup> Commission, 'A Digital Agenda for Europe' (Communication) COM (2010) 245 final.

common resource for the general development of society. The United Nations also highlights e-services as a useful part of the development of public administration.<sup>9</sup>

A practical problem, both globally and locally, is the limited number of people who currently have access to digital media. For example, age, intellectual ability, interest and financial constraints all seem to be central ingredients in user exclusion. According to Swedish Statistics (SCB) data from 2009, there seems to be a connection between lower levels of education and lower levels of computer ownership among the elderly.<sup>10</sup> The statistics also show that elderly women with little education are particularly likely to have little access to a computer.<sup>11</sup> Computer access for the elderly varies by education and sex. Access for those with secondary education and college education is higher than for those with only lower secondary education.

The e-government development gives rise to central legal questions about how to maintain legal security and how to guarantee correct and fair decisions according to current legislation during this process. What are the legal consequences of using e-services in areas of significant public interest? E-services for social services as well as health care must be able to carry out their official mission for marginalised groups as well.<sup>12</sup> The aim is to highlight this question from a vulnerability perspective, ie focus on how an integrated lifespan approach can guide political and institutional practices, to ensure that societal responsibility is taken for the individual's dependency

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<sup>9</sup> United Nations E-Government Survey 2010: Leveraging e-government at a time of financial and economic crisis, [http://www2.unpan.org/egovkb/documents/2010/E\\_Gov\\_2010\\_Complete.pdf](http://www2.unpan.org/egovkb/documents/2010/E_Gov_2010_Complete.pdf), viewed 2012-04-01.

<sup>10</sup> See L Melin, *Privatpersoners användning av datorer och internet 2009* (Stockholm, Statistiska centralbyrån, 2010).

<sup>11</sup> According to SCB's statistics, 91 per cent of people aged 16–74 had access to a computer and the Internet in 2010. Even at this high level of access, it is reasonable to assume that the 9 per cent of this age group without Internet access at home includes large numbers of people in need of state welfare services.

<sup>12</sup> Compare E-Government: Reaching socially excluded groups?, [www.idea.gov.uk/idk/core/page.do?pageId=1074872](http://www.idea.gov.uk/idk/core/page.do?pageId=1074872). See further T Mattsson, 'Sociala medier och socialtjänsten. Ett medel för målen?' in T Erhag and T Mattsson (eds) *Festskrift till Lotta Vahlne Westerhäll* (Stockholm, Santérus förlag, 2011) 239.

and vulnerability throughout life.<sup>13</sup> So far, the issue has been discussed in an article and a conference paper.<sup>14</sup>

## 5. Innovation and the elderly

We live in a time of rapid scientific developments which affect our health and daily life. One such field experiencing rapid development is the health care sciences. As a result of innovations in health care worldwide, we are continuously receiving better and more advanced care and medication in Europe. One condition for this development is participation in research. The increasing population of elderly persons in society puts pressure not only on health care to adjust to this change, but also on health sciences to involve more elderly persons in medical research. However, there is a concern over the participation of some elderly people in medical research, owing to their limited decision-making capacity.<sup>15</sup> Aging-related declines in cognitive ability are well documented, and concerns have been raised about some elderly adults' ability to make good decisions and obtain good life decision outcomes. Some elderly people may lack capacity to consent to research participation, due to illness or severe cognitive impairments, or they may only be able to provide such consent if they have significant support.

Today, in order to minimise the risk for vulnerable persons, many ethical rules and guidelines exist which intended to protect human research participants. One example is the Swedish Act concerning the Ethical Review of Research Involving Humans. According to the law, certain kinds of research can only be conducted if the persons have given their informed consent. The main aim is to study the considerations that have been made –

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<sup>13</sup> M Fineman, “‘Elderly’ as vulnerable: Rethinking the nature of individual and societal responsibility” (2012) 20 *The Elder Law Journal* 101.

<sup>14</sup> T Mattsson, ‘E-government for the distribution of social welfare services in Sweden.

A vulnerability approach’ (peer-review); E-Government for the Distribution of Social Welfare Services in Sweden: ‘Old’ Administrative Law Reshaped or ‘New’ Public Contract Law? Paper presented at the Conference Contract as ‘Public Law’ at the Intersection of Globalization and Privatization, March 1– 2, 2013, Emory University School of Law.

<sup>15</sup> See for example K Christensen et al, ‘Decision-making capacity for informed consent in the older population’ (1995) 2 *The Bulletin of the American Academy of Psychiatry and the Law* 353.

and that ought to be made – in the law and by institutional review boards (IRBs), regarding research on elderly individuals who are decisionally incapacitated. This part of the project connects to another research project in which I am involved.<sup>16</sup>

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<sup>16</sup> *Research on decisionally incapacitated individuals – a legal study of the Act concerning the Ethical Review of Research Involving Humans, and its application* is a multidisciplinary research project conducted at Lund University in close collaboration between researchers from the Department of Law and the Department of Clinical Sciences, Division of Medical Ethics. The project will run for three years (until 2015) and is funded by the Swedish Research Council.

# Sickness Insurance Reform and the Elderly

*Per Norberg*

## 1. Introduction

Society needs the elderly to work more. This can be done in two ways. One is to persuade those above the pensionable age to continue to work. The second is to prevent persons close to the pensionable age from being excluded from the labour market, through long-term sickness benefits. In Sweden there is no single pensionable age. People can begin withdrawing their state pensions the age of 61; these pensions can be postponed indefinitely and each year of delayed retirement results in a rather large increase of the pension level.<sup>1</sup> At the age of 65 there is a guarantee pension providing a liveable income, and at this age unemployment and long-term sickness benefit can no longer be collected.<sup>2</sup> Employment protection applies until the age of 67.<sup>3</sup>

The Swedish system results in an internationally high (maybe even the highest) participation rate for persons close to the age limit for social security (65) and an internationally low participation rate afterwards.<sup>4</sup> The sickness

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<sup>1</sup> <http://www.pensionsmyndigheten.se/4615.html> The Pension Authority says in a press release from 14 December 2011 that delaying pension or taking pension early normally affects the amount by 7–8 % a year.

<sup>2</sup> Social Security Code (2010:110) Ch 67 Sec 4, Ch 33 Sec 16, and Unemployment Insurance Act (1997:238) Sec 22.

<sup>3</sup> Employment Protection Act (1982:80) Sec 32 a.

<sup>4</sup> Government White Paper 2013:25 131.

insurance reform introduced in 1995 and further developed in 2008 – which is my field of study within the elder law project – is aimed at ‘purifying’ the sickness insurance. This purifying creates a sharp line of distinction between unemployment, sickness and ageing, which can be problematic and may explain both the high participation rate below the limit and the low rate above it.

## 2. The start – a pension system giving importance to sickness

This idea of a sharp line between unemployment and sickness problems on the one hand and ageing on the other is a relative novelty. When pension systems started in Europe, they were basically a long-term sickness benefit.<sup>5</sup> In the first Swedish pension system (from 1913) old-age pensions to healthy persons were small. When the system had operated for 20 years, the average pension was around 5% of the earnings of an unskilled manual worker.<sup>6</sup> The invalidity pensions were seven times bigger. Thus, a healthy person must work to live – regardless of age.

Later, the normative ground changed. Reaching a certain age – in Sweden the age of 67 – was enough to be allowed to live on a pension. The elderly were relieved of both the duty and the need to work. The Swedish 1935 and 1947 Pensions Acts were built along these lines and provided almost equal sums to all persons.<sup>7</sup> Yet the sums were so small that many persons chose to work past 67. If they did, they could often remain insured for unemployment.<sup>8</sup> When the new mandatory sickness insurance system was

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<sup>5</sup> Compare A Christensen, ‘Normativa grundmønster i pensionssystemen’ in C Henrichsen et al (eds), *Lovens liv, till Jørgen Dalberg-Larsen på 60-årsdagen*, (Köbenhavn Jurist- og Økonomforbundets forlag 2000) 171. When the famously generous German pension system started (1890), the average pension for a healthy 67-year-old worker was 18% of a normal wage. Even this system could not provide a liveable income.

<sup>6</sup> Government Bill 1935:217 21. The average amount of old-age pension was 34 SEK; invalidity pensions started at 150 SEK, and in 1921 this was increased to 225 SEK.

<sup>7</sup> The 1935 system had a small addition depending on fees paid into the system and both systems were linked to the cost level of the municipality.

<sup>8</sup> Only two unemployment funds required that a person who had reached a certain age (67 and 70) to leave the unemployment insurance programme.

created in 1955, the right of an elderly person to sickness benefits was debated; in the end, Parliament decided that elderly should receive income-related sickness insurance for 90 days instead of 730.

It was not until the pension system was reformed and based on the income replacement principle in the 1960s that the right to combine sickness and unemployment insurance with old-age pension was gradually abolished. The motive was that one income should not be replaced twice within the social security system. It is thus fair to say that the pension scheme evolved from a basic idea that a healthy 75-year-old person must work or starve in 1913, through an intermediate stage, pensions were barely survivable, and the wages of the elderly were therefore worthy of protection within unemployment and sickness insurance systems. It was not until the 1960s that the principle of a pension as the sole way to protect elderly persons firmly took hold. From that point, the work income of the elderly became no longer worthy of protection.

### 3. The continuation – unemployment and sickness insurance systems giving importance to age

In the middle of 1960s, all parts of today's Swedish social security systems can be said to have been put in place. The Swedish unemployment insurance has traditionally had a strong element of active labour market policies. Firstly, the unemployed must be ready to move to a new location to take a job. Secondly, they must take any job for which they are qualified, e.g. an academic cannot refuse to work as a cleaner. These principles have been fundamental since the creation of the first state-subsidised unemployment system in 1934.

A young person with a disability will often be taken care of within labour market programmes. These started for military personnel in the 1940s and were extended to other groups in the 1950s.<sup>9</sup> The system was named 'work

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<sup>9</sup> Government White Paper 1958:17 15f.



care', as making the persons work was perceived as a good way of providing care for persons with disabilities.

Today, there are various kinds of wage subsidies. One form is that the employer receives a wage subsidy to compensate for the reduced amount of work caused by the disability.<sup>10</sup> In such cases the worker carries out ordinary tasks together with fellow workers and receives an ordinary wage. Another form is Samhall, where a state company employs workers with disabilities and seeks contracts for work which these workers can perform. The losses arising from the difference between the market price received for the work produced and the cost of paying normal wages to disabled workers is paid by the state.

In the systems where the worker replaces an ordinary worker, great effort is put into making sure that the employer/customer pays a fair price for the privilege of having a worker. This price is paid to Samhall for the work provided, or is the unsubsidised part of wages employers pay on wage-guarantee jobs. The trade unions and the authorities do not want such jobs to 'crowd out' ordinary employment, and this limits the number of persons who can be employed this way.

The Swedish unemployment insurance covers 60 weeks for most persons. When this period is over, labour market programmes provide a possibility to have 65% of previous pay up to a low ceiling, without a time limit.<sup>11</sup> Educational activities, job training and traineeship are example of activities in these programmes. However, the work performed is not allowed to replace that of an ordinary worker. For instance, a person in such a programme cannot be the only worker present at a day-care facility in the early morning or late afternoon, even if only one child is present; the programme participant cannot take on the duties of a 'normal' employee.

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<sup>10</sup> The maximum time of support is four years, and there must be a plan for how the worker shall be able to work in the future with no subsidy or a reduced subsidy. An ageing person would not normally be expected to improve (comment: improve in what way?). See SFS 2000:630 Sections 8 and 30. There can be new decisions to increase the subsidy if work capacity deteriorates (see Section 26), but in principle the expectation must always be that the person shall improve (improve in what way?).

<sup>11</sup> Individual programmes have time limits, but new activities are offered continuously. There is no legal duty to do so but the goal is to avoid persons from falling into poverty.

Workers in these kinds of unemployment programmes often feel that they are not equal members of the community in the workplace. They must work there, but cannot work to their full potential.

The requirement on the long-term unemployed has clear elements of 'workfare' thinking.<sup>12</sup> Strict requirements to actively seek work and requirements for a certain amount of effort in order to achieve benefits are seen as important necessary to maintain taxpayers' trust in the unemployment insurance system. These requirements thus have a triple purpose:

- The work provided is good for society.
- Skills learned and social contacts in the workplace are good for the individual.
- Compelling benefit receivers to work hard weeds out welfare cheats.

In 1970 Sweden was rich and had a comprehensive social safety net. The retirement age was still 67. If a farmer or a carpenter or any other manual worker became too sick to continue with demanding work, they were allowed early retirement even though they were healthy enough to do many other jobs. The National Social Insurance Board was instructed to accept statements from the old manual worker that he or she no longer had the strength to continue to work:

From a labour market perspective, leaving the choice to the individual is appropriate. There is a manifest link between the willingness to work and the ability to do so. Is the willingness to work weak, labour market programs which otherwise would have been successful will often fail [my translation].<sup>13</sup>

A quasi-right to early retirement was introduced, and the age for this became 60 years. The idea was that sick elderly persons should not need to compete on the labour market. In practice, the acceptance of awarding early retirement based on labour-market considerations crept downward in the age limits. When the age of 60 years was written into the law in 1992, it was

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<sup>12</sup> H Pettersson, *Frihet från underordning* (Malmö, Bokbox förlag, 2012) 233.

<sup>13</sup> Government Bill 1970:66 40.

to emphasise that persons below that age should not get early retirement for labour-market reasons.<sup>14</sup>

This legal praxis was a clear example of age stereotyping. Age was directly relevant for deciding which persons should be given long-term sickness benefit, for which there is no duty to work, and who should receive unemployment benefits with extensive such duties.

#### 4. The sickness insurance reform – age no longer important

The definition of sickness was changed in 1995, so that Ch. 3 Sec. 7 of the National Insurance Act (1962:381) clearly stated that when sickness (reduction in capacity to work) was measured, labour-market, economic, social and other similar circumstances should not be taken into account.<sup>15</sup> According to the legislator, both the sickness insurance and the early retirement system were on a path leading to their becoming general income insurances rather than insurances for persons who had lost their capacity to work.<sup>16</sup> From 2003 the term *early retirement* was changed to *sickness benefit*.<sup>17</sup>

The reform was brought one step further in 2008. Today sickness (medical and psychological problems) comprises the only grounds on which sickness benefit can be awarded. If a person has been sick for 179 days, their capacity to work shall be assessed in terms of the normal job on the labour market that is best suited to their medical problem. It does not matter if this job is not available where they live, or if it has a low wage.

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<sup>14</sup> Government Bill 1994/95:147 40.

<sup>15</sup> Acts (1995:508) and (1996:1542) on changing the National Insurance Act (1962:381). There were exceptions but these were restrictively framed.

<sup>16</sup> Government White Paper 1995:149 216; L. Vahlne Westerhäll, 'Det sjukförsäkringsrättsliga arbetsoförmågebegreppet' in L. Vahlne Westerhäll (ed), *Arbets(o)förmåga* (Stockholm Santerus förlag 2008) 235. See also S. Stendal, *Communicating Justice. Providing Legitimacy* (Uppsala, Iustus förlag, 2003) 107.

<sup>17</sup> Act (2001:489) on Changing the National Insurance Act (1962:381). At this point in time there were two forms of sickness benefit, one time-limited and one open-ended. Today, only the open-ended sickness benefit exists for persons who are permanently sick.

Furthermore, if the National Employment Agency can provide a place in a labour-market programme or a subsidised job, the capacity to work shall be assessed in relation to this particular activity. When the sickness has continued for 915 days, the agency shall normally try to design a suitable activity for the person, and only those who cannot participate in such activities may get sickness benefit instead. Thus, a person who is sick but has some capacity to do work will often be in a labour-market programme. Formally, these rules apply to elderly workers as well as younger workers. There is no way to earn a right to special treatment for workers with many working years behind them and only a few years to retirement.

Government White Paper 2009:89 suggested another focus. The important factor should not be whether a person *could* work despite the medical problems. The important thing was whether or not the person *ought* to be forced into the labour-market programmes. Only those persons who had reasonable chances of getting a new job ought to be forced into labour-market programmes.<sup>18</sup>

According to this principle, an older person will get long-term sickness benefit more easily than a young person. From an employer's perspective, a deteriorating medical condition like ageing is worse compared to a stable disability. It would also make it easier for manual workers to get the long-term sickness benefit because bodily functions age faster compared to mental functions. An academic who loses some of his or her mental capacity has more jobs to choose from in which the remaining capacity can be used.

This government white paper was met with silence. The idea that anybody who can work shall work was the normative centrepiece of the sickness insurance reform. Saying that some people *can* work, but ought not be required to try to *find* work, and should be left alone by the National Employment Agency because their chances of getting a job are few, could be seen as a way of returning to a practice that allowed both age and the situation on the labour market to determine who was sick enough to get early retirement.

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<sup>18</sup> Government White Paper 2009:89 108.

## 5. Some final remarks

Today there is thus a sharp line at the age of 65. People seem to use their employment protection to stay employed, because the alternative is unemployment insurance which comes with demanding duty. At the age of 65, most persons take out pensions and stop working.<sup>19</sup> They do not use the extra two years of employment protection, although it would be very profitable to do so. Government White Paper 2013:25 and 2012:28 contains suggestions with regard to the ageing population. One proposal is to gradually lift the cut-off limit for unemployment insurance and long-term sickness insurance, and increase the age limit for the right to a guarantee pension at the same time, starting with an increase to the age of 66 in 2019.<sup>20</sup> As the Swedish system is very good at creating a high participation right before this important limit, such a reform is likely to be effective. If 66 becomes the age at which everyone is guaranteed a livable pension, most people will probably work to that age.

The same Government White Paper also made suggestions to increase participation above the guarantee-pension age. Increasing the employment protection age to 69, creating improved possibilities for elderly persons to enrol in education, developing a better working environment so that persons stay healthy longer, and offering flexible working hours so the elderly can work the desired amount of time are examples of the legislators' line of thinking. Fighting discriminatory attitudes is another central element.

It is questionable whether such things will work. Today, most people leave at 65 and not at 67. Age stereotyping is wrong. Yet the pension/sickness/unemployment age limits are of utmost importance. Why should a person work if they have sufficient income? All employment is built upon the foundation that the alternative for the worker is much worse. Had it not been so, the employer would not have any real power over the employee. Labour-market activities and the unemployment insurance system are designed partly to uphold this.

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<sup>19</sup> Pension Authority, *Pensionsåldern* 2011 22.

<sup>20</sup> Government White Paper 2013:25 24.

If society cannot make the healthy elderly and the elderly with a 50% work capacity choose to work voluntarily, then the alternative is to use the social security system to decide who shall work. It can be done by one crude stereotype like the pension/sickness/unemployment age limit of 65, which can be increased to any age that seems appropriate. Such a solution requires more work of everyone.

A stereotype – if correct with regard to the group level – is a rule of thumb. Sometimes it is appropriate and sometimes it is not. Taking away such rules one by one is not necessarily a good idea. The stereotyping suggested by Government White Paper 2009:89 may become relevant.

The higher the pensionable age becomes, the more important it will become to find general rules of thumb for differentiating it with regard the fact that age affects different persons in different ways; that involves some stereotyping. Not long ago, long-term sickness benefits were called invalidity pension. Sickness benefits are closely related in some ways to pensions, in that the central element involves the person receiving the benefit without a duty to work, and the central normative question is why this person should not work.

Should society withhold liveable pensions from some persons above the pensionable age if they are healthy? There is no way to increase the work duty more for those below the pensionable age. In the future, the strict line between ‘workfare’ below the age of 65 and extensive carrots above this age may need to be softened – regardless of whether the age limit is increased.



# Citizens as Customers – Social Rights and the Marketization of Elder Care

*Mirjam Katzin*

## 1. Introduction

The last decades have seen major changes in welfare systems. Deregulation and privatization have given the market a more prominent position in the welfare field, and the elder care has been largely influenced by this marketization. It is now to a greater extent privately financed and produced, recipients of public care are called ‘customers’ instead of ‘care users’ and market mechanisms are increasingly influential. The trend has been evident in Sweden<sup>1</sup> but it also exists on a global scale; in both classical welfare societies and in countries where care needs and production are already privatized to a large extent.<sup>2</sup> Meanwhile, both the number of elderly people and the societal cost of safeguarding the needs of older people are expected to increase. In recent years, these factors have attracted increasing attention at EU level, with a European Year for Active Ageing and Solidarity between Generations<sup>3</sup>, as well as attempts to implement further Art 25 of the EU Charter of Fundamental Rights, where the rights of the elderly to lead a life

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<sup>1</sup> L Lundqvist, ‘Privatisering’ in B Rothstein (ed), *Politik som organisation* (2010) 229.

<sup>2</sup> C Estes, ‘Social Security privatization and older women: A feminist political economy perspective’ (2004) 18 *Journal of Aging Studies* 10.

<sup>3</sup> <http://europa.eu/ey2012>.



of dignity and independence and to participate in social and cultural life are recognized.

The marketization of the elder care can be seen to take place on different levels. On one plane, the production and organization of elder care, as well as the responsibility for the needs of elderly, have increasingly moved (back) into the private sphere. On another plane, a value such as 'freedom of choice' has gained growing importance within the elder care system and New Public Management ideas create a driving force of change.<sup>4</sup> Signs of the latter can be seen in the development of 'care choice systems' in the elder care sphere. A care choice system means that the elderly are customers who, with the help of a 'care allowance', can make their own choices when selecting a producer in a care service market.<sup>5</sup> A welfare recipient thus has the possibility of what is called 'exit', ie to opt out from a producer with which they are dissatisfied, and instead choose a better one.<sup>6</sup>

Care choice systems have been introduced in elder care in almost half of the Swedish municipalities, but these systems are not obligatory for the municipalities.<sup>7</sup> However, the political ambition is to make choice systems obligatory and to increase further the share of private providers of elder care. The value is considered to be found in increased quality of care that the politicians hope will result from greater freedom of choice and exit possibilities, which will force poor performers to leave the market.<sup>8</sup> Increased possibilities to choose a service producer can also be seen as a way to give the elderly – people often perceived as passive recipients – increased power and influence over their lives. There are also motives such as criticism of the centralization, formalization and bureaucratization of the public

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<sup>4</sup> H Brodin, *Does Anybody Care? Public and Private Responsibilities in Swedish Eldercare 1940–2000* (2005) 103.

<sup>5</sup> Lundqvist, 'Privatisering' 236.

<sup>6</sup> J Fountain, 'Paradoxes of public sector customer service' (2001) *Governance: An International Journal of Policy and Administration* 60

<sup>7</sup> Konkurrensverket, *Kommunernas valfrihetssystem – så fungerar konkurrensen* (2012) 20.

<sup>8</sup> M Larsson, 'Valfrihet inom äldreården kan bli obligatorisk 2014', *DN* 15 September 2012.

sector, as well as a wish to achieve optimal utilization of resources through competition.<sup>9</sup>

However, the citizen's relationship with the state and municipality is changing. Public bodies are increasingly assuming the role as mere probation and financier of relationships that primarily are private, rather than being institutions where welfare is generated; these authorities are moving from political decisions to funding and production.<sup>10</sup> It is therefore interesting to study the legal problems that privatization, combined with a need for growing social commitment for the elderly as the numbers of older people increases, may pose to the public, as well as what impact this change and dynamic has on the situation of elderly citizens.

In addition, it is essential to critically examine the legal differences between being a citizen and being a customer, an analysis which can be based on the shifts that have occurred in the elder care field and the effects which can be connected to these. Another relevant focus is the impact of the developments on the social rights of elderly, their ability to claim their rights and their chances of getting their needs for good and qualitative care met within the framework of the elder care of the future.<sup>11</sup>

## 2. Purpose and research question

The purpose of my project is to analyse the changing role of the individual in the elder care system and the impact of changes in social rights of the elderly, by studying legal changes in Swedish elder care on regulatory, organizational and implementation levels. I will try to answer two main questions: which legal changes have occurred, and what effects have these had for the elderly individual?

The questions can be developed into the following sub-questions:

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<sup>9</sup> J Aberbach and T Christensen, 'Citizens and consumers: An NPM dilemma' (2005) *Public Management Review* 232.

<sup>10</sup> A-C Landelius, 'Statlig styrning och privatisering: vård, skola och omsorg' in B Rothstein and L Vahlne Westerhäll (eds), *Bortom den starka statens politik* (2005) 88.

<sup>11</sup> M Fineman, "'Elderly' as vulnerable: rethinking the nature of individual and societal responsibility' (2012) *Elder Law Journal* 20.

- How have the public obligations changed, directly and indirectly in terms of the social rights of elderly, particularly regarding *the responsibility for the needs* of elderly, *the responsibility for the quality of elder care* and the *equality aspects of the elder care system*, as a result of marketization of elder care?
- In which ways has the legal status of elderly persons in need of care changed as a result of this development, and how does it affect their situation?
- How can values such as rule of law, equal treatment and other values of public law be ensured in privatized elder care?

As seen in the posed questions, I have three main aspects on which I want to focus my investigation: the responsibility for the needs of elderly, the responsibility for the quality of elder care and the equality aspects of the elder care system.

## 2.1. The responsibility for the needs of elderly

The perception of the public responsibility to meet the needs of the elderly is one important aspect in analysing the provisions of the welfare system for the elderly. Many private providers of elder care services perform so-called ‘additional services’, which can be bought by the elderly in combination with publically funded services.<sup>12</sup> The need for such services has increased as the municipalities’ ‘need assessment’ has changed in recent decades, with a reduction in the public funding to meet these needs.<sup>13</sup> It is important to study how privatization of the responsibility for needs can be seen through the privatization of production, the existence of ‘additional services’ and the access to public assistance.

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<sup>12</sup> Prop. 2008/09:29 *Lag om valfrihetssystem* 123.

<sup>13</sup> Brodin, *Does Anybody Care?* 104.

## 2.2. The responsibility for the quality of elder care

From a rights perspective, it is central to establish whether or not the responsibility for the quality of elder care is changing with the privatization of the care.<sup>14</sup> As stated above, one fundamental idea of the customer choice models is that the quality will increase as poor performers are eliminated through market mechanisms. Research has demonstrated that *continuity* is the most important aspect for the elderly, which makes the ‘exit’ option less powerful. Furthermore, because of the impairments that often come with age, many older persons have difficulties in choosing service providers. Only one in five makes an active choice of provider.<sup>15</sup> One of the risks of the care choice system is that in reality, the influence of the elderly decreases; instead of their complaints being heard, the response they receive to their complaint may be that they are asked to change providers.

## 2.3. The equality aspects of the elder care system

Criticism of care choice systems also focuses on equality issues.<sup>16</sup> There is a risk that consumer choice systems will lead to resourceful individuals obtaining a better quality of care than others, thereby creating unequal distribution of elder care.<sup>17</sup> Research has indicated that groups such as women and elderly with other ethnicities tend to be the losers in care choice systems.<sup>18</sup> Based on the welfare-state goal of equality in living conditions, changes in the regulation of and access to elder care need to be analysed from an equality perspective.

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<sup>14</sup> A-C Landelius, ‘Statlig styrning och privatisering: vård, skola och omsorg’ 105.

<sup>15</sup> B Meinow, M Parker and M Thorslund, ‘Consumers of eldercare in Sweden: The semblance of choice’ (2001) *Social Science and Medicine* 1288.

<sup>16</sup> Eg Fountain, ‘Paradoxes of public sector customer service’ 65.

<sup>17</sup> Aberbach and Christensen, ‘Citizens and consumers: An NPM dilemma’ 232.

<sup>18</sup> A Gavanas, ‘Privatisering av äldreomsorgen och äldre kunder som aktörer på (in)formella, etnifierade marknader’ in P Mulinari and R Selberg (eds), *Arbete: Intersektionella perspektiv* (2011) 103.

### 3. Method and material

The project will consist of a combination of two approaches: a legal analysis of how social rights as basic principles of public law are affected by the marketization of the Swedish elder care system, and a qualitative empirical comparison over time and between municipalities. I want to examine changes in the regulation, organization and implementation at national and municipal levels, through study of a combination of national and local regulatory and policy documents. I will concentrate on the development during the past decade.

# III Legal Empowerment of Elderly Migrants



# Pensions on the Move

*Emma Holm*

## 1. Introduction

The European countries are facing an ageing population. At the same time, birth rates are declining. Although this is a global trend, Europe will be the only continent with a negative population growth rate over the next 50 years; it will also have the highest median age. The working-age population is thus shrinking, resulting in fewer people who in turn must support a larger number of pensioners.<sup>1</sup> This development also means that legislation with implications for elderly persons will become increasingly important. For example, health care and pension systems must be able to provide good care and sufficient income, while also being economically sustainable. While the Member States of the European Union are entitled to design their own social systems, it is obvious that the integration of the economies and societies of the Member States means that national reforms may have an impact beyond national borders.<sup>2</sup>

The EU rules on free movement of persons will most likely be challenged as well. Tomorrow's pensioners might be more inclined to move to another Member State to retire, either with an exportable pension from the previous work state but with a potentially increased need for health care, or with insufficient means, which might make the person dependent on family

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<sup>1</sup> Commission, 'Demography, active ageing and pensions', Social Europe guide Volume 3 (2012).

<sup>2</sup> Commission: 'White paper – An agenda for Adequate, Safe and Sustainable Pensions' COM (2012) 55 final.



members or even social assistance in the host Member State. Increased mobility during work life also makes it crucial to consider all the relevant facts when calculating old-age pension, such as periods of child rearing completed in other Member States.

This project seeks to examine the situation of elderly persons in relation to the free movement of workers/persons, from three main aspects: the right to residence and equal treatment as regards social benefits and the specific issues related to elderly persons; the right to social security benefits for elderly persons moving to another Member State; and the issue of child-rearing periods and pension rights, with the Swedish rules on barnår as a practical example. The project will be presented in the form of articles.

## 2. Theoretical framework

In my thesis<sup>3</sup>, the theory of law as normative patterns in a normative field<sup>4</sup> formed the basis of analysis, and was used to systematise the norms examined and discuss why problems of interpretation might arise in the area of EU law and parental benefits.

According to the theory of law as normative patterns in a normative field, legal solutions in the area of the social dimension may be said to oscillate between at least three basic normative patterns, or poles, in a normative field. These are the pattern protection of the established position, the market-functional pattern and the pattern of just distribution. Rules based on income replacement represent the pattern of established position. Work is normally a condition for receiving such benefits, in which case the rules also represent the market-functional pattern. Benefits based on need or implying a solidarity-based redistribution of resources represent the pattern of just distribution. Such benefits are normally residence-based.

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<sup>3</sup> E Holm, *Fri rörlighet för familjer – en normativ analys av föräldrapenningen och EU-rätten* (Lund, Juristförlaget, 2010).

<sup>4</sup> See A Christensen, 'Normative Patterns and the Normative Field: A Post-liberal View on Law' in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense. Welfare State Expectations, Privatisation and Private Law* (Aldershot, Ashgate, 1999) 83ff.

This theory will also be central in this research project, as it is particularly useful in an EU-law/comparative context where norms on different levels are being examined.

### 3. The right to residence and equal treatment in other Member States

The right to free movement for workers is a cornerstone in European integration. When taking up employment in another Member State, workers are protected against discrimination in accordance with Article 45 of the Treaty on the Functioning of the European Union and Regulation 492/2011<sup>5</sup> (previously Regulation 1612/68)<sup>6</sup>. The workers' right to residence in another Member State is guaranteed through Directive 2004/38/EU<sup>7</sup> – the Free Movement Directive – which provides very limited possibilities for a Member State to expel a person with worker status.

Equal treatment as regards social circumstances is naturally of crucial importance for a worker who moves to another Member State with his or her family, in order for the worker to be fully integrated in the host state. Workers are thus also entitled to the same social advantages as the host state's own nationals. Direct or indirect discriminatory conditions may not be upheld against a worker from another Member State. Nationality clauses or residence requirements are examples of such discriminatory conditions.

The protection surrounding workers leads one to wonder which groups are excluded from this privileged lot. Although the term 'worker' is to be interpreted in accordance with the practice of the Court of Justice of the European Union (CJEU), according to which it does not require full-time

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5 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers, [2011] OJ L141/1.

6 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] OJ L 257/2.

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L158/ 77.

employment as long as the work is considered effective and genuine, it is obvious that pensioners, students and job-seekers may fall outside this category. Non-economically active Union citizens have gradually been granted certain rights to move and reside in other Member States, and receive equal treatment in the EU legal system and according to case law from the CJEU. This development was codified in the Free Movement Directive. However, the rights for non-economically active Union citizens are not as strong and transparent as those for workers. According to the Free Movement Directive, Union citizens other than workers have a right to residence only if they have sufficient resources for themselves and their family members so as not to pose a burden on the social assistance system of the host Member State during their period of residence; they must also have comprehensive sickness insurance cover in that state.

The right to residence is maintained as long as the Union citizens do not become an unreasonable burden on the social assistance system of the host Member State. In many countries, there are specific benefits for elderly persons with insufficient pensions, often classified as so-called special non-contributory benefits (hybrid benefits) within the framework of Regulation 883/2004<sup>8</sup> (previously 1408/71<sup>9</sup>) concerning the coordination of social security benefits (see below). Although they comprise a mix between social security and social assistance, these benefits fall within the scope of the social security coordination system. Is the dependence on such benefits in the host state equal to being an unreasonable burden to the social assistance system? There is currently a case pending before the CJEU concerning this issue, where the Austrian Oberster Gerichtshof has made a reference for a preliminary ruling.<sup>10</sup> The case concerns a person who has ceased his professional activity to reside for more than three months in another Member State. He receives a retirement pension below the minimum subsistence level of the host Member State and has requested a compensatory supplement (*Ausgleichszulage*), which is a special non-

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<sup>8</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L166/ 1.

<sup>9</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1971] OJ L 149/2.

<sup>10</sup> Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* (pending).

contributory cash benefit. The definition of the term ‘social assistance system’ is of course crucial in this case, and the question is whether benefits similar to social security benefits might also fall into this category.

In certain aspects concerning equal treatment as regards social advantages, pensioners have been granted a stronger protection than other non-active persons. Might this be explained by the idea that pensioners, as previous workers, have an established position? <sup>11</sup>

Another interesting aspect as concerns residence and equal treatment is that the notion ‘family member’ also covers dependent direct relatives in the ascending line.<sup>12</sup> Elderly persons who do not fulfil the criteria for residence themselves may thus depend on their children living in a Member State. This may seem odd for Member States with social systems that are highly individualised and where family is no longer the primary form of belonging.

In conclusion, one may see that in the area of free movement of persons, there is a tension between residence and economic activity.

## 4. Social security benefits in cross-border situations

The EU rules on coordination of social security benefits are also an important part of the free movement of workers/persons. The legal base is found in Article 48 of the Treaty, where two important principles of coordination are also mentioned: aggregation of insurance periods and exportability of benefits.

Social security is a politically sensitive issue and there is no room for the EU to make material rules, but only to coordinate the national systems to avoid negative consequences for migrant persons. The coordination provisions are found in Regulation 883/2004. The Regulation covers all Union citizens who are or have been insured in a social security system in a Member State. This expansion of the personal scope was one of the main changes in

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<sup>11</sup> See Christensen, *Normative Patterns and the Normative Field*.

<sup>12</sup> Article 2.2 of the Free Movement Directive.

Regulation 883/2004 and is an adjustment to the developments in the area of free movement of persons. When determining applicable legislation, the main rule is that economically active persons are covered by the legislation in the work state, whereas non-active persons are covered by the legislation in the state where they reside. There are also principles on equal treatment, assimilation of benefits, income, facts or events, exportability and aggregation of insurance periods.<sup>13</sup> Where non-economically active persons are concerned, the question arises whether they are entitled to only residence-based benefits, or whether they may invoke periods of work/income from other Member States to also be entitled to work-based benefits.<sup>14</sup> However, the scope of the principle of assimilation, which is new in Regulation 883/2004, is still unclear.<sup>15</sup>

As regards old-age pensions, there are specific rules and principles in the Regulation. The calculation of old-age pension is based on the principle of pro-rata calculation, meaning that each Member State where a person has been insured will pay pension in relation to the insurance periods fulfilled in that state.<sup>16</sup> This is a different solution than for other benefits covered by the Regulation. A pensioner might thus receive pension from several states, and the pensions are fully exportable to the state of residence, which is the applicable legislation for non-active persons as regards benefits in general. Although a person has pension/pensions from other Member States, the state of residence may still be burdened by costs for elderly persons, claiming for example health care and child allowances. There are specific rules concerning health care for pensioners, in order to divide the responsibility among the Member States.<sup>17</sup> However, the specific rules on family

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<sup>13</sup> For a general overview of Regulation 883/2004 see F Pennings, *European Social Security Law*, 5th edn (Antwerp, Intersentia, 2010).

<sup>14</sup> See case C-257/10 *Försäkringskassan v Bergström*, judgement of the Court of 27 January 2012 which concerned the right to Swedish parental benefit for a non-economically active person.

<sup>15</sup> Y Jorens and F von Overmeiren, 'General Principles of Coordination in Regulation 883/2004' (2009) *European Journal of Social Security* 65ff. See also Y Jorens and S Roberts (eds), *Think Tank Report 2010 Analysis of selected concept of the regulatory framework and practical consequences on the social security coordination* (Training and Reporting on European Social Security, Project DG EMPL/E/3-VC/2009/1325) 6ff.

<sup>16</sup> Article 52 of Regulation 883/2004.

<sup>17</sup> Articles 23–30 of Regulation 883/2004.

allowances for pensioners in Regulation 1408/71 have been abolished in the new Regulation.

The abovementioned leads to the following questions: what responsibility does the host state have for granting social security benefits to a pensioner? What responsibility does the host state have for granting social security to an elder person, who is not yet receiving pension, but is instead in search of work? The latter question relates to the problems of non-economically active persons. The issue of elders in search of work – also across borders – will probably be of increased importance in the future, as there are discussions within the EU countries to increase pension eligibility ages.<sup>18</sup> Elderly persons may thus fall in different categories when Regulation 883/2004 is to be applied, possibly with varying results as regards the right to social security.

The special non-contributory benefits are another area of interest.<sup>19</sup> As stated above, these benefits are on the borderline between social security and social assistance, and are often in the form of supplements to old-age pensions. An elderly person might move to a new Member State with an insufficient pension. In contrast to the old age pension, the non-contributory benefits are not exportable from the Member State responsible for paying pension. This is because non-contributory benefits, although covered by Regulation 883/2004, are excluded from the exportability principle due to their strong link with the cost of living in the state in question. A pensioner with an insufficient pension (or who, due to the economic standard in the new host state, suddenly does not have sufficient means to live there), might be inclined to rely on such non-contributory benefits in the new host state. Might this have implications for the person's right to residence, regulated in the Free Movement Directive?

In conclusion, the tension between residence and economic activity is seen also in the area of social security coordination. The relationship between the legal instruments in the area of free movement of persons – Regulation

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<sup>18</sup> See Commission, *White paper*.

<sup>19</sup> Chapter 9 of Regulation 883/2004. See H Verschuere, 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ' (2009) *European Journal of Social Security* 217ff.

883/2004 and the Free Movement Directive – is also quite unclear. Does the right to social security benefits presuppose a right to residence, or can the granting of a social security benefit or a non-contributory benefit in fact constitute a right to residence?

## 5. The specific issue of pension and child-rearing periods

The specific issue of pension for child-rearing periods, with the Swedish rules on ‘barnår’<sup>20</sup> as a practical example, will also be part of my research.

Regulation 883/2004 contains a new principle on assimilation of facts, meaning that Member States must take into account benefits, income, facts or events from other Member States. This principle might be seen as a codification of the case law concerning Regulation 1408/71 from the CJEU, according to which, for example, child-rearing periods from other Member States must be considered when calculating pensions.<sup>21</sup> As stated above, exactly how far-reaching this new Article might be is yet unknown. There is also a specific Article concerning child-rearing periods in the implementing regulation to Regulation 883/2004.<sup>22</sup> Problems may arise, however, as to which state is responsible for taking into account periods of child rearing when it comes to calculating pensions.<sup>23</sup>

In the Swedish pension system, a person is entitled to a pensionable amount for years spent at home with small children. A condition is that the parent and the child have been residing in Sweden during the year in question. For the pension entitlements for the years spent with children to be included in the future pension, the person must have at least five years with income from work in Sweden before the age of 70. The earnings must be at least

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<sup>20</sup> See Chapters 60 and 62 of the Swedish Social Insurance Act (*Socialförsäkringsbalken*).

<sup>21</sup> Case C-135/99 *Ursula Elsen v Bundesversicherungsanstalt für Angestellte* [2000] ECR I-10409, case C-28/00 *Liselotte Kauer v. Pensionsversicherungsanstalt der Angestellten* [2002] ECR I-01343.

<sup>22</sup> Article 44 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, [2009] OJ L 284/1.

<sup>23</sup> Jorens and Roberts, *Think Tank Report 2010* 47ff.

two base amounts. Only one of the parents may be entitled to the pensionable amount. It is automatically granted to the parent with the lowest earnings, but this right may be transferred to the other parent. In this regard, the rules are on the borderline between old-age benefits and family benefits.<sup>24</sup> This legal solution may lead to problems of interpretation in a cross-border context.

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<sup>24</sup> See <http://www.regeringen.se/sb/d/14846>, where the Swedish government informs website visitors that the rules are considered part of the support system for families (together with parental benefits, for example).





# Health Care – A Right without Borders, also for the Elderly

*Martina Axmin*

## 1. Introduction

The purpose of this presentation is to briefly introduce my current research project – a doctoral thesis focusing on the free movement of the elderly and their right to cross-border health care in a European context. The project, which started in October 2012, is part of the focus area ‘Legal Empowerment of Elderly Migrants’.

As presented in the introductory chapter, demographic change is transforming the population structure of the EU. The population aged 65 and older will increase significantly. As people age, their need for medical care increases, and old age is often connected with illness and disability. A shrinking workforce has to handle increasing health care needs for the elderly. In the EU a shift is foreseen in the so-called depending ratio: instead of this ratio being four working-age people for every person aged over 60 years, it will decrease to two working-age persons per each older EU citizen. This challenges national social security systems and, in particular, pension levels and health care systems.

## 2. The focus of the research project

After starting out first and foremost as an economic community, the European integration has expanded its cooperation over the years to new fields, such as the social dimension of the internal market. The Treaty has always contained provisions granting free movements for the economically

active, and the right to free movement has always been a fundamental part of the EU and the internal market. The introduction of a European citizenship concept expanded the free movement of non-economically active persons. The elderly likely make up a large part of this group. Nevertheless, in certain ways the movement of non-economically active citizens is limited. According to the Directive 2004/38,<sup>1</sup> the right of residence in the territory of another Member State for a period longer than three months is conditional, in that the Union citizen must not become a burden on the host state's social welfare system. Here, both insufficient pensions and health care costs among the elderly are key issues.

The European integration has also led to increased mobility in health care. Article 168.7 TFEU provides that Member States' responsibilities include health management and allocation of the resources assigned to them. Member States have traditionally seen health care as an area 'free' from EU law, and health care systems differ among the Member States. Furthermore, a distinction can be made between social health insurance systems (Bismarck model) and national health systems (Beveridge model), where the former is financed by insurance premiums and the latter is financed by general taxation.<sup>2</sup> The Member States have repeatedly stated that in order to plan the number of hospitals and the geographical distribution and the organization of these hospitals, they need to know approximately how many patients will make use of their health care systems. In the long run, the Member States have argued, a right for patients to freely choose treatments or products outside the home state would incur higher costs and lead to situations in which the responsible health institution would be unable to reimburse the costs.<sup>3</sup>

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<sup>1</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>2</sup> E Jakubowski and R Busse, *Health Care Systems in the EU: A Comparative Study* (Brussel, European Parliament, 1998). See also Y Jorens, 'The Right to Health Care' in M McKee, E Mossialos and R Baeten (eds), *The Impact of EU Law on Health Care Systems* (Brussels, P.I.E.-Peter Lang, 2002).

<sup>3</sup> See eg Case T-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep*

Nevertheless, the EU has introduced secondary legislation regarding cross-border health care, in the form of the legislation on the coordination of social security benefits.<sup>4</sup> In 1998, the CJEU decided to extend the scope of health care integration under the free movement of services.<sup>5</sup> Since then, a chain of case law has come into being, granting the freedom to individuals to receive health services in a Member State other than that in which they are affiliated for health purposes. In the newly adopted Directive on cross-border health care<sup>6</sup> the case law of CJEU was codified.

### 3. Different situations

The main aim of the research project is thus to examine the right to free movement of elderly migrants and their access to health care in cases when they are making use of their right to free movement, either by (I) moving permanently to another Member State and thus *changing residence*, by (II) *temporarily staying* in another Member State or by (III) *seeking* health care in another Member State.

(I) An increasing number of non-economically active Union citizens are moving long-term to *reside* in another Member State for reasons other than pursuing economic activities. The grandfather living in Sweden is moving to London to unite with his daughter and grandchildren. The daughter has already exercised her right to free movement for workers, and now she wants to unite with her father. There is also the case where the retired German couple chooses to move to Italy in order to enjoy a better climate, and other

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*Zorgverzekeringen* [2001] ECR I-5473 and Case C-368/98 *Vanbraekel and Others v Alliance Nationale des Mutualités Chrésiennes* [2001] ECR I-5363.

<sup>4</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, formerly Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

<sup>5</sup> Case T-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931 and Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

<sup>6</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care [2011] OJ L88/45.

situations, such as elderly persons moving back to their native country after working and living in another Member State.

(II) There is also the situation where a person *temporarily* stays in another Member State. The length of stay may vary. Elderly choose to leave their state of residence for a period limited in time and on a regular basis, spending part of the year in another Member State, eg the Swedish couple who has bought a house in Spain and stays there from October until March. The rest of the year they are resident in Sweden. During their time in Spain, one of them has a toothache and needs to see a dentist. When people grow older, their health care problems increase. Perhaps one of the two has a kidney disease and is dependent on kidney dialysis four times a week, or is dependent on long-term care. It could also be an occasional stay. Yet another person is skiing in another Member State and has an accident, resulting in a broken bone that needs to be set.

(III) Lastly, there is the specific situation where a person is travelling for the purpose of *seeking* treatment in another Member State, on a regular basis or on one certain occasion. He or she wishes to obtain treatment in another Member State because that specific treatment is not available in the home state, or because the quality of the care is considered to be higher in the destination state. There could also be waiting lists in the state of affiliation and the desired treatment can thus be available in sooner in another Member State.

These three situations constitute the starting point in my research project for describing and analysing the right to cross-border health care in a European context. As set out above, the legal framework of cross-border health care in an EU law context consists of secondary legislation and its interpretation, but also the Treaty-based case law of the CJEU. European citizenship and the right to free movement are central concepts when the right to cross-border health care is being examined.

## 4. The legal framework

The original Treaty gave no explicit competence to the EU institutions as regards health care. At that time it was clear that each Member State had the exclusive competence to organise its health care systems. However, it was recognized early on that the existence of different national educational

systems and their issuing diplomas and qualifications constituted an obstacle to the free movements of persons.<sup>7</sup> An explicit legal basis provision for health was introduced in 1993 in the Treaty by Treaty of Maastricht.<sup>8</sup>

Although the Treaty provides that Member States' responsibilities include health management and allocation of resources assigned to them, secondary legislation concerning cross-border health care has been adopted in form of the legislation on coordination of social security benefits and the newly adopted Directive on cross-border health care, and the CJEU has extended the scope of health care integration under the free movement of services.

The creation of the common market is one of the central purposes of EU. It was clear from the beginning to achieve this goal, coordination of national

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<sup>7</sup> Various directives aiming at mutual recognition have therefore been adopted, of which one of the first concerned doctors and recognition of their degrees (the original directives were: Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1975] OJ L167/1 and Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors [1975] OJ L167/14 and the current Directive Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications [1993] OJ L165/1). A general system for recognition of diplomas was established in Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L19/16 and a general system of recognition of professional educations was established in Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [1995] OJ L30/40. – In the late 80s and at the beginning of 90s, additional measures were taken in the area of health care; examples include the Europe against Cancer and the Europe against AIDS initiatives.

<sup>8</sup> Article 129 of the Treaty of Maastricht provided that 'the Community shall contribute towards a high level of human health protection by encouraging co-operation between Member States, and if necessary, lending support to their action'. Article 152 of the Treaty of Amsterdam, which came into effect on 1 May 1999, defined the role of EU in the health care field, and explicitly declared that 'Community action in the field of public health shall fully respect the responsibilities of the Member States for organization and delivery of health services and medical care'. The TFEU renumbered the public health section and according to Article 168, 'Member States' responsibilities include health management and allocation of resources assigned to them'.

social security systems of the Member States was essential for the free movement of workers.<sup>9</sup> On the one hand, the Regulations' health care provisions are administrative rules regulating the coordination between the social security institutions of the responsible state and the state which provides the health care; on the other hand, they are provisions concerning cross-border health care, ie a right to obtain health care during a temporary stay in another Member State than in the state of affiliation.<sup>10</sup> In the perspective of the elderly, the Regulation also contains specific rules in section 2 concerning pensioners and their right to health care.<sup>11</sup>

In the *Kohll and Decker* cases, however, the CJEU ruled that in some situations the condition of authorization is contrary to the Treaty. The authorization could constitute an obstacle to the rules of free movement. Medical treatments, according to the CJEU, are to be considered as services, and fall within the rules of free movement. Since then, a line of case law has

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<sup>9</sup> Therefore, it is no coincidence that one of the earliest regulations was Regulation n° 3 (OJ 30/561 DE, FR, NL). In 1971, Regulation n° 3 was replaced by Regulation 1408/71, which was replaced on 1 May 2010 by Regulation 883/2004.

<sup>10</sup> According to the coordination rules, obtaining care in another Member State requires authorization. The Regulation requires the home state to pay medical costs incurred when a citizen is in another Member State in two situations. The first situation involves an insured person who needs emergency treatment during a stay in another Member State. The patient then has a right to health care as though he or she were insured in that state (Article 19). The second situation involves a person who wants to go to another Member State to receive appropriate treatment there. In this situation, an authorization shall be given if two conditions are fulfilled. Firstly, the treatment in question shall be among the benefits provided for by the legislation in the Member State where the person resides. Secondly, the insured person cannot be given the treatment in the home state within a time limit which is medically justifiable, taking into account his or her current state of health and probable course of his or her illness (Article 20). Many judgements of the CJEU have been concerned with the right to receive prior authorization for obtaining treatment abroad.

<sup>11</sup> In the regulation, medical treatments are referred to as 'benefits in kind'. The definition of benefits in kind is according to Article 1 (va) benefits 'which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes long-term care'. The general rule is that the pensioner is insured for sickness benefits in the state of residence, but only if he or she is entitled to a pension from the state of residence (Article 23). If there is no such right, the pensioner is entitled to benefits in the state of residence at the expense of the responsible state (Article 24).

been developed.<sup>12</sup> It makes no difference whether the care is provided in a hospital environment or outside such an environment. However, the CJEU has ruled that in the case of services provided in a hospital, a requirement of prior authorization can be justified if based on objective, non-discriminatory criteria which are known in advance so that the prior authorization is not used arbitrarily.<sup>13</sup>

The case law of the CJEU has led to two parallel systems of reimbursement for cross-border health care. Over the years, it has been noted that Member States are having problems accepting that health care can be provided in another Member State without prior authorization, and national administrative procedures have made it difficult to obtain cross-border health care. As a consequence, in 2008 the Commission proposed a Directive on the application of patients' rights in cross-border health care.<sup>14</sup> The proposal was finally approved by the European Parliament on 19 January 2011. The fact that it took more than two years before the proposal could be adopted shows how complex the issue of cross-border health care is. The Directive aims to ensure patient mobility in accordance with the principles established by the CJEU, and is also intended to achieve a more effective application of the case law, while ensuring clarity for Union citizens

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<sup>12</sup> The cases emerged within proceedings brought before a national court, where the latter referred questions to the CJEU for a preliminary ruling on whether national prior authorization obstructs the freedom of movement. Lately, however, the Commission has initiated actions against Member States that failed to adapt their social security legislation to the EU law; see eg Case C-211/08 *European Commission v Kingdom of Spain* [2010] ECR I-05267, Case C-512/08 *European Commission v French Republic* [2010] ECR I-08833 and Case C-255/09 *European Commission v Portuguese Republic* [2011] Not yet reported in ECR.

<sup>13</sup> Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

<sup>14</sup> Commission's proposal on a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border health care (COM/2008/0414 final). See also Commission staff working document – Accompanying document to the proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border health care – Impact assessment (SEC/2008/2163 final).



about their rights when they are moving from one Member State to another.<sup>15</sup>

## 5. Concluding remarks

At the same time as national health care systems become increasingly strained, we can see a change allowing free movement of all EU nationals throughout the Union and a right to receive health care in a Member State other than the Member State of affiliation. The research project highlights the tension between the guarantee of free movement on the one hand, and on the other hand the autonomy of the Member States and their right to organise their own health care systems. It also highlights the tension between solidarity and contributions-based rights to health care within the framework of European integration.

The Member States have repeatedly maintained that issues concerning social security do not fall within the scope of free movement. To what extent may the Member States limit the right of elderly to receive health care in situations where they are making use of their right to free movement? It is also a matter of care providers' rights and obligations to provide health care in cross-border situations, as well as how the health care is being financed. Ultimately, the research project is about the freedom of movement as such for elderly Union citizens – and how this might threaten to burden the health care system in the country of residence.

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<sup>15</sup> 8<sup>th</sup> recital, 9<sup>th</sup> recital and 10<sup>th</sup> of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.

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The Norma Elder Law Research Environment within the Norma Research Programme at the Faculty of Law at Lund University began its work in 2012, with generous funding from Ragnar Söderberg's Foundation and the Marianne and Marcus Wallenberg Foundation, respectively. The general aim of the project is to establish Elder Law as a new research discipline – first and foremost in Sweden and the other Nordic countries but also in Europe, as we are 'lagging behind' the US and the Anglo-Saxon world in this area. This book is the result of a semi-internal workshop held at the Old Bishop's house in Lund in March 2013. It is hoped that this volume will serve as an introduction not only to the Norma Elder Law Research Environment but also to some extent to Elder Law research more generally. To this end the book also contains an extensive bibliography of relevance for Elder Law studies.



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From the left to the right: Taeko Nakano, Andrea Iossa, Niklas Selberg, Mirjam Katzin, Per Norberg, Mia Rönnmar, Ann Numhauser-Henning, Eva Ryrstedt, Nancy Dowd, Lana Goral, Martina Axmin.