

Protecting the Health of the Elderly

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Israel Doron & Nena Georgantzi (eds.), [Ageing, Ageism and the Law. European Perspectives on the Rights of Older Persons](#) (2018).

Like other regions in the world, Europe is being confronted with major demographic changes through decreasing birth rates and an ageing population. Although one cannot deny the advantages of the increased life expectancy, the elderly are struggling with stereotypes and facing discrimination based on age. For instance, elderly people use healthcare services disproportionately compared to younger generations, and an ageing population will further increase healthcare costs. Also, in times of public health emergencies like the Covid-19 pandemic, there is an ongoing discussion on whether the elderly should be deprioritised for admission at intensive care units due to scarcity of ventilators.

Facing such challenges, *Ageing, Ageism and the Law* includes the outcomes of a research project on the consequences of ageism and the role of law (enacting, enforcing and changing laws) in fighting ageism in contemporary societies.

This book is in two parts. Part one covers theories and concepts, explaining the core notions of equality and older people, ageing, vulnerability and ageism and how they can be related to law. The leading concept here is ageism. Although there are several definitions of ageism, here the authors describe ageism as: ‘negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being “old” or elderly. Ageism can be implicit or explicit and can be expressed on a micro-, meso-, or macro-level’ (P. 4.) Based on this definition, the authors start a journey to ‘explain the reasons and foundations for ageism’.

Part two addresses the legal experiences to protect the rights of elderly and the manifestations of ageism, from a European—both European Union and Council of Europe level—and international human rights perspective. EU law places age in anti-discrimination clauses both in primary law (Treaty and Charter) and secondary law (directives), although the focus is on labour relations. A more ‘horizontal’ directive, implementing the principle of equal treatment in other parts of sectors in society, [has been proposed](#) by the European Council. In addition, a range of other measures and strategies have been adopted to “combat social exclusion and discrimination” and “promote ... solidarity between generations ...” (Article 3(3) EU Treaty). Thus, at EU level the notion of solidarity encompasses the value of *intergenerational* solidarity to mutually support generations, including the elderly, by various social protection and social inclusion policies (P. 78.)

The Council of Europe operates in a different manner, fighting all forms of prohibited discrimination, including age-based discrimination and stereotyping, as covered by the European Convention on Human Rights (Article 14) and protected by the European Human Rights Court. Article 14 violations must be read together with other rights under the Convention, such as the right to respect for family and private life. An illustrative case is that of *Carvalho Pinto de Sousa v. Portugal*, claiming compensation in a medical malpractice case where the plaintiff’s primary injury was a loss of sensation in the vagina area. At a national level, the Portuguese Supreme Court reduced the amount of compensation for non-pecuniary damages since the plaintiff was already 50 years old and had two children, that is, ‘an age when sex is not as important as in younger years, its significance diminishing with age’. It is no surprise that the European Human Rights Court did not accept such a reasoning, based on age and gender discrimination, particularly since the national court upheld similar compensation claims of two male victims in their fifties in which the medical operation left them impotent and incontinent. In its ruling, the European Court criticised the Portuguese judiciary (all

men at that time) for its sexist prejudice.

Different from the Convention, the European Social Charter (ESC) includes a specific provision protecting the rights of the elderly to social protection (Article 23), obliging state parties ‘to take measures to enable elderly persons to remain full members of society and live independently, by means of ... the health care and the services necessitated by their state’. Article 23 overlaps with other social rights covered by the charter (work, education, occupation, health, social security and welfare), whereas the European Committee on Social Rights consistently held that the rights embodied in the two treaties (the Convention and the Charter) are inextricably linked, since human dignity is the core value of European human rights law. At the same time, the Committee confirmed in [International Federation of Human Rights Leagues \(FIDH\) v. France](#) that ‘health care is a prerequisite for the preservation of human dignity’. Examining the Committee’s Article 23 decisions and conclusions, it shows that ‘the conclusions regarding the rights of the elderly are increasing, and certain patterns can be seen, i.e. only a minority of conclusions authorise the state’s conformity with the requirement of the Charter’ (Pp. 152-3.) More specifically, [the Committee emphasises](#) the need for healthcare programmes and services (in particular primary healthcare services) specifically addressed for elderly people, and adequate palliative care services. But so far the Committee has made no explicit references to ageism, although the ESC provides a strong and powerful tool to develop the social rights of the elderly (P. 171.)

In the concluding chapter, the authors call for a more global approach to human rights violations faced by older people, as ageism is not unique to Europe. So far, ageism has only been marginally addressed by international human rights law. Prior to a new international binding treaty that focuses on older people, the authors emphasise the need for a substantive discussion on the implications of ageism on the content of such a new convention in that regard. A mere prohibition of age discrimination alongside the confirmation of other human rights will not be sufficient to tackle systemic and structural ageism (P. 189.)

Although there are strong arguments for such a new convention, at a European level the ‘elderly rights provision’ in combination with other social rights has the potential to fight ageism in various settings. What is important is that the Committee will be triggered to assess potentially discriminatory actions by state parties. A likely test case could be the Dutch [Covid-19 critical care triage guideline](#) that has age cut-offs that deprioritise or exclude the elderly. Since the Committee will focus its 2021 examination of state reports on the right to protection of health—specifically on the immediate response to the current Covid-19 pandemic—the arguably discriminatory triage guideline [will be reviewed](#) by the Committee.

To conclude, *Ageing, Ageism and the Law* addresses and examines a highly relevant issue in contemporary health care systems, which became even more prominent during the Covid-19 pandemic.

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