



## Age Discrimination

"How old are you?"  
 "Ten," answered Tangle.  
 "You don't look like it," said the lady.  
 "How old are you, please?" returned Tangle.  
 "Thousands of years old," answered the lady.  
 "You don't look like it," said Tangle.  
 "Don't I? I think I do. Don't you see how beautiful I am!"

George MacDonald

This conversation takes place in Fairyland, but it makes such a perfect sense to me that when people speak as if aging in the "real" world is some kind of decline, that decline feels like an aberration from reason. It is logical, is it not, that one who is a few thousand years old should be more beautiful, as well as more intelligent, wiser, more just, kinder to people, enjoying a wealth of skills, and certainly happier than us. That the vast majority of us living today will die before reaching a hundred does not change the possibility that as time passes, and perhaps till our last day, we could be moving ever closer to the fullness of life. We are not diminished.

Contrary to this vision of ever-growing personal development, the Greeks considered the age of 40 to be the ἀκμή, the pinnacle, the best age of man, his defining age. The doxographers often mentioned only the ἀκμή of the great men of earlier generations whose "opinions" they were transmitting, and not

their birth or death dates which in any case were of no significance.

Is there a best age, an age suitable for a life in an ideal world? In Aldous Huxley's *Brave New World*, in which happiness is a manipulated biological destiny, while the right to be unhappy is claimed as the only pathway to freedom, everyone lives until 60, but after reaching maturity, everyone looks like a young adult, frozen in a permanent physical and mental age of bloom, and never deteriorating, until they reach their programmed *dead-line*. The anti-utopia, consciously or not, reflects the 20<sup>th</sup> century dream of the best age – that of the cover girl in women's magazines.

The question so serenely answered by the Greeks may have troubled theologians trying to figure out what apparent age the soul has, once it relocates to paradise – that of the moment of death of its earthly owner, or some

other; perfect age. And while scientists are laboriously deciphering the codes of aging, the question about the “best age”, hurled out of the window by science, has landed in law – namely, in the anti-discrimination law of our day. Crashing down, it has slightly disguised itself, and arrived in the form: “which is the worst age?” More precisely, which age group, if any, is the most disadvantaged, and as such, most in need of protection from discrimination in order to make it equal?

All materials of this edition of *The Equal Rights Review* devoted to age discrimination are based, one way or another, on some assumption in this regard, which is key for the conceptualisation of discrimination law. Csilla Kollonay Lehoczky is categorical that the elderly are more vulnerable to discrimination than other age groups; from this it follows that, as the purpose of equality law is primarily to protect and elevate the weakest, the personal scope of the right to be free from age-based discrimination should cover the old. She criticises the view that, as long as everyone has an age, and the term “age discrimination” suggests prejudicial stereotyping and treating someone unfavourably because of their age, regardless of what that age is, anti-discrimination law should prohibit discrimination against any age group. This conclusion, in her view, is based on the false premise that persons of any age are equally vulnerable to unfair differential treatment because of their age. She recognises that children, as well as young adults (but not middle-aged adults), are also vulnerable, but argues that childhood, young age and old age should be three separate and very different protected characteristics that cannot be lumped together for the purposes of anti-discrimination law. She emphasises that, unlike with other grounds such as sex or race, it is not the “young” and the “old” that are the two opposite poles; rather, the

“mainstream” middle-age group is the opposite group and therefore the comparator to both the old and the young. She further differentiates between relevant rights within the age groups at both ends of the spectrum: while young adults (approximately 18-30 year olds) and older people who are still not that old (60-80?) need protection from age-based less favourable treatment, particularly in employment, children and those of the “fourth age” (above 80) need protection because of their physical and mental vulnerabilities.

Indeed, as Kollonay Lehoczky points out, most of the existing equal treatment provisions at the international, regional and national levels – with the exception of European Union equality law – take an asymmetric approach reflecting the assumed one-way accumulation of disadvantage characteristic of old age. The symmetrical approach of EU equality law is unique in that it provides, in principle, exactly the same type and level of protection to a younger person treated less favourably than an older one, as it does to an older person treated less favourably than a younger one.

Contrary to this view, and in unison with the EU Framework Directive on equal treatment in employment (27 November 2000), Robin Allen seems to suggest, in the Interview section of this issue, that age discrimination provisions should defend equally children, young adults and older persons, as well as everyone in-between who has been treated less favourably due to their age, without objective and reasonable justification. This position is rooted in the universality of human rights: the right to equality must be enjoyed by everyone regardless of their age, whereby age is a protected characteristic analogous, in respect to personal scope, to gender, race, religion, etc.

In my view, each of these positions has at its core a compelling principle and recognising both principles is important; equality law should try to reconcile them and rest on both. On one hand, the law cannot dismiss the principle that everyone's individual right to non-discrimination requires equal protection, as doing so would deny the universality of human rights. On the other hand, the progressive understanding of the main aims of human rights law in general, and of equality law in particular – to ensure substantive rather than only formal equality – implies taking the side of the weaker, the more vulnerable, when their right is conflicting with the right of the privileged. There should be no abuse of equality norms by the privileged, be they members of dominant ethnic majorities complaining of affirmative action, able-bodied persons challenging reasonable accommodation of the disabled, the wealthy claiming that economic policies should affect them no less favourably than the poor or, by the same token, middle-aged workers challenging a policy that aims to empower older workers. Legislatures and courts have the difficult task to find a balance: to ensure that the impact of the law is not greater inequality; but at the same time, that a member of even the most powerful group in society could also have a legitimate case when treated less favourably in a way that is not proportional to the purpose of promoting equality.

This balancing act should be performed contextually, i.e. with an eye on the changing balances of power over time and place. In the context of age discrimination law, the disadvantage suffered by the elderly should not be regarded as a timeless truth but as an empirical reality that might well change in the future. Even with respect to the past, I am not sure that ageism targeting the old is a universal cultural bias of all times. While ac-

knowledging the current prevailing negative attitudes to the old, I see so many strengths attached to “older persons” (*sic*: this somewhat paradoxical category has now become the official term in international human rights) that I must wonder if I am always fair to the young. Simone de Beauvoir wrote, in *La vieillesse*: “There is only one solution if old age is not to be an absurd parody of our former life, and that is to go on pursuing ends that give our existence a meaning.” Despite my admiration for the author, the statement does not resonate with me, and I wish she knew better. In my youth, I felt that old age meant more power and that the old were lucky. I suspected they were secretly amused at everything people said about “the infirmities of old age”, but mischievously, had no wish to enlighten us. They even, perversely, accepted to be pitied.

Not much of this positive attitude has been subdued by my later experience. The adventure, the risk, the complexity, the delights, the freedom, and the fun of old age remain, for me, as attractive as ever, with the joys of youth paled by comparison. Clearly, these are my own stereotypes, driving my own fallibility. However, the point is that our society's cultural bias against older persons, while not a writing in the sand, is not written in stone, either.

Despite my – and I think many others' – admiration for the victory which old age itself represents, personal attitudes must give way to the evidence. Here comes the bad news. Patterns of discrimination against older persons that have been well documented across many societies include: the denial of the right to die with dignity; widespread elder abuse, both in institutions, in the community, and in the family; various types of discrimination in employment, including mandatory retirement irrespective of occupation or personal

capabilities; denial of educational opportunity; institutionalisation in nursing homes and the like; lack of affordable community-based quality health care as well as social care for activities of daily living such as eating, bathing, dressing, grooming, or housekeeping; inadequate or lacking end-of-life care; discrimination in access to financial services such as credit or insurance; and negative stereotypes of older people reinforced by the media. Multiple discrimination affecting older persons based on gender, family status, ethnicity, citizenship, etc., is also widespread, and a breeder of poverty. Because of the cumulative effect of gender inequalities throughout a woman's life on the enjoyment of rights in old age, intersectional discrimination against older women is an acute problem, which is the worst in societies where systemic gender discrimination is the most entrenched.

The issue of mandatory retirement needs to be, and has been, highlighted as one of the key issues around age discrimination. If one hasn't been paying attention to recent debates on this issue but reads Kollonay Lehoczy's article in the Special section, one wonders how it has been possible that mandatory retirement has gone unchallenged for so many generations. Isn't it quite obvious that a forced retirement at a certain legislated age, regardless of occupation or ability, is unfair? However, it appears that the unfairness has not been obvious to the Court of Justice of the European Union (CJEU), which has deliberately missed every opportunity to condemn mandatory retirement, and which, since 2000 has been able to rely for its position on the exemption provided in the Framework Equality Directive of 27 November 2000. While mandatory retirement has long been outlawed in the United States as non-justifiable age discrimination, in the European Union, the CJEU has placed this matter within the margin of appreciation of states, and given its blessing to their use of

macroeconomic interests and social policy to justify violations of the individual right to equal treatment regardless of age.

Acceptable, even laudable, social policy objectives justifying mandatory retirement often included "intergenerational solidarity" understood (or rather misunderstood) as a need for older workers to free up work places for the young. While at first glance this public interest makes sense to anyone who is not a staunch individualist, it is found to be based on the so called "lump of labour fallacy", of which Robin Allen reminds us in the Interview section. This is the common but wrong belief that, within an economy, there is a fixed number of jobs, so that, unless older persons cease to work, new entrants into the labour market cannot find jobs. To its great credit, the British government has specifically eschewed this belief in its recent new legislation which abolished mandatory retirement.

Just as one ponders on how the history of a more collectivist, social Europe has made possible the disregard for the fundamental human right to non-discrimination in favour of a broad and problematic public good, enter the European Committee of Social Rights. This body, empowered to supervise compliance with the revised European Social Charter in the 47 member states of the Council of Europe, has recently resolved that mandatory retirement violates the Charter and, as such, member states, including the 28 member states of the European Union in which the CJEU has jurisdiction, are required to abolish it. Attitudes change. And it is my view that Europe will in fact become more, not less "social", when it finally catches up with the United States on this issue: older persons are also a part of social Europe, after all.

While there is no specific or thematic legally-binding United Nations instrument on the

rights of older persons, they are covered under all general and many thematic treaties; for example, under the Convention against Torture, institutions that care for older people fall within the definition of places of detention, and the right of detainees to be free from torture or other cruel, inhuman or degrading treatment apply to residents of such institutions. It should also be noted that due to the partial overlap between old age and disability, many provisions of the UN Convention on the Rights of Persons with Disabilities are of high relevance to older persons, e.g. the rights to independent living, legal capacity, participation in decision-making, as well as the concepts of reasonable accommodation and universal design.

Since there are patterns of discrimination (such as mandatory retirement) specific to older persons, there is a need for specific provisions of legal protection from discrimination in an instrument focusing on older persons' rights. Agreeing with Alexandre Kalache's opinion expressed in the Interview in this volume, I believe that the best approach to age discrimination is one that combines general principles on equality with specialised group protections. Universal human rights standards, which are currently lacking in detail when it comes to older persons' equality, need to be elaborated to reflect the unique human rights situation of older persons. Such old-age-relevant rights that are key to age equality (not in the sense of belonging exclusively to the elderly but in the sense that they matter most for achieving substantive equality of older persons) have already been articulated by UN treaty bodies as well as civil society groups, and include: the right to live in the community and not in an institution (often referred to as "ageing in place"); the right to services enabling older people to hire individualised care tailored to their changing needs; the right to live in their

own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of older persons to gain access to and use them; the right to non-contributory old-age benefits or other assistance for all persons, regardless of sex or family status, who find themselves without resources on attaining an age specified in national legislation; and of course, the right to choose when to retire; and when and how to die.

A process is currently underway at the United Nations that would hopefully lead up to the adoption of a specific instrument addressing age discrimination against older persons. The beginning of this process, which at this time is taking place in the framework of the UN Open-Ended Working Group on the Rights of Older Persons, may be said to be 1982, when the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing, containing 62 recommendations. Ten years later, in 1992, the UN General Assembly adopted the UN Principles for Older Persons grouped around five organising values: independence, participation, care, self-fulfilment, and dignity.

In 1995, in its General Comment No. 6, the Committee on Economic, Social and Cultural Rights addressed the Covenant rights of older persons. The year 1999 was proclaimed by the General Assembly as the International Year of Older Persons in recognition of humanity's demographic "coming of age". In 2002, the Second World Assembly on Ageing adopted the Madrid International Plan of Action on Ageing, a UN document intended to design international policy on ageing for the 21st century. UN specialized agencies, especially the International Labour Organization, have also given attention to the rights of older persons in their respective fields of competence.

The 2012 UN OHCHR report *Normative standards in international human rights law in relation to older persons* makes the case for a new human rights instrument on the rights of older persons. The report states that there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons.

One such inadequacy is the absence of “age” from the lists of prohibited grounds of discrimination. Although the lists of prohibited grounds in UN and regional human rights instruments are illustrative, and therefore the open-ended category of “other status” has allowed considering age-related discrimination, the current situation is not satisfactory. First, the practice of considering age as “other status” is far from consistent among human rights bodies, and lacks the benefit of legal clarity. Second,

“[T]he consideration of age as ‘other status’ for the purpose of anti-discrimi-

nation protection still raises the question of the standard of scrutiny employed to decide the claim: even if age might be considered ‘other status’ in order to trigger anti-discrimination analysis, if the standard of scrutiny utilised is too deferent, distinctions on the basis of age might be easily justified. Furthermore, as age is in general not explicitly identified as a forbidden ground of discrimination, the need for positive measures to eradicate age-based discrimination might also be challenged.”<sup>1</sup>

The new agenda of addressing age discrimination and promoting age equality takes human rights law to a next, higher level. Equality law, which is integral to the fulfilment of human rights, is evolving in the right direction. Ultimately, a stronger framework, including through the adoption of an international legally binding treaty in the near future, will help create change for older persons, in everything except their calendar age. But, as Jules Renard said long ago, what matters is not how old you are, it’s how you are old.

Dimitrina Petrova

---

1 UN Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons*, August 2012, p. 8-9.