

Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination

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Age discrimination is a late child within the non-discrimination family. As such, it faces the advantages and disadvantages of being the youngest child in a large family. It gets less, never sits at the elegant place of a first-born, but also gains from getting experience, learning, and inheriting this and that from its older siblings.

Robert Neil Butler, a gerontologist, holds the title of being the creator of the word “ageism”, which he used in his much quoted 1969 article to describe the widespread hostile prejudice that he observed was faced by elderly persons.² The word clearly and sensibly expresses the similarity with “racism” and “sexism”, associating “ageism” with the two most severe and outrageous forms of historic discrimination.

Lots of symptoms suggest that Butler was right and at the same time over-optimistic and over-ambitious, when suggesting that the place of ageism was within the same box as racism and sexism. One of these symptoms is the difference in the ways in which authors are writing on, and advocating for, the elimination of age discrimination. Papers often start by acknowledging that differential treatment on the grounds of age may sometimes serve a useful purpose, followed by the statement that “nonetheless” such differentiation might be based on incorrect presumptions and prejudice and therefore should be

prohibited. No paper on racial or sex discrimination would start with such a concession. In spite of the clear “relationship”, the prohibition of age discrimination cannot share the clear and undisputed status of race and sex in the family of grounds of discrimination, while it continues to be marked by ambivalence in the law and jurisprudence. This article attempts to detect some of the conceptual reasons why age is different from its “older siblings”, on the basis that clear recognition of some of the unique attributes of age discrimination might facilitate a stabilisation of its place within the family.

The birth date of the notion of age discrimination marks a key difference between it and its “older siblings”: it arrived too late (in the late 20th and early 21st Century) to benefit from inclusion in the system of the post-World War II human rights protection. Perhaps it is not only a late, but also an “unwanted child”. Its conception is frequently explained as being the result of the revolutionary demographic and economic changes which took place in the second half – especially the last two decades – of the 20th Century and which necessitated appropriate legislation. The “ageing population” syndrome resulted in social and economic problems and the inclusion of ageing persons in paid work and taxation in order to preserve the long term balance of the social security budget. These realities, coupled with globalisation and de-

mographic differences, above all, lie behind the increased interest for protecting the human rights of older persons.³

Since this late child is still young, its genuine attributes have not yet entirely unfolded. Frequently, the child has to wear clothes and shoes that do not fit, thus it looks clumsy and limping.

One of the unique attributes of age not yet properly explored is that age is not a static but a dynamic attribute. It has a temporal dimension, a one-way, progressive and irreversible nature. This dynamic nature makes age discrimination substantially different from race, sex, religion and even disability discrimination and disregarding this attribute might cause confusion in the protection of the aged.

A second attribute of the prohibition of age discrimination is the almost inseparable combination of the right to equal treatment and the right to accommodation and assistance, both different forms of non-discrimination; however, assistance is a relationship that may imply or generate inequality and therefore is, in the public mind, distinguished from equality. The combination of these two specific attributes demands to be clearly addressed along the temporal line – change in time – that is a third and unique attribute of the personal and material scope of the legal protection.

This article will briefly discuss these conceptual issues, in addition to looking at the main international instruments prohibiting discrimination on the ground of age, and paying particular attention to the first regulation regarding non-discrimination in employment, the United States Age Discrimination in Employment Act (ADEA). The age discrimination legislation of the European Union will

not be discussed, apart from occasional comments regarding some general or basic issues of age discrimination.

Part One explores the place of age discrimination in the non-discrimination family, and tries to find an explanation as to why it is considered by many less important than its siblings. Part Two provides an overview of the personal scope of the protection in order to see clearly the groups to be covered, the subgroups and their attributes. This article contends that the law should protect all persons from age discrimination, and should not be restricted to those within a specific age group. The one-way and progressive nature of ageing has to be “discovered” and henceforth old age and young age have to be distinguished as two separate protected attributes. Part Three starts the mapping of the “material scope”, namely the protection of the right to equal treatment in employment, presenting some features of the US ADEA. Part Four discusses a separate issue of non-discrimination in employment: mandatory retirement – a controversial issue revealing the difficulties on the road to consistent prohibition of age discrimination. Part Five provides a brief overview of the possibilities of protecting the elderly outside employment in the so called “fourth age”: when the right to equal dignity necessitates positive measures, the provision of social services, sometimes costly, provokes sharp questions about what society means by equality and how equality is distributed. The brief summary draws mainly on the relevant case law of the Revised European Social Charter (RESC).

Part I: The Place of Age in the Hierarchy of Protected Attributes

Age discrimination in the human rights world does not enjoy the same place and vigour as race or sex discrimination. Language reflects

the mind. The occasional timid approach to age discrimination reflects the overall ambivalence to the issue which is connected to its informal lower status in the hierarchy of various prohibited discrimination grounds. Whilst some may deny that there is a hierarchy and/or that age has a lower status, considering the reasons for its perceived low ranking might be useful when contemplating effective guarantees of the equal rights of the elderly.

The late arrival and consequent lower rank is signalled primarily by the fact that international conventions that set up the post-World War II human rights system did not include age into their catalogues of “suspect” classification. Neither the Universal Declaration of Human Rights (UDHR), nor the two main UN treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), mention age in their catalogue of protected attributes.⁴

The African Charter on Human and Peoples’ Rights (ACHPR) adopted in 1981 is mentioned in surveys of international treaties as the exception, explicitly including the prohibition of discrimination on the ground of age. However, such reading of the Charter is misleading. Article 18 of the ACHPR on the “Protection of the Family and Vulnerable Groups” prohibits discrimination against women, while the aged and the disabled are provided with “right to special measures of protection in keeping with their physical or moral needs”. With the lack of clear distinction between protection by special measures and prohibition of discrimination, such reference, like the provision itself, rather underlines and contributes to the mixed and irresolute nature of age discrimination.

Similarly to the ACHPR, when age is mentioned in international treaties, it is meant as

a ground for permitted classifications of persons in order to “protect” older or younger people who are seen as “vulnerable”, or in order to “protect” the public from attributes associated with age (e.g. lower age limits for drivers’ licences or lower ages for certain occupations).⁵ Such a protective approach is a further factor in the ambiguity surrounding the application of age discrimination.

In Europe, age is not included either in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or in Article E of the RESC.⁶ No doubt, in principle the open-ended wording of the lists of discrimination grounds within these treaties permits the addition of further grounds.⁷ When listing the grounds upon which a person may be protected from discrimination, the phrase starts with “such as” and ends with “other ground” or “other status”, indicating that the list of enumerated characteristics, including sex and race for example, is non-exhaustive. Thus, age could be added through case law by the adjudication of compliance monitoring bodies. But it is not.

By the explicit inclusion or non-inclusion in the given catalogue, these treaties classify and thereby set up a hierarchy between “suspect” and “non-suspect” grounds.⁸ The distinction between “suspect” and “non-suspect” grounds almost naturally results in a differentiation of rigour in the application of the prohibitions in general, and in the case of age in particular. As states are granted a broader margin of appreciation and respect, reluctance or uncertainty emerges regarding the inclusion of age among the protected attributes.

As a result, age as a discriminatory distinction remains little discussed in the case law of adjudication bodies supervising

the implementation of human rights treaties with cases more likely to be brought or decided on other grounds such as the gender of the applicants⁹ or, even, extending the catalogue of prohibited grounds, on grounds of sexual orientation in relation to age-distinctive legislation.¹⁰

Further weakening the status of age-discrimination is the existing divide between civil and political rights on the one hand and social and economic rights on the other. The aged, or to put it more accurately, the “elderly”, are protected predominantly by conventions on economic and social rights, whose hierarchical status is seen by many as lower than that of civil and political rights conventions, in contradiction with the principles of universality and indivisibility of human rights.

The ECHR prohibits discrimination only in respect of the enjoyment of the rights guaranteed by the Convention. Social and employment rights, where protection against age discrimination is the most relevant, remain outside the material scope of civil and political human rights and their equal rights check. Protocol 12 to the ECHR which prohibits discrimination in any context could be a vehicle to bringing equality regarding social rights within the scope of the ECHR. However, this Protocol has only been ratified by a minority of member states.¹¹

The case of *Brooks v Netherlands*¹² before the UN Human Rights Committee was a promising milestone case and a potential “promoter” for the Protocol 12 idea in as much as it extended the scope of equal treatment to social and economic rights by declaring that the state’s obligation to observe equal treatment is not dependent on the subject matter of the legislation. Although sovereign states are not obliged under the ICCPR

to adopt any social legislation, if they decide they are bound by Article 26, they must ensure that the law prohibits “any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Relying on Article 26, the Committee found that Dutch legislation violated the rights of Ms Brooks to old age benefits on equal footing with men. Even though the case related to pension rights, it cannot be considered as an extension of the prohibited grounds to cover age, as the decision of the Committee was based on sex discrimination rather than age discrimination or the pension rights of the elderly.¹³

Moving from the international level to the federal and “quasi-federal” (supranational) level of the United States and the European Union, the hierarchy is more hidden, but nonetheless can be discovered and traced, though less so in the US, where the issue of hierarchy gets minor attention. In both legal systems, age is one of the grounds which gained legal recognition later and is separate from the classic grounds such as race, sex and religion. The US Civil Rights Act 1964 did not include age in its Title VII protecting groups subjected to historic, egregious discrimination. At a short distance in time and spirit from the original discrimination grounds, age discrimination was addressed in 1967 in a separate piece of legislation, the US Age Discrimination in Employment Act (ADEA).¹⁴ This legislation, in spite of its strong reliance on the wording of Title VII, has resulted in a different interpretation, with a slightly but clearly lower level of scrutiny in comparison to race, sex or religion cases.

At a longer distance in time from the original grounds of sex and nationality, EU legislation addressed age discrimination in one of its pieces of legislation which separated race/ethnicity from the “other” new grounds and differed from sex or race discrimination in respect to the scope of application¹⁵ and the permitted exceptions.¹⁶ The distance in time ultimately was an advantage with regard to the content of the provisions. Sex and nationality discrimination (“the oldest children” in the family) produced, over the years, a significant amount of case law, eventually resulting in sophisticated interpretations of the prohibitions. This process has clearly helped shape the sound development of the new-born concept of age discrimination.¹⁷

The prohibition of age discrimination is included in Directive 2000/73/EC of 27 November 2000 (the Framework Directive) on establishing a general framework for equal treatment in employment and occupation,¹⁸ to combat certain types of discrimination on “other” grounds,¹⁹ in addition to sex and race (ethnic origin). The implied ranking in the legislative instruments has been confirmed by the European Court of Justice (ECJ, later CJEU).

The Charter of Fundamental Rights of the European Union,²⁰ which entered into force (in a limited sense) with the Lisbon Treaty in 2009, includes age in its list of 14 prohibited grounds of discrimination. Furthermore, in Article 25, it recognises the rights of the elderly (inserted between the rights of the child and the integration of persons with disabilities in Articles 24 and 26).

The existence of a hierarchy within the prohibition on discrimination is not disputed in the analysis of EU anti-discrimination legislation. On the other hand, opinions are divided about the impact and

possible “ranking” or “levelling” of the hierarchy. It might also be telling that the issue of hierarchy is mainly discussed in academic articles, when dealing with one of the “newer” and perhaps “weaker” (or supposedly weaker) protected grounds, such as religion, sexual orientation and disability. While the presence of a hierarchy, either in international human rights law, or in EU anti-discrimination legislation, is seen as a fact, views diverge about its assessment. Some find it “worrysome”,²¹ some have a neutral view,²² or see potential risks for certain “strands” both in treating the grounds as equal²³ and in establishing a hierarchy.²⁴ Dagmar Schiek, seeing problems both in the current hierarchy under the Framework Directive and its planned legislative extension, makes a proposal for a novel approach, a “heterarchical” instead of “hierarchical” system of organising the principle of non-discrimination around “nodes”. In that system, age discrimination is placed around the “node” of disability since age “often leads to a reduction in bodily functions and associated prejudice”.²⁵

Since EU age discrimination legislation prohibits discrimination against the young, just as it prohibits discrimination against the elderly, this grouping raises serious questions with regard to age discrimination: how the “lower end” of the age-scale connects to the group of the disabled. At the same time, this categorization beneficially directs the limelight to one of the principal issues for this article: whether the concept of age discrimination is a symmetric, two-way model or can it reasonably and consistently guarantee protection if it is perceived as an asymmetric notion.

The next part will address the need for further specification of the personal scope of the prohibition of age discrimination.

Part II: Who Is Covered by Age Discrimination Provisions? – Personal Scope of the Protection

Who should be protected by provisions on non-discrimination on the ground of age? Within what limits should “young age” and “old age” be recognised? These apparently simple questions receive sharply differing answers from legislation, the courts and from academia.

One of the reasons for the doubts regarding the nature of the prohibition of age discrimination is rooted in the personal scope of the concept. Not only because of the conflicting answers but also, and mainly, because of the specific group characteristics of those protected, this class of persons is distinguished from all other protected classes in the equal rights world. Looking into these specificities not only helps to confirm our views on age discrimination but may also help clarify some concepts of discrimination on other grounds or discrimination in general.

Everyone has an age, be it young or old. The term “age discrimination” suggests prejudicial stereotyping and treating someone unfavourably because of their age, regardless of what that age is. Since such stereotyping and disparate treatment violates the dignity of the person, age discrimination should be prohibited against any age group.

This conclusion is based on the false premise that persons of any age belong to a category or group which shares characteristics which can be the basis for their differential treatment. Evidently this is not the case. The harms of negative stereotypes, such as presumed reduction of physical and intellectual capacities and growing inflexibility, are attached to the upper age groups, the elderly. Thus, the category of persons most exposed

to discriminatory treatment and needing protection from age discrimination legislation are the elderly, the upper age groups along the age-scale.

1. Protection of the Young with Respect to their Age

From time to time young persons are also subject to discrimination either due to a real or presumed lack of physical, intellectual or moral maturity, or because of the lack of autonomy or autonomous responsibility. The public mind, as well as the prevailing socio-cultural attitudes and legal approaches, associate autonomy with “maturity”, at least at the lower end of the age ladder; and maturity is measured by the number of years the person has lived.

Thus, identifying a person as young has been used in law first and foremost to regulate their protection rather than their equal treatment. Equal treatment is a secondary and scarcely regulated topic, not only in respect to children but also to young persons.

In international treaties, young age is subject to regulation primarily with a protective intention, setting minimal ages for activities that, at an early age, would be harmful for the young person or would bring risk for others. A clear example is provided by the prohibition of child labour, the subject of a core convention and related legal instruments of the International Labour Organisation (ILO).²⁶ Further, Article 10(3) of ICESCR not only obliges state parties to prohibit child labour, but also requires national legislation to protect children from “economic and social exploitation”, i.e. from discriminatory wages and working conditions. Both the ILO conventions and the ICESCR merely require states to legislate on a minimum age limit without specifying the acceptable minimum

age. The RESC, in order to guarantee the right to special protection against the physical and moral hazards for children and young persons, sets the minimum age for admission to employment at 15 years,²⁷ while the minimum age for admission to dangerous or unhealthy occupations is set at 18 years.²⁸

Further, international treaties set a minimum age for a number of activities which impact on other fundamental human rights (such as the rights to marry²⁹ or to move freely) or other activities and autonomous choices.³⁰ The analysis of the limitation of the autonomy of under-age persons in order to protect children and young persons, and occasionally others (e.g. minimum age for driver's licence), is beyond the scope of this article. These examples are mentioned in order to illuminate the complexity of protection and autonomy when considering age in human rights and non-discrimination law.

All these limitations might sound discriminatory within the sphere of thoughts on age discrimination. They are based on assumptions, setting fixed dates that do not permit individual assessment. Still, such norms, protecting the young, especially those under full age are not considered "discriminatory".

The markedly different nature of young age is expressed in the unquestioned international consensus about the need for limitations. We may conclude that a benevolent protective aim behind a limitation eliminates or neutralises the discriminatory nature of a provision.³¹

Thus, we should look at age as a bipolarity (two opposite poles) and a (temporal) continuum at the same time. While in the context of other grounds of discrimination, especially gender discrimination,³² feminist theorists argue that "[s]ex in na-

ture is not a bipolarity; it is a continuum. In society it is made a bipolarity", resulting in the unattainable requirement to be the same as others at the same pole, and setting the standard pole in order to provide for equality.³³

Contrary to the binary nature of race, sex or other discriminations, here there is a one-way path that might connect the group of the young and its comparator group, or the group of the old and its comparator group, but not the young and the old. A person of a majority race is different from a person of a minority race exactly as much as the minority person is different from the majority person. Similarly, a woman is different from a man as much as a man is different from a woman.³⁴ Any difference (especially hierarchy) established between the different race (or sex) groups is suspect classification. The path between the two race (or sex) groups is equal, back and forth. By contrast, in considering the two poles of the age scale, it is clear that the "young" is differently different from the "elderly" than the "elderly" is from the "young". There is no equal way back and forth, because, in the context of non-discrimination, they are not comparable groups. Their comparator is the "adult", the "mainstream adult". (See below in section 2.)

This is an important element to clarify in order to correctly identify the personal scope of age discrimination. With the exception of the age-neutral approach of EU age-discrimination legislation, which is unique in its kind, and apart from protective limitations, it is difficult to find comprehensive protection for the right to equal treatment of the young at the international level. This is particularly missing in respect to the early years of adulthood when protection against age discrimination and the guarantee of the right to equal treatment would be the most important.

2. *Everyone Has an Age?*

Age discrimination is considered primarily to concern protecting the aged against treatment which is not based on the merits of the individual, but is instead based on presumptions and prejudice connected to the category. The need for such legislation is clear and is addressed in detail in the human rights literature.³⁵ In spite of the broad and convincing arguments, age discrimination is, as discussed above in Part I, surrounded by doubt as to whether ageing persons are, indeed, a category in need of the same protection as other, classic categories.

Above, we have seen how misleading the statement “everyone has an age” is in respect to age discrimination. Another similar, misleading objection against prohibiting discrimination on grounds of age is the statement that “ageing affects everyone”, i.e. the disadvantages are distributed equally and there is no one group that can be demarcated as “vulnerable” or “inferior” and thus requiring protection.

While it is a trivial truth that with time old age reaches everyone, this does not mean that all age groups are “equal” and we do not find a division between “dominant” and “minority” groups, the superior and inferior in the social context of all discrimination. These groups are also present along the age scale. However, it is important to emphasise again that it is not the “young” and the “old” that are the two opposite poles here; rather, the “mainstream” (“normal”) age is the comparator and the opposite group to the “ageing” or “older”. Or, in the context of discrimination on the ground of young (full) age, the young adult has to be compared to the mainstream adult, underlying again that “old age” and “young age” are two different grounds of discrimination.

Another recurrent argument is that it is difficult to talk about social disadvantages faced by the elderly as a class. The social status and material conditions of life are changing with ageing. Some people are better off while being younger; some reach better conditions by their older years, and therefore it would be difficult to associate the differences with discrimination. Further, it is argued that age is not an attribute that is unchangeably a part of the identity of the person, determining social contacts, cultural identity, creating a “discrete and insular” minority lacking access to political power.³⁶ Conversely, political and economic power can be rather associated with older age groups.

This is misleading again. In spite of individual differences, the elderly, especially when not having regular income anymore, are worse off as a group, at any point in time.³⁷ Arguing “fluctuation” overlooks the irreversible, progressing nature of ageing. Even if everyone is ageing, at any given time there is a dominant and a “minority” group. This is, indeed, a dynamic phenomenon, which however does not support the statement that the advantages and disadvantages of life are distributed among age groups equally.

Ageing is a one-way, progressing and irreversible process that is coupled with certain disadvantages at any point in time and these disadvantages are increasing, creating the need for equal treatment, protection and balance. Such a dynamic of growing and decreasing is not an attribute of any other discriminatory grounds. At the same time, the fact that ageing reaches everyone expresses the one-way character of the attribute which underlines its irreversible and irresistible nature and powerfully underlines the importance of nuanced protection, adequate and proportionate, against all forms of discrimination on the ground of age.

A legal framework which enables adequate, complex and proportionate protection of the category differentiation within the group is needed in order to protect against various manifestations of age discrimination and to protect the equality and dignity of individuals throughout the various phases of the ageing process. The elderly are not a homogenous category. The group is comprised of two main subcategories: the elderly of working age (the limits of which are individual and not fixed to a specific number of years) and those beyond working age. For those who are of working age and want to work, learn and develop, non-discrimination legislation should establish firm employment protection, equal access to employment, job security and equal treatment in the workplace. These guarantees are crucial and are the core of non-discrimination. At some point in time, the need for protection against employment discrimination gives way to the phase of life when non-discrimination in health care and social services is of particular importance together with the right to conditions of maintaining a life in dignity and independence. This latter age might be associated with the so called “fourth age”, although no clear borderline can be drawn.

The differentiated scope *ratione personae* dictates a differentiated *ratione materiae*. Failure to properly distinguish the two subcategories and adjust legislation to their needs may weaken protection for both and may contribute to the persistence of the obscurities around age discrimination.

While emphasising the importance of the distinction between the two subcategories and of an adequate legal framework, it is also important to underline that no normative definitions or borderlines are acceptable, especially not years of age. Statistical catego-

ries are used for approximate distinction.³⁸ Regulatory borderlines provide an indication of years. Policies which rest on the criterion of biological age, such as a birthday, and not on substantive factors or capabilities such as when a person is losing her or his capacities and competences, would be fundamentally undermining the principle of individual assessment of all persons, which is a core concept of equal rights.

At this point, the distinction between two different groups of older persons protected against “ageism” raises the need to try to clarify how protection and non-discrimination are and should be present in the guarantee of equal dignity and in the creation of an integrated society, whereas the inclusion of the young in non-discrimination legislation further complicates the understanding of age discrimination.

Part III: The Material Scope of the Prohibition of Age Discrimination – Protection in Employment

The material scope of the prohibition of age discrimination can be said to cover two major areas: prohibiting discrimination in employment, and, outside employment, providing assistance while prohibiting discrimination. These two different areas correspond to the above mentioned internal grouping of the affected population:

- 1) those of working age (i.e. those who are able and willing to participate in the labour market, regardless of age), and
- 2) those who, being beyond working age and detached from the workplace, still have a right to a full life in health and dignity, integrated and participating in society and in all kinds of human activity, as much as possible and for as long as possible.

The distinction between the two areas is essential when looking at the existing legislation protecting the elderly from discriminatory differentiation. A brief international review shows that where legislation provides stronger protection to the ageing population in the first area (i.e. in employment), like in the US, the protection of equal opportunities in the second area (i.e. beyond working age) is weaker; and *vice versa*, the extended protection of life opportunities and provision of social services beyond working age in Europe is coupled with more permissive legislative and/or judicial approach to coercive ending of the labour market career of a person.³⁹

At a risk of simplification, the strong protection in employment for those above a certain age is the model adopted in the US, while protection outside employment and beyond the working age is rather found on the European continent. The focus of the following sections will be on this division, whilst also exploring EU norms on age discrimination in employment.

1. ADEA: the Exemplary Statute

The US ADEA⁴⁰ is an early and, still, the clearest example of statutory protection of ageing workers against discrimination in employment. Age discrimination legislation in the US was an early, welcome and non-discriminated child: the Congressional reason behind ADEA was to uphold the constitutional right to equality of individuals in this group. In contrast to other parts of the world, there was no reference to numerous demographic and economic exigencies necessitating the protection of the equal rights of the elderly.

The US Congress, in its statement on the purpose of the proposed legislation, referred primarily to the contrast between

“rising productivity and affluence” in the country and the disadvantages faced by older workers in their efforts to retain and, especially, to regain employment when displaced from jobs due to discriminatory employment practices, especially those of setting arbitrary age limits.⁴¹ The problems affecting older people due to the deterioration of their skills, morale and acceptability to employers resulting from longer unemployment, were also mentioned.⁴² No mention was made of the (already at that time) ageing society or to the needs of the labour market or pension budgets.

Second, the timing of adoption of ADEA and its terms also expressed the very close relationship with civil rights equality protected by Title VII of the Civil Rights Act. ADEA was adopted fairly soon after the adoption of Title VII, in the wake, and as another result, of the rising civil rights awareness of the decade. Its language was almost identical to that of Title VII and its exceptions tailored similarly narrowly.

A different and more elastic approach is reflected in the EU Framework Directive, especially in its Recitals 6-8. These considerations include the point that the “social and economic integration of the elderly and disabled people” (Recital 6) is necessary for the achievement of their substantive equality. The reference in Recital 7 to the coordination of employment policies of EU member states, and, particularly, the text of Recital 8, referring to the 2000 Employment Guidelines, as well as further references to labour market policies, imply a goal of “combating discrimination” as a social phenomenon and as a labour market policy instrument.

An apparent second difference between the US and EU approaches is the consistency of the prohibition. The *Bona Fide Occupational*

Qualification (BFOQ) defence under US law offers narrow and specifically worded exceptions which have been narrowly interpreted. By contrast, the text of the Framework Directive establishes quite a host of exceptions.⁴³ Some of the exceptions related to public safety are similar to those included in the definition of “employee” in ADEA.⁴⁴ However, the US Act gives a concrete catalogue of those positions. Furthermore, the specific old age exceptions (employment policy and social security) are entirely missing from ADEA.

The US ADEA protection originally covered persons between 40 and 65 before being extended to 70. Later, ADEA was amended to remove any upper limit. The Act prohibits discrimination on the ground of age in decisions relating to recruitment, discharge, promotion and other treatment, including financial benefits. The transfer of the administration of the Act from the Department of Labour to the US Equal Employment Opportunity Commission (EEOC)⁴⁵, the administrative agency with broad power to enforce the most important equal treatment legislation of the US, indicates an intention to ensure effective enforcement.⁴⁶

In the US, with its employment-at-will system in which employees hardly have any protection other than through anti-discrimination laws, especially in respect to hiring, promotion and dismissal, the adoption of age discrimination legislation had a distinctive impact on the status of people over 40.⁴⁷

Despite the apparently strong protection granted by ADEA, some flaws still tarnish the tight system. One is the limitation of the personal scope of the Act through the concept of “employer”. The first limitation is based on the size of the employer expressed in the number of employees, based on a legally set calculation of an average. Only employers

employing 20 or more workers are “employers” for the purpose of the Act, obliged to obey the non-discrimination rule.⁴⁸ Thus, employees working for an employer having fewer than 20 employees are deprived of the right to non-discrimination based on age. This questionable limitation is not dissimilar to the approach to discrimination of Title VII, where the limitation is to employers having 15 or more employees. The limitations express the hesitant intervention of a liberal state into private relations (private employment), which would be incompatible with the nature of human rights from a European point of view.⁴⁹

Restrictions depending on the size of the employer do not feature in the European equality Directives, contrary to the continuous and consistent special attention paid to small and medium size enterprises in the labour and employment law of the European Union. Any concession based on the size of the employer is incompatible with the principle of equal treatment followed by the CJEU even before the adoption of the equality directives.

2. Differential Treatment of ADEA and Title VII?

With the broadening opportunities to litigate against discrimination on different grounds relying on different pieces of legislation (for example race and age – protected by different legislative instruments both in Europe and in the US), the question might arise: reliance on which of the grounds is most likely to result in a successful outcome? Such a question might imply testing the “force” of the different laws.

In the EU, the proliferation of grounds of discrimination, i.e. the addition of further grounds (race, ethnicity, religion or belief, disability, age and sexual orientation) to the

original two (nationality and sex) by the so called “Article 13” Directives,⁵⁰ coupled with the stratification of the grounds, has been said to result in a preference in discrimination lawsuits for “newer” grounds.⁵¹ Claims in cases where discrimination is present on multiple grounds are more likely to be won in relation to the newer grounds. Dagmar Schiek points to the *Kücükdeveci* case⁵² to illustrate this observation.⁵³ In this case, the formal age discrimination claim overshadowed the originally referred ethnic discrimination (Turkish accent) and veiled the probably present impact of gender. In *Coleman*,⁵⁴ the disability ground was clearly joined by the gender aspect; however, gender was not covered by the judgement.⁵⁵

Contrary to the example of the EU, where the “new”, and – as mentioned above – “weaker” grounds – seem to be preferred, in the US, in spite of the almost identical language of the US ADEA with the text of Title VII, we seem to be confronted with the opposite case. In addition to the comparative usefulness of grounds protected under ADEA and Title VII, a further incentive to comparison of the effectiveness of the two Acts has been that surveys on the impact of ADEA relating to the type of cases and affected classes of persons have shown somewhat unexpected results, which were not contemplated when ADEA was adopted. For example, the composition of the cases is notable. The vast majority of the cases concerned wrongful (discriminatory) discharge of workers or forced retirement. There have been significantly fewer cases litigated in relation to discriminatory experiences in job seeking, discriminatory employment conditions, such as promotion or demotion, compensation and benefits.⁵⁶

Surveys on the subject demonstrate that typically white males, mainly in managerial positions or professionals over the age of 50,

have taken advantage of ADEA.⁵⁷ Women and racial minorities in older ages are underrepresented.⁵⁸ It has been argued that one possible reason for this is that these groups are more frequently in lower positions than white males and have less to lose or gain.⁵⁹ However, there are a number of other possible explanations. First, it may be the result of the difference between available damages and compensation under ADEA and Title VII, which makes it more attractive for women and racial minority employees to pursue a Title VII claim. The remedies available for a violation of ADEA are weaker than those available under the Civil Rights Act. Violations of ADEA fall within the remedial rules of the Fair Labour Standard Act,⁶⁰ which limits remedies to lost pay (back pay and anticipated future pay) and reinstatement. Compensatory (for emotional distress or pain) and punitive damages are not available to age discrimination victims. This difference might create a silent incentive to claim discrimination under Title VII if both are available.

There appears to be a preference by plaintiffs covered by multiple non-discrimination protections to pursue a claim based on a more traditional suspect ground, where they have more of a chance to be successful with their claims under Title VII than under ADEA. The difference in the burden of proof and the available defences under each system might be crucial for the success of the claim.

The similar language of Title VII and ADEA has raised the question – to which there is no unequivocal answer – of their analogous or different interpretation by the courts. A quick review of the allocation of the burden of proof in two specific discrimination situations, in disparate impact cases and in so called “multiple ground” cases, show that the original “equal treatment” of ADEA and Title VII by the courts has given place to “differential treatment” of

the two statutes, raising the burden of proof on ADEA plaintiffs higher in comparison to Title VII victims of discrimination.

In 1973 the US Supreme Court established a clear test, the so called “McDonnell Douglas test”,⁶¹ for Title VII (race or sex) discrimination cases, intended to facilitate the difficult task that plaintiffs face of proving discriminatory intent in the invisible mind of the employer. The McDonnell Douglas test assists plaintiffs by shifting the burden of proof between the plaintiff and the defendant employer. Once the employee establishes a *prima facie* case of discrimination – e.g. being rejected and someone else being preferred, the burden shifts to the employer to produce evidence that the rejection or preference was for a non-discriminatory reason. Then the plaintiff should provide evidence that the employer’s asserted justification is false. This test has been applied in ADEA cases by several Circuits, based on the similarity of its language with Title VII; however, the US Supreme Court has not yet ruled on its applicability.⁶²

A different, less promising approach is reflected in the courts’ treatment of ADEA and Title VII cases in assessing so-called “disparate impact cases”. The original aim of admitting disparate impact litigation (similar, but not identical, to indirect discrimination in the EU) under Title VII was to ease the burden of proof on plaintiffs by allowing the plaintiff to prove disparate intent through statistical and other circumstantial evidence. Employers could then defend themselves by referring to business necessity and to the reasonableness of their measures, a defence which would then be explored to examine whether alternative options which impacted less on the protected class were available.

In the controversial *Smith v City of Jackson* case,⁶³ a group of senior police officers

claimed that a salary increase plan that advantaged those who had less than five years of service over those who were more senior constituted age discrimination. In the *City of Jackson* case the Supreme Court found that the aim of the employer “to make junior officers’ salaries competitive with comparable positions in the market” was reasonable and did not violate ADEA. The much criticised, controversial and, indeed, absurd aspect of the judgment was that, on the one hand, the Court, referring literally to the analogous language of ADEA and Title VII, accepted that a claim for disparate impact can be submitted both under Title VII and ADEA. However, on the other hand, referring to a difference in the language of the two Acts regarding the available defence for employers, the Court found it “clear that the disparate-impact theory’s scope is narrower under the [ADEA] than under Title VII”.⁶⁴ The reason for this seemingly self-contradicting argumentation is that ADEA permits employers to take actions with disparate impact affecting workers above 40 if there is a “reasonable factor other than age”, an opportunity not available to defendants under Title VII. In addition, since the textual difference between the two Acts resulted from a 1991 amendment of Title VII expanding the room for disparate impact claims, which was not replicated in ADEA, the Court interpreted the decision of Congress as consistent with the fact that age, unlike Title VII’s protected classifications, has relevance to an individual’s capacities.⁶⁵

The difference between the treatment of claims under Title VII and ADEA cases finally received confirmation by a 2009 milestone (or rather bumping stone) case. In *Gross v FBL Financial Services*,⁶⁶ the Supreme Court excluded so-called “mixed-motive” claims from US ADEA by, again, distinguishing the language and interpretation of ADEA from Title VII.

Similarly to the introduction of the McDonnell Douglas test and disparate impact claims, the intention behind admitting mixed-motive claims had been to make the onerous, occasionally insurmountable, burden of proof lighter on discrimination victims. In mixed-motive cases, when the differential treatment has both legitimate and discriminatory reasons, the plaintiff has the burden of showing that discrimination was one of the motivations substantiating the employer's action, and then the burden shifts to the employer to convince the court that they would have taken the same action without the discriminatory motive present.⁶⁷ This saved the plaintiff from the difficulty of proving that "but for" the discriminatory intention, the employer would not have taken the same action.

In *Gross v FBL Financial Services*, a case where there were legitimate reasons mixed with discriminatory consideration based on age, surprisingly for many, the Supreme Court decided not to permit the application of the mixed-motive approach. Mr Gross, a 54 year old employee of FBL, was transferred to another position, while his former job was assigned to a younger employee, previously his subordinate. He claimed that this reassignment took place due to his age, therefore it violated ADEA. FBL defended its action by asserting that the transfer was due to company restructuring and the new position more was closely aligned with Mr Gross' skills. Since the facts of the case pointed at the presence of legitimate, non-discriminatory reasons as well as the consideration of the age of the employee, the Supreme Court decided that this was a mixed motive claim, and that the mixed motive analysis developed under Title VII was not applicable under ADEA.⁶⁸ As a result of the judgment, where there are multiple reasons for an employer's action, a plaintiff will only be successful if

they can persuade the court that their employer would not have acted in this way "but for" their age.⁶⁹

3. Reverse Discrimination - Younger and Older

The lack of clarity around age discrimination, especially the principle of its one-way protection, and the necessity of separation of young age and old age discrimination as two different grounds, have led to uncertainties under ADEA in the US and, in the future, may lead to uncertainties in the EU as well. The European Framework Directive prohibits age discrimination against a person at any age, in comparison with those who are either older or younger. There is no distinction either in the language of the Directive or in the case law so far between discriminating on the ground of older age and discriminating on the ground of younger age. In spite of the lack of symmetry and the non-binary nature of age discrimination, this has not caused a problem so far. There was no competition or clash between the younger and older protected groups, in contrast to the case law under ADEA, where the question arose as to whether the protection of the younger against the older was covered by the statute. Taking the cases that have been decided so far by the CJEU on discrimination on the grounds of young age, the discrimination was not in favour of older persons, no older comparators were present and in both cases the actual age of the applicants was not at issue.⁷⁰

ADEA, by setting 40 years of age as the lower limit of the personal scope of the Act and excluding from protection anyone younger than 40, clearly creates two groups: the protected and the non-protected. There is, however, a clear difference between someone in their early 40s and someone in their late

60s or older. Several cases have reached the courts on the basis of ADEA where the discrimination has occurred within the protected group. These cases raised the question of whether discrimination within the protected group is prohibited and, particularly, whether discrimination within the protected group is prohibited not only against the older, but also against the younger person, in favour of an older person (“reverse discrimination”).

Contradictory interpretations by courts at different levels in “reverse discrimination” cases resulted in almost two decades of uncertainty. This uncertainty raises more general issues as to the nature of two-way age discrimination, such as whether the protection is provided equally in both directions (from young to old and from old to young) and thus whether age discrimination is comparable to other grounds in this respect. Discriminating against a man in favour of a woman is not less prohibited than *vice versa*, but is the same true of age discrimination, i.e. is discriminating against the young in favour of the old prohibited the same way as *vice versa*? The non-binary character of the personal scope (see Part II, section 1 above) of age discrimination also necessitates a consideration of what difference is required for a finding of age discrimination. How much younger or older should the claimant be than the comparator in order to get protection? The issue of retirement (especially early retirement or deferred pensions) gives an additional twist to the issue of the “two-way” discrimination. These questions have been answered under ADEA case law and might contain some message for the interpretation of the unlimited definition of age discrimination by the European Framework Directive.⁷¹

The issue of two-way discrimination had already arisen in a case in 1988. In *Karlen v City Colleges of Chicago*,⁷² the plaintiffs, who were

over 40, claimed that the employer’s early retirement plan discriminated against them on the basis of their (younger) age. The case was decided in favour of the defendant employer, and the Seventh Circuit Court clearly rejected any symmetrical view of the two possible directions under ADEA. The Court stated that “[t]itle VII protects whites and men as well as blacks and women, but [ADEA] does not protect the young as well as the old, or even, we think, the younger against the older.”⁷³ The Court added that permitting such claims would end the possibility of early retirement plans, unless such plans were open for employees from 40.⁷⁴ The wording of ADEA, by referring repeatedly to “older” persons, seemed to indicate that the prohibition was only in one direction, even within the broad age category of over 40.

This decision was followed by divergent analyses by the courts. In 1991, the EEOC issued a regulation acknowledging that, although ADEA prohibits discrimination in both directions, it does not permit favouring one person, be they older or younger, over another merely on the basis of age if both are over 40.⁷⁵ However, this regulation was not followed by the majority of the courts.

The divergence between the EEOC and the majority of courts deciding cases of reverse age discrimination culminated in, and was ended by, a US Supreme Court decision in the case of *General Dynamics Land Systems, Inc. v Cline*.⁷⁶ Cline, together with other 196 workers, all between 40 and 49, claimed that General Dynamics discriminated against them on grounds of age by entering into a collective agreement that abolished the provision of health benefits to retired workers except for workers who were 50 years of age or older on 1 July 1997. Upon a survey of the former reverse discrimination claims and arguments presented, the Court found that

the meaning of the word “age” is determined by the context of “discrimination” because of the age of an individual. This context, as interpreted by the Court, revealed the intent of the drafters to protect the old from employers arbitrarily favouring the young. The Supreme Court decided the case in favour of the employer. It held:

“[T]he ADEA’s text, structure, purpose, history, and relationship to other federal statutes show that the statute does not mean to stop an employer from favouring an older employee over a younger one.”⁷⁷

The EEOC amended its regulation and adjusted it to the decision, and according to the amended text:

“It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favouring an older individual over a younger individual because of age is not unlawful discrimination under the [ADEA], even if the younger individual is at least 40 years old. However, the [ADEA] does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences.”⁷⁸

One of the arguments accepted in the *Cline* decision was that:

“[R]ecognising reverse age discrimination would limit the freedom of employers to offer any sort of benefit to the oldest workers, whether it is to encourage them to retire or to reward them for years of service.”⁷⁹

Indeed, the two-way prohibition of age discrimination (without clearly distinguishing between “ageism” and the protection of the

young), not only contributes to the uncertainties accompanying age discrimination but is also a barrier in the way of prohibiting the most frequent form of age discrimination – mandatory retirement.

Part IV: Mandatory Retirement

If we say that employment discrimination, and particularly age-based discharge from employment, constitutes the bulk of age discrimination claims, mandatory retirement is at the very crux of the age discrimination debate. Mandatory retirement arrangements either in law or in collective agreements mainly serve to assist employers in avoiding the legal and financial costs of discriminatory termination of employment. Notwithstanding legal enactment, the discriminatory nature of mandatory retirement stays there.

1. Arguments for and against Abolishing Mandatory Retirement

With the process of ageing, working life inevitably comes to an end at some point in time. Who is competent to determine when this should be? The most rational and most fair answer to this question is that the individual is best placed to know when this should happen.

The formal retirement age has been a result of the historic changes coming with the industrial era: the social and institutional separation of the place of work (wage-earning) from the home and the consequent need for institutionalised income replacement when wage-earning became impossible. Before this separation, no formal (lower or upper) limits of working age were known; the gradual growth of the child and its capacities, and, similarly, the gradual reduction of capabilities resulted in natural and gradual increase or decrease of the participation in

the work of the family or larger community while permanently having a share in the results of the family work.⁸⁰

Formalisation of retirement resulted in the legal entitlement to retire, i.e. to receive an income replacement from the state.⁸¹ On the other hand it brought a compulsion, too, to detach from the workplace and the labour market. While it is undisputed that the entitlement to retire and to receive an income replacement needs a formal lower age limit and the entitlement cannot be connected to the actual state of working capacity of the individual,⁸² the issue of when and how the worker might be compelled to leave the workplace is not at all undisputed.

From a non-discrimination point of view such a compulsion is unfavourable treatment, and if discrimination is prohibited on the ground of age, then such compelled retirement must be prohibited.

Mandatory retirement refers to two main ways of ending employment. The first is termination of employment upon the initiative of the employer, with reference to a retirement age that cannot be legally challenged by the employee. This might be based on the law (in systems where termination requires just reason), or on a provision of a collective agreement or contract.⁸³

The second way is the automatic termination of employment by law, whereby no action is required by the employer. Such automatic termination might be assimilated to the loss of legal capacity of that person for at least that position, similarly to losing, in the wake of a criminal charge, a medical qualification enabling one to work as a medic, or the clean criminal record for a job where such record is a requirement.

Numerous arguments are brought up in favour of permitting involuntary retirement (or against the abolition of forced retirement) and this article does not explore all of them. To summarise, the arguments are clustered around two key justifications. Firstly, reference is made to the need for fair distribution of job opportunities, having regard to the chances of younger generations. Secondly, a reference is made to safety considerations (e.g. in the case of airplane pilots, fire-fighters, etc.). Both arguments might have some limited relevance in certain professions and occupations, but they are of no general value.⁸⁴

A frequent benign argument is that automatically ending employment at a certain age pays more respect to the dignity of the employee than referring to (and eventually proving) a decrease in their capacities and in the quality of their performance. It could be argued, however, that the ageing person is able to decide and choose the best way for their own interests.

Notwithstanding a degree of rationality in all these arguments, the normative indication of a date as the compulsory upper limit of a person's working capacity and of their right to work is incompatible with the principle of non-discrimination, at the core of which is the right to individual assessment. Therefore, the abolition of mandatory retirement is a *sine qua non* of the genuine prohibition of age-discrimination.

2. Plain Prohibition in the US and Complacency in the EU

The attributes, similarities and differences of the US and the EU treatment of the issue of mandatory retirement have their roots in the divergent social security systems: the contract (collective agreement) based

insurance, as well as the generally more individual and freedom-oriented US system, compared to the top-down, mandatory protection that can be traced back to the Bismarck social security system which forms the foundation of social security in continental Europe. Similar to pensions, in the US the mandatory retirement system was established by a system of contracts, while in Europe it was established by protective social legislation originating the famous Bismarck social security legislation of the last decades of the 19th Century.⁸⁵

Under both systems, the termination of employment on the ground of an assumed decline of physical and intellectual capacities was considered a valid constitutional solution. The fact that such a restriction on the right of the individual to freely choose and exercise a profession was a violation of a constitutional right was not considered by the courts, which accepted mandatory retirement as constitutional.⁸⁶

The idea and need for the abolition of mandatory retirement came around the same time as the introduction of a legal prohibition of age discrimination, which in the US meant the time of the introduction of ADEA (and finally with its 1986 amendment); and in the EU this meant the time of introducing the Framework Directive in 2000.

If we compare the case law of the ECJ and the US courts developed on the basis of the respective legislation, the apparent difference is that while US courts do not accept the automatic retirement age, the ECJ has a significantly more deferential attitude towards regulations in member states forcing employees to retire involuntarily. The apparent difference is mainly attributed to the different background of, and motivation behind, the legislation. While in the US, ADEA

was motivated by a strong respect for individual free choice and the intent to eradicate unfair stereotyping, in the EU Framework Directive, the anti-stereotyping intent was coupled with a broader social and economic consideration and the intent to react to the problems of “ageing society”,⁸⁷ as well as to labour market and budgetary (social security) problems. Thus, while the US courts do not treat the issue of mandatory retirement any differently from other issues of age-discrimination under ADEA, the ECJ treats mandatory retirement differently, submitting it to different tests.

The US Supreme Court’s approach was established in *Western Airlines Inc. v Criswell*, a mandatory retirement case for airline pilots and engineers,⁸⁸ in which the Court held that age cannot serve as a proxy for the possession of high level safety-related job qualifications. The Federal Aviation Administration regulation prohibited persons aged 60 or over from serving on an airplane as a pilot, co-pilot or cockpit engineer for safety reasons. Accordingly, Western Airlines required the plaintiffs to retire upon reaching their 60th birthday. While it was not disputed that the high level safety requirements were relevant and that ageing may affect the ability to meet these, the Court held that the employer must establish either (a) that it had reasonable cause to believe that all, or substantially all, persons over the age of 60 would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with older employees on an individualised basis.⁸⁹ The Court emphasised that Congress, when adopting ADEA, subjected differentiating decisions to the objective justification of the BFOQ test which demands the “reasonable necessity” of the measure for it to be permitted, a test which is a higher requirement than “reasonableness”.⁹⁰

When appreciating the high level of scrutiny applied in this case, especially in comparison with the more lenient tests applied by the ECJ – which is more receptive towards references to labour market reasons legitimising regulatory efforts by the member states to set time limits of the retirement of older workers⁹¹ – certain things must not be forgotten.

First, in 1985, when the case was decided, the US ADEA still contained an upper limit on the prohibition of discrimination. When a person reached their 70th year, the protection finished. In other words, there was a retirement age foreseen by the legislation and it made it possible to make no distinction between mandating retirement and other age-based differentiation as long as it remained below the legislative end of the (protection of the) working career. By contrast, the ECJ was confronted with a legislative situation not setting any upper limit, where a ceiling to the infinite prohibition of age discrimination could only be set by court interpretation.

Another uncertainty for the ECJ might have derived from the symmetric approach followed by the Framework Directive, i.e. where discrimination is prohibited not only against the older but in the reverse way too. As discussed above, while ADEA only prohibits discrimination against older persons, even within the protected age group, the EU Framework Directive protects everyone. This naturally raised uncertainties for drafters of the Directive and resulted in references to social security benefits as well as pension age in Recitals 13 and 14 of the Directive, excluding such benefits from the concept of pay, and setting a shield between pension systems and the reach of the Directive. However, if one perceives these references as merely a precaution against the young (or at least those below the national pension age)

claiming discrimination, the interpretation by which they are seen to permit mandatory retirement seems exaggerated.

The difference in the motivation and the text of the US and EU legislation almost naturally led to a difference in the interpretation and case law based on these legislative instruments. Unlike in Europe, the respect for the free choice of the individual lying behind the US non-discrimination rules permits exceptions from the prohibition of differential treatment on the basis of age to only a limited extent, submitting any exception to the strict BFOQ test and apparently not permitting the use of age as a proxy for the lack or loss of the appropriate qualification.

3. Article 24 of the European Social Charter

Not unlike other human rights treaties, the RESC does not expressly mention age in its Article E prohibition of discrimination. Containing a non-exhaustive list of grounds ending with “other status”, Article E is open for interpretation as covering other grounds of discrimination. Recent developments in the case law are shifting towards a more individual and free-choice oriented interpretation of several provisions of the Charter.⁹² For example, in its 2012 cycle of supervision, the European Committee of Social Rights (ECSR), the independent expert body supervising the implementation of the Charter and the compliance of state parties with their obligations under the Charter, has developed its interpretation of Article 24 in a new and stronger non-discrimination spirit.

Article 24 guarantees the right of employees to protection in cases of termination of their employment. Among others, states must adopt legislation that guarantees the right of all workers not to have their employment terminated without valid reason. The

text specifies two sorts of reasons that are considered valid: reasons connected either with the capacity or the conduct of the employee; and operational requirements of the employer. The Appendix to the Charter (an integral part of it and equally binding) enumerates the reasons that “in particular” may not be considered valid under the Charter.⁹³ The text makes it clear that further reasons might join this list.

Age is not enumerated among the prohibited reasons, and the assessment of national laws permitting age as a legitimate ground for termination of employment (i.e. mandatory retirement) was unclear in the first cycles assessing Article 24.⁹⁴ This changed with the 2012 cycle and the issued statement of interpretation.

The ECSR confronted (or matched) with each other the open-ended list of prohibited reasons in the Appendix and the exhaustive definition of valid reasons in Article 24 and said that a new ground – age – can be added to the automatically illegitimate reasons; however, no ground can be added to the defined legitimate grounds (those connected with the conduct or capacity of the employee or the operation of the enterprise). Thus, the ECSR established that under Article 24, dismissal of the employee on the ground of having reached the normal pensionable age (the age when an individual becomes entitled to a pension) will be contrary to the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.⁹⁵ At the same time, the statement of interpretation emphasised that such termination is prohibited only when it is initiated by the employer, and situations where a mandatory retirement age is set by statute, as a consequence of which the employment relationship automatically

ceases by operation of law, do not fall within the scope of this provision.

This distinction between the above mentioned two kinds of “mandatory retirement” is based on the text of the Appendix that declares that for the purposes of Article 24 the term “termination of employment” means termination of employment at the initiative of the employer. It is important to add that legislation that makes the retirement “mandatory” for the employee, but provides the employer with the privilege to retain and continue employing the employee, is not considered to be a statutory exception from the Charter.

On the ground of this new position of the ECSR, in the 2012 cycle of assessing the compliance with the Charter, a total of six countries⁹⁶ were declared to be violating their obligations under Article 24, specifically by not observing the prohibition of termination by the employer merely on the ground of age without the presence of any valid reason. In view of the novelty of the clear requirement of having mandatory retirement abolished, the situation could not be unequivocally assessed due to the lack of information in the reports on a number of countries. With respect to these countries, the 2012 “deferral” of conclusion on that point and the request for more information on the prohibition of mandatory retirement might result in a negative conclusion in the 2016 cycle when reports on Article 24 will next be assessed.

Following the above-mentioned 2012 cycle, a pending collective complaint alleging a violation of Article 24 in general, and the prohibition of involuntary retirement in particular, must be mentioned. *Follesforbundet for Sjøfolk (FFFS) v Norway*⁹⁷ concerns the mandatory retirement at the age of 62 for seamen under the Norwegian Seamen’s Act.

The claim was declared admissible and the case is still pending and is to be watched with interest.

4. Conclusion: Two Preconditions for a Natural Ending of Working Life

We cannot reject the fact that working capacity decreases with age and the prohibition of age discrimination would not mean that persons who are objectively not capable of performing certain tasks might not be transferred to jobs more adjusted to their capacities or have their employment terminated. Mandatory retirement is nevertheless incompatible with a principled approach to equality and its broad acceptance undermines non-discrimination on the basis of age.

In place of mandatory retirement, two preconditions are necessary to remove the bias and reluctance. First, objective, accurate and systematic evaluation systems must be in place at the workplace. Apart from the potential impact of such systems on the efficiency of management and the workplace atmosphere, employers should be interested in developing them with the understanding that such systems are critical in age discrimination legislation, as a key-point in building the evidence either in favour of or against the defendant employer. The objective and accurate evaluation system promotes the avoidance of judgements on the basis of impression and presumption, ensuring that anyone can work and be useful as long as they continue to contribute.

The second precondition is to promote genuine voluntary retirement through the provision of adequate incentives. These incentives should include a social security and pension systems that make it possible for persons to retire, voluntarily or in agreement with

the employer, at the age when work performance and the daily challenges of the workplace become burdensome.⁹⁸ These systems can guarantee a smooth, flexible and, above all, dignified career end.⁹⁹

Issues of human resource management, just reasons for terminating employment, as well as the proper regulation of the social security and pension systems go beyond the scope of this article.

Part V: Discrimination outside Employment

1. Legislative Acknowledgement of the Right to Dignity beyond Working Life

The right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others extends to the period following the age of paid work. The start of this period is individual and its end is the end of life. Those who, at some stage, live their everyday life with the assistance of others, have the right to be equal in dignity and to have equal protection and benefit of the law. At older ages, the right to live in dignity not only implies a right to choose between different options, but also requires material conditions and services facilitating independent life and the social participation of the aged person.

The need to specify the meaning of equality of protection of the law for persons far beyond working age and to acknowledge the right to such equality was recognised late in international human rights law. While some forms of social care for the elderly, sympathy and charity were present in different forms historically, no one had a right to care or benefits and no one in such care had the right to be an equal member of society. Institutions of care frequently became institutions of ostracism.

It was as late as in 1988 when an Additional Protocol to the European Social Charter, in its Article 4,¹⁰⁰ guaranteed, for the first time in an international human rights treaty, the right of elderly persons to have social protection, live in dignity preserving their independence and autonomy, and enjoy integration and participation in society. (This provision is now Article 23 of the RESC.)

Later, in 1995, the Committee on Economic, Social and Cultural Rights (CESCR) adopted its General Comment No. 6 on the economic, social and cultural rights of older persons,¹⁰¹ without any enforceable legal content, without clearly outlining the required measures regarding the two distinct age groups, and mentioning rights in an undifferentiated way that might be relevant only to one or the other group.

2. The Covered Age Group

The language of the Additional Protocol clearly refers to persons in the post-working period of life, even if only indirectly, by enumerating the needs that generally occur in the last phase of life.¹⁰² The norms contained in the Additional Protocol, guaranteeing non-discrimination and equalising life opportunities outside of employment, are norms which typically reflect the issues faced by those who are already detached from the labour market but still have a need and a right to live a healthy and fullest possible human life.

Section 9 of CESCR's General Comment No. 6 refers to persons in this stage of life as being in the "fourth age". The term is taken from the literature that divides human life into four ages: childhood, working age, post-working age and the "fourth age".¹⁰³ The third age is estimated to be between 65 and 80 and the

"fourth" age starts between 80 and 85. The age-defined borderlines between the categories are merely indicative and are not fixed. Anyone in any age might belong to any of the three adult-groups.¹⁰⁴ Someone in their late 60s might be *de facto* in the "fourth age" and conversely, someone might be still working well over the age of 80.¹⁰⁵ The second and third ages are one group for the purpose of age discrimination law: this is when the prohibition of discrimination in employment on the ground of age is vital, including the prohibition of mandatory retirement.

The aim of looking at these categories is to find the most adequate and proportionate legal measures to guarantee equality. Nonetheless, sectioning old age into "working age" and "beyond working age", especially when the latter is labelled "fourth age" (which might sound stigmatising), might raise objections. Any sectioning, any categorisation implies associated stereotypes and possible discrimination.

However, treating old age as one undifferentiated section of human life would be as unjust as unfair differentiation. As Aristotle says, it is an injustice not only to treat those who are alike differently, but also to treat as alike those who are different. If combating ageism is nothing more than an unlimited guarantee of equal treatment in employment, even for those who are not capable of working anymore, we are far from the idea of equality. The different phases of ageing should be reflected in different forms of guaranteeing equality, with respect to the differences of the phases. Equal access to health, financial benefits and social services comes to the forefront. The second subject area of age discrimination legislation is about requiring positive measures to remove obstacles to an equally dignified life at any age and any stage.

This must amount to a requirement to do more than just removing and abolishing stereotypes in society. Human life may come to a stage when the individual is incapable of functioning independently and is no longer able to have an active role in society. These persons have the right to live in dignity, not because of who they are or because of what they have achieved in the past. The dignity of human society makes this right indispensable.

3. The Content of “Equal Protection” in the Fourth Age

Having identified the “fourth age” category and its main characteristics, the differences of its members from the majority advise the content of the requisite protection. In regulating non-discrimination in this area, the focus is on mandating positive measures for the provision of services, and on the support to ensure material conditions necessary to facilitate the continued participation and integration in society and preserve independence and autonomy.

Article 23 of the RESC lays down a set of broad and at the same time specific obligations on states that can guarantee the effective exercise of the fundamental right of elderly persons to social protection. The obligations could be categorised into three main areas.¹⁰⁶ First, whether in work or not, elderly persons should be guaranteed adequate resources to enable them to live a decent life and continue to take active part in public, social and cultural life. Resources, together with the provision of information about services and facilities available to elderly persons, guarantee the uninterrupted full membership in society.¹⁰⁷

Second, elderly persons have the right to health care and services necessitated by their state, as well as the right to housing suited to

their needs, with the aim of enabling them to freely choose their lifestyle and live independently in their familiar surroundings as long as they wish and are able to do so.¹⁰⁸ Third, states have the obligation to provide appropriate support for elderly persons living in institutions and, at the same time, to guarantee respect for their privacy as well as their participation in the decisions concerning living conditions in the institution.¹⁰⁹ As the statement of interpretation of this provision underlines, the “measures envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons”.¹¹⁰ The predominant “service provision” nature of the obligations requires an underlining of the guaranteed individual liberty and freedom of the person provided with assistance that is an inherent requirement of Article 23.

There might be an odour of discrimination at the bottom of any positive action to protect disadvantaged groups. This calls attention to a balanced and proportionate approach to life situations at any time when the legislature steps beyond the formal concept of equality and, particularly, when social justice requires positive safeguards of equal protection and equal dignity. The “provision” and “service” nature of the rights and obligations regulated by Article 23 is not opposite to the right to non-discrimination, but rather norms built on the requirement of equality.

Prohibiting discrimination was not an express part of the above provisions, nor of the accompanying documents – demonstrating the ambivalence related to “protection” and “equality”. The original form (questionnaire) for reports, while requiring a description of the legal framework, did not expressly require non-discrimination legislation to be in place. Although the ECSR declared that

non-discrimination legislation should exist “at least in certain domains”,¹¹¹ there was no consistent scrutiny of the legislative framework of the state parties. At the same time, pervasive discrimination against elderly persons has been reported in health care, services (especially in the financial industry such as banking and insurance), travel, education, the use of facilities, participation in civil dialogue, allocation of resources, etc.¹¹²

In its 2009 cycle, the ECSR, with reference among others to the European Old People’s Platform’s report, started conducting an examination of the legislation of state parties, requiring all state parties to Article 23 to ensure that their national law explicitly prohibits discrimination on the ground of age in areas beyond employment.¹¹³ A general prohibition of discrimination declared in the Constitution or in a piece of legislation would not satisfy this requirement. For example, Sweden was found in violation of Article 23, because its new anti-discrimination legislation, in force from 2009, prohibits discrimination in a wide range of areas of society on all grounds of discrimination except age.¹¹⁴ The prohibition of age discrimination was limited to work, occupational and educational areas. Similarly, in the Czech Republic and Denmark, the legal framework was found inadequate for protecting against age discrimination outside employment.¹¹⁵

The new case law of the ECSR provides an opportunity not only for more effective implementation of the right of the elderly to equal treatment but also for further clarification and development of the concept of “non-discrimination”. The identification of non-discrimination with the combined concept of formally equal treatment and a broad scale of positive measures (regardless of whether such measures require financial resources as well) opens the door to a genuine substan-

tive equality – not yet universally accepted or practiced. This combined concept may also contribute to dismantling the association of service provision and assistance with absence of equality. Thus Article 23 – adopted primarily to provide protective services – is reframed as a genuine non-discrimination human rights provision. The next round of examining countries’ reports on the implementation of Article 23 is in 2013. The Conclusions adopted by the end of the year may (and hopefully will) reflect the above position.

Conclusion

The purpose of this article was to find the real place of age discrimination in the world of anti-discrimination law. The review of the key issues related to age discrimination revealed that the uncertainties around it are due, in part, to general conceptual issues of anti-discrimination law, and that analysing age-discrimination might also contribute to the clarification of more general issues of this area of law.

First, the two opposite groups relevant to age discrimination – majority (mainstream) and minority, dominant and subordinated, perceived as superior and as inferior – had to be identified. Even if no real comparator is required for the finding of discrimination, in order to find discrimination as classification of a group, it is necessary to point to the two opposite groups. It has to be clearly seen that, for the prohibition of age discrimination, these are not the “young” and the “old”; rather, for both vulnerable groups, the “mainstream” age-group is the opposite, the dominant. This also might require a decision that, within the “mainstream” group, no age discrimination can occur. Furthermore, in contrast to the other grounds of discrimination, age cannot be seen as a “symmetric” ground.

Second, the minority groups, both young and old, comprise further sub-groups, with regard to the necessary legal measures adjusted to the level and nature of their vulnerability. Within both groups, we find a group whose members merely need non-discrimination in order to achieve what is corresponding to their personal merits, in particular in employment. For the other, increasingly vulnerable, subgroup, protection against exclusion, abuse, exploitation or degradation has to share the main role with enforced prohibition of discrimination in order to preserve a person's dignity. At the lower end of the age ladder, the sub-groups are "the under-age" (children) and "young adults", while at the upper end, the sub-groups are the elderly in working age and the elderly in the "fourth age". Obviously, no clear age limits may be set between both the age groups and sub-groups; the borderlines must be left to the individual attributes and inclinations, in order to avoid artificial stereotyping that would confirm rather than abolish discrimination. The exception here is the group of young persons, where the borderline between full age and under-age ought to be set by formal rules.

Third, while everyone is ageing, and social and economic advantages and disadvantages may fluctuate with age, this cannot make "age" a relative and fluctuating concept. This nature of age explains, in part, the lack of symmetry in the concept of age discrimination and, consequently, the permissibility of reverse discrimination: the prohibition of discrimination does not necessarily prohibit unfavourable treatment of the younger in favour of the older. There are significant differences between the vulnerabilities of young persons

and old persons and their subcategories, which ought to incur differences in the regulation of their equality and equal opportunities. Youth decreases over time and therefore the young have a decreasing need for protection, while the opposite is true of old age. The two extreme poles, the child-age and the "fourth age" or its later stage, may show similarities in the need for care, support, control, institutional care and assistance in decision making. One of the core concerns addressed by construing ageing as a one-way process is to avoid a reverse process in terms of legal guarantees of equal rights and equal dignity. The child also has rights and dignity and these become full when the child reaches full age. The dignity of the adult remains full and intact until the end of life.

Fourth, at the international level, there is a need to adjust legal instruments to the changed perception of human rights, equal rights and the rights of the elderly. Similarly to the more recently "discovered" rights of categories of persons such as children and the disabled, the rights of the old need to be recognised through the adoption of a specific convention. The clarification of key concepts might promote a more uniform concept of age discrimination and a consensus on related legislation.

In Europe, the increasing human rights edge of the application of the RESC may promote a progressive concept of age discrimination. Although this article has expressed some concerns with the application of the EU Framework Directive, a clarification of its concepts and application may be expected in due course from the jurisprudence of the CJEU.

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2 Butler, R., "Age-ism: Another Form of Bigotry", *Gerontologist*, Volume 9, 1969, p. 243.

3 Committee on Economic Social and Cultural Rights, General Comment No. 6 "The Economic, Social and Cultural Rights of Older Persons", 12 August 1995, Doc. E/1996/22, Para 1; see also Fredman, S., Spencer, S., *Age as an Equality Issue*, Hart, 2003, pp. 3-4; Lahey, J., "State Age Protection Law and the Age Discrimination in Employment Act", *Journal of Law & Economics*, Volume 51, 2008, p. 433.

4 The lists of prohibited grounds are identical in the Universal Declaration of Human Rights and the two UN Covenants and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2 UDHR, Articles 2(1) and 26 ICCPR and Article 2(2) ICESCR).

5 While some conventions set age limits for certain situations, without a general provision permitting age-based differentiation, Article 23 of the American Convention on Human Rights indicates age as a ground that might establish exceptions from the rights enumerated in that article. In other words, it permits differentiation on the basis of age for national legislations.

6 These two conventions prohibit discrimination on the same grounds, except that the RESC includes one additional ground, health.

7 De Schuetter, O., "The Prohibition of Discrimination under European Human Rights law, Relevance for the EU Non-Discrimination Directives – An Update", *European Commission*, 2011, p. 15, available at: http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_3_diger/human_rights/prohibition_of_discrimination_under_european_human_rights_law.pdf.

8 *Ibid.*

9 *Andrle v the Czech Republic*, Application No. 6268/08, Judgment of 17 February 2011, European Court of Human Rights. The case related to pension age and the Court found no violation of Article 14 of ECHR. The divorced applicant got custody of his two children, aged 13 and 15, and cared for them until they reached the age of majority. His early retirement pension request, based on the right to have a lowered retirement age according to the number of children, was dismissed, since only a woman's retirement age could be lowered. His complaint regarding discrimination with respect to his property rights was dismissed by the Court.

10 *B.B v The United Kingdom*, Application No. 53760/00, Judgment of 10 February 2004, European Court of Human Rights. In this case the applicant claimed that he was discriminated against on grounds of his sexual orientation by the existence of, and by his prosecution under, legislation that made it a criminal offence to engage in homosexual activities with men under the age of 18 whereas the age of consent for heterosexual activities was fixed at 16 years of age. He also complained that he was discriminated against on the grounds of age by the decision to prosecute him while failing to prosecute the 16-year-old boy who would technically have been as guilty as he was of the same offence. Assessing the case and drawing on the case of *Sutherland v United Kingdom* (Application No. 25186/94, Judgment of 27 March 2001) the European Court of Human Rights found a violation of Article 14 of the Convention in conjunction with Article 8 for discrimination on the grounds of sexual orientation (also a non-listed ground). The Court did not consider it necessary also to consider the complaint of age discrimination.

11 As of August 2013, 18 countries out of the 47 member states of the Council of Europe had ratified it.

12 *W.M. Brooks v Netherlands*, Communication No. 172/1984, UN Human Rights Committee, 29th session (1987). See ERT summary, available at: <http://www.equalrightstrust.org/view-subdocument/index.htm?id=322>.

13 A further step forward was the case of *Kavanagh v Ireland*, Communication No. 819/1998, Views of 4 April 2001, in which the Human Rights Committee interpreted Article 26 of the ICCPR, which guarantees the "right to equality before the law and to the equal protection of the law", as implicitly suggesting that it is not necessary to identify any specific ground for discrimination.

14 Pub. L. No. 90-202 Code, 29 U.S.C. § 621.

15 The prohibition of age discrimination is limited to employment, similarly to discrimination based on religion, disability and sexual orientation, and in contrast to race discrimination which is prohibited in the broader area of work, education, social security, public services and business services, and to sex discrimination, which is also prohibited in the provision of services.

16 The genuine and determining occupational requirements – an exception for all kinds of discrimination – is supplemented here with the "public security" exception in Article 2(5), i.e. discriminatory measures in respect of grounds under the Directive are permitted if necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. The "armed forces" exception in Article 3(4) exempts from disability and age discrimination. In addition, age-specific justification is permitted in Articles 6(1) and 6(2), with reference to employment policies and occupational social security schemes.

17 This was clearly manifested in the multiple references in age discrimination cases to earlier gender discrimination cases. See, for example, Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, 2002, referred to in Case C-144/04 *Mangold v Helm*, 2005, and the *Marshall* and another case referred to in Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA*, 2007. Similarly, the experience from Case C-15/96 *Schöningh-Kougebetopoulou*, 1998, which was a nationality discrimination case, was relied upon as a basis for the new ground.

18 Council Directive 2000/78/EC, Official Journal L 303, 2 December 2000, pp. 16-22.

19 See the classification of discriminatory grounds by Ruth ben Israel in 1993 establishing families centred around the main grounds. This approach is similar to D. Shiek's "nodes" approach but differs by setting up a hierarchy: 1. Race, 2. Sex, 3. Religion, and 4. "Others". According to this approach, age is categorised together with disability, the recognition of both rising in the 1980s. See Ben-Israel, R., "Equality and Prohibition of Discrimination in Employment", in Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer, 1998, pp. 254-259.

20 2010/C 83/02.

21 Kochenov, D., "On Options of Citizens and Moral Choices of States: Gays and European Federalism", *Fordham International Law Journal*, Volume 33, 2009, p. 174.

22 Olivier de Schuetter sees hierarchy in European human rights law as a fact, without negative or positive comments. See above, note 7, pp. 5 and 14-16.

23 As it was presumably intended by the EU legislation.

24 Freedland, M., Vickers, L., "Religious Expression in the Workplace in the United Kingdom", *Comp. Lab. L. & Pol'y J*, Volume 30, 2009, pp. 621-622.

25 Schiek, D., "Organising EU Equality Law around the Nodes of 'Race', Gender and Disability", in Schiek, D., and Lawson, A., (eds.), *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, 2011, p. 26.

26 Convention C 138 (1973) concerning Minimum Age for Admission to Employment, supplemented by R 146 – Minimum Age Recommendation 1973 (No. 146).

27 European Social Charter (Revised), Strasbourg, 9 May 1996, Article 7(1).

28 *Ibid.*, Article 7(2). Under the 1961 Charter, this minimum age was 16.

29 Age is only mentioned in the Universal Declaration of Human Rights in Article 16(1) which declares the right of men and women of full age to marry. 30 Especially in the areas of reproductive freedom, consumption, driving, etc.

31 While international and national rules on minimum ages and the substantive limitations of the autonomy and free choices of the individual also raises questions, in part addressed by the UN Convention on the Right of the Child, the analysis of these limitations with regard to eventual discriminatory elements goes beyond the scope of this article.

32 Race discrimination likely falls into this category as well.

33 MacKinnon, C., "Difference and Dominance: On Sex Discrimination", in Bartlett, K.T. and Kennedy, R. (eds.), *Feminist Legal Theory*, Westview Press, 1991, pp. 90-91.

34 *Ibid.*, p. 85.

35 See Fredman, S., above note 3; see also O' Cinneide, C., "Comparative European Perspectives on Age Discrimination", in Fredman, S., and Spencer, S. (eds.), *Age as an Equality Issue*, pp. 195-218, especially pp. 214-215; Australian Human Rights and Equal Opportunity Commission, Canberra, May 2000; and Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, Toronto, 2000.

36 The phrase became famous and much cited as a footnote by Justice Stone to an 1938 US Supreme Court case (*United States v Carolene Products Company*, 304 U.S. 144 (1938)) defining the grounds for so called "heightened scrutiny" of legislative acts.

37 Individual examples of members of any discriminated group reaching high status in society do not evidence the lack of social exclusion or group disadvantages.

38 While statistical categories are based on predominant pension ages (60-65 – forecast to go higher), their regulatory origin nonetheless is apparent. The category for which equal treatment outside employment is increasingly needed due to increasing disadvantages, called in some cases the "fourth age", is assessed to start from 80. (See Committee on Economic, Social and Cultural Rights, above note 3, Para 9.)

39 Simitis, S., "Denationalizing Labour Law: The Case of Age Discrimination", *Comparative Labour Law Journal*, Volume 15, 1994, pp. 233, 238 referring to the collective versus individual approach as a difference between EU and US law; see also Suk, J., "From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe", *American Journal of Comparative Law*, Volume 60, 2012, p. 76.

40 US ADEA, 29 U.S.C. §§ 621 ff.

41 *Ibid.*, Congressional Statement of Findings and Purpose, § 621(a).

42 *Ibid.*, § 621, section 2(a)(1)-(3).

43 This Directive protects against discrimination on several grounds – religion, disability and sexual orientation besides age, and the exceptions had to be adjusted to all these grounds. Therefore, in addition to the "genuine and determining occupational requirement" exception, which is very similar to the BFOQ defence, the Directive sets up further exceptions not prescribed for sex and race. See above, note 18.

44 The term "employee" does not cover persons in elected public offices or persons chosen by them, fire-

fighters, and law enforcement officers. (29 U.S.C. § 630(b)(1) and (2), (i), (j) and (k).)

45 Lahey, above note 3, p. 434.

46 The EEOC was established on the basis of Title VII of the Civil Rights Act 1964 and has significant powers and entitlements on the enforcement of Title VII, in addition to ADEA and other pieces of anti-discrimination legislation. Its powers include submitting lawsuits for alleged victims of discrimination. It can also (but relatively rarely does) prosecute cases.

47 Similarly to persons with disabilities, whose discrimination on the basis of their disability was declared unlawful by the Americans with Disability Act 1990.

48 See above, note 40, Section 11(b).

49 The Hungarian Constitutional Court – in Decision No.49/2009 (III. 27) AB – declared unconstitutional the Labour Code provision setting different (less favourable) norms on compensation for damages to employees caused by the employer, where the latter was a private individual employing less than ten persons. The Constitutional Court reasoned that neither the difference between a private and a corporate employer nor the number of the employees prove weaker economic power or greater vulnerability, and therefore the distinction between categories of employees unconstitutionally violated the right of each person of equality before the law and equal dignity. Even if the right to compensation for damages is not a fundamental right, the unequal treatment violates the Constitution if the reasons for the measure do not proportionately justify the differentiation.

50 Directive 2000/43/EC (on race and ethnic discrimination) and Directive 2000/78/EC (on discrimination in employment on grounds of religion, disability, age and sexual orientation), were both adopted on the basis of the authorisation in Article 13 of the Amsterdam Treaty.

51 See above, note 25, pp. 16-17.

52 Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, 19 January 2010.

53 See above, note 25, pp. 16-17k.

54 Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008.

55 See above, note 25.

56 A survey in the mid-1980s has shown that 76% of US ADEA claims were based on termination, 9% on refusal to be hired, demotion made up 6.6% and non-promotion made up 6.3% of the cases. Compensation and benefits cases were altogether 1.9%. (See Schuchmann, A.L., "The Special Problem of the Younger Older Worker: Reverse Age Discrimination and the ADEA", *University of Pittsburgh Law Review*, Volume 65, 2004, p. 376. She quotes Issacharoff, S. and Harris, E.W., "Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution", *N.Y.U. L. REV.*, Volume 72, 1997, pp. 780 and 783: "[t]he numbers are in complete conflict with what had been predicted by the original legislators and are inconsistent with the original intent of the ADEA".

57 See above, note 45, pp. 438-439.

58 *Ibid.*

59 *Ibid.*, p. 435.

60 ADEA, Section 7(b), 81 Stat. 604, 29 U. S. C. § 626(b).

61 *McDonnell Douglas v Green*, 411 U.S. 792 (1973).

62 See on the courts' application of the "McDonnell Douglas" test Zisk, N.L., "What Is Old Is New Again: Understanding *Gross v. FBL Financial Services, Inc.* and the Case Law That Has Saved Age Discrimination Law", *Loyola Law Review*, Volume 58, 2012, pp. 799, 818; see also Hartzler, K.J., "Reverse Age Discrimination under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class", *Valparaiso University Law Review*, Volume 38, p. 232.

63 *Smith v City Of Jackson*, 544 U.S. 228 (2005).

64 *Ibid.*, Paras 233, 240.

65 Congress' aim in introducing the 1991 amendment of Title VII was to help plaintiffs bring their claim to court even when there were legitimate grounds behind the employer's action in addition to the grounds enumerated in Title VII. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012). As amended, Title VII allows an employer to limit, but not escape, liability by showing that it would have made the same decision "in the absence of the impermissible motivating factor".

66 *Gross v FBL. Financial Services*, 129. S.Ct.2343 (2009).

67 *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989).

68 See above, note 66, Para 169.

69 In reaction to the *Gross v FBL* decision, several senators introduced a bill to amend ADEA and other laws "to clarify appropriate standards for Federal employment discrimination and retaliation claims". The bill is still pending. On 30 July 2013 it was assigned to a congressional committee, which will consider it before possibly sending it on to the House or Senate. It is available at: <http://www.govtrack.us/congress/bills/113/hr2852>.

70 See above, note 52; see also C-88/08 *David Hütter v Technische Universität Graz*, 18 June 2009.

71 The issue of reverse age discrimination is noticeably less addressed in the literature than old-age discrimination. Schuchman's brief summary of ADEA reverse discrimination case law draws strongly on the thorough analysis of that case law. (See Schuchmann, above note 56, pp. 339-384.)

72 *Karlen v City Colls. of Chicago*, 837 F.2d 314 (CA7 1988).

73 *Ibid.* See also Schuchmann, above note 56, p.342.

74 *Ibid.*

75 *Hamilton v Caterpillar Inc.* 29 C.F.R. § 1625.2(a) (1991).

76 *General Dynamics Land Systems, Inc. v Cline*, 540 U.S. 581 (2004).

77 *Ibid.*, p. 581.

78 36873 Federal Register, Volume 72, 6 July 2007.

79 See Schuchman, above note 56, p. 377.

80 On this traditional model of solidarity see Zacher, H.F., "Traditional Solidarity and Modern Social Security – Harmony or Conflict?", in Von Benda-Beckmann, F., Von Benda-Beckmann, K., Casino, E., Hirtz, F., Woodman, G.R. and Zacher, H.F. (eds.), *Between Kinship and the State: Social Security and Law in Developing Countries*, Dordrecht, 1993, pp. 458-459. Similarly, no formal (expressed in percentage or otherwise) limits of ability or disability were known. Everyone contributed as far as they were able.

81 Either in the form of "earned" insurance pension, or a social benefit established for old members of society without income, depending on the social security regime.

82 If for no other reason, then to avoid excess burden on the relevant community funds and also to avoid eventual abuse. Furthermore, even if individual fitness could be exactly measured, such a system would be bizarre and as discriminatory as mandatory retirement.

83 Retirement age as a just reason to terminate employment has significance only in legal systems where the employee is protected against unjustified termination. The employment-at-will system of the US has given particular significance to the regulation of age discrimination, and this is why the US collective bargaining agreements – guaranteeing among others the right to just reason when dismissed – had a tremendous role in the development of mandatory retirement regulation, as it became problematic under ADEA.

84 Indeed, there are professions (e.g. recently, the medical profession in some countries including Germany, Hungary and Romania) where there are not enough younger persons to fill the vacated posts; or there is clearly a scarcity of professionals and retaining, rather than dismissing, the elderly would be important. As to health and safety risks, these vary widely in the different industries, and it is in a small number of areas where the risk or danger might be real at all, aside from the false presumptions regarding the capacities of individuals.

85 The differences between the American and European mandatory retirement systems fit nicely with the classification of welfare regimes by Gøsta Esping-Andersen in his seminal book. (See Esping-Andersen, G., *The three worlds of welfare capitalism*, Polity Press, Cambridge, 1993.)

86 See Simitis, S., above note 39, p. 327, on the German Constitutional Court clearly affirming the validity of forced termination of the employment relationship, similarly to the French Cour de Cassation that clearly saw mandatory retirement clauses as nothing but a form of dismissal on the ground of an assumed reduction in capacities.

87 In the more developed regions of the world, the population aged 60 or over is expected to increase at 1% annually before 2050 and 0.11% annually from 2050 to 2100. It is expected to increase by 45% by the middle of the 21st Century, rising from 287 million in 2013 to 417 million in 2050 and to 440 million in 2100. (World Population Prospects, "The 2012 Revision – Key Findings and Advance Tables", Economic and Social Affairs, United Nations, 2013.)

88 *Western Airlines, Inc. v Criswell*, 472 U.S. 400, p. 422 (1985). The case was decided by an undivided court, not too frequent an event in the practice of the Supreme Court.

89 *Ibid.*, pp. 412-417.

90 *Ibid.*, pp. 418-420.

91 See O'Conneide, above note 35, pp. 9 and 37; Suk, above note 39, pp. 93-95.

92 By this token, the change of Article 8(1) requiring the provision of "mandatory" maternity leave of at least 14 weeks is to be mentioned. Julie Suk associates mandatory retirement with mandatory maternity leave regulations in her critique and comparison between the European and US regulatory attitudes. (See Suk, above note 39.) The statement of interpretation on Article 8 (1) in the introductory part of the 2011 Conclusions of the European Committee of Social Rights moves away from the fifty-years-old approach and, while obliging states parties to guarantee the 14 weeks and a minimum six weeks post-natal leave, this has only to be "mandatory" in the sense of the entitlement of the mother. However, she must have a free choice to return, when she wishes, to the workplace, provided that the legal environment (strong protection against dismissal or transfer) and the level of the maternity benefit together guarantee that the option to continue working is entirely a free choice of the

mother. (See European Committee of Social Rights, Conclusions 2011, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GenIntroConclusions2011_en.pdf)

93 These are in part discriminatory, in part otherwise abusive grounds. The Appendix does not mention discrimination. The reasons that cannot be valid reasons are the following: (a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours; (b) seeking office as, acting or having acted in the capacity of a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) maternity or parental leave; (f) temporary absence from work due to illness or injury.

94 It was first assessed in the 2002 cycle for only five countries. By 2012 it concerned 26 countries.

95 European Committee of Social Rights, above note 92, p. 10.

96 Armenia, Azerbaijan, Bulgaria, Ireland, Malta and the Netherlands.

97 Collective Complaint No. 74/2012, case documents available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.

98 See Suk, above note 39.

99 A similar view is reflected in the "Dignified Life Approach" presented by Alon-Shenker, supporting a deferred compensation model that requires administration. (See Alon-Shenker, P., "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination", *Canadian Journal of Law and Jurisprudence*, Volume 25, 2012, pp. 281-282.

100 The 1988 Additional Protocol supplemented the European Social Charter with four significant rights, showing the increased importance of human rights in the employment and social area: the right to equal treatment without regard to sex, the right to be informed and consulted, the right to take part in decision making on working conditions, and last but not least the right of every elderly person (here not "worker") to social protection. (See Additional Protocol to the European Social Charter, Strasbourg, 5 May 1988.)

101 This was based on the UN Principles for Older Persons adopted by the General Assembly in 1991, characterised by a lack of regulatory content and broad coverage, including both persons in working ages and beyond.

102 The Explanatory Report on Article 1 of the Protocol clarifies this, explaining that the elderly have the right to be a "full member", "since (...) the right (...) is not (...) depending on whether an elderly person has retired or is still vocationally active". (See Additional Protocol to the European Social Charter: Explanatory Report, ETS No. 128, Para 54.)

103 See above, note 3, section 9; see also Barnes, S.F., "The Final Years of Adulthood", San Diego University, available at: <http://calbooming.sdsu.edu/documents/TheFourthAge.pdf>.

104 Of course, age 65, the standard pension age, has relevance as much as someone unable to work and showing symptoms characteristic of the fourth age is considered unable, and not "fast-ageing".

105 And not only with the help of modern medical technology; well-known is the age-stereotype destroying example of Dandolo, Doge of Venice, who, in 1204, at age 90 and blind, took part in the fourth crusade against Constantinople, leading the Venetian contingent.

106 With regard to the "optional" character of the RESC that permits state parties to ratify only certain articles or certain paragraphs within articles, Article 23 separates its paragraphs by bullets instead of numbered paragraphs, so that states have to ratify (or not ratify) the whole article. (See above, note 27, Article 23.)

107 See above, note 27, Article 23, bullet 1.

108 *Ibid.*, Article 23, bullet 2.

109 *Ibid.*, Article 23, bullet 3. This article was adopted together with the preceding article, now Article 22 of the RESC, originally Article 3 of the Additional Protocol of 1988. The vocabulary underlines the identical approach: as workers are entitled to participate in decisions determining their working conditions and working environment, similarly, elderly persons living in institutions are entitled to participate in decisions determining their living conditions in the institution.

110 European Committee of Social Rights, Conclusions Cycle XIII-5, Statement of Interpretation in Article 23, p. 455.

111 European Committee of Social Rights, Conclusions 2003, for example on France, p. 186; and Conclusions 2005, Sweden, p. 711.

112 European Old People's Platform, *Building the case for more action at European level to combat age discrimination in access to goods, facilities and services*, 2007, available at: http://www.age-platform.eu/images/stories/Building_the_case_for_more_action_to_combat_age_discrimination_in_access_to_GFS_October_2007.pdf.

113 Discrimination in employment on the ground of age is prohibited under Articles 1(2) and 24.

114 European Committee of Social Rights, Conclusions Cycle XIX-2 (2009), Sweden, pp. 778-779, 783.

115 *Ibid.*, Conclusions Cycle XIX-2 (2009), Czech Republic, pp. 114-115, 119, Denmark, pp. 156-157, 161.