

**ASEM Partners' Adoption of Human  
Rights-Based Elements in Elder Law:  
Five Case Studies**

2022. 12



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## Abstract

The ASEM Global Ageing Center (AGAC) was established in 2018 as a specialized international agency to promote the human rights of older persons at the Asia–Europe Meeting (ASEM).<sup>1</sup> AGAC pursues annual research projects that are relevant to and have important policy implications for the human rights of older persons. As its research theme for 2022, AGAC has chosen to focus on five case studies under the title "ASEM Partners' Adoption of Human Rights-Based Elements in Elder Law".

In the protection or enjoyment of older persons' human rights, there may be a potential affinity between international approaches to human rights issues and policies for older persons; these may converge, but they may also diverge due to different cultural, historical, and political backgrounds. Drawing on the legal underpinnings of human rights promotion in the EU and ASEAN, the aim of this project is to provide a comparative analysis of how human rights are integrated into and mainstreamed in their respective elder laws.

The project assesses the extent to which certain countries and regional bodies among ASEM partners have incorporated human rights-based elements into their legal systems. For the essential elements of human rights for older persons, this study uses Lewis et al.'s (2020) human rights framework for elder law derived from the UN Principles for Older Persons. Analysis by experts in elder law from ASEAN, the European Union, Malaysia, Sweden and the Republic of Korea shows which elements are developed or overlooked in each country's or grouping's policies for older persons. Their papers illustrate the challenges faced by each country in the development of elder law, and outline possible future directions. This project hopes to provide ASEM partners and other countries with valuable political and practical insights with which they can improve their own elder law.

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<sup>1</sup> The Asia–Europe Meeting (ASEM) is a process of dialogue and cooperation involving 21 Asian countries and the ASEAN Secretariat with the European Union and its 27 member states, plus Norway, Switzerland, and the United Kingdom. ASEM links Asia and Europe by facilitating discussion on political, economic, and cultural relations.

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# Introduction

JANE PARK

Older persons represent a larger proportion of the world's population than ever before. The challenges associated with this demographic shift, such as neglect and mistreatment, financial insecurity, and lack of access to appropriate healthcare and legal services, make international and national action essential. International initiatives such as the Madrid International Plan of Action on Ageing of 2002, and regional initiatives, have expanded the concept of older persons' rights, calling for a necessary paradigm shift from responding to the needs of older persons through charity-based models to viewing them as active holders of legally-enforceable rights. Moreover, some countries have improved the translation of defined rights into specific actions and objectives for government and policy makers to pursue. However, these declarations fall short of operating as binding international treaties, failing to provide countries with specific guidance on how to address older persons' human rights and needs adequately. Consequently, the protection of older persons' rights is fragmented and inconsistent. In this respect, the development of elder law from a human rights perspective has become increasingly important for legally protecting older persons, advocating for them, and ensuring their rights against various types of abuse.

According to Lewis et al. (2020), a human rights-based approach to older persons can establish minimum standards within various areas of elder law, and augment multidisciplinary approaches to ageing, if it is undertaken systematically and supported by the appropriate legal architecture. In addition, it may promote an attitudinal shift within societies more broadly and help combat ageism, which is becoming pervasive. Lewis et al. (2020) suggest key components of human rights-based principles for elder law. Their framework is structured around three interrelated layers. The first layer, core values, reflects all human rights law: respect for dignity, autonomy, liberty, and equality. These core values also reflect the five areas of the UN's Principles for Older Persons: independence, participation, care, self-fulfillment, and dignity. The core values on the first level of the framework establish a set of fundamental criteria against

which to test elements of elder law. Building on these core values, the second level involves rights found within human rights law, such as social security, healthcare, housing, and freedom from inhuman treatment. The third level includes principles that can operationalize the second level, enabling a detailed analysis of select areas of elder law and cross-cutting issues. The elements of the third level include participation, non-discrimination, respect for will and preferences, and access to justice.

The EU and ASEAN are making, or beginning to make, efforts to acknowledge the centrality of human rights in their domestic policies for older persons by incorporating elements from international instruments. For example, the Kuala Lumpur Declaration on Ageing was endorsed at the 27th ASEAN summit in 2005, raising awareness of the necessity to promote human rights for older persons in ASEAN countries. Nationally, for example, the Malaysian government enacted a new National Policy for Older Persons and Plan of Action for Older Persons in 2011, based on the 1995 National Policy for Older Persons. In 2021, the Malaysian government stated its commitment to enacting a law for protecting older persons from mistreatment and abuse. In Europe, Sweden is accelerating the process of advancing the human rights of older persons by providing social services that strongly reflect participation and independence. However, little comparative research has been conducted to assess each country's success in developing a legal system for older persons based on human rights principles.

Although countries appear to have adopted a common human rights approach to elder law, they may diverge in how they define human rights principles due to varying sociocultural, historical, and political contexts. And the extent to which each country has adopted elements of the human rights framework remains uneven. For example, the European Union adopted a human rights approach earlier than other groupings or individual countries. The European Convention on Human Rights enshrines human rights as the guiding principle and objective of the Union's actions to promote older persons' rights. At the same time, the dynamics of interaction between EU institutions and EU member states has played a significant role in shaping policies for older persons in each European country. ASEAN countries, for their part, recently adopted human rights-based principles to respond to an increasingly older population and ameliorate its quality of life, but the application of these principles is still in a nascent stage. Implementing human rights policies for older persons tends to be determined by and large at the domestic level. ASEAN nations diverge not only in size, culture, history, values and traditions, but also in their

levels of economic development and national policy priorities. Given this diversity, regional influences could be weaker in ASEAN than in European countries.

The EU and ASEAN could also diverge considerably in their adoption of elements of human rights mechanisms in legal systems, both regionally and nationally. Therefore, this volume provides five comparative case studies of the degree to which human rights-based elements, suggested by the UN Principles for Older Persons and Lewis et al. (2020), are integrated and mainstreamed into legal systems for older persons. The comparison makes evident similarities and differences between the EU, ASEAN at the regional level, and Sweden, Malaysia, and Korea at the national level, regarding the development of elder law that focuses particularly on the human rights of older people. The authors analyze each country's or region's adoption of human rights-based elder law in terms of the following research questions:

- To what extent have human rights mechanisms been developed and achieved in the country or region in question?
- To what extent does the legal system/mechanism of the country comply with, be far ahead of, or fall behind international human rights principles?
- Are there specific examples in the country or region that show successful adoption of human rights principles by the legal system?

Andrew Byrnes addresses efforts to promote human rights. In the ASEAN context, regarding human rights bodies at the regional level, he introduces ASEAN's international commission for promoting human rights. However, ASEAN has not yet developed a normative policy framework for affirming the human rights of older persons. Although the Kuala Lumpur Declaration on Ageing fosters concrete actions to empower older persons, he points out the limitation of its not having formal linkages with mainstream ASEAN policy or instruments regarding older persons. Related policy documents tend to be welfare-oriented, with limited reference to human rights standards that are not in any case translated into specific human rights-focused actions or approaches. Moreover, 'the ASEAN way' is the foundation for ASEAN's institutional human rights framework; it prioritizes cooperation and collaboration over criticism of, or attempts to directly influence or sanction, member states alleged to have violated human rights. He argues that a new international convention is required that can guide

ASEAN member states dealing with issues of ageing and human rights.

For Malaysia, Nur Amalina Aziz et al. present the country's steps towards formulating policies and laws for older persons, particularly with regard to employment, pensions, abuse, healthcare, and social care for older persons. However, the legal system still overlooks certain aspects such as participation in and access to justice (described in the third level of Lewis' framework of human rights). Aziz et al. also argue that the required quality of services has not yet been achieved, though many services are being offered. The authors suggest that comprehensive protection systems and elder-specific laws rising from human rights-based approaches must be implemented in response to the numerous challenges.

In the case of Korea, Namhee Kim discusses the extent to which Korean elder law complies with international human rights standards and mechanisms. Korea has developed a framework of elder law that seemingly covers areas of human rights such as income, healthcare, housing, employment, legal capacity, participation, and freedom from abuse. However, the laws and policies that cover each area have drawbacks that have led to insufficient regulation regarding the human rights of older persons. These drawbacks are evident when she analyzes Korea's elder law based on the core values of the human rights framework: independence, adequate income security and social and legal services to ensure the autonomy of older persons are not provided for. For participation, there is no clear legal basis for the elder work program. For care, the current guardianship system makes guaranteeing the rights of older people with cognitive disabilities difficult. As for self-fulfillment and dignity, there is no comprehensive anti-discrimination legislation, and no active discussion of the need to end multiple forms of discrimination. Professor Kim argues that guaranteeing the human rights of older persons through fragmented laws poses challenges, and a clearer definition of older persons' rights, plus the participation of older persons in their implementation, are necessary to improve the system.

Sara Tonolo discusses the EU's human rights-based approach to establishing a legal system designed for older persons. Her paper depicts EU standards based on a strong commitment to promoting and protecting human rights for older persons, regarding older people themselves as active holders of rights. EU law has developed a set of principles challenging discrimination against older persons that forms the basis for consistently developing new laws and policies oriented toward the promotion and protection of their human rights. However, the paper indicates that the EU does not have a specific elder law similar to that of the United States.

Laws are fragmented, a major factor inhibiting the development of a binding legal system for older persons. The author argues that uniform protection of older persons (particularly in cross-border situations) requires focused effort, and suggests future directions to enhance legal systems for older persons across the EU.

Titti Mattsson describes human rights protections for older persons in Sweden, a country with a well-developed welfare system that incorporates, she argues, respect for human rights. She introduces three areas in which respect for the rights of older persons is particularly visible: healthcare, social services, and the labor market. Mattsson argues that the legal system in Sweden enshrines the core values of the human rights framework in its elder law, progressing from the second to the third level of the framework, and explains where these elements can be found. For example, she introduces the Social Act in Sweden, which aims to promote socioeconomic security, equality in living conditions, and active participation in community life for older people. She describes the Swedish Employment Protection Act, which provides the explicit right for older people to remain in the workforce. She discusses the strength of Sweden's elder law, and possible challenges and areas of focus for the future.

Overall, this study aims to provide a deep analysis of the progress of some ASEM partners' adoption of human rights-based elements in elder law. Interestingly, the elements most frequently addressed in policies to protect the human rights of older persons appear to converge: employment, social security, health, mistreatment, and neglect. The Malaysian government is accelerating the implementation of policies in response to challenges posed by increasing number of older persons. At the same time, quality of services for older persons and respect for their human rights diverge from country to country. In the EU – and in Sweden, as one national-level example – the centrality of the human rights perspective leads to a greater degree of binding policies for older persons than in other countries. In the case of Korea, laws are fragmented and policies tend to be more needs-based. The papers in this collection describe persistent challenges to achieving a human rights-based approach in elder law, and emphasize the importance of developing concrete laws specific to older persons. The aim of this comparative study is to provide insights from each country that will assist in enhancing and strengthening legal systems to protect the human rights of older people across ASEM partners and beyond.

# ASEAN AND THE HUMAN RIGHTS OF OLDER PERSONS

ANDREW BYRNES

## A. INTRODUCTION

The countries of South East Asia, including the member States of the Association of South East Asian Nations (ASEAN), are experiencing demographic ageing, with an increasing number and percentage of older persons in their populations (UNESCAP, 2018). Older persons in ASEAN countries experience many of the same human rights issues as in other parts of the world (Gardiner, 2019). The Association of South East Asian Nations (ASEAN) was established in 1967 and now comprises ten members: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam, with Timor Leste an aspirant for membership. The organisation was originally founded for, and continues to be animated by, the objectives of economic cooperation and regional security, although its aspirations have developed in the more than half a century since its founding. Its present overarching goals and institutional structure are set out in the Charter of ASEAN, adopted in 2007.<sup>1</sup>

In this paper I examine how ASEAN has approached the issue of ageing and the situation of older persons, and whether it has done so by employing a human rights framework. This involves an exploration of the principal policy documents on ageing adopted by ASEAN itself and the manner in which it has taken up regional and international frameworks on ageing adopted by United Nations bodies. It also requires an examination of the extent to which ASEAN's human rights framework and its human rights bodies – in particular the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on

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<sup>1</sup> Charter of the Association of Southeast Asian Nations, 2624 UNTS 223, entered into force 15 December 2008, <https://asean.org/asean-charter/>.

the Promotion and Protection of the Rights of Women and Children (ACWC)<sup>2</sup> – have incorporated older persons’ human rights issues in their work. The paper also suggests ways in which the human rights of older persons might be better integrated into these two spheres of ASEAN’s activities.

The major arguments I put forward in this paper are that

1. ASEAN has not yet developed a normative or policy framework for affirming the human rights of older persons which is comprehensive, specifically tailored to the diverse circumstances of older persons, and coherent in its approach.
2. ASEAN’s approach to ageing and the situation of older persons is predominantly a social development and welfare approach, with few references to human rights standards in its policy documents; these are, in any event, general and largely formulaic, not yet translated into specific rights-focused approaches or actions.
3. The human rights of older persons and older women clearly fall within the respective mandates of the AICHR and ACWC. However, thus far, the theme of the human rights of older persons has not found any prominent place on the agenda or in the work plans of AICHR or the ACWC. There is no formal linkage between ASEAN’s main policy instrument on older persons, the *Kuala Lumpur Declaration*, and the work of the human rights bodies, and neither body has taken up the *Kuala Lumpur Declaration*, or the issue of older persons’ rights included in the ASEAN Human Rights Declaration (AHRD), in a systematic and sustained way. Nor have the AICHR and ACWC taken up the issue by reference to the Universal Declaration of Human Rights or the individual treaties to which ASEAN member States are parties.
4. The human rights institutions of ASEAN should take steps to include the human rights of older persons in their work; the ASEAN bodies working on ageing issues should include a human rights-based approach across their work on ageing.
5. One of the barriers to a more effective use of a human rights framework in both ASEAN’s ageing policy work and human rights work is the absence of a comprehensive, focused, thematic international instrument on the human rights of older persons. The

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<sup>2</sup> I do not deal with the third body, the ASEAN Committee on Migrant Workers, although its mandate is also relevant to the situation of older persons: <https://hrasean.forum-asia.org/mechanism/asean-committee-on-migrant-workers/>.

adoption of such an instrument, especially if it were a binding treaty, would offer possibilities for ASEAN and its institutions, as well as individual member States, to promote more effectively the enjoyment of human rights by older persons in the region.

Part B of the paper provides a brief overview of the principal objectives and the architecture of ASEAN and how human rights in general, and the human rights of specific groups, have been brought within ASEAN's different Pillars and Communities, in particular the ASEAN Political-Security Community and the ASEAN Social-Cultural Community.

Part C of the paper then describes the major policy document adopted by ASEAN in relation to ageing and older persons, namely the *Kuala Lumpur Declaration on Ageing* and the *Regional Plan of Action* to implement this Declaration, and locates these documents within the broader framework of regional and United Nations policy frameworks around ageing. It then analyses the extent to which these documents reflect a human rights-based approach to the issues, concluding that references to human rights are largely rhetorical and have not been translated into meaningful human rights-based strategies or actions.

Part D of the paper then identifies and discusses, in broad outline, the main characteristics of human rights systems in other regions of the world with which the ASEAN institutions are frequently compared. This is followed by Part E, which describes the emergence, mandates and current status of the AICHR and ACWC. In Part F, the paper examines whether the human rights of older persons have been taken up in any substantial way by those bodies, and what barriers and opportunities exist in relation to future possibilities in light of the contrasting experience with the rights of the child, the rights of women, and the rights of persons with disabilities.

The paper concludes with suggestions as to how a human rights approach to the situation of older persons might be more effectively embedded in ASEAN's work on ageing and older persons.

## **B. ASEAN: PURPOSES, STRUCTURES AND HUMAN RIGHTS POLICY**

The approaches of ASEAN member States to the role of the organisation reflect for the most part what is often referred to as 'the ASEAN way': an approach that gives primacy to cooperation, non-confrontation and non-interference in the internal affairs of other member

States. In many areas, though not all, ASEAN has pursued substantive policy goals through the adoption of non-binding policy frameworks and ‘soft law’ (that is, non-binding normative instruments such as declarations, rather than treaties), with relatively limited monitoring or enforcement mechanisms: this has certainly been the case in the area of human rights, despite the significant advances in ASEAN’s formal engagement with the topic in the last decade and a half. The engagement of ASEAN with human rights has grown since the early 1990s and is evolving in directions that many commentators see as positive, though progress is gradual and still subject to contestation (Tan, 2022). The following section provides an overview of human rights generally in the major institutional documents of ASEAN, while a more detailed discussion of the specific ASEAN normative human rights framework and its major human rights bodies appears in Part E of the paper.

Under the ASEAN Charter (2007), the organisation’s current constitutional document, the members of ASEAN undertake to promote and protect rights, foster the rule of law and good governance, and respect international law, although these objectives are not the major focus of the organisation – regional security and economic prosperity are the top two priorities (Tan, 2022). Nevertheless, the ASEAN Charter does include reference to human rights in its Preamble as one of the purposes of ASEAN; it also provided for the establishment of an ASEAN human rights body.<sup>3</sup>

The original – and still current – objectives of ASEAN include promoting economic cooperation across the sub-region, and that desire for enhanced cooperation has evolved into many areas of activity – including efforts to align or harmonise laws and policies in certain areas. To build the broader ASEAN Community, ASEAN has organised its functions and activities around three Pillars: the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). The APSC has the objective of ensuring ‘regional peace and a just, democratic, and harmonious environment’(ASEAN Secretariat, 2016a). The AEC seeks to achieve economic integration of the region and sees ASEAN ‘as a single market and product base, a highly competitive region, with equitable economic development, and fully integrated into the global economy’(ASEAN Secretariat, 2015). The ASEAN Social-Cultural Community ‘is all about realising the full potential of ASEAN citizens’ (ASEAN Secretariat, 2016b), with its detailed goals and implementation procedures set out in the *ASEAN Social-Cultural Community Blueprint 2025*,

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<sup>3</sup> Charter of the Association of Southeast Asian Nations (n 1), article 14.

adopted in 2015 (ASEAN Secretariat, 2016b). ASEAN *Blueprints* are statements of political aims and aspirations, rather than legally binding member States to take specific steps, and these aspirational commitments are subject to monitoring, though the system is fairly loose.

Human rights as a general theme falls within the ASEAN Political-Security Community, the latest *Blueprint* for which aims to ‘strengthen democracy, good governance, the rule of law, promotion and protection of human rights and fundamental freedoms as well as combat corruption’ and sets out a list of ways in which States might achieve these goals, including in relation to human rights (ASEAN Secretariat 2016a).

The human rights of specific groups such as women, children and other ‘vulnerable’ groups are institutionally located primarily in the ASEAN Social-Economic Community, although there are some references to these categories of rights in the *APSC Blueprint 2025* (ASEAN 2016a). The *ASCC Blueprint 2025* sets as one of its objectives the promotion and protection of human rights of ‘women, children, youths, the elderly/older persons, persons with disabilities, migrant workers, ethnic minority groups, and vulnerable and marginalised groups, throughout their life cycle, guided by a life-cycle approach and adhering to rights-based principles in the promotion of ASEAN policies and programmes in the ASCC Pillar’(ASEAN Secretariat 2016b). Among the many measures proposed to promote inclusion are the strategic measures of ‘reduc[ing] inequality and promot[ing] equitable access to social protection and enjoyment of human rights by all and participation in societies, such as developing and implementing frameworks, guidelines and mechanisms for elimination of all forms of discrimination, violence, exploitation, abuse and neglect’(ASEAN Secretariat, 2016b).

The *ASCC Blueprint 2025* also contains a substantial section on human rights, although its primary focus is on the named ‘vulnerable’ groups and the development of social protection and social services. However, the strategic measures identified include ‘enhanc[ing] the effective implementation of relevant ASEAN declarations and instruments related to human rights’ and ‘enhanc[ing] regional initiatives to promote and protect the rights of women and children as well as persons with disabilities especially through the work of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)’ ASEAN (ASEAN Secretariat, 2016b), and the ‘enhance[ment] of regional initiatives to eliminate all forms of discrimination, exploitation, trafficking, harmful practices and violence and abuse against children, women, persons with disabilities, youths, migrant workers, the

elderly/older persons, and victims/survivors of trafficking in persons, ethnic minority groups, and vulnerable and marginalised groups’ (ASEAN Secretariat, 2016b).

Thus, although there are few specific, binding legal obligations, and the political commitments and aspirations in relation to human rights are general in nature and limited by other goals, these issues are referred to in the major policy documents, amidst many other potentially competing goals and strategies. In cases where ASEAN member States are parties to treaties relating to particular groups, or there is a specific ASEAN declaration or plan of action in relation to the rights of a specific group, this can provide, and has provided, the basis for focused policy and administrative action by ASEAN bodies and member States. The rights of persons with disabilities, violence against women and children, and trafficking are prominent examples.

### **C. ASEAN, AGEING, OLDER PERSONS AND HUMAN RIGHTS**

ASEAN has engaged with ageing issues for some time. Its approach has for the most part been a social development and welfare approach that aligns with the various United Nations universal frameworks adopted at the World Assemblies on Ageing in 1982 in Vienna and in 2002 in Madrid, and the regional plans of action adopted by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) to give effect to the Vienna and Madrid Plans in 1999 (the Macao Plan of Action on Ageing and the Pacific), United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP, 2000), and 2002 the Shanghai Regional Implementation Strategy on Ageing (UNESCAP, 2003).

In this paper I distinguish between a policy-based framework, even one informed by and aligned with human rights standards, and a human rights-based framework.<sup>4</sup> Principal features of a fully-fledged human rights framework include:

- A clear statement of an entitlement or claim as an **individual right possessed by a rights holder**, not just the statement of a broad social or developmental objective that applies to the community as a whole

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<sup>4</sup> The following draws on Andrew Byrnes, “A Human Rights Perspective”. Presentation to the United Nations Economic and Social Commission for Asia and the Pacific Third Stakeholder Consultation for the Asia-Pacific Inter-governmental Meeting on the Fourth Review and Appraisal of the Madrid International Plan of Action on Ageing, 19 May 2022, [https://www.unescap.org/sites/default/d8files/event-documents/Human\\_rights.pdf](https://www.unescap.org/sites/default/d8files/event-documents/Human_rights.pdf)

- a clear recognition that the **State is a duty-bearer** and under an international legal obligation to take steps to respect, protect and ensure the enjoyment of the rights in question
- an affirmation that those affected by the exercise of State power are **entitled to participate in and/or be consulted** on policy decisions that affect them
- **transparency** of process and **accountability** mechanisms for the exercise of power that has an impact on the particular group
- the existence of procedures for **access to prompt and effective remedies or reparation for violations** of the rights guaranteed
- **independent mechanisms for monitoring** implementation by individual States in a focused and regular way at the international and national levels.

These components of a human rights framework are seen as important elements of one effective way to bring about legal and social change, though they are not a panacea and can complement and reinforce policy frameworks that are aligned with them.

### **The Kuala Lumpur Declaration on Ageing**

The major policy framework adopted by ASEAN in relation to ageing and older persons is the 2015 *Kuala Lumpur Declaration on Ageing: Empowering Older Persons in ASEAN* ('the *Kuala Lumpur Declaration*') (ASEAN, 2015). This declaration in essence sets out a social development approach to addressing ageing and ensuring better lives for older persons in the region. In so doing it seeks to advance the enjoyment of some human rights by older persons substantively, but it does not seek to do so by the adoption of an explicit and comprehensive human rights approach in its analysis or in its implementation strategies.

#### *Preamble to the Kuala Lumpur Declaration*

The Preamble of the *Kuala Lumpur Declaration* locates the Declaration in the context of a number of international, regional and sub-regional policy frameworks relating to ageing, disability and development more generally. At the same time, amidst the string of references

to these various policy frameworks, including Vienna and Madrid, preambular paragraph 4 ‘recalls’

- the United Nations Principles for Older Persons 1991
- International Labour Organization (ILO) Convention on Discrimination (Employment and Occupation) (No 111); and
- ILO Termination of Employment Recommendation, 1982 (No 166).

While the United Nations Principles for Older Persons seek to advance the position of older persons and their enjoyment of human rights, the instrument is limited in coverage and not expressed in human rights terms. ILO Convention No 111 is a binding treaty for those States which have ratified it: this includes six ASEAN member States.<sup>5</sup> However, Convention No 111 does not include (older) age as an explicitly prohibited ground of discrimination in relation to employment, although States parties to the Convention may add this ground in their national systems of protection. ILO Recommendation No 166 is a non-legally binding instrument, and no member of ASEAN has ratified the corresponding binding treaty, the Termination of Employment Convention, 1982 (No 158).<sup>6</sup>

A further paragraph refers to additional human rights instruments, first ‘acknowledging the commitments of individual ASEAN Member States to the Universal Declaration of Human Rights’. Although the Universal Declaration is not as such a legally binding instrument, it is broadly accepted that most of its provisions are binding on States as part of customary international law.

The same paragraph of the *Kuala Lumpur Declaration* also ‘acknowledges’ the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) – which had been ratified by all member States at the time of the adoption of the *Kuala Lumpur Declaration* in 2015 -- and the Convention on the Rights of Persons with Disabilities (the CRPD Convention) – which had been ratified by all but one member State by 2015 and is now ratified by all ASEAN members (Brunei Darussalam ratified in 2016). No reference is made to the Convention on the Rights of the Child (CRC), which all ASEAN member States had ratified by 2015. This omission is perhaps due to a perception that the rights of the child were not

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<sup>5</sup> Six ASEAN member States have ratified ILO No 111. The non-ratifying member States are Brunei Darussalam, Malaysia, Myanmar, and Singapore: [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256).

<sup>6</sup> [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312303](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303).

relevant to older persons' human rights, despite the references in the *Kuala Lumpur Declaration* to intergenerational solidarity and promotion of a 'life-cycle [life course] approach'.

The *Kuala Lumpur Declaration* also refers in general terms to 'related international instruments that ASEAN Member States are parties to'. These would include the other core United Nations human rights treaties to which member States are parties. ASEAN member States have a generally good record in terms of ratifying the core United Nations human rights treaties (albeit with problematic reservations in some cases), although a couple of member States have not yet ratified the ICCPR,<sup>7</sup> the ICESCR<sup>8</sup> or the Convention against Torture.<sup>9</sup> As noted above, all are parties to the CEDAW Convention (United Nations, 1979), the CRC (United Nations, 1989) and the CRPD (United Nations, 2006). As will appear from the discussion below in relation to the work of the ASEAN human rights institutions, the three treaties to which all ASEAN member States are parties have provided important normative hooks or connection points with the work of those bodies, something which presumably builds on a broad consensus on those issues reflected by the ratification of those treaties by all member States.

The approach of listing documents and instruments continues in the next paragraph of the Preamble, which refers to a number of declarations and programmes related to disability and to the ASEAN Community, as well as to the ASEAN Human Rights Declaration. These documents, too, are all 'recalled'.

For the purposes of interpreting the *Kuala Lumpur Declaration*, it is difficult to assign any particular significance to these references to human rights and other instruments. The instruments and frameworks referred to are of varying substantive coverage, and differing legal status in and applicability to ASEAN member States; the significance of their being 'recalled' or 'acknowledged' in the Preamble for the interpretation of the Declaration and the actions it

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<sup>7</sup> All ASEAN member States except Brunei Darussalam, Malaysia, Myanmar and Singapore have ratified the ICCPR: Multilateral Treaties, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en).

<sup>8</sup> All ASEAN member States except Brunei Darussalam, Malaysia and Singapore have ratified the ICESCR: Multilateral Treaties, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en).

<sup>9</sup> Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam are parties to the Convention against Torture (CAT); Brunei signed the treaty in 2015 but has not yet ratified it, while Singapore, Malaysia and Myanmar have neither signed and ratified nor acceded to the CAT: Multilateral Treaties, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en). Cambodia, Indonesia and Thailand all accepted the inquiry procedure under CAT Article 20, while Lao PDR and Viet Nam declared that they did not accept that procedure: id. No ASEAN member State has accepted the individual communications procedure under the CAT: id.

envisages is not clear. The Preamble appears to be an example of the not uncommon practice in international drafting of including everything that everyone involved thought might be relevant; the Preamble thus serves as a sort of institutional genealogical record. Yet these references have been included, and might provide a hook for a body that wished to infuse a more human rights-based framework into the interpretation and application of the *Declaration* and its implementation.

### *Operative Provisions of the Kuala Lumpur Declaration*

The operative provisions of the *Kuala Lumpur Declaration* do not add much in human rights terms. Under these provisions ASEAN member States ‘declare’ that they will ‘foster’ ten categories of ‘concrete actions towards the empowerment of older persons subject to each ASEAN Member State’s national laws, policies, and programmes’. These actions are to:

1. Promote a shared responsibility approach in preparation for healthy, active and productive ageing by supporting families, care givers/care workers and strengthening communities in delivering care for older persons;
2. Promote intergenerational solidarity towards a society for all ages by raising public awareness on the rights, issues and challenges of old age and ageing;
3. Promote rights-based/needs-based and life-cycle approach and eliminate all forms of maltreatment on the basis of old age and gender through equitable access of older persons to public services, income generation, health care services, and essential information, as well as preventive measures, legal protection, and effective support system;
4. Mainstream population ageing issues into public policies and national development plans, and programmes, which may include flexible retirement age and employment policies;
5. Promote the development of human capital and expertise in gerontology, geriatrics and other related professional and para-professional manpower including care workers to meet the current and future demands for health and social services for older persons;
6. Promote the development of reliable information, evidence-based and gender-disaggregated data on ageing, including improved capacity to bridge the gaps in policy, research and practice;
7. Strengthen the capacity of government agencies, corporate bodies, civil society organisations, including voluntary welfare organisations, communities, and relevant stakeholders, for better coordination and effectiveness in the delivery of quality services for older persons at local, national and regional levels;
8. Encourage the development of older people’s associations or other forms of networking including elderly clubs and volunteer networks in each ASEAN Member State by strengthening their

capacity, and providing them with multi-sectoral platforms of dialogue with the government on ageing issues;

9. Promote age-friendly communities/cities in the region through sustainable and accessible infrastructure;
10. Build and strengthen the networking and partnerships within and among ASEAN Member States as well as with Dialogue Partners and Development Partners including UN Agencies, civil society organisations, private sector, and relevant stakeholders in supporting and providing adequate resources and effective implementation of the commitments reflected in this Declaration.

While all of these aspirations, if achieved, would enhance the enjoyment of some human rights by older persons, the approach and specific actions envisaged do not reflect a human rights-based analysis or approach to implementation: they embody a largely social development, care and service delivery model along with provision of channels for ‘dialogue’ with government.

Operative paragraph 3 comes closest to a human rights focus, calling for a ‘rights-based/needs-based and life-cycle approach’ and the elimination of ‘all forms of maltreatment on the basis of old age and gender through equitable access of older persons’ to various services and opportunities. But notions of a right to be free from violations of physical or mental integrity or of one’s person, or of freedom from torture, cruel, inhuman or degrading treatment, or of the right to equality and non-discrimination on the basis of older age, are not explicitly mentioned (though they may be implied); nor is there any reference to accountability mechanisms or to individual remedies for such violations.

The *Kuala Lumpur Declaration* assigns the overall responsibility for its implementation and monitoring to the ASEAN Ministerial Meeting on Social Welfare and Development, to be supported by senior officials in that area, and asks them to coordinate and collaborate ‘with relevant sectors’ in relation to the empowerment of older persons, and ‘to develop a regional action plan to implement this Declaration’ (Operative paragraph 2). This locates policy and action in relation to the empowerment of older persons principally within the social development Pillar of ASEAN, the ASEAN Socio-Cultural Community (ASCC).

Despite the references to the ASEAN Human Rights Declaration and other human rights treaties in the Preamble, there is no explicit reference to the ASEAN Intergovernmental Commission on Human Rights or the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children or to any role that they might have in implementing the *Kuala Lumpur Declaration*.

Thus, the *Kuala Lumpur Declaration* is a non-binding policy document that embodies a primarily social development approach and, while referring to human rights instruments in its Preamble, does not adopt a human rights approach in its substantive provisions or envisaged implementation.

#### *Regional Plan of Action (RPOA) to Implement the Kuala Lumpur Declaration*

The *Kuala Lumpur Declaration* is, of course, a broad framework for policy development and action and, while unpromising on the face of it as a stimulus to incorporating an explicit human-rights based approach in ASEAN activities relating to older persons, the implementation of the *Declaration* may provide opportunities to develop those aspects of the framework. Accordingly, it is important to consider whether the steps taken to implement it have included human rights-based analysis and strategies. In order to implement the *Declaration*, ASEAN developed the detailed *Regional Plan of Action to implement the Kuala Lumpur Declaration* that was adopted in 2020 (ASEAN, 2020) and was developed with the support of ESCAP (UNESCAP, 2019). Overall, the focus and balance of the *RPOA* is a social development, care-based approach to ageing and the position of older persons, understandably reflecting the focus and balance of the ten areas of action set out in the *Kuala Lumpur Declaration* itself.

The declaration by member States in Action 3 (based on paragraph 3 of the *Declaration*) of their desire to foster the adoption of a ‘rights-based approach’ is not reflected in most of the objectives, targets or indicators of the *RPOA*. It would have been possible to draw a rights-based approach through most of the specified actions by identifying relevant rights and framing the proposed actions in terms of realising those rights. Essentially each action in the *Declaration* has been mapped silo-like to a series of implementing objectives, activities and indicators in the *RPOA* without cross-fertilisation by a rights-based approach.

The only substantial reference to rights and their formal protection is in relation to elder abuse. The *RPOA* provides:

Objective 3.2: To develop or review and strengthen laws and regulations that put emphasis towards protecting older persons against abuse, maltreatment and discrimination.

Activity 3.2.1: Enact or review laws and regulations to protect the rights of older persons as measures to safeguard older persons from abuse and maltreatment.

Indicator: Existence of or number of reviewed laws and regulations on rights, and protection against abuse and maltreatment of older persons.

It is perhaps no surprise that the structure and approach of the *RPoA* is tied so closely to the structure and conceptual framework of the *Kuala Lumpur Declaration* itself, but there were opportunities to adopt a more explicit human rights approach in a number of the different objectives. That this approach was not taken reflects the conceptual and policy field within which ageing issues are located in ASEAN and in ESCAP, a body which has been influential in framing these issues within the Asian and Pacific region primarily as social development issues rather than as having a complementary human rights perspective as well.

### **Ageing Issues as Social Development Issues**

Thus, to understand the broader policy frameworks influencing ASEAN and its member States in relation to ageing and the rights of older persons, it is also necessary to take into account frameworks and standards adopted at the regional or universal level, by which I mean the ESCAP or United Nations level. These fall into two broad categories: (a) policy frameworks such as the Madrid International Plan of Action on Ageing (MIPAA) and the Sustainable Development Goals (SDGs); and (b) standard setting instruments, both non-binding, such as the United Nations Principles for Older Persons, and legally binding instruments, namely the various United Nations human rights treaties to which ASEAN member States are parties.

Thus, there are multiple policy frameworks and normative instruments that have the potential to influence law, policy and practice in individual ASEAN member States in relation to the enjoyment by older persons of their human rights. Some of those frameworks have been taken up by ASEAN and incorporated into its own policy declarations on ageing issues, as noted above. While ASEAN declarations themselves, and the principal international policy frameworks, make reference to human rights in general and sometimes to general and thematic human rights instruments, those references appear amidst many other contextual factors, seem to be largely rhetorical, and have not been translated with any vigour into human rights-based analysis, policy development or practice. (This reflects the fact that the dominant international frameworks that are currently influential with States, MIPAA and SDGs, do not incorporate a strong approach relating to the human rights of older persons.)

Even when human rights are referred to, reference to the human rights of older persons tends to be general in nature and vague in content. This reflects in part a lack of interest in a human rights approach to ageing issues, but also the absence of a comprehensive and detailed human rights framework relating to the human rights of older persons at the international level: there is no equivalent to the thematic international conventions on racial discrimination, discrimination against women, rights of the child, persons with disabilities or the rights of migrant workers. While each of these treaties, as well as general treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are relevant to older persons, their lack of specificity has meant that older persons are relatively invisible in the interpretation and application of those conventions. Thus, even for those who wish to employ human rights frameworks, the resources offered by the current international human rights framework are limited.<sup>10</sup>

#### **D. THE MAIN CHARACTERISTICS OF HUMAN RIGHTS SYSTEMS IN REGIONS OTHER THAN ASIA AND THE PACIFIC**

As is well-known, unlike other regions of the world, Asia and the Pacific does not have a regional human rights treaty that applies across the whole region, nor does it have a set of human rights bodies created by States in the region to promote and protect the human rights and fundamental freedoms affirmed in universal and regional human rights instruments (Cali, 2017; Kittichaisaree, 2021; Meoeckli et al., 2014). The lack of such a system is often attributed to the diversity of States, cultures and political traditions across the region, as well as to the often oppositional stance taken to human rights, and especially to external scrutiny of national records on ensuring the enjoyment of human rights (especially civil and political rights), by some, perhaps many, States in the region.

Against this background at the regional level, ASEAN's development of a sub-regional system for the promotion and protection of human rights is a significant development. The ASEAN system is at a relatively early stage of its development and one hopes that it may develop more

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<sup>10</sup> For analysis of the extent to which the existing international human rights framework addresses the situations of older persons, see Office of the United Nations High Commissioner for Human Rights (OHCHR), *Update to the 2012 Analytical Outcome Study prepared by the Office of the High Commissioner for Human Rights on the normative standards in international human rights law in relation to older persons* (Working paper, 23 March 2021), and OHCHR, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, UN Doc A/HRC/49/70.

robust and independent institutions and practices as time passes, though there is no certainty that it will follow the trajectory of other systems. Nonetheless, it is worthwhile briefly reviewing major features of other comparable systems,<sup>11</sup> something to which scholars and advocates have devoted considerable attention. I provide a brief description of the emergence of concern with human rights in ASEAN, and the origin and structure of the two principal ASEAN institutions.

In contrast to Asia and ASEAN, other regions have extensive human rights regional normative frameworks, and well-established independent human rights bodies and mechanisms that exercise monitoring, adjudicatory and supervisory functions. Europe, in its two different configurations, the European Union and the Council of Europe, has two supra-national systems that provide strong regional general human rights normative frameworks as well as monitoring, adjudicatory and implementation mechanisms (Moeckli et al., 2014).<sup>12</sup>

Within the Council of Europe, the two main general human rights mechanisms are (a) the European Court of Human Rights, which has the power to issue legally binding judgments in relation to States' obligations under the European Convention on Human Rights and its additional protocols, and (b) the increasingly prominent European Committee of Social Rights under the Revised European Social Charter,<sup>13</sup> which supervises the implementation of that instrument, including through the adoption of (non-binding) decisions and recommendations under its reporting and collective complaints procedures. However, there is no Council of Europe convention specifically addressing the rights of older persons, though Article 23 of the Revised European Charter, along with other provisions, have shown some promise in this context;(Quinn & Doron, 2021) and there are non-binding Council of Europe recommendations and an increasing rights focus in the area of ageing policy. Within the European Union framework, the European Union Charter of Fundamental Rights protects both against discrimination on the basis of older age and the rights of older persons, while EU legislation relating to employment provides some protection against age discrimination in employment contexts, though not in other areas; these are enforceable before both domestic courts and the European Court of Justice (Byrnes & Mattsson, 2021).

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<sup>11</sup> A relevant set of standards is also found in Office of the United Nations High Commissioner for Human Rights, *Principles for Regional Human Rights Mechanisms, Principles for Regional Human Rights Mechanisms (Non-Paper)* (n.d.), <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>.

<sup>12</sup> Steven Greer and Lewis Graham, 'Europe' in Moeckli et al., (2014), 463-486.

<sup>13</sup> <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=163>

Under the Inter-American system of human rights (Moeckli et al, 2014),<sup>14</sup> there exists an extensive normative framework underpinned by the non-binding American Declaration on the Rights of Man and the binding American Convention on Human Rights, as well as a significant number of thematic conventions covering topics such as violence against women, torture and, relevant to our discussion, the human rights of older persons (Rodríguez-Pinzón, 2016). These are subject to supervision by the Inter-American Commission on Human Rights, which has both promotion and protection functions, undertaking thematic and country investigations and studies and the consideration of individual complaints of rights violations; it established a rapporteurship on the rights of older persons. In addition, the Inter-American Court of Human Rights stands at the apex of the system, with the power to issue binding judgment in cases involving individuals and cases brought before it by the Commission, as well as to issue advisory opinions, and it has used its powers to adopt expansive interpretations of human rights.

In Africa, the African Union's human rights framework (Moeckli et al., 2014)<sup>15</sup> includes a fundamental general human rights treaty, the African Charter on Human and Peoples' Rights, as well as other thematic human rights treaties on topics such as women, children's rights and, relevantly, older persons' human rights in Africa.<sup>16</sup> This normative framework is supplemented by the promotion and protection offered by the monitoring and implementation work of the African Commission on Human and Peoples' Rights and the African Court of Justice and Human Rights, the latter having power to issue binding judgments. The Commission also has established a Working Group on the Rights of Older Persons and Persons with Disabilities.

Each of these systems has a more extensive and stronger normative framework and a set of institutions with a wider range of functions and powers than the ASEAN human rights system. At the same time, we should recall that each of these systems has evolved in major ways since their establishment some decades ago: evolution has sometimes been slow, and often contested.

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<sup>14</sup> Thomas Antkowiak, 'The Americas' in Moeckli et al., (2014), 445-462.

<sup>15</sup> Christof Heyns and Magnus Killander, 'Africa' in Moeckli et al., (2014), 487-504.

<sup>16</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

## **E. THE DEVELOPMENT OF ASEAN'S HUMAN RIGHTS NORMATIVE FRAMEWORKS AND INSTITUTIONS**

In this section I provide an overview of the development of the two most important ASEAN human rights institutions, AICHR and the ACWC, and their mandates, including their potential application to the human rights of older persons. I also discuss the primary overarching ASEAN human rights instrument, the ASEAN Human Rights Declaration, including its relevance to the human rights of older persons. In Part F I then assess the extent to which AICHR and ACWC have taken up the topic of the human rights of older persons; this is followed by a discussion of possibilities for devoting significant attention to these issues.

### **The Relevance of United Nations Norms and Mechanisms to ASEAN Member States and ASEAN**

Before examining the ASEAN-specific developments, it is important to recall the relevance of the United Nations human rights normative framework and mechanisms. These include the normative instruments broadly accepted by the international community and by ASEAN member States, as well as treaties to which ASEAN member States are variously parties. In terms of procedures, this includes the human rights treaty system with its reporting and other procedures that apply to ASEAN member States, and also procedures such as the Universal Periodic Review, which all ASEAN member States undergo regularly. It also includes special procedures of the Human Rights Council, including thematic and country-specific procedures to which all member States of the United Nations (and that includes all ASEAN States) are subject. These operate directly on the States concerned and may, in some cases, form part of directly enforceable national law; they also provide a linkage point for regionally-based activity by the ASEAN human rights institutions, which those institutions have sought to use in some areas.

### **The Establishment of the AICHR and its Mandate**

Although human rights were not a priority in ASEAN's early years, the subject began to attract more attention in the 1990s, in particular during the lead-up to the Vienna World Conference on Human Rights held in 1993 (Tan, 2011). The World Conference was preceded by regional

meetings to contribute to the conference, including one for Asia and the Pacific held in Bangkok. The intergovernmental meeting led to the adoption of the Bangkok Declaration, which pushed back against some aspects of ‘universal’ human rights, arguing that regional and national cultural and other particularities needed to be taken into account when formulating and interpreting and applying human rights, and that there were shared ‘Asian values’ that needed to be taken into account. There had also been concern among some leaders that human rights and democracy would be used by some developed countries as conditions for trade, investment and other forms of cooperation (Wahyuningrum, 2021). This position gave rise to much debate, and many civil society organisations challenged this approach. The Vienna Conference achieved a consensus outcome in the form of the Vienna Declaration and Programme of Action, adopted on 29 June 1993.

The ASEAN Foreign Ministers meeting, held in July 1993 following the Vienna Conference, ‘reaffirmed ASEAN’s commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration’ and emphasised the interrelatedness and interdependence of all rights, that human rights ‘should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances’ and that ‘the promotion and protection of human rights should not be politicized’.<sup>17</sup> They also stressed the need to be cognisant of the principles of national sovereignty, territorial integrity and non-interference in the internal affairs of states and the need for a balance between the rights of the individual and those of the community (ASEAN Secretariat, 2016b).<sup>18</sup> Importantly, they agreed that ‘ASEAN should also consider the establishment of an appropriate regional mechanism on human rights’ (ASEAN Secretariat, 2016b).<sup>19</sup>

The ASEAN Charter adopted in 2007 restated the intention to establish an ASEAN human rights body, and this was also included in the *ASEAN Roadmap for an ASEAN Community 2009-2015* (2009). ASEAN Foreign Ministers eventually adopted Terms of Reference (TOR) for the ASEAN Intergovernmental Commission on Human Rights (AICHR) (ASEAN, 2009),

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<sup>17</sup> Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993, para 16, [https://web.archive.org/web/\\*/https://humanrightsinasean.info/wp-content/uploads/2018/10/ASEAN-Joint-Communique-26th-ASEAN-Ministerial-Meeting-1993.pdf](https://web.archive.org/web/*/https://humanrightsinasean.info/wp-content/uploads/2018/10/ASEAN-Joint-Communique-26th-ASEAN-Ministerial-Meeting-1993.pdf).

<sup>18</sup> Id at para 17.

<sup>19</sup> Id at para 18.

and the institution was inaugurated by the ASEAN Summit in late October 2009 (Hanara & Bon, 2022; Muntarbhorn, 2013; Petcharamesree, 2013; Tan, 2022).

The TOR provide that the purposes of the AICHR include the promotion and protection of the ‘human rights and fundamental freedoms of the people of ASEAN’ (ASEAN, 2009) and the promotion of ‘human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities’.<sup>20</sup> In terms of the specific normative frameworks to be applied, the TOR stipulated that one of the AICHR’s purposes was ‘to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and programme of action, and international human rights instruments to which ASEAN Member States are parties’.<sup>21</sup>

Certain features of the AICHR were a disappointment to those who had advocated for an expert body independent of government with a broad range of functions and powers to promote and protect human rights in the ASEAN region. Critics saw the AICHR as falling short of best practice and as creating a less robust framework for the protection of human rights than existed in other regional human rights systems.

One major concern was that, as the AICHR was created as an intergovernmental body, the members of the Commission would be appointed by governments and were likely to be government officials, as has been proved to be the case for most appointments (though some member States have appointed independent academics or advocates to serve on the Commission who have taken individual or joint action to try to make the AICHR more effective). The AICHR was stated expressly to be a ‘consultative’ body,<sup>22</sup> thus limiting its power to take independent action.

Another major deficiency in the eyes of its critics was the omission of an explicit *protection* function: although one of the functions of the AICHR is ‘to promote and protect’ human rights, the TOR contain no specific procedure by which the AICHR could receive complaints by individuals of violations of their rights by member States and take action on those complaints.<sup>23</sup> This has been an ongoing criticism, and civil society regularly calls for detailed provision of a

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<sup>20</sup> Id at para 1.4.

<sup>21</sup> Id at para 1.6.

<sup>22</sup> Id at para 3.

<sup>23</sup> The functions of AICHR are set out in detail at id paras 4.1 to 4.14.

protection procedure to be included in the AICHR TOR. At the same time, the AICHR has sought to develop informal ways to respond to such complaints, and more generally used its general power to engage States and try to institute transparency and accountability through its scrutiny of thematic issues.

Many early assessments of ASEAN human rights norms and institutions were highly critical of the soft law status of their norms, and their potential to undermine universal standards and the limited mandate and functions conferred on ASEAN human rights bodies. Notwithstanding these early assessments, the ASEAN human rights institutions have evolved, with some observers arguing that this may enable the human rights institutions to have more of a positive impact than many critics initially foresaw (Collins & Bon, 2022; Duxbury & Tan, 2019; Muntarhorn, 2019; Tan, 2022; Wahyuningrum, 2021).

### **The Development of the ASEAN Human Rights Declaration (AHRD)**

Among the tasks conferred on the AICHR by its TOR was that of developing ‘an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights’ (ASEAN, 2009). The AICHR worked to develop this instrument, the ASEAN Human Rights Declaration on Human Rights (AHRD), which ASEAN Heads of State/Government adopted at the 2012 ASEAN Summit in Phnom Penh (ASEAN, 2013).

The AHRD is a non-binding instrument that does not itself impose obligations on States; States simply ‘declare’ and ‘affirm’ various human rights (civil, political, economic, social and cultural), as well as the right to development and the right to peace. The AHRD affirms ASEAN member States’ commitment to the Universal Declaration of Human Rights, the Vienna Declaration, international human rights instruments to which ASEAN States are parties, and relevant ASEAN human rights declarations. It then sets out a standard list of rights, drawing on the UDHR as well as on human rights treaties.<sup>24</sup>

However, the AHRD also includes provisions that were criticised as undermining universal standards and adopting a cultural relativist approach (Muntarhorn, 2019; Renshaw, 2019;

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<sup>24</sup> Civil and political rights are set out in Articles 1-5 (‘General Principles’) and Articles 11-25, while economic, social and cultural rights appear in Articles 27-31. The right to development is affirmed in Articles 35-37 and the right to peace in Article 38.

Duxbury and Tan, 2022). Article 6 states that enjoyment of rights must be balanced with corresponding duties;<sup>25</sup> while Article 7 restates the mantra that all rights are ‘universal, indivisible, interdependent and interrelated’ and must be treated equally, and that the realisation of rights must be considered in the particularities of regional and national contexts ‘bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’. Article 9 states the relevance of ‘the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation’, wording that has often been used by States whose human rights records are being subject to criticism to seek to justify attempts to avoid such scrutiny.

This is the normative framework which ASEAN has adopted, with potentially significant limitations and escape clauses that might frame any consideration of the human rights of older persons that might be taken up by the AICHR.

The *Kuala Lumpur Declaration* includes in its Preamble a reference to the AHRD (among many other documents) though it does not refer to the AICHR. Article 4 of the AHRD refers explicitly to older persons, along with a regularly repeated list of socially ‘vulnerable and marginalised groups’:

The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

Thus, it is clear that the AICHR has a mandate to exercise its role and functions in relation to the human rights of older persons (‘the elderly’), although as noted earlier the general human rights referred to in the AHRD and the instruments it refers to provide inadequate guidance and detail in relation to the human rights of older persons. Conversely, there appears to be no reason why those ASEAN bodies working to implement the *Kuala Lumpur Declaration* could not draw on the AHRD and other human rights instruments referred to in it to help frame and drive that work.

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<sup>25</sup> ‘The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.’ AHRD, Article 6.

## **The ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC)**

The other major ASEAN human rights body that I discuss in this paper is the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC). This body also emerged from the increasing engagement by ASEAN with human rights that started around the time of the Vienna Conference (ASEAN, 2020; Tan, 2022). The establishment of an ASEAN commission on the promotion and protection of the rights of women and children was included as part of the *Roadmap for an ASEAN Community 2009-2015*, adopted in 2009 (ASEAN, 2009). The ACWC was established in 2010.

The Terms of Reference of the ACWC are similar to those of the AICHR, though focused on promoting and protecting the rights of women and children (ASEAN, 2010). A principal purpose of the ACWC is ‘to promote and protect the human rights and fundamental freedoms of women and children in ASEAN, taking into consideration the different historical, political socio-cultural, religious and economic context in the region and the balances between rights and responsibilities’.<sup>26</sup> Its mandate and functions include ‘promot[ing] the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children’.<sup>27</sup>

The ACWC TOR also contain some of the same limitations as the AICHR TOR, including references to regional and national specificities. In relation to specific human rights norms, the ACWC TOR make reference, in a manner similar to the AICHR TOR, to the Universal Declaration of Human Rights, the Vienna Declaration and other international human rights instruments and regional declarations related to women’s and children’s rights to which ASEAN Member States are parties. The TOR also refer to the Beijing Platform for Action, and UNICEF’s World Fit for Children framework.<sup>28</sup>

One significant difference between the ACWC TOR and the AICHR TOR is the specific reference to the CEDAW Convention and to the Convention on the Rights of the Child – the framework and procedures of these treaties are explicitly contemplated as informing the activities of the ACWC. In particular the functions of the ACWC include assisting ‘upon request by ASEAN Member States’ to prepare ‘for CEDAW and CRC Periodic Reports, the

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<sup>26</sup> Id at para 2.1.

<sup>27</sup> Id at para 5.1.

<sup>28</sup> Id at para 2.5.

Human Rights Council’s Universal Periodic Review (UPR) and reports for other Treaty Bodies, with specific reference to the rights of women and children in ASEAN<sup>29</sup> and assisting States upon request ‘in implementing the Concluding Observations of CEDAW and CRC and other Treaty Bodies related to the rights of women and children.’<sup>30</sup> There are no equivalent functions in the mandate of the AICHR – the existence of the two external frameworks contained in the CEDAW Convention and the CRC Convention were of particular importance in making such a function feasible; the final version reflects extensive advocacy by civil society organisations (Forum-Asia, 2020).

## **F. THE HUMAN RIGHTS OF OLDER PERSONS IN THE WORK OF THE AICHR AND THE ACWC: TRACK RECORD AND FUTURE POSSIBILITIES**

I now turn to examine the extent to which the AICHR and ACWC have incorporated older persons in their work and the possibilities for expanding their work on this topic.

### **The AICHR’s inclusion of the human rights of older persons in its work**

The AICHR has had a full agenda and undertaken many activities since its establishment: these have ‘included standard setting and institution building, capacity building, public awareness, engagements with various actors, human rights mainstreaming as well as alignment with relevant ASEAN Sectoral Bodies’ (Forum-Asia, 2019). However, the rights of older persons have not attracted any substantial attention from the AICHR in its work.

The AICHR has addressed issues relating to other marginalised groups referred to in Article 4 of the AHRD. For example, as noted by Forum-Asia in its review of the work of the AICHR in its first ten years, the AICHR has attempted ‘to supplement the work of relevant ASEAN Sectoral Bodies, such as ACWC, ACW and Senior Officials Meeting on Social Welfare and Development (SOMSWD) in the areas of commonly ratified instruments, namely CEDAW, CRC and CRPD’(Cali, 2017; Kittichaisaree, 2021; Moeckli et al., 2014). In relation to women’s rights, the AICHR explored the possibility of producing a regional mechanism for

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<sup>29</sup> Id at para 5.6.

<sup>30</sup> Id at para 5.7.

the protection of women and girls (despite the existence of the ACWC which, one might have thought, would be the body best positioned to take the lead on such a mechanism).<sup>31</sup>

In relation to disability issues, from 2015 the AICHR established a taskforce on mainstreaming the rights of persons with disabilities in ASEAN, and this prepared the *ASEAN Enabling Masterplan 2025; Mainstreaming the Rights of Persons with Disabilities*, adopted by the ASEAN Summit in 2018. This document ‘outlines key action points for the three ASEAN community pillars to ensure the alignment of protection and promotions of the rights of persons with disabilities within ASEAN with the CRPD and with regional instruments’ (Cali, 2017; Kittichaisaree, 2021; Moeckli et al., 2014). The existence of an established international framework in the form of the Convention on the Rights of Persons with Disabilities -- and presumably also the fact that all ASEAN member States are parties to that treaty – appears to have helped to frame and stimulate such action, both by AICHR and ASEAN leaders.

Similar attention has not been devoted to ‘the elderly’ or the human rights of older persons. Neither the first nor the second work plan of the AICHR contained any specific reference to ‘the elderly’ or to older persons.<sup>32</sup> The AICHR’s work plan for 2021-2025<sup>33</sup> does contain a few brief references to older persons’ rights, but these are not a particular focus of its work and are included as part of standard references to other socially vulnerable groups.

For example, one reference appears under Priority Area 2.1, which encompasses the pursuit of ‘the mainstreaming of human rights with a focus on vulnerable groups such as women, children, people with disabilities and older persons’. One Indicative Activity under this area is ‘Consultation addressing changing demography, i.e. human rights of the elderly/older persons, right to food, right to health’. The only other explicit reference appears under Priority Area 3.2, to ‘promote favourable conditions based on human rights principles and existing domestic laws of the countries for the rights of women, children, the elderly, persons with disabilities, migrant workers, vulnerable and marginalised groups’. One relevant Indicative Activity is ‘Consultations on favourable conditions for advancing the rights of’ those named groups, with an Expected Output being ‘recommendations for the implementation of Article 4 of the AHRD’.

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<sup>31</sup> Id at 36.

<sup>32</sup> AICHR, *Five-year work plan of the ASEAN Intergovernmental Commission on Human Rights 2010-15*, Microsoft Word - AICHR Five-Year Work Plan 2012-2015; AICHR, *Five-year work plan of the ASEAN Intergovernmental Commission on Human Rights 2016-2020*, [https://aichr.org/wp-content/uploads/2018/10/AICHR\\_Five-Year\\_Work\\_Plan\\_2016-2020.pdf](https://aichr.org/wp-content/uploads/2018/10/AICHR_Five-Year_Work_Plan_2016-2020.pdf).

<sup>33</sup> AICHR, *Five-year work plan of the AICHR 2021-2025*, [https://aichr.org/wp-content/uploads/2020/10/AICHR-FYWP-2021-2025-approved-at-53rd-AMM\\_for-web.pdf](https://aichr.org/wp-content/uploads/2020/10/AICHR-FYWP-2021-2025-approved-at-53rd-AMM_for-web.pdf).

It is clear that the human rights of older persons are not yet a priority issue for the AICHR. However, there are possibilities within the general priorities and planned activities under the AICHR's 2021-2025 work plan. For example, under Priority Area 1.1, 'Facilitat[ing] the formulation of frameworks for human rights cooperation based on the AHRD', a number of Indicative Activities might include consideration of the human rights of older persons. The envisaged Activities include consultation and dialogue, or related activities, to provide recommendations for the implementation of the AHRD at national level and among ASEAN sectoral bodies across the three Pillars, and on legal instruments on human rights. The expected outputs from these activities include: 'AICHR recommendations for the implementation of the AHRD', 'identification of thematic areas for cooperation in promoting the full implementation of the . . . AHRD', and 'identification of possible themes for the development of legal instrument[s] on human rights in ASEAN'.<sup>34</sup>

Other possibilities for including a focus on the human rights of older persons might be available under Priority Area 2.3, 'Support[ing] thematic studies on human rights, in consultation with relevant ASEAN bodies', which envisages the preparation of a thematic study,<sup>35</sup> which could be on the human right of older persons in ASEAN. There would be other opportunities in the context of many other general activities – what is needed is a willingness to give this area some focus.

### **ACWC's Inclusion of the Human Rights of Older Women in Its Work**

As is the case with the AICHR, the ACWC has undertaken a wide range of activities since its establishment (Forum-Asia, 2020). However, it does not appear to have placed any particular emphasis on the human rights of older women in its work. In its 2012-2016 work plan, the ACWC included active ageing among women as Thematic Area 21 (ASEAN ACWC, 2012), and this was to have resulted in the publication of a compilation of best practices on encouraging active ageing, but it is not clear whether any follow-up action was planned or has taken place. The subsequent ACWC work plan for 2016-2020 makes no specific mention of active ageing as a Thematic area, or of older women (ASEAN ACWC, 2016).<sup>36</sup> While the ACWC work plan for 2021-2025 contains a number of references to 'the elderly/older persons',

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<sup>34</sup> Id at 3.

<sup>35</sup> Id at 8.

<sup>36</sup> *The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Work Plan 2016-2020*, <https://asean.org/wp-content/uploads/2021/01/ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2016-2020.pdf>.

these are embedded in the standard list of socially vulnerable or marginalised groups, and there is no particular focus on older women in the planned activities (ASEAN, ACWC, 2020).<sup>37</sup>

Similarly, even though violence against women and children has been an important component of the ACWC's work (including standard-setting and implementation), there is relatively little explicit attention devoted to elder abuse or violence against older women. For example, neither the ASEAN Declaration on the Elimination of Violence against Women<sup>38</sup> nor the ASEAN Regional Plan of Action<sup>39</sup> on the subject reflects any emphasis on violence against older women as a particular problem, though older women are referred to as one of a multitude of groups who experience 'multiple and intersecting forms of discrimination and inequalities, making them especially vulnerable to violence'.<sup>40</sup> In a report supported by the ACWC on good practices in the elimination of violence, there is just one mention of 'elder abuse' but no detailed discussion of any of the examples offered (ASEAN ACWC, 2016).<sup>41</sup>

The ACWC has drawn attention to the impact of demographic ageing in ASEAN member States on the rights of women to social protection and social justice.<sup>42</sup> However, it is not clear that this has led to inclusion of this issue in its work plan in any substantial way. While thus far the ACWC has done little focused work on older women, the subject plainly falls within its mandate, and there are opportunities to do further work in this area.

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<sup>37</sup> ACWC, *ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Work Plan 2021-2025*, <https://asean.org/wp-content/uploads/2022/10/09-2.-ASEAN-Commission-for-the-Protection-and-Promotion-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2021-2025.pdf>.

<sup>38</sup> See the *Declaration on the Elimination of Violence against Women and Children in ASEAN 2013*, <https://asean.org/declaration-on-the-elimination-of-violence-against-women-in-the-asean-region/>.

<sup>39</sup> *ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW)*, <https://asean.org/wp-content/uploads/2021/01/ASEAN-Regional-Plan-of-Action-on-Elimination-of-Violence-Against-WomenAdopted.pdf>.

<sup>40</sup> *ASEAN Regional Plan of Action* (n 39), 7.

<sup>41</sup> Ministry of Women, Family and Community Development Malaysia, *Good Practices: Eliminating Violence Against Women and Children (EVAWC): Documentation of Good Practices in ASEAN Member States on the Elimination of Violence against Women and Children*, <https://103.233.109.66/wp-content/uploads/images/Community/ASCC/ACWC/Good%20Practices%20-EVAWC%20Publication.pdf>

<sup>42</sup> ACWC, *Progress Report on Women's Rights and Gender Equality* (2016), <https://asean.org/asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-acwc/#:~:text=Progress%20Report%20on%20Women%E2%80%99s%20Rights%20and%20Gender%20Equality>.

## **The Upshot**

It is clear that the human rights of older persons, while formally within the mandate of both the AICHR and the ACWC, have thus far received little attention from either body. This may be the result of too many other pressing issues, a lack of interest or expertise on the part of AICHR and ACWC members in this area, or lack of advocacy by civil society organisations and National Human Rights Institutions (NHRIs) on the theme. The absence of a comprehensive international or regional framework on the human rights of older persons also appears to have played a significant part, when one considers the steps taken in relation to the CRD, the CEDAW Convention and the CRC by the AICHR and ACWC.

At the same time the discussion above has shown that the human rights of older persons fall within the formal mandates of both the AICHR and the ACWC, and that there are possibilities within their general work plans to give this issue greater attention

## **G. CONCLUSIONS AND RECOMMENDATIONS**

### *Conclusions*

1. ASEAN has not yet developed a normative or policy framework for affirming the human rights of older persons in a manner which is comprehensive, specifically tailored to the diverse circumstances of older persons, and coherent in its approach.
2. ASEAN's approach to ageing and the situation of older persons, as reflected in the *Kuala Lumpur Declaration on Ageing* and the *Regional Plan of Action to implement the Kuala Lumpur Declaration on Ageing* and other related documents, is predominantly a social development and welfare approach, with general and largely formulaic or tangential references to human rights standards in its policy documents, which are not translated into specific rights-focused approaches or actions.
3. The orientation of ASEAN on these matters aligns with the Madrid International Plan of Action on Ageing (MIPAA), and the ASEAN Secretariat has worked closely with the ESCAP Secretariat in developing policy and operation plans in relation to ageing. Neither of these bodies has given any significant emphasis to the human rights dimensions of the Political Declaration adopting the MIPAA or sought to consistently formulate a human rights-based approach to the specific policy recommendations of the MIPAA.

4. ASEAN's human rights institutional framework has emerged from the underlying principles and approaches of 'the ASEAN way', in which cooperation and collaboration and non-interference in the affairs of other member States are prioritised over criticism or efforts to directly influence or sanction those State which are alleged to have engaged in violations of human rights.
5. Many early assessments of the ASEAN human rights norms and institutions were highly critical of the soft law status of their norms and their potential to undermine universal standards and the limited mandate and functions conferred on the ASEAN human rights bodies. Notwithstanding these early assessments, the ASEAN human rights institutions have evolved to demonstrate that they may have the potential to have more of a positive impact than many critics initially foresaw.
6. The human rights of older persons and older women clearly fall within the respective mandates of the AICHR and ACWC. However, thus far, the theme of the human rights of older persons has not found any prominent place on the agenda or in the work plans of the AICHR or the ACWC. There is no formal linkage between the *Kuala Lumpur Declaration* and the work of the human rights bodies, and neither has taken up the *Kuala Lumpur Declaration* or the issue of older persons' rights included in the ASEAN Human Rights Declaration in a systematic and sustained way. Nor have they taken up the issue by reference to the Universal Declaration of Human Rights or the individual treaties to which ASEAN member States are parties.
7. The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, to which all ASEAN member States are parties (albeit some with reservations), have provided both a substantive normative framework and procedural impetus to the work of the ACWC. The Convention on the Rights of Persons with Disabilities, to which all ASEAN member States are also party, has offered similar opportunities for the AICHR in its work in relation to the rights of persons with disabilities. Such a framework is lacking in relation to the human rights of older persons.

#### *Recommendations*

8. The AICHR and ACWC should make the human rights of older persons a substantive part of their work and incorporate research and capacity-building on these issues into their work

plan; they should also refer explicitly to the *Kuala Lumpur Declaration on Ageing* and endeavour to give effect to its human rights dimensions.

9. ASEAN bodies working on ageing issues should incorporate a more explicit human rights-based framework into their work, in order to better reflect the general and specific human rights standards which ASEAN States have embraced and the treaties to which they are party, the ASEAN Human Rights Declaration, the human rights dimensions of the MIPAA, and the *Kuala Lumpur Declaration*.
10. ASEAN member States and other States should support the elaboration of a new international convention on the human rights of older persons which would provide a comprehensive, coherent and focused framework for the protection of the human rights of older persons that could guide law and practice in ASEAN member States and ASEAN's own institutions working on ageing issues and human rights.

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# **THE ADOPTION OF A HUMAN RIGHTS-BASED FRAMEWORK FOR OLDER PERSONS IN MALAYSIA'S LEGAL SYSTEM**

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## **INTRODUCTION**

People in all corners of the globe, regardless of national status, face unpredictable risks and difficulties in today's society. The pandemic COVID-19 taught us many lessons, prompting all nations to prepare for unknown situations and circumstances. Vulnerable groups, notably older persons, were among those impacted by this catastrophe. Many people were reported to have died as a result of the virus, particularly those with poor health and chronic disorders. Despite this, older persons have previously faced a variety of rights-based challenges in their daily lives (health, protection, and security) as well as in their interactions with other people and parties (abuse, maltreatment, discrimination). This has prompted all governments to pay close attention to the protection and rights of older persons.

Human rights are fundamental rights that belong to everyone regardless of age, gender, race and background. An older person has the right to be protected and respected by everyone, and all their rights need to be upheld. They have been living in the country for many decades, and have experienced history, life changes, shifts in norms, and many challenges. All of these valuable life lessons, moral values and knowledge will be transferred to younger generations by older persons. Their contributions to cultural, social, economic and religious life are priceless, and irreplaceable. Sadly, the stigma created by ageism – which labels older persons as weak, and a burden – has diminished their pride and independence and the respect due to them. This needs to be stopped.

Additionally, compulsory retirement in Malaysia by the age of 60 years old has led to a huge loss of human capital assets, in organisations and the country as a whole. This harsh cut-off

causes older persons to lose their jobs, their social networks, and economic opportunities. Pressure is doubled on nations and the working population to support the growing ageing population because healthcare and social care costs are most likely to be incurred by older persons. In these circumstances, all parties are required to accept responsibility for the needs of older persons, including the government, family and society.

Adult children in Asian countries, including Malaysia, are urged to exercise filial piety to look after their old parents. This somehow causes a role loss for older persons, who were child-bearers or the main supporters of their families, but who now see their caring roles switched to their adult children, who are expected to look after their parents. Heavy reliance on their children may cause anxious or unsettled feelings to accumulate in older persons. Older persons tend to feel they are a burden to the family, which later becomes a source of regret on all sides. Thus, it is crucial to strengthen the right of older persons to access support and protection.

Malaysia is now attained status as an ageing nation, along with several other nations. The most pressing issue is supporting older persons in remaining independent, healthy, and active because doing so can ease demand on governments. The country needs to have a comprehensive policy on health provision and social security systems, and develop laws to focus specifically on the rights of older persons. The right to access quality healthcare, better social security, and a participative and inclusive environment, are among the rights of older persons. This paper intends to explore to what extent Malaysia has developed and implemented a human rights framework to be enjoyed by older persons since the proportion of people aged 65+ in the population has already reached 7.3 percent. Such a framework is crucial to ensure the preparedness and readiness of the country to support the ageing population.

### ***Demographic Profile of Older Persons in Malaysia***

Malaysia is formally recognised as an ageing nation since this year 2022, the proportion of those 65 and older is predicted to exceed 7.3% of the total population. The United Nations (UN) defines an ageing nation as one where 7% or more of the population is 65 years of age or older. By definition in Malaysia, older persons are those who are aged 60 years and above. Most developing nations define older persons as those who turn 60, compared to developed nations, where the figure is 65 years (Public Service Department, 2022). The difference in age definition is caused by a few factors, including developed nations' better advancement in healthcare, longer life expectancy, economic opportunities, and educational attainment. In 2020, the Malaysia government intends to raise the threshold for defining older person in Malaysia to 65 years old. However, the government has not yet finalised these amendments, and no announcement has been made. Another concept to define older persons, which can be classified into three categories: (i) the young-old (aged 65 to 74); (ii) the old-old (aged 75 to 84); and (iii) the very-old-old (aged 85 and above) (Public Service Department, 2022). These three categories are used to show the demographic profile of older persons in Malaysia. This separation into categories could assist the government in assessing which categories need further attention in terms of healthcare and other services. Notably, it is apparent that the definition used to describe older person is inconsistent. The definitions of older persons differ, with the first category's starting age being set at 65 or 60, respectively.

According to statistics, from 2018 to 2020 there was a rapid surge in the number of older persons. In 2020, there were 3,510,000 people over 60 in total. The important question is, how well is our country prepared to deal with an ageing population?

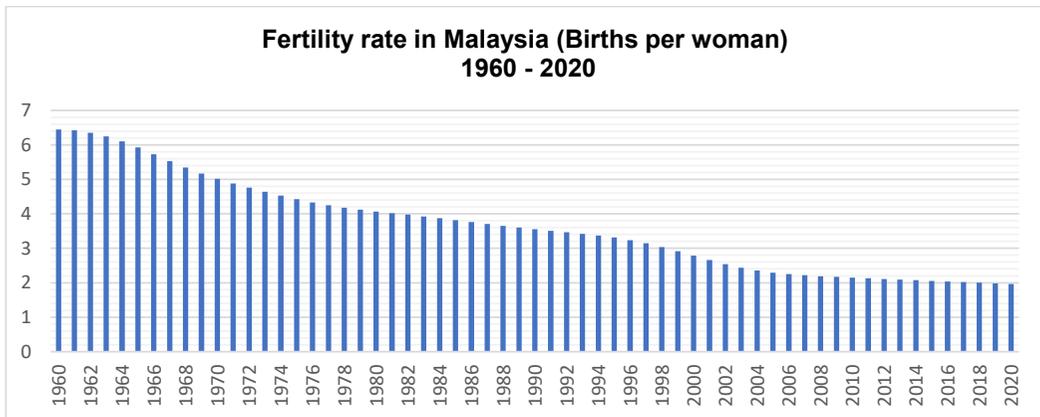
**Figure 1. Total population ageing, 2018-2020**

Age	2018 ('000)			2019 ('000)			2020 ('000)		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
60 - 64	566	565	1,131	585	586	1,171	604	605	1,208
65 - 69	416	427	843	429	442	870	442	459	901
70 - 74	276	296	572	295	318	613	310	336	647
75 - 79	159	179	338	163	184	347	171	195	366
80 - 84	91	105	196	97	113	210	101	119	221
85+	71	75	146	75	75	150	80	78	158
Total	1,579	1,647	3,225	1,643	1,718	3,362	1,709	1,792	3,501

Source: Department of Social Welfare, Malaysia (2021)

From four decades ago to 2020, there has been a decline in fertility that has lowered the number of infants born in Malaysia (The Star, 2021). Figure 2 shows that Malaysia's fertility rate fell dramatically between 1960 and 2017, before gradually settling down between 2016 and 2020 (The World Bank, 2022).

**Figure 2. Fertility rate in Malaysia (1960—2020) (Source: The World Bank, 2022)**

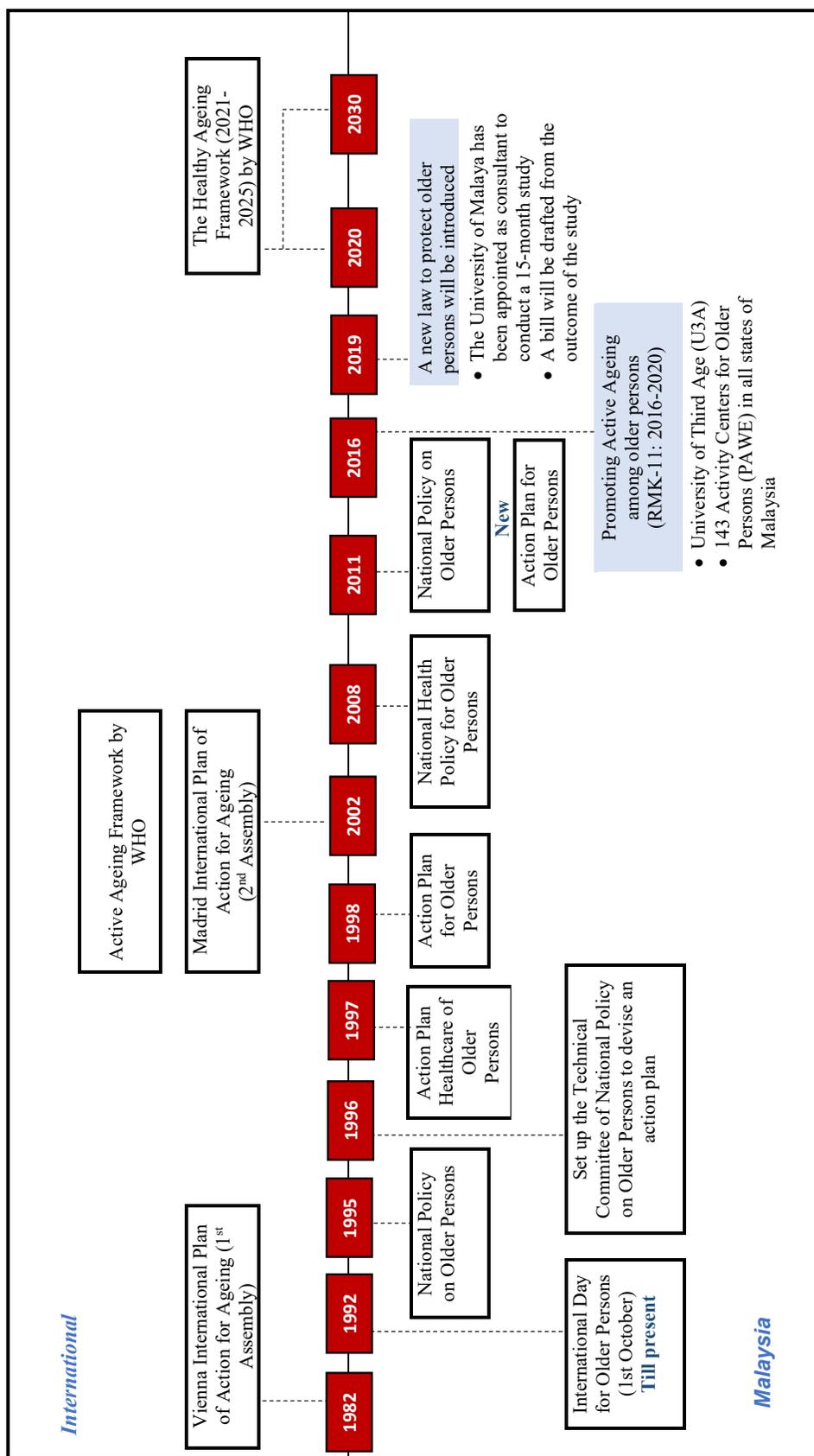


A few factors have led to this reduction in numbers. The development of the nuclear family is one of them, as in the modern era more families prefer to have fewer children. This is not happening only in Malaysia; nonetheless, the government has urged people to think ahead about sustaining human capital and producing more people in the future. The government can forecast the ageing of the population from the fertility rate.

### ***The Evolution of Regional Formulations of Policies and Concepts for Older Persons***

The upsurge in the ageing population worldwide was spotted in early 1980; as a result, the United Nations decided to call all nations to participate in the first international meeting of the Vienna International Plan for Ageing in 1982. The First World Assembly on Ageing in Vienna called the attention of all nations to addressing the rights and needs of older persons. Subsequently, the Assembly of the Madrid International Plan of Action on Ageing (MIPPA) took place in 2002 to aid nations in reforming and implementing their policies. In the same year, the World Health Organization (WHO) introduced the Active Ageing Framework, with the aim of achieving the ‘continuous participation of older persons in social, economic, cultural and civic affairs’. However, in 2020, the WHO unveiled a further Healthy Ageing Framework (2020–2030), the successor to the earlier Active Ageing framework (Abud et al., 2022). The pandemic, which has caused a sizable number of deaths, exponentially exposed the majority of vulnerable populations, notably older persons, to higher risks.

**Figure 3. The Evolution of Regional and National Steps in Formulating Policies and Programmes for Older Persons**



### ***Malaysia's Steps in Formulating Policies, Laws and Acts for Malaysian Older Persons***

After the First World Assembly in Vienna was put into effect, it took the Malaysian government thirteen years to recognize the importance of having a specific policy for older persons. In Malaysia, the first National Policy for Older People was developed in 1995, and in 1998, an Action Plan for Older People was created (Figure 3) by using documents from the Madrid International Plan for Ageing 2002 and the Vienna International Plan of Action for Ageing 1982. All older persons, regardless of their backgrounds, are recognized as having the right to a happy life, respect, and the capacity to contribute to the development of their nation. This demonstrates the government's commitment to helping older persons age successfully, joyfully and healthily while living a free and proud life.

The government then established the first Technical Committee of the National Policy for Older Persons in July 1996 to work on the Action Plan for Older Persons the following year. To ensure full participation by older persons in all areas of the country's development, six initiatives were created, including: (1) promotion and advocacy; (2) lifelong learning; (3) safety and protection; (4) governance and shared responsibility; (5) collaborative effort and engagement across agencies; and (6) research and development. The creation of an Older Person Action Plan and Older Person Health Action Plan during the execution of the National Policy for Older Persons has further shown how seriously the government considers the needs of the older person. However, from 1998 to 2008, no published reports provide any evidence of government action prior to the introduction of the National Health Policy of Older Persons. The government's focus during that time was diverted to other crucial issues, like accelerating the slow growth of revenues, as a result of the economic crisis.

On 5 January 2011, changes were made to the earlier National Policy for Older Persons by the Ministry of Development of Women, Families, and Community Development (MDWFS). This represented a turning point for the government as it pertained to future efforts to fully address the needs of Malaysian older persons. The Malaysian plan's implementation from 2016 to 2020 received accolades for placing a strong emphasis on programmes meant to improve older persons' living circumstances, establish a supportive environment, and support active ageing. The University of Malaya was then hired as a consultant group by the Ministry of Women, Family, and Community Development to carry out a 15-month study. The major goal is to support the government in creating a far-reaching law that upholds older persons' rights and

safeguards Malaysian older persons. A Senior Citizens bill to protect the rights of the older person has been drafted based on the findings of the study. Stakeholders have developed and reviewed the bill to protect the older person, according to Datuk Seri Rina Harun (News Straits Times, 2022).

## **THE CURRENT STATUS OF HUMAN RIGHTS MECHANISMS IN THE MALAYSIAN CONTEXT**

This section aims to explore how well mechanisms of human rights have been adapted and implemented in Malaysia to address the issues faced by older persons. From thorough investigation of existing literature, it appears there are currently no particular laws and rules governing the rights of older persons in Malaysia. Nonetheless, Malaysia should be acknowledged for the implementation of the National Policy on Older Persons in 2011. This policy has been used as a guide to improve the rights of older persons in Malaysia. Among initiatives that have been developed based on the policy are the University of the Third Age Malaysia (U3A), HomeHelp Services, Mobile Care Services, Financial Aid, and others. These initiatives promote older persons' participation and engagement, which is consistent with Malaysia's existing position as an ageing society by 2030. Three principles put forth by Lewis et al. (2020) are further described as a crucial component of this discussion in order to further understand the human rights that apply to older person.

This paper scrutinises significant documents from both the international and national contexts, including pertinent policies, laws, government reports, information from government websites, and other materials that are available online. Notably, the investigation led to the 8 gaps outlined by the United Nations High Commissioner for Human Rights (United Nations, 2021) that older persons faced in economic, cultural, civic, politic and social rights: (1) freedom from violations and abuse; (2) employment rights and opportunities; (3) health (long-term care and palliative care); (4) equality; (5) adequate standard of life; (6) social security and social protection; (7) legal capacity; and (8) participation in policy, political, and cultural aspects of life. In regard to these rights, Malaysia is still in the process of strengthening the state of well-being as well as welfare for older persons in the country, as reflected in its policy statement:

The National Policy on Older Persons is the Government's commitment to creating older persons who are independent, with dignity, high sense of self-worth and respected by optimizing their self-potential through a healthy, positive, active, productive and supportive ageing to lead a well-being life (National Older Persons Policy, 2011).

A detailed discussion of the **three principles** follows here.

**Principle 1: Core values**—As proposed by Lewis et al. (2020), the fundamental principles that should be emphasised in human rights, particularly for older persons, are dignity, autonomy, liberty, and equality. Older persons deserve to be respected and to have their needs and rights acknowledged. In regard to Malaysian older persons, Bhatt (2017) claimed that Part II of Malaysia's Federal Constitution reflects international human rights and encompasses fundamental liberty. The author also stated that Article 8(1) of the Federal Constitution provides that 'everyone is equal before the law and entitled to the equal protection of the law'. Article 8 emphasises both equality and equal protection of the law as everyone else. It is believed that older person deserves the same level of protection. Additionally, Bhatt (2017) stated that Article 5 emphasises the right to life, demonstrating that the older person has a full and equal right to a high standard of living. Ironically, the author argued that Malaysia's Constitution and human rights laws offer little protection for older persons. These rights may not always ensure that older persons have an equal opportunity for employment.

The issue of age discrimination in the workplace, which begins at the age of 54 (Bani et al., 2018), continues in many public and commercial organisations. There is no law in Malaysia that can shield older persons from age discrimination, especially at their places of employment. The pride and dignity of older persons who have given the organisation the majority of their years in tireless labour may be wounded by this. Their body and mind are still aware of the effort they put in to get to where they are now. Due to this gap, it is essential to create a special law to ensure that the older person's opinion is heard and safeguarded under Malaysian constitutional law. The government took a prior decision to extend the retirement age to 60 years old, as stipulated in the Minimum Retirement Age Act 2012. Undoubtedly, this decision has benefited the older person's ability to keep employment and safeguard their financial future. But to ensure rights in the workplace, the legislation must provide assistance and protection.

The absence of proper laws and regulations continues to discriminate against older persons after they retire. Older persons should be granted other rights, such as liberty and autonomy. Lack of empowerment in decision-making among older persons demotivates them and subsequently reduces their self-esteem, especially for older persons with disabilities. Heide (2020) states that having a disability does not prevent older person from making their own decisions about how to organise their days. Their physical limitations simply restrict their ability to move around; they have no impact on people's ability to speak up and have their choices respected by others.

Involvement and engagement in social activities are crucial for older persons to recover meaningful roles and find community support, happiness, and contentment. This raises a significant point: will Malaysia be able to address older persons' difficulties in less than eight years? Considering all the initiatives undertaken by the Malaysian government, this paper argues that there is still a significant amount of work to be done if Malaysia is to deal with a substantial ageing society by 2030.

**Principle 2: Particular Human Rights and Duties**—This principle emphasises the rights of the older person, which include that they have the right to be protected and respected, and enjoy the same benefits as everyone. These fundamental human rights include the right to be free from inhuman treatment, and the rights to access healthcare, social security, and housing

### ***Freedom from inhuman treatment***

As reported in United Nations (2021), being free from violations and abuse is among the fundamental human rights of older persons. Abuse cases involving Malaysian older persons have occurred in institutional settings in close to 80 percent of cases since the outbreak of COVID-19 (The Star, 2022). Yunus (2021) in his study asserts that there is a high need to have more investigations of abuse cases involving older persons in institutional settings. The author also expresses his concern over the scarcity of publications that examine the scale and extent of this issue (Yunus, 2021). Currently, there are no specific laws protecting older person from being abused and neglected. This is concerning, as it endangers their safety. According to Bidin and Yusoff (2015), older person abuse is covered by the Domestic Violence (Amendment) 2012 (Act 1414) and the Penal Code of Malaysia (Act 574) relating to incompetent adult law. Their investigation revealed that the domestic abuse legislation did not sufficiently address

violence against the older person because it was specifically designed to combat the abuse of women and children (Bidin & Yusoff, 2015). A report by the Malaysian Society of Geriatric Medicine (2014) suggests many cases of abuse and neglect allegedly have gone undisclosed, since the symptoms of abuse are difficult for medical professionals to identify. Due to uncertainty regarding the reporting process, some cases have gone unreported. If this situation persists, it will undermine the older person's independence and their ability to live the life they desire.

There is no specific law protecting older persons in Malaysia from abuse, abandonment, or neglect. Even if they are accompanied by their family or nearest relatives, this does not guarantee the security of older person. According to the most recent figures, in the five years from 2018 to 2022 inclusive, more than 2,000 older persons who had been mistreated by their family members were left in public hospitals. Older persons who have been neglected will be admitted to welfare homes for additional care if there is no sign of family records. A total of 1,230 neglected older persons have been sent to welfare institutions after no family came for them (New Straits Time, 2022). The absence of regulations and laws once again increases the government's difficulties in expressly challenging older persons' domestic abuse.

### ***Right to Health***

A common subject that is always related to older persons is health. Modern healthcare has contributed to extending life expectancy, resulting in an increase in the number of people living beyond the age of 60. Healthcare utilisation varies according to individuals and gender (Noor'ain et al., 2017). Although older persons' health needs are often complex, they still have the right to enjoy better healthcare provision. Everyone is entitled to proper, equitable, and inexpensive healthcare. The government must make sure that all citizens have access to the best healthcare services, without prejudice.

In Malaysia, the Care Centre Act of 1993 has prompted the government and other relevant parties to construct more nursing homes, daycare centres, and older persons' living facilities. This act regulates aged care centres in Malaysia. The need for institutionalised care settings among older Malaysians is growing, yet the quality and adequacy of healthcare are an increasing concern. Given that the current facilities can't keep up with expanding needs, more facilities for older persons are required. In order to provide older persons with high-quality care at centres, more trained caregivers and enough facilities are required. The government needs

to address a number of issues, including the shortage of qualified geriatric healthcare professionals. The government has also urged children to exercise filial piety towards their older parents in order to maintain shared responsibilities. According to Ali et al. (2021), family members have a variety of challenges when providing long-term informal care, including financial constraints, a rotating schedule with other family members, a lack of experience in caregiving, and health-related issues.

Malaysia has a dual healthcare system, which means that both the public and private sectors are involved in the delivery of healthcare services. The majority of older persons with lower incomes use public healthcare, which tries to give equal access to healthcare at the lowest cost. Older persons are entitled to several perks, such as waived specialist and outpatient consultation costs (1.08 USD) at all government clinics and hospitals. Older patients are entitled to a 50 percent discount on third-class ward admissions at all government hospitals, up to a maximum of \$53.91 (Ministry of Health, 2012). Malaysia's healthcare system needs to be improved, nevertheless. When older persons need medical attention, they continue to receive subpar care, including subpar medicines, a lack of supplies, and delays in treatment, especially in government hospitals. Regarding private healthcare, the government passed the Private Aged Healthcare Facilities and Service Act 2018 (Act 802) with the goal of ensuring that older persons receive care that meets a minimal standard. This is to guarantee that frequent follow-up inspections are conducted for older patients' and employees' safety. However, the regulations for the Private Aged Healthcare Facilities and Services Act 2018 have not yet been put into effect.

### ***Social security***

The Employees Provident Fund Act of 1991 and the Pensions Adjustment Act of 1980 are two pertinent laws that control the social security programme that is related to retirement plans. There are four primary statutory social security programmes: (1) the Public Service Pension Scheme (only for the public sector); (2) the Employees Provident Fund (EPF) (only for private sectors and self-employed); and (3) the Social Security Organization (SOCSO) (only for private sector employees if afflicted with any disability and injury, and only for enlisted armed forces personnel) (Lutfi et al., 2022), and lastly (4) self-employed options for retirement (i-Saraan and i-Suri).

Most older persons in Malaysia receive benefits from pension programmes, particularly the Employee Provident Fund (EPF) (Ubaidillah and Mohd Adib, 2020). The Employee Provident Fund Act of 1991 and the Pensions Adjustment Act of 1980, respectively, were established to ensure retirement savings for retired public and private employees. There are two accounts available under the EPF savings plan: Account 1, the primary account, which contains 70 percent of savings, and Account 2, which holds 30 percent of assets for pre-withdrawals at age 55 for housing, healthcare, attending the Hajj, and paying for children's education.

The issue of insufficient funds in older persons' retirement plans has become a popular topic, discussed and debated by many parties recently since Malaysia experienced the catastrophe of the COVID-19 pandemic. The Employees Provident Fund (EPF) has expressed concern that the majority of its members are now at risk of falling into old age poverty as COVID-19-related withdrawals have caused insufficient savings to enable people to live a dignified retirement life (The Sun Daily, 2021; Harakah Daily, 2021; Parkaran, 2022). Many contributors withdrew their investments without much thought, arguing that they were entitled to the money. Worryingly, their entire savings will be diminished because such withdrawals would have long-lasting effects (Aziz et al., 2021). Due to this situation, the country will need far-reaching solutions covering an effective safety net programme, comprehensive life-cycle social protection systems, a robust labour market and wage policies, sustainable economic growth, reskilling and upskilling of the labour force, as well as policies to encourage automation and digitalisation, in order to increase productivity and emerge from the problem (The Sun Daily, 2021). Malaysia's ageing population necessitates the development of an innovative and viable pension scheme. It is crucial to safeguard social security from significant shocks and maintain its long-term fiscal and social viability.

The study by Ali et al. (2020) discovered that 50 percent of participants were dissatisfied with the pension system's benefits. Low-paying jobs resulting in lower benefits (Ali et al., 2020), early retirement and EPF withdrawal before age 60 (Sallahuddin et al., 2018), and flexibility in pre-withdrawal, are some of the contributing causes of low benefits (Sallahuddin et al., 2018). Due to the reduced pension payouts to EPF contributors, they did not have enough savings after five years of retirement (Mohd Jaafar et al., 2021). The ability to pre-withdraw savings funds is being addressed by academics. Because it leads to diminished savings, pre-withdrawal seems to defeat the goal of securing funds for retirement.

In Malaysia, older persons typically reside with their adult children and grandchildren under one roof. Some older persons even give their children a portion of their savings as thanks for taking care of them. Some retirees withdraw their EPF funds solely for their children's needs, such as purchasing a new car, home renovations, and student loan debt. Unfortunately, their residual savings are then insufficient to support their lifestyle after retirement due to offspring who appear to be exploiting their parents' wealth. Many children, who are supposed to care for their parents, rely exclusively on their old parents to sustain them. The absence of law and rights has caused the nation to reconsider these issues seriously, because they blatantly violate older persons' rights.

### ***Housing***

According to Sulaiman et al. (2006), the Malaysian government has been carrying out the housing plan from its five-year Development Plan (from 1950), which is intended to give the population access to adequate, cheap homes (2006). Most housing complexes provide inexpensive housing to aid low-income households. However, neither governmental nor private housing efforts are specifically designed for people with special needs, including older persons. Housing is not regarded as a key priority for older person. There is no specific law that addresses the housing issues of older persons. A quality home is typically created to the highest standards; it's in substandard dwellings that housing problems frequently occur.

As stated in Sustainable Development Goal 11, it is essential to provide equal, safe, and affordable housing. According to Aziz et al. (2020), it is crucial to consider older person's preferences and age-friendly features while developing homes. This is necessary for the freedom, support, and safety of older person, who have a right to lead fulfilling lives on their own.

The Ministry of Women, Family, and Community Development is in charge of ensuring that older persons and other vulnerable groups receive welfare and other benefits (KPWKM). For instance, volunteers who participate in HomeHelp programmes assist lonely older persons by accompanying them on grocery runs, helping with housework and other daily chores, and engaging in other activities as well as mentoring the caregivers in the family. As alternative savings schemes, the government has established the Private Retirement Scheme and 1 Malaysia Retirement (for which housewives, farmers, and irregular workers are eligible) (Ministry of Women, Family and Community Development, 2015).

**Principle 3: Framework Principles**—Principle 3 places an emphasis on older person's engagement, non-discrimination, respect for their preferences and will, and access to justice. According to Article 8(1) of the Federal Constitution, everyone has a right to receive equal protection under the law. Even though there are no laws that address discrimination, respect for preferences, or access to justice specifically, relevant legislation like the Employees' Social Security Act of 1969 does at least safeguard human rights for the older person. Older person can make a complaint with Kasih Help, the Public Complaints Bureau, or the Social Welfare Department. This is one of the ways older person can access the legal system. The critical challenge, however, is that there is still no specific law governing the pursuit of justice that would be capable of securing some privileges for older person in terms of access to legal assistance.

In addition, Principle 3 emphasises non-discrimination, anti-stigmatization and anti-ageism, such as being labelled weak, old, or incapable (Aziz et al., 2022), which leads to loss of respect and diminishes older person's desire to live. As promoted in the Sustainable Development Goal promise 'leave no one behind', every older person has the right to participate and engage actively in the community, economy, environment, and elsewhere. Regardless of their background, economic situation, or other factors, the question to consider is whether all people have equal opportunities. Once a person reaches the age of 60, they lose their employment owing to obligatory retirement, suggesting they can no longer actively contribute to the growth of the economy and society as a whole.

Some older persons, particularly those with professional and specialised expertise like doctors, academics, and others, still want to participate and contribute, not because of a drive for monetary gain but because they want to be healthy and active, and continue to use their skills. Those who are from middle and lower-income groups, who need to secure their income due to family commitments and as a question of survival, often generate income by working in 3D (Dangerous, Dirty, and Difficult) industries such as cleaning services, the wholesale and retail trade, manufacturing, construction, transport, storage, and communication, as well as in security or defense. The participation of older persons in economic and social activities is highly encouraged for their own survival.

## **THE COMPLIANCE OF THE MALAYSIAN LEGAL SYSTEM WITH INTERNATIONAL HUMAN RIGHTS MECHANISMS**

This section discusses whether the nation's legal system and laws adhere to, outperform, or lag behind the international human rights framework. Older Malaysians' human rights are considered to fall behind international human rights standards; however, Malaysia is moving in the right direction. The Senior Citizens Bill, which was drafted to protect the rights of older person is currently being reviewed by stakeholders. The establishment of programmes and policies that are pertinent to the requirements of Malaysian older persons reflects the government's purposeful commitment to support them. According to Madu et al. (2017), the Malaysian government has a lot to be commended for in its ongoing efforts to provide comprehensive policy and a variety of programmes to serve older person: financial support, activity centres, welfare homes, HomeHelp Services, Unit Penyayang (We Care Services), employment opportunities, as well as health and transportation benefits. Although there is no specific law for Malaysian older persons, there are specific policies and frameworks that address their needs, including the National Health Policy for Older Persons 2008, the National Policy for Older Persons 2011 and the Action Plan for Older Persons (2010-2020). Other relevant laws that may apply in respect of the older person are as follows;

- (1) Employment Act 1955: Employment (part-time employees) Regulations 2010
- (2) Employees Provident Fund Act 1991
- (3) Pensions Adjustment Act 1980
- (4) Care Centre Act 1993
- (5) Minimum Retirement Age Act 2012
- (6) Domestic violence (Amendment) 2012 (Act 1414)
- (7) A new Private Aged Healthcare Facilities and Service Act 2018 (Act 802) (Replacement)

However, because these laws do not particularly address the requirements of older person, they do not guarantee that their rights are protected. Major modifications are required in the laws governing older person.

## **CONCLUSION AND RECOMMENDATIONS**

The right-based framework for older persons provided by Lewis et al. (2020) is an ideal mechanism for measuring the extent to which human rights considerations are used in the country's legal system. In theory, the rights of older persons are a fundamental issue that should be understood by all parties, beginning with family institutions, then all relevant parties, and finally the state. However, many families and government institutions have failed to offer enough protection and rights for the older person. The burden has passed indirectly to international organisations to promote an older persons' rights agenda to assure protection and security for older person worldwide. Ironically, ensuring that this principle is accepted by all nations is a significant challenge; progress is determined by a country's leadership and governing agenda, as well as its economic, social, and political stability.

The older persons' agenda is regarded as an essential feature in Malaysia; yet certain aspects, notably the legal system for older persons, might be claimed to lag behind the agenda worldwide. At present, there is no formal statute that regulates older persons' rights—this is considered the key gap that prevents Malaysia from providing comprehensive protection and security for older persons. Senior Citizens Bill has been under examination by the stakeholders since an endeavour to develop new legislation to safeguard older person was launched in Malaysia in 2019. It took over four years, and any further delays would put the rights and protections of older persons in jeopardy. Considering a Senior Citizens Bill has really been on the table for close to ten years; it has to be revived to safeguard Malaysian older persons (New Straits Times, 2022). Malaysia must begin preparing for the law's implementation and enforcement, because various challenges occur during the implementation and enforcement of policies and laws—and legislation for older persons in Malaysia is likely to be no exception.

Based on prior experience, Malaysia should take drastic action to promote the agenda of rights and safety for older persons. Following the First Vienna International Plan of Action on Ageing in 1982, Malaysia only began after thirteen years to acknowledge the older persons' agenda, culminating in the development of the National Policy for Older Persons in 1995. While the concept of the older persons' agenda grew from the 1990s until 2011, it went into decline again until 2019. The government continues to support older person in Malaysia by promoting ongoing employment through two initiatives, including tax benefits for employers who hire them (salary cap at RM4,000) and a reduction in EPF contributions from 6% to 4%. However, the COVID-19 epidemic, which has a significant impact on most government planning and

operations, has rendered the government's programmes. Given that the government's objective of being a developed country by 2020 has not been realised, Malaysia should adopt a strategic plan to become an older person nation by 2030 (within 8 years from now). This may be accomplished by strategic collaboration with international organisations such as AGAC, and other nations such as Korea, Sweden, and other ASEAN countries, in order to benefit from their experiences and successes. This is the most practical way to advance the older persons' rights agenda and prepare for becoming an older person country by 2030. Meanwhile, Malaysia must perform a capacity development requirements analysis to determine existing capabilities, and those required in future, to achieve this aim. Finally, all parties must work together and commit to making this noble goal for older persons a reality in order to ensure their dignity, autonomy, liberty, and equality.

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# **ASEM PARTNERS' CASES OF ADOPTING HUMAN RIGHTS-BASED ELEMENTS IN ELDER LAW: THE CASE OF SOUTH KOREA**

NAMHEE KIM

## **THE HUMAN RIGHTS OF OLDER PERSONS IN SOUTH KOREA**

“The situation of older persons presents a number of particular and urgent human rights challenges.”<sup>1</sup>

South Korea is one of the fastest ageing countries in the world, driven by the declining birth rate and rising life expectancy. The population ratio of persons older than 65 was only 2.9% in 1960, but it exceeded 7% in 2000 (ageing society), 14% in 2017 (aged society), and now 17.5% (Statistics Korea, 2021). However, South Korea is not the best place for older persons to live. Large numbers of older persons are financially vulnerable and face increasing medical expenses and unfulfilled care needs. Older persons tend to lose a job against their will and find it hard to be re-employed. In addition, older persons are exposed to various human rights violations, including prejudice, discrimination, and abuse (Won et al, 2006). Therefore, the human rights of older persons in South Korea face many challenges, and systems and laws are needed to solve these problems.

In this article, I will give an overview of elder laws in South Korea, and analyze whether these laws sufficiently guarantee the human rights of older persons. I will conclude by proposing an overall improvement of elder laws based on human rights.

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<sup>1</sup> Report of the United Nations High Commissioner for Human Rights, E/2012/51, para 64

## **THE CURRENT STATUS OF ELDER LAWS IN SOUTH KOREA**

### **1. OVERVIEW OF ELDER LAWS IN SOUTH KOREA**

In Korea, the Constitution of South Korea is the supreme law of the country, which means it is superior to any other laws. As a basic law in the field of welfare for older persons, the Senior Citizen Welfare Act was implemented in 1981. Later, to respond to the ageing of the population and establish and implement relevant policies, the Framework Act on an Ageing Society with a Low Birth Rate was enacted in 2005. These two laws serve as the basic law regarding policies for older persons. South Korea is a country with a statutory law system, and written laws stipulate the main contents of its policies. The basic policies related to the human rights of older persons are thus written in various elder laws.

<Table1. Overview of Laws Related to the Rights of Older Persons in South Korea>

The Constitution (The supreme law of the country)							
Welfare of Senior Citizens Act							
Framework Act on an Ageing Society with a Low Birth Rate							
Supreme Law	Income Security (Poverty)	Health & Care	Housing	Work, Self-fulfillment	Legal Capacity, Non-Discrimination	Participation, Access	Freedom from Abuse
<b>Basic Laws</b>							
<b>Areas of Human Rights</b>							
<b>Related National Laws</b>	- National Pension Act - Basic Pension Act - National Basic Livelihood Security Act	-National Health Insurance Act -Long-term Care Insurance Act -Medical Care Assistance Act -Act on Hospice, and Palliative Care and Decisions on Life-sustaining Treatment at the End of Life	-Act on the Support for Housing Disadvantaged Persons	-Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion	-National Human Rights Commission Act	-Act on Convenience Promotion of Persons with Disabilities, Older Persons etc. - Act on Improvement of Transportation Mobility for the Disadvantaged Persons	- Welfare of Senior Citizens Act

## **2. BASIC LAWS RELATED TO THE RIGHTS OF OLDER PERSONS**

### **2.1 THE CONSTITUTION (IN KOREAN, “헌법”)**

The Constitution is the supreme law in South Korea, which sets forth basic values and defines principles to fully guarantee fundamental human rights in South Korea. Although the Constitution does not mention the human rights of older persons specifically, the fundamental rights clauses in the Constitution apply to all people or citizens, including older persons. These fundamental rights include the right to equality (Article 11(1)<sup>2</sup>), the right to lead a life worthy of human dignity (Article 34(1)<sup>3</sup>), the right to work (Article 32(1)<sup>4</sup>), and the right to education (Article 31(1)<sup>5</sup>). Additionally, the Constitution mentions comfortable housing (Article 35(3)<sup>6</sup>) and the health of citizens (Article 36(3)<sup>7</sup>).

The Constitution directly mentions older persons only in the following articles: according to Article 34(4) of the Constitution, the “State is obliged to implement policies to improve the welfare of older persons and youth.” And under Article 34(5), “persons who are incapable of living independently due to illness or old age shall be protected by the State.” Therefore, one can see that the Constitution views older persons as the beneficiaries of welfare policies and obliges the State to protect older persons in need.

### **2.2 WELFARE OF SENIOR CITIZENS ACT (IN KOREAN, “노인복지법”)**

The basic law to guarantee the rights of older persons in South Korea is the Welfare of Senior Citizens Act. The Welfare of Senior Citizens Act was enacted in 1981 to contribute to promoting the welfare of older persons by taking necessary measures to maintain their mental and physical health and stabilize their lives (Article 1).

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<sup>2</sup> All citizens shall be equal before the law, and there shall be no discrimination in political, economic, or cultural life on account of sex, religion or social status.

<sup>3</sup> All citizens shall be entitled to lead a life worthy of human dignity.

<sup>4</sup> All citizens shall have the right to work.

<sup>5</sup> All citizens shall have an equal right to receive an education corresponding to their abilities.

<sup>6</sup> The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

<sup>7</sup> The health of all citizens shall be protected by the State.

However, this Act does not function well as a basic law serving the welfare and rights of older persons, since it only lists several welfare services for older persons in vulnerable groups. The content of this Act should be amended so that it can establish itself as a basic law that guarantees the rights of older persons.

The main contents of the Welfare of Senior Citizens Act are as follows:

- health and welfare services for older persons (Articles 23 to 30): Elderly Employment Agency (Article 23-2), discounted admission (Article 26), designation of community service counselors (Article 24), medical examination (Article 27), support for older persons living alone (Article 27-2)
- Welfare facility for older persons (Articles 31 to 39): Establishment of welfare facilities for older persons, human rights education for facility workers and older persons (Article 6-3)
- Prevention of elder abuse (Article 39-5 to 39-20): Elder Protection Agency, etc.

(3) Framework Act on an Ageing Society with a Low Birth Rate (hereinafter, Framework Act on Ageing; in Korean, “저출산·고령사회 기본법”)

The Framework Act on Ageing sets out the key direction of central and local government policies in response to an ageing society. The main contents of this Act include (i) the basic direction of policies on an ageing society and (ii) a system for establishing a national basic plan to respond to an ageing society.

This Act lists several principles for policies in an ageing society, including employment and income security (Article 11), improving health and providing medical services (Article 12), living environment and security (Article 13), encouragement of leisure, cultural and social activities (Article 14), lifelong education and informatization (Article 15), preparation for old age (Article 15-2), and disadvantaged old persons (Article 16). However, the principles set out in this Act are at a level that urges the State’s efforts, and it is difficult to say that the State’s obligation to guarantee the human rights of older persons in these matters is well stated.

### 3. AREAS OF HUMAN RIGHTS OF OLDER PERSONS AND RELATED LAWS IN SOUTH KOREA

#### 3.1 LAWS FOR INCOME SECURITY OF OLDER PERSONS

Older persons should have access to adequate food, water, shelter and clothing through the provision of income.<sup>8</sup> Lack of sufficient income is very likely to lead to poverty. Older persons typically retire from their job, which may decrease or stop their income. It is necessary to secure a minimum income level for older persons to prevent them from falling into poverty. In general, the public pension system functions to ensure the income of older persons. The Committee on Economic, Social and Cultural Rights (hereinafter, CESCR) General Comment 19 states: that the right to social security (2008) provides comprehensive guidance on the elements of the right to social security.<sup>9</sup> It covers the right's core elements of: availability, including in old age; adequacy of benefits in amount and duration; accessibility, including coverage, eligibility, affordability, participation, information and physical access; and non-discrimination and equality, including gender equality. And the earlier CESCR General Comment No.6 concerning the economic, social and cultural rights of older persons (1996) says that providing non-contributory old-age benefits or other assistance for those without access to other pensions or resources is necessary to fulfill Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereinafter, ICESCR).<sup>10</sup> Also, according to Article 11(2) of the Framework Act on Ageing of South Korea, the State and local government are required to take necessary measures to ensure that citizens can lead an economically stable life in their old age, such as the establishment of pension systems and the creation of jobs suitable for senior citizens. Correspondingly, South Korea operates a pension system for the income security of older persons.

The pension system of South Korea basically consists of (i) the National Pension Scheme and (ii) the Basic Pension Scheme. The National Pension is a typical social insurance scheme under the National Pension Act (in Korean, “국민연금법”), in which the subscriber pays a portion of their income at working age and receives a pension when they reach a certain age (62 in 2022, will be 65 by 2033).

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<sup>8</sup> UN Principles for Older Persons

<sup>9</sup> E/C.12/GC/19, CESCR, 2008

<sup>10</sup> *General Comment No.6 on the economic, social and cultural rights of older persons*, CESCR, 2006, para 30

However, the National Pension scheme cannot cover all older persons, especially the large number of older persons living in poverty now. This problem is due to the late introduction of the scheme (the National Pension started to function in 1988) and its many blind spots (housewives, non-standard workers, and the low-income self-employed who fail to pay the contribution cannot receive the pension). To address this issue, the Korean government introduced the Basic Pension in 2014 according to the Basic Pension Act (in Korean, “기초연금법”) (ESCAP Policy Brief, 2015). The Basic Pension is a non-contributory pension that is tax-financed. The Basic Pension pays KRW 300,000 (USD 210) monthly to the bottom 70% (income-based) of the population aged 65 and over.

Furthermore, to guarantee a minimum standard of living for the poor, the National Basic Livelihood Security Act (in Korean, “국민기초생활보장법”) was enacted in 1999. This Act is regarded as the reform of social welfare law in South Korea, and benefits under this Act serve as the ultimate safety net for the poor. The benefits under this Act are (i) livelihood benefits, (ii) housing benefits, (iii) medical benefits, (iv) education benefits, etc. (Article 7). Livelihood, housing, and educational benefits are mainly paid by cash, and medical benefits are provided by the health service. The Housing Benefits Act (in Korean, “주거급여법”) and Medical Care Assistance Act (in Korean, “의료급여법”) were separately enacted to provide detailed regulation of housing and medical benefits.

Under the National Basic Livelihood Security Act, a person with less than 30% of median income can be a livelihood benefit recipient and receive livelihood benefits (in cash) under certain conditions. According to the Ministry of Health and Welfare, 37.6% of recipients under this Act are older persons, and 9.6% of the total elderly population receive benefits under this Act (Ministry of Health and Welfare of South Korea, 2021).

However, according to the report and statistics published by the OECD, the poverty rate of Korean seniors is the highest among OECD countries (40% in 2020) (OECD Statistics, n.d), and the same is true for the suicide rate (OECD, 2017). Despite various welfare systems, the level of income security for older persons is low, and many older persons in South Korea are in too difficult a situation to enjoy a decent life.

## **3.2 LAWS CONCERNING HEALTH AND CARE FOR OLDER PERSONS**

### **3.2.1 HEALTH CARE**

The right to the highest attainable standard of physical and mental health is declared in several international treaties, including ICESCR. The CESCR General Comment 14 on the highest attainable standard of health (2000) outlines the core elements of the right to health: availability; accessibility, including non-discrimination; physical access; affordability; access to information; acceptability; and quality. Maintaining physical as well as mental health and receiving adequate care are essential conditions of human dignity. Older persons need public support to enhance their health, which is often weakened by functional impairment and disease.

South Korea has a universal health care system, in which National Health Insurance (“NHI”) covers almost the entire population (National Health Insurance Service, 2022). Under the system, citizens pay contributions based on their financial capabilities and enjoy equal rights to insurance benefits.

However, the cost coverage rate of NHI is not high (61%, lower than the OECD average of 74%)(OECD, 2021), and the citizens bear the burden of medical expenses. A medical benefit under the Medical Care Assistance Act is applied for low-income persons. Low-income people with less than 40% of median income are eligible for medical assistance under certain conditions.

### **3.2.2 PALLIATIVE CARE AND DYING WELL**

The UN Special Rapporteur on the highest attainable standard of health has stated that patients should be able to make autonomous and informed decisions about access to adequate pain relief, location of death, and the ability to refuse treatment designed to prolong life when it is against their wishes. Even though palliative care is not an issue only for older persons, it is important for the rights of older persons, as older persons are more likely to face illness and severe pain at the end of their lives. In South Korea, to protect the dignity of patients, the Act on Hospice, and Palliative Care and Decisions on Life-sustaining Treatment at the End of Life (in Korean, “호스피스, 완화의료 및 임종과정에 있는 환자의 연명의료결정에 관한 법률”) was enacted in 2016. This Act provides terminally ill patients with hospice and palliative care and the right

to refuse life-prolonging treatment. Patients can exercise this right by signing an advance document, or by a doctor's order signed by two doctors and with consent from the patient's family (Article 17). The law also allows for the refusal of life-prolonging medical treatment for patients who may not have expressed this wish if all their family members agree and two doctors confirm (Article 18). However, the Act has raised considerable debate about whether the law protects autonomous patient decision-making at the end of their lives (National Human Rights Commission, 2016).

### **3.2.3 LONG-TERM CARE**

CESCR General Comment No. 6 recommends that State parties provide social services to support older persons and their families via government and non-governmental agencies. In addition, State parties must assist older persons who live alone and prefer to stay in their own homes (UN Committee on Economic, Social, and Cultural Rights, 2006).<sup>11</sup> Even though there is no specific provision for the right to long-term care under international human rights law, an adequate care system is essential for older persons to live a decent life.

Traditionally in South Korea, caring for older persons with age-related diseases was regarded as a family responsibility and, more specifically, the responsibility of female family members (daughter or daughter-in-law). However, due to women's broad participation in the labor force and declining fertility rate, it has become difficult to leave the caregiving responsibility to the family (ESCAP Policy Brief, 2015). Therefore, the Korean government launched the Long-Term Care Insurance for the Elderly Act in 2008 to provide services for age-related diseases. According to the Long-term Care Insurance Act (in Korean, “노인장기요양보험법”), services including activity support are provided to the older persons who have difficulty performing daily life as a result of old age or geriatric diseases (Article 1). Under this Act, older persons with geriatric diseases can file an application for long-term care with a doctor's referral (Article 13). After investigation and examination, the eligibility committee organized by the local government makes a final decision (Article 15). In this Act, no provision reflects the variability of individual older persons' needs or allows older persons to participate in the decision-making process.

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<sup>11</sup> General Comment No. 6. CESCR, 2006, para. 31

### 3.3 LAWS CONCERNING HOUSING FOR OLDER PERSONS

Older persons should have access to adequate shelter. CESCR General Comment No. 9 restates the Vienna International Plan of Action on Ageing in which housing for the older persons must be viewed as more than mere shelter; in addition to the physical, it has psychological and social significance which should be taken into account. Accordingly, national policies should help older persons to continue living in their own homes as long as possible. Moreover, the need to take into account the functional capacity of the older persons is mentioned, as a way to provide older persons with a better living environment (UN Committee on Economic, Social, and Cultural Rights, 2006).<sup>12</sup>

The Act on the Support for Housing Disadvantaged Persons including Persons with Disabilities and the Aged (hereinafter, Act for Housing Disadvantaged Persons; in Korean, “장애인·고령자 등 주거약자 지원에 관한 법률”) aims to promote the stabilization of housing for the disabled and the aged (“housing disadvantaged persons”) and improve their standard of housing (Article 1). This Act regards the disabled and older persons as housing-disadvantaged persons and contains objectives to support them. The primary contents of this Act include the establishment of a housing support plan (Article 5), surveys on actual housing conditions (Article 7), minimum standards of housing for housing-disadvantaged persons (Article 8), mandatory construction of housing units for housing-disadvantaged persons, and establishment of housing support centers (Article 17).

### 3.4 LAWS CONCERNING WORK AND OLDER PERSONS

Older persons’ right to work is protected under human rights standards, including the Universal Declaration of Human Rights (Article 23), ICESCR (Articles 6, 7), the Convention on the Elimination of all Forms of Discrimination against Women (Article 11), and the Convention on the Rights of Persons with Disabilities (Article 27). CESCR General Comment No. 6 (1996) urges State parties to take measures to prevent discrimination in employment on the basis of age, encourage the employment of older workers in circumstances that make the best use of their experience, and prepare workers for retirement (UN Committee on Economic, Social, and

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<sup>12</sup> General Comment No. 6. CESCR, 1996, para. 33

Cultural Rights, 2006)(UN Committee on Economic, Social, and Cultural Rights, 2006).<sup>13</sup> The Committee also pointed out that in areas where age discrimination is still tolerated, such as mandatory retirement ages, the trend is to eliminate such discrimination, and State parties should take steps to expedite this (UN Committee on Economic, Social, and Cultural Rights, 2006).<sup>14</sup>

In South Korea, the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion (hereinafter, Act on Elderly Employment, in Korean, “고용상 연령차별금지 및 고령자고용촉진에 관한 법률”) aims to prevent discrimination against the aged and support the employment of the aged (Article 1). Under this Act, age discrimination in employment by an employer is prohibited (Article 4-4), but there are many exceptions (Article 4-5), and employers can set the retirement age of workers to be 60 or older (Article 19). Additionally, the State and local government are to conduct training and other support for employment of the aged.

### 3.5 LEGAL CAPACITY AND NON-DISCRIMINATION

Older persons with declining physical and cognitive function may face challenges in relation to legal capacity, and older persons are sometimes unnecessarily stripped of their legal capacity by guardianship measures which deny them the ability to make their own decisions.<sup>15</sup> South Korea adopted an adult guardianship system in 2013 (Civil Act Articles 9-17), but under this system, if a guardian is designated for the older persons, the guardian shall act on behalf of the older persons in legal matters. The legal capacity of older persons with cognitive impairment should not be denied very easily, and the guardianship system should be improved to support older persons in exercising their legal capacity.

Ageism and age discrimination are the dominant types of human rights violations older persons experience. In South Korea, legal protection against discrimination on the basis of age is under the National Human Rights Commission Act (in Korean, “국가인권위원회법”). Under this Act,

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<sup>13</sup> General Comment No. 6. CESCR, 1996, paras 22-25

<sup>14</sup> General Comment No. 6. CESCR, 1996, para 12

<sup>15</sup> Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 212, August 2012

anyone who has suffered from a discriminatory act may file a petition to the National Human Rights Commission (Article 30). A discriminatory act includes discrimination on the grounds of age as well (Article 2(3)).

Older women often face multiple forms of discrimination resulting from their gender-based roles in society.<sup>16</sup> Along with older women, older minorities, including older migrants or older LGBTI, may experience various kinds of discrimination. Moreover, ageism intersects with other forms of discrimination, creating distinct challenges for older persons with disabilities, older women, older LGBTI, migrants and other minorities who are more exposed to social isolation and have fewer opportunities (National Human Rights Commission. 2017). However, in South Korea, comprehensive anti-discrimination legislation has not yet been adopted, and there is no means to respond to the multiple forms of discrimination.

### **3.6 PARTICIPATION AND ACCESS**

Older persons can maintain health and emotional stability and contribute to society through social participation. Older persons also have a desire to participate actively in society. However, certain social barriers make it difficult for older persons to do so. The pace of technological change is also too rapid for older persons to catch up with it.

The Act on Convenience Promotion of Persons with Disabilities, Older Persons, etc. (hereinafter Act on Convenience Promotion; in Korean, “장애인, 노인, 임산부 등의 편의증진 보장에 관한 법률”) was enacted to allow persons with disabilities and older persons safe and convenient access to facilities and information. According to this Act, persons who feel inconvenienced in moving, using facilities, and accessing information in daily life (like persons with disabilities, older persons, and pregnant women) have the right to use facilities equally and access information (Article 4). Furthermore, the owner of important facilities is required to install convenient facilities such as access roads to ensure accessibility.

Moreover, the Act on the Improvement of Transportation Mobility for the Disadvantaged Persons (hereinafter, Act on Mobility Disadvantaged Persons, in Korean, “교통약자 이동편의

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<sup>16</sup> A/RES/69/146, 2015

증진법”) stipulates that mobility disadvantaged persons, including persons with disabilities and older persons, have the right to safely and conveniently use all means of transportation, passenger facilities and roads, without discrimination (Article 3). However, changes according to this law are still being made very slowly, and the introduction of low-floor buses is only around 30%.

### **3.7 LAWS TO PREVENT ELDER ABUSE**

The Prohibition on torture and other cruel, inhuman or degrading treatment is an absolute right that applies to older persons and is protected in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Prohibition on torture covers severe forms of abuse and ill treatment of older persons. A 2021 report by the Korea Elder Protection Agency and Ministry of Health and Welfare said the cases of abuse against older persons continuously increased from 3,424 in 2012 to 6,774 in 2021 (Korea Elder Protection Agency, 2021). In South Korea, the law that intervenes and responds to elder abuse is the Welfare of Senior Citizens Act. The related articles are as follows :

- Emergency Call Service (Article 39-4) : The State and local governments should install an emergency call service to prevent elder abuse at any time.
- Elder Protection Agency (Article 39-5) : The State and local governments should establish an Elder Protection Agency in every province to prevent elder abuse.
- Obligations and Procedures for reporting Elder Abuse (Article 39-6) : Lists of persons obligated to report elder abuse include health care providers, long-term care service providers, public officers, etc.
- Emergency Measures (Article 39-7) : Emergency procedures in case of elder abuse.
- Appointment of Assistant (Article 39-8) : Assistant for the older persons in case of elder abuse.
- Prohibited Acts (Article 39-9) : Prohibited types of elder abuse .
- Shelters for Elder Abuse Victims (Article 39-19).
- Post Management of Elder Abuse (Article 39-20).

This Act was initially criticized for not including support for elder abuse victims (Shin, 2015), but related content was added through the revision of the act. However, the overall response

system in the case of elder abuse is entrusted to the Elder Protection Agency, which is not a public institution, and there are insufficient provisions to protect the rights of victims.

## **ANALYSIS OF ELDER LAW OF SOUTH KOREA FROM THE PERSPECTIVE OF HUMAN RIGHTS**

As mentioned above, there are many laws related to the rights of older persons in South Korea. However, whether these laws fully reflect human rights is another matter. In the following section, I will analyze elder laws in South Korea based on the UN Principles for Older Persons, and point out some aspects to be improved.

### **1. INDEPENDENCE**

- To ensure adequate income, work opportunities, housing and health for older persons, various policies and laws are being implemented in South Korea.

As seen above, the Welfare of Senior Citizens Act, the Pension Act, the Long-term Care Insurance Act, the Act on Elderly Employment, and the Act for Housing Disadvantaged Persons are intended to provide welfare benefits to older persons in the areas of income security, care, work and housing. South Korea tries to provide welfare benefits to older persons in various areas which are essential for the decent living of older persons.

- Adequate income security is not guaranteed as a human right.

Although various welfare systems have been introduced and are operated in South Korea, adequate income and housing for the older persons are not guaranteed as human rights.

National Pension under the National Pension Act is paid only to those who have paid premiums for 10 years or more (Article 61), and those with little or no income (housewives, non-regular workers, or the low-income self-employed) are likely to be excluded from this system. The Basic Pension was introduced to resolve serious poverty among the current generation of older

persons. Yet the amount of Basic Pension paid (USD 210 a month) is too small to live a decent life. Furthermore, the National Basic Livelihood Security Act, the last safety net for poor older persons, only covers less than 10% of the total elderly population, even though more than 40% of the older persons of South Korea live in poverty (OECD Statistics, n.d.).

- The right to work and education for older persons is not fully guaranteed.

Korean laws do not guarantee the rights of older persons to work or determine retirement age, and it is difficult to find regulations on appropriate education or training for older persons.

Even though the Act on Elderly Employment prohibits age discrimination by an employer (Article 4-4), the retirement age set under labor contracts, rules of employment, collective agreements, etc., pursuant to this Act, is not regarded as age discrimination (Article 4-5). Under the Act, retirement age should be 60 or over, and after retirement age, the re-employment of retirees is left to the discretion of the employer (Article 21). Hence, under the current law, older persons' right to work is not fully guaranteed.

In addition, the age for receiving the Basic Pension is 65, and the age for the National Pension is now 62 and will increase, reaching 65 by 2033. So there is a gap between retirement and pension entitlement, and older persons may face a loss of income for a few years. At least the retirement age should be the same as the pension entitlement age to secure a decent life for older persons.

Also, the law has no general provisions to guarantee the rights to education and training. Yet, as life expectancy increases, appropriate education and training are needed to ensure seniors lead independent lives after retirement.

- The right to live at home in a safe and adequate environment is not fully guaranteed.

The Act for Housing Disadvantaged Persons contains the State's obligation to strive for housing stability for older persons. However, there is no provision to protect the proper housing of older persons as a right, and adequate housing provision is primarily left to the government's discretion.

## 2. PARTICIPATION

- The right to participate in policy-making processes by older persons is not guaranteed.

Governments should conduct their ageing-related policies through inclusive and participatory consultation with relevant stakeholders.<sup>17</sup> However, according to the elder laws in South Korea, the right to participate in formulating and implementing policies for older persons is not fully guaranteed to older persons. According to Article 46 of the Long-term Care Insurance Act, an organization of older persons may participate in the Long-term Care Committee, a policy body that reviews insurance premium rates and levels of benefit. However, this is the only statutory provision for the participation of seniors' organizations in the process of policy-making for older persons. Most committees, when reviewing policies for older persons, exclude the participation of older persons or groups. For example, even for the Presidential Committee on Ageing Society and Population Policy under the Framework Act on Ageing, which is the committee to review important issues concerning policies in an ageing society, the participation of older persons or senior groups is not guaranteed. The involvement of older persons in the policy-making process related to older persons needs to be further guaranteed.

- There are few laws that support older persons' involvement in community or older persons' organizations.

Under Article 23 of the Welfare of Senior Citizens Act, the State or local governments are required to make efforts to support older persons' engagement in community activities. Accordingly, to support the contribution of older persons in society, the Elderly Work Program is being implemented. However, the Elderly Work Program has no clear legal basis and its reach is sometimes reduced according to the budget. After a change in government policy, the number of public Elderly Work Programs is expected to decrease from 608,000 to 547,000 in 2023, decreasing by 61,000.<sup>18</sup> There is also no procedure to reflect the opinions of older persons in the operation of the Elderly Work Program.

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<sup>17</sup> A/RES/69/146, 2015, para, 17

<sup>18</sup> "Older people's lives are getting harder... 60,000 public Elderly Work 'snack'" [https://go.seoul.co.kr/news/newsView.php?id=20220919009011&wlog\\_tag3=naver](https://go.seoul.co.kr/news/newsView.php?id=20220919009011&wlog_tag3=naver) (Seoul Newspaper, 2022. 9. 18.)

And there are few provisions which support older persons' organizations except for the Act on Support to Korean Senior Citizens Association.

### **3. CARE**

- Various welfare systems have been introduced to protect and care for older persons, but the right to health and adequate care is not guaranteed.

The National Health Insurance Act and Medical Care Assistance Act are laws for health care. And the Long-term Care Insurance Act provides care services for older persons. However, to receive long-term care services, it is necessary to go through a rigorous grading process. In 2021, only 74.4% of applicants for long-term care received the grade eligible for the service (National Health Insurance Service, 2021). Many older persons who need adequate care services are excluded from this process. Moreover, the amount of long-term care benefits has been limited by budgetary considerations, and older persons can receive only up to four hours of care a day. The number of services provided is too small to maintain the dignity of older persons with daily living difficulties.

- Social and legal services to ensure the autonomy of older persons are not available.

Under the current guardianship system, according to the Civil Act, it is difficult to guarantee the right of older persons with cognitive disabilities to exercise their legal capacities autonomously. The ability to make free and informed decisions in advance around the choice of medical treatment or long-term care and support is not guaranteed under the current laws. If older persons' wishes in these areas might not be respected, it is a denial of autonomy and deprivation of dignity (National Human Rights Commission, 2017).

- There is no law to guarantee the dignity and basic human rights of older persons living in care facilities.

The Welfare of Senior Citizens Act and the Long-term Care Insurance Act regulate the live-in care facilities for older persons and the services provided in these facilities. According to a 2021 report by the Korea Elder Protection Agency and Ministry of Health and Welfare, 7.9%

of elder abuse occurred in live-in facilities (Korea Elder Protection Agency, 2021). Despite the fact that human rights violations in live-in care facilities are serious problems, it is difficult to find regulations to guarantee the dignity and human rights of older persons living in these facilities. To guarantee human rights in care facilities, restrictions on older person's freedom must be lawful and proportionate and based on the voluntary consent of older persons. Along with this, appropriate monitoring of live-in care facilities and a remedy system for human rights violations are needed.

#### **4. SELF-FULFILLMENT**

- There are few laws to promote and protect access of older persons to the resources of society.

The Act on Convenience Promotion and the Act on Mobility Disadvantaged Persons aim to promote older persons' access to facilities and information. These laws cannot guarantee safe and convenient access for older persons since there are many exceptions, and the laws do not impose strong obligations on the State and local government. However, the recent revision of the Act on Mobility Disadvantaged Persons made it mandatory for bus operators to introduce low-floor buses when they replace their buses. This Article will come into effect in January 2023.

#### **5. DIGNITY**

- There is no comprehensive anti-discrimination legislation.

Over the past 15 years, United Nations mechanisms, including the UN Human Rights Committee, CESCR, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child, have repeatedly expressed concern about discrimination and urged the Korean government to adopt comprehensive anti-discrimination legislation. Lawmakers in South Korea have introduced comprehensive anti-discrimination legislation 11 times since 2007 (Ilga, 2020), but these bills have not passed yet, facing opposition from religious groups

and anti-LGBTI groups. It is necessary to enact a comprehensive anti-discrimination law that will prohibit and remedy widespread discrimination against older persons.

- The human rights of older persons in areas of multiple discrimination are not yet being discussed.

Older persons may experience intersectional discrimination as a combined effect of age and other characteristics (sex, gender, sexuality, race, ethnic origin, disability, etc.). Older women, older LGBTI, and older migrants may experience multiple and intersectional discrimination. However, in South Korea, the complex nature of multiple or intersectional discrimination in older age is not adequately discussed and regulated under current laws.

## **CONCLUSION**

In South Korea, there are many laws to protect the rights of older persons in various fields, but the current laws are insufficient as a system for protecting the rights of older persons based on human rights. Older persons are not guaranteed the opportunity to participate actively in the policy-making process regarding their rights. Although various welfare services are related to older persons, older persons are only regarded as recipients of welfare services. In the process of delivering welfare services, there are insufficient regulations to ensure dignity and human rights. The amount of welfare benefits and services depends on the budget, and policies are not implemented based on the rights of older persons. Basic principles for the human rights of older persons, such as anti-discrimination and eradication of ageism, are not fully reflected in policies and laws.

In conclusion, it is difficult to sufficiently guarantee the human rights of older persons through fragmented laws in various fields. Laws related to the rights of older persons exist independently from each other in different areas, and do not play an integrated role to guarantee the human rights of older persons. Although many laws stipulate the welfare of older persons, it is difficult for this to be claimed as a right because implementation of the laws can depend on the discretion of the administrative agency. Older persons' rights should be defined as rights, and procedures must be in place to realize them.

CESCR emphasized older persons should participate actively in the formation and implementation of policies that affect their well-being. Also, older persons should be able to enjoy human rights and fundamental freedom always, even when they reside in a shelter, care or treatment facility. These fundamental rights are not realized under the current laws.

Therefore, it is necessary to establish the principle of human rights for older persons by enacting the framework act for human rights for older persons. It would also be possible to revise the existing Welfare of Senior Citizens Act as a basic law for human rights for older persons. The new act should include the basic principles of human rights of older persons. This should include active participation of older persons in the policy-making process and a guarantee of the fundamental rights of older persons everywhere.

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# **THE HUMAN RIGHTS APPROACH OF THE EUROPEAN UNION (EU) TO THE ESTABLISHMENT OF A LEGAL SYSTEM DESIGNED FOR OLDER PERSONS**

SARA TONOLO

## **PRELIMINARY REMARKS**

Recent studies highlight that future demographic trends will result in an extraordinarily aging society, and moreover that this will occur, to a greater or lesser extent, in many countries, including both developed and developing countries. By 2025, more than 1.2 billion people will be aged sixty or above, and more than 70 percent of them will be residing in what are currently regarded as developing countries (Economic, Social and Cultural Rights of Older Persons: General Comment 6, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 13th Sess., para.1, UN Doc. E/C.12/1995/16/Rev.1 (1995) [hereinafter General Comment 6]). Currently, Asia and Europe are ageing the most rapidly, as is outlined in the WHO report (World Report on Ageing and Health 2015). This extraordinary trend is set to change society significantly in the sense that a large percentage of the total population would have inadequate mental capacity, in terms of what is usually required for day-to-day activities.

In Europe, where, due to an ageing population, about 37 percent of people will be over 60 years old and 10 percent over 80 years old by 2050, and where, in the EU alone, it is projected that there will be close to half a million centenarians by 2050, case numbers are set to rise for age-related illnesses typical for vulnerable adults, such as Alzheimer's and other forms of dementia. As a result, the need for guardianship arrangements will increase. Moreover, due to the mobility of EU society today, issues related to the protection of vulnerable adults in cross-border situations, including important issues such as medical care in case of serious illness, or the correct handling of property, are expected to become more prevalent in the not-too-distant future. For example, guardianship by national authorities may not necessarily be recognised in other EU Member States, as various different forms of protection measures and schemes are in

place across the EU. According to the Ageing Report 2021 issued by the European Commission on 20 November 2020, the total population of the EU is projected to decline in the long term, with the age structure changing significantly in the coming decades. The EU population is projected to decline from 447 million people in 2019 to 424 million in 2070, and during this period, Member States' populations will age dramatically, given fertility, life expectancy and migration dynamics. The median age is projected to rise by five years over the coming decades.

Older persons have historically been neglected by human rights law. However, recently the issue of demographic change has renewed general interest in older persons' human rights. Many international instruments and regional human rights conventions recognise specific rights for all persons and are clearly applicable to older persons as citizens of signatory states.

None of the equality clauses contained in the 1948 Universal Declaration of Human Rights – UDHR (GA Res. 217 A (III), 10.12.1948), the 1966 International Covenant on Civil and Political Rights – ICCPR (999 UNTS 171), and the 1966 International Covenant on Economic, Social and Cultural Rights – ICESCR (993 UNTS 3), mentions older persons or persons with disabilities as protected categories. For international human rights law, the principle of non-discrimination and equality is a value in itself that can be derived directly from human dignity (McCrudden 2004, p. 581). Of particular significance to old age is Article 25(1) UDHR, which states that everyone has the right to security and a 'standard of living adequate for the health and well-being of himself and his family'. The two Conventions, the ICESCR and the ICCPR, offer generic protection for cultural, economic, social, civil and political rights. For older persons, important specific rights in the ICESCR include work-related rights (Articles 6–7) as well as the right to social security (Article 9), to an adequate standard of living (Article 11), to education (Article 13) and to the highest attainable standard of physical and mental health (Article 12).

The ICESCR itself does not contain any direct references to older persons. In 1995, the Committee on Economic, Social and Cultural Rights (CESCR) released General Comment No. 6 on 'the economic, social and cultural rights of older persons'. The comment provides a legal interpretation of how the ICESCR ought to apply to older persons. It explains that the omission of 'age' as a specifically illegal ground for discrimination was not intentional, but had occurred because, when the ICESCR and ICCPR were adopted, 'the problem of demographic ageing was not as evident or as pressing as it is now'. In the ICCPR, 'participation rights' of special concern for older persons include the commitment of states to ensure freedom of expression,

assembly and association (Articles 18–19, 21). Article 25 recognises the right of all to take part in the conduct of public affairs. Article 26 states that: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law’. The article includes race, colour, sex, language, religion, origin ‘or other status’ as prohibited grounds of discrimination. ‘Age’ is not mentioned explicitly, although it could be argued that it falls under the ‘or other status’.

A number of UN treaties have been adopted in order to deal specifically with the rights of disadvantaged groups. Although none of them focuses on older persons, a few do mention ‘age’. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mentions ‘age’ in Article 11, in the context of the equal rights of women and men to social security and paid leave. International Convention on the Protection of the Rights of Migrant Workers and the Members of their Families (ICMW) includes ‘age’ in the list of prohibited grounds of discrimination in Article 7. However, it is generally recognised that the elderly population remains a vulnerable group, with no legal instrument tailored to its particular needs (Pinzón & Martin, 2003).

The most useful protection for older persons may be found in the Convention on the Rights of Persons with Disabilities – CRPD, adopted in 2007, which has now been ratified by around 160 UN member countries (Convention 30. 3.2007 no. 61/106, GA Res. 61/611, 13.12.2006, A/61/611; 15 IHRR 255. See *Disabilities – Handbook on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (Geneva: OHCHR, 2007), available at: <http://www.ohchr.org/english/about/publications/docs/ExclusionEqualityDisabilities.pdf>). It amounts to the most organic system of rules and guarantees for the protection of vulnerable people, and has also acted as an inspiration for other provisions, such as for example those referred to in the Nice Charter (Article 25 – recalled by the Lisbon Treaty, OJEU, C 303/17 – 14.12.2007), which provides that: ‘The Union recognises and respects the right of older persons to lead a life of dignity and independence and to participate in social and cultural life’.

The General Assembly mandate under which the Convention on the Rights of Persons with Disabilities was developed stipulated that the negotiating committee was to give effect to existing human rights under the particular circumstances of persons with disabilities. In spite of this, the Convention lies at the heart of international human rights law, rather than being an ancillary element of existing law. Articles 3 to 9 contain overarching principles, to be applied when implementing the Convention. Article 4 sets out the general obligation to incorporate the

terms of the Convention into national laws, policies and programmes, and to repeal national laws that are inconsistent with the Convention.

It is noteworthy that the procedural aspect of the Convention, concerning the procedures established in order to protect the rights established under it, essentially charges the body responsible for such matters – namely the Committee on the Rights of Persons with Disabilities, which is competent to engage in consultative activities – with monitoring compliance with the Convention by the States, as well as examining appeals brought by individuals and associations. Under the Optional Protocol (Article 1), the treaty body is also empowered to receive complaints concerning violations of rights from individuals and groups of individuals, provided that they have exhausted domestic remedies. The Optional Protocol also establishes an inquiry procedure in relation to gross violations of fundamental rights (International Legal Materials, 2007).

Article 1 CRPD, which sets out the purpose, also states that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ Article 12, on ‘equal recognition before the law’, states that ‘parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ It has been argued that the latter article implies a possible paradigm shift from substitute decision-making to supported decision-making with a view to understanding the principal’s will and preferences and implementing his or her wishes.

Even though older persons can qualify as eligible for protection according to the CRPD rules, and are indeed generally protected under international human rights law, there are a number of normative gaps in the general protection regime, where aspects of the lives of older people are not addressed adequately by existing human rights law. These include for example: international standards on rights within community-based and long-term care settings for both the caregiver and the person receiving care; legal planning for old age; and the abolition of mandatory retirement ages.

## REGIONAL SYSTEMS

Various standards to protect older people's rights are scattered throughout regional conventions. Generally speaking, in the European and Inter-American systems, the provisions on the rights of older persons are embodied in treaties concerning economic, social, and cultural rights, while African countries protect those rights alongside civil and political rights within one single instrument.

In 2014, the Council of Europe (COE) Committee of Ministers adopted a non-binding Recommendation on the promotion of the human rights of older persons, not qualifying the older persons per se in the category of vulnerable groups or individuals but confining their consideration in general consideration of ageism (Explanatory Memorandum to the recommendation CM/Rec (2014)2 promotion of human rights of older persons adopted by the Committee of Ministers of the Council of Europe on February 19, 2014). While the COE's Commissioner for Human Rights does not have a particular focus on older person's rights, the European Court of Human Rights has addressed this issue in a number of cases.

The European Union has adopted the Charter of Fundamental Rights. This Charter, which applies exclusively to Member States of the European Union, includes an ambitious and innovative list of human rights covering the full range of civil, political, economic, and social rights. As regards the protection of the older persons, Article 25 provides that: 'The [European] Union recognises and respects the rights of the older persons to lead a life of dignity and independence and to participate in social and cultural life.' The Explanatory Report indicates that this right must be interpreted in the light of Article 23 of the Revised European Social Charter and two provisions of the Community Charter of the Fundamental Social Rights of Workers.<sup>1</sup>

In the African human rights system, we can find specific attention to older persons as a distinct group of persons and the need to protect them as such by means of special rights. Thus, Article 18 (3) and (4) of the African (Banjul) Charter on Human and Peoples' Rights (ACHR) provides that the aged shall 'have the right to special measures of protection in keeping with their physical and moral needs', and the Protocol to the African Charter on Human and Peoples'

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<sup>1</sup> See §6 CHARTE 4473/00. CONVENT 50, explaining that Article 25 draws on Article 23 of the revised European Social Charter, available at <http://www.europarl.eu.int/charter>

Rights on the Rights of Older Persons in Africa, adopted in 2014, rules the vulnerability of older persons through the definition of positive human rights' nature, although this act has not yet come into force (fifteen instruments of ratification must be deposited in order for it to enter into force, although currently only five have been deposited: Benin, Ethiopia, Kenya, Lesotho, Malawi, Rwanda). Also within the African regional system, under the African Commission on Human and Peoples' Rights, the Working Group on Rights of Older Persons and People with Disabilities endeavours to protect the rights of older persons.

The Inter-American human rights system adopted the first binding convention on the rights of older persons, the Inter-American Convention on Protecting the Human Rights of Older Persons, on 12 December 2016 [(adopted on 15 June 2015, into force since January 2017), A-70]. The purpose of the Convention is to recognise, promote, and protect the rights of older persons, who are generally defined as persons 'aged 60 or older, except when legislation determines an age that is lesser or greater, provided that it is not over 65 years' (Article 2). It provides that, as people age, they should continue to enjoy and exercise all human rights and fundamental freedoms on an equal basis with other members of society. To this end, the Convention draws on existing principles established in non-binding or soft law instruments in order to enumerate 26 protected rights. It also establishes a follow-up mechanism to monitor the implementation of the commitments made under the Convention, which includes a reporting procedure and the ability of individuals to submit petitions alleging violations of the Convention to the Inter-American Commission on Human Rights.

The Convention lists general principles related to the rights and fundamental freedoms of older persons, with a focus on equality and non-discrimination as stated in Article 3. Furthermore, the Convention emphasises the dignity, independence, and autonomy of older persons as well as their physical, economic, and social security. It also calls for respect for and appreciation of cultural diversity, effective judicial protection, as well as proper treatment and preferential care. The Convention lists several general duties of States Parties, which are under a duty to 'adopt measures to prevent, punish, and eradicate practices that contravene this Convention' and to 'adopt affirmative measures and make such reasonable adjustments as may be necessary for the exercise of the rights established in this Convention'.

More specifically, Articles 5 to 31 of the Convention list the various protected rights of older persons: the right of older persons to safety and a life free of violence of any kind; the right to receive long-term care; the right to work; the right to health, including physical, mental, and

social health; the right to education; the right to housing, stressing policies that progressively adapt housing solutions so that they are architecturally suitable for older persons, policies that ensure expedited procedures for complaints regarding evictions, and measures to protect older persons from illegal forced evictions; and the right to accessibility and personal mobility. The rights of older persons receiving long-term care are detailed in Article 12 of the Convention. The article encompasses the right to a comprehensive system of care that promotes the health of older persons, provides social services that cover food and nutrition security, promotes the ability of older persons to live in their own home and maintain their autonomy, and provides services for families and caregivers. In order to ensure this right is fulfilled, the Convention calls on States Parties to establish mechanisms that ensure long-term care services are subject to the free and express will of older persons and that such services have specialised personnel. In addition, it requires States Parties to establish a regulatory framework that: ensures access to information for older persons; prevents arbitrary or illegal intrusions in any sphere in which older persons are involved; and protects older persons' personal security, freedom of movement, and their integrity in all aspects of their lives – particularly in acts of personal hygiene.

Article 18 of the Convention elaborates on older persons' right to work. The right to work encompasses anti-discriminatory policies and procedures that promote more inclusive labour markets guaranteeing the same rights, benefits, and protections to all workers for similar tasks and responsibilities, regardless of age. In particular, Article 18 includes measures that would facilitate the gradual transition into retirement and promote labour policies that take account of the needs and characteristics of older persons.

The Convention establishes two processes for monitoring and assessing States Parties' compliance with its provisions. Article 35 establishes a Committee of Experts, composed of individual experts appointed by States Parties, who are tasked with monitoring and reviewing States' implementation of the Convention through a periodic reporting process. Each State Party is required to submit an initial report on compliance by it with the Convention within one year of the Committee's first meeting and to submit follow-up reports every four years after that. The Committee of Experts is based at the OAS Headquarters in Washington, D.C. Moreover, Article 36 authorises individuals, groups of individuals, and non-governmental organisations to submit complaints of violations of the Convention by a State Party to the Inter-American Commission on Human Rights. States Parties may also submit a specific declaration recognising the competence of the Inter-American Commission to hear inter-State complaints

under the Convention. The Convention also expressly authorises States Parties to accept the jurisdiction of the Inter-American Court of Human Rights to hear complaints against it involving the Convention.

## **THE PROTECTION OF OLDER PERSONS IN THE EUROPEAN HUMAN RIGHTS SYSTEM**

The European human rights system is comprised in particular of the treaties adopted within the Council of Europe, including first and foremost the European Convention on Human Rights (European Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 U.N.T.S. 222, E.T.S. No. 005.) and the Revised European Social Charter. The 1988 Additional Protocol to the European Social Charter articulates protection for the rights of older persons in Article 4 (Additional Protocol to the European Social Charter, opened for signature 5 May 1988, Article 4, E.T.S. No. 128 (entered into force 9 April 1992) (addressing the rights of the older persons to social protection), available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>).

Although the rights of older persons do not feature as such in the ECHR, older persons have been considered in the case law of the European Court of Human Rights (ECtHR). This is possible as the right to a fair trial and the right not to be discriminated against are fundamental guarantees that can be used creatively to protect older persons from certain practices, such as forced retirement or slow judicial proceedings concerning health or social benefits. Similarly, provisions prohibiting cruel and degrading treatment take on a special meaning and provide specific protection for older persons, for instance in relation to prison sentences, including those involving compulsory labour, as well as cases involving inhumane treatment in healthcare facilities. Moreover, older persons may protect their rights to pensions and social security benefits through the right to property, whilst they may achieve fulfilment in their private lives through the right to marriage.

In several cases, the ECtHR has applied certain civil and political rights recognised in the European Convention on Human Rights to older persons. In the *Deumeland* case (*Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. B) (1986), available at <http://www.echr.coe.int>), Johanna Deumeland applied for a widow's supplementary pension, arguing that an industrial accident

had caused her husband's death. Following her death during the proceedings before the ECtHR, her son continued the proceedings and brought the petition before the ECtHR system after exhausting all domestic remedies. The applicant claimed that the German courts had not guaranteed a fair hearing in the case by considering it within a reasonable time, thereby violating Article 6(1) of the European Convention on Human Rights. The Court assessed the reasonableness of the length of the *Deumeland* proceedings with regard to criteria established within the Court's case law, namely: the degree of complexity of the case, the behaviour of the applicant, and the conduct of the competent courts.

In several cases, the ECtHR has affirmed that the Convention does not contain any prohibition on the incarceration of persons who have reached an advanced age. Nevertheless, a failure to provide the necessary medical care to prisoners could constitute inhuman treatment, and States are under an obligation to adopt measures to safeguard the well-being of persons who have been deprived of their liberty. Whether the severity of the ill-treatment or neglect reaches the threshold prohibited by Article 3 (prohibition of inhuman or degrading punishment or treatment) of the Convention will depend on the particular circumstances of the case, including the age and state of health of the person concerned as well as the duration and nature of the treatment and its physical or mental effects (see. *Sawonjuk v. UK*, 29 May 2001; *Priebke v. Italy*, 5 April 2001; *Enea v. Italy*, 17 September 2009). In the case of *Contrada v. Italy* (11 February 2014), the Court held that Article 3 (prohibition of inhuman or degrading treatment) of the Convention had been violated. It observed in particular that it was beyond doubt that the applicant had suffered from a number of serious and complex medical disorders, and that all of the medical reports and certificates submitted to the competent authorities during the proceedings had consistently and unequivocally found that his state of health was incompatible with the prison regime to which he was subjected. The Court further noted that the applicant's request to be placed under house arrest had not been granted until 2008, that is to say, until nine months after his first request. In the light of the medical certificates available to the authorities, the time that had elapsed before he was placed under house arrest, and the reasons given for the decisions refusing his requests, the Court found that the applicant's continued detention had been incompatible with the prohibition of inhuman or degrading treatment under Article 3 of the Convention.

Regarding the right to a fair trial, in several cases the ECtHR has found Article 6 § 1 (right to fair trial) of the Convention to have been violated in respect to the length of proceedings, having

regard more specifically to the fact that, in view of the applicants' old age, the national courts should have exercised particular care in handling those cases (see *Jablonska v. Poland*, 9 March 2004; *Schlumpf v. Switzerland*, 8 January 2009; *Georgel and Georgeta Stoicescu v. Romania*, 26 July 2011).

In the *Delecolle* case (*Delecolle v. France*, 37646/13, 25 October 2018), it held that the right to marriage (Article 12 ECHR) of a wealthy French citizen had been violated where, following his development of a slight cognitive impairment with his advancing age, a 'supervisor' (*curatelle renforcée*) had been appointed for him. As a result, the applicant's ability to marry was conditional upon prior authorisation by his supervisor, whose decision could be challenged before the national courts. After authorisation had been denied both by the supervisory and by the national authorities, Mr. Delecolle applied to the ECtHR, which however held that no violation of the Convention had occurred even though the decision taken by the national authorities did not take account of the applicant's wishes. The Court focused on the adequacy of the procedural safeguards intended to protect the applicant, rather than analysing the circumstances of the specific case, thus avoiding a discussion of the decision-making regime adopted by the State.

More generally, the Council of Europe seems not to qualify older persons per se in the category of vulnerable groups or individuals, but confines their consideration in a general consideration of ageism, aiming 'at promoting older persons' protection in societies where ageism is rising or in situations where they may be vulnerable' (Explanatory Memorandum to the recommendation CM/Rec (2014)2 promotion of human rights of older persons adopted by the Committee of Ministers of the Council of Europe on February 19, 2014).

## **THE APPROACH OF THE EU REGARDING OLDER PERSONS**

The human rights-based approach for the protection of older persons adopted by the Council of Europe has also had an impact on European Union Law. In fact, the European Court of Justice derives from international human rights treaties the general principles of Community law protecting older persons against discrimination. In *Mangold* (Case C-144/04, *Werner Mangold v. Rüdiger Helm*, (2005) E.C.R. I-9981, Nov. 22.2005), the ECJ held that there exists in European Law a general principle of non-discrimination on the ground of age. Mr. Mangold

at the time aged 56, was employed on a fixed-term basis in 2003 by Mr. Helm, who practiced law. In their contract of employment, the parties justified the fixed-term clause by reference to the German Fixed-Term Employment Act, under which such employment contracts are lawful without further justification if the employee is 52 or more. Mr. Mangold brought proceedings before the national labour court claiming that the fixed-term clause, although in conformity with national law, was incompatible with European Law, in particular with the Framework Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L. 303/16). Consequently, the Munich Labour Court referred the question of how to interpret the Directive to the ECJ. The ECJ, after finding the order for reference admissible, considered the compatibility of the German Statute with the Framework Directive and concluded that it entailed a differential treatment on the basis of age which was not justified under Art. 6(1) of the Directive. Even though the ratio legis of promoting the vocational integration of unemployed older workers was legitimate, the Court concluded that the means to achieve that objective went beyond what was appropriate and necessary. At the time the contract was concluded, the period prescribed for the transposition of the Directive into domestic law had not yet expired, since Germany had availed itself of an option to defer this deadline. Therefore, because the Framework Directive could not be applied directly, the Court pursued other arguments. The Court decided that the retention of a discriminatory rule during the transposition period conflicted with the rule that ‘Member States must refrain from taking any measures seriously liable to compromise the attainment of the result prescribed by the directive’ (§67). Moreover, the Court stated that ‘the principle of non-discrimination on grounds of age is a general principle of Community law’, whose observance was not dependent on the Directive’s transposition period.

The Court’s judgement is remarkable for its presumption that there exists a general principle of Community law forbidding age discrimination. In fact, the ECJ derives general principles of Community law from international human rights treaties, especially the European Convention on Human Rights (ECHR), and from the constitutional traditions common to the Member States (at the time of the Mangold case the European Charter of Fundamental Rights was not binding law).

Thanks to this principle, the ECJ developed a wide case law concerning age discrimination (Caballero v. Fondo de Garantia Salarial (Fogasa) Case C-442/00; Maria-Luise Lindorfer v. Council of the European Union Case C-227/04 P; Felix Palacios de la Villa v. Cortefiel Services

SA Case 411/05; Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH Case C 427/06; The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform Case C-388/07).

More generally remarkable are the attempts of the EU to give effect to the provision laid down in Article 25 of the European Charter of Fundamental Rights, which provides that: 'The Union recognises and respects the rights of older persons to lead a life of dignity and independence and to participate in social and cultural life'. This is in spite of the fact that the European Union has not yet adopted any legislation seeking to harmonise national laws on legal capacity (Drventic, *The Protection of Adults in the European Union*, in *EU and Comparative Challenges Series*, 2019, p. 803). As such, the system for regulating legal capacity, developed in order to protect the fundamental rights of older persons, appears to be much less robust than international standards.

The situation is complex, above all in light of the differences between the legislation governing protection for the vulnerable in force in individual national systems in Europe, and these differences make it even more difficult to ensure protection within cross-border situations. Guardianship by national authorities may not necessarily be recognised in other EU Member States, as various different forms of protection measures and schemes are in place across the EU. For example, in Germany the main tool for protection of vulnerable adults is (*Vorsorgevollmacht* (durable power of attorney)). In the Netherlands, the *levenstestament* (living will) and in France the *Mandat de protection future* are the main applicable instruments. Although all three provide for continuing powers of attorney, in a cross-border situation a question may arise concerning for instance the recognition of the Dutch *levenstestament* in France or Germany.

Thus, in the light of the legislative differences existing within individual Member States, the European institutions have also launched a number of initiatives with a view to harmonising legislation in this area. In 2008, the European Parliament adopted a resolution calling on Member States to ratify the United Nations Convention on the Rights of Persons with Disabilities (which had only recently entered into force at the time), as well as the Hague Convention on the international protection of adults, and requested the Commission to submit a legislative proposal on strengthening cooperation between Member States and improving the recognition and enforcement of decisions on the protection of adults and incapacity mandates and lasting powers of attorney (European Parliament resolution of 18 December 2008 with

recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)) (2010/C 45 E/13, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008IP0638>). In 2015, the European Parliament requested the Commission to adopt legislation on the protection of vulnerable adults in accordance with Article 225(2) TFEU. Following the Commission's failure to act in 2017, the European Parliament adopted a new resolution in which it called on the Commission to submit a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity (European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults (2015/2085(INL)) (2018/C 307/24) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0235>).

The Parliament observed that, whereas in the meantime the United Nations Convention had been ratified by all of the Member States, only a few Member States had ratified the Hague Convention, and thus this regulation would encourage them to ratify and implement it. The European Commission replied that an act of this nature could be adopted once a larger number of Member States had ratified the Hague Convention on the international protection of adults, as it would then amount to an act complementing the Convention (European Commission, Follow up to the European Parliament resolution of 1 June 2017 with recommendations to the Commission on the protection of vulnerable adults, SP (2017) 510). It also considered the legal basis on which the European institutions' actions should be grounded: the Commission appeared to take the view that the matter fell within the scope of family law pursuant to Article 81(3) TFEU. As such, it would be necessary to apply a special legislative procedure involving a unanimous decision by the Council, following consultation with the Parliament; the Parliament by contrast took the view that the issue of adult protection pertained to civil matters having cross-border implications under Article 81(2) TFEU, under which it decides jointly along with the Council according to the ordinary legislative procedure.<sup>2</sup> The Commission has only recently changed its previous view, although now the existence of EU competence rooted in Article 81(2) TFEU could certainly facilitate legislative action. On 27 May 2021, the Council of the European Union invited the Member States to use available funding opportunities from

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<sup>2</sup>see also European Law Institute, Report of the European Law Institute. The Protection of Adults in International Situations, 2020, p. 18 et seq [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/publications/ELI\\_Protection\\_of\\_Adults\\_in\\_International\\_Situations.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/publications/ELI_Protection_of_Adults_in_International_Situations.pdf)

the EU budget in order to actively develop actions related to the protection and promotion of the rights of vulnerable adults, including in the area of digital literacy and skills.

It also called on them to promote greater awareness of the 2000 Hague Convention on the international protection of adults, and to advance procedures to ratify it or advance domestic consultations on a possible accession to it. The Hague Convention of 13 January 2000 on the protection of adults has been in force internationally since 1 January 2009 (the Convention was drawn up under the auspices of the Hague Conference on Private International Law to replace the 1905 Hague Convention. The text is published in *International Legal Materials*, vol. 39, 2000, p. 7). The purpose of this Convention is in fact to organise ‘the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests’ (Article 1(1)).

The Council also requested the Member States to ensure the correct and full implementation of existing criminal law and enhance the use of cross-border victim protection mechanisms, and also ensure that vulnerable adults (whether suspects or accused persons or victims) are properly identified so that they can fully exercise their rights.

The conclusions then invited the Commission, on civil law matters, to conduct a study aimed at reflecting on how the protection of vulnerable adults in cross-border situations could be further strengthened, and to consider the possible need for a legal framework within the European Union to facilitate the free circulation of judicial and extrajudicial decisions on the protection of vulnerable adults in civil matters. On criminal law matters, the conclusions invited the Commission to consider whether there is a need to strengthen the procedural safeguards for vulnerable adults and to carefully reflect on the need to identify uniform and common criteria for identifying vulnerable adults in criminal proceedings. In response to this, the European Commission launched a public consultation on EU-wide protection for vulnerable adults on 21 December 2021, the results of which have been available since 29 March 2022 ([https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults/public-consultation_en)).

It is clear that the ratification of the Hague Convention of 2000 will result in greater uniformity in the protection of older persons throughout the EU, although at present Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland have yet to ratify it. Specifically, this Convention lays down uniform rules on jurisdiction, applicable law and the automatic recognition of

measures for the protection of vulnerable persons in different States. Therefore, its application would enable some of the questions concerning cross-border situations affecting vulnerable adults to be resolved.

## **CONCLUDING REMARKS**

### *Strengths and Limitations of the EU System*

Although the protection of older persons is generally regarded as a human-rights concern, and older persons are regarded as holders of rights, and no longer as passive recipients of care, the legislative framework in Europe is quite fragmented. Thanks to the general principle of non-discrimination on the grounds of age (deriving from international human rights law), the EU Law has set a common ground of principles to guarantee support against discrimination to older persons in several aspects: employment, social welfare support, public services; and healthcare. However, about the protection of vulnerable older persons the rules are still fragmented within the different EU countries. Indeed, a number of reforms have been enacted within the legal systems of some European countries following the ratification of the United Nations Convention on the Rights of Persons with Disabilities. It must, however, be noted that protection for older persons in Europe is classified under the more general protection afforded to vulnerable people, with the result that age is implicitly regarded as a source of vulnerability.

In Germany, powers of attorney applicable as a result of the granter's incapacity have been in use for some years without any need for specific regulations other than the general legislation on powers of attorney (in a similar manner to the position in other countries such as Belgium, Denmark, Finland, Portugal and the Netherlands); however, the position changed when the Second Guardianship Modification Act of 21 April 2005 entered into force in July 2005 with the aim of enhancing the self-determination of persons who are unable to protect their own interests (Gesetz zur Stärkung des Funktionen der Betreuungbehörde, 28 August 2013, BGBl, 2013, I, p. 3393). In the Czech Republic, the law enacted following the ratification of the United Nations Convention (Act No. 89/2012 Coll. the Civ. Code) provides for the provision of assistance in decision-making (sec. 45 Civil Code) and representation by a household member as the mildest form of protection measures for adults who have diminished capacity. In Austria, the law was first amended in 2007 to provide for continuing powers of attorney called

*Vorsorgevollmacht*; in 2017, with the adoption of the Second Protection of Adults Law (2 Erwachsenenenschutz-Gesetz-2 ErwSchG), Austria adopted one of the most modern laws in Europe on the protection of adults, which has been in force since 1 July 2018. It thoroughly modernised the guardianship system for adults with incapacity, with the aim of maintaining and recognising the autonomy of each individual for as long as possible and of supporting those individuals in the management of their affairs through the grant of various powers (enduring power of attorney, elective representation, statutory representation, and court-appointed representation). In Finland the Parliament passed the *Lag om interessevakningsfullmakt* (law no. 648/2007), concerning representation and powers of attorney, which entered into force on 1 November 2007. In Spain, new legislation introduced a new provision into Article 1732 of the Spanish Civil Code, which provides that the power of attorney mandate terminates upon the incapacity of the grantor, unless the mandate provides that it should continue in that eventuality, or unless the mandate has been granted for the purpose of being exercised in the event of the grantor's incapacity, as assessed according to the grantor's instructions (Ley 41/2003 de 18 de noviembre de protección patrimonial de las personas con discapacidad). In France, Law no. 2007-308 of 5 March 2007 (JORF no. 56) on the reform of the legal protection of adults entitled *Mandat de protection future*, and Articles 477 – 494 of the Civil Code, introduced a new form of legal protection for adults, including continuing powers of attorney. It entered into force on 1 January 2009 and was later subject to minor amendments by the 2015 Order. Work is in progress in some other states (such as Sweden, Estonia and Malta). In Italy, protection for older persons is essentially achieved through the judicial appointment of a legal representative who is charged with acting on behalf of the protected person in the performance of all or some acts. A reform has been enacted to provide that the representative may be an *amministratore di sostegno* (support administrator), a *tutore* (full guardian) or a curator, depending on whether the protection is organised in the form of an *amministrazione di sostegno* (support administration), *interdizione* (full guardianship) or *inabilitazione* (curatorship). Statistical evidence shows that, since 2004, the curatorship has de facto been replaced by the *amministrazione di sostegno*. This is in fact the preferred solution when the circumstances do not require a more far-reaching intervention. In Lithuania, amendments to the Civil Code and to the Code of Civil Procedure entered into force on 1 January 2016. The objective of these amendments was to reform legal provisions on incapacity in order to bring them into line with the requirements set out in Article 12 of the United Nations Convention, rejecting any total loss of capacity and providing that a person may be declared incapable or partially incapable either

in one specific area only, or in a variety of areas. The position in the Slovak Republic is similar following the enactment of a reform in Act no. 161/2015 (The Civil Proceedings Code for non-Adversarial Proceedings), which has been in force since 1 July 2016. In Slovenia, protective measures for vulnerable adults are set out in the new Family Code, which has applied since 15 April 2019. A number of guardianship measures are provided for, such as guardianship in special circumstances, where a social-work centre appoints a special-circumstances guardian or a guardian charged with performing specific tasks for a person of unknown abode and who has no representative.

In order to resolve the differences in legislation between the various Member States and to enable the different forms of protection to be more readily identifiable, a good strategy could be to obtain the ratification of the Hague Convention on the Protection of Adults by all EU Member States, coupled with the adoption of additional legislative measures by the EU in the area of judicial cooperation in civil matters, especially in the area of mutual recognition. This would help to establish greater legal certainty for older persons in cross-border situations compared to the current position.

### *Perspectives*

A legislative act at EU level, adopted on the basis of Article 81(2) TFEU, would present considerable added value in effectively completing the existing international and European legal framework for the protection of older persons.

Such legislation could for example provide for the creation of a European certificate of powers granted for the protection of an adult. More specifically, such legal measures would allow for quicker, more efficient and more complete protection of older persons, improving their daily lives throughout Europe. A legal measure in the form of an EU act would enhance legal certainty, ending the high degree of diversity between the various measures and instruments throughout the EU Member States. As a positive consequence, practitioners would only have to refer to two legal tools (a future EU act and the Hague Convention as ratified by all EU Member States) when applying private international law in order to protect a vulnerable adult in a cross-border situation, in a similar manner to what already occurs with regard to the provisions governing maintenance obligations in the European Union by reference to the Hague Convention made by Regulation no. 4/2009 (Council Regulation (EC) No 4/2009 of

18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations).

More generally, the reference to the situation of older persons in normative and judicial acts confirms in the EU the value of capturing an ‘added dimension’ of the problem under consideration, proactively operationalising the principle of effectiveness used in the interpretation of human rights law. But beside the individual dimension of protecting older persons in their daily lives, the protection of older persons could instead be assimilated to a principle, something which one must take into account ‘as a consideration inclining in one direction or another’ (Dworkin 2013, p. 40), as confirmed within the tentative approach of the EU highlighted in this research.

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# HUMAN RIGHTS MECHANISMS FOR OLDER PERSONS IN SWEDEN

TITTI MATTSSON

## INTRODUCTION

### BACKGROUND

In recent decades, there has been a trend towards an ageing population in Europe, Sweden included. Average life expectancy has increased dramatically over the last century due to rising living standards. This development brings benefits to individuals and society as a whole, but it also poses challenges.

Due to age discrimination, difficulties in obtaining secure employment, legal challenges, etc., many older persons find it difficult to integrate into their communities, of which they now make up such a large proportion. Considering this, one of the above-mentioned challenges arising from changing demographics is that older persons must be respected as full legal subjects who are bearers of legally enforceable rights, just as younger persons.

Within the European Union (EU), this question has been analyzed from different perspectives. For example, the worries and ambitions are reflected in several policy documents within the EU.<sup>1</sup> Furthermore, Article 25 of the European Union Charter of Fundamental Rights declares that “the union recognizes and respects the rights of older persons to lead a life of dignity and independence and to participate in social and cultural life” (Numhauser-Henning, 2013).

Zooming in from an EU perspective, we can see that the issue of older persons’ rights and position in society has been the subject of research in Sweden for several years.<sup>2</sup> As will be

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<sup>1</sup> See for example “The Year of Active Ageing and Solidarity between Generations” (Decision 940/2011/EU 14th of September 2011 by the European Parliament and the Council, *OJ L 246*) and the “Europe 2020 Strategy” (COM (2010) 2020 Final).

<sup>2</sup> As one example of many, the research group “The Norma Research Programme” took an initiative in 2011 to create a new research environment in Elder Law at the Faculty of Law of Lund University, Sweden.

discussed further, Sweden is a country with well-developed welfare structures, meaning that the public sector offers far-reaching support for older persons in several aspects – employment, social welfare support, public services, and healthcare. The interesting questions to dive deeper into are what human rights are expressed in the legislation, and what mechanisms underpin Sweden as a welfare state.

## **QUESTION**

In light of this background, this paper aims to answer the question: To what extent have human rights mechanisms concerning older persons been developed and achieved in Sweden?

## **DISPOSITION**

In order not to make the paper too lengthy, it focuses on three areas in which the rights of older persons in Sweden are particularly visible:

### **Swedish Healthcare**

#### **The Social Service System**

#### **The Labour Market**

These focus areas will be discussed in order. Within each focus area, the reader will first be briefly introduced to the topic. Then, the legal instruments and systems in Swedish law dealing with the human rights of older persons will be presented. Lastly, a summary commentary on the conclusions that can be drawn from Sweden's implementation of human rights for older persons within that particular focus area will be presented.

## **1. HEALTHCARE FOR OLDER PERSONS**

### **1.1 INTRODUCTION**

While we are living longer and staying active and healthy as we age, the demographic trend of increasing life expectancy has social, economic, and political implications for society. Among other things, consumption by older persons nowadays represents a large share of the total national healthcare production in a society. The overall health situation is improving, but other causes of morbidity and disability will most likely become more common and require increased healthcare efforts in the coming years. For example, Sweden and other EU countries are expected to have much higher levels of certain disabilities such as dementia and musculoskeletal disorders (Mattsson, 2017).

With the older person's group in society as the largest consumer of Swedish healthcare, it is relevant to address the question of what human rights in contemporary Swedish healthcare regulation they can benefit from.

### **1.2 RIGHT TO HEALTH – A POINT OF DEPARTURE IN SWEDISH HEALTHCARE**

The goal of good health for the whole population can be seen as a component of the right to health as a human right. From such a perspective, the organization and regulation of Swedish healthcare is largely about trying to ensure that healthcare is accessible and of good quality for the whole population, including for vulnerable groups in society.

The European community has agreed on certain legal regional commitments to which Sweden is bound. For example, the European Convention on Human Rights and the European Union Charter of Fundamental Rights require measures to guarantee the right to health protection. Specifically, the Treaties require that all healthcare developments consider and respect the fundamental principles of accessibility and quality, as well as legal certainty, protection of privacy, proportionality, and non-discrimination (Mattsson, 2017).

### **1.3 GENERAL STARTING POINTS IN THE HEALTH AND MEDICAL SERVICES ACT (2017:30)**

The Health and Medical Services Act, the main law governing Swedish healthcare, is not a regulation that sets out a certain number of rights for persons in the same way as the Social Services Act (2001:453) or the Swedish Act concerning Support and Service for Persons with Certain Functional Impairments (1993:387) does. The Health and Medical Services Act is rather a legal obligation for Sweden's regional and local healthcare providers (Mattsson, 2017). However, it states that "the aim of health care is good health and care on equal terms for the whole population. It must be provided with respect for the equal value of all persons and the dignity of the individual. Those persons in most need of health care shall be given priority access to it."<sup>3</sup> The expression "care on equal terms for the whole population" implies that everyone should be able to access health services when in need, and on equal terms. Factors such as age, gender, capacity, education etc. must not affect the access to care.<sup>4</sup>

The requirement of good health is specified in a later chapter of the Act. The chapter states that good care means that the care should be easily accessible, promote contact between staff and the patient, and be characterized by, among other things, security and continuity for the patient.<sup>5</sup> Such assurances can be seen as acknowledging the right to dignity and equal value irrespective of sex, gender or age, as well as the right to non-discrimination.

Healthcare for older persons is a shared public responsibility between the regions and the primary municipalities, which means that care is organized differently for this group than for the rest of the population, where the regions have sole responsibility for healthcare. The division of responsibilities is set out in Chapter 12 of the Health and Medical Services Act.

### **1.4 PARTICIPATION IN HEALTHCARE**

In recent years, the importance of patient participation in Swedish healthcare has been emphasized in various contexts and is reflected in new legislation, for example the Patient Act (2014:821). The aim is to strengthen and clarify the patient's position and emphasize the

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<sup>3</sup> The Health and Medical Services Act (2017:30), Chapter 3, Section 1.

<sup>4</sup> See Vahlne Westerhäll, Hälso- och sjukvårdslagen (2017:30), 3 kap. 1 §, Karnov 2022-01-01 (JUNO 2021-08-20, version 11).

<sup>5</sup> The Health and Medical Services Act (2017:30), Chapter 5, Section 1.

patient's integrity, self-determination, and participation. The Act emphasizes both the right to good care and the right to adequate and individually-tailored information, as well as the importance of participation, self-determination, and accessibility. The Act gives patients the right to choose providers of publicly-funded primary care and outpatient specialized care throughout the country (Mattsson, 2017).

On the theme of participation, there are special powers of attorney in Sweden, so-called future powers of attorney, which apply when you are unable to make decisions about your personal affairs. These currently apply only to financial and personal matters and thus not to healthcare issues.<sup>6</sup> It has been discussed whether they could also cover decisions relating to healthcare.<sup>7</sup> However, the proposal has not yet been adopted into any legislation.

## 1.5 HEALTHCARE AND ANTI-DISCRIMINATION

Although Swedish healthcare is generally based on so-called obligation legislation (meaning that the public services have an obligation – not, however, always enforceable by the possibility for a citizen to overrule a decision that is not fully in line with their wishes), there is an actual right to non-discrimination, enforceable in court. Discrimination is prohibited, inter alia, in relation to healthcare, through the Discrimination Act (2008:567).<sup>8</sup> According to this regulation, discrimination is defined as someone being disadvantaged by being treated worse than another person in a comparable situation.<sup>9</sup> As healthcare professionals work with persons in vulnerable situations, it is problematic when people experience discrimination in their encounters with representatives of these services. It can be viewed as particularly critical because it worsens the situation for people who are already in poor health (Mattsson, 2017).

Sweden's healthcare system sets high standards for equivalence, but its failure to live up to these standards has been highlighted in recent years. Organizational changes, such as the introduction of performance-based compensation for healthcare centres, risk disadvantaging older persons. These organizational changes have led to practices that favour frequent and short treatments in care, a structure that does not benefit older persons with complex care needs, who

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<sup>6</sup> Prop. 2016/17:30 Framtidsfullmakter – en ny form av ställföreträdarskap för vuxna.

<sup>7</sup> SOU 2015:80 Stöd och hjälp till vuxna vid ställningstaganden till vård, omsorg och forskning.

<sup>8</sup> The Discrimination Act, Chapter 2, Section 13.

<sup>9</sup> The Discrimination Act, Chapter 1, Section 4.

require longer time for a medical visit (Mattsson, 2017).

## **1.6 DIVERSIFICATION AND DIGITALIZATION OF HEALTHCARE**

Sweden's membership in the EU means that Sweden is obliged to have a healthcare system that can compete on equal terms within the EU. Among other things, this means an increased number of foreign players in the Swedish healthcare market. The increasing use of e-services in the healthcare sector also contributes to an international health market, with a mix of private and public actors.

The diversification of healthcare, with the growth of an increasingly large and complex market, can of course be of great benefit to older persons who have the time and capacity to investigate this market to find the most appropriate care options for themselves. However, for many older persons, this development can be difficult to navigate and too complex to use in a beneficial way. Poorer cognitive abilities and less familiarity with technology are two common reasons why difficulties may arise for older persons in getting good care in practice (Mattsson, 2017).

The introduction of smartphones, applications and cloud storage services have changed the way technical systems are created and developed. For example, we are facing a change in the diagnostics sector where many previously complicated procedures performed by healthcare professionals will be able to be performed at home in the near future. For older persons with care needs, digital security alarms can, for example, be complemented with motion and fall sensors, and home care can be performed via videophone. These changes have major implications for the entire healthcare market as the private sector invests in the development of different types of e-health solutions. Healthcare is increasingly flooded with different types of medical information systems and applications. Such developments can of course benefit many older persons, but at the same time they make great demands on people's capacity for self-care and their ability to manage technical aids in everyday life (Mattsson, 2017).

## 1.7 CONCLUDING REMARKS ON HUMAN RIGHTS FOR OLDER PERSONS IN SWEDISH HEALTHCARE

To analyze the mechanisms set out above from a human rights perspective, it is relevant to identify the rights on which the discussion will be based. A starting point is the core values which reflect all human rights law: (i) respect for dignity, (ii) autonomy, (iii) liberty, and (iv) equality (Lewis, Perser & Mackie, 2020). These core values reflect the four areas of the United Nations Principles for Older Persons.<sup>10</sup>

With this starting point in mind, it is possible to begin answering the main question in this paper: *To what extent have human rights mechanisms for older persons been developed and achieved in Sweden?* In the specific case of healthcare, the following conclusions are possible to make.

Respect for dignity is emphasized already in the target provisions of the main legislation in the field – the Health and Medical Services Act (see section 2.3 above). Interpreting “respect for dignity” broadly, it may include participation (participation in care is a form of respect for dignity) (Lewis et al., 2020). This mechanism permeates the Swedish healthcare system to a large extent. For example, as mentioned above, the Patient Act emphasizes the patient’s participation and self-determination. Furthermore, voices have been raised in favor of introducing future powers of attorney that cover decisions on health matters, something that could be argued to strengthen the participation of older persons in health issues in the future.<sup>11</sup>

The Patient Act is also actualized in relation to the core value of *autonomy* (more specifically self-determination), since it gives patients the right to choose providers of publicly-funded primary care and outpatient specialized care throughout the country. The core value of *liberty*, with obvious links to autonomy (Lewis et al., 2020), is also visible here.

Regarding the core value of *equality*, there is generally strong protection against discrimination against older persons in Sweden’s healthcare system through Sweden’s Discrimination Act, derived from EU law. However, there are examples of mechanisms that risk disadvantaging older persons (especially those with complex care needs); inter alia, the above-mentioned

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<sup>10</sup> United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991.

<sup>11</sup> See for example SOU 2015:80 Stöd och hjälp till vuxna vid ställningstaganden till vård, omsorg och forskning, p. 467.

organizational change that has introduced performance-based compensation.

Furthermore, there is clearly an ambition to go further in the implementation of rights for older persons in Sweden than is prescribed in international legal documents. For example, the United Nations Principles for Older Persons state that older persons should have access to adequate health care<sup>12</sup>, while the standard set out in the main healthcare law in Sweden is good care.

In contrast to Sweden's relatively developed laws regarding the rights of older persons, even though elder law is a relatively new area of law in Sweden, older people's rights are mostly invisible under international law. This can be assumed to be a consequence of the fact that interest in the rights of older persons varies greatly between different parts of the world. In the United States, for example, elder law has existed as a legal discipline for almost 50 years, while it has only now begun to emerge in Europe, primarily as a response to an ageing population.

Currently, there is only one international human rights convention that mandates against age discrimination, and existing commitments to the rights of older people are not legally binding. However, within the United Nations, a trend towards an international convention to protect the rights of older persons can be observed. Work began as early as 2010 but has faced challenges, and it is difficult to know when such a convention can be expected to be in place. One reason for the difficulties in agreeing on a convention for the rights of older persons is that it is disputed whether older persons need special rights; some believe that they are sufficiently protected by the human rights conventions that already exist. An international convention on the rights of older persons would give governments an explicit legal framework, with guidance and support that would enable them to ensure that older people can realize their rights (Ataguba, Bloom, & Scott, 2021). All states, including Sweden, should prepare for the adoption of such a convention in the near future and develop their existing regulations in the area.

The COVID-19 pandemic and the challenges we faced at the time have also contributed to an increased focus on the rights of older people, both in Sweden and internationally, with proposals for changed rules as a natural consequence. Despite developed legislation in the area of elder law, Sweden for instance gained international attention during the pandemic as an example of how a society can fail to protect its older members – an example to avoid (Mattsson, Nordberg, & Axmin, 2021; Meier, Matus, & Seunik, 2021). Great opportunities for

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<sup>12</sup> Article 1, United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991.

development exist, and common international regulations underline the importance of investing resources in the rights of older persons and making a significant difference by creating binding obligations on states.

To sum up, it can be argued that Sweden has come quite far in its efforts to develop human rights mechanisms in the healthcare system. Not only does the framework legislation governing these activities contain provisions that impose an obligation on the state to respect certain human rights for older persons, but there are also special regulatory frameworks that further strengthen the rights of older persons, especially autonomy. Since a human rights-based approach to elder law promotes individual autonomy in decision-making to the greatest extent possible<sup>13</sup>, it is possible to argue that the country has reached an acceptable level in this particular area from an older persons' rights perspective. However, the absence of the right for individuals to take most healthcare matters to court is a problem. Therefore, it is considered important to continue to take older persons' rights into account always when making organizational changes, and to bear in mind the diversity of the group. Older persons are not a homogeneous group, and individuals within this group in society have very different opportunities to take advantage of the benefits provided by the community.

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<sup>13</sup> Lewis, Perser K & Mackie (2020), p. 72.

## **2. THE SOCIAL SERVICES SYSTEM**

### **2.1 HISTORICAL BACKGROUND**

Throughout history, care for older persons has shifted from being a private to a public concern. In the latter part of the 19th century, families were given financial responsibility for the care of family members. The original view of elderly care as a family responsibility continued into the 20th century; for example, the Poor Persons Act (1918:422) stated that it was the duty of adult children to care for their parents if possible, a responsibility that in almost all cases fell on the female members of the family.

During the 1970s, the Swedish Parliament decided that care for older persons should be organized on a municipal basis. The focus of the care thus began to shift from families to the state, and elderly care would no longer be based on financial need (which had previously been the principle) but on the need for care and attention. This development occurred at the same time as the idea of Sweden as a welfare state began to emerge. The idea was that Sweden should have a strong state that cared for its citizens, and this idea permeated social policy reforms. During the strongest decades of the welfare state (the 1950s to 1970s), care for older persons was developed into a quite advanced public service. The goal was a welfare state that would free the individual from traditional notions and structures (of, for example, family and gender). Another part of the thinking was that if the public provided basic care for all, the vulnerability of the individual would be reduced (Katzin, 2017).

### **2.2 THE SOCIAL SERVICES SYSTEM: ORGANIZATION, OVERRIDING GOALS AND CONSENT-BASED ACTIVITIES**

#### **2.2.1 ORGANIZATION**

The mindset that clearly permeates the current regulations is that *elderly care is a state matter*. According to the Social Services Act (2001:435), the public social services system shall encompass all persons in Sweden who for different reasons are in socially or economically vulnerable situations and in need of help or assistance. The provision of services, or the distribution of money, are a municipal responsibility, and the Social Services Act defines the municipality's obligations. This responsibility enfolds all who reside in or are visiting the

municipality. Each municipality must appoint one or several social welfare committees (*socialnämnder*) to carry out the social services within its geographical area. However, the organization of this public function is up to the individual municipality to shape and develop. The Act is constructed as a “framework law” (*ramlag*), with few details on such issues. However, even though the legislation thus allows flexibility in how to organize the work and how best to assist the municipality, it states that social welfare committees have a special responsibility for certain groups. These groups are children and young persons, persons with alcohol or drug abuse problems, older persons, persons with functional impairments, persons who are taking care of a relative, and victims of crimes. Many decisions made by the municipality to meet its responsibilities can be taken to court if the decision for assistance is not in accordance with the needs and wishes of the person.

### **2.2.2 OVERRIDING GOALS AND CONSENT-BASED ACTIVITIES**

The overriding goals of the Social Services Act are to promote (i) economic and social security, (ii) equality in living conditions, and (iii) active participation in the life of the community. Social services aim at liberating and developing the innate resources of individuals and groups. When measures affect children, the best interests of the child will be given special consideration.<sup>14</sup>

Like the Health and Medical Services Act, the Social Services Act lays down that all activities are voluntary for the recipient and must be based on respect for that person's self-determination and privacy. Services without the consent of the person are only permitted under certain circumstances for specific individuals: e.g., persons with severe alcohol and drug abuse problems and vulnerable children and young people.<sup>15</sup>

The means for achieving these goals are in many ways left open for the municipality to decide locally. However, most activities in this area can roughly be divided into two types: those aimed at all individuals or groups in the municipality, and those based on individuals' specific needs for assistance and support. Examples of the first type of activity include participating in the community, cooperating with other public bodies, supplying public information concerning available social services, and arranging special accommodation for persons who, for age,

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<sup>14</sup> The Social Services Act (2001:453), Chapter 1, Section 1-3.

<sup>15</sup> The Social Services Act (2001:453), Chapter 1, Section 1 and 3.

physical, or mental reasons, encounter considerable difficulties in their daily lives. Examples of the second, individually-based, type of activities are advice, counselling, support, encouragement, care and treatment, and social assistance in the form of economic aid and family or family-law counselling (Mattsson, 2022).

### **2.3 OLDER PERSONS AS A TARGET GROUP IN THE SOCIAL SERVICES ACT**

As mentioned briefly above, the Social Services Act prescribes a special responsibility for several groups, including older persons.<sup>16</sup> The so-called “Special Provisions for Different Target Groups” state that social services' care for older persons should focus on enabling older persons to live a dignified life and experience well-being, defined as core values of social service care. Furthermore, the Social Welfare Committee (*socialnämnden*) shall work to ensure that older persons have the opportunity to live independently, in safe conditions, and have an active and meaningful life in community with others.<sup>17</sup> This includes the idea of naturalization, allowing older persons to live their lives as similarly as possible to how they lived previously. The importance of a dignified life is particularly highlighted, emphasizing that care for older persons should be characterized by respect for privacy and physical integrity (not by institutionalizing and paternalism, as was the case in the past)(Katzin, 2017).

The Social Welfare Committee shall work to ensure that older persons have good housing and will also provide those who need it with support and assistance, both at home and through other easily accessible services. The municipality has the obligation to arrange special housing facilities for social services, and care for older persons who need special support. The municipality may also establish special housing for older persons who primarily need support and assistance at home and through other easily accessible services, or who need to end undesirable isolation. The older person shall, as far as possible, be able to choose when and how support and assistance in housing and other accessible services are provided.<sup>18</sup>

The Social Welfare Committee has the obligation to familiarize itself with the living conditions of older persons in the municipality and, in its outreach activities, provide information on the activities of the social services in this area. The municipality must plan its activities for older

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<sup>16</sup> The Social Services Act (2001:453), Chapter 5, Section 4-6.

<sup>17</sup> The Social Services Act (2001:453), Chapter 5, Section 4.

<sup>18</sup> The Social Services Act (2001:453), Chapter 5, Section 5.

persons. In this planning, the municipality must cooperate with the region and other social bodies and organizations. The municipality must ensure that there are staff members with knowledge of minority languages where this is needed.<sup>19</sup>

## **2.4 SUPPORT AND SERVICE FOR PERSONS WITH CERTAIN FUNCTIONAL IMPAIRMENTS ACT**

Swedish law has a specific regulation concerning the rights of certain groups of persons with disabilities – Support and Service for Persons with Certain Functional Impairments Act (1993:387). The Act provides for special and very generous support and services for persons with developmental disabilities, autism or autism-like conditions, severe brain injuries or other physical and mental disabilities that cause significant difficulties in everyday life.<sup>20</sup>

However, the Act explicitly excludes from its scope persons with needs that are clearly only due to normal ageing. This can be argued to invalidate the Act as a rights law for older persons (over 65 years of age) to some extent. However, older persons for whom ageing accentuates difficulties due to a disability which started at such an age that it is clearly not age-related are included in the scope of the Act, and will receive extensive services also in old age. Similarly, older persons who have suffered a major disability unrelated to ageing, for example because of injury in a road accident, may take advantage of all the services included in the Act.<sup>21</sup> It is therefore a piece of legislation that is highly relevant to consider in the discussion concerning older persons' human rights that is taking shape in Sweden. A specific advantage of the regulatory framework from a rights perspective is the extensive possibilities it offers to take a case to court if a person is not content with the services offered by the municipality.

The Act prescribes entitlement to assistance and services such as counselling, assistance by a personal assistant and financial support for such assistance, individually appropriate transportation assistance, assistance by a contact person, different kinds of individually-preferred activities, and short-term stays outside the home. It is mainly the municipality's responsibility to enforce the rights stipulated in the law.<sup>22</sup> Since these services are very

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<sup>19</sup> The Social Services Act (2001:453), Chapter 5, Section 6.

<sup>20</sup> The Support and Service for Person with Certain Functional Impairments Act (1993:387), Section 1.

<sup>21</sup> See Clevesköld, Lag (1993:387) om stöd och service till vissa funktionshindrade, 1 §, Karnov (JUNO) (besökt 2022-09-13).

<sup>22</sup> See Lundgren & Sunesson, Nya sociallagarna (12 januari 2022, Version 35, JUNO), kommentaren till 1 §.

expensive, the costs are shared by the municipality and the state. The need to share the costs makes it possible to achieve services on equal terms across the whole country.

Also, similarly to the Social Services Act, the Act contains certain goals to be fulfilled<sup>23</sup> which set the overall objectives for the individual activities and interventions for each person. The guiding principles are (i) participation, (ii) self-determination, (iii) continuity and (iv) accessibility.<sup>24</sup>

## **2.5 CONCLUDING REMARKS ON HUMAN RIGHTS FOR OLDER PERSONS IN THE PUBLIC SOCIAL SERVICES SYSTEM**

Similar to the analysis of the Swedish healthcare system, this discussion will be based on the core values mentioned above – respect for dignity, autonomy, liberty and equality. However, several framework principles will also be discussed.

First, it should be recalled that older persons are recognized as a specific target group for social service activities in Sweden’s legislation for social services; in other words, the legislation recognizes older persons as a priority group in society. At an operational level, this means that large parts of social service resources are spent on organizing activities for older persons. Both the planning and the execution of the activities need in turn to be based on the overriding goals of the social services: security, equality, and active participation. These goals reflect the principles of the rights of older persons set out at an international level.

Secondly, all interventions within the framework of the social services system are consent-based. This can be argued to be consistent with several of the framework principles and core values of human rights, for example, self-determination and autonomy. It is an important mark of these rights, and contributes to the central idea that older persons are entitled to live an independent and dignified life. The Support and Services for Persons with Certain Functional Impairments Act rests on this basis of self-determination, and states that there should always be an opportunity for the person to decide for themselves or to influence actions that will have an impact on their lives.

Furthermore, social service interventions for older persons on a general level, such as the

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<sup>23</sup> The Support and Service for Person with Certain Functional Impairments Act (1993:387), Section 5 and 6.

<sup>24</sup> See Lundgren & Sunesson, *Nya sociallagarna* (12 januari 2022, Version 35, JUNO), kommentaren till 5 §.

development of housing accessible to older persons who want to break out of unwanted isolation, indicate a strong ambition to make older persons experience feelings of well-being, and make possible their full integration into society. Another important tool is that the social services must provide information about their activities to older persons. This obligation, with its emphasis on the right to information, implies increased accessibility, which in the long run is an important step in older persons being able to participate in society and its activities.

Lastly, in the social service system currently in place, we can note that the aim reflects the principle of equal care (based on need and not, as in the past, on financial circumstances), and that the system thereby rests on a solid ground of *equality*, one of the core values of human rights.

However, certain changes are expected in the area of elder law in Sweden, especially within social services. Consultations have been underway on whether a new Older Persons Care Act (*äldreomsorgslag*) should be introduced, and in June proposals for such a law were put forward. The proposals have their origins in structural problems and challenges for the health-care and care of older people in Sweden, and the purpose is to clarify the mission and content of elderly care and create the conditions for a more equally good quality of care throughout Sweden. The Act is intended to apply in addition to the provisions of the Social Services Act and is planned to enter into force on 1 January 2024.<sup>25</sup>

In addition to a new Elderly Care Act, changes are expected to be made in eight other laws to increase both quality and equality of care for older people. These proposals mainly aim to clarify what is already expected of municipalities and regions, but where there are currently major shortcomings.<sup>26</sup>

To sum up, regarding the social-services system, Sweden has developed and achieved mechanisms that promote older persons as holders of human rights. It may be argued that the combination of the recognition of older people as a target group in the Social Services Act, and the fact that already, consent should always be the deciding factor in services, supports this claim.

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<sup>25</sup> SOU 2022:41 Nästa steg - Ökad kvalitet och jämlikhet i vård och omsorg för äldre personer.

<sup>26</sup> SOU 2022:41 Nästa steg - Ökad kvalitet och jämlikhet i vård och omsorg för äldre personer.

### **3. OLDER PERSONS AND THE LABOR MARKET**

#### **3.1 EMPLOYMENT PROTECTION FOR OLDER WORKERS**

At the heart of Swedish labor law is the regulation concerning employment protection. EU law is a large part of Swedish labor law, and much of the legislation we have in the field of labor law therefore is a consequence of decisions and directives at EU-level.

The employment form determines an individual's employment protection. An open-ended contract remains the norm in the labor market, even though the labor market is under a so-called "flexibilization" process (relating to labor market segmentation, with increasingly more part-time and precarious employment) (Rönmar et al., 2017). Until a recent change in regulation, older workers occupied a special position concerning the increasing number of fixed-term employment contracts. The Swedish Employment Protection Act (1982:80) contained a rule stating that, in principle, temporary (and therefore less secure) employment contracts were permitted without limitations once the employee had reached the age of 67. However, since 1 January 2020, an employment contract can no longer be limited in time because the worker has reached a certain age.<sup>27</sup>

#### **3.2 AGE DISCRIMINATION IN THE SWEDISH EMPLOYMENT PROTECTION SYSTEM**

The provisions in the Swedish Employment Protection Act raise the issue of indirect and direct discrimination, both favorable and unfavorable to older workers.

Firstly, the Employment Protection Act provides for an explicit right to remain in employment until the month in which the person reaches the age of 68<sup>28</sup>, constituting a central codified right for older persons. However, when reaching the age of 68, a person may have to leave his or her employment without any requirement for the employer to give a substantive reason.<sup>29</sup> Even though it is a strengthening of the rights of older workers in one sense<sup>30</sup>, the provision still has the consequence of causing involuntary retirement for many workers. In this way, it expresses

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<sup>27</sup> SFS 2019:528, compare prop. 2018/19:91.

<sup>28</sup> The Swedish Employment Protection Act (1982:80), Section 32a.

<sup>29</sup> The Swedish Employment Protection Act (1982:80), Section 33.

<sup>30</sup> A couple of years ago, it was possible to dismiss a worker over the age of 67 with just one simple written notice.

direct age discrimination.<sup>31</sup>

Secondly, the length of employment is relevant to several provisions of the same legislation; this typically favours older workers who may have been employed for a long time in many situations during their working life (Numhauser-Henning, 2017). For example, higher age gives precedence under the rotation rules for dismissals for equal length of employment.<sup>32</sup> These cases imply indirect discrimination in favor of older workers (Numhauser-Henning, 2017).

A regulation that raises the issue of (anti-)discrimination, and in the long run the core value of *equality*<sup>33</sup> for older workers is the prohibition on age discrimination that now applies in both EU and Swedish law. The prohibition is an important response to the negative expectations that typically accompany increasing age in the labor market (so-called “ageism”). In the Mangold case, the European Court of Justice stated that protection against age discrimination is a fundamental principle of EU law.<sup>34</sup> An EU directive – the General Framework for Equal Treatment in Employment and Occupation – resulted in prohibiting the termination of employment on grounds of age in Sweden.<sup>35</sup> However, article 6(1) of the directive prescribes that member states may decide that differences in treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim.

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<sup>31</sup> Compare Numhauser-Henning (2017), p. 51–52. Please note that the Employment Protection Act has changed in several ways since the book was written.

<sup>32</sup> The Swedish Employment Protection Act (1982:80), Section 22.

<sup>33</sup> Regarding the link between non-discrimination and equality, see Lewis, Perser & Mackie (2020), p. 77.

<sup>34</sup> C-144/04 Mangold.

<sup>35</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The directive was introduced into Swedish law through the Discrimination Act (2008:567), Chapter 2, Section 1.

### **3.3 CONCLUDING REMARKS ON HUMAN RIGHTS FOR OLDER PERSONS AND THE LABOR MARKET**

The position of older persons in the labor market has been a subject for debate in recent years in Sweden. On the one hand, one of the main labor law instruments in Sweden – the Employment Protection Act – prescribes a right to remain in work until the age of 68. The Act is of great importance to the labor market, and many of its provisions, for example the one giving older persons the right to remain in work, are compulsory. This regulation facilitates older persons staying integrated in society, since work is an important tool for that, and enables them to (legally) battle ageism in the workplace, contesting claims that, for example, a person is “too old” to adapt to new technology and processes (Lewis et al., 2020). For many older persons, the right to remain in work, even at a higher age, can function as a tool for self-fulfilment and well-being. On the other hand, Sweden's current regulations imply a kind of involuntary retirement at the age of 68, counteracting the mechanisms leading to general goals of integration, self-fulfilment and well-being.

A further mechanism that may be questioned from a rights perspective is the EU's requirement for non-discrimination against older persons, which has been implemented in Swedish law. It certainly provides a good, strong starting point – discrimination on the grounds of age is prohibited. Yet it still allows member states to carry on with discriminatory treatment if it is justified by a legitimate aim.

To summarize, although Sweden has good ambitions for the establishment of older persons as rights holders in the labor market, more work and research need to be done to fully achieve this goal.

## FINAL WORDS

The fact that Sweden's many years of work on issues relating to the rights of older persons have been quite successful is evident from the information presented in this paper. Sweden has to a large extent developed and achieved human rights mechanisms for older persons. For example, the guiding principle of *participation* is, together with self-determination as an extension of the core value of *autonomy*, visible in the Swedish healthcare system through the Patient Act and the right to choose a health care provider.

These guiding principles are strong also within Sweden's public social services system in general, since all activities are consent-based, and independent of the person's individual status or situation. The public social services system rests on the solid ground of the core value of *equality*, since it is based on the need for support, not financial circumstances. The Swedish labor market is also permeated by *equality*, due to the strong anti-discrimination mechanisms that derive from EU law and are implemented in Swedish regulations.

Within the topic area of this paper there is a word that is recurs commonly in legislation and the legislative framework concerning all three focus areas, i.e. *opportunity*. For example, regulations for Swedish healthcare prescribe an obligation for the state to give all citizens the opportunity to receive care on equal terms. The Support and Service for Persons with Certain Functional Impairments Act stipulates an opportunity for self-determination even when this is not physically possible, and there is an opportunity to stay in employment until the age of 68 through Swedish labor laws. This common factor is an important marker that human rights such as autonomy and participation are not dependent on age or physical condition. This is likely to have an impact at an operational level concerning the enforcement of human rights of older persons, today and in the future.

However, although Sweden has relatively well-developed human rights mechanisms for older persons, the same progress has not taken place regarding elder law issues linked to classic family law. Family law deals with issues of inheritance and wills as well as future powers of attorney and guardianship, including trustees. It actualizes regulation of the supervision of such systems, to protect older persons against exploitation in various forms. The latter is the field of elder law which large parts of the world focus on the most, but it is far from sufficiently developed in the Swedish context.

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