

Against Ageism and Towards Active Social Citizenship for Older Persons

The Current Use and Future Potential of the European Social Charter



Study by
Gerard Quinn and Israel (Issi) Doron



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Foreword

I welcome the publication of this study by the Council of Europe. The early provisions in the European Social Charter on older persons were among the first in the world to embrace a rights-based perspective. They heavily influenced EU law and policy and remain formidable weapons against ageism in law, policy and practice.

I welcome the detail given in the study to the myriad of opportunities now available to civil society to use the machinery of the European Social Charter to advance the rights of older persons. This applies to both the reporting procedure as well as the collective complaints procedure. And I welcome the fact that the study will help governments to strengthen the implementation of the human rights of older persons. One of my key concerns to do with the diversity and inter-sectional nature of ageing. I am happy that the study is attuned to this.

I note that the Secretary General of the Council of Europe has recently stated that the European Social Charter is “an instrument capable of providing a dynamic response to evolving realities.” I fully agree. One of those realities that has to be squarely faced is the legacy of ageism in law, policy and practice. This is one of the major defining human rights issues of our times. And not just for Europe. This study is timely as the world debates the case for a new treaty on the rights of older persons. It assesses the impact of the Charter in the past. More importantly, it lays out a vision of how the Charter can be optimised in the future as Europe struggles to eliminate ageist laws and policies. This is the Council of Europe at its best – looking forward and continually refreshing human rights to make them relevant as we build more inclusive and resilient societies.

Claudia Mahler

United Nations Independent Expert on the enjoyment of all human rights by older persons

Introduction

"It is...high time to confirm clearly and unambiguously, at the highest political level, that the European Social Charter provides a response to today's social challenges in Europe and to show a renewed commitment to the common objectives underpinning the Charter."

Improving the implementation of social rights – reinforcing the European Social Charter system: Secretary General's Proposals, 22 April 2021.

The purpose of this study is to explain the critical role of the European Social Charter in advancing and protecting the rights of older persons in Europe.

It is designed to be of use to civil society groups of older persons to enable them to engage effectively with the machinery of the Charter and to use its jurisprudence in the development of domestic advocacy strategies for reform. It should also provide guidance to policy makers as they open up a new policy imagination on the rights of older persons. And it should prove of use in the global debate about the rights of older persons more generally and the case for a new UN treaty in particular.

The European Social Charter contained the very first legal provisions in the world on the rights of older persons.

The European Social Charter was the first legally binding international instrument in the world to make explicit provision for the social rights of older persons. The original provisions date back to an Additional Protocol in 1988 (Article 4) and were carried forward by the Revised European Social Charter of 1996 (Article 23). The Charter was significantly ahead of all other international or regional instruments at the time.

Some 30 years later, the move toward a human rights-based framing of ageing is now more widely accepted as the most appropriate policy perspective. The deliberations of the UN Open-ended Working Group on Ageing all centre around a human rights-based framing of old age. There is now a symmetry of sorts between the Council of Europe and European Union policy trends on age. The landmark Council of Europe Recommendation of 2014 on the promotion of the rights of older persons sits neatly alongside the EU Social Affairs Council Conclusions of 2020 which also point unambiguously in this direction (see chapter 3 below).

Both the global and European regional process have given salience to the visibility, subjectivity, and human agency of older persons, as well as to the symbolic aspects of social justice. They mark a decisive rejection of ageism which is the underlying cause of exclusion. Instead of protection and passive maintenance through traditional social protection systems, we now tend to talk more about autonomy, inclusion, the right to belong and the right to flourish in one's own home and community. In many respects, the European Social Charter helped to spur these developments and directly inspired, for example, the relevant provisions in the EU Charter of Fundamental

Rights on the rights of older persons (Article 25). This is a good example of the complementarity of the two European organisations.

The European Social Charter has not stood still. It too is evolving to meet the exigencies of the 21st century and to create a new policy imagination for older persons in Europe based on social support for autonomy, inclusion, and social citizenship. The jurisprudence of the European Committee of Social Rights has grown significantly in volume as well as in sophistication since 1988.

Firstly, the European Committee of Social Rights has developed a sophisticated theory of equality and non-discrimination with direct implications for many groups in vulnerable situations, including older persons. The addition of Article E on equality and non-discrimination to the Charter (1996) has imparted a creative energy to the jurisprudence that had remained latent. It has shone a light on structural or systemic issues faced by “discrete and insular” minorities like older persons with many accumulated disadvantages. Like most other international treaty bodies, the European Committee of Social Rights has developed a much broader theory of equality anchored in autonomy (the legal capacity to make one’s own decisions), inclusion, participation, and active social citizenship. This has had the wholesome effect of refreshing and re-invigorating the mix of social rights in the Charter. This means that ageist assumptions are continually being interrogated by the European Committee of Social Rights as it seeks to re-set social policy away from a deficits-based approach to a rights-based approach to old age.

Getting away from ageism: autonomy, social inclusion and participation as the key departure points.

With a more nuanced approach to the “progressive realisation” of social rights.

Secondly, a more nuanced and subtle understanding of the “progressive realisation” of social rights has emerged in the Committee’s jurisprudence. This creates more space for constructive dialogue about progress. In turn, this helps to maintain a ratcheting effect on the overall evolution of social policy. Since Europe (and the world) is on the threshold of a new paradigm on age, there will be a need to transition away from systems and services that carry the DNA of an old paradigm.

This cannot be done overnight - but it has to be done. The evolution of a more nuanced understanding of the obligations inherent in the concept of “progressive realisation” means that the Charter machinery is well placed to effectively guide policy as governments transition to a more recognisable rights-based approach to age.

Specifically, with regard to Article 23 and the social rights of older persons, the Charter has adopted an approach which included two distinct novel elements: one, which focused on the full and meaningful participation in society; two, which focused on independence and life choices in old age. These two elements were complemented with a specific reference to the rights of older persons living in institutions. Moreover, down through the years, and via its growing body of decisions and casework, the Committee further expanded the scope and material construction of Article 23 to

Article 23 has evolved by means of a growing body of decisions and case work, to broaden the understanding of the rights of older persons as full members of society.

include new elements. These included the legislative frameworks on ageing (including issues around age discrimination and legal capacity/assisted decision making), and the prevention of elder abuse (including issues of data collection and specific legislation). This dynamic evolution has shown that Article 23 of the Charter is a living text, which can be progressed and reconstructed to fit changes in social reality and human rights norms.

And many more opportunities now arise for civil society to engage with the European Social Charter's machinery. This applies most obviously in the system of collective complaints which has been growing in importance as a source of new and deeper jurisprudential understandings of the Charter. However, it also applies

in the reporting system and even in the procedure on "non-accepted provisions". Through procedural innovations, for example, there is now a standing possibility of applying for "urgent action measures" in suitable cases. This could apply, for example, to older persons adversely affected by discriminatory triage regulations. It is important to equip civil society groups with this knowledge so that constructive use can be made of it in helping to shape future law and policy on the rights of older persons across Europe

And with many more opportunities civil society to engage with the Charter's machinery.

The analysis and recommendations in this study are fully in line with the Council of Europe's Secretary Generals' proposals on improving the Charter's system (22 April 2021) and with the report of the High Level Group of Experts on Social Rights which reported to the Secretary General in March 2021. The Council of Europe's Secretary General has described the Charter as an "instrument capable of providing a dynamic response to evolving realities." And one of those realities is the ageing of Europe and the need for fresh approaches. Reference to the High Level Group report and the Secretary Generals' recommendations will be made where relevant in this study.

The time is therefore right to take stock of the Charter as it applies to older persons. In a way, the application of the Charter to older persons is a case study of the relevance of the Charter in the early 21st century, as well as its capacity to lead and inspire especially in light of the demographic transition and the ageing of Europe.

The shadow cast over this study is the COVID-19 pandemic. The pandemic has vividly exposed the raw edges of inequality faced by older persons. It has exposed shortcomings in services that have made community living precarious. It has exposed the heightened risks of disease and worse that older persons face in institutional settings. It has exposed blatant inequality and discriminatory practices with regard to triage policies and the rationing of scarce health care resources. Many of these shortcomings arise in the context of social rights and services and originate in

ageism. A test of the European Social Charter is whether and how it responds to these challenges.

Part A of this study sets out the context for the examination of the Charter. It comprises three chapters.

Chapter 1 recounts the profound shift away from ageism and towards a justice and rights-based framework on older persons. This shift has been taking place over the past 20 years or so, and directly counteracts ageism and its pernicious effects. Importantly, this chapter reprises the values that lie at the base of this shift – values that are carried forward by the Charter. Chapter 2 traces the evolution of these values in international law and policy, and particularly in the UN system, but also in other regions of the world, such as in the Organisation of American States and the African Union. To a large extent, the European Social Charter has always been ahead of these developments. Now, these too are catching up and, if anything, powerfully reinforce the trajectory of the Charter. Chapter 3 summarises the line of travel taken by the rights of older persons at the European regional level – both within the broader Council of Europe system and in the European Union. This is important as it helps situate the relevant developments in the European Social Charter within a broader European policy context and indeed serves to validate its overall line of travel towards autonomy, inclusion, and active citizenship. Its analysis and conclusions are consistent with the influential Background Paper for the 2021 annual Asia/Europe Meeting (ASEM) by Titti Mattsson and Andrew Byrnes.

Part B examines the European Social Charter as an instrument that both reflects and helps to powerfully advance the rights-based framing of older persons. It is comprised of 5 chapters.

Chapter 4 sets out the European Social Charter treaty system. This is important as it contains the nuts and bolts of the operation of the system which, though complicated, can be communicated clearly. This chapter is essential reading especially for civil society groups keen to learn about how they can engage constructively with the machinery of the Charter. Chapter 5 unpacks the notion of equality in Article E of the Charter. This informs all the other substantive provisions of the Charter. It operates as a side constraint on how the social rights are delivered. More importantly, it points towards a theory of active social citizenship. That is to say, it is not just used to question the relativities of treatment between different groups with respect to certain social rights, but it is also used to animate an overall theory of inclusion and belonging through social rights. This is fully in keeping with theories of “inclusive equality” being pronounced under the equivalent UN treaty (the International Covenant on Economic, Social and Cultural Rights – ICESCR).

Chapter 6 deals with the seemingly arcane but quite crucial concept of “progressive realisation” under the Charter. Many of the more important obligations incumbent on States Parties are of this variety. This, most assuredly, does not rob them of their critical bite. The parameters of “progressive realisation” have been slowly evolving in the jurisprudence of the European Committee of Social Rights. When required, it has not held back from declaring that States have not made sufficient progress. However, in order to use the machinery effectively, it is important to be aware of

the evolving parameters of this jurisprudence and, in particular, the need for groups directly affected by major policy choices to have a say in those choices.

After setting out the mechanics and operation of the Charter, two chapters then focus on the social rights of older persons. Chapter 7 deals with the headline norm on the rights of older persons in the Charter – Article 23. The original vision was somewhat curtailed in that Article 23 (and, before it, Article 4 of the Additional Protocol) did not envisage a full right to continue to live in the community. It is suggested that the space for this exception has been narrowed and especially when one views Article 23 in light of Article E’s theory of social inclusion (as one must). An additional notable feature has been the European Committee’s insistence that maintaining and supporting the autonomy of older persons is reckonable under Article 23. To some degree, this completes the paradigm shift towards a rights-based approach to older persons by pivoting the analysis on autonomy and inclusion. This, of course, does not mean that older persons do not experience decision-making frailties. But it does mean that the first response should focus on what is needed to support older persons to maintain their right to make choices regarding their own lives. Again, this evolving jurisprudence in the Committee is testament to the strength and power of the shift towards the human rights paradigm.

Chapter 8 then unpacks a few social rights as being of particular relevance to the lives of older persons. Of course, nearly all the Charter provisions are relevant. We have selected the right to work (Article 1), the right to health and equal treatment in health (Article 11), the right to social and medical assistance (Article 13), the rights of family carers (Article 27), the right against poverty and social exclusion (Article 30), and the right to housing (Article 31) for analysis. Not every aspect of these rights is examined – the focus of analysis is on their resonance for older persons.

Part C looks at the application of the Charter in emergency situations. And COVID-19 most assuredly counts as an emergency situation. Chapter 9 sets the scene by describing how the Charter makes allowance for emergency situations and the limiting principles that apply to how States respond. The three chapters (10, 11, 12) that follow set out our summary and analysis of survey questionnaires about the European Social Charter distributed to governments, National Human Rights Institutions (NHRIs) and National Equality Bodies (NEBs) and civil society organisations. The purpose of these questionnaires was to gauge the respondents’ awareness of – and engagement with – the mechanisms available under the European Social Charter. At the same time, the survey sought information about how these bodies were framing their responses to the COVID-19 pandemic and whether, in their view, the jurisprudence of the European Social Charter was relevant and useful. The analysis of these three chapters triangulates between power (governments), voice (civil society) and ideas (the checking power of NHRIs and similar bodies) in driving change and whether and how the Charter can equip all of them to interact effectively in moving Europe away from the ageist laws and policies of the past.

Chapter 13 of this study looks to the future. It builds on the analysis of the study and is informed by the survey of governments, NHRIs and civil society. It summarises the key issues that affect older persons and which can be ventilated using the Charter mechanism. It summarises the various ways that civil society can interact with the

Charter mechanisms (Chapter 12). It also summarises how the Charter might be used to animate general advocacy for law reform in the States Parties. Lastly, it contains some key conclusions and recommendations.

1. Ideas: the evolution of ideas and law on the rights of older persons

"Ageism is deeply structural, 'find[ing] expression in institutional systems, individual attitudes and inter-generational relationships'. All manifestations of ageism...gravely undermine older people's right to human dignity and reduce their potential to contribute actively to society."

EU Fundamental Rights Agency, Annual Report, 2018, 'Shifting perceptions – towards a rights-based approach to ageing,' p. 7.

Why is any justification required to talk about the social rights of older persons? Are "social rights" – like all other human rights – not universal in nature? And, if so, and to the extent that there are justifications for focusing or dedicating or refining social rights to address specific social groups, such as women, or children – why is there such a justification with regard to "older persons" specifically? In other words, what is the justification for viewing "older persons" as a distinct social group, and "age" as a distinct social category, within the context of social rights?

In our view, this is not a simple question to answer. We would suggest that the key to understanding the answer lies in the social phenomenon of "ageism". But what is ageism, and why has it become so relevant and important to address? The answer lies in the following basic understandings:

that unlike "ageing" or "chronological age" which are objective and neutral, old age, and the social group of "older people" is an outcome of human invention and socio-cultural construction,

that Europe (and the world) is experiencing a demographic revolution in which "older persons" are becoming a significant social group while traditional social institutions are undergoing a transformation with regard to the place and role of older persons within societies,

that older people, both individually and as a social group, experience "ageism" – a combination of mostly negative stereotypes, prejudices, and discrimination, which are based on the social categorisation of age. Ageism causes significant infringements of the human and social rights of older persons, and

that there is a growing realisation that in order to advance and protect the human rights of older persons, and to eradicate ageism, there needs to be not only a struggle for "formal" / liberal-based equality, but also a more material and contextual equality, while also recognising the unique social identity of "being old" and the meaning of being part of the "older persons" group – all within an ideology of ageism.

1.1 The importance of terminology: age, ageing, old age and older persons

Ageing is a universal, biological process, which every living organism on the planet earth experiences. It begins with the birth or creation of the organism and ends with its death. This biological process of ageing is objective: it can be seen, observed, and can be studied by means of various bio-physio-chemical examinations.

Ageing is also a natural process: it is not a pathology, a disability or an illness. Although at some stages in history, the bio-medical professions and sciences assumed that ageing is the outcome of a pathological process, which only needs to be found and “cured” - this view has been mostly abandoned.

The ageing process holds real life implications. Part of the natural ageing process includes the gradual loss of abilities of the living organism with the passage of time. In humans, for example, this process can be experienced in the decline of physical strength, and cognitive abilities, or in the weakening of the immune system as one ages.

It is important to note that there is no intrinsic value to this natural biological process of ageing: it is neither good nor bad. Like many other bio-physio-chemical natural process, it simply happens, and it is part of nature. It is part of the essence of the human existence and part of the natural characteristics of life on planet earth.

Why we age is still, to a large degree, a mystery. There are various biological theories which try to explain why and how we age. None of these theories, however, has been fully proven or validated. This mystery has been with us for thousands of years, as the quest to find the “fountain of youth” which will make us immortal, has almost always been part of human aspiration, and this quest to “solve” the key to ageing is still with us today.

As “ageing” is an ongoing “process”, “age” is simply the attempt to “measure” and quantify this process.

This attempt can be subjective (how old one “feels” or “believes” he or she is), or can be objective (that is, measured in objective scales). One objective way of doing so is to measure the ageing process using time measurement: or what is known as “chronological age”. Chronological age is therefore an attempt to objectively and neutrally, provide a universal yardstick to measure the ageing process using known time units (years, days). Here again, this “measurement” instrument is – in and of itself – neither good nor bad. It has no intrinsic value, and a mere number (for example, 27 or 78) says

nothing – in and of itself – about the person or organism in question.

Ageing is a universal, biological process, which every living organism on the planet earth experiences. It begins with the birth or creation of the organism and ends with its death.

However, it should be noted that the interesting feature of “age” is that it can be more complicated, diverse and richer. There are those who argue that every person has actually more than one age, and “chronological age” is only one of them. For example, the late Israeli geriatrician, Prof. Marian Rabinowitz (Rabinowitz, 1985), argued that one can identify no fewer than six different “ages”: chronological, psychological, social, biological, medical, and familial. Naturally, each of these “ages” uses different criteria to “measure” age. Therefore, in many cases, we need to clarify and define what we mean when we refer to someone’s “age”.

Unlike aging or age – “old age” or “being old” is not neutral nor objective: it is founded on culture and values.

It is only after one realises and fully understands what ageing and what age mean – that one can appreciate the essence of the concept of “being old” or being an “elderly/older person”. Unlike ageing or age, “old age” or “being old” is neither neutral nor objective. It is not a natural concept. It is a totally human “invention”, “creation” or “construction”. Biologically, physiologically or from any other scientific discipline, there is no “one point of time” or “one specific event” which turns a person into “old”. Nothing in nature transforms a human being or any other organism into being “old”. Being old

is that outcome a socio-cultural process, which is embedded in time and space, that results in “naming” a person or a group of people as “elderly” or “old”.

This subjectivity and relativity of the definition of “old age” is revealed in various arenas. For example, within law, “old age” may be defined differently for different purposes: the age for entitlement to an old age pension; the process for renewing a driving license changes due to old age; the age for eligibility for various discounts; and more. For example, from a sociological perspective, different societies define “old age” differently (for example, studies based on the European Social Survey have shown how people in different countries regard different chronological ages as the marker for being old). And from a psychological perspective, for example, people have different subjective understandings of their being “old” and how their subjective age compares with their objective age. And, finally, within the same society, different age groups can answer the question “who is old” in different ways and in comparison with their own age.

This subjectivity and relativity of the socio-cultural concept of “being old” or defining “who is old” provides a very rich and diverse anthropological reality, with societies and social systems defining “old” and attaching to it moral and essence in very different ways. For example, some cultures and societies in history, have given old age and the elderly high praise and social status. In these societies, the “elders” would have been viewed as the leaders or as holders of knowledge, wisdom or wealth. On the other hand, some cultures and societies may have constructed old age as a burden, as inability or weakness. Such societies would possibly abandon their elders or sacrifice them in order to preserve or save the young (De Beauvoir, 1972).

Finally, it is only after we realise that there is a natural and objective process of ageing that can be measured via the concept of age, which in turn can then be used and utilised to subjectively define “old age” that we can understand who older

Being part of the social group of “older persons” is eventually an outcome of a socio-cultural construction, which may change through time, place and context.

persons – as a distinct social group - are. Older persons, according to the logic described above, are the social group of people which a society - in a specific context of time and place, and depending on culture, traditions, political power relations, institutions, rules and laws – decides to identify and categorise as being “old”. The reverse side of the coin is that those people, through the internalisation of the views and norms of the society they live in, self-define themselves as being old. The essence of this definition is that being part of the social group of “older persons” is eventually the outcome of a socio-cultural construction, which may change in time, place and context.

This understanding is of much importance for two key reasons. First, it is not up to the individual to “decide” or “choose” if he or she is “old”. Even if a person subjectively feels “young”, or politically does not define himself or herself as an “elderly”, this does not matter at the societal level. Since it is the society which defines and constructs this concept, the individual’s perspective is irrelevant – and a person will be treated as if he or she is “old” regardless of their own definition (for example in the context of receiving the old-age pension).

Second, since there is nothing “objective” regarding the actual moral/value content and meaning of “being old”, our understandings and moral evaluations can change over time, and through social action. In other words, being old is a dynamic identity, and it is in our hands to change it.

1.2 The ageing of Europe

Global ageing will be a major determinant of long run social and economic development in the European Union.

As described in Doron (2007), there is no doubt today that global ageing will be a major determinant of long-run social and economic development in the European Union (Kinsella and Velkoff, 2001). The extent of the demographic change is dramatic and will deeply affect future labour, financial and goods markets. The expected strain on public budgets and social security in particular has already received considerable attention. However, ageing poses many other economic challenges that threaten productivity and growth if they remain unaddressed. Within this global context,

Europe is, and is projected to remain, the area of the world most affected by ageing.

There is a wealth of publications and analyses regarding the ageing of Europe. One of the leading publications in this field is “Ageing Europe – Looking at the Lives of Older People in the EU” (Ageing Europe, 2020). We will hereby share some key statistical data, to reflect and exemplify the statistical meaning of the demographic ageing revolution in Europe. According to “Ageing Europe”, there were 101.1 million

older people (defined as those aged 65 years or over) living in the EU at the start of 2018. This equates to almost one fifth (19.7%) of the total population. During the next three decades, the number of older people in the EU is projected to follow an upward path, peaking at 149.2 million inhabitants in 2050. This significant increase is not only in terms of numbers, but also in terms of older persons' relative share in the population as a whole, which is projected to reach 28.5% of the EU population in 2050.

Demographic change is a complex human phenomenon. While sometimes, within a limited socio-geographic and historic context, it might be easily explained, in most cases it involves a complex web of socio-economic factors. Current European demographic change is not easily understood. Without pretending to fully explain it, a few of the dominant factors will be detailed below.

Bloom and Canning (2004) describe how improvements in health and the related rise in life expectancy are among the most remarkable demographic changes of the past century. The growing multidisciplinary research consensus attributes the gain in human longevity since the 1800s to the interplay of advances in medicine and public health against a backdrop of new modes of familial, social, economic, and political organisation (Kinsella and Phillips, 2005, p. 12). This has resulted in an almost doubling of the average life expectancy at birth from 40 to 50 years in the mid- 19th century to more than 80 years today.

Specifically, within the European context, and as described in *Ageing Europe* (p. 48): "Life expectancy at birth has been increasing for a considerable period in the European Union (EU): official statistics reveal that life expectancy has risen, on average, by more than two years per decade for both sexes since the 1960s..."

"In 2017, a woman aged 65 years living in the EU could expect to live an additional 21.4 years, while the corresponding figure for a man was lower, at 18.1 years. Among the EU Member States, the highest life expectancy at age 65 was recorded in France -23.6 years for women and 19.6 years for men." (p. 49).

Fertility is another major determinant of a nation's population and the primary driver of the Europe Union's demographic transition (England & Azzopardi-Muscat, 2017). As noted by Sleenbos (2003), traditionally, concerns about fertility have focused on "excess" fertility, mainly in developing countries, and on its implications for natural and environmental resources. However, European Union Member States are confronting a very different problem today: fertility has declined for several decades to levels that are, in most of them, well below those needed to secure generation replacement. This decline, which started in the late 19th century, has been widespread throughout Western Europe, and appears to have been fairly independent of levels of economic development.

As a consequence of the declines observed in most European countries, fertility rates have reached levels that are well below those needed to secure generational replacement (roughly 1.53 children per women within the EU) (England & Azzopardi-Muscat, 2017). Current levels of fertility — such as those recorded in several countries in southern and continental Europe — imply, for given mortality and migration rates,

that the population of these countries may shrink to about a third of today's level in as little as one century (Sleeboos, 2003).

Finally, while the combination of a dramatic increase in life expectancy and a decrease in fertility rates would have resulted in a dramatic demographic change in any event, this has been amplified, by what is known as the mid-twentieth century baby-boom. This phenomenon was the outcome of a significant increase in fertility rates in many countries around the globe, but especially in Europe, during the post-World War II period (referring commonly to the years 1945-1960). This generation is now entering its "old age", and it will continue to be part of Europe's population for the next 5 to 6 decades. The European baby-boomers are of importance in the context of ageing Europe for two main reasons: firstly – they were followed by what is called "the baby bust" generation, a generation that is characterised by a much lower fertility rate (as described above). secondly – the baby-boomers are commonly considered to be much more educated, individualistic, and human-rights oriented compared with earlier generations.

1.3 Some unique aspects of the ageing of Europe

Europe is not only ageing: in fact, the fastest growing segment of the population are not "older persons" but what are known as "the older old" (or the "very old"),

Perhaps the most remarkable aspect of the projected changes to the EU's population structure concerns the progressive ageing of the older population itself.

that is, those above the age of 85. As described in "Ageing Europe" (p. 15), "perhaps the most remarkable aspect of the projected changes to the EU's population structure concerns the progressive ageing of the older population itself: the relative importance of the very old (people aged 85 years or more) is growing at a faster pace than any other age group. Between 2018 and 2050, the number of very old people in the EU is projected to more than double, up by 130.3 %. To give some idea of the magnitude of this change, the number of people aged 85 years or over is projected to increase from 13.8 million in 2018 to 31.8 million by 2050, while the number of centenarians (people aged 100 years or more) is projected to grow from close to 106 000 in 2018 to more than half a million by 2050."

Another key aspect that one cannot ignore is the "feminine" nature of European (and human) ageing. As described in Ageing Europe (p. 17), "women consistently outnumber men at older ages within the EU population. In recent years, this gap has started to narrow, as an increasing number of men survive to older ages. In 2018, there were, on average, 1.32 women aged 65 years or more in the EU for every man of the same age. The biggest gender imbalances were recorded in the Baltic Member States: for example, there were more than two women aged 65 years or more for every man of the same age in Latvia.... [T]his gender gap was most apparent among very old people (aged 85 years or more). In 2018, there were more than twice as many very old women in the EU (compared with very old men), a ratio of 2.08:1."

1.4 Combatting ageism whilst embracing the ageing of Europe

Once we have accepted that there is a social group which is socially defined as being “older people”, that this group is growing significantly, and that it is currently part of one of the most dramatic demographic changes in human history, the question is “so what?”. Why is the realisation of the subjective and socially constructed nature identifying the social group of “older persons” important? And why is it related to human and social rights? In our view, the only way to be able to satisfactorily answer these questions is through understanding the phenomenon of ageism.

Ageism is a relatively new concept. It was first coined by Prof. Robert Butler in the late 1960s. The historical definition of ageism, which usually serves as the starting point to any discussion and a deeper understanding of it goes as follows:

“Ageism can be seen as a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorised as senile, rigid in thought and manner, old fashioned in morality and skills ... Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.” (Butler, 1975).

As can be seen, this historical definition compared two principal components of ageism, stereotypes and prejudices against old age, with those found in sexism and racism – some much better known and historically established social phenomena.

However, and as described by Doron & Kafka (2015), many other attempts have been made since then to offer more precise or more comprehensive definitions of the term ageism (Bytheway, 1995; 2005). Thus, for example, Palmore (1990) defined the concept as “every prejudiced opinion or discrimination against or for any age group” (p. 4). In other words, ageism for Palmore can be manifested against other age groups, not just older persons, and can be not only negative but also positive.

One of the most comprehensive attempts to define the term was made by Iversen, Larsen and Solem (2009), who proposed the following definition:

Ageism is defined as negative or positive stereotypes, prejudice and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being “old” or “elderly”. Ageism can be implicit or explicit and can be expressed on a micro-, meso- or macro-level.

As can be seen in this definition, ageism includes all the classic social psychological components: cognitive (stereotypes/how we think); affective (prejudice/how we feel); and behavioural (discrimination/how we behave). It encompasses the understanding that ageism can operate both consciously (explicitly) and unconsciously (implicitly). And, finally, it tries to emphasise the fact that ageism operates on all social levels: micro, meso, and macro. The basic level is the micro – personal and interpersonal – which appears in the form of refraining from personal communication, exhibiting a paternalistic attitude, and talking down to older persons. The intermediate, or meso,

level refers to the family and one's social network. The highest level is the macro, which includes the social structuring of old people and the subjects of policy and legislation.

But why? How can we explain ageism? Unlike sexism, racism or even ableism – everyone will age one day, and most of us would prefer to age than die young – hence it could be argued that ageism is different and cannot simply be explained by pure group difference. Indeed, many different theories have attempted to explain the causes of ageism. It is beyond the scope of this paper to present them all. Instead, we will present a few very different theories, stemming from very different perspectives.

One of the more well-known, individually based (micro) theories in this field is that of the Terror-Management Theory (TMT). TMT explains how people's awareness of their mortality causes them to fear old age, because death is associated almost exclusively with old age.

Another way by means of which ageism may be explained is that of social identity theory (SIT), which proceeds from the assumption that a person aspires to attain a positive self-identity. Self-identity is constructed to a large extent on an individual's group identity, and therefore a positive feeling towards the group to which the person belongs will also create a positive feeling in regard to self-identity. Attitudes towards the other are less positive than attitudes toward "us", thus causing the individual to feel good with his/her belonging to the group. Thus, self-identity enables a distinction to be made between young and old as belonging to groups, the young distinguishing themselves from the old in attributing positive traits to their young age, and vice versa.

A totally contrasting attempt to explain and theoretically understand ageism is founded on a macro-level approach and on the industrial-age-based generational division and segregation. For example, according to one such approach, until the industrial revolution, people of all ages lived, worked, and were engaged with each other. It was only as part of the functional division between three-stages-of-life, which fitted well the needs of the capitalist and industry-based economy, that human society was split into three distinct and separated groups: the young/the children, whose goal was to grow and gain the skills needed in order to become the future workers; the workers, whose purpose was to be the engine of the economy, as well as the "manufacturers" of future generations of workers; and, finally, "the elderly"/the pensioners, who did not have any significant role, other than enjoying a short period of relative freedom before they died. One of the outcomes of this new division was not only the irrelevance and insignificance of the older population, but also their exclusion and social disconnection from the rest of society.

There are naturally many other different theories in this field. However, they all share a similar understanding: while ageism may resemble other "-isms" (for example, sexism or racism), its main roots are unique and different: it is founded on the unique human social construct of what it means to be old – and nothing else.

It should be stressed that ageism exists and is manifested in almost all spheres of life. There are numerous empirical studies which exemplify and document how ageism affects the lives of older persons. For example, in the context of healthcare,

Ageism exists and is manifested in almost all spheres of life.

various studies have shown how different health-care professionals hold stereotypical views regarding older persons, and in many instances prefer to work with children or young families and rather than with the older population. Moreover, numerous studies have also shown how, compared with young patients, the real-life medical/care-related treatment of older patients is lower in quality and out of line with the

professional care standards in the field.

For example, in the context of the labour force, there is a large body of empirical data showing how older workers are discriminated against. This starts with the recruitment process (older workers are less frequently invited to interviews); it goes on to promotion (in their later years, older workers are less often sent on courses or to training sessions), and ends with exiting the work force (there are various countries where mandatory age-based retirement is still the norm). On a daily basis, the treatment experienced by workers in older age groups is based on “group-based” stereotypes rather than on their individual abilities.

Or, another example, in the context of the public media, evidence shows how, in very different platforms, older persons are stereotypically portrayed. Whether it is in children’s books (older people portrayed as archetypes of evil or witches), or advertisements (either older persons depicted as incapable or as “ageless”), or in the news section (most commonly with a focus on cases of elder abuse and neglect, while totally ignoring them in positive contexts), in all these cases, older people are visible and characterised in very typical moulds: ageist moulds.

Overall then, the bottom line of this rich and growing empirical data is clear: older people – on the sole basis of being categorised as being “old” – experience, on a daily basis, and all over Europe, mostly negative prejudices, biases, stereotypes and discriminatory behaviours. They are stripped of their individualistic and humanistic nature and are all thrown into one big “bucket” of a group generalisation: of being elderly.

The reality described above has a direct impact on older persons. As summarised in the recent World Health Organization (WHO) report (WHO, 2021), “ageism has serious and far-reaching consequences for people’s health, well-being and human

Ageism has serious and far-reaching consequences for people’s health, well-being and human rights.

rights. For older people, ageism is associated with a shorter lifespan, poorer physical and mental health, slower recovery from disability and cognitive decline. Ageism reduces older people’s quality of life, increases their social isolation and loneliness (both of which are associated with serious health problems), restricts their ability to express their sexuality and may increase the risk of violence and abuse against older people. Ageism can also reduce younger people’s commitment to the organisation they work for. For individuals, ageism contributes to poverty and financial insecurity in older

age, and one recent estimate shows that ageism costs society billions of dollars”. (WHO, 2021, p. XVI).

Finally, the significance of ageism is not only on how it shapes, influences, and impacts the ways societies and people shape their views, attitudes, and behaviour towards older persons. Ageism impacts older persons' living experience in yet another very significant way: older persons internalise the social expectations which are embedded in ageism. They believe they have to behave "according to their age". This internalisation of social expectations can result in significant real-life changes. For example, in various experimental settings, it has been shown that cognitive and physical achievements of older persons (for example, in cognitive tests or physical rehabilitation programmes) are much lower once the older participants are exposed to negative descriptions and portrayals of old age.

Older persons internalise the social expectations which are embedded in ageism.

1.5 A 21st century human rights agenda – uprooting ageism in law and practice

As has been described above, ageism allows "younger" people to view "older people" as different, and not only place them together as a unique and distinct social group, but to treat them differently. In an attempt to address and combat ageism, various intervention schemes have been provided. For example, inter-generational activities, promoting the joint actions where young and old meet, interact, work, or engage on an equal basis, in order to break down stereotypes and biases. For example, media campaigns, museum exhibitions, movies or media shows which provide more nuanced, less shallow or stereotypical visions and stories about older persons. Or various other social and cultural programmes and initiatives which break down the existing structures of the public positioning of the older population.

However, this report stems from a different social approach: one which believes in law and human rights as instruments for social change and for social transformation. In other words, as will be described in the following chapters, looking into the international developments around the human rights of older persons, a clear "path" can be seen: one which begins with the invisibility of older persons as a distinct and unique social group, which results in their almost total absence from the human rights discourse which has emerged since World War II. This socio-legal invisibility, which only mirrored the phenomenon of ageism – which was described above – was replaced by yet another ageist approach: one which focuses on a social welfare approach. Older persons, being viewed as a new "social problem" needed a solution in the guise of new social policies: policies to keep them healthy, active, and engaged as economically contributing actors. It was only in the last century that there has been an attempt to make a real paradigm shift in thought and conceptualisation: one that places older persons in the centre, one that builds personhood, makes them visible, and allows their voice to be heard.

It is within this new paradigm shift that a new element has emerged: an ideological element, which will hereafter be referred to as "ageivism". Ageivism, it will be argued, is a key element which is currently missing in the discussions around active ageing

(as well as other “positive” discourse about social policies for old age). It is unlike ageism (which refers to social phenomena, namely, attitudes, prejudices or beliefs regarding older persons):

“Ageivism” refers to an ideology: a distinct cause and call for social action (echoing similar “isms”, for example feminism, or socialism). Ageivism provided the ideological basis to advocate for social action for rights, powers and opportunities for older persons based on the grounds of political, social and economic principles of identity, dignity and social justice.

Ageivism derives from two well-known bodies of knowledge: one – the politics of identity; the other – social activism. The politics of identity is not new to the field of social justice and social policy. Women, Afro-Americans, Persons with disabilities, the LGBTIQ community have all used this kind of discourse to utilise their social struggle for equality, dignity, human rights, and social justice (Polletta and Jasper, 2001). One very clear and forceful example of how cultural-symbolic social justice is no less important to economic-distributional justice can be found in the feminist writings of Prof. Nancy Fraser (Fraser, 1997). It is beyond the scope of this short chapter to fully discuss and implement Fraser’s argument in the context of older persons as this has been already done (Doron, 2015). For the purposes of this chapter, it would be sufficient to argue that older persons experience both symbolic and cultural injustices which justify the development of self-identity politics similar to other excluded and disadvantaged social groups.

Yet, it is surprising in this context to see how relatively little of these kinds of rhetoric and calls for action have been used within gerontological discourse. The language of “oppression”, “humiliation” or “invisibility” is not new to critical gerontology. However, the political transformation and the formation of the “older person’s political identity” or “grey power”, have so far played a very limited role in the development of the theoretical, empirical and political landscape of gerontological social policy discourse.

This lacuna has been very recently exposed during the international discussions at the UN level around the need for a new international convention for the rights of older persons. During these discussions, the language of social justice or political identity has been almost totally missing or simply ignored (Doron, 2015). Many of the debates, discussions, and policy papers are “blind” to the politics of identity of older persons, or to their unique historical and contextual experiences as a social group.

Ageivism is however not only about the evolution of “older persons’ political identity”. It is also about social action, social movement, and activism. Once again, these terms are not only historically and theoretically rich and complex, but entail diverse sociological, psychological and political contexts about which a full discussion is beyond the scope of this article (Tilly, 2004). However, in order to provide some context, we will use Suanders’ (2013) definition of “activism”, which is: “[T]he action that movements undertake in order to challenge some existing element of social or political system and so help fulfil movements’ aims”. (p. 9).

As described by Doron (2020), in reality, almost any reader can envision various forms of collective actions that were taken since the early 20th century by women, and later on, in the 1960s, by Afro-Americans within the civil rights movement – which were then followed up by other racial and ethnic groups, students, persons with disabilities, gays, lesbians, and others – to feel and sense the real-life meaning of “activism”. In many ways, all these social movements responded to what they viewed as not only their social “invisibility” but also oppressive discrimination, capitalist intrusions, bureaucratic domination, and symbolic humiliation (Buechler, 2000).

From this historical perspective, important questions can (and should) be asked: have the collective social-identity processes matured in the context of the group-identity of older persons? Can the various historical examples in this field, for example, the development of the Gray Panthers movement (Jacobs, 1980); the recent establishment of Senior Citizens' political parties (Vincent, 2003); the new movement for a new international convention for the rights of older persons (Doron and Apter, 2010); or local elder activists' actions such as “The Raging Grannies” (Sawchuk, 2009) – all be signs of a new older persons' social movement?

There are already those who claim that the next generation of social movement will indeed be that of older persons (Kohn, 2010, 2011). Yet, so far, the questions presented above, and their empirical examination have received relatively limited attention in existing gerontological literature and research (Binstock, 2005; Binstock, 2010; Schulz and Binstock, 2008; Vincent, 2005). More importantly, they are rarely discussed or incorporated within the existing conceptualisation of the “active” and “positive” frameworks regarding social policies towards older persons. It is therefore inevitable, that these questions will need to find their answers in the coming future. (Doron, 2020, p. 259).

Therefore, and as part of this document's analysis of the social and human rights of older persons, it not only necessary to understand what age, ageing and old age mean. It is also not enough to understand the social phenomena of ageism, its roots, and impact. It is also necessary to understand that there is a need for a paradigm shift from a social problem-based model to a human rights approach model – which is based on the ideology of ageivism.

2. The United Nations and other regional initiatives

“A United Nations convention on the rights of older persons that applies to older persons everywhere would provide a clear baseline, enshrined in law, to guide better policies, laws and services in future. It would put solidarity and respect for everyone’s dignity to the fore as common values that we need to uphold at all times. It would challenge community attitudes, behaviours, norms and social constructions that keep us from living fairly and freely as equals when we are older. It would amplify the voices of older persons and help ensure that people, no matter what their age, can live their lives to the full.”

AGE Platform Europe...

Time for a UN Convention on the Rights of Older Persons, 2020. p.3

In this chapter, we chart the progression of ideas and framings concerning the human rights of older persons at the UN level.

A brief mention is made of the legally binding instruments adopted by the Organisation of American States and the African Union.

The overall trend – whether at UN level or in other regions – is towards the complete rejection of ageism. This helps give context to the pioneering provisions of the European Social Charter on the social rights of older persons.

In general, one can identify a three-stage progression in the way the UN has viewed, understood, and acted upon the field of human rights of older persons:

- (1) The invisibility stage – where “older persons” did not “exist” under UN instruments,
- (2) The economic development / social problem social-policy stage – when the UN recognised the demographic “age revolution” and viewed it as a social development “problem” which needs to be solved via targeted socio-economic policies; and, finally,
- (3) The current struggle for recognition and building the unique personhood of older persons as well as group-identity, along with re-framing the international discourse in this field within a human rights discourse.

2.1 UN system - Stage 1: invisibility in UN instruments (1940s-1980s)

Generally speaking, from the early days of the UN, for example, starting from the UN Universal Declaration of Human Rights (1949) and until the 1980s, older persons, as a distinct social group with unique interests and rights, were unacknowledged,

Generally speaking, from the early days of the UN and until the 1980s, older persons, as a distinct social group with unique interests and rights, were unacknowledged, and older persons were essentially invisible.

and older persons were essentially invisible¹. For example, when the UN's Universal Declaration of Human Rights (UDHR), the general international commitment for equality in rights and freedoms, was drawn up in 1948, it did not include age as a legally-prohibited distinction². Moreover, the Universal Declaration included very few references to older adults as a distinct category of people needing human rights protection³.

Using this human rights reference point, the following, well-known human rights treaties the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contained almost no explicit or direct references to older persons.

It was only many years later, in 1995, that a unique and direct step was taken to secure the human rights of older people by the Committee on Economic, Social and Cultural Rights, in publishing its General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons. This General Comment, for the first time, interpreted and constructed the different relevant articles of the ICESCR as they apply specifically to older persons. Tangentially, General Comment No. 19: The Right to Social Security (2008) clearly articulates these rights for older people.

Once the UN moved to group-specific conventions, such as the Convention on the Rights of the Child (1989/1990), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it became clear that a similar approach would be required for older persons.

Once again, as was the case in the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979/1981) was also almost totally silent with regard to the specific human rights of older women. It was only many years later, and via its General Recommendation No. 27 on older women and protection of their human rights (2010), that the gendered nature of ageing was directly acknowledged, and the specific human rights issues concerning older women recognised.

It is interesting to note that even in the most recent UN human rights convention, the Convention on the Rights of Persons with Disabilities (CRPD), which includes key binding features that are of great importance and relevance to the rights of

1. See in general Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 *Am. U. Intl. L. Rev.* 915, 953 (2003); and see also Israel Doron, *From national to international elder law*. 1 *Journal of International Aging, Law and Policy* 45 (2005). See also: Doron, I., & Spanier, B. (2012). *International convention on rights of older persons: Where we were, where we are and where we are going?* *Global Ageing*, 8(1), 7-16.

2. See *Universal Declaration of Human Rights 1948*. In Israel Doron and Kate Mewhinney, (Eds.) *The Rights of Older Persons: Collection of International Documents*. Jerusalem, Israel: IFA (2007) [hereinafter "*The Rights of Older Persons*"], p. 443. Article 2 of the Declaration states that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

3. E.g. article 25, which provides for the right to "a standard of living adequate for the health and well-being of himself and of his family", details specific life events relevant to this right as follows: "unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control". See *The Rights of Older Persons*, *ibid*, p. 444.

older persons (for example, those involving legal capacity, guardianship, housing and accessibility), lacks specific references to older persons as such (unlike women in Article 6, or children in Article 7).

It is not surprising, therefore, that in various historical analyses and reviews in this field, the following conclusion (for example, that of Rodriguez-Pinzon and Martin, 2001) was reached in regard to the traditional and historical body of human rights mechanisms at the UN level:

“...A strategy to have a comprehensive legal instrument on elderly rights is missing at the international level in both universal and regional systems. There are very few provisions in international law that directly address elderly rights. There are isolated efforts by certain international bodies to systematically refer to the rights of the elderly when interpreting their corresponding conventions . . . However, there is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly rights convention in place. It is, in fact, the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.” (p. 1008).

2.2 UN system - Stage 2: ageing as an economic development/social problem

The abovementioned invisibility, not to mention the discounting of the humanity of older persons both as individuals and as a distinct social group, has been dramatically transformed at the UN level since the 1970s, a time when the seeds for the second stage can be found. In general, the second stage of the UN approach to

The second stage of the UN approach towards older persons was characterised by a global recognition of the demographic ageing revolution, while conceptualising it as a social problem which needed a social solution in the shape of well-planned social policies.

older persons is characterised by a global recognition of the demographic ageing revolution, while conceptualising it as a social problem needing a social solution in the shape of well-planned social policies⁴.

In general, since the 1970s, a wealth of policy and international soft law documents in the field of older persons' rights have been adopted by UN Member States. This significant body of international declarations, proclamations, and plans of action are in many cases rich in content and knowledge. However, they all share one characteristic: they are not legally binding and cannot be internationally or nationally enforced. Moreover, they do not use the language of rights at all, although they show

4. See: Doron, I., Brown, B., & Somers, S. (2013). International protection for the human rights of older people: History and future prospects. In P. Brownell and J. Kelly (Eds.) *Ageism and Mistreatment of Older Workers: Current Reality, Future Solutions* (pp. 165-180). NY, New York: Springer.

support and attention regarding the situations of older people. It is beyond the remit of this document to cover all the many different policy documents produced down through the years within this UN framework, but we will try to point out some key documents and developments.

MIPAA is a comprehensive policy document that touches upon almost all key areas relevant to older persons, not only identifying these areas but also setting priorities and objectives.

This process began more than 40 years ago, as part of the 1974 UN World Population Conference, which adopted the World Population Plan of Action. A crucial part of this plan of action was the recognition that the world is ageing and that there is “an urgent need...for the development of social security and health programs for the elderly.” As an outcome of this plan of action, the UN General Assembly adopted a series of resolutions that culminated in a decision to convene, for the first time, a World Assembly on Ageing.

In 1982, the World Assembly on Ageing created the Vienna International Plan of Action on Ageing (VIPAA) which was endorsed by the UN General Assembly (United Nations, 1982). This Plan of Action included significant declarations and statements. For example, in the Preamble, it reaffirmed the belief that “the fundamental and inalienable rights enshrined in the Universal

Declaration of Human Rights apply fully and undiminished to the aging” (p. 30). Moreover, it declared that all countries will “develop and apply at the international, regional, and national levels, policies designed to enhance the lives of the aging as individuals and to allow them to enjoy in mind and in body, fully and freely, their advancing years in peace, health and security”. VIPAA concentrated on two facets of population ageing: humanitarian (responding to the specific needs of older persons); and macro-economic or demographic (dealing with the implications of an ageing population for socio-economic policy). The latter focused on general concepts meant to ensure that older persons did not become a drain on national resources. (UN Department of Economic and Social Affairs, 2008).

As part of the implementation of VIPAA and marking its tenth anniversary, the UN General Assembly (GA) adopted the UN Principles for Older Persons (United Nations, 1991), which correlate closely with the rights recognised in the ICESCR. These Principles included independence, participation, care, self-fulfilment and dignity. This document was followed by yet another UN General Assembly (GA) Resolution, known as the Proclamation on Ageing (United Nations, 1992). Among other things, the Proclamation established the International Day of Older Persons, and declared 1999 as the International Year of Older Persons.

The final important stage in the development of social policy / soft-law instruments in the field of ageing and older persons came about in 2002, during the second World Assembly on Ageing in Madrid. Similar to the Vienna Assembly, this meeting concluded with the creation of the Madrid International Plan of Action on Ageing (MIPAA) (United Nations, 2002). MIPAA was the product of the convening of over 156 countries by the then UN Secretary General, Kofi Annan. Unlike VIPAA, which

included more general declarations on humanitarian interventions and social welfare, MIPAA adopts a life-course, inter-generational, and developmental approach. It is more concrete, by setting both priority directions and specific objectives. The general spirit of the document is towards promoting the participation of older persons as citizens with full rights. It seeks to ensure that persons everywhere are able to age in security and with dignity. MIPAA is a comprehensive document that touches upon almost all key areas relevant to older persons, not only identifying these areas but also setting priorities and objectives.

However, despite its ambitious goals, MIPAA is only a social policy document and not a binding human rights instrument⁵. Its major drawback is that it is a non-binding document; it lacks clear targets and its implementation and monitoring are based solely on the goodwill of its signatories. It should be noted that, in an attempt to improve the implementation of MIPAA, the UN established a review and appraisal process which takes place every five years (starting in 2008), and we are now in the process of the fourth 5-year cycle. Nevertheless, various reports about and evaluations of MIPAA have shown that, despite its success in pushing governments to take measures in the field (for example, adopt national action plans, along with some specific new legislation), it focuses on issues such as care or social protection without addressing the full spectrum of civil, political, economic and cultural rights (for example, see the IE Report of 2016)⁶.

2.3 UN system – Stage 3: the struggle for recognition, personhood, group identity and human rights

A combination of, on the one hand, the top-down view recognising the failure of the social policy approach, with the bottom-up, grassroots voice of older persons' organisations calling for change, triggered the UN to move to its current stage. This third and final stage (the current one) is characterised as an attempt to re-frame the global discourse around older persons and to advance a paradigm change from a social welfare / social problem approach, to a human rights approach founded on the political recognition of older persons. A significant aspect of this re-framing is the movement working towards establishing a new international human rights convention for the rights of older persons⁷.

Although other actions can be traced, a symbolic and important first point of reference was the UN Expert Meeting Group that was held in Bonn, Germany (April 2009)⁸. The international group of experts in the field of elder law held in-depth debates that

5. See: Alexandre Sidorenko & Asghar Zaidi, International Policy Frameworks on Ageing: Assessing Progress in Reference to the Madrid International Plan of Action on Ageing, 16 J. SOC. POL'Y STUD. 1, 141 (2018).

6. See: GAOR, Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons on Her Mission to Costa Rica, U.N. Doc. A/HRC/33/44/Add.1, 123, at 20.

7. See: Israel Doron & Itai Apter, The Debate Around the Need for an International Convention on the Rights of Older Persons, 50 GERONTOLOGIST 5, 586 (2010).

8. See: ESA SOCDEV, Report of the Expert Group Meeting "Rights of Older Persons," UN Bonn Expert Meeting, 2009 (5–7 May 2009, Bonn, Germany), <https://www.un.org/esa/socdev/documents/ageing/reportofegm.pdf>

resulted in various recommendations with regard to the advancement of the rights of older persons, including a specific reference to the need for a new convention:

“A convention on the rights of older persons would add additional weight in furthering, deepening and more precisely defining the rights of older persons. A convention would create obligatory and binding international law. Similar to the adoption of various other human rights instruments, Member States would undertake a threefold commitment when adopting such a convention: to respect, to protect and to fulfil the rights enshrined in the relevant text”.

Following the report from the UN Expert Meeting in Bonn, further high-level meetings were held by various UN bodies, including the UN OHCHR. In July 2010, the UN Secretary General presented a follow-up report on the Second World Assembly on Ageing to the UN General Assembly. The UN process culminated on 21 December 2010, when the UN General Assembly adopted Resolution 65/182, establishing an “open-ended working group (OEWG) for the purpose of strengthening the protection of the human rights of older persons”. The role of this working group was to consider the existing international framework for the human rights of older persons and to identify possible gaps, as well as how best these might be addressed, including by considering, if appropriate, the feasibility of further instruments and measures.

The OEWG held its first meeting in New York 18-21 April 2010. The purpose of this inaugural meeting was to set the relevant international socio-legal scene. The existing international human rights framework was presented, along with descriptions as to how it has been applied by the UN Human Rights mechanisms to protect older men and women. On 8 November 2011, the UN General Assembly, as part of its follow-up to the Second World Assembly on Ageing, decided to invite States and relevant bodies to “continue to make contributions to the work entrusted to the open-ended working group, as appropriate” and also to request “the Secretary General to continue to provide all necessary support to the open-ended working group, within existing resources.” In the five years that followed, the OEWG met annually and held various discussions about the existing human rights situation of older persons and the existing human rights instruments in regard to the question as to whether there is really a need for another new international human rights instrument in the field⁹.

Since its seventh meeting (in 2016, the OEWG changed its mode of deliberations and discussions, moving away from the broad issues on the normative gaps, or monitoring and enforcing existing HR instruments, to diving into specific elements and issues that need to be better addressed in order to allow older persons to fully enjoy their human rights. Thereafter, and until the most recent meeting (held in 2020), each meeting has focused on two or three topics (for example, equality and

9. For an overview and analysis of the OEWG proceedings see: Annie Herro, *The Human Rights of Older Persons: The Politics and Substance of the UN Open-Ended Working Group on Ageing*, 23 *AUSTRALIAN J. HUM. RTS.* 1, 90 (2017); Annie Herro, *Advocating a UN Convention on the Rights of Older Persons in the United Kingdom: The Case for a Radical Flank*, 11 *J. HUM. RTS. PRAC.* 1, 132 (2019).

non-discrimination, neglect and abuse, autonomy and independence), while allowing governments, experts, and non-governmental organisations (NGOs) to submit their respective insights and perspectives. This approach was adopted mainly because of the view that actual material content could be gathered to provide the foundations for a future convention drafting process, if, subsequently, the necessary agreement to move forward were to be reached (unfortunately, such an agreement is still far from being attained).

The OEWG initiative and the UN-level discussions about the need for a new human rights instrument dedicated to older persons experienced a significant boost from a different direction. While there have been critiques of the choice of special procedures within the UN Office of High Commissioner of Human Rights – until the launch of the OEWG there had been no dedicated special procedure for the human rights of older persons within the OHCHR. Moreover, the naming of an Independent Expert is considered a weaker signal than that of a Special Rapporteur, because it is more of an “advisory mechanism” than a “scrutiny mechanism”. Nevertheless, the Human Rights Council’s decision in 2013 to establish the mandate of an Independent Expert on the enjoyment of all human rights by older persons, which was followed by the appointment of Rosa Kornfeld-Matte as the first Independent Expert (IE) in the field, was a significant move forward. Her term in office (which ended only a few months ago when she was replaced by the new IE, Ms Claudia Mahler) included the submission of various country reports, thematic reports (including, for example, some on autonomy and care, and on AI and technology), along with a comprehensive report. It is worth mentioning that, in her comprehensive report of 2016, the IE reflected both on the paradigm shift from a predominantly economic and development perspective to ageing to the imperative of a human rights-based approach and on the need to move forward in the context of a new human rights (HR) instrument:

The creation of the mandate of the Independent Expert on the enjoyment of all human rights by older persons by the Human Rights Council in 2013 constituted a paradigm shift from a predominant economic and development perspective to ageing to the imperative of a human rights-based approach⁸ that views older persons as subjects of law, rather than simply beneficiaries, with specific rights, the enjoyment of which has to be guaranteed by States.

The Independent Expert calls on States to step up their efforts to determine the best way to strengthen the protection of the human rights of older persons and to consider the various proposals that have been made, notably the elaboration of a convention on the rights of older persons.

Finally, alongside the establishment and the ongoing work of the UN OEWG and the ongoing work of the OHCHR Independent Expert, another important development occurred at the UN level during this third stage of development: the formalisation of the NGOs and civil society organisations in the field. While NGOs and civil society organisations of older persons became visible and of significance as early as during the MIPAA discussions in 2002, their actions at the time were not coordinated, and the majority of organisations were service/care-providers organisations. This has changed significantly in the course of the OEWG deliberations, with the establishment of the Global Alliance for the Rights of Older People (GAROP). GAROP was established in 2011 as a strategic body which coordinates and leads hundreds of

NGOs and other civil society organisations from around the world working for a single cause: to strengthen the rights and voice of older people globally. More specifically, GAROP has been highly instrumental in the various OEWG deliberations, in ensuring that the clear and powerful voice of older persons is heard and is part of the UN process. Many of these organisations are advocacy and human rights focused, with the significant involvement of older persons themselves.

2.4 Regional action in the Americas – the Inter-American Convention on protecting the rights of older persons

This chapter cannot be concluded without mentioning two of the more significant developments in the international arena in the context of the human rights of older persons outside the UN framework. While the OEWG discussions continue to move forward, but without a clear global consensus with regard to the need to establish a new HR convention in the field, at the regional level, two regions have decided to move forward on this front.

The Inter-American convention is a very extensive treaty on the rights of older persons in the Organization of American States (OAS) system. Adopted in 2015, it has now entered into force. Currently, five OAS Member States have ratified. Its stated purpose is to:

Promote, protect and ensure the recognition and full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration and participation in society.

Among the many general principles that apply to the convention are the “dignity, independence, proactivity, and autonomy of older persons” (Article 3.c) and “participation, integration and full and effective inclusion in society” (Article 3.e). The prohibition of discrimination embraces multiple forms of discrimination based on overlapping grounds of age with aspects such as disability, living in poverty, indigeneity, etc. (Article 5).

The right to independence and autonomy embraces both decision-making and the right to choose one’s place of residence (Article 7). The convention states that State Parties shall ensure “respect for the autonomy of older persons in making their decisions and for their independence in the actions they undertake” (Article 7.a). This is further reinforced in Article 30 which is to the effect that the States Parties shall “take appropriate measures to provide access by older persons to the support they may require in exercising their legal capacity”.

The convention goes on to stress that older persons shall “have the opportunity, on an equal basis with others, to choose their place of residence and where and with whom they choose to live, and are not obliged to live in a particular living arrangement” (Article 7.b). These twin autonomy rights ground the next right which is the right to participation and community integration (Article 8).

There is a specific right or set of rights dealing with older persons receiving long-term care (Article 12). Unusually, it speaks of the need to develop care approaches that cater to long-term needs taking into account the wishes of the person to remain

living at home and the needs of their families and especially family carers. Therefore, it is not wedded to the idea that long-term care means residential institutions. That said, it goes on to provide for a web of safeguards for those living in long-term care institutions (Article 12).

In terms of material scope, the Inter-American Convention is quite similar to the European Social Charter and covers rights such as health (Articles 11 and 19), privacy and intimacy (Article 16), social security (Article 17), right to work (Article 18), education (Article 20), culture (Article 21), housing (Article 24), etc.

The convention envisages a Committee of Experts to review periodic reports and receive individual petitions (Article 35), as well as a Conference of States Parties (Article 34).

2.5 Regional action in Africa - Protocol to the African Charter on Human and Peoples' Rights on the rights of older persons in Africa (2016)

The original African Charter was adopted in 1981. Article 18.4 was to the effect that:

[T]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs

In 2016, the African Union adopted the above-mentioned Protocol¹⁰.

The anchor norms are equality (Article 4) and the elimination of discrimination (Article 3). The Protocol contains a right to make decisions. However, it also contemplates legal incapacity. In contemplating incapacity, it provides for a right to “legal and social assistance in order to make decisions that are in their best interests and wellbeing” (Article 5.2). One might characterise this as a right to supported decision-making, although it is unclear if the support is intended as a support to the person or if substitute decision-making is itself considered as a support (even though it supplants the person).

There is an interesting provision on care and support (Article 10). It requires incentives to be given to family members who provide care at home for older persons. It does not have a provision on independent or community living as such. However, under residential care (Article 11), it provides that residential care be considered optional and affordable. In this context, “optional” might mean a preference for community living – but that has to be extrapolated. There is a welcome (and unusual) provision on the protection of older persons during armed conflicts and in disaster situations (Article 14).

The periodic reports due under Article 22 of the Charter, which go to the African Commission on Human Rights, should cover legislative and other means for implementing the Protocol. Matters of interpretation may be transmitted to the African Court of Human and Peoples' Rights (soon to be integrated in the African Court of

10. For a general background regarding this development see: Doron, I., Spanier, B., & Lazar, O. (2016). Human rights of older persons in Africa. *The Elder Law Review*, 10, 1-44.

Justice). As of mid-2020, there were only 2 full ratifications (Benin and Lesotho). Fifteen ratifications are required for it to come into force (Article 26).

3. Regional reception of the new thinking: European regional developments

“Older persons have exactly the same rights as everyone else, but when it comes to the implementation of these rights, they face a number of specific challenges. For example, they often face age discrimination, particular forms of social exclusion, economic marginalisation due to inadequate pensions, or are more vulnerable to exploitation and abuse, including from family members.”

**Nils Muižnieks, former Commissioner for Human Rights,
Human Rights Comment,
“The Rights of Older Persons to Dignity and Autonomy in Care”,
Strasbourg, Council of Europe, 18 January 2018.**

In this section, we chart the progression of ideas and framings of the rights of older persons in the machinery of both the Council of Europe and the European Union.

With respect to the Council of Europe, we recount the evolution of policy from the perspectives of (i) the Committee of Ministers, (ii) the Parliamentary Assembly of the Council of Europe (PACE), (iii) the Commissioner for Human Rights, and (iv) the European Court of Human Rights (ECtHR). As will be seen, all have been trending towards a primary focus on autonomy and inclusion.

With respect to the European Union, we describe the evolution of policy from the perspective of (i) the underlying treaties which have steadily increased the capacity of the Union to act, (ii) the place of age in the various EU charters and instruments on rights (which owe much to the lead of the European Social Charter), (iii) landmark EU Commission staff papers on the subject, (iv) the work of the European Network of National Human Rights Institutions (ENNHRI) on age, (v) the work of the European Social Protection Committee (an advisory body to the EU Council of Social Affairs Ministers) on age and especially in re-thinking strategies on long-term care, (vi) the work of the EU Fundamental Rights Agency and especially on clarifying ageism, (vii) the EU Council Conclusions on age and against ageism, and (viii) the recent (January 2021) EU Green Paper on Ageing which is intended to lead to a new EU strategy on age.

As will be seen, although the above is far from comprehensive, the overall trend has been in favour of re-framing the rights of older persons from the newer departure points of autonomy, inclusion, participation and equality. This is being used to recalibrate the older agenda of protection and to plot a different course into the future. This is true in both the Council of Europe and the European Union.

And, as will also be seen, the role of social rights has become one of enabling autonomy and participation.

3.1 Council of Europe

3.1.1 Committee of Ministers Recommendations – toward autonomy, inclusion and participation

The Committee of Ministers is the main political or policy-setting body of the Council of Europe¹¹. The main tools at its disposal are the drafting of legally binding treaties open to the Member States (and sometimes outsiders) for ratification and the adoption of policy recommendations. Policy recommendations contain practical suggestions to its Member States on how they should go about reform in particular areas. Sometimes, these recommendations fill in the gaps suggested by leading judgments of the European Court of Human Rights. Sometimes, the divergence between the Member States on common challenges calls for some central guidance. Recommendations do not have the force of law. However, they are frequently referred to and relied on by judicial organs like the European Court of Human Rights to reinforce their judgments. And they can be quite instrumental in setting domestic policy reform agendas.

Since the 1990s, several Committee of Ministers' recommendations have been adopted with respect to older persons¹². One can detect a clear line of thinking from one to the other, culminating in a new framing based on autonomy and inclusion. What follows is a brief survey and a summary of the main policy recommendations in the field of age.

Recommendation No. R (94)9 concerning elderly people, which was adopted on 10 October 1994, contains an interesting mix of an old framing combined with embryonic elements of a new one¹³. It begins with strong language about the importance of older people – their accumulated wisdom and experience – to society. It stresses solidarity between the generations and the capacity of older people to transmit timeless values to the younger generation. It then quickly moves on to a prevention agenda which, in 2020, reads a bit strangely. It calls for preventive policies to enable people to age well. Implicit in this is that if people do not age well then this will be the primary cause of future problems. That is to say, the social construct of age is clearly not present in this approach. This is further evident in the assertion that “longer life should not mean diminished enjoyment of life” which again might seem to subtly problematise the person.

On the other hand, Recommendation (94) 9 does emphasise the right to self-determination. But it qualifies it by “taking into account the different stages in their ageing”. This seems to genuflect before a general norm of autonomy only to then undercut it somewhat by highlighting the “natural” decay of rights through the ageing process.

11. Main website of the Committee of Ministers: <https://www.coe.int/en/web/cm>

12. For an overview of these recommendations, see generally, Barbara Mikołajczyk, *The Council of Europe's Approach towards Ageism*, Chapter 20 in L. Ayalon, C. Tesch-Romer (Eds.) *Contemporary Perspectives on Ageism*, (St. Philip Street Press, 2020).

13. Recommendation No. R (99)4 of the Committee of Ministers is available here: <https://rm.coe.int/16804c49ec>

Recommendation (94)9 – ambivalent about the autonomy of older persons.

The Recommendation does emphasise the right to “equal participation at all levels and in all fields, whether social, cultural or political”. However, there is a curious double take here. Autonomy and participation are given a particular meaning for those living in institutions in the Recommendation. Here, it asserts, opportunities should be provided for social, cultural and individual activities in a manner

that secures “self-determination” in institutional settings. It is hard to see how such environments, in and of themselves, lend themselves to self-determination. That is to say, the autonomy ideal, or the notion of self-determination, are not used to interrogate the very existence of such settings. Instead, the central quest is to insert the ideal of self-determination into how such institutions are configured and run. This seems out of date in 2021.

This is balanced somewhat towards the end of the Recommendation where there are calls for policies aimed at preventing social exclusion. The Recommendation shows an awareness of the housing and other needs of particularly vulnerable groups including elderly migrants and refugees. In short, Recommendation (94)9 is ambivalent about some foundational ideals. While they are said to rest at the core of future policies in Recommendation (94)9, they are not really used to fundamentally question those policies.

Recommendation (2009)6 as an early effort at intersectionality.

Recommendation CM/Rec(2009)6 on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society, marks an interesting early pivot away from protection and a static notion of welfare¹⁴. It is noteworthy that this policy recommendation is configured as an intersectional instrument covering both disability and old age in so far as they overlap

but also in so far as they do not overlap. This is both innovative and far ahead of its time. Recommendation CM/Rec(2009)6 contains sets of main policy recommendations: (1) promoting autonomy and an independent and active life, (2) enhancing the quality of services, and (3) enhancing equal access to services, including social services, and legal protection.

It is fascinating to see how, as early as 2009, a decisive pivot was made to reset the recommendation on autonomy and active participation. This speaks volumes about the paradigm shift happening at European level at that time. Indeed, the very opening of the Recommendation (1.1) highlights the “right to choice and self-determination”. Likewise, the concept of active participation in all spheres of life figures prominently (1.8, 1.9). Interestingly, the Recommendation is alive to the needs (and equal rights) of carers and families. A very welcome development.

14. Recommendation CM/Rec(2009)6 of the Committee of Ministers to member States on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d0b09

Recommendation CM/Rec(2009)6 laments the poor quality of existing services for older persons and persons with disabilities. It speaks (approvingly) of a paradigm shift in the disability sector from viewing persons with disabilities as passive “clients” to seeing them as active consumers of services. Implicitly, it anticipates the same happening for older persons. It recommends that both older persons and persons with disabilities “should be fully and directly involved throughout the process of designing, implementing and evaluating services” (2.2). This is now legally required in the disability context by Article 4.3 of the UN Convention on the Rights of Persons with Disabilities. There is no reason why older persons and representative groups of older persons should be denied a similar process-based right. Again, notice the subtle but real paradigm shift. Services are there to underpin individual autonomy and the right to belong and participate. They are not there – as in the past – to passively maintain older people at the edge of society.

Recommendation CM/Rec(2009)6 does contain some ambiguous language on residential institutions: “[S]o far as possible services should be provided in a person’s home or community environment, rather than in a residential institution, and as close to a person’s home as possible” (2.3). This might have been expressed a bit more forcefully had it been drafted in 2021.

The last tranche of recommendations in Recommendation CM/Rec(2009)6 deal with the issue of equality of access to services and legal remedies. There is some ambiguity here as the newer model seems to be co-mingled with elements of an older one. It acknowledges the loss of legal capacity (for example, due to the “worsening of a disability”) and seeks to hedge it with a right to supports. This applies to both older persons and persons with disabilities. The language is a bit awkward as indeed is the language in 3.1. about “suffering any reduction in their rights as they grow older”. It almost implies that the enjoyment of rights reduces naturally as persons grow older. Put another way, language like this might be used to suggest that any decline in natural powers or capacities automatically means a reduction in capacity to exercise rights. If so, this is unfortunate and might be considered redundant in 2021.

The Committee of Ministers Recommendation CM/Rec(2014)2 “on the protection of the human rights of older persons” marks a much more positive and decisive move in the direction of a modern human rights framing¹⁵.

Recommendation (2014)2 starts from the refreshing premise that there are no normative gaps.

Interestingly, it is predicated on the view that the main challenge is to find ways to ensure the *equal and effective* enjoyment of human rights by and for older persons. This is very welcome as a clear new departure point. The key task facing the Committee of Ministers was to list the important rights, to lay out a sense of the barriers erected preventing their equal enjoyment and to plot a way forward

15. Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons:
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c649f

with targeted policy recommendations¹⁶. How this was done in the text gives one a sense of how the Committee sees the field and what it considers foundational - and marginal.

Interestingly, in Recommendation CM/Rec (2014)2, the Committee of Ministers foregrounded the issues of equality/non-discrimination, personal autonomy, and participation. As the Explanatory Memorandum accompanying the Recommendation states¹⁷:

[T]he starting point of the Recommendation is the recognition that all human rights and fundamental freedoms apply to older persons, and that they should fully enjoy them on an equal basis with others.

[p. 1]

Policy recommendation II.6 is to the effect that “[O]lder persons shall enjoy their rights and freedoms without discrimination on any ground including age”. So equality and non-discrimination are the main tools by which the existing normative range of rights are to be effectively implemented by and for older persons.

This, of course, places a premium on which theory of equality predominates in the field. The Explanatory Memorandum makes it plain that both Article 14 of the European Convention on Human Rights and Article E of the European Social Charter underpin the equality approach foregrounded in the Recommendation. Specific and affirmative mention is made of the case law under Article 23 of the Charter (even leaving to one side Article E) to the effect that anti-discrimination legislation is needed to protect older persons.

The Explanatory Memorandum to Recommendation CM/Rec(2014)2 points out that both the European Court of Human Rights and the European Committee of Social Rights take the view that the Contracting Parties “enjoy a margin of appreciation in assessing whether and to what extent differences in similar situations justify different treatment” (p. 3). It recalls that both bodies have emphasised that any difference in treatment may be justified if it furthers a legitimate aim and is proportionate to the achievement of that aim. Of course, this leaves ambiguous what is to be considered a legitimate aim. As will be seen below, EU law gives even further scope to these exceptions in Council Directive 2000/78/EC (general framework for equal treatment in employment and occupation). It is suggested that the scope of what might now be considered a legitimate aim has narrowed since 2014 (and especially since 2000). What seems to have happened in the past was that the weight of historical exceptions narrowed down the scope of new general rules based on the equality of older persons. Now, it seems that the scope of these exceptions is being slowly eroded by virtue of the strength of the controlling norm of equality.

Tellingly, the next set of policy recommendations in Recommendation CM/Rec(2014)2 does not go straight into traditional welfare or protection issues. Instead, it foregrounds autonomy and participation. It reads “[older persons] ... are entitled to

16. Explanatory Memorandum to Recommendation (2014)2 states: “it is important to highlight possible barriers to the full enjoyment of human rights by older persons and measures to be taken to eliminate these barriers” (p.29).

17. Explanatory Memorandum of the European Convention on Human Rights: https://www.ilga-europe.org/sites/default/files/explanatory_report_rec_age_definitive_en.pdf

lead their lives independently, in a self-determined and autonomous manner”. (III.9). This is said to include the taking of all independent decisions including on property, finances, place of residence, health and medical treatments. Mixed in with autonomy are privacy interests, including sexual privacy. This is quite new and wholly welcome.

Policy recommendations III.12 and III.13 go on to state that older persons have a right to enjoy legal capacity “on an equal basis with others” (which again begs the question about which theory of equality applies) and a right to receive appropriate support in exercising legal capacity in making their decisions. This very much mirrors Article 12 of the UN CRPD. The Explanatory Memorandum adds:

[T]herefore, older persons are presumed to be capable of self-reliance (capacity to provide for one’s own needs), personal preference (capacity to express wishes and make own decisions and choices) and self-assertion (pursuit of the fulfilment of one’s desires and goals).
[p.35]

This marks a sweeping change. However, it is undercut somewhat by policy recommendation III.15 which represents a very conservative view of Article 12 of the UN CRPD. It effectively takes sides with those who argue that guardianship is still permissible under Article 12 of the UN CRPD (and hence in this recommendation for older persons) provided certain safeguards are provided. This is no longer the view of the UN CRPD Committee¹⁸.

The Explanatory Memorandum seems conscious of this ambiguity. It states:

[T]he recommendation acknowledges the possibility of limiting the older persons’ decision making and legal capacity for protection purposes without, by this, meaning to encourage the widespread application of such limitations. [p. 37]

Recommendation (2014) 2 foregrounds the autonomy of older persons.

What is important is not so much the view of legal capacity in policy recommendation III – but the fact that it is foregrounded in the first place. The traditional approach was to emphasise protection and vulnerability first and then to super-add autonomy. Here, that is inverted – albeit imperfectly. Autonomy

comes first and is seen as foundational to one’s own plans as to how to participate in society. Interestingly, social cohesion and participation are seen as part of a broader agenda of “active citizenship”.

Next comes the more traditional protection agenda (IV.16-20). The recommendation aims at a radical re-balancing of autonomy with protection. It seeks to empty the protective impulse of patronising or ageist assumptions. The Explanatory Memorandum sometimes lapses back into the reification of the older person as the source of their own problems: for example, to protect “those whose older age constitutes a barrier to the full enjoyment of their rights” (p. 31). These lapses to one side, it is fairly plain from the whole tenor of the Explanatory Memorandum that older persons are not henceforth to be problematised on account of their age and the focus has to be placed elsewhere and especially on how society accommodates (or fails to accommodate) older persons.

18. See, e.g., General Comment No. 1 of the UN Committee on the Rights of Persons with Disabilities, ‘Equal Recognition before the Law’, (2014). The text is available at: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

As a result, it is protection (against violence, exploitation, neglect and abuse) with two differences. First of all, the traditional framing of older persons as inherently vulnerable is gone. Implicitly, this has usually meant “problematizing the person” – that is to say, it is the peculiarities of the person that cause their problems. Instead, the opposite view is taken. Older persons find themselves in a range of vulnerable situations (not necessarily of their own making) and the role of the State is to recognise these vulnerabilities and to guard against abuse.

Secondly, protection adds a layer on top of autonomy – it does not displace it. Protections are said to apply “within an institution” (IV.16). This does not in itself endorse institutionalisation. Part V deals with social protection and employment. Interestingly, social protection does not just apply to the social contingency of poverty arising from a lack of resources. Instead, social protection is re-purposed to enable older persons to participate in public, economic and cultural life – a sort of active social citizenship. This is fully in keeping with the view of the UN Special rapporteur on the rights of persons with disabilities on the nature of social protection when it comes to persons with disabilities¹⁹. States are encouraged to include older persons in their labour market and employment policies (V.27). The explicit model for Part V (Social protection and employment) is Article 23 of the European Social Charter (p. 41 of the Explanatory Memorandum).

Next come care and long-term care. Recommendation CM/Rec(2014)2 requires that services “should be available within the community to enable older persons to stay as long as possible in their own homes” (VI.30). This phrase “as long as possible” also occurs in Article 23 of the European Social Charter. It is suggested that the equality idea, when superimposed on this phrase, means that older persons should not be problematised. That is to say, the continuum of possibilities should not pivot on the peculiarities (deficits) of the person. Instead, they should pivot on how supports are configured and applied (or not, as the case may be). Usually, the reason for institutionalisation has less to do with the peculiarities of the person and more to do with how social resources are used.

Curiously, consent to medical care is dealt with under the heading of care in Recommendation CM/Rec (2014)2 and not under the heading of autonomy where it more properly belongs. Just like the mental reservation expressed above (autonomy) whereby guardianship can be imposed (with safeguards), policy recommendation VI.B.37 requires where an individual cannot give consent (presumably because they lack legal capacity) that their previously expressed wishes be taken into account. This is not exactly a ringing endorsement for the view that all persons, regardless of their decision-making frailties, continue to possess legal capacity (a theory of universal legal capacity).

Recommendation CM/Rec(2014)2, part VI.C, deals with “Residential and institutional care” VI.C.40 is to the effect that sufficient and adequate residential services (that is, institutionalised services) should be provided for “those older persons who are no longer able or wish to reside in their own homes”. Again, consistent with

19. See 2015 Report of the UN Special Rapporteur on the rights of persons with disabilities, ‘Social Protection’, available at: <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SocialProtection.aspx>

a non-problematising approach, it is not really the intrinsic abilities or inabilities of the person that should count. It is the total situation in which the person finds themselves that should hold sway. Are there sufficient supports and services to enable the person to continue living in their own home? That should be the primary focus of attention. And great caution is needed with respect to the “architecture of choice” surrounding a decision to exit one’s own home. In other words, there may be no effective choice if continued habitation is rendered less than ideal given the lack of appropriate supports to remain in the community.

Policy recommendation VI.C does cross-refer to the baseline jurisprudence of the European Court of Human Rights with respect to any consequent loss of liberty arising from an involuntary move to an institution, etc. This is useful as it focuses on the conditions under which a “decision” is made to exit one’s own home and “opt” to live in institutional settings. But this should not detract from the main focus which is the need for a gradual build-up of supports to enable older persons to continue living in their own milieu. There is a limit to the jurisdiction of the European Court of Human Rights to mandate this kind of social support. No such limit applies to the European Social Charter – the very essence of which is the provision of positive rights.

The ambiguity – mentioned above – is repeated in the Explanatory Memorandum. It states:

[T]he vulnerability of older persons, or in some cases, their limited capacity to look after themselves are risk factors for violence, abuse or neglect against them, sometimes endangering their lives.
[p. 49]

It is suggested this is not fully in keeping with the overall tenor of the recommendation and perhaps needs to be qualified in light of more recent developments. It goes on:

[T]he placement of older people in institutions may often happen without their consent or appropriate safeguards and may have a particular impact on their freedom of movement. While noting a constant trend towards de-institutionalisation and having underlined that older persons should be able to stay as long as possible in their homes, the Recommendation dedicates some specific provisions to residential and institutional care, in light of the specific risks of abuse related to this situation.
[p. 49]

The rest of Recommendation CM/Rec (2014)2 deals with palliative care (VI.D.44-50) and the administration of justice. There is some nice language on the need for accommodations in the administration of justice. To some degree, this ports over ideas about “reasonable accommodation” from the disability field into the elder policy field²⁰. Of course, perfect access to justice only affords justice “according to the law”. If the law in force reflects ageist assumptions, or if the exceptions are cast too widely (as in the EU Framework Directive of 2000), then no amount of heightened access

3.1.2 Parliamentary Assembly of the Council of Europe (PACE): combatting age discrimination

The Parliamentary Assembly of the Council of Europe has also been at the fore in advancing the rights of older persons. The Parliamentary Assembly does not adopt

20. There is currently no equivalent of the ‘International Principles and Guidelines on Access to Justice for Persons with Disabilities’ (UN Special Rapporteur on the Rights of Persons with Disabilities, 2020) for older persons. Text is available here: <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/GoodPracticesEffectiveAccessJusticePersonsDisabilities.aspx>

legislation as would a domestic parliament. Nor does it have a formal role in the adoption of treaties – that is a matter exclusively for the Committee of Ministers. Nevertheless, since it is made up of representatives of national parliaments coming from all 47 Member States, its debates are a useful barometer of opinion and often signal an emerging consensus.

An early Parliamentary Assembly Recommendation, Recommendation 1619(2003), deals with the more specific topic of the “rights of elderly migrants”²¹. This was at a time when migration, diversity and inclusion were close to the top of the political agenda right across Europe. It speaks in particular to those who migrated to Europe during the economic boom of the 1960s and who were now growing old. It therefore is not directed at older persons in general but at this specific cohort. And it does not aim at a revolution of thinking on the rights of older persons as such but at the equal treatment of this particular cohort. It remains of general interest to elderly economic migrants. The issue of older asylum seekers or refugees is of course separate.

The 2006 Parliamentary Assembly Recommendation 1749(2006) on “demographic challenges for social cohesion” is essentially concerned with the increased strain put on the financial viability of social protection programmes by Europe’s ageing population²². It does not propound any new paradigm. Essentially, it calls for more intensive focus on demographic shifts and their implications for the long-term viability of social protection programmes and social cohesion more generally. This is, of course, merely one side of the ledger.

**2007 PACE
Recommendation
– looking forwards
and looking
backwards.**

A 2007 Parliamentary Assembly Recommendation mixes together some profound, forward-looking insights with some very traditional policy perspectives: Recommendation 1796 (2007) on “the situation of elderly persons in Europe”²³.

It starts by calling for a new approach to social policies and it emphasises the diverse range of older persons. It notes that older persons encounter discrimination and the “scandalous situation” observed in some institutions (namely, institutional settings), as well as social exclusion. Usefully, it points out that women encounter multiple discrimination as do older migrants. This early emphasis on the intersectional nature of discrimination covering gender is very welcome.

On the other hand, its policy recommendations do not really break new ground. They are hewed narrowly to (1) social protection systems, (2) employment, (3) assistance and support for families, (4) access to health care, and (5) vulnerable groups. For example, rather than foregrounding autonomy and its preservation, it stipulates that States should encourage the creation of “supplementary and specific allowances in case of the loss of autonomy” (11.3.2). And instead of emphasising a right to grow

21. Recommendation 1619 (2003) of the Parliamentary Assembly of the Council of Europe: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17137&lang=en>

22. Recommendation 1749 (2006) of the Parliamentary Assembly of the Council of Europe: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17441&lang=en>

23. Recommendation 1796 (2007) of the Parliamentary Assembly of the Council of Europe: <https://pace.coe.int/en/files/17545/html>

old in place, it calls for “model rules on minimum standards for elderly persons in institutional [that is, residential] care”.

PACE Resolution 1793 (2011) as an inflection point.

Parliamentary Assembly Resolution 1793 (2011) on “Promoting active ageing – capitalising on older people’s working potential” marks a true inflection point in the thinking of the Parliamentary Assembly towards a new paradigm²⁴. It starts at the very outset by asserting that:

[A]ge discrimination is often unconscious, but it undermines older people’s dignity, their human rights and self-esteem and is a huge waste of talent.
[paragraph 1]

It asserts that there is a need to change the approach to ageing and to “adjust policies accordingly”. It conceptualises older persons as citizens, carers and consumers. It calls for legislation to combat discrimination based on age and to implement programmes to help change attitudes. It proceeds to make more specific recommendations with respect to social protection, flexible work, lifelong learning, health promotion and other commitments.

PACE Resolution 1958 (2013) with a core focus on age discrimination.

Parliamentary Assembly Resolution 1958 (2013) focuses on “[C]ombating discrimination against older persons on the labour market”²⁵. This was (and is) a major issue as older people were disproportionately hit by the economic downturn caused by the financial crash. The foundational premise of the resolution is age discrimination.

It says “age discrimination is one of the most widespread forms of discrimination” (paragraph 1). It goes on to lay out a series of recommendations aimed at ending discrimination against older workers (including the adoption of anti-discrimination legislation) and accommodating them in the workplaces of the future.

Particularly noteworthy in PACE Resolution 1958 (2013) is the focus placed on older women and the challenges they face in remaining in or entering the labour market. This may be due to long periods of absence “while raising children or caring for other family members”. This intersectional approach is greatly welcomed especially in light of the “feminisation of poverty”. An added challenge is the fact that such women end up with no or reduced pension entitlements.

PACE Resolution 2168 (2017) calls out Ageism.

Parliamentary Assembly Resolution 2168 (2017) is entitled “[H]uman rights of older persons and their comprehensive care”²⁶. Despite positive trends, it notes that “widespread negative stereotypes of older persons continue ... to be at the root of

24. Resolution 1793 (2011) of the Parliamentary Assembly of the Council of Europe: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17961&lang=EN>

25. Resolution 1958 (2013) of the Parliamentary Assembly of the Council of Europe: <https://pace.coe.int/en/files/20231>

26. Resolution 2168 (2017) of the Parliamentary Assembly of the Council of Europe: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23768&lang=en>

age discrimination and violence against them as well as isolation and exclusion". It recommends several measures on the part of States to "combat ageism, improve care for older persons and preventing their social exclusion". It is notable that the overall challenge of combating ageism is ranked first. Among the more notable recommendations contained in it are the enacting of legislation combating age discrimination, promoting positive attitudes towards ageing and ensuring adequate support for older persons living in their homes. Particularly welcome is the emphasis placed on supporting informal caregivers who are often neglected in national policies.

It is interesting to see a clear line of travel within PACE from early ambivalence to autonomy to a clearly worked out thesis on ageism as the core challenge.

3.1.3 The Council of Europe's Commissioner for Human Rights: towards equal and effective enjoyment of all rights by older persons

The Office of the Council of Europe Commissioner for Human Rights dates back to 1999. Its core tasks are to assist the Member States of the Council of Europe in implementing human rights, to promote human rights education and awareness, and to identify possible shortcomings in the law, etc.

The Commissioner has several thematic priorities in her work. The rights of older persons do not seem to be a current thematic priority of the Commissioner. That is to say, there is no line of "thematic" reports on the rights of older persons emanating from the office of the Commissioner.

However, many of the other thematic publications of the Office have at least an indirect bearing on the rights of older persons. These include publications on the rights of persons with disabilities to live independently and the right to legal capacity (people's right to make their own decisions).

To his immense credit, the very first Commissioner, Commissioner Gil-Robles, was very concerned with the rights of older persons living in institutions or retirement homes and decided to hold a major conference on the subject as far back as 2001 (convened at Neuchatel, Switzerland). An extensive Background Paper was prepared for the conference²⁷. Six themes were selected for discussion at the conference: (i) restrictions on liberty, (ii) protection and appointment of guardians, (iii) ill-treatment and unwarranted restraints, (iv) access to palliative care (end of life care), (v) health care costs, and (vi) compulsory placement and treatment of the elderly.

From our perspective, looking back now in 2021, what is interesting is that the threshold decision whether a person should be placed in an institution was placed last in the list of issues for discussion. Today, that would likely be the first consideration. Also of interest is the assumption that guardianship (compulsory loss of decision-making autonomy) remains a viable option in principle requiring only stringent safeguards

27. The relevant papers are on file with the authors. No electronic versions of the files have been located.

and the effective policing of those safeguards²⁸. Put another way, “protection” means guardianship which is a bit strange since guardianship nearly always means compounding any diminution of autonomy by taking even away voice.

The Background paper for the Neuchatel conference clearly sees institutionalisation of older persons as a human rights issue.

The Background Paper acknowledges that the focus of an older person’s life changes dramatically from their own home to an institution. A state of both physical and mental dependence is said to ensue in an institutional setting. It concedes that residence in such an institution is normally long-term and not short term and that it is important that older people are involved in determining the range and quality of life in the institution.

In addition, the Background Paper asserts that older persons may not be able to make their own decisions due to “mental disorder” or “extreme physical frailty”. It hints at (but does not develop) a more modern conception of “supported decision-making” by commenting that States might consider appointing support carers in a more systematic manner. More than likely, this aspect of the Background Paper would be written very differently today.

Usefully, the Background Paper distinguishes between several different kinds of abuse: physical, sexual, mental and financial. It refers to the relevant European Court of Human Rights rulings on the issue of physical restraints. Interestingly, the issue of “chemical restraints” is not mentioned, although it must have been prevalent even in 2001.

On the last issue – which is arguably the most important issue (compulsory placement in a residential institution) – the Background Paper concedes that such placement contrary to the consent of the individual poses serious human rights concerns. It asserts that such involuntary placements can only take place in “exceptional circumstances” and in accordance with Article 5.1 of the European Convention on Human Rights. It envisages such placement if the person “become[s] a danger to themselves ... incapable of seeing to their basic personal needs, or a threat to law and order”.

The conclusions of the debates at the Neuchatel seminar are equally interesting. They start with a ringing endorsement of the concept of autonomy and self-determination.

The participants quickly intuited that the last issue in the Background Paper is actually the primary issue. As a matter of principle, the participants concluded that:

unless otherwise provided by law [which begs the question], the decision to go into an institution must be left to the elderly person concerned or, if his or her judgement is impaired, his or her representative.

An interesting conclusion is added dealing with those elderly people “who carry on living at home”. This is useful as it shows that some of the participants were thinking

28. See the landmark Recommendation of the Committee of Ministers on ‘Principles Concerning the Legal Protection of Incapable Adults,’ Recommendation No. R (99)4 (February 1999). Available at: [https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec\(99\)4E.pdf](https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf)

about a right to “lifetime adaptable homes” and social protection measures to offset the costs of supporting an older person living in their own home.

In a far-seeing set of conclusions, the participants pointed to the need for adequate training of home-support workers and the need to ensure that their employment was not precarious (“the authorities must help to improve the status of people working with the elderly”). The conclusions are rather more forthright than the Background Paper on the inherent inequality between the person and an institution (“where the two parties are on an unequal footing”). The conclusions point strongly towards the idea of an advocate or independent support person – an idea that is not a million miles away from the modern concept of “supported decision-making”. The Conclusions call for a “radical change throughout society, not only at the level of available resources but also in terms of people’s attitudes”.

The former Commissioner Nils Muižnieks issued a Human Rights Comment in January 2018 on “The right of older persons to dignity and autonomy in care”²⁹. It is quite an interesting comment and reveals how lines of thinking have been steadily evolving and crystallising since the late 1990s.

**Commissioner 2018
Human Rights Comment:
long-term care does
not have to mean
institutionalisation.**

It begins by insisting that older persons “have exactly the same rights as everyone else, but when it comes to the implementation of these rights, they face a number of specific challenges”.

Also, the comment takes the view that long-term care is not synonymous with residential or institutional settings. This

places the focus back where it should be – on the adequacy of home supports to enable an older person to continue to live and thrive at home. It acknowledges advances in this regard under Article 19 of the UN CRPD (right to community living), implying that something similar is needed to underpin a right to live in the community for older persons too. It specifically directs attention to inadequate provision for palliative care across the Council of Europe Member States and the degree to which pain is often left under-diagnosed for older persons.

The comment still tends to lapse back into very traditional ways of thinking about legal capacity. It speaks of the need to make legal provision for advance care directives in circumstances where an older person loses consciousness or is unable to make their own decisions. And it interestingly echoes the view of the Parliamentary Assembly that consideration should be given within the Council of Europe system for a regional treaty on the rights of older persons. This would be keeping with cognate developments within the Organisation of American States and the African Union – each of which have adopted treaties to advance the rights of older persons (see Chapter 2 above). A similar endeavour by the Council of Europe would not be out of place. If the Council of Europe were to heed this call, then it would be on the

29. The 2018 Human Rights Comment of the Commissioner for Human Rights is available here: <https://www.coe.int/en/web/commissioner/-/the-right-of-older-persons-to-dignity-and-autonomy-in-care>

right track by focusing on how to secure the equal and effective enjoyment of all human rights by older persons.

3.1.4 European Court of Human Rights judgments – the rights of older persons through the lens of civil rights

How does the European Court of Human Rights approach claim of discrimination and what is its current jurisprudence on age-based discrimination?

Article 14 of the European Convention on Human Rights prohibits discrimination with respect to the enjoyment of the rights contained in the Convention. Famously, it is viewed as an ancillary right – that is to say, it attaches to the enjoyment of the substantive rights in the convention. It is invoked with respect to the equal enjoyment of the other rights enumerated in the convention. Protocol 12 to the convention (ETS. No. 114, 2000) extends the right to equality and non-discrimination beyond the rights enumerated in the convention. It does not specifically add age as a prohibited ground of discrimination.

The European Court of Human Rights insists on the right to autonomy and legal capacity for older persons.

Three general tranches of cases have arisen³⁰. As will be seen, there is often a substantive overlap with the social rights contained in the European Social Charter.

The first tranche has to do with autonomy and the circumstances under which an older person's right to legal capacity can be withdrawn. This directly implicates Article 8 (private life) and often in association with Article 14 (non-discrimination). Most of the case law here before the Court touches on the rights of persons with disabilities. But this case law can and does overlap with the rights of older persons in order to both retain and vindicate their autonomy.

A long line of cases from the Court reflects the legal understanding that deprivations of legal capacity offend implicit notions of legal personhood in Article 8 and therefore need a strong justification. The grounds for withdrawal have to be narrowly cast and prescribed clearly in law. The extent of the loss of legal capacity must be proportionate and not indeterminate. The knock-on effects of legal incapacity on other rights (such as the right to vote) are not open ended and beg strong justification of their own. And the process for the withdrawal of capacity has to be fair, transparent and subject to judicial oversight and review.

In this way, the Court has narrowed down the potential applicability of legal incapacity and insisted on clear procedural safeguards. This is still a long way from the vision contained in Article 12 of the UN convention on the rights of persons with

30. A useful summary of the caselaw is contained in a Factsheet of the European Court of Human Rights on 'Elderly People and the European Convention on Human Rights,' (Strasbourg, February 2019). Available at : https://www.echr.coe.int/Documents/FS_Elderly_ENG.pdf

disabilities which precludes guardianship and insists on supported decision-making³¹. The UN convention – unlike the ECHR – blends together civil and political rights with economic and social rights. So, there is much more room within the UN CRPD to anchor and then develop a much more positive right to “supported decision-making”, especially for older persons with disabilities. The European Court’s case law has not yet gone that far. That is not to say that it cannot be nudged in that direction. For the moment, the European Committee of Social Rights case law on supported decision-making for persons with disabilities (and indeed older persons) goes further. The case law of both bodies is certainly complementary and should be considered before considering challenging outdated incapacity laws affecting older persons.

The second tranche of European Convention cases has to do with conditions of confinement for older persons within places of detention which can include prisons, nursing homes or other congregated settings. This directly implicates Articles 2 (right to life and especially the positive obligations that flow therefrom) and 3 (freedom from torture, inhuman or degrading treatment). A threshold issue often concerns the very placement of an older person in, for example, a nursing home. An involuntary placement runs directly counter to an avalanche of Council of Europe policy documents on old age.

Article 5 of the European Convention on Human Rights (right to liberty) does not expressly enumerate age as a ground for potential loss of liberty. How then can involuntary placement be justified? One revealing case on point is *H.M. v Switzerland* (2002)³². The applicant was an older lady who was placed involuntarily in a nursing home as a result of neglect at home. The Court reasoned that the loss of liberty in her case had not amounted to a deprivation of liberty within Article 5.1 of the convention as it had been motivated to supply her with the necessary medical care and satisfactory living conditions and standards of hygiene. This is a curious form of reasoning since it sanctions the loss of a civil right as an acceptable result of deficiencies in meeting basic social needs. There may have been less intrusive means to achieve the substantive right to treatment than to mandate loss of liberty. Usually when one talks of a substantive social right it is with the purpose of adumbrating

The European Court of Human Rights is attentive to ensure that the conditions of confinement of older persons in detention settings do not amount inhuman or degrading treatment.

the positive obligations to satisfy it and not with a view to curtailing a core civil right. If the logic of the judgment is followed strictly, it means that any substantive need for treatment could justify the involuntary loss of liberty. This cannot be strictly true.

There is no prohibition, as such, of the detention and imprisonment of older persons under the European convention. Nevertheless, some detentions might fall foul of Article 3’s prohibition against

31. A useful summary of the trends in the relevant caselaw is to be found in ‘A Study on the Equal Recognition before the Law: Contribution towards the Council of Europe Strategy on Disability, (Strasbourg, 2017): <https://rm.coe.int/168070d7f5>

32. *H.M. v. Switzerland*, 39187/98 [2002] ECHR 157.

inhuman or degrading treatment. The Court is often at pains to point out that the question whether the relevant thresholds of Article 3 have been reached depends very much on the circumstances of each case. While genuflecting to the broad margin of appreciation of the States Parties, the Court has emphasised that States need to be attentive to the specific needs arising from a prisoner's infirmity (which may be due in part to old age). Put another way, there is a semblance of a positive obligation in the jurisprudence to "reasonably accommodate" the prisoner and provide for basic needs.

It has to be acknowledged that the solicitude of the Court towards imposing some positive obligations on the part of the State is probably at its highest where the individual is in captivity of one sort or another. In *Dodov v. Bulgaria* (2008)³³, it was argued that failure to supervise an older lady in a nursing home contributed to her death and that the State had failed to respond in an adequate and timely manner to uphold her right to life. In *Watts v. the United Kingdom* (2010)³⁴, the Court asserted that, in the right case, a State might be held liable for badly managing the transfer

Patently inadequate services for older persons may amount to inhuman or degrading treatment.

of older persons from one institution to another if the right to life were thereby put seriously in jeopardy. The conditions of confinement must meet the relevant thresholds of Article 3 of the ECHR if inhuman and degrading treatment is to be found. In a way, this case law gets at more substantive rights (such as the right to services) but through the narrow lens of

negative rights. That is why the case law of the Court has to be read alongside the jurisprudence of the European Committee of Social Rights.

The third tranche of cases has to do with the adequacy of services or pensions (regardless of confinement) bearing in mind Article 3 (prohibition of inhuman or degrading treatment). There is an obvious overlap here with Articles 12 (social protection) and 13 (social and medical assistance) of the European Social Charter. For example, *Larioshina v. Russia*³⁵ concerned the alleged insufficiency of a pension for an older person. It was alleged that it was so low as to directly and negatively impact the person's physical and mental health contrary to Article 3. The Court held that the alleged insufficiency had not in fact reached that threshold. The Court was coming at the issues from the perspective of the thresholds of Article 3. Again, the European Committee of Social Rights would look at it somewhat differently under Articles 12 and 13 of the European Social Charter (see Chapter 8).

In *McDonald v. the United Kingdom* (2014)³⁶, a reduction in budgetary allocation at municipal level meant that a night-time carer had been withdrawn and was replaced by incontinence pads. The Court held that the reduction had interfered with the applicant's right to private and family life. It went on to declare that Article

33. *Dodov v. Bulgaria*, [2008] ECHR 5, Case 59548/00, January 2008.

34. *Watts v. United Kingdom*, Case 53586/09, [2010] ECHR 793, May 2010.

35. *Larioshina v. Russia*, Case 56869/00, April 2002.

36. *McDonald v. United Kingdom*, Case 4241/12, ECHR [2014] 141.

8 had been violated because the reduction was not accomplished in accordance with domestic law.

Another line of cases seeks to challenge deportation on the grounds that minimum treatment or social rights will not similarly travel with persons, thus exposing them to degrading or humiliating treatment in the country of transfer contrary to Article 3. Many of these cases are resolved before they reach the European Court.^[4] What is interesting though, is that this line of jurisprudence at least makes possible the argument that deportation to a country with little or no services for older persons could amount to a violation of Article 3.

Overall, it is clear then that, unlike the framework of the European Social Charter which operates within the clear and specific textual framework of Article 23, the European Court of Human Rights has to struggle to shape its jurisprudence with regard to the rights of older persons while using concepts and precedents which have evolved outside the realm of elder law. So far, this seems to have inhibited the Court in several ways.

First, there is an absence of an explicit recognition of older persons as a unique social group in the text of the convention. It is surprising that this textual absence was repeated in Protocol No 12. Second, there is absence of recognition of the deleterious effects of ageism by the Court. Gender and race may well amount to suspect classifications in the eyes of the Court. But age seems left behind. Third, there is limited or no usage of the wealth of soft-law elder-rights related documents (either in the Council of Europe system or broader afield).

Intersectional discrimination overlapping with age remains a challenge for the Court. This has been exemplified in the case of *Carvalho Pinto de Sousa Morais v. Portugal* (2017)³⁷. In that case, the Portuguese courts had reduced the quantum of compensation awarded for a medical malpractice that had left a woman in her 50s seriously impaired in her physiological functions and in her sex life. The reduction in damages was justified by the domestic courts on the grounds that "... sex is not as important as in younger years, its significance diminishing with age". Ultimately, the European Court sided with her but more on the grounds of gender rather than age. As analysed by Mantovani, Spanier & Doron (2018)³⁸, the European Court's majority ruling in favour of Carvalho had to rely almost exclusively on sexism, while mostly ignoring ageism, in light of the lack of reference to age in the convention.

3.2 European Union

The European Union is a totally distinct body from the Council of Europe. The latter tends to be more a classical inter-governmental body. Nevertheless, as the above survey indicates, its various inter-governmental entities have gravitated toward a rights-based approach to age and against ageism. The European Union, on the other

37. *Carvalho Pinto de Sousa Morais v. Portugal*, Case 17487/15, July 2017.

38. See Mantovani, E., Spanier, B., Doron, I. (2018). Ageism, human rights and the European Court of Human Rights: A critical analysis of the *Carvalho v. Portugal* Case. *DePaul Journal for Social Justice*, 11(2), 1-14.

hand, contains many supra-national elements where one might expect to find even stronger moves towards the rights-based agenda on age.

As will be seen, both organisations have followed their own path toward the rights-based approach to age. There is now a strong unity of purpose on age across and between both European organisations to the advantage of European citizens. This is the essential backdrop to the history and further evolution of the European Social Charter as it touches on age.

In this section, we cover the main developments at European Union level.

This includes (i) EU Treaty law (giving the Union the capacity to legislate and combat discrimination based on age); (ii) the evolution of the EU human rights instruments and their “reach” to age-based discrimination; (iii) the positions of the European Commission as the initiator of EU law and policy; (iv) the approach of the European Network of National Human Rights Institutions (ENNHRI); (v) the innovative approach of the European Social Protection Committee on the future of long-term care; (vi) the landmark 2018 report of the EU Fundamental Rights Agency against ageism; (vii) the pivotal Council Conclusions of 2020 on ageism; and (ix) the less promising EU Green Paper on Ageing (2021).

3.2.1 Background EU Treaty provisions

Age, as such, did not figure prominently in the treaties establishing the European Economic Community and later the European Union.

**Initial breakthrough:
Treaty of Amsterdam
(1996).**

Equality was seen from the beginning as a norm embracing only gender and nationality: nationality in order not to break up the embryonic common market; gender in order to entrench

and protect some positive social advances for women in France. Hence the headline norms dealing with equal treatment focused on gender and nationality. That meant that early legislative measures dealing with equality were largely focused on gender – whether in the workplace or in terms of social security rights.

The breakthrough came with the adoption of the Treaty of Amsterdam in 1997 which, in its Article 13 (now Article 19 of the Treaty on the Functioning of the European Union – TFEU), conferred explicit power on the Union to “take appropriate action” (which is assumed to include legislative measures) to combat discrimination on eight grounds which include age. It reads:

Article 13

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Only two Directives so far were adopted in 2000 on the foot of Article 13.

The Race Directive focuses on discrimination grounded on race (Council Directive 2000/43/EC implementing the principles of equal treatment between persons irrespective of racial or ethnic origin) and covers a number of substantive domains including employment, vocational guidance, social protection, social advantages, access to the supply of goods and services (Article 3 – Scope). The material scope of the directive covers many domains of direct interest to older persons. However, since it only applies on the grounds of race, it does not extend to older persons as such (although it can be interpreted to apply to older persons who happen to belong to ethnic minorities).

The second Directive, the Framework Employment Directive, is narrower in material scope, covering employment in the main. However, it explicitly includes age (along with disability, etc.) within its protection (Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation).

However, the way it covers age (as distinct from the other grounds) indicates a much narrower construal of discrimination based on age compared with the other grounds. This narrowing was not driven by the Treaty provisions as such. That is to say, there was nothing in the Treaty of Amsterdam that compelled those who drafted the Directive to enable Member States to adopt wider defences for age-based discrimination. On the other hand, there was nothing to stop them.

EU Framework Directive appears to allow wide and open-ended justifications for age-based discrimination.

More particularly, Article 6 of the Framework Directive, provides (extra) possible justifications for differential treatment based on age. It is to the effect that

Member States may provide:

that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Article 6.1 continues to the effect that such (justifiable) differences of treatment on the grounds of age are said to include the setting up of special conditions on access to employment, the setting of age requirements for advantages linked to seniority, the setting of maximum age for certain employments, etc.

In effect, this means that direct discrimination based on age is permissible under certain conditions. This is not the case for other protected grounds under the directive. In addition, Article 3.4 enables/allows Member States to exclude their armed forces from the age provisions in the directive. They are not required to do so. It is questionable whether such a broad sweep of exemptions would be reflected in the directive if it were to be drafted today.

Thus, the directive enables legislative and policy distinctions to be made on the grounds of age provided they are “objectively and reasonably justified by a legitimate aim”, and the means of achieving that aim are “appropriate and necessary”.

The Court of Justice of the European Union (CJEU) has taken a largely restrictive approach to the interpretation of the rather open-ended defences of age discrimination in the Framework Directive. Most of the cases that have reached the Court have focused on the existence or scope of an “objective justification” proffered by the State and its rational relationship (or otherwise) to the measure adopted. Because of the scope for distinctions seems broader on age than on other grounds, and thus forms an exception to a rule, the Court has taken a restrictive approach to the exceptions. As O’Cinneide points out:

[T]he Court has stated that Article 6.1 constitutes a very specific derogation from the general principle of equal treatment. As such, this exception is to be read narrowly, in line with the general interpretive approach that the Court has applied in interpreting the provisions of the 2000 Directives³⁹.

The Court was invited by the Advocate General (Mazak) to consider that age was not a suspect classification on a par with sex or race, and that the Court should recognise that age-based differentiations, age limits and age-related measures are widespread. This amounts to a plea that wide, open-ended defences are allowable given the state of European law and practice at the time of the adoption of the Directive. To its credit, the Court has maintained its overall approach.

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In *Age Concern England*, the Court has made it plain that objective purpose refers to matters that lie squarely in the public interest and not simply to cost⁴⁰. Public safety, as such, does not and cannot amount to an “objective justification”.⁴¹ Member States enjoy a broad discretion in their choice of measures to achieve legitimate objectives.

Since *Mangold*, the CJEU has adopted a more nuanced approach and seems to have relaxed the objective justification test by accommodating policy aims rooted in broad social policy considerations⁴². Mere assertions that a distinction was based on an objective justification are not enough: evidence of probative value to that effect must be proffered⁴³. The Court has been relatively liberal in allowing for mandatory retirement ages⁴⁴. And, on occasion, States may defend age limitations as constituting a bone fide occupational requirement (under Article 4.1 of the Directive). For example, one case involved an upper age limit of 30 years to apply for a job as a firefighter.

39. O’Cinneide, C., *Age Discrimination in EU Law*, p. 3. See generally, Doron, I., *Older Europeans and the European Court of Justice*, No. 42, *Age & Ageing*, (2013), 604; and, Numhauser-Henning, A., *Ageism, age discrimination and employment law in the EU*, in Dopron, I., & Georgantzi, N., (Eds.) *Ageing, Ageism and the Law*, (Elgar, 2018).

40. Case C-388/07, *Age Concern England* [2009] ECR-I-1569, [53]-[57].

41. Case C-447/09, *Prigge v. Deutsch Lufthansa AG*, 13 September, 2011.

42. For a review of the caselaw see generally O’Cinneide, C., *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age*.

43. *Joined Cases C159/10 and C-160/10, Fuchs and Kohler v. Land Hessen*, 21 July, 2011.

44. Case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, [2007] ECR I-8531

The Court allowed for this under Article 4.1 since the available evidence suggested that it would be difficult for a firefighter to handle all tasks associated with the post beyond the age 45 and it was permissible to try to maximise the serviceable years of potential employees⁴⁵.

The Race Directive shows that it is possible to adopt an equal treatment directive in a broad sweep of areas of relevance to the lives of older persons (for example, social advantages). And the Framework Directive shows the narrow approach adopted in 2000 which would be unlikely to be repeated in 2021 if the Directive were to be drafted today.

The European Commission published a third and broader draft Equal Treatment Directive in 2008⁴⁶. This would include discrimination based, *inter alia*, on age and would extend it to cover the main domains covered under the 2000 Race Directive. The draft proposal does not contain the equivalent to Article 6 of the Framework Employment Directive (opening up many possibilities for excusing age-based discrimination). However, adoption requires unanimity in the Institutions of the Union and that, so far, has proven elusive. While the proposal has not been formally withdrawn it does seem to stand a slim chance of adoption in the near term (largely for reasons unrelated to age).

3.2.2 The evolution of EU human rights instruments as they touch on age

The Council of Europe is self-consciously designed as Europe's premiere human rights organisation. By adopting treaties and other legal and policy instruments, it places a web of collective guarantees— without disturbing national sovereignty.

The European Union was designed differently. It was self-consciously designed from its infancy to penetrate national sovereignty albeit in the initially narrow field of economics (the construction of a supra-national common market). This logic required a supra-national institution (the European Commission) to apprehend the “public interest” and to have the sole initiative to propose binding legislation. It also required a doctrine of the supremacy of European law so that national legislation (including constitutional provisions) could not function as an excuse for non-performance of EU law. And it required that the judgments of the Court of Justice of the European Union would have immediate effect throughout the Union.

The “functionalist” vision of the Union, over time, led inevitably to deeper political integration and pressure to super-add new headline norms and hard legal competences going beyond the purely economic sphere. The main route in – initially at least – was through the slow evolution of social policy and then eventually through headline human rights norms. Social policy was initially seen as an adjunct to the market – hence the term

1989 Community Charter of Fundamental Rights.

45. Case C-229/08, Wolf v. Stadt Frankfurt am Main, 2010.

46. COM(2008)426.

the “social dimension” to the market. Older persons (and others) were among the prime beneficiaries of this overall trend.

An initial stab at setting out pertinent social rights – which would not expand EU competences but influence how existing competences would be used – was the 1989 Community Charter of Fundamental Rights.

This 1989 Charter remained outside or alongside the main Treaty provisions until absorbed later in the 1990s with the change of the UK Government in 1997⁴⁷. It claimed direct inspiration, *inter alia*, from the European Social Charter (which had not been Revised at that point) as well as from cognate ILO instruments⁴⁸. Title I (paragraphs 1-29) was said to contain ‘Fundamental Social Rights.’ They uncannily track the European Social Charter (right to work, just and fair working conditions, etc). Tellingly, for the time, the relevant equality provision in the 1989 Charter (paragraph 19) only covered gender equality. No other grounds of discrimination were provided for. This was in keeping with EU treaty law at the time which was almost exclusively concerned with gender-based discrimination (in as much as it was concerned with equal treatment or discrimination at all).

Older persons were specifically referenced in “right to social protection” (paragraph 13 of the Charter) as well as under “elderly persons” (paragraphs 27 and 28) in the 1989 Charter.

Paragraph 13 provided that “persons, especially the elderly, who do not have adequate means of subsistence should be able to receive a minimum income modulated or complemented by appropriate social assistance”. This is not really

2000 EU Charter of Fundamental Rights.

about the older person as such but concerns the contingency of poverty that can arise in old age unless alleviated by social assistance programmes. Paragraph 27 is to the effect that every person in retirement or early retirement “must be able to enjoy resources affording him

or her a decent standard of living”. This adds very little to paragraph 13. Paragraph 28 goes beyond securing a minimum income to include “medical and social assistance specifically suited to their needs [older persons] and as wide an access as possible to such assistance”. The net effect is that the 1989 EU Charter did not add to the European Social Charter which covered much the same ground (at least from the 1988 Additional Protocol onwards).

The EU Charter of Fundamental Rights was adopted by solemn Declaration (European Commission, European Parliament, European Council) in 2000⁴⁹. Importantly, the 2000 Charter, by its own terms, “does not establish any new power or task for the Community or the union, or modify powers and tasks defined by the Treaties” (Article 51). That is to say, nothing in the Charter can be construed as conferring additional legislative powers above and beyond those already conferred on the Union by its

47. The text of the 1989 Charter is available here: <https://op.europa.eu/en/publication-detail/-/publication/51be16f6-e91d-439d-b4d9-6be041c28122>

48. 10th preambular paragraph.

49. The text of the EU Charter (2000) is here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

Member States under the existing treaties (the doctrine of conferral). The Charter is divided into several titles: Title I is on dignity rights; Title II deals with freedoms; Title III deals with equality, and Title IV deals with solidarity or social rights (the largest part of the Charter).

The preambular paragraphs “reaffirm” certain instruments including specifically the European Social Charter adopted by the Council of Europe. Older persons specifically figure in Articles 21 (non-discrimination) and 25 (the rights of the elderly). Article 21.1 specifically prohibits any discrimination on the grounds, inter alia, of age. Unlike the aforementioned Framework Employment Directive, it does not even hint at more expansive defences that might be applied by States in the context

EU Charter of Fundamental Rights - foregrounding the dignity and autonomy of older persons.

of age discrimination.

Article 25 of the 2000 Charter states:

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

2017 European Union Pillar of Social Rights.

The leading reference guide to the Charter of Fundamental Rights asserts that the above language draws directly on Article 23 of the Revised European Social Charter⁵⁰.

This language is very revealing. First, the main departure norms are dignity and independence. Second, the traditional protection agenda is not foregrounded. That does not mean it has gone away but the language chosen enjoins us to take seriously the main departure points of dignity and autonomy. Third, there are no qualifiers with respect to the right to live independently. For example, it does qualify the right by saying “for as long as possible” or “for as long as one is able”. Hence the focus is on the enabling quality of social policy – not on the characteristics (that is, deficits) of the person. Last, implicit at least, is some image of decision-making autonomy (with adequate supports) to enable an older person to lead the kind of life they choose.

Another influential tract is the European Pillar of Social Rights which was adopted in 2017. Like the original 1989 Charter, it does not, in itself, confer any additional power or competence beyond those already conferred under EU law. However, unlike the 1989 Charter, it goes far beyond a narrow view of social rights as embodying only the social dimension to the market. It is intended to make visible the higher social goals of the European Union and to motivate common political action (but always within the confines of existing legal competences).

50. Colm O’Cinneide, ‘Article 25 – The Rights of the Elderly’, in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights – A Commentary*, (Hart, 2004). For recent caselaw see Focus Report in the EU FRA Human Rights Report 2020, *Ten Years on: Unlocking the Charter’s Full Potential*.

The European Pillar of Social Rights breaks the link between long-term care and institutionalisation for older persons.

Older persons specifically appear in Principles 3 (Equal opportunities), 15 (Old age income and pensions) and 18 (Long-term care) of the European Pillar of Social Rights. Principle 3 repeats the prohibition against discrimination on several grounds, including age. And it innovates by specifying the material scope of the prohibition which is said to cover social protection, education, and access to goods and services. Of course, this depends on whether

the EU has competence in these fields – which generally it does not. Principle 15 reaffirms the longstanding goal of securing adequate income through pensions into old age.

What is truly remarkable is Principle 18 on long-term care. It reads:

“Everyone has a right to affordable long-term care services of good quality, in particular home-care and community-based services.”

So, the European Pillar of Social is studious in avoiding the common error of assuming that long-term care necessarily and primarily means residential institutions. On the contrary, it emphasises home-care services and community-based services. This is not going to be achieved overnight. But the line of travel is obvious. Therefore, States are to be questioned about whether their policies are consistent with this goal and EU instruments (like the Structural Funds and the newer Recovery and Resilience Funds) are to be utilised to assist in the overall transition.

An Action Plan to implement the European Pillar of Social Rights was published by the European Commission in March 2021⁵¹. Among its many interesting features is a commitment on the part of the European Social Protection Committee and the European Commission to publish a joint paper on the future of long-term care in 2021 and then to produce an initiative on long-term care in 2022. The purpose of the initiative is to “set a framework for policy reforms to guide the development of sustainable long-term care that ensures better access to quality services to those in need”. This is not exactly a ringing endorsement for community-based options.

It is hoped that the initiative will pivot on the expressed preference stated in the European Pillar of Social Rights for community-based options which indeed sits well with the previous views of the Social Protection Committee. The 2021 publication and the follow-through initiative (2022) will need to be monitored closely.

2012 was designated European Year for Active Ageing.

51. The European Pillar of Social Rights, Action Plan, (March, 2021). Available here: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan_en

3.2.3 European Commission Staff Working Document (2008) on demography

The European Commission Staff Working Document – *Demography Report 2008: Meeting Social Needs in an Ageing Society* – presents the challenges in terms of trends in birth rates and death rates and changing family and household living⁵². It is an indispensable source of data on the living conditions of older persons in Europe at the time. Implicitly at least, the Demography Report assumes that long-term care means residential settings (p. 124). It does, however, refer approvingly to the famous 2007 Mansell report which justifies community living investments on a cost-efficiency basis⁵³.

2012 was designated European Year for Active Ageing. The European Commission's proposal for a decision designating the year drew a sharp contrast between viewing age as a burden (the traditional approach) and viewing age in terms of the actual and potential contribution older persons can make to society. It laid out the main challenge ahead which was to adopt policies that enable older persons to "stay longer in the labour market, and to remain healthy, active and autonomous as long as possible"⁵⁴. Although not quite a human rights approach, this was clearly a step in the right direction. The primary purpose of the Year was to raise public awareness of the abilities and capacities of older persons and thus pave the way for newer policies and social supports.

One notable outcome was the *Guiding principles for Active Ageing and Solidarity between Generations* document adopted in 2012 as an annex to a Council Declaration⁵⁵. This contains three sets of guidelines on (1) employment, (2) participation in society, and (3) independent living. Among other things, it called for a reconciliation of work and care, social inclusion strategies, participation in decision-making (which can be read as preservation of legal capacity), adapted housing and services to enable older persons live with the highest possible degree of autonomy, and the maximisation of autonomy in long-term care. The latter is extremely interesting and revealing. It seems to implicitly accept that long-term care equates with residential settings (institutionalisation) and that the main goal is to try to insist on autonomy even within such settings. It does not really come to terms with the architecture of choice (or reduced choice) implicit in such settings.

The 2014 Evaluation Report of the impact of the Year started by emphasising that rising age is first and foremost a major achievement. Prospectively, it signalled the EU's support for active ageing policies. Though not quite couched in the language of human rights, this was nevertheless a solid step in the right direction.

52. Text available as: SEC(2008)2911.

53. Mansell, Knapp & Beadle-Browne, *Deinstitutionalisation and Community Living: Outcomes and Costs – Report of a European Study*, (2007) Tizard Centre, UK.

54. COM (2010)462 final.p.2.

55. 16592/12 SOC 948 SAN 289 (7 December 2012).

3.2.4 European Commission Staff Working paper (2013): radically re-thinking long-term care

A European Commission Staff Working Paper was issued in 2013 entitled *Long-term care in ageing societies – Challenges and policy options*⁵⁶. It was intended as part of a broader series of reflections connected to the implementation of the European Social Fund (part of the European Investment and Structural Funds – ESIF). It recalls that more women than men will have long-term care needs in the future simply because women are living longer. It also recalls that most informal carers are women. And it reveals that the number of Europeans aged 80+ at risk of needing long-term care is set to triple over the next five decades.

An extremely insightful section on “Conditions influencing the capacity for independent living” was included. It emphasises that the vast majority of older people prefer to continue living in their own homes (ageing-in-place). Among those conditions, it identifies (1) whether the person lives alone or with others, (2) the relative age-friendliness of their homes (removal of hazards and obstacles – in other words, lifetime adaptable housing), (3) the availability and use of assistive aids and ICT, and (4) access to informal home help and care.

To be possibly added to this list is the existence (or absence) of webs of social connections outside the home. The section succinctly summarises influencing the effects of an over-reliance on family for informal care:

...the near absence of direct public expenditure does not mean that family care is free. It comes at a significant cost to families (that is, primarily women as spouses, daughters, or daughters-in-law) in terms of the working time of the carer, alternative employment income foregone, and reduced accrual of social protection entitlements.

[p. 14]

The Commission Working Paper states that the emphasis in the future should be on prevention, healthy ageing and independent living (p. 22). The Working Paper refers to the Active Ageing Index of the United Nations Economic Commission for Europe (UNECE). Updated in 2018⁵⁷. This index contains four domains: (1) employment of older workers; (2) social activity and participation; (3) independent and autonomous living of older persons; and (4) an environment that enables active ageing. Interestingly, it includes within (3) voluntary activities, care given to children and grandchildren, care to older adults (for example, spouses) and political participation. Just as interesting, the Index conceptualises independent living as including decision-making autonomy regarding aspects of one’s own life in older age.

A 2013 OECD paper “*A Good Life in Old Age: monitoring and improving quality in long-term care*” deals essentially with quality improvement and monitoring⁵⁸. It acknowledges a gradual shift from institutional to home care and critiques traditional approaches to quality of care as being too medical or clinical. Instead, it sees quality of life as covering autonomy, consumer choice, relationships and meaningful social

56. 16592/12 SOC 948 SAN 289 (7 December 2012).

57. See generally, <https://unece.org/population/active-ageing-index>

58. See generally, <https://www.oecd.org/els/health-systems/a-good-life-in-old-age-9789264194564-en.htm>

activity. (p. 19). Although the report does not take a stand on some major issues of principle that is, the future (?) of institutionalised long-term care, it does emphasise the importance of the voice of older persons in any arrangements (p. 38).

3.2.5 The Social Protection Committee of the EU (2014): maintaining the momentum to re-think long-term care

The EU's Employment and Social Affairs Council has an advisory committee called the Social Protection Committee⁵⁹. It was established by a Council Decision under Article 160 of the Treaty on the Functioning of the European Union (TFEU). Its core tasks are to monitor the overall social situation, to promote exchanges of information and good practice, to produce reports and formulate opinions, and to prepare Council discussion on social policy topics.

It works principally using the Open Method of Coordination – setting benchmarks for common reporting and conducting peer review and analysis with the possibility of (non-binding) recommendations.

In 2014, the Social Protection Committee (SPC) published a joint report with the European Commission entitled *Adequate social protection for long-term care needs in an ageing society*⁶⁰. It is a remarkably clear and insightful document. It defines “long-term care” needs as arising from long-term physical or mental frailty and/or disability over an extended period of time. Such persons typically depend on help for “activities of daily living” (ADL), such as bathing, dressing, eating, getting in and out of bed, moving around, using the toilet and controlling bladder and bowel movements (p. 11).

The 2014 Social Protection Committee Report breaks the chain between long-term care and institutionalisation.

The 2014 report usefully distinguishes between ADL and more instrumental ADL (IADL) tied to independent living such as preparing meals, managing money, shopping for groceries or personal items, performing light or heavy housework and using a telephone. It asserts that “without access to LTC (long-term care), the affected person’s wellbeing, dignity, health or even survival may be endangered” (p. 11).

The 2014 SPC report asserts that there are three main pressures on long-term care in Europe: (1) a huge increase in need due to the ageing population; (2) a threat to the supply of long-term carers due to demographic and other reasons; and (3) pressures on the quality of care. It calls on EU Member States to adopt a more proactive approach rather than a purely reactive approach as in the past.

The report distinguishes between informal care at home (usually performed by family members), formal care at home (under a contract of employment – part of the ‘Silver Economy’) and formal care in an institutional setting.

59. The general website of the EU Social Protection Committee is here: <https://ec.europa.eu/social/main.jsp?catId=758&langId=en&furtherPubs=yes>
60. The 2014 Social Protection Committee Report is available here: <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7724>

Unlike many other reports, and to its great credit, the SPC report does not assume that long-term care means institutionalisation. Quite the reverse. Indeed, it defines a more practical approach as one that includes measures aimed at preventing people from becoming dependent on care by, for example, promoting healthy life-styles, promoting age-friendly environments (lifetime adaptable housing) and universal design, and active rehabilitation to enable people to continue to live independently. In other words, the future of long-term care in Europe is the same as in the United States (US) – re-investment in the community and home to enable independent living.

Also, to its credit, the 2014 SPC report is very alive to the plight of informal carers who include, in the main, women (Section 2.6 on Informal carers). It details their steep opportunity costs in the labour market, the extent to which they are exposed to poverty later in life partly due to their absence from the labour market and the fact that their full pension entitlements have not been built up (though no fault of their own), their particular health risks (as well as mental health risks), and their isolation and loneliness. It states that "... there is a strong case for supporting family carers at different levels: legal, institutional, financial and organisational..." (p. 12).

ENNHRI seeks rights within institutions and tends not to challenge their existence.

3.2.6 European Network of National Human Rights Institutions (ENNHRI) – controlling traditional approaches to long-term care (2017)

The European National Network of Human Rights Institutions (ENNHRI) produced a major study in 2017 based on research conducted into congregated settings (mainly nursing homes) by six of their constituent NHRIs: *We Have the Same Rights: the Human Rights of Older Persons in Long-Term Care in Europe*⁶¹.

The 2017 report marks the first time the network has engaged in a project touching on the rights of older persons. It is a curious beginning as it focuses, in the main, on conditions within residential institutions.

It seems to rest on the assumption that long-term care is equivalent to residential institutions. Symbolically, the network might have sent a stronger signal about the rights of older persons if it had started from the assumption that community living is, by far, the preferred option in order to maintain both autonomy and community engagement.

It points to the radical departure of the UN CRPD (institutional settings is a *prima facie* form of unequal treatment or discrimination and the right to live independently and in the community is of prime importance). It asserts that this is important for older persons since many older persons (whether living in residential institutions or not) have a disability (p. 9). And it points to newer elements in EU law that re-direct EU funding (European Structural and Investment Funds) to put in place

61. The 2017 ENNHRI Study is available here: http://ennhri.org/wp-content/uploads/2019/10/ennhri_application_of_human_rights_to_ltc_feb_2017.pdf

community supports to enable de-institutionalisation to happen. However, it tends not to address the need to reconcile these two trends with the continued existence of residential institutions for older persons. Indeed, it hints that ESIF funding might well be invested in staff development for residential settings – which is not really consistent with the ex-ante conditionalities in the 2013 Regulations to move toward community-based alternatives.

The 2017 ENNHRI report does usefully draw attention to the plight of women as informal carers and to the precarious nature of their employment in the formal employment market. It thus draws attention to the further feminisation of poverty and especially the loss of pension rights that women who are informal carers face later in their lives. The ripple effect of poverty is inestimable.

The EU FRA takes aim at ageism and its many pernicious effects (2018).

The report highlights many shortcomings with respect to residential settings and marks them down invariably to poor funding and training. Additionally, the physical plant, tends not to lend itself to respecting autonomy or privacy. The report identifies a range of rights that are relevant to residential settings. Revealingly, it does not start with the most basic right of them all – which is to have one’s wishes respected

to remain in the community with adequate supports. In time, the 2017 report will likely be seen as a worthy first attempt of the ENNHRI to enter the field of the rights of older persons and it is to be commended for doing so. However, its focus seems even now to represent the past and not really the future of elder rights.

3.2.7 EU Fundamental Rights Agency – crystallising the new paradigm on human rights and against ageism (2018 Report)

The EU Fundamental Rights Agency provides evidence-based advice on human rights to the Institutions of the European Union and its Member States (but only when implementing EU law)⁶². Each year, it produces a Fundamental Rights Report which leads off with a different thematic subject. In 2018, the focus chapter ‘*Shifting Perceptions: towards a rights-based approach to ageing*’ explains how the rights-based to ageing is gradually taking hold and emphasises older people’s right to live in dignity and actively participate in social and cultural life⁶³.

This is a most impressive report. It characterises ageism as the “stereotyping of, prejudice or discrimination against individuals or groups based on their age. Although ageism can target young people, most studies in this area focus on the unfair treatment of older people.” (p. 11). As outlined in Chapter 1 above, it distinguishes between chronological age, biological age, psychological age and social age. It sharply contrasts two views of age – one view “sees older people as ‘dependent and vulnerable’ associating old age with a withdrawal from economic activity and

62. On the role and impact of the EU Fundamental Rights Agency see generally Byrne & Entzenger, *Human Rights and Evidence Based Policy: The Impact of the EU Fundamental Rights Agency*, (Routledge, 2020).

63. The 2018 EU Fundamental Rights Agency report is available here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-fundamental-rights-report-2018_en.pdf (see pp. 9-28)

increased illness and disability. This view influences policy approaches aimed at compensating deficits and meeting needs” (p. 11). The other view “sees older people as active contributors to economic and social life. This view calls for policies that focus active ageing and increasing opportunities for participation.” (p. 11).

Usefully, the 2018 FRA Report lays out the impacts of ageism on three different levels: (1) the individual level, (2) the group level, and (3) the societal level. At the individual level, it charts the impact in terms of unequal access to health care, heightened risks of poverty, exposure to violence, abuse and neglect. At the group level, the report focuses on intersectional impacts and accumulated disadvantages, including specifically older women, older persons with disabilities and older persons living in remote rural areas. Its analysis of the social impact focuses on the deleterious nature of ageism on society as a whole.

Basically, the 2018 FRA Report tries to distance the modern approach to ageing from the more traditional default which is to see age simply as a burden implying heavy costs. It asserts that “scientific evidence contradicts these stereotypes showing the valuable and important contribution of older people to their families and community.” (p. 15).

Human Rights is the starting point of the EU Council on age policy (2020).

The report then charts the evolution of EU law and policy with respect to older persons. It concludes with three opinions: (1) to adopt the proposed Equal Treatment Directive which would “extend horizontally protection against discrimination based on various grounds including age, to areas of particular importance for older people including access to goods and services, social protection, health care and housing”, (p. 25), (2) “to deliver on stronger social rights protection”, and (3) “the EU should consider using the European Structural and Investment Funds (ESIF) to promote a rights-based approach to ageing” (p. 26). Presumably, the “stronger social rights protection” should sub-serve the overall goal of equality and inclusion rather than simply compensate for exclusion or loss of opportunity. The reference to the ESIF is important given its central role in funding community-based independent living options for persons with disabilities – something that can and should be replicated for older persons to enable them age in place.

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3.2.8 EU Council Conclusions (October 2020): Human Rights, Participation and Well-Being of Older Persons in the Era of Digitalisation⁶⁴

Despite its title, these Council Conclusions range much more deeply and broadly than digital inclusion. The Council Conclusions are traditionally important in setting priorities both at EU level and within (and as between) the Member States.

This set of conclusions is firmly and explicitly based on a human rights-based approach to age. The conclusions acknowledge that human rights are “applicable

64. The EU Council Conclusions are available here: <https://data.consilium.europa.eu/doc/document/ST-11717-2020-REV-2/en/pdf>

to older women and men in the same way as to any human being and must also be guaranteed without exception to older persons” (paragraph 16). The Member States are invited to “[A]dopt an age-integrated approach including a rights-based and life cycle perspective to ageing” and to consider a “rights-based approach in shaping their exit strategies from the COVID-19 pandemic.” (paragraphs 23-24).

Usefully, the Council Conclusions call for ways to involve older persons in policy and decision-making that affects them (paragraph 29) in the digital world. Although tailored to the digital world, this call for more engagement has relevance across the board.

3.2.9 EU Green Paper on Age (February 2021): Fostering solidarity and responsibility between generations⁶⁵.

Normally, a Green Paper sets out an ambitious agenda with many options for change. The eventual White Paper usually narrows down the options in keeping with consultations and inputs and with felt needs. This Green Paper seems unusually constrained.

For one thing, it does not unambiguously adopt a rights-based approach as its core departure point. This stands in stark contrast to the Council Conclusions of 2020. While pointing to an ageing society as a success story of the European social market economy, it also depicts age and the ageing process as a problem or a set of problems that pose severe challenges to European policy-makers.

Undoubtedly there are challenges. But what is unusual is that the Green Paper offers no compass to guide how we should frame those challenges. It posits two core policy concepts that will enable a thriving ageing society: healthy and active ageing and lifelong learning (p. 3). Though both valid, they are not situated in any broader frame such as autonomy and inclusion. Lacking context, they seem curiously adrift as policy goals. The Green Paper belabours obvious points. For example, it asserts that “students from disadvantaged backgrounds are overrepresented among underachievers.”

The much rehearsed tension between an increasingly elder population drawing on social protection and a decreasing young population economically active and paying taxes to fund social protection) seems very out of date. A decreasing percentage of a population in active employment does not necessarily mean a net reduction in economic activity especially at a time when productive capacity seems to count less on labour. Probably, the real policy choice here is whether to switch the tax base toward new sources of wealth such as enterprises that disproportionately benefit from these productivity gains. Undoubtedly, that poses difficult policy choices and especially on the overriding need to preserve the wealth-creating capacity of our economy. But that is probably where the debate should be centred and not whether we need to squeeze more from less (younger workers).

Like nearly all reports of its type, the Green Paper does touch on the plight of informal carers (usually women). However, there is no blue-sky thinking on how to elevate their status. Instead, there is almost a note of desperation that informal care may

65. The EU Green Paper is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0050>

no longer fill the gaps “with families having fewer children, living further apart and women participating more in the labour market”. As the World Bank has indicated, this is a source of job growth in the future. Why not use the pandemic to come to terms with how badly informal carers have been treated and then intentionally sculpt what a market for care should look like in the future?

In a section dedicated to autonomy and participation, very little is actually said about autonomy and strategies to retain it in old age. The Council of Europe’s Social Charter is ahead in emphasising autonomy and legal capacity – with supports of course. It is strange not to see a similar emphasis on enabling older persons to retain voice, choice and control in their own lives in an EU Green Paper.

More pointedly, in the section dealing with long-term care, the implicit assumption appears to be that some form of institutionalisation is the natural default. That is, older persons have the right to live independently for as long as possible (p. 16). As mentioned before, this kind of language subtly problematises the person. If the circumstances that no longer make it possible to live at home have to do with the range, type and quality of services (formal and informal), then why not focus on the transition Europe needs for a completely different service paradigm into the future? This is what service providers are asking for: an enabling policy space that allows them to personalise their services.

It asserts “[R]esidential or other services . . . may secure the provision of care services that exceed the capacities of community-based settings.” True. But again, why not use this to interrogate such shortcomings and come up with an ambition for a different service paradigm?

The publication of the Green Paper opens up a process of public consultation. It does not, in

itself, indicate a reversal of all trends to date – which is to re-frame elder law and policy in the future based on the centrality of the equal rights of older persons. It is hoped that many civil society groups will respond and that the eventual White Paper will look quite different and be fit for purpose in a Europe that needs to age better. Certainly, that would be more consistent with the Council Conclusions of 2020.

3.3 Conclusions – overall European trends against ageism

What conclusions are warranted from the above and why is this relevant for the future development of the European Social Charter?

Both the Council of Europe and the European Union have come a long way with respect to elder policy and law. The very first Council of Europe Commissioner for Human Rights placed a focus on the rights of older persons and particularly in institutional environments in 2001. A variety of recommendations have been adopted by the Committee of Ministers culminating in the landmark 2014 recommendation which foreground the now-familiar themes of autonomy and inclusion. Likewise, the Parliamentary Assembly has been very active and especially with its 2011 resolution which emphasises age discrimination. The European Court of Human Rights now has a developed jurisprudence on the rights of older persons. Naturally, it views

the issues using its own traditional civil rights lens. This is by no means a criticism. We look to bodies like the European Committee of Social Rights to develop the jurisprudence on positive rights.

The European Union has been active too and its perspectives have also been evolving. Early rights instruments have tended to reflect an older agenda on age – based on protection and passive welfare. The EU Framework Directive in Employment was also a creature of its time with broad (perhaps overly broad) exceptions made for age-based discrimination. To its credit, the European Court of Justice has narrowed down the scope for these exceptions. Subsequent rights instruments, like the EU Charter of Fundamental Rights, draw on the European Social Charter with a very positive perspective on the rights of older persons.

The above analysis demonstrates a remarkable symmetry between Council of Europe and EU policy perspectives on age. Slowly but surely, the focus of attention in the EU is now on autonomy, social inclusion, and active ageing. Of particular note is the 2018 report by the EU FRA which provides a crystal clear critique of ageism. Equally worthy of note are the Council conclusions of 2020 and, to a lesser extent, the EU Green Paper on Ageing (2021). The EU Council conclusions in particular endorse a very clear rights-based perspective on age.

All of the above builds on and confirms the main thrust of the jurisprudence of the European Social Charter on the rights of older persons. The common threads have to do with an acknowledgement of personhood, an awareness of the centrality of human autonomy (with supports), a focus on the importance of home and community living, and a realisation that social support systems need to be re-configured to enable older persons to flourish in their own lives and contribute to their communities. These departure points were already deeply embedded in the DNA of the European Social Charter. But, as the above survey of the evolution of Pan-European instruments shows, it is now more important than ever that the jurisprudence of the Charter grows in order to guide States as they adjust to an exciting 21st century agenda of autonomy and active citizenship.

4. The European Social Charter Treaty System: Practice and Procedure

“The Charter is the second flagship convention of the Council of Europe. As a complement to the [European] convention, which establishes civil and political rights, the Charter is concerned with social and economic rights ... The Council of Europe can take pride in the fact that it has produced the most comprehensive international instrument on social and economic rights.”

Carole Benelhocine, The European Social Charter,
Council of Europe, 2012, p. 12.

The European Social Charter refers to a series of five treaties commencing in 1961 (the original Turin Charter). It comprises the following:

- ▶ the European Social Charter of 1961, Council of Europe Treaty Series (CETS) 035
- ▶ the Additional Protocol of 1988, CETS 128, (adding four new rights)
- ▶ the Amending Protocol 1991, CETS 142, (clarifying the role of the main treaty monitoring body, the European Committee of Social Rights)
- ▶ the Additional Protocol of 1995, CETS 158, (providing for a system of collective complaints)
- ▶ the Revised European Social Charter of 1996, CETS 163, (updating the original 1961 Charter).

Despite the use of the word “Charter”, these texts comprise legally binding treaties (all registered on the Council of Europe Treaty Series – CETS) intended to protect and promote economic and social rights in the Council of Europe system as a counterpoint to the European Convention on Human Rights⁶⁶.

In this chapter, we set out the five treaties that collectively compose the European Social Charter. We briefly characterise the rights contained in and protected by the Charter. We examine the practice and procedure of the European Committee of Social Rights with respect to the periodic reporting mechanism and the collective complaints mechanism. We emphasise throughout the various entry points that civil society organisations – including elder rights groups – have to get engaged in the processes. And we sketch the role of the Governmental Committee of the European Social Charter and European Code of Social Security, as well as the Committee of Ministers.

66. This is reinforced by the Appendix to the Social Charter which points out that “the Charter contains legal obligations of an international character...” (Part III).

There is already extensive literature on the Charter and its monitoring processes, and this chapter is intended mostly as a ready-reckoner compilation for the especial use of elder rights groups⁶⁷.

Further reference should be made to the website of the Academic Network on the European Social Charter and Social Rights (ANESC) to locate more specialised publications and particularly those dealing with the Charter's impact in different domestic legal orders⁶⁸.

The Charter is not to be confused with the European Code of Social Security (CETS No. 048 of 1964). Both the Charter and the Code are linked – but not in relation to the rights of older persons.

4.1 The Treaties explained⁶⁹

Just 12 years after the formation of the Council of Europe (1949), the world's first treaty on economic and social rights was adopted in 1961. It would take five more years for the International Covenant on Economic, Social and Cultural Rights (ICESCR) to be adopted in the UN system (1966) and nearly 10 more years before the ICESCR entered into force.

Social rights were seen as vital in avoiding the severe economic and social dislocation that helped give rise to authoritarianism in the 1930s and 1940s, as well as a mean to secure a democratic Europe.

Thus, the initial efforts within the Council of Europe system were genuinely pioneering.

This, no doubt, reflected a judgment that economic and social dislocation and deprivation played a part in creating space for fascist and totalitarian regimes in the 1930s and 1940s with devastating results across Europe. The reconstruction of the European democratic order required that attention be paid to the social foundations for a sustainable democratic future. In a way, the Charter provides the political economy for civil and political rights.

The Turin Charter – the European Social Charter, 1961 (CETS No. 035).

The original treaty (the Turin Charter of 1961) contained a preamble, five parts and several appendices. Importantly, the preamble asserted that the enjoyment of the

67. An exceptionally useful compendium of materials is the 7th edition of the European Social Charter Collected Texts (Council of Europe Publishing, European Social Charter, 2015).

68. ANESC is available at: <https://www.racse-anesc.org/en/network/>
On the impact of the Charter in domestic legal orders see Stein Evju, Application by Domestic Courts of the European Social Charter, NJHR, (2020) 401.

69. For general literature see: A.Ph.C.M., Jaspers & L. Betten, 25 Years, the European Social Charter (Kluwer, 1988); Lenia Samuel, Fundamental Social Rights: Case law of the European Social Charter, (Council of Europe Publishing, 1996); The Social Charter of the 21st Century – colloquy organised by the secretariat of the Council of Europe, (Council of Europe Publishing, 1997); David Harris & John Darcy, The European Social Charter, (2nd Ed., Transnational, 2001). A particularly cogent account is given by Carole Benelhocine, The European Social Charter (Council of Europe Publishing, 2012).

social rights contained therein should be secured without discrimination on a limited number of grounds. Age, as such, was not enumerated, although there is little doubt it was implicitly covered from the beginning.

Counterintuitively, the 1961 Charter itself did not contain any overarching or substantive provision on equality or non-discrimination. From time to time, the European Committee of Social Rights relied on this preambular reference to equality to reinforce its conclusions. Although the entire instrument is recognisably an egalitarian instrument, the formal placing of the overarching norm of equality at the heart of the system came much later (with the adoption of the Revised European Social Charter in 1996 – see below).

Part 1 of the 1961 Charter set out a series of 19 pithy principles corresponding to the rights to be further enumerated and elaborated in Part 2. In a way, they provided a set of interpretive guidelines when ambiguities appeared later in Part 2 (as they inevitably do).

**The “a la carte”
approach of
the European
Social Charter.**

Part 3 (Undertakings) is rather unusual in that it required adhesion to certain rights (Contracting Parties could not opt out) and then enabled the Parties to opt in to certain other articles (or sub-provisions thereof). The Contracting States undertake to be bound by at least five “core” articles out of a possible seven:

Core:

- Article 1 (right to work),
- Article 5 (right to organise),
- Article 6 (right to bargain collectively),
- Article 12 (right to social security),
- Article 13 (right to social and medical assistance),
- Article 16 (right of the family to social, legal and economic protection),
- Article 19 (rights of migrant workers and their families).

It should be noted that Article 23 (rights of older persons) is not included in this “core” basket. It is also to be noted that most of the rights contained in the core are in the broad labour law field. That has led to some criticism that the Charter (at least the original Charter) is imbalanced and insufficiently weighted relative to broader social rights. An argument could certainly be made in the 21st century (but only assuming the spatial concept of core/periphery is maintained) that this should be flipped to give pride of place to the more avowedly social rights as the core.

Overall, States Parties are expected to be bound by at least 10 full articles or 45 numbered paragraphs (Article 20). There is where the term *à la carte* obligations is used to characterise the Charter – in stark contrast to the ICESCR. Space is left for Contracting Parties to increase the number of paragraphs adhered to over time. Indeed, they were (and are) periodically assessed by the machinery of the Charter to gauge progress toward full adhesion (see Article 22 of the 1961 Charter).

Interestingly, one might frame this *à la carte* approach as an indirect reference to some inchoate concept of “progressive realisation” embedded in the logic of the

Charter. The basic idea is that States pick their obligations to match their level of economic and social progress (or their perceived capacity to finance social rights). And one might frame the process for examining “non-accepted provisions” as a way of testing whether States have reached the point where they can opt in to certain provisions (that is, whether sufficient progress has been made to enable them to realise the rights).

Part 4 of the 1961 Charter set out the reporting procedure which was directed to a Committee of Independent Experts (subsequently re-named the European Committee of Social Rights). Confusingly, the label “European Committee of Social Rights” does not appear to have a grounding in any of the treaties. Nevertheless, that is the term currently in common use.

Article 24 (which deals with the examination of periodic State reports) was silent when it came to the status (legal or otherwise) of the conclusions or reports of the Committee of Independent Experts. For a time, this cast a doubt over the legal status of the conclusions. This was remedied later by Article 2 of the Amending Protocol of 1991 (see below). This latter provision is to the effect that the Committee shall “assess from a *legal standpoint* the compliance of national law and practice with the obligations arising from the Charter.” This removed any doubts about the legal status of the Committee’s conclusions (and certainly vis-à-vis the Governmental Committee – see below).

Given that the majority of the original social rights in the Charter referred to labour market issues, space was deliberately left for a representative of the ILO to participate in a consultative capacity in the deliberations of the Committee (Article 26).

The process envisaged by Part 4 (reporting procedure) starts with a set of conclusions from the Committee on State Reports which then triggers a report to the Committee of Ministers from a sub-Committee of the Governmental Committee (an inter-governmental committee of the Council of Europe). This report usually contained a set of proposed recommendations that the Committee of Ministers might adopt with respect to the conclusions of the Committee of Experts taking into account the views of the Consultative Assembly (now the Parliamentary Assembly) of the Council of Europe: see section below on the role of the Governmental Committee. A two thirds majority was needed in the Committee of Ministers to adopt a recommendation (Article 29).

The 1961 Charter contained specific provisions on Derogations during emergencies and controlling the use of general restrictions on social rights.

Part 5 of the 1961 Charter contained a series of important miscellaneous provisions.

Article 30 dealt with derogations in times of war or public emergency. This is important, in part because COVID-19 could certainly count as a public emergency. Article 30 is crafted along the lines of the famous Article 15 of the European Convention on Human Rights. It allows for derogations provided the relevant emergency is “threatening the life of the nation” and then only “to the extent strictly required by the exigencies of the

situation” and provided that the measures “are not inconsistent with its [Contracting Parties’] other obligations under international law”. There is a further obligation of transparency whereby any Contracting Party that wishes to avail itself of a derogation must keep the Council of Europe system (through the office of the Secretary General) informed of the “measures taken and the reasons therefor”. Article 30 is now reproduced in Article F of the Revised Social Charter. Interestingly, no State party has yet availed of the possibility of a derogation. This is all the more surprising during COVID-19.

Article 31 of the 1961 Charter deals with Restrictions. By restrictions is meant any general restrictions to rights that go above and beyond those specifically allowed for in the body of the right itself. To be allowable, such restrictions must be “prescribed by law” (the principle of legality), must be “necessary in a democratic society” for the protection of a limited number of grounds including “the rights and freedoms of others”, or for the protection of “public interest security, public health or morals”. The Committee often invokes the spatial image of a balancing test when dealing with the necessity of restrictions “in pursuit of a legitimate purpose”. In *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, the Committee stated:

It is for the national legislature to balance the concerns of the public purse with the imperative of adequately protecting social rights.

[paragraph 85]

In truth, this probably has less to do with restrictions in a classic legal sense and more to do with inevitable balancing inherent in any “progressive realisation” of a right.

The reference to necessity “in a democratic society” refers essentially to the proportionality of the measures in question relative to the legitimate aim being pursued. As explained in the *Digest of the case law of the European Committee of Social Rights* (2018):

Moreover, a thorough balancing analysis of the effects of the legislative measures should be conducted by the authorities, notably of their possible impact on the most vulnerable groups in the labour market as well as genuine consultation with those most affected by the measures.

[Digest, p. 235]

What is interesting in this formulation are the process rights afforded to the groups in vulnerable situations before retrogressive measures are contemplated. This fits well with the Sandra Liebenberg theory of “participatory justice” in social rights adjudication (see analysis in Chapter 6).

The reference to public health as one possible legitimate purpose for a restriction to a right is of course relevant in the context of COVID-19 restrictions (for example, triage in the rationing of scarce medical treatments). Further, such restrictions must not be misapplied or for “any purpose other than that for which they have been prescribed” (Article 31.2).

Restrictions to rights are qualitatively different to (or give rise to a different set of juridical concerns) than resource scarcity which can lead to questions about the

adequacy of “progressive realisation” or, in some cases, the retrogressive effects of periodic retrenchments. This is dealt with more fully in Chapter 6 of this study.

The 1961 Charter contained no explicit provisions on “progressive realisation”.

One point of note about the 1961 Charter is that there is no textual equivalent to the “progressive realisation” provision in the UN CESCR (Article 2.1, ICESCR). This is somewhat surprising given that the whole point of the Charter is to promote and protect economic and social rights. However, the absence of such a provision may be somewhat understandable when one remembers that the

bulk of the rights protected in the original treaties are in the broad labour law field and are therefore somewhat more amenable to immediate realisation⁷⁰.

Of course, as the text of the Charter treaties evolved to contain more explicit economic and social rights (like the rights of older persons), the Committee also evolved its own jurisprudence on “progressive realisation” (for fuller analysis and discussion, see Chapter 6). But it is still striking that neither the original 1961 Charter nor the substantially revised Charter of 1996 contained any explicit provision on “progressive realisation”.

The Appendix to the original 1961 Charter contains, for the most part, interpretive principles applicable to many of the substantive rights. Given that there is, as yet, no specific provision in the Charter on the rights of older persons, the Appendix did not add anything specific on this topic. Famously – or otherwise – the Appendix makes it plain that the rights contained in the Charter extend to foreigners “only in so far as they are nationals of other contracting parties lawfully resident or working regularly within the territory of the contracting party concerned”. Over time, the Committee has marginalised this exception.

The Additional Protocol of 1988 (CETS No. 128).

The intention behind the 1988 Additional Protocol was to essentially add four new rights to those protected under the 1961 Charter.

These have to do with the right to equal opportunities and equal treatment in employment on the grounds of sex (Article 1), a right to information and consultation (in the workplace – Article 2), a right to take part in the improvement of working conditions (Article 3) and the right of elderly persons to social protection (Article 4). Three of these new rights added to the already broad field of labour rights in the 1961 Charter and one added a wholly new social right dealing with a specific group (the “elderly”).

It is important to point out that Article 4 of the 1988 Additional Protocol was the first piece of international law in the world to specifically deal

The 1988 Amending Protocol contained the world’s first legally binding provision on the rights of older persons.

70. See Rataj Primoz, *The European Social Charter and the Employment Relation*, 20:1 Europe J. Soc. Sec., (2018).

with the rights of older persons. It existed long before the African Union Protocol or the Inter-American Convention on the Rights of Older Persons (see Chapter 2 above). And it long pre-dated policy developments at European regional level (in the EU and in the Council of Europe – see Chapter 3). The use of the term “elderly” does seem a bit dated now. It was clearly pioneering even in its day. As mentioned in Chapter 3, it directly influenced the drafting of the relevant part of the EU Charter of Fundamental Rights. It reads:

Article 4 – Right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

1. to enable elderly persons to remain full members of society for as long as possible, by means of:
 - a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life,
 - b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them,
2. to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
 - a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing,
 - b. the health care and the services necessitated by their state,
3. to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Interestingly, when Belgium and Hungary ratified the Additional Protocol, they declined to be bound by Article 4. Italy entered a declaration to the effect that it considered Article 4.2 to be of a “programmatically character”. In its own way, this was a backhanded concession that some obligations in the Charter are subject to “progressive realisation” (without specifically using that language).

There are several noteworthy points about Article 4 as originally drafted.

First of all, it contains 3 numbered paragraphs (allowing plenty of opportunity to opt-in or out of the three separate and separable parts). The substance of Article 4 was repeated in the Revised Social Charter of 1996 – but crucially without the numbered paragraphs (see now Article 23 of the Revised Social Charter – see Chapter 7 below). This means that Article 23 now comes as a unitary package – once a Contracting Part opts in to Article 23, it is deemed to have opted in to the entirety of Article 23. This removal of the numbered paragraphs seems to have been quite deliberate on the part of the framers of the Revised Social Charter.

Secondly, the phrase “for as long as possible” in paragraph 1 is interpreted to refer to the elderly person’s “physical, psychological and intellectual capacities” (see Appendix to the 1988 Additional Protocol). What is interesting about this language in the appendix is that it does not interpret “for as long as possible” to refer to, and place a spotlight on, the adequacy of social arrangements or supports as the reason why it is no longer possible to reside at home. By focusing on the peculiarities of the person (as *the* reason why they cannot continue to live at home) it clearly does not come from the “social construct” theory of age. In a way, it problematises the person and not the adequacy (or otherwise) of social supports surrounding the person. In any event, the reference to “intellectual capacities” would mean something completely different today relative to 1988 when there was no vision of “supported decision making” to enable a person with decision-making frailty to continue to plot their own life-course. Further analysis of Article 4 (now Article 23) is left to our treatment of the Revised Social Charter (see Chapter 7 below).

Of particular (if now historic) interest is the Explanatory Memorandum accompanying the Additional Protocol of 1988⁷¹. It explains that the use of the words “in particular” in the opening paragraph was intended to convey that the “provisions enumerated are not exhaustive” (paragraph 53). This simply means that the States Parties are free to go beyond the material scope of Article 4. It continues:

54. The expression “full members” means that elderly persons must suffer no ostracism on account of their age, since the right to take part in society’s various fields of activity is not granted or refused depending on whether an elderly person has retired or is still vocationally active or whether such a person is still of full legal capacity or is subject to some restrictions in this respect (*diminutio capitis*).

Of note in this thinking is the sharpness of the distinction drawn between being fully economic active, on the one hand, or suffering from a complete loss of legal autonomy, on the other. Such a characterisation would not be put forward today and is certainly not in keeping with the “social construct” of age.

The term “adequate resources” is to be interpreted, according to the Explanatory Memorandum, in line with Article 13 of the Charter which deals with the right to social and medical assistance. Again, this might be viewed as a sideward acknowledgement of the concept of “progressive realisation” intrinsic to the Charter system (at least when it comes to the more ostensibly social rights that it contains like Articles 13 and 23).

With respect to paragraph 2, the Explanatory Memorandum explains the ability of elderly persons to remain in their familiar surroundings (that is, their own home):

should be assessed in relation to their psychological and physical state, their living conditions, the standard of their accommodation, etc.
[paragraph 56]⁷²

This again is quite dated since now the focus would not so much be on the peculiarities of the person but on the quality and depth of the social measures that are put in place to enable the person to benefit from remaining in their own home.

71. The explanatory memorandum is available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb346>

72. In the interests of authenticity, we remain faithful to the term “elderly” as used in the Charter and associated texts, even though this term would not be used today.

Paragraph 2.b of Article 4 in the 1988 Additional Protocol refers to healthcare and services related to their state. The Explanatory Memorandum interprets “services” more narrowly than the dictionary might suggest to include “admission to specialised institutionalised services”. This spin was quite unnecessary since the paragraph 3 which follows guarantees to older persons in institutions certain rights (which would not be needed unless they lived in institutions). It continues “this provision [Article 2.b] assumes the existence of an adequate number of institutions” (paragraph 57). The Explanatory Memorandum goes on to assert that independence is just as important in institutions as outside them (not explaining how institutions per se mean a loss of independence) and also emphasising the right of privacy in institutions as guaranteed by the European Convention on Human Rights (at paragraph 59).

Thus, the Additional Protocol of 1988 was important in providing for the first legal provision in the world on the rights of older persons. It would evolve later on as the move was made away from viewing older persons as objects towards viewing them as subjects with equal human rights and with an associated move toward the “social construct” of age. Despite some of its obvious blind-spots rooted back in the 1980s, it nonetheless provided a solid base for the evolution of jurisprudence.

Amending Protocol of 1991 (CETS No. 142).

The intent behind the Amending Protocol of 1991 was to “improve the effectiveness of the [original 1961] Charter and particularly the functioning of its supervisory machinery”. This essentially meant clarifying and strengthening the role of the Committee of Independent Experts which had been left somewhat ambiguous in the original 1961 Charter.

As previously indicated, Article 2.2 of the Amending Protocol is to the effect that the Committee shall “assess from a legal standpoint the compliance of national law with the obligations arising from the Charter...”. Apparently, the Governmental Committee had begun issuing its own conclusions which rivalled those of the Committee. That was perhaps inevitable given the ambiguity of the original Charter – but it was cleared up in the 1991 Amending Protocol.

The 1991 Amending Protocol (Article 4 of which amends Article 27.3 in the original 1961 Charter) further clarifies the role of the Governmental Committee which:

... shall prepare the decisions of the Committee of Ministers. In particular, in light of the reports of the Committee of Independent Experts and of the Contracting Parties, it shall select, giving reasons for its choice, and on the basis of social, economic, and other policy considerations, the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned ...

[Italics added].

The reference to “social, economic and other policy considerations” could also be viewed as an oblique reference to notions such as “progressive realisation” which were not present in the text of the original 1961 Charter and which the Committee did not really focus on in the early days of the system. But it is somewhat superfluous now, given that the Committee has fully embraced the concept of “progressive realisation” (see Chapter 6). Logically, therefore, there should be little gap between the Committee’s assessment of whether “progressive realisation” has been achieved with the judgment of the Governmental Committee. Put another way, if the Committee of

Independent Experts (now the European Committee of Social Rights) already factors in “progressive realisation” while granting sufficient latitude to the Contracting Parties, then there is little or no need for a secondary body to do likewise.

Article 5 of the 1991 Amending Protocol amended Article 28 of the original 1961 Charter by enabling the Committee of Ministers to adopt a general resolution covering the entire supervisory cycle (see below) “and containing individual recommendations to the Contracting Parties concerned”. Article 6 of the Amending Protocol clarified that the Parliamentary Assembly of the Council of Europe (formerly the Consultative Assembly) could hold a periodic plenary debate on the reports of the Committee of Experts and of the Governmental Committee as well as the resolutions of the Committee of Ministers. Presumably, this debate can include the recommendations (if any) directed to the Contracting Parties. It seems that the Committee of Ministers has operationalised this Protocol even though the requisite number of ratifications has not yet been reached.

Additional Protocol of 1995 providing for a system of collective complaints (CETS No. 158).

Neither the original Turin Charter of 1961 nor the International Covenant on Economic Social and Cultural Rights (1966) contained any provisions allowing for either individual or collective complaints. This was always in stark contrast to the European Convention on Human Rights which contained an individual right of petition from the start.

The new system of collective complaints was the first treaty-based complaints mechanism on economic and social rights in the world.

The Additional Protocol of 1995 broke entirely new ground under international law by allowing for a system of collective complaints which could be transmitted to the European Committee of Social Rights.

This was pioneering as it was the first piece of international law to allow for such complaints dealing with economic and social rights to be ventilated before an international treaty mechanism. An Optional Protocol to the ICESCR (2008)

now allows for a similar communications mechanism (which can include individual complaints).

This is of course an “Additional” Protocol which means that the Contracting Parties to the original 1961 Charter are not bound by it unless they voluntarily accede to it. Thus far, sixteen States have adhered to the Additional Protocol⁷³. The Revised European Social Charter of 1996 creates space for a contracting party to make a declaration under that instrument to be bound by the collective complaints procedure (under Article D).

Of course, creating space for collective complaints (complaints brought on behalf of distinct groups) is understandable if the overall intent is to identify structural

73. For the full list of ratifications see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=F3KSQtYr

weaknesses or gaps within social systems that require systemic solutions. That is to say, if it is feared that individual complaints (no matter how meritorious) might distort social policy or spending (the traditional allocational prerogatives of the executive), then this is much less of a worry if the flaw that is revealed is more structural or widespread in nature. Put another way, such collective complaints can be seen as a productive factor in a system that seeks rationality and uniformity of treatment. Further, such collective complaints might reveal inefficiencies that systems – if left to their own devices – might struggle to identify and rectify. This of course, is exactly the situation with respect to older persons who, as a group, have been treated as relatively invisible and as a burden in traditional social policy.

Several categories of groups are allowed to bring forward collective complaints: (1) international organisations of trade unions or employers, (2) international non-governmental organisations (INGOs) which have consultative status with the Council of Europe system and have been placed on a list for the purpose of lodging such complaints by the Governmental Committee, and (3) national organisations of trade unions and employers within the jurisdiction of the contracting parties (Article 1 of the Additional Protocol).

When ratifying the Additional Protocol, a contracting party may also declare that it recognises the standing of purely national NGOs to lodge collective complaints (Article 2 of the Additional Protocol). To date, only one contracting party has done so (Finland). International and national NGOs can only lodge collective complaints with respect to matters that lie within their sphere of competence.

Several prominent European elder rights groups are registered to lodge collective complaints.

A cursory glance at the list shows two European level INGOs in the field of age that have successfully registered to lodge collective complaints: AGE Platform Europe and International Federation of Associations for Elderly People. Many more which have successfully registered have a field of competence that overlaps with the rights of older persons (for example, Alzheimer Europe, Mental Health Europe, European Federation of National Organisations

Working with the Homeless, etc).

This does not mean that groups that are not registered have no opportunity to engage. They can approach those INGOs that are registered and, provided they agree, a collective complaint can be lodged in their name. It does not matter if the complaint

Small national elder rights NGOs can approach pan-European INGOs to take carriage of a collective complaint.

only refers to one country (as is normally the case). Thus, an affiliate (or even a non-affiliate) part of an INGO (say, in Ireland) can approach AGE Platform Europe to see if they will assume carriage of a collective complaint that relates to the situation faced by older persons in Ireland. Of course, the contracting party must have opted into the Optional Protocol to allow the collective complaint to move forward. Indeed,

it must allow opt-in to the provision in the Charter complained of. For example, Ireland has ratified the Optional Protocol but has not opted into Article 31 of the Revised Social Charter (the right to housing). Therefore, as things stand, it would not be possible to launch a collective complaint against Ireland based on Article 31.

The 1995 Additional Protocol envisages a two-stage process: the first dealing with admissibility and the second dealing with the merits. Article 6 of the Optional Protocol empowers the Committee to request written submissions from the parties concerning admissibility. Article 7§4 specifically confers discretion on the Committee to organise an oral hearing with the representatives of the parties. Article 8 requires the Committee to draw up a report (now a decision) presenting its conclusions (and reasoning) as to whether or not the contracting party has ensured the satisfactory application of the provision/s of the Charter referred to in the complaint. The language used here (“satisfactory application”) may also hint to an implicit notion of “progressive realisation”.

The decision is first transmitted to the Parties and to the Committee of Ministers which will then adopt a resolution dealing with the same. The decision is not made public until such a resolution is adopted by the Committee of Ministers, or 4 months later – whichever comes first. The Committee of Ministers may adopt a resolution to the effect that the Charter has not been “applied in a satisfactory manner” (essentially agreeing with the conclusions if not the reasoning of the Committee of Experts) and a recommendation addressed to the contracting party concerned. Specific recommendations are still the exception.

“Country profiles” on the Social Charter web site contain useful information on a State’s record over time as well as the inputs of civil society on that country.

Sixteen Council of Europe Member States have ratified the 1995 Additional Protocol allowing for collective complaints. They include Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain and Sweden.

A useful part of the Social Charter webpage contains “Country profiles”. Among other things, one can find recent alternative or “shadow reports” on this webpage, alongside State reports and the successive conclusions arrived

at by the European Committee of Social Rights, the non-accepted provisions procedure with respect to the relevant State and decisions with respect to collective complaints against the State (assuming the State has opted in to the procedure)⁷⁴. It is often useful to consult this page to see what submissions (if any) various social rights groups are making alongside State reports whether they include, for example, inputs on the rights of older persons.

74. See, e.g., the Country Profile webpage of Ireland as an example (the shadow reports appear under “Latest National Report by Ireland”: <https://www.coe.int/en/web/european-social-charter/ireland>)

Revised European Social Charter – 1996 (CETS No. 163).

Despite its title, the 1996 Revised European Social Charter did not, as such, replace the original 1961 Charter.

Contracting parties could continue under the original Charter and opt not to adhere to the Revised Charter. Some have. Obviously, the intention was that most or all of them would progressively migrate over to the new Revised Charter and most of them have. To date, 34 States have ratified the Revised Social Charter⁷⁵. This means that, for them at least, the 1961 Charter is redundant.

A completely Revised Charter was necessary to consolidate the many amending and optional protocols as well as to refresh and update the substance of the social rights protected.

Usefully, the preamble refers to a Council of Europe Ministerial Conference on human rights held in Rome in 1990 which stressed the interdependence of civil and political rights with economic, social and cultural rights. A political decision was taken in 1991 to “update and adapt the substantive contents of the Charter in order to take account in particular of the fundamental social changes which have occurred since the text was adopted”.

The structure of the Revised European Social Charter follows the original 1961 structure. Part 1 contains the pithy interpretive principles – with the difference that they now number 31 instead of the original 19. Part II contains the substantive rights – now running to 31 articles. The expanded list contains several new rights. And Part III deals with undertakings.

Article 23 of the Revised European Social Charter repeats the content of Article 4 of the 1988 Additional Protocol, except it now lacks numbered sub-paragraphs. Interestingly, the Explanatory Memorandum that accompanies the Revised Social Charter of 1996 does not contain any analysis of the new Article 23. That is presumably because the new Article 23 remains (substantively) exactly as it was in Article 4 of the 1988 Additional Protocol with the only difference being that the numbered paragraphs are removed in Article 23 and the article now stands as an indivisible whole. Maybe this is not too surprising since there were no major shifts between 1988 and 1996 (a period of under ten years) in thinking on the rights of older persons. There certainly have been since then.

As previously mentioned, Article D allows for the Contracting Party to opt in to the collective complaints system upon ratification (if they had not already done so under the 1995 Additional Protocol). And, substantively speaking, Article E adds a wholly new textual provision on equality and non-discrimination that is transversal in scope (covering the entirety of the Social Charter) – see Chapter 5.

Some of the larger Council of Europe States have not yet ratified the Revised European Social Charter. They include Poland and the United Kingdom. Germany

75. For the full list of ratifications see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=6WKmbcgT

ratified the Revised Charter in March 2021. It has still not opted in to the collective complaints procedure. Spain ratified the Revised Charter in May 2021 accepting all the provisions of the treaty and the 1995 Additional Protocol providing for a system of collective complaints.

4.2 The rights protected

There are many ways of making sense of the spread of rights in Part 2 of the Revised European Social Charter⁷⁶.

Here, for our purposes, it is suggested that they fall into three broad categories, in addition to the overarching norm of equality. This is by no means watertight. Nevertheless, it is useful to categorise the rights protected as follows.

Labour market rights (21 articles): the first (the majority) touch on labour matters in the broadest sense. 21 rights out of the 31 protected by the Revised European Social Charter cover the labour market in one way or another. At the pre-employment level, Articles 9 and 10 cover vocational guidance and vocational training. Article 1 covers the right to work itself. Articles 2 and 3 cover the rights to just and favourable conditions at work and the right to a safe working environment, and Article 26 deals with the right to dignity at work. Articles 5 and 6 cover the freedom to associate and the right to engage in collective bargaining. Several articles in this tranche deal with the employment rights and conditions of particular groups including women (Articles 8 and 20), children (Article 7), migrant workers (Article 19) and the protection of the families of workers (Article 27).

A variety of rights in this first tranche deal with the right to participation in the improvement of working conditions and particular protections that arise in specific contingencies such as insolvency. They include a right to information and consultation in the workplace (Article 21), to take part in the improvement of working conditions (Article 22), to protection in cases of termination of employment (Article 24), to protection during insolvency proceedings (Article 25), to protection during redundancy procedures (Article 29), and to protection of workers' representatives (Article 28).

This is a fairly comprehensive sweep across the world of work and it overlaps substantially with the UN ICESCR as well as with many ILO conventions and recommendations. And it covered a period (1960s-1990s) when the EU was not really as active as it now is in the whole labour market sphere.

This is obviously an important set of rights. Economic independence is not only important in its own right, but it serves as a foundation for independence in other spheres of life. This is as true for older persons as it is for others.

Ageism and ageist laws and policies highly disadvantage older workers. The main issues that arise in the context of older persons (workers) have to do with unequal access to vocational training and the opportunity to upskill, discrimination in hiring practices, unequal payment, unequal treatment when it comes to redundancy or

76. For example, the Digest (2018 ed.) divides them up into housing, health, education, employment, social protection, integration and participation and non-discrimination (pp. 12-14).

termination of employment, lack of “reasonable accommodation” when it comes to employment conditions, etc. A whole set of issues arise due to mandatory retirement ages, age of retirement, choice in retirement, and work-related occupational pensions. Related issues might arise with respect to trade union representation (or the lack thereof) and policies that fail to sensitively balance caring and working responsibilities.

A hidden but very real issue (as always) has to do with informal carers (mainly women) and the precarious nature of formal caring roles and employment. Several labour-related issues also arise with respect to the rights of carers (formal or informal) to leave, to sick leave, to compensation if forced to leave employment due to caring responsibilities, etc. These issues remain somewhat invisible but are beginning to register as live issues around the world.

A minimum floor of social rights provision (4 articles): the second tranche has more to do with a minimum floor of social provision (going beyond labour market issues). They include a right to the protection of health (Article 11), a right to social security (Article 12), a right to social and medical assistance (Article 13), a right to protection against poverty or social exclusion (Article 30) and a right to housing (Article 31).

All of these rights are relevant to the situation of older persons.

Again, arising from ageism and ageist policy assumptions, many of the relevant programmes are configured to compensate for the absence of older people from the lifeworld and are not configured to forge pathways into the mainstream and to enable older persons live their own lives in their own way and in their own community. Social security is often inadequate. Social security systems sometimes ignore intersectional aspects of ageing (for example, being an older widowed woman or being an older migrant). Medical assistance, which is naturally relevant for older age-groups, may be shaped in a discriminatory manner and exclude older persons either *de jure* or *de facto*. This may be more pronounced in certain fields of healthcare like rehabilitation or medical geriatrics.

Finally, discrimination with respect to medical treatment (and a lack of specialised medical facilities) creates many problems as revealed by discriminatory triage protocols during the COVID-19 pandemic. The lack of life-long housing options contributes to decisions to leave the family home (and the community) to enter residential facilities. And, even when spatially residing in the community, the degree of social exclusion felt by older persons is palpable.

The social rights of particular groups (3 articles): the third tranche relates to the social rights and social situation of particular groups: persons with disabilities (Article 15), children (Article 17) and older persons (Article 23). All of these provisions are pioneering. And they all lean on one another and hint at intersectional impacts especially between disability and old age. And the animating philosophy behind all three is a highly positive one of protecting, nurturing and empowering.

The overarching norm of equality: informing and controlling all three tranches of rights is the concept of equality and non-discrimination contained in a new Article E. This is covered extensively in Chapter 5 below.

It suffices to say at this juncture that the concept of equality in Article E (and certainly as interpreted by the Committee) goes far beyond a simple analysis of relative treatment (how one class of persons is treated relative to another). Instead, it is anchored in respect for dignity; it recognises and aims to preserve autonomy; it creates space to positively view and treat human difference (“reasonable accommodation”); and it views social rights and arrangements as something that underpin rather than undermine individual autonomy and rights of participation. It is the glue that holds social citizenship together.

4.3 European Committee of Social Rights - practice and procedures.

The Committee (referred to as the European Committee of Social Rights since 1988 – but without any accompanying treaty amendment to that effect) has adopted successive rules governing its practice and procedure. Amongst other things, these rules govern practice and procedure with respect to the collective complaints procedure. The latest iteration of the rules dates back to 2021. If intending to engage with this machinery, it is important to be familiar with these rules.

A. Reporting procedure.

The reporting process is governed by Part IV of the 1961 Charter, as amended by the 1991 Amending Protocol⁷⁷.

Originally, the contracting parties reported on the core articles they accepted every two years and then on the remainder every other two years (in a four-year cycle). Each contracting party now reports on all articles and paragraphs accepted once every four years. However, this reporting does not happen all at once since there are too many substantive articles and provisions to report on. Instead, the four-year reporting cycle is broken down into four separate years, with reporting each year on different provisions of the Charter.

In each year of the reporting cycle, the European Committee of Social Rights adopts conclusions based on its analysis of the reports (sometimes running to two or more volumes).

Importantly, each set of annual conclusions is prefaced with “interpretive statements” which signal a development in the jurisprudence and put the contracting parties on notice of the next reporting cycle relating to the article or provision in question.

A Committee of Ministers decision was made in 2006 dividing the reporting cycle as follows (CM(2006)53).

77. For a trenchant critique of the reporting system see Philip Alston, *Assessing the Strengths and Weaknesses of the European Social Charter’s Supervisory Mechanism*, chapter 4 in DeBurca & DeWitte, (Eds.), *Social Rights in Europe*, (Oxford, 2005).

YEAR 1 OF THE 4-YEAR REPORTING CYCLE.

Article	Right	Comment
1	Right to work	
9	Right to Vocational Guidance	
10	Right to Vocational Training	
15	Rights of Persons with Disabilities	
18	Right to engage in a gainful occupation in the territory of other Parties	
20	Right to equal opportunities and equal treatment on grounds of sex in employment	
24	Right to protection in cases of termination of employment	
25	Rights of workers in cases of insolvency	

YEAR 2 OF THE 4-YEAR REPORTING CYCLE.

Article	Right	Comment
3	Right to safe and healthy working conditions	
11	Right to protection of health	
12	Right to social security	
13	Right to social and medical assistance	
14	Right to benefit from social welfare services	Highly relevant to older persons
23	Right to elderly persons to social protection	Highly relevant to older persons
30	Right to protection against poverty and social exclusion	Highly relevant to older persons

YEAR 3 OF THE 4-YEAR REPORTING CYCLE.

Article	Right	Comment
2	Right to just conditions of work	
4	Right to a fair remuneration	
5	Right to organise	
6	Right to bargain collectively	
21	Right to information and consultation	

22	Right to take part in improvement of working conditions	
26	Right to dignity at work	
28	Right of worker's representatives at work	
29	Right to information and consultation in collective redundancy procedures	

YEAR 4 OF THE 4-YEAR REPORTING CYCLE.

Article	Right	Comment
7	Right to children and young persons to protection	
8	Right of employed women to protection of maternity	
16	Right to the family to social, legal and economic protection.	Highly relevant to older persons
17	Right of children to social, legal and economic protection.	
19	Right to migrant workers and their families to protection and assistance	
27	Right of workers with family responsibilities to equal opportunities and equal treatment	
31	Right to housing	

This was not exactly a logical way of breaking down the Articles and provisions and was probably based in part on the mix or spread of labour law and social rights expertise within the Committee.

Since a 2014 decision of the Committee of Ministers of the Council of Europe⁷⁸, all States that have accepted the collective complaints procedure must submit a simplified report every two years, according to a schedule that depends on the group to which they belong.

- ▶ Group A: France, Greece, Portugal, Italy, Belgium, Bulgaria, Ireland, Finland
- ▶ Group B: the Netherlands, Sweden, Croatia, Norway, Slovenia, Cyprus, the Czech Republic, Spain

A simplified report should contain information exclusively on the follow-up taken by States in response to the Committee's decisions in collective complaints. When submitting a simplified report, States are exempted from reporting on the provisions of the thematic group.

78. CM(2014)26: Ways of streamlining and improving the reporting and monitoring system of the European Social Charter

The schedule set for both ordinary and simplified reports can now be found in the 2014 decision of the Committee of Ministers, available online⁷⁹.

Both the High Level Group report and the Secretary General's 2021 proposals make further recommendations aimed at the simplification of the reporting regime. An interesting idea is the introduction of smarter or more thematic reporting. This could be of obvious benefit to older persons and their representative organisations.

Civil society groups representing older persons can have their say in the process reviewing "non-accepted provisions of the Charter.

Importantly, each State party reports on "non-accepted provisions" every five years. The intent here is not to adopt legal conclusions with respect to compliance. Instead, through constructive dialogue, it is to gauge the readiness of the State party to opt in to the relevant provision. Sometimes, a delegation from the Committee will visit the relevant State for discussions on progress under the relevant provision and to better assess the possibilities of opting in. Mostly, the process is handled by a written exchange of information. Occasionally, the State party will not respond to requests for information to apprise the Committee. This can seriously hamper the work of the Committee.

seriously hamper the work of the Committee.

The rules adopted by the Committee (2021)⁸⁰ say nothing about the practice and procedure to be followed with respect to reports by the Committee on non-accepted provisions. However, in an analogy with the space provided for civil society to lodge their own submissions (shadow reports) alongside States in the more formal reporting process, it should be possible for civil society groups to interact with the Committee in the procedure on non-accepted provisions. Again, the aim is not to adopt firm conclusions on legal compliance but rather to assess whether sufficient progress has been made to clear the way for the relevant State to opt in to the relevant provision⁸¹. For example, the process might be used by Belgian civil society groups to encourage Belgium to opt in to Article 23 on the rights of older persons.

Some regard may be had by the Committee to "non-accepted provisions" to give business efficacy to accepted provisions.

In *MDAC v. Bulgaria*, the Committee explained the relationship between accepted and non-accepted provisions as follows:

79. See Committee of Ministers decision CM(2014)26: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c76e3

80. Rules of the European Committee of Social Rights, 19 May 2021: <https://rm.coe.int/rules-rev-320-en/1680a2c899>

81. See procedure on non-accepted provisions of the European Social Charter: <https://www.coe.int/en/web/european-social-charter/accepted-of-provisions>

The Charter was conceived as a whole and all its provisions complement each other and overlap in part. It is impossible to draw watertight divisions between the material scope of each article or paragraph. It therefore falls to the Committee to ensure at the same time that obligations are not imposed on States Parties stemming from provisions they did not intend to accept and that the essential core of accepted provisions is not amputated as a result of the fact it may contain obligations which may also result from unaccepted provisions.

Although the language used above is quite cryptic, what it probably means is that the fact of not accepting a paragraph within an article (part of which is accepted) should not be conclusive since the non-accepted part may in fact form part of the relevant “core” of an article. However, that spatial image (core and periphery) is still hard to square with one of the basic defining characteristics of the Charter which is that States are allowed to opt in or out of most provisions. Probably a better way of apprehending this is to say that certain provisions give off a penumbra and that, to give business efficacy to the accepted provisions, some regard must be given to these ancillary obligations.

A conclusion may be deferred by the Committee to the next round of reporting because of a lack of information. Of course, that means that if a provision is reviewed with respect to country X in year 1 of the 4-year cycle it will not come up for review again for 5 years. That is certainly not conducive to social progress. Theoretically, that might mean indefinite postponement of a conclusion if the information is still not provided. The *modus operandi* now adopted by the Committee is that if the information is not provided in the next cycle, then the Committee may well adopt a negative conclusion on the grounds that the State in question has not established that it is in conformity. The burden of proof is effectively reversed.

There is a prescribed form for State reports. The latest version dates from 2008⁸². With respect to Article 23, it requires the following information from States:

23. Information to be submitted:

- 1) Please describe the general legal framework. Please specify the nature of, reasons for and extent of any reforms.
- 2) Please indicate the measures taken (administrative arrangements, programmes, action plans, projects, etc.) to implement the legal framework.
- 3) Please provide pertinent figures, statistics or any other relevant information on measures taken to ensure that elderly persons have access to adequate benefits in cash or in kind; on the level of public expenditure for social protection and services for the elderly; on the accessibility of measures and the number of elderly people benefiting from them; on the number of places available in institutions for elderly persons; on the number of elderly living in such institutions, and on whether a shortage of places is reported.

An appendix to the 2008 form gives a list of relevant international instruments in the same field (as the relevant article). None is listed for Article 23. Each Committee member is assigned one or more articles per reporting cycle to act as article/s rapporteur.

82. See form for State reports : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804922f8>

States are assessed against the law but also in terms of the application of the law. De jure compliance is not enough. States must demonstrate that their own laws and policies are being applied effectively. Another way of viewing it is that the Committee is just as interested in outcomes as it is in the formal law.

Carole Benelhocine, usefully observes:

Unlike some courts which base their decisions only on the legal norms, the Committee looks at the wider situation in the country concerned including national rules, their means of implementation, how this is monitored and the results achieved. This approach has the merit of highlighting situations where countries' legislation is entirely in keeping with the Charter but actual practice is not⁸³.

This broader lens is powerfully reflected in the Committee's very first decision in a collective complaint (*International Commission of Jurists v. Portugal*, Complaint No. 01, 1998) where it said:

...the Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this regard, it considers that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (see, for example, Conclusions XIII-3, pp. 283 and 286)⁸⁴.

Interestingly, dissenting opinions by Committee members are allowable. That is to say, if an individual member disagrees with a conclusion or a statement of interpretation or a decision on a collective complaint, then he or she may vote accordingly and also write/append his/her written dissent. This applies to both the reporting procedure and the collective complaints procedure.

B. The collective complaints procedure.

Part VIII of the Rules deals with practice and procedure with respect to collective complaints and should be consulted before lodging a complaint⁸⁵.

Rule 23 is to the effect that such complaints should be addressed to the Executive Secretary of the Committee and signed by the applicant. Normally, such complaints are lodged in one or other of the official languages of the Council of Europe (French or English) but can be entertained in another language in particular circumstances (Rule 24). The respondent State is represented by its agent and advisers (if any).

Interestingly, the language used in Rule 25.2 does not appear to require the representative of the moving party to be legally qualified.

Collective complaints are normally processed in the order in which they are received (Rule 26). However, the Committee has discretion to give a particular collective complaint priority (26). Rule 26 does not indicate any criteria upon which this discretion may be exercised.

83. Benelhocine, *cinquième ouvrage cité supra* note 69, p. 70.

84. Para 32.

85. Curiously, there are only three full-length and thoughtful articles on the Collective Complaints procedure to date: Holly Cullen, *The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social Rights*, HRLR, 9:1 (2009), 61; and Colm O'Conneide, *Equality and Non-Discrimination Rights within the Framework of the European Social Charter*, *European Equality Law Review* (2015:1), 1; and Churchill & Khaliq, *The Collective Complaints System of the European Social Charter: an Efficient Mechanism for Ensuring Compliance with Economic and Social Rights?*, (2204) *Eur. J. of Int. Law.*, 417.

If two or more collective complaints cover substantially the same subject matter, then the Committee has competence and discretion to join them (Rule 26A.1). A rapporteur from the Committee is appointed for each collective complaint.

The rules set out how the two-stage process is to progress: (1) first, a decision on admissibility, and then, (2) a decision on the merits. If it manifestly appears that admissibility will not be a hurdle, then the respondent State may be asked for written observations on both admissibility and the merits.

There is no rule that domestic remedies have to be exhausted before a collective complaint can be lodged.

Interestingly, neither the text of the Charter nor the rules specify the criteria of admissibility as such. They can be gleaned from a variety of provisions: they must be submitted in writing; the entity submitting must be among those permitted to submit under the terms of the Charter; the complaint must be signed by a person entitled to represent the complainant organisation and, if it is lodged by an INGO, it must fall within a field in which the INGO is qualified. The rule that domestic remedies should

first be exhausted does not apply to collective complaints under the Charter, even where such remedies exist.

A collective complaint can be declared admissible even if another case is pending before a different international body or court. Similarly, the fact that the Committee has already traversed the ground covered by a collective complaint in a previous round of conclusions (or that it will likely cover the ground in an upcoming reporting round) does not preclude it declaring a complaint admissible⁸⁶. And the fact that the Governmental Committee may have previously declined to propose a recommendation to the Committee of Ministers on the point against the respondent State does not preclude a declaration of admissibility⁸⁷. Indeed, if the relevant government is on record as proposing changes to the underlying law (and even if a bill to that effect is pending before its parliament), that too does not preclude a declaration of admissibility.

If a collective complaint has been declared admissible, then the Committee invites the respondent State to submit written observations with respect to the merits with a further opportunity for the moving party to respond (Rule 31). Other States may lodge their own observations (provided they too have opted in to the collective complaints procedure). On at least four occasions, States have availed of this opportunity (Belgium once, and Finland three times)⁸⁸. The President of the Committee (together with the case rapporteur) then decides at what point the written procedure is closed (Rule 31.4).

Interestingly, the President can, upon a proposal from the rapporteur, “invite any organisation, institution or person to submit observations”. This comes close to allowing for *amicus curiae* briefs. There have been fourteen of these so far – including one

86. See Digest (2018 ed.), p. 18.

87. *Id.* At p. 25.

88. See Digest (2018 ed.), pp. 28-29.

from the UN High Commission for Refugees. The language used in the rules is not as crabbed as Articles 1 and 2 of the Additional Protocol of 1995. So, theoretically, provided it had sufficient bona fides in the issues being ventilated, a public interest elder rights group could lodge its observations on a collective complaint.

Note also that the lodging party or *amicus* need not be from a State that has ratified the Additional Protocol (or opted in under the Revised Social Charter). This opens up many possibilities to ventilate issues that elder rights groups need to be mindful of.

Civil society groups representing older persons can lodge ‘amicus briefs’ to collective complaints even when not directly involved in the case.

The essence of the complaint is that it is collective – that is to say, it highlights the impact of laws or policies or practices on defined groups. However, as Cullen points out, the moving party can point to impacts on individuals to substantiate the evidence of a complaint⁸⁹. The Committee cannot, of course, make findings on individual cases.

Sometimes, collective complaints will, incidentally, touch on issues connected with elder rights. If so, and even if not directly involved in the proceedings, there now is an opportunity get involved and make one’s voice heard through, for example, *amicus* briefs. This of course places a premium on keeping a close watch on the docket of the Committee to spot collective complaints that may warrant an intervention⁹⁰.

Cullen gives a useful table of provisions in the Revised Charter matched with collective complaints. Sadly, this is now ten years out of date and deserves highlighting and updating to give the uninitiated an understanding of the scope of collective complaints. At the time she wrote (2009), the preponderance of collective complaints fell under Articles 5 and 6 (labour rights). Even then, her analysis revealed a growing reliance on Article E in combination with the more substantive provisions⁹¹.

The Committee has the discretion to convene an oral hearing of the parties either at the request of one or other of the parties or on its own motion (Rule 33). Such hearings are run in a quasi-judicial manner and are generally held in public unless the President decides otherwise (Rule 33.3). They are not livestreamed or video archived – but they certainly could be. At least, there is no rule against such a practice and there are sound public policy reasons why it ought to evolve. For example, hearings before the European Court of Human Rights are now routinely webcast and have been for some time.

An important rule now deals explicitly with motions for “immediate measures” (Rule 36) or what would be termed “urgent action measures” elsewhere. It is to the effect that:

89. Cullen, *supra* note 85, p. 89.

90. See generally, Claire Lougarre, How can (I)NGOs engage with the European Committee of Social Rights under the monitoring procedures of the European Social Charter: <https://rm.coe.int/prems-125919-ingos-engagement-ecsr-web-en/168098fcc1>

91. Cullen, *supra* note 85, p. 89. .

36.1 At any stage of proceedings, the Committee may, at the request of a party, or on its own initiative, indicate to the parties any immediate measure, the adoption of which is necessary to avoid irreparable injury or harm to the persons concerned.

It is not hard to imagine how this might be an exceptionally valuable tool in some cases involving the rights of older persons. If, for example, the relevant collective complaint involves unequal treatment or discrimination with respect to the rationing of healthcare services (like ventilators), then “immediate measures” might be sought if there were older people about to be disadvantaged (putting it mildly) as a result of such policies. That would clearly be a life or death situation.

“Immediate measures” to avoid irreparable harm can be requested of a State by the Committee in the collective complaints procedure which maybe of direct use to older persons.

Interestingly, the Committee does not have to wait until there is a motion to this effect by the parties – it can request “immediate measures” from the respondent State on its own motion. If the request is made by one of the parties, then it should “specify the reasons therefore, the possible consequences if it is not granted, and the measures requested”. To use the example above, the Committee might determine that

an “immediate measure” might take the form of an order to “cease and desist” in the implementation of triage policies pending the outcome of the case on the merits.

A decision to grant an “immediate measure” has to be accompanied by reasons and signed by the President, the case rapporteur, and the Executive Secretary to the Committee. The Committee may request “information from the respondent State on the implementation of the immediate measures” (Rule 36.3).

There are several recent examples of such “immediate measures” requested during the course of a collective complaint. In *FEANTSA v. The Netherlands*, Complaint No. 86/2012, the Committee issued a decision on “immediate measures” requesting the respondent State to meet basic shelter needs and avoid destitution of the groups in question. The request itself is a model of simplicity (22 July 2013)⁹². In its request, FEANTSA explained that “the right to shelter is closely and irrefutably connected to the right to life and the right to health. It is obvious that the impossibility of obtaining shelter increases the risk of serious and irreparable injury to health.” The decision under Rule 36.3 is also a model of simplicity. On 25 October 2013 – some 2 months after the initial request – the Committee invited the respondent Government (it has no power to enjoin or order) to:

“[A]dopt all possible measures with a view to avoiding serious, irreparable injury to the integrity of persons at immediate risk of destitution, through the implementation of a co-ordinated approach at national and municipal levels with a view to ensuring that their basic needs (shelter) are met; and Ensure that all the relevant public authorities are made aware of this decision⁹³.”

92. Text of the request is available here: <https://rm.coe.int/no-86-2012-european-federation-of-national-organisations-working-with-/1680742494>

93. The Committee’s decision on the request for “immediate measures” is available here: <http://hudoc.esc.coe.int/fre/?i=cc-90-2013-dimmed-en>

A similar decision on “immediate measures” was issued by the Committee on 25 October 2013. It invited the respondent State to avoid irreparable injury to the integrity of the persons at immediate risk of destitution “through the implementation of a co-ordinated approach ... with a view to ensuring that their basic needs (shelter, clothes and food) are met”: *Conference of European Churches (CEC) v. Netherlands*, Complaint No. 90/2013.

One decision on “immediate measures” shows the close nexus between civil and political rights with social rights in the Charter. It arose in the case of *International Commission of Jurists (ICJ) and the European Council for Refugees and Exiles (ECRE) v. Greece*⁹⁴. In order to avoid “serious, irreparable injury to the integrity of migrant minors at immediate risk of life, physical and moral integrity”, the Committee requested several measures including access to food, water ... and appropriate shelter, etc⁹⁵. Interestingly, this was a joint decision on both admissibility and immediate measures. Another more recent joint decision on admissibility and immediate measures requested the respondent State to adopt all possible measures to “... ensure that persons evicted are not rendered homeless, to ensure that evictions do not result in “...unacceptable living conditions”⁹⁶.

A negative decision on the merits against a respondent State has several effects.

First, it triggers a response by the Committee of Ministers that has the competence to issue specific recommendations to the State concerned⁹⁷. These recommendations depend on a proposal for the same from the Governmental Committee (see below). They tend not to be directive or specific.

The Committee follows through on its decisions in collective complaints in the next reporting cycle.

Secondly, the State is obliged to submit information to the Committee in the periodic reporting system regarding the “measures taken to bring the situation into conformity” (Rule 40). In practical terms, this means that the next report due from that State on the article in question must update the Committee regarding actions taken to bring it into compliance with the decision.

Thirdly, the jurisprudence generated by the decision has a ripple effect beyond the collective complaints procedure and into the reporting cycle. That is to say, the decision informs the benchmarks against which State reports are reviewed (notwithstanding that they themselves may not have opted in to the collective complaints system). In this way, the jurisprudence generated by the collective complaints procedure can have a powerful ratcheting effect on the overall jurisprudence of the Charter.

Finally, and most importantly, a negative decision often leads to domestic debates about law reform not only in the respondent State but also in others in which the issues

94. Collective Complaint No. 173/2018.

95. The decision is available at: <http://hudoc.esc.coe.int/fre/?i=cc-173-2018-dadmissandimmed-en>

96. *Amnesty International v. Italy*, Complaint No. 178/2019.

97. The process for adopting such Committee of Ministers Recommendations is set out in the European Social Charter, Collected Texts (7th Edition, 2015, in), 7th Ed, at p.204.

are current. Ideally, this means that legal strategies pursued before the Committee have to be complemented with policy and legislative (and indeed media) strategies domestically. This is of course no different in kind to the situation that obtains as a result of other forms of strategic litigation involving, for example, judgments of the European Court of Human Rights.

A collective complaint usually takes about 2 years from beginning to end. That is much faster than the process before the European Court of Human Rights which can take up to 10 years. It remains to be seen whether the success of the system will lead to more complaints and possibility longer delays before the Committee.

So far, the European Committee of Social Rights has not been consistently pressed by claimants in the collective complaints procedure to request a remedy in the form of “just compensation”. Rather, it has of its own motion made some recommendations to this effect but the Committee of Ministers seems not to have followed through. Nothing, a priori, would appear to expressly preclude the Committee of Ministers from doing so. Obviously, the Committee of Ministers would have to be satisfied that there was a clearly definable/asertainable group and the breach warranted some form of compensation either as part of restorative justice or as a future deterrent. For example, one might easily imagine an older person who was refused a ventilator (and survived) as qualifying for a right to just compensation.

C. The case law or jurisprudence of the Charter.

The relevant case law (or jurisprudence) of the Committee is contained in its various conclusions (on State reports), decisions (on collective complaints) and general statements of interpretation (contained in the conclusions on State reports).

The relevant volumes containing the conclusions (from various reporting cycles) are usually prefaced with “statements of interpretation”. These “statements of interpretation” seek to summarise the normative understandings reached by the Committee during its deliberations on the relevant State reports. To follow the line of thinking of the Committee (for example, on Article 23), one has therefore to consult the volumes of conclusions for the relevant 4-year cycles.

The *Digest* of the case law of the Committee seeks to crystallise the accumulated interpretations placed on an article by the Committee. The most recent *Digest* is dated December 2018⁹⁸. Other useful guides to the case law include the periodic *European Social Charter – Short Guide*.

General comments or their equivalent could be a good way of highlighting positive jurisprudence in the Committee.

It is suggested that the Committee might exercise its inherent jurisdiction to better highlight its jurisprudence. At the moment, (though extremely valuable) the jurisprudence seems buried in successive cycles of conclusions in the reporting procedure (and as elaborated in decisions on collective complaints).

98. The full *Digest* is available online at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

The *Digest* – though exceedingly useful – is essentially an inert summary of the jurisprudence. This has several drawbacks.

On the supply side, the normative developments are not as sharp or crystallised as they deserve to be. On the demand side, it is hard to pin down the normative thrust of the Charter or particular parts thereof. One result is that groups that could engage with profit in the Charter process may not do so because of the difficulty of assembling the right information and then connecting it directly to their own policy reform agendas.

One (eminently doable) way around these blockages would be for the Committee to stand back from its case law and draft thematic general comments (or equivalent) on particular rights, obligations or connected layers of rights and to give prominence to these general comments on its website and in its own deliberations. Given the wide latitude the Committee has in fashioning its own Rules and indeed in authorising the *Digest*, there would appear to be no a priori reason why this could not be done. This would incentivise greater engagement of, for example, elder rights groups, with the social rights provisions in the Charter. It would certainly seem to have as much time and space to do this as does the UN Committee on Economic, Social and Cultural Rights.

This would bring the Social Charter (and its many innovative provisions and interpretations) much closer to processes of change on the ground. For example, one might image a thematic general comment on the rights of older persons (mirroring but developing the equivalent general comment under the ICESCR). This could cover Article 23, Article E and several substantive articles in the Charter such as 12, 13, 30, and 31. The impact across European civil society would be immediate and beneficial in moving our societies beyond the ageist policy agenda of the past.

At the very least, the statements of interpretation should be brought together in one place and made easily accessible.

4.4 The role of the Governmental Committee of the European Social Charter and the European Code of Social Security

The European Social Charter process is unusual in that an entity called the Governmental Committee is supervened between the European Committee of Social Rights and the Committee of Ministers.

In general, the Governmental Committee prepares the debates and decisions of the Committee of Ministers. It is composed of one representative per contracting party. Up to two international trade unions and employers organisations are allowed to be present at its meetings, as are specialised international bodies (like the ILO), as matters within their specialisation arise. In addition to the Social Charter, the Governmental Committee also has responsibilities with respect to the European Code of Social Security. The current Rules of procedure for the Governmental Committee were adopted at the 134th meeting of the Committee of Ministers in 2016.

The Governmental Committee considers conclusions of non-conformity by the European Committee of Social Rights provision by provision and country by country in each reporting cycle. It has discretion to pass over negative conclusions if reached for the first time unless a delegate requires that it be debated. Usually, the Governmental Committee hears (orally and/or in writing) from a representative of the relevant State party. Usually, these statements have to do with planned legislation or other national reform proposals. These statements are included in the reports of the Governmental Committee and form a useful reference point (among many others) in assessing the level and depth of activity within a contracting party⁹⁹.

The Committee then votes on each conclusion of non-conformity by the European Committee of Social Rights with a view to proposing a recommendation to the contracting party (on the part of the Committee of Ministers). If there is no majority in favour of a recommendation, then it may decide to issue a “warning” to the effect that if the situation is not remedied by a contracting State then a recommendation may ensue in the next reporting cycle. Short of either proposing a recommendation or issuing a warning, it can append an opinion on the issue at hand. If a party is submitting a first report, then a warning rather than a recommendation is generally issued.

Rule 16.B of the Rules of procedure of the Governmental Committee (2016)¹⁰⁰ lays down selection criteria that are applied in determining whether to propose a recommendation to the Committee of Ministers: they are as follows:

- a. Does the provision in question belong to the hard core of the Charter or the revised Charter?
- b. Is the provision one that has been updated by the revised Charter?
- c. In which cycle was the situation first criticised?
- d. Are a significant number of persons unprotected and what are the consequences of non-compliance for those involved?
- e. How serious does the European Committee of Social Rights consider the situation to be?
- f. Have the social partners expressed an opinion on the seriousness of this type of breach?
- g. What was the Committee’s position in response to the previous conclusion of the European Committee of Social Rights on this point? Was a recommendation adopted by the Committee of Ministers?
- h. Is the country taking or planning to take measures to modify the situation in question?
- i. Does the situation in question also concern another provision of the Charter?
- j. What has the Committee decided in similar situations?

99. The various reports of the Governmental Committee to the Committee of Ministers can be found on its main webpage : <https://www.coe.int/en/web/european-social-charter/governmental-committee>

100. The Rules of Procedure of the Governmental Committee (2016) are available at: <https://rm.coe.int/rules-rev-320-en/1680a2c899>

These criteria seem seriously out of date and not fully consistent with the underlying human rights character of the Charter. For example, most of the hard core of the Charter relates mainly to labour rights – and not to the broader skein of social rights.

Probably a better approach would be to consider whether the breach is evident of a systemic trend or underlying weakness; whether the breach has the potential to do irreparable harm to the individual or group of individuals involved; the potential for inter-generational damage if left unaddressed; the impact of the breach on third parties (like families); whether the breach stems from and/or reinforces deep-seated inequalities and accumulated disadvantages in society; whether the breach results from or helps to cement into place the disadvantaged position of “discrete and insular minorities” who, due to prejudice or otherwise, cannot easily count on the normal democratic process to vindicate their rights, etc. The current criteria seem lenient and are probably in need of being tightened up.

The report of the Governmental Committee shall propose recommendations if deemed necessary but shall not repeat proposals for recommendations made in previous reports. That of course means that proposals for recommendations not acted on by the Committee of Ministers can run dormant. This again is not optimal in a human rights mechanism.

Usually, the Governmental Committee first issues a warning (following upon a negative conclusion from the Committee against a contracting party) and waits to see if there is a constructive response. It may issue a second warning. If a proposal for a recommendation ensues, this process could take 10 years. Obviously, domestic strategies for change should not pivot exclusively on a recommendation from the Committee of Ministers but instead seek to make the most use of the conclusions – more importantly the reasoning – of the European Committee of Social Rights in domestic advocacy for reform.

Criteria are also provided to enable the Governmental Committee deal with situations of deferral of conclusions because of the lack of information (a lack which may rumble through successive reporting cycles).

The Charter provides that the Governmental Committee may consult representatives of INGOs which have participatory status with the COE and have particular competence in the matters governed by the Charter.

Note, the Governmental Committee has no role in the collective complaints procedure. The relevant decision of the European Committee of Social Rights go directly to the Council of Ministers.

The Governmental Committee maintains the list of INGOs it recognises with capacity to lodge collective complaints. Those pan-European INGOs with participatory status with the Council of Europe (formerly consultative status) are entitled to apply to be registered¹⁰¹. The general criteria for registration with participatory status at the

101. The full list is maintained here and should be consulted regularly: <https://rm.coe.int/gc-2020-1-rev2-bil-list-ingos-01-10-2020/1680a01607>

Council of Europe are now contained in a 2016 Committee of Ministers Resolution on participatory status for international non-governmental organisations with the Council of Europe¹⁰².

4.5 The role of the Committee of Ministers of the Council of Europe with respect to the European Social Charter

As mentioned previously, the Governmental Committee prepares the deliberations of the Committee of Ministers on the conclusions of the European Committee of Social Rights.

Only those States that have ratified the European Social Charter are allowed to vote in the Committee of Ministers. If a recommendation is proposed by the Governmental Committee (directed at a particular State party against whom negative conclusions have been adopted by the European Committee of Social Rights) then they can only be adopted by two thirds of attending members voting provided they constitute a majority of States Parties. A contracting party can request a debate before a recommendation is adopted.

Thus far, the Committee of Ministers has adopted very few specific recommendations directed at contracting parties. This places a heavier than usual premium on follow-through at the national level, especially by advocacy organisations. In other words, and in the absence of a clear steer from the Committee of Ministers, such advocacy groups need to carefully think through how they will use negative conclusions domestically.

Given that the European Committee of Social Rights has now developed its own concept of “progressive realisation”, there seems to be less of a need to supervise the Governmental Committee between the European Committee of Social Rights and the Committee of Ministers. Accordingly, as the European Committee of Social Rights is becoming more adept at analysing whether sufficient progress has been made – which necessarily requires it to factor in surrounding circumstances such as the level of socio-economic development, then there is less need for the Governmental Committee to do so. As Liebenberg convincingly points out, this is already being done successfully under the ICESCR¹⁰³.

Perhaps, instead of focusing on whether to make a proposal for a recommendation from the Committee of Ministers, the Governmental Committee should focus instead on what changes in legislation, policy and practice are needed to bring a State into compliance. This would be in keeping with the 2021 proposals of the Secretary General to the effect that the Committee of Ministers could more frequently have recourse

102. CM/RES(2016)3, Participatory status of international non-governmental organisations with the Council of Europe. Available at: <https://rm.coe.int/gc-2020-1-rev2-bil-list-ingos-01-10-2020/1680a01607>

103. For the best overall review, Sandy Liebenberg, ‘Between Sovereignty and Accountability: the emerging jurisprudence of the Committee on Economic, Social and Cultural rights under the Optional Protocol’, 42/1 Human Rights Quarterly, (2020), 48-84.

to the adoption of recommendations “on collective complaints in order to provide guidance to Member States on ways to improve their social rights policies” (p. 5)¹⁰⁴.

The Governmental Committee has no formal role when it comes to the collective complaints procedure. The relevant decision is transmitted directly to the Committee of Ministers. With respect to decisions on collective complaints, the Committee of Ministers can adopt a resolution noting the decision of the European Committee of Social Rights. This does little or nothing to enforce the decision. Or it may issue a more pointed recommendation directed to the respondent State. If such a recommendation is adopted, then it means “that the State is required to do everything in its powers to bring the situation (in law and in practice) into conformity with the Charter”¹⁰⁵. The Committee of Ministers then remains seized of the issue until such time as the respondent State satisfies it that the situation is in conformity. Given that this is rare, it is incumbent on advocacy organisations to ensure that their advocacy strategy does not exclusively pivot on or depend on the Committee of Ministers.

To be clear, the Committee of Ministers has no power to reverse a conclusion or decision reached by the European Committee of Social Rights¹⁰⁶. However, for all the reasons outlined above, and as the system currently stands, any strategy that relies on the outcomes of the European Committee of Social Rights (conclusions or decisions on collective complaints) should always be broader than simply relying on the Governmental Committee and/or the Committee of Ministers to validate claims.

4.6 Conclusions: facing the future with the Charter

What useful conclusions can be drawn from the above analysis?

First of all, the European Social Charter was very pioneering and ambitious. It was drafted at a time when there was no equivalent either at the international or European regional level.

Second, and somewhat surprisingly, the original Charter contained neither a provision on “progressive realisation” nor on equality. The latter was remedied in the 1996 Revised European Social Charter and the former was remedied by the steady evolution of jurisprudence within the Committee. It is now ready to face the future.

Third, the original Charter was heavily weighted in favour of labour rights. This was understandable at the time. Slowly but surely, the corpus of rights has evolved to encompass more avowedly social rights and to embrace particular groups placed in vulnerable situations.

Fourth, older persons were always implicitly included under each of the substantive rights and were specifically included in the new Article 4 in 1988 (subsequently

104. SG/Inf(2021)13 “Improving the implementation of social rights –reinforcing the European Social Charter system: Secretary General’s proposals, 22 April 2021: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a238c2>

105. Benelhocine, cinquième ouvrage cité *supra* note 69, p. 70.

106. See Confédération française de l’Encadrement – “CFE-CGC” v. France, Collective Complaint No. 16/2003 : <https://hudoc.esc.coe.int/eng/?i=cc-16-2003-dmerits-en>

re-numbered 23 in the Revised Charter). This was truly pioneering on the world stage. For example, there still is no direct equivalent in the context of the ICESCR.

Fifth, the periodic reporting system under the Charter allows for many possibilities for NGOs and others to engage. They can interact with the Committee on State reports. They can comment on State reports dealing with non-accepted provisions. For example, if a country has not opted in to Article 23, NGOs can exert their influence in nudging States toward opting in through the non-accepted provisions procedure. One way the Committee could better reach civil society groups and engage them in the process would be to issue thematic general comments and to do so after consultations. Or, at the very least, all the general interpretive statements need to be brought together and made more easily accessible.

Sixth, the collective complaints procedure offers many opportunities for engagement. Through registered INGOs, civil society groups can lodge collective complaints. They can lodge the equivalent of *amicus* briefs. They can request the equivalent of “urgent action” measures. The collective complaints procedure brings the Charter closer to the people and the discipline that is intrinsic to quasi-adversarial proceedings helps to enhance the reasoning (reasoned elaboration) and conclusions of the Committee. In our view, public hearings should become the rule and not the exception, and all such proceedings should be streamed in exactly the same way as proceedings before the European Court of Human Rights. One by-product could be the growth of a European bar specialising in suits under the European Social Charter.

5. The centrality of equal treatment/non-discrimination in the Charter (Article E): social citizenship refreshing social rights

“Democracy entails the obligation to treat all individuals as equals and to treat them with equal respect. This leads to the acceptance of freedom rights and a duty on States to guarantee economic and social rights. Just as an arbitrary detention violates this principle of equal respect, so do arbitrary deprivations of food, housing, work, environmental protection and social security.”

Aalt Willem Heringa, Rapporteur on Social Rights and the Rule of Law, The Social Charter in the 21st Century, Council of Europe, 1997, at p. 193.

5.1 Equality as an overarching guarantee

The equality/non-discrimination ideal lies at the heart of most human rights instruments and the (Revised) European Social Charter is no exception.

It is important to determine which theory of equality/non-discrimination pervades an instrument like the Charter since it has a decisive influence on how the substantive rights are to be interpreted and delivered.

At play therefore is some underlying theory about the difference of age and how the various rights and obligations are understood to accommodate and make positive provision for that difference. This militates against a standing danger that social provision and social rights could lock into place unacceptable stereotypes and prejudices about age.

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), which were adopted in 1966, contain common provisions on equal treatment and non-discrimination which were placed at the very heart and foundation of both instruments (Articles 2 and 3 respectively). The concept of equality clearly acts as a bridge between both sets of rights. It suffuses and animates both covenants. It guards against any intention, temptation or even unwitting effort to differentiate unjustly between different groups with respect to their enjoyment of the relevant rights.

The original Turin Charter pre-dated both these general human rights treaties (1961). It had, as its immediate inspiration, the original social rights contained in the Universal Declaration of Human Rights of 1948.

While each and every provision in the Charter is obviously due to a recognisable egalitarian philosophy it, strangely enough, did not contain an express provision on equality/non-discrimination. It did contain a general reference to equality in its preamble (which curiously enough, did not include the grounds of age).

Maybe that is not such a surprise. At that date (1961), the two UN covenants had not yet been adopted and it was not obvious that equality would sit as a centrepiece within each instrument and act as bridge between them. And detailed Europe-wide social legislation had still not been adopted. That had to wait for the evolution of the relevant competences first in the EEC and later in the EU. The priority was to set minimum standards of social provision.

So, the original Turin Charter looked like, and operated like, a prescriptive set of legislative provisions dealing with social rights. Despite its appearance, and especially its emphasis on granular social norms that looked like legislation, it was, however, always intended as a human rights instrument and indeed as a sister instrument to the European Convention Human Rights (ECHR – which entered into force in 1953). Its specifically human rights character was affirmed and emphasised by the report of the High Level Group of Experts on Social Rights of March 2021.

5.2 The addition of Article E in 1996

While it is true to say that the original Turin Charter of 1961, unlike the ECHR, did not contain an express provision on equality/non-discrimination, it did contain six references to equality in particular or isolated provisions¹⁰⁷. The original Charter was of course generally interpreted by the European Committee of Social Rights to contain such a guarantee.

Article E on equality was finally added in the Revised European Social Charter of 1996 and reads:

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Besides the general provision in the new Article E, the text of the Revised Charter actually now contains eight scattered references to equality:

- Principle 18 (the right of nationals of other contracting parties to engage in any gainful occupation on an equal footing with nationals, subject to certain restrictions),
- Principle 20 (equal opportunity and treatment in employment without discrimination on the grounds of sex),

107. The original six references are in Principle 18 (reciprocating rights of nationals), Article 4.3 (equal pay for equal work), Article 5 (right to organise), Article 12.3 (right to social security), Article 13.4 (right to medical and social assistance) and Article 38 (Appendix).

- Article 4.3 (the right of men and women to fair remuneration),
- Article 6 (the right to bargain collectively),
- Article 12 (the right to social security at a level equal to the European Code of Social Security),
- Article 13 (the rights of nationals of other Contracting Parties to equal social and medical assistance),
- Article 20 (equal opportunities in employment),
- Article 27 (rights of workers with family responsibilities to equal treatment) and final provisions on the equal authenticity of the French and English language versions of the Charter.

Notice, Article E is placed in Part V outside the numbered Articles of the Charter (Part II – Articles 1- 31). This means, on the one hand, that Article E is not an opt-in article. That is to say, the contracting parties are bound by it *ab initio* as it attaches to (and serves to condition) all the articles and sub-articles they have contracted into. On the other hand, since it is not a numbered article or sub-paragraph, the contracting parties are not obliged to report on it under their periodic reporting obligations. However, this is not such a disadvantage as they tend to report on equality measures adopted within each substantive article (for example, Article 31, housing).

Importantly, Article E has been interpreted by the European Committee of Social Rights to be an ancillary guarantee. That is to say, it does not typically ground a separate cause of complaint but must be associated with the treatment received under one or more of the substantive provisions of the Charter (for example, right to health, Article 11). This is, of course, fully in keeping with the text of Article E as well as with the overall approach of the European Court of Human Rights to the equivalent prohibition against non-discrimination in the ECHR (Article 14). This normative parallelism is intentional on the part of the Committee.

Strangely enough, age was not explicitly included as one of the prohibited grounds of discrimination in Article E. At around the same time that the Revised European Social Charter was being drafted in the Council of Europe, the Treaty of Amsterdam was being negotiated in the EU¹⁰⁸. Famously, Article 13 of the Treaty of Amsterdam extended the relevant prohibition on discrimination in EU treaty law to specifically include age as well as disability. Many of the States drafting the Revised Social Charter were the same States that adopted the Treaty of Amsterdam. It is inconceivable that they did not intend Article E to embrace discrimination on the grounds of age. In practice, the European Committee of Social Rights has interpreted Article E to include a prohibition of discrimination on the grounds of age. This certainly fits under the category of “other status” under Article E.

An important point to note is that Article E can be found by the Committee to have been violated in conjunction with another article (for example, Article 23 on the rights of older persons) even though that other article is not itself independently

108. For a comparison see Quinn G., ‘The European Social Charter and EU Anti-Discrimination Law: Two Gravitational Fields with one common purpose, in DeBurca and DeWitte, *Social Rights in Europe*, (Oxford, 2005).

Article E on equality is a powerful overarching norm cutting right across the Charter.

violated. So, a finding of discrimination can be found in the interaction between Article E and Article 23 even though Article 23 itself has not been violated. It is enough that the alleged discriminatory action falls within in the scope of the substantive provision (like Article 23).

But what does the guarantee of equal treatment or the prohibition against discrimination actually mean in the specific context of social rights? Given that the social rights contained in the Charter are already there due to a recognisable egalitarian theory of human rights, what does the specific addition of the equality/non-discrimination provision actually add? It has to add something since otherwise it would be surplusage. More particularly, how does it apply to unequal treatment on the grounds of age with respect to the delivery of the social rights contained in the Charter?

5.3 Three phases of thinking about equality/non-discrimination in the UN treaty system

It is instructive to zoom out momentarily from Article E to explore how the equivalent prohibition of discrimination has been treated under the UN human rights treaty system which of course includes the International Covenant on Economic, Social and Cultural Rights (ICESCR).

It is clear that the concept of equality in the general UN human rights treaty system has evolved considerably. In an influential piece, Professor Oddný Arnardóttir (an ad hoc judge from Iceland to the European Court of Human Rights) has identified at least three distinct phases in the evolution of equality theory and practice under international human rights law¹⁰⁹.

Universal sameness - a narrow juridical approach.

She calls the first phase, “universal sameness” (1950s-1990s). This corresponds with the Aristotelian approach of treating equals equally and unequals unequally. The focus here is on the relativities of treatment as between two different groups who are otherwise similarly situated. It calls for exactly equal treatment.

This approach has been criticised as morally empty in that it is agnostic as to the substance of the treatment and is only concerned that the relativities in treatment (if any) are fully justified. It also tends to take a synchronic snapshot of treatment – in the here and now. It does not tend to open up the inquiry into how people arrived at where they are at (a more diachronic approach). Therefore, any accumulated disadvantage that befalls one group (like older people) is not the primary focus. And it tends to take identity as a given (like

109. See Arnardóttir, O, 'A Future of Multidimensional Disadvantage Equality', ch. 3 in Arnardóttir & Quinn (Eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, (Nijhoff, 2009).

age or disability). The human condition is of course infinitely more plastic than having, or sharing, a single identity like age or disability¹¹⁰.

One interesting by-product of the first phase is that it allows a lot of room for manoeuvre on the part of States with respect to the justification of differential treatment. There is ample space to argue that the material difference between the two groups not only justifies different treatment but actually requires it. Certainly, this fits with the Aristotelian conception. In a way, it allows space for decision-makers (legislators, judges) to exaggerate human difference or to view difference negatively. Obviously, there is plenty of scope here for implicit and sometimes explicit ageist assumptions about older people and their rights. Martha Minow famously observed a policy dilemma (for legislators, policy-makers and judges) arising from difference¹¹¹. What she meant by this is that if legislators, etc., acknowledged difference and responded positively to it, they ran the risk of perpetuating stereotypes. On the other hand, if they ignored difference, they ran the risk of maintaining the purity of the fiction of equality but at the cost of ignoring actual difference. In this context, the more specific needs and wants of older persons might be set to one side in order to maintain the illusion of formal equality.

Of course, no matter the obvious drawbacks of this first approach, it still tends to predominate in legislative as well as in judicial approaches. However, it is of relatively little value in the context of older persons since it tends to allow too much space for ageist assumptions to prevail.

The second phase identified by Arnardóttir focuses on “specific difference” (1970s-1990s). By this she means that the equality/non-discrimination norms have become more nuanced and open to actual or specific difference and seek to respond more positively. Whereas the first phase emphasised exact equal treatment (provided the two groups being compared were in a similar situation), this second approach is open to the fact that some differential treatment (namely, somewhat more favourable treatment) would be better in keeping with the equality ideal. That is to say, genuine equal treatment requires differences to be openly acknowledged and positively accommodated.

**2nd Phase -
accommodating
specific
differences –
“reasonable
accommodation”.**

This was embodied most famously in comparative disability discrimination law before being reflected in UN treaty law. The US Rehabilitation Act of 1973 contained a famous prohibition against discrimination on the grounds of disability (Section 504). It was judicially interpreted to require “reasonable accommodation” to the difference posed by disability. Put bluntly, the courts reasoned that there is no point in insisting on equal treatment in the form of having

stairs that all were equally forced to navigate unless persons with disabilities were enabled (for example by means of a ramp) to navigate the stairs to gain entry to a

110. The literature on intersectionality is voluminous. A useful primer is Collins & Bilge, *Intersectionality: Key Concepts*, (Polity Press, 2016).

111. Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law*, (Cornell U Press, 1990).

building. Famously, this obligation of reasonable accommodation became a central distinguishing feature of the Americans with Disabilities Act (ADA 1990) and ended up as a core feature of the UN Convention on the Rights of Persons with Disabilities (UN CRPD 2007)¹¹².

To be sure, this conception of non-discrimination is a hybrid concept. It is still a classic civil right and is therefore to be considered immediately enforceable. On the other hand, it entails at least some positive obligations on the part of States and others – positive obligations that are normally considered the purview of economic, social and cultural rights. One might ask, if economic and social rights already entail positive obligations (albeit subject to the lower obligation of progressive achievement), then what could this newer conception of equality/non-discrimination possibly add?

These positive obligations which emanate from a broader conception of equality/non-discrimination are said to be distinct from the more robust positive obligations that flow from economic, social and cultural rights. Unlike a more policy- or programmatic-oriented approach, they are tailored to individual circumstances. And there are limits to these obligations which are variously expressed in terms of undue or disproportionate burden. These limits do not apply to economic and social rights as such.

The advancement of this second phase may seem modest. Nevertheless, this advancement in equality theory is of crucial importance to older people – just as it was for persons with disabilities. It weighs against blunderbuss approaches to old age and demands a more nuanced and sensitised approach that takes due (that is, positive) account of the differences of age. Applying the obligation of reasonable accommodation by analogy to discrimination based on age would of course mark a major advance throughout the world.

The third phase that Arnardóttir identifies she calls “multidimensional disadvantage” (1990s). She explains:

This era has been characterised by the strengthening of protection against discrimination, an increased awareness of the complex structural social factors that interference in the playing field that the law previously presumed was neutral and an increased awareness of how individual and group identities that create vulnerability to discrimination are multidimensional. Therefore, this present era can best be described by reference to the concepts of multidimensionality and structural disadvantage.

[p. 54]

**3rd phase –
multidimensional
disadvantage.
Advancing inclusion
and belonging.**

Arnardóttir specifically sees the UN Convention on the rights of persons with disabilities (UN CRPD) as a treaty that embodies this approach. Certainly, many of the granular obligations in the substantive provisions of the UN CRPD seem to be responding to accumulated disadvantage as well as laying the foundation of a more inclusive society. And certainly, the UN CRPD makes

a decent enough stab at the multidimensionality of human identity with specific

112. Article 2 of the UN CRPD famously defines discrimination, inter alia, to include a ‘denial of reasonable accommodation.’

intersectional articles on gender and children (Articles 6 and 7). Conspicuous by its absence in the CRPD is an intersectional article on age. Discrimination on the ground of age is mentioned in preambular paragraph (p) of the UN CRPD. The fact that it did not end up in a substantive provision is probably simply down to the absence of elder rights groups in the CRPD negotiations.

As if to underpin the predominance of the third phase (at least at the level of international law), one might point to the General Comment No. 6 (2018) on equality and non-discrimination recently adopted by the UN Committee on the Rights of Persons with Disabilities¹¹³. Bear in mind that the majority of obligations in the CRPD cover ground typically covered by economic and social rights. Therefore, the conception of equality fixed on by the UN CRPD Committee is of considerable interest when it comes to the interaction of equality with social rights (the purview of the European Social Charter).

General Comment No. 6 states in part:

11. Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in:
 - (a) a fair redistributive dimension to address socioeconomic disadvantages;
 - (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
 - (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
 - (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.

Taking these elements and putting them into a more lexical order, we might arrange them thus:

- Recognition (as a person – with all that this entails),
- Positively accommodating difference,
- Enabling a life of inclusion, participation and active citizenship,
- Engineering social arrangements to underpin and not undermine the above.

Recognition of personhood: point b above (in General Comment No. 6) speaks most directly to a “recognition” dimension – meaning recognition as a person. This is important as it hints that if some of the social rights provisions themselves have been fashioned with stereotypes in mind – or have been implemented having the effect of cementing stereotypes into place – then the equality ideal would weigh heavily against that. Put another way, the equality ideal helps to inform and refresh the social rights to underpin human recognition, autonomy and flourishing, and not to undermine them. This is a major weapon against the danger of ageism in

113. General comment No. 6 on equality and non-discrimination : United Nations Committee on the Rights of Persons with Disabilities: <https://digitallibrary.un.org/record/1626976?ln=en>

social provision. Interestingly, Holly Cullen pinpoints the concept of autonomy as directly to an **accommodating outlook** in the equality ideal – fitting neatly into Arnardóttir’s second phase of equality thinking (that is, positively responding to and accommodating difference). That is to say people are not to be expected to fit into pre-arranged situations – rather, those pre-arranged situations are expected to accommodate the difference of disability – or age in this instance. This seems particularly important for older persons.

Enabling inclusion: thirdly, the concept of equality embraced by the CRPD is said to be **participatory and inclusive**. This goes a considerable distance from a concept of equality that only focuses on sameness in the first phase outlined above by Arnardóttir. It follows that the equality idea in Article 5 of the UN CRPD is not simply or exclusively about the relativities of treatment. It is about the substance of that treatment. And that treatment must be aimed at social inclusion, participation and not segregation – active social citizenship. This has clear implications in the context of social arrangements for older persons.

Social provision enabling human flourishing: finally, meshing nicely with Arnardóttir’s final phase of equality, General Comment No. 6 also sweeps in a re-distributive element (normally associated with social rights). That, of course, is one direct way of dealing with accumulated disadvantage, as well as laying the groundwork for a more inclusive future. However, the re-distributive element sits on top of prior commitments to both dignity and inclusion. That is to say, if the re-distributive element (the social right) is engineered to perpetuate social isolation or has that effect then it too is suspect.

The participative dimension (point c) is extremely important when it comes to “discrete and insular minorities” like persons with disabilities or older people. One major reason why social provision and rights may have unwittingly contributed to the marginalisation of older persons in the past might have to do with the fact that policies that affect them have been adopted without adequate consultation. Hence the importance of voice and participation as a good in itself and as a sort of corrective. This desideratum of good policy making has now become a legal obligation of States Parties under Article 4.3 of the UN CRPD. Parenthetically, Liebenberg has speculated that this participatory dimension ought to be central to economic and social rights especially where there are periodic retrenchments¹¹⁴.

5.4 The European Committee of Social Rights jurisprudence under Article E: autonomy, respect for difference, inclusion and active citizenship

How then has the European Committee of Social Rights interpreted Article E?¹¹⁵ Where does its interpretation fall within Arnardóttir’s tripartite distinction?

114. Sandra Lieberman, Participatory Justice in Social Rights Adjudication, 18 Human Rights Law Review, (2018), 623.

115. For an exceptionally insightful account see Csilla Kollonay Lehoczky, ‘Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination,’ The Equal Rights Review (2013) 69.

Has it also moved away from narrow juridical understandings of the past to focus more on recognition, the positive accommodation of difference, the goal of belonging/participation/inclusion, and re-distribution of resources to make this a reality?

One might already see economic and social rights as responding to structural or accumulated disadvantage (as in the European Social Charter). So again, the question becomes, what does the concept of equal treatment and non-discrimination add to social rights?¹¹⁶

Of some interest to this discussion is General Comment No. 20 on non-discrimination in economic, social and cultural rights of the UN Committee on Economic, Social and Cultural Rights (2009). While defining direct and indirect discrimination, and while building on General Comment No. 6 of 1995 (on the economic, social and cultural rights of older persons)¹¹⁷, General Comment No. 20 observes:

29. Age is a prohibited ground of discrimination in several contexts. The [UN] Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty and with unequal access to universal old-age pensions due to their place of residence. In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

It will be recalled that General Comment No. 6 of the ICESCR did not lay out any understanding of ageism or base its content on a rejection of ageism in all its forms with respect to the equal enjoyment of economic and social rights. Presumably, if General Comment No. 6 was drafted today, it would look and feel very different.

There have now been a series of decisions on collective complaints dealing with Article E in combination with other substantive provisions in the Charter.

At issue in Collective Complaint No. 13/2002 (International Association of Autism Europe (IAAE) v. France) was an allegation that children with autism were not sufficiently included in the French education system¹¹⁸. The issues were framed around Article E in combination with Article 15 (integration of persons with disabilities) and 17 (rights of children). Commenting on the added value of Article E, the Committee stated:

[T]he insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considers that [the function of Article E] . . . is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint. It follows that the Committee understands the arguments of the complainant as implying that the situation as alleged violates Articles 15.1 and 17.1 when read in combination with Article E of the Revised Charter.
[paragraph 52. Italics added...]

This emphasis on equal effective enjoyment of social rights applies just as much to older persons as it does to persons with disabilities.

116. The text of General Comment No. 20 is available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

117. The text of General Comment No. 6 is available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

118. See International Association of Autism Europe (IAAE) v. France, Collective Complaint No. 13/2002: <http://hudoc.esc.coe.int/eng/?i=cc-13-2002-dmerits-en>

Article E positively values and accommodates difference.

Reflecting on some of the then jurisprudence of the European Court of Human Rights (for example, *Thlimmenos v. Greece*)¹¹⁹, the Committee in its decision went on to explain that adherence of the equality/non-discrimination ideal meant taking positive steps to value and accommodate difference. It stated:

Human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.
[paragraph 52]

This corresponds at least to phase two of equality theory and practice as propounded by Arnardóttir above (accommodating difference). The Committee's understanding of Article E includes indirect as well as direct discrimination. It said:

Indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and coactive advantages that are open to all are genuinely accessible by and to all.

The decision, which turned on the interaction between Articles E, 15 and 17, also has some interesting language about the nature of the social rights themselves. It casts Article 15 (dealing with the rights of persons with disabilities) as a bundle of rights/obligations that advanced the citizenship rights of persons with disabilities. This plainly fits the "inclusion" emphasis on rights implied by Arnardóttir's third phase of equality thinking. In other words, the social rights are in place not merely to place a floor of material provision underneath all but to actively support persons in pursuing their own lives in concert with others: "The underlying vision of Article 15 is one of equal citizenship for persons with disabilities..." (see paragraph 48 of the Decision on the merits).

The 2005 decision of the European Committee of Social Rights in Collective Complaint No. 27/2004, *European Roma Rights Centre v. Italy*¹²⁰, develops the idea of the positive accommodation of difference implicit in Article E. That is to say, a failure to specifically accommodate the needs, interests and rights of a minority (Roma) in developing criteria for access to housing was held to be a violation of Article E in combination with Article 31 (right to housing). There is ample precedent here for a putative obligation on the part of States Parties to proactively consider the circumstances of older people when designing social rights and entitlement.

The 2007 decision of the European Committee of Social Rights in Collective Complaint No. 41/2007, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, illustrates the application of the evolving Article E jurisprudence¹²¹. Virtually no children in Bulgarian institutions for children with intellectual disabilities received any education. The complaint was framed around Article 17 (which embraces a right to education) and Article E. Much of the analysis of the Committee revolved around whether there had been sufficient "progressive achievement" of the right in question (see Chapter 6 in

119. *Thlimmenos v. Greece*, Case No. 34369/97, ECHR 2000/IV.

120. See *European Roma Rights Centre v. Italy*, Collective Complaint No. 27/2004 : <http://hudoc.esc.coe.int/eng/?i=cc-27-2004-dmerits-en>

121. See *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Collective Complaint No. 41/2007 : <http://hudoc.esc.coe.int/eng/?i=cc-41-2007-dmerits-en>

this study). The answer was no. And given the stark gap between the treatment of children with intellectual disabilities in institutions with respect to the right to education and other children, the Committee had little difficulty reaching the conclusion that there was discrimination as understood under Article E.

Collective Complaint No. 81/2012, *European Action on the Disabled v. France*, was decided in 2013. It concerned the transfer of children and adolescents with autism over the border from France into the Belgian system¹²² (funded by the French system). This was framed as a form of direct discrimination by the European Committee on Social Rights. Interestingly, it was not framed – either by the advocates or by the Committee – as an attack on the integrity of the family. It may have been possible to argue that all children (including children with disabilities) have a right to the continued community of their family under Article 17. There were two dissents (Leppick and Schlachter) who basically argued that it cannot be assumed that such exports were discriminatory since the standard of treatment was at least notionally higher in the Belgian system. The two dissentients also questioned who or what was the relevant comparator. In a way, they still operationalised an old conception of equality (the first phase in Arnardóttir’s trilogy).

In sum, the European Committee of Social Rights has moved some distance away from equality as sameness. By emphasising autonomy and decision-making rights (see the treatment of Article 23 in Chapter 7), it has grounded its analysis on the recognition of personhood – something that is of profound importance to older persons as their full personhood is often discounted under ageist assumptions. By emphasising the positive accommodation of difference, the jurisprudence clears the way for a much more nuanced treatment of discrimination based on age and leaves ample space for the adoption of an obligation of reasonable accommodation by analogy to disability. By emphasising participation and inclusion as the essence of social rights (alongside equality), the Committee has adopted a much more positive and instrumental view of social rights to underpin active citizenship compared with the past – all of which helps to reanimate social rights to face the 21st century and the legacy of ageism.

5.5 Discrimination methodology under the European Social Charter

The substantive innovations connected with Article E were itemised above. Surprisingly, the methodology used in connection with Article E remains relatively straightforward and orthodox.

The list of grounds covered under Article E (race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status) is more extensive than covered by Article 14 of the European Convention on Human Rights.

122. The Decision of the plurality – along with the two dissenting statements are available here: <http://hudoc.esc.coe.int/eng/?i=cc-81-2012-dmerits-en>

Interestingly, it does not include age on its face. Nor, for that matter, does Article 14 of the ECHR explicitly cover age. However, both instruments have been interpreted to prohibit discrimination on the ground of age.

As previously mentioned, some articles of the European Social Charter specifically mention equality (for example, secure a particular right on an equal basis with others). Article E, as such, is redundant in such cases – although the effect is the same since the Committee relies on the same theory of equality regardless of whether Article E or the particular article in question is controlling.

Both direct and indirect discrimination are prohibited under Article E. The text of Article E itself does not make any distinction between direct or indirect discrimination. The distinction – and its effects – is a creature of the jurisprudence of the Committee. At one level, one might interpret the entirety of the Charter as a reaction to indirect discrimination – an effort to secure equal effective social rights for all and to target implicit barriers. So, one might assume that notions of indirect discrimination are already baked into the substantive obligations contained in the Charter. Yet the concept of indirect discrimination under Article E remains highly useful in excavating the hidden discriminatory effects (largely unintentional) of social arrangements that can often become out of date quickly and which do not take adequate account of human and/or group differences.

Ostensibly at least, the underlying theory of equality used by the Committee is the Aristotelian notion of treating “equals equally and unequals unequally”. Human difference, according to the Committee, should be responded to with discernment in order to ensure real and effective equality. Indirect discrimination can arise where there is a failure to take due and positive account of relevant differences (and accumulated disadvantages) or by failing to take adequate steps to ensure that the relevant rights are genuinely accessible to all.

To trigger discrimination analysis, the relevant groups must be in a similar situation but treated differently. A difference of treatment is not discriminatory if it rests on an objective and reasonable justification. The Committee has said:

A difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds¹²³.

Cullen states that the Committee tends to be relative deferential to assertions made by States that there is a legitimate aim behind the difference of treatment “but often subsequently finds the limitation to be disproportionate¹²⁴.”

The scope for such justifications on the grounds of age under Article E must be assumed to be much narrower than they are under the EU Framework Directive on equal treatment in employment and occupation which seem excessively wide. Even if there is an objective and reasonable justification, the Committee will then analyse whether there is a proportionate relationship between the end desired and the means chosen. It may have been possible to achieve the same end with less intrusive

123. To trigger discrimination analysis.

124. Cullen, *supra* note 85, p. 89.

methods. The Committee has adopted the reversal of the burden of proof once sufficient prima facie evidence has demonstrated that discrimination has occurred.

The principle of legality must also be met for Article E to be satisfied. That is to say, the difference of treatment must have some grounding in positive law. This is certainly true of “restrictions” under Article G and also true by analogy under Article E.

5.6 Conclusions: the added value of equality in considering the social rights of older persons

In conclusion, what does the equality/non-discrimination ideal add to the social rights of older persons and especially under the European Social Charter?

It is clear that most analysis has gravitated towards the third prong of Arnardóttir’s trilogy (what she calls “multidimensional disadvantage equality”). This is plain under the ICESCR and the UN CRPD. And it is certainly powerfully implicit in the Article E jurisprudence.

In practice, this is grounded on several connected theses.

First of all, there is a commitment to human dignity and a recognition of personhood embedded in Article E. Implicit in this is that social arrangements and social rights should not be configured as to effectively objectify, infantilise or simply passively maintain or narrowly protect older people. This recognition dimension sits perfectly with the Committee’s insistence on the autonomy of older persons and their right (legal capacity) to make life choices for themselves. In a way, it suggests that social rights are not just for the maintenance of older persons but should be optimised to respect and give effect to their autonomous life choices.

Secondly, the human difference of age (or whatever else) is to be positively accommodated and not used as an occasion to segregate, isolate or treat differently under Article E. There is

no room for ageist assumptions in the design and delivery of substantive social rights or services. Or, put another way, ways should be found to accommodate the difference of age while avoiding any reinforcement of stereotypes about age. There certainly is room here for engrafting the well-known obligation of “reasonable accommodation” that pertains to persons with disabilities to the situation of older persons.

Thirdly, there is a commitment to inclusion and participation embedded in Article E. That is to say, social rights and arrangements have a powerful role to play in underpinning the autonomy and participation rights of older persons. Usefully, the European Committee of Social Rights calls this the citizenship dimension to the various rights. It is suggested that this framing (equality to advance active citizenship) is just as potent in the context of older persons as it is for persons with disabilities.

Finally, the re-distributive element is not to be thought of simply as the static provision of material or social support. It is there partly to honour dignity but partly to make active citizenship a reality. This is as important for older persons as it is for anyone else. Why is this important? It is important first of all because some provisions of the Charter were drafted long before thinking on equality ran deep. Those provisions

stand in need of interpretation in light of the uber norm of equality. For example, language like older persons have a right to independent living "for as long ... as they are able" (Article 23) should now be read (consistent with a deep theory of Article E) to lead to an interrogation of external reasons why an individual is in fact no longer able to take advantage of their right. And it is also important as a departure point in analysing the effectiveness of social provision on the grounds to actually enable older persons remain active citizens.

Article E, combined with Article 23, gives the Charter a leadership role in defining the role of social rights of older persons into the future.

In sum, Article E and the image of personhood, belonging, inclusion and active social citizenship is the fulcrum of the Charter with clear implications for Article 23 into the future.

Article 23 was once far ahead for its day. Combined with Article E, it will maintain a clear leadership role in guiding social rights of older persons into the future – a future shorn of ageism.

6. The Concept of “Progressive Realisation” under the European Social Charter: implications for the rights of older persons

“When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.

States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.”

Collective Complaint No. 13/2002, International Association of Autism Europe (IAAE) v. France. Decision of the European Committee of Social Rights, (2005) at paragraph 53.

6.1 Background to the concept

The concept of “progressive realisation” is said to be one of the chief distinguishing features of economic, social and cultural rights in contrast to civil and political rights.

The concept has a peculiar history and is partly a function of the Cold War and its exaggeration of the differences between civil and political rights, on the one hand, and economic, social and cultural rights on the other. The former are said to be more amenable to judicial enforcement and the latter relatively less so.

Many commentators rightly debate and challenge the sharpness of this distinction. Certain civil rights, such as the right to a fair trial, require as much if not more resource allocation than certain economic and social rights like the right to associate and to bargain collectively. Indeed, the Universal Declaration on Human Rights (1948) itself made no hard and fast distinction between both sets of rights.

Famously, the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains an express provision dealing with the general nature of State obligations in that instrument (Article 2, ICESCR). This is in addition to, and on top of, the particular obligations contained in each substantive right. Article 2 ICESCR is drafted to the effect that the obligations in question are to be “progressively realised”. There is no equivalent to Article 2 in the ICCPR.

Nor is there any express equivalent to Article 2 ICESCR in the European Social Charter. That is somewhat surprising. The ICESCR does make explicit provision for

both “restrictions” to rights (Article 4) as well as for “progressive realisation” (Article 2). This sends a very strong signal that “restrictions” are qualitatively different to the limits imposed by the necessity of “progressive realisation”. That is to say, one should not expect the concept of “restrictions” (governed by Article G of the European Social Charter) to do the job of “progressive realisation”.

Fortunately, the European Committee of Social Rights has been steadily developing the notion of “progressive realisation” under the Charter. Since many of the relevant obligations in the Charter affecting older people are amenable to “progressive realisation” it is instructive to review the origins of the concept under the ICESCR, the important and real parameters that control its proper use by the States Parties (in the eyes of the UN Committee on ESCR) and its current status under the European Social Charter.

Despite the fact that it traces its background back to the Cold War, the concept of “progressive realisation” can and should be separated out from that legacy. That is to say, the concept can and should play a positive role in guiding States in the implementation of their obligations. There is always a natural tension between economic development (and the exigencies of economic development) and social rights. Often the European Committee of Social Rights calls this the tension between individual (social rights) and general interests. The concept genuflects to the reality that the realisation of individual social rights is a function of general economic and social development – but without sacrificing either the essence of the rights or the need for a forward dynamic of change, even in difficult times.

The concept of “progressive realisation” is important when it comes to an assessment of the rights of older persons. This is because some elements of Article 23 may be said to be subject to this obligation. It therefore matters what criteria the Committee can use to determine if sufficient “progressive achievement” has in fact been met to advance the rights of older persons. In addition, many of the specific rights in the Charter (for example, Article 13 on the right to social and medical assistance) may also have important elements that are amenable to “progressive realisation”. Likewise, some clarity on the core criteria of fulfilment is needed to assess compliance with respect to the rights of older persons under those more specific provisions.

One important caveat is that Article E (equal treatment/non-discrimination) is not subject to “progressive realisation”. This applies as much to the rights of older persons as it does for others. However, the fact that Article E is to be immediately achieved does not, in itself, detract from the fact that some elements of a right (like Article 23) are to be achieved progressively. That is to say, the application of Article E (which has to be immediately achieved) does not in itself serve to convert an otherwise “progressive” obligation into one that is to be immediately achieved. Thus, some care is needed when reading Article E with the substantive provisions like Article 23.

6.2 Origin and use of the concept in the ICESCR

Article 2.1 of the International Covenant on Economic, Social and Cultural Rights states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The drafting history to Article 2.1 was comprehensively addressed by Alston and Quinn¹²⁵. As befits its central importance, one of the first General Comments of the UN Committee on Economic, Social and Cultural Rights dealt specifically with the nature of States' obligations and particularly the obligation of "progressive realisation" – General Comment No. 3 (1990)¹²⁶.

At the time and for the purposes of General Comment No. 3, the ICESCR Committee rested much of its analysis on a draft report of the International Law Commission (ILC) on the nature of States' obligations under international law – particularly the distinction between "obligations of conduct" (for example, very specific obligations to do x, y, or z) or "obligations of result" (an obligation to achieve a certain overall result which generally leaves the steps to do so in the hands of the State Party). Notwithstanding that the ILC has not consistently used this distinction since then, it is nevertheless a useful way to conceptualise the rights and obligations under the European Social Charter.

Unlike the ICESCR, many of the obligations in the Charter are very precise obligations of conduct (for example, Article 12.1, "to establish or maintain a system of social security") and some are obligations of result (Article 15.3., "to promote the full social integration of persons with disabilities"). In a way, the fine detail in the original 1961 Charter (specifying the detailed "obligations of conduct") substituted for the lack of Europe-wide social legislation and policy at the time. Even so, some of the more specific "obligations of conduct" are preceded and informed by more general "obligations of result" (for example, Article 15 is preceded by more general or prefatory language on "the right to independence, social integration and participation in the life of the community").

The main point is that "obligations of conduct" tend to be relatively precise and therefore amenable to immediate achievement. Obligations of result, on the other hand, tend to leave a wide margin of discretion to States as to the means used to achieve the stipulated result. Many (but certainly not all) of the more important obligations in both the ICESCR and the European Social Charter are of this latter variety. It therefore matters how one approaches and interprets the obligation to "progressively realise" these rights/obligations.

125. The Nature and Scope of States Parties Obligations under the International Covenant on Economic, Social and Cultural Rights, HRQ 9. No 2, 1987.

126. See, General Comment No. 3: The Nature of States Parties' obligations (art. 2, para. 1 of the Covenant), (E/1991/23 (1990). Text is available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2fICESCR%2fGEC%2f4758&Lang=en

General Comment No. 3 under the ICESCR (1990) was precisely intended to clarify that. It is to the effect that the obligation to take “steps” to meet “obligations of result” means just that. It states:

While the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonable short time after the Covenant's entry into force for the States concerned.

And

Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.
[paragraph 2]

It continues that “all appropriate means” can and should include legislative measures. It asserts that:

[I]n many instances legislation is highly desirable and in some cases may even be indispensable.
[paragraph 3]

Other measures that may be “appropriate” include but are not limited to “administrative, financial, educational and social measures”. Of course, all of the above are needed to implement the rights of older persons.

Interestingly, Article 2.1 of the ICESCR speaks separately of “achieving progressively” and “full realisation”. Although conceptually distinct, they were melded together in General Comment No. 3 which refers to “progressive realisation”. Thus, although it has no clear footing in the text of the ICESCR, the term “progressive realisation” is now commonly used to refer to the set of dynamic obligations contained in Article 2 (and, *mutatis mutandis*, under the European Social Charter). General Comment No. 3 characterised the concept as a:

necessary flexibility device reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights ... It thus involves an obligation to move as expeditiously and effectively as possible towards that goal.
[paragraph 9]

Implicit in “flexibility” is not just forward movement but also backward movement especially in times of economic retrenchment. There is no absolute bar on such retrogressive measures. Importantly, General Comment No. 3 states:

... any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided in the Covenant and in the context of the full use of the maximum available resources.
[paragraph 9]

However, the ICESCR Committee insists that even though flexibility can work in reverse, (for example, during times of economic retrenchment) there has to be some floor beneath which it should not be allowed to fall. Hence, the ICESCR Committee conceptualized the notion of a “minimum core obligation” to ensure the satisfaction of “minimum essential levels of each of the rights”. The Committee asserts that if there were no such minimum core obligations and there was no floor beneath retrogressive measures that the Covenant would be largely deprived of its *raison d'être*. Presumably, this floor looks a bit different in different jurisdictions depending on local circumstances. However, the UN Committee did not provide any criteria to determine which aspect of a right could be designated either as core or periphery. Partly, that depends on the text in question. Partly, it also probably depends on

some underpinning concept like human dignity that can never be abandoned even in times of severe economic retrenchment.

In addition, under the ICESCR, if a State Party wants to avail itself of the flexibility inherent in the concept of “progressive realisation” to introduce retrogressive measures on the basis of the lack of resources, it must:

demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority those minimum obligations.
[paragraph 10]

Parenthetically, it is to be doubted if this spatial concept of a minimum core applies to the European Social Charter. For one thing, the language used throughout the Charter is more peremptory relative to the language used in the ICESCR. For another, there is no meta-theory (at least none that is obvious on the face of the text of the Charter) according to which one can securely sift between what is the irreducible core of each right and what lies on the periphery. If the Committee were to resort to such a notion, it would presumably have to articulate how it would go about identifying core from periphery based on, for example, dignity or autonomy rights. Thus far, that has not been attempted.

Even in those circumstances, a State Party is expected to “strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances”. [paragraph 11]. And importantly, the most vulnerable should be protected even in circumstances of retrogressive measures. General Comment No. 3 asserts:

...even in times of severe resource constraints ... the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.
[paragraph 12]

What is the net effect of the above?

First of all, “progressive realisation” only attaches to “obligations of result” – obligations that notionally leave the means of implementation to the States Parties. These obligations are not open-ended or empty. There must be concrete steps; there must be the maximum use of available resources; there is a core minimum or floor to each right beneath which no one should be allowed to fall (in the text of the ICESCR at least); and the most vulnerable ought to be a priority.

All of which is directly relevant to older persons, since many of the relevant obligations look open-ended (“obligations of results”) and older persons often find themselves in vulnerable situations and not just in times of economic retrenchment.

6.3 The evolution of “progressive realisation” in the European Social Charter

There is no equivalent to Article 2 ICESCR in the European Social Charter.

Nevertheless, it is plain that while many of the rights create “obligations of conduct” (and are therefore amenable to immediate achievement), some of the more important ones create “obligations of result” that implicitly leave much room for an equivalent notion of “progressive realisation”.

This was formally acknowledged in *International Association Autism Europe v. France* (Collective Complaint No. 13/2002). At issue was the pace or speed of catch-up plans to include/integrate children with autism into the French educational system under Articles 15§1 and 17§1 in combination with Article E (non-discrimination). In its decision on the merits, the European Committee of Social Rights said:

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.

States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

[paragraph 53]

This three-pronged test (reasonable time, measurable progress, use of maximum available resources) might be considered the functional equivalent of the “progressive realisation” concept under Article 2 ICESCR.

The question of “retrogressive measures” was not at issue in that complaint. However, it is fair to imply that, if they were, the Committee would probably have adopted a similar posture to that of the ICESCR Committee (for example, targeted measures must nevertheless be adopted for the “vulnerable”).

One clear advantage of the European Committee’s formulation above is that it specifically covers third parties like families and carers on whom burdens are likely to fall in the absence of appropriate cover. One might argue this is implicit in the view of the ICESCR Committee. But it is made very explicit in the formula adopted by the European Committee of Social Rights. This is especially important in the context of the widespread phenomenon of informal care in the elder sector across Europe and the separate claims this may give rise to on the part of informal carers.

How has this concept of “progressive realisation” been used in subsequent decisions and conclusions of the Committee?

The above formula (in Collective Complaint No. 13/2002) was cited with approval by the Committee in *European Roma Rights Centre v. Greece* (Complaint No. 15/2003). At issue in that case was the alleged insufficiency of housing rights for the Roma community in Greece – implicating Article 16 (which includes family housing). The Committee found, applying the formula in Collective Complaint No. 13/2002:

42. that Greece has failed to take sufficient measures to improve the living conditions of the Roma and that the measures taken have not yet achieved what is required by the Charter, notably by reason of the insufficient means for constraining local authorities or sanctioning them. It finds on the evidence submitted that a significant number of Roma are living in conditions that fail to meet minimum standards and therefore the situation is in breach of the obligation to promote the right of families to adequate housing laid down in Article 16.

There was one interesting twist in the case which has to do with the onerous nature of some conditions attached to the enjoyment of the right in Greece. The European Committee of Social Rights stated:

22. The Committee notes that if it is possible to subject the receipt of social rights to the fulfilment of a certain number of conditions, the conditions must not be such so that is impossible in the majority of cases to satisfy them, with the effect that the realisation of the rights is impeded.

Thus, access to social rights must not be overburdened. This comes close to (but is not the same as) the doctrine of “unconstitutional conditions” in the United States which is to the effect that the State cannot make access to its largesse (social rights) dependent on agreeing to waive a civil or political right¹²⁷. That is to say, that which a State cannot directly do (diminish or dilute a civil right), it is not allowed to do indirectly by conditioning access to a social right on the loss or waiver of a civil right. This could be highly relevant to older people since the loss of some civil rights (freedom of association, privacy) is sometimes said to follow access to their social rights¹²⁸.

In its 2005 decision in Collective Complaint No. 31, *European Roma Rights Centre v. Bulgaria*, the Committee prefaced the three-pronged Collective Complaint No. 13/2002 formula above by saying:

States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources.
[paragraph 35]

This idea of balancing the general interest against individual interests is not new and is at least implicit in in General Comment No. 3 of the ICESCR.

Having thus introduced the idea of a “margin of appreciation”, the Committee then went on to reiterate the Collective Complaint No. 13/2002 formula. It emphasised and drew out the three key elements of the Collective Complaint criteria (reasonable timeframe, measurable progress, and financing consistent with the maximum use of available resources). It found that while the measures adopted to advance the relevant rights seemed in keeping with these criteria, there was inadequate implementation. Thus, the requirements of “progressive realisation” were not satisfied. This goes on to be one of the hallmarks of the jurisprudence of the European Committee of Social Rights – measures taken have to be concrete and not just abstract (Collective Complaint No. 1/1998 – *International Commission of Jurists v. Portugal*).

Collective Complaint 30/2005, *Marangopoulos Foundation v. Greece*, (2005), concerned lignite mining in Greece. At issue were Articles 2.4 (just and fair conditions of work for the miners), 3§1 (safe and healthy working conditions), and 11 (protection of health). The Committee re-iterated the formula used in Collective Complaint No. 13/2002 by first observing that “[A]dmittedly, overcoming pollution is only an objective that can be overcome gradually”. (paragraph 204). Impliedly at least, the Committee was saying that the relevant obligations were amenable to “progressive realisation”.

Articles 7 (family protection), 30 (protection against poverty and social exclusion) and 31 (housing) were at issue in Collective Complaint No. 33/2006, *International Movement ATD Fourth World v. France*, (2006). There was some telling skirmishing on how to characterise the obligations in Article 30 (right to housing). On the one hand, the government asserted that Article 31 (housing) only imposed “obligations of means” and not of “results”. In their mind, this meant that “so long as suitable measures

127. See Kathleen Sullivan, *Unconstitutional Conditions*, 102 *Harvard Law Review* (1989), 1413-1506.

128. There is an echo of this in Article 13.2 (right to social and medical assistance) to the effect that persons in receipt of social or medical assistance should not suffer from a diminution of their political rights. This could certainly be expanded into an equivalent doctrine of unconstitutional conditions under the European Social Charter.

were taken with a view to securing the right to housing, the situation would be in conformity with the Charter” (paragraph 58.). This seems an odd locution on the traditional understanding of “obligations of results” and “obligations of conduct”. In the orthodox view, “obligations of conduct” are not amenable to “progressive realisation” as they specifically stipulate what needs to be done. It is only “obligations of result” (that is, obligations that leave open-ended how the relevant obligations are to be achieved) that are amenable to “progressive realisation”. In any event, these obligations are not open-ended to be satisfied only by a showing of a good faith effort. Other conditions must be met too (like measurable progress).

On the other hand, the error seems to have been compounded by the Committee at the time which stated:

The Committee agrees that the actual wording of Article 31 of the Charter cannot be interpreted as imposing on states an obligation of “results”. However, it notes that the rights recognised in the Social Charter must take a practical and effective, rather than purely theoretical, form.
[paragraph 59]

This seems to be a conceptual confusion. It is “obligations of results” that attract “progressive realisation” not “obligations of conduct”. Maybe the intent of the Committee was plain enough. Even if a particular obligation is subject to “progressive realisation”, that does not thereby mean it is empty of consequences. With respect to timeframes for implementation, the Committee usefully added:

66. In connection with timetabling – with which other regulatory bodies of international instruments are also very concerned – it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category. At all events, achievement of the goals that the authorities have set themselves cannot be deferred indefinitely.

So, there is the expectation of the Committee at play – but also the timeline that the State Party sets for itself. If the latter comes first, then the Committee seems to insist on it. As is often the case, the Committee is called on not so much to judge provision but to judge whether a State’s action plan goes far enough and fast enough. So too in this case. At the end of the day, the Committee observed that the relevant French catch-up plan, even if fully implemented, would still yield a considerable shortfall that could not be justified in keeping with Article 31.

Furthermore, and echoing General Comment No. 3 of the UN Committee on ESCR, the Committee noted another defect which is that, in the plan:

[T]here would also appear to be no clear policy mechanism in place to ensure that due priority is given to the provision of housing for the most deprived members of the community, and that the assessment of the needs of the most deprived is built into the programme of providing social housing.

This is very important as the Committee is here aligning itself with the fuller understanding of “progressive realization” under the ICESCR to the effect that the more marginalised or vulnerable members of society are, the more it should be a priority in driving forward plans to “progressively realise” a right.

In reiterating its case law, the Committee spelt out what “progressive realisation” means in the context of Article 31 (right to housing) in Complaint No. 39/2006, *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*:

54. This means that, for the situation to be compatible with the treaty, States Parties must:

- a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
- b. maintain meaningful statistics on needs, resources and results;
- c. undertake regular reviews of the impact of the strategies adopted;
- d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
- e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

It is recalled that one of the requirements of “progressive realisation” in the eyes of the original formula in Collective Complaint No. 13/2002 is that there would be “measurable progress”. That of course assumes there is a capacity to measure. This arose in *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*.

59. The Committee notes that in several areas the Government fails to supply relevant statistical information or does not compare identified needs with the resources made available and results achieved. Regular checks do not appear to be carried out on the effectiveness of the policies applied. In the absence of any commitment to or means of measuring the practical impact of measures taken, the rights specified in the Charter are likely to remain ineffective.

This is very relevant for older persons since reliable data are needed to track the life course impacts of public policies.

The Committee also stated:

60. In connection with timetabling – with which other regulatory bodies of international instruments are also very concerned – it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category. At all events, achievement of the goals that the authorities have set themselves cannot be deferred indefinitely.

61. The authorities must also pay particular attention to the impact of their policy choices on the most vulnerable groups, in this case individuals and families suffering exclusion and poverty (*Autism Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, §53).

This latter point is highly relevant in the context of older persons.

Collective Complaint No. 41/2007, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, involved a straightforward application of the three-prong test under the original Collective Complaint No. 13/2002 formula. The case involved the alleged lack of inclusive education for children with intellectual disabilities in Bulgaria and the slow pace of ensuring the same over time. Tellingly, on the point of “progressive realisation”, the Committee said:

47. As to the Government's argument that the right of children with intellectual disabilities residing in HMDCs to education is being implemented progressively, the Committee is aware of Bulgaria's financial constraints. It notes however that any progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example HMDC directors and the municipal officials to whom HMDCs and primary schools are accountable could have been informed about and given training on the new legislation and action plans). The choices made by the Government resulted in the situation described above (see in particular §§ 43 et 45). Progress is therefore patently insufficient at the current rate and there is no prospect that the situation will be in conformity with article 17.2 within a reasonable time. Consequently, the Committee considers that the measures taken do not fulfil the three criteria referred to above, i.e. a reasonable timeframe, measurable progress and financing consistent with the maximum use of available resources. In view of this situation, the Committee considers that Bulgaria's financial constraints cannot be used to justify the fact that children with intellectual disabilities in HMDCs cannot enjoy their right to an education.

[Italics added]

The concept of making provision for the most vulnerable as an aspect of "progressive realisation" was further developed in Collective Complaint No. 53/2008, *European Federation of National Organisations working with the Homeless (FEANTSA) v. Slovenia* (dealing again with the right to housing under Article 31). There, the Committee stated:

72. The Committee considers that, in order to establish that measures are being taken to make the price of housing accessible to those without adequate resources, States Parties to the Charter must show not the average affordability ratio required of all those applying for housing, but rather that the affordability ratio of the poorest applicants for housing is compatible with their level of income, something that is clearly not the case with former holders of the Housing Right, in particular elderly persons, who have been deprived not only of this right, but also of the opportunity to purchase the flat they live in, or another one, on advantageous terms, and of the opportunity to remain in the flat, or move to and occupy another flat, in return for a reasonable rent.

In its 2009 decision in Collective Complaint No. 58/2009, *Centre for Housing Rights and Evictions (COHRE) v. Italy*, the Committee explicitly mentioned the "progressive" character of many of the relevant rights/obligations in the Charter:

27. In this regard, the Committee holds that such realisation of the fundamental social rights recognised by the Revised Charter is guided by the principle of progressiveness, which is explicitly established in the Preamble and more specifically in the aims to facilitate the "economic and social progress" of State Parties and to secure to their populations "the social rights specified therein in order to improve their standard of living and their social well-being".

It is unclear if, by this, the Committee specifically meant to underscore the concept of "progressive realisation". The only mention of the word "progressive" in the preamble of the Revised Charter is to the progressive replacement by the 1996 Revised Charter of the original 1961 Turin Charter.

The second prong of the Collective Complaint No. 13/2002 formula – "reasonable timeframe" – was in issue in Collective Complaint No. 52/2008, *Centre on Housing Rights and Evictions (COHRE) v. Croatia*. Although sufficient progress and financial provision had not been proven, the Committee nonetheless went on to decide against Croatia on the basis that the timeline for change was unreasonable and therefore in violation of the concept of "progressive realisation".

83. However, the Committee notes that the slow pace of the housing programme, and the lack of clarity as to when housing would be provided under it, would appear not to reflect the needs of displaced families who wish to return to Croatia. An extensive period of time has elapsed since the housing programme was launched in 2003. In addition, displaced families who expressed their wish to return and applied for housing programme have been obliged to remain without security of tenure for an unreasonably long period of time due to the slow processing of applications. These factors taken together have ensured that for many displaced families who wish to return to Croatia, the absence of effective and timely offer of housing has for a long period of time constituted a serious obstacle to return.

84. As a consequence, the Committee considers that the housing programme has not been implemented within a reasonable timeframe.

Again, this is very relevant to reform programmes in favour of older persons. Perhaps even more so as time is often of the essence for many older persons.

It is interesting how the three-prong analysis often overlaps with Article E analysis (equal treatment/non-discrimination). In Collective Complaint No. 64/2011, *European Roma and Travellers Forum (ERTF) v. France*, the Committee found no deficiency with respect to “measurable progress” or “maximum use of available resources” and hesitated when it came to “reasonable timeframe”. The case involved the housing rights of Roma and travellers in France. The Committee did find a violation of Article E in conjunction with Article 31.1. In a sense, its Article E analysis helped the Committee decide that there was insufficient or timely implementation of the right.

The Committee can focus on the lack of voice of those directly affected by policies that impact them.

The decision of the Committee in Collective Complaint No. 62/2010, *International Federation of Human Rights (FIDH) v. Belgium* illustrates the application of the three-pronged criteria alongside Article E and introduces a new element, the need for the active consultation of affected vulnerable groups:

204. The Committee does not ignore the ad hoc measures concerning Travellers mentioned by the Government. It highlights nonetheless the scarcity of suitable means of collecting the necessary information to draw up targeted policies, the lack of such policies, the insufficient use of binding measures aimed at local and regional

authorities and the fact that the representatives of Travellers are not involved in the various stages of policy making. The case file shows that, as a vulnerable group, Travellers do not sufficiently benefit from a co-ordinated overall policy to combat the poverty and social exclusion from which they suffer in Belgium although their situation requires differentiated treatment and targeted measures to improve their circumstances.

[Italics added]

This is quite important when it comes to policy making and implementation for older persons. And it is indeed fully consistent with the UN Sustainable Development Goals (UN SDGs) which place voice at the very heart of the process of change.

The distinction between individual rights and interests and the general public interest – and the task of governments to balance same – came back into view in Collective Complaint No. 67/2011, *Médecins du Monde - International v. France*. The complaint revolved around the housing rights of Roma. Perhaps the best way to think of this is that such balancing of rights and interests is inherent in the concept of “progressive realisation”. The Committee was again of the view that Article 31 (right to housing) does not contain “obligations of results”. It is suggested that the Committee misconceived this category. An “obligation of result” is one that leaves

maximum space for a government to determine the means (and time) of change. It is therefore, by definition, amenable to “progressive realisation” (see paragraph 55). What the Committee perhaps intended was that the progressive character of the obligations did not rob them of either force or normative autonomy.

To some degree, *Defence for Children International (DCI) v. Belgium* (Collective Complaint No. 69/2011), which concerned the housing and other rights of unaccompanied minors, touched on the issue of “retrogressive” action, although it was not framed thus. Since 2009, the Belgian government “no longer guaranteed unaccompanied minors unlawfully present in the country any form of accommodation” (paragraph 82). This the Committee found to be a violation of Article 17.1.b (right of protection against negligence, violence or exploitation). Since it involved the removal of a former guarantee, it might be considered a step that went beyond what was permissible for a retrogressive measure.

In *Collective Complaint No. 72/2011 International Federation of Human Rights (FIDH) v. Greece*, the Committee reiterated a point made in *International Movement ATD Fourth World v. France* concerning the need to measure progress:

129 In the absence of any commitment to or means of measuring the practical impact of measures taken, the rights specified in the Charter are likely to remain ineffective (...). In connection with timetabling (...) it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category. At all events, achievement of the goals that the authorities have set themselves cannot be deferred indefinitely” (*International Movement ATD Fourth world v. France*, complaint No 33/2006, decision on the merits of 5 December 2007, § 65-66).

Implicit in this is that the reasonableness of the timelines for “progressive realisation” will depend in part on the vulnerability of the group in question.

International Federation of Human Rights (FIDH) v. Belgium concerned the alleged lack of housing options for adults with disabilities and their families (Collective Complaint No. 75/2011). With respect to the obligation to make “measurable progress” inherent in the concept of “progressive realisation”, the Committee concluded on the basis of the record of the respondent government that:

149. Over a period which the Committee considers to have lasted long enough, the authorities have failed to make any progress on organising the available financial resources in order to prevent the many genuine cases of highly dependent persons with disabilities being denied access to any care or accommodation solution.

Interestingly, part of the reasoning of the Committee turned on the impact of a lack of appropriate housing options for families (part of the formula in *Collective Complaint No. 13/2002*). The Committee stated (in finding a violation of Article 15.3):

184. The Committee takes note of the testimonies made available to it in the form of letters denouncing cases of exclusion from care and accommodation facilities, sent to the public authorities by the parents of persons with severe disabilities (see § 85 above), and observes that the shortage of places in these institutions obliges highly dependent persons to live with their families, with far-reaching negative implications for the family's living conditions in many cases. For many parents the painful consequence of their devotion to a child with a permanent health problem is that they have to give up work altogether or reduce their working hours to take care of their highly dependent family member. Apart from the financial losses thus incurred, as the FIDH pointed out in its response, this situation often causes families to make an even greater financial outlay, in that they utilise their own funds to build and set up appropriate care and accommodation facilities without receiving any public subsidies.

185. The Committee reiterates that States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities, such as persons with disabilities, as well as for the other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings (International Association Autism-Europe v. France, op. cit., § 53).

It is suggested this is highly relevant to the social care of older persons and the burdens that may fall on their spouses, partners or extended family in the absence of adequate support.

The question of the adequacy of timelines for change also figured prominently in Collective Complaint No. 75/2011, FIDH v. Belgium:

149. Over a period which the Committee considers to have lasted long enough, the authorities have failed to make any progress on organising the available financial resources in order to prevent the many genuine cases of highly dependent persons with disabilities being denied access to any care or accommodation solution.

150. Despite the length of this period, the Committee, having compared the information provided by the Government with the data and information provided by the FIDH, notes that projects to build new care and accommodation centres, which could have increased the number of places available for persons with severe disabilities, have either been dragging on for years (as is the case with four projects launched by non-profit-making associations in the French Community of the Brussels-Capital Region) or are being run by the parents of persons with disabilities, who are desperately seeking funds and grants to complete them. Deadlines have also been put back in other areas. For example in Flanders, a census of people with disabilities, including persons with severe disabilities, which was decided on in 2003 and scheduled to take place in 2010, has been put back to 2020, and in the Brussels-Capital Region, a decree on the integration of people with disabilities, which is supposed to show due regard for the issue of care for highly dependent persons with disabilities and was originally supposed to have been adopted a year ago, has been put back to 2014 or 2015. Ultimately, the Committee would point out that the lack of objective and reliable figures on the number of persons for whom appropriate solutions have been found or who are awaiting such solutions, whose conformity with the Charter will be assessed subsequently in the context of the complaint, prevents it from judging, even approximately, if there are areas in which progress has been made in the community care provided for these persons despite the generally gloomy picture which has already been painted.

151. None of the justifications given by the Belgian Government for its failure to provide enough places in care and accommodation centres for highly dependent adults with disabilities to ensure that these people are not denied access this form of social service, may legitimately be accepted. The Committee holds therefore that this failure constitutes a violation of Article 14.1 of the Charter.

This too is highly relevant for older persons. It is not beyond the realm of possibility that similar timelines for the implementation of elder policy also tend to slip without adequate justification.

And in Collective Complaint No. 109/2014, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, the Committee found against the respondent government under Article 15.1 (right to inclusive education for children with disabilities) in part because:

78. Based on the information at its disposal, the Committee has found no evidence that the M-Decree sets out a time frame for implementing the right to inclusive education and indicators of success for measurable progress ... The Committee also notes a lack of permanent adequate monitoring and evaluation of the measures taken to ensure the right of inclusive education and protect children from discrimination.

79. In these circumstances, on the evidence before it, the Committee finds that the refusal to enrol children with intellectual disabilities in the mainstream school system is not justified by any legitimate aim.

80. In conclusion, the Committee considers that the right to inclusive education of children with intellectual disabilities is not effectively guaranteed in the Flemish Community of Belgium. It therefore holds that there is a violation of Article 15.1.

6.4 Conclusions: How to frame the parameters of “progressive realisation” under the Charter: key benchmarks and relevance for older persons

What working benchmarks can be garnered from the above?

First of all, the notions of “restrictions to rights” (Article G) and “progressive realisation” are qualitatively distinct. Both concepts are explicitly covered in the text of the ICESCR. Only the “restrictions” concept was explicitly covered in the text of the European Social Charter. The fact that they were kept distinct in the ICESCR means that they are distinct concepts. It follows that the welcome evolution of the notion of “progressive realisation” in the jurisprudence of the Charter is also to be kept distinct from the idea of “restrictions to rights” under the Charter.

Secondly, only “obligations of results” are amenable to “progressive realisation”. So-called “obligations of conduct” (granular obligations that specify exactly what is to be done) are not so amenable. Partly due to when it was originally drafted (1961), many if not most of the obligations contained in the Charter are “obligations of conduct”. Some are obligations of “result” and are therefore amenable to the general obligation of “progressive realisation”. Distinguishing between the two in the text of the Charter is a function for the European Committee of Social Rights.

Thirdly, the concept of equality and non-discrimination under Article E does not, in itself, function to convert an obligation that is amenable to “progressive realisation” into one that is to be immediately achieved. For example, if one of the obligations flowing from Article 23 is deemed to be an “obligation of result” then over-layering Article E on it does not thereby convert it into an “obligation of conduct” or immediate effect.

Fourthly, just because an obligation is considered one of “results” does not thereby rob it of normative significance. The obligation of “progressive realisation” under the Charter primarily means that progress must be (1) timely, (2) measurable, and (3) consistent with the maximum use of available resources. The Committee is well placed to make these kinds of judgments and has developed clear jurisprudence in this regard and especially in the collective complaints procedure.

Fifthly, at least within the rubric of the ICESCR, retrogressive measures are allowable under the chapeau of “progressive realisation”. Progress can go backwards or forwards. However, when implementing retrenchments, particular attention should be paid to those on whom the most burden will fall. For example, in the absence of adequate supports to enable an older person to remain living at home, much of the informal care burden will fall on spouses or family. In the absence of real and effective family supports, this will further compound their isolation and may even impact their health (including their mental health). This would seem to be something that impacts women in particular and thus raises profound issues of indirect discrimination on the intersecting basis of age and gender. In this way, the jurisprudence of the Committee is useful in exposing structural issues that can have a ripple effect beyond the original policy flaw.

Finally, in times of retrenchment, there would appear to be at least an implicit obligation to consult with those most directly affected. This comes loud and clear from the Committee's jurisprudence and fits neatly with Sandra Liebenberg's theory of procedural fairness in social rights litigation. This is not, as yet, a well-developed aspect of the jurisprudence. This proactive obligation of consultation as a precondition for retrogressive measures is particularly promising. It does not mean that special interests have a lock on social policy. But it does act as a corrective to the well-known tendency of systems to cut without thinking through the longer-term impacts and costs of retrogressive measures especially on groups who find themselves in vulnerable situations.

7. Article 23 of the European Social Charter: The Sword and Shield of the European Social Charter Against Ageism

“Article 4 [now Article 23] is the first human rights treaty provision [in the world] that specifically protects the elderly.”

David Harris & John Darcy, The European Social Charter, (2nd Ed., Transnational, 2000) at p. 250.

As described in length in the previous part, the original text of the European Social Charter (Turin, 1961) did not include any specific article regarding the social rights of older persons. The rights of older persons, as such, were added, protected and anchored only as part of the 1988 Additional Protocol (Article 4), which was later on transformed (without any textual changes) into Article 23 of the 1996 Revised Charter. The numbered paragraphs (in the original 1988 version) were removed in the 1996 Revised Charter.

This new addition of the 1980s reflected the broader global awakening to the demographic change, as exemplified in the 1982 UN Vienna Plan of Action on Ageing (VIPAA), which was described in Chapter 1 of this study.

The language of the article is as follows:

Article 23 – The right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
 - a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
 - b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;
- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
 - a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;

- b. the health care and the services necessitated by their state;
 - to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

[For the purpose of the application of this paragraph, the term “for as long as possible” refers to the elderly person’s physical, psychological and intellectual capacities.]

In general, as summarised in the official Digest of the case law of the European Committee of Social Rights (Digest, 2018), the significance of Article 23 is as follows:

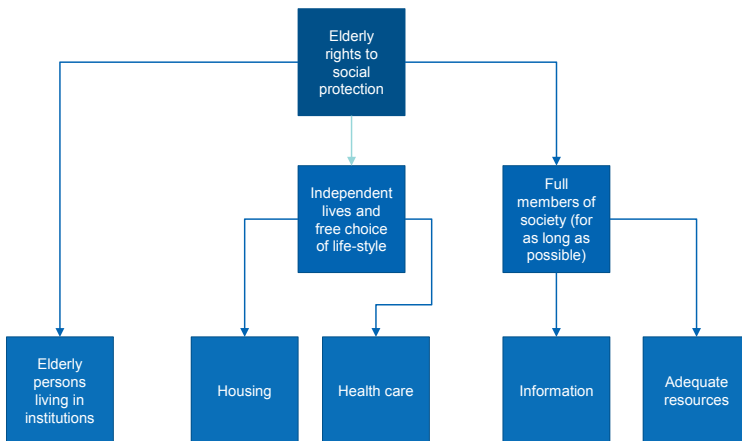
Article 23 of the Charter is the first human rights treaty provision to specifically protect the rights of the elderly. The measures envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons, obliging the Parties to devise and carry out coherent actions in the different areas covered.

In the 2008 version of the *Digest*, it was also stressed that Article 23:

“... is a dynamic provision in the sense that ‘the appropriate measures it calls for may change over time in line with a new and progressive notion of what life should be for elderly persons.’”
[p. 147]

It should be noted also that, as the 2008 Digest stresses, “Article 23 overlaps with other provisions of the Charter which protect elderly persons as members of the general population, such as Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance), and Article 30 (Right to protection against poverty and social exclusion). Article 23 requires States Parties to make focused and planned provision in accordance with the specific needs of elderly persons.” (p. 199). Chapter 8 outlines these other provisions as they apply to older persons.

The original logic of the structure of Article 23 was as follows:



It is quite clear that the original logic of the structure, as described above, meant that:

- a. Article 23 did not intend to cover all the relevant rights of older persons to social protection, but only those which were viewed as either specifically relevant to older persons and/or not covered by the other articles in the European Social Charter.
- b. Two key conceptual aspects were central:
 - a. One – the full/meaningful membership in society: or in the words of the Digest: “elderly persons must suffer no ostracism on account of their age” (p. 199); this concept is “operationalised” via two main aspects: adequate resources and information.
 - b. Two – independence and choice in life-style; this concept is “operationa-
lised” via two main aspects: healthcare and housing.
 - c. “For as long as possible” – the notion that, even with normal ageing processes, older persons are at risk of losing their ability to remain full members in society – hence the duty to take pro-active steps to prevent or delay this point in time.
 - d. The older residents in institutions were viewed as a unique and important sub-population with needs for special protection and attention due to the nature of these total institutions, and the special characteristics of their older residents.
 - e. It is also clear that, originally, Article 23 did not refer to the key social phenomena of “ageism” as such, and their central impact on the living experiences of older persons – generally; and with regards to discrimination, and socio-legal exclusion – due to their age – specifically.

Down through the years, out of the 47 signatories and 36 ratifications of the Revised Charter, Article 23 (or Article 4 of the Additional Protocol, 1988) has only been adopted by 22 countries (that is, under 50% of the members of the Council of Europe). This compares with the ratification by 40 countries of Article 17 (on children and young persons) or 36 countries ratification of Article 20 (on employment and occupation without discrimination on the grounds of sex) is relatively low.

In order to understand the historical and current meaning and impact of Article 23, it is necessary to analyse the monitoring and implementation mechanisms of the European Social Charter. Once again, and as described above (Chapter 4 of this study), there are two key processes and mechanisms which enable the European Committee of Social Rights to monitor, interpret, and materially construct the actual implementation of Article 23: the reporting system and the collective complaints system (based on the 1995 Additional Protocol).

We will hereby describe the development of the jurisprudence around Article 23 – based on these two different frameworks.

7.1 The reporting system and the Committee's conclusions on Article 23

As described in Chapter 4, the 1991 Protocol to the European Social Charter has established a procedure of monitoring and implementing the Charter via a reporting system which is followed up with the European Committee of Social Rights' review and conclusions.

Within this process, the States submit reports about how they have implemented the provisions of Article 23. After the submission, the Committee adopts conclusions on these reports.

Article 23 falls under the category which mandates reporting once every 4 years (group 2 – health, social security, and social protection), and, in a case where the Committee concludes that a situation is not in conformity because of lack of information, the State Party has to submit the requested information after 2 years.

As described in Chapter 4, after reviewing the national reports, if the European Committee of Social Rights concludes that a State's laws and policies are not in conformity with Article 23, it refers its observations to the Governmental Committee. The Governmental Committee is comprised of representatives of States but also involves European and international employers' organisations and trade unions. They are responsible for assessing whether the planned national reforms and progress to remedy the violation are satisfactory. If a government fails to set out the measures that they plan to take to improve their law and practice, the Governmental Committee can suggest to the Committee of Ministers to issue a recommendation calling on the State concerned to take all the necessary action in order to comply with the Charter and the Committee's conclusion.

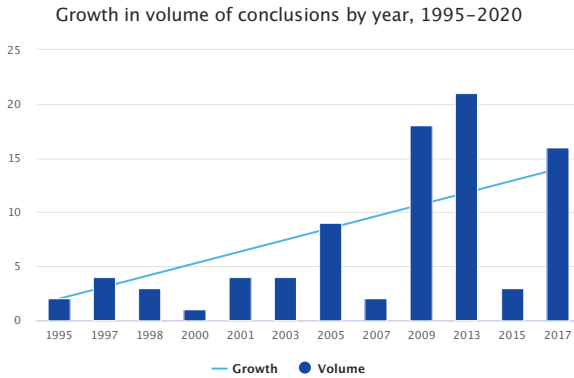
It is interesting to note that, other than the general analysis provided by the Digest and the Spanier and Doron (2018) analysis of the European Committee of Social Rights, there has been neither a systematic study of the Committee's conclusions under Article 23 of the Charter, nor any significant scholarly writings focusing specifically on this article or on the Committee's jurisprudence in its regard.

Several authors and scholars, while analysing or studying the rights of older persons within the European context, have referred to Article 23, or have mentioned some of the decisions made or conclusions reached with reference to this article. However, these writings and references were usually part of a general or broad analysis of the rights of older persons in the European context and were never based on a systematic empirical review of the Committee's decisions and conclusions.

When trying to analyse the Committee's casework, it should be noted that *de facto*, the Committee began to deliver and publish its conclusions on Article 4 (now 23) only in 1995, and in that year, it delivered its two first conclusions. Article 4 of course continues to hold valid for those States that have ratified the Additional Protocol, but who have not ratified the Revised Social Charter. Thus, it is not just of historical interest. Since then, the number of conclusions has gradually increased. To date (2020), 86 conclusions have been delivered by the Committee. Moreover, since the signing of the Charter and over the years, the work of the Committee has increased,

and some key patterns have been discerned. The growth in the number of conclusions can be seen in Graph 1.

Chart 1: Growth in volume of conclusions by year, 1995-2020



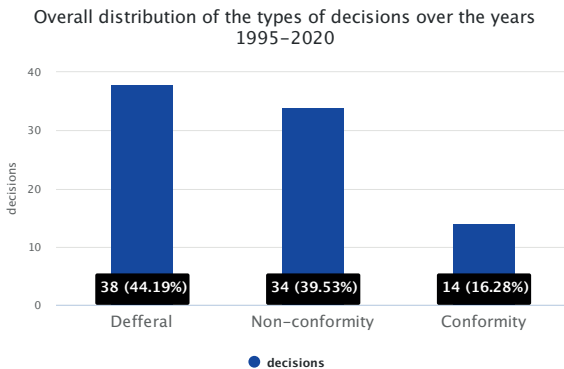
Overall, then, it is clear that, generally speaking, since the mid-1990s, there has been a clear trend in not only accepting, but also reporting and acting upon Article 23 and on the rights of older persons. The increase in the number of conclusions is due to the States' gradual acceptance of the Charter in general and of Article 23 in particular.

As can be seen from the graph, growth peaked in 2013, the year which saw the Committee deliver its conclusions relating to Article 23 for all 21 signatory States. The continued growth in the number of conclusions will depend on the continued acceptance/ratification of Article 23 by State Parties.

Beyond the mere numbers of conclusions, a different perspective is the actual outcome of the examination process. The Committee's summary report means literally that after a detailed discussion, the conclusions can be summarised in a bottom line, which can be one of the following three possibilities: conformity of the State with the requirements of Article 23 of the Charter, non-conformity, or a deferral of the decision.

A deferral is usually the result of the absence of information conveyed by the States. Graph 2 presents the distribution of the different types of decisions over the years. An examination of the Committee's three possible types of conclusions over the years produced the picture presented in Graph 2.

Chart 2: Overall distribution of the types of decisions over the years 1995-2020

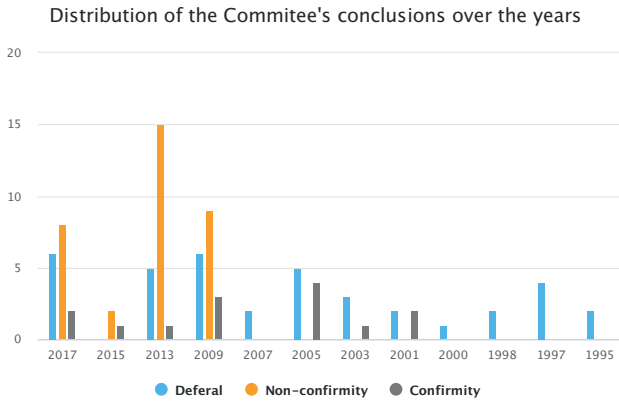


Graph 2 shows that, in the majority of cases, the European Committee of Social Rights had to defer its conclusion regarding Article 23. This is followed by a non-conformity with the requirements of Article 23, and only a minority of conclusions validate the States' conformity with the requirements of the Charter. This reality, in itself, may suggest that,

overall, there is still much work to be done by the different States to improve their laws and policies in order to meet their social rights obligation under the European Social Charter.

It is also interesting in this context to understand how the pattern of conclusions has changed down the years. Graph 3 shows that the overall picture regarding the types of conclusions has evolved, indicating that the Committee is moving in a clear direction and that there has been a change in the emphasis of the conclusions that it has delivered over the years.

Chart 3: Distribution of the Committee’s conclusions over the years



As can be seen, in the early years, the large majority of conclusions were deferred because of a lack of data in the States’ reports. This stage can be interpreted as being the years of construction and creation of a system of clear norms in relation to the Committee regarding its reporting

requirements and in relation to the States and the reports that they were requested to deliver. It is noteworthy, as mentioned above, that relatively few reports were submitted during those years.

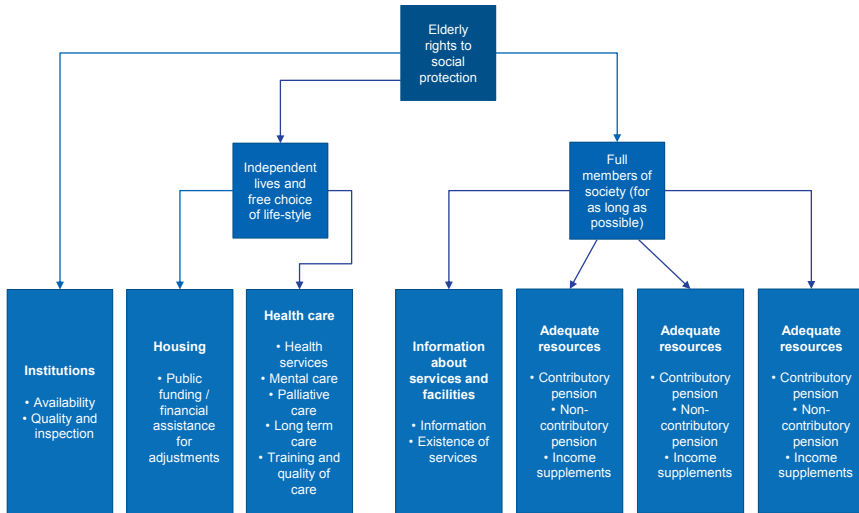
A change in direction was seen in 2005, when the number of conclusions delivered by the Committee doubled (from four to nine), but deferral and conformity to the Article’s requirements were still evenly distributed. In 2009, the Committee changed its mode of delivering conclusions. In that year, half of the conclusions (nine) declared that the States were not in conformity with the requirements, whereas six conclusions were deferred and only three conformed.

In 2013, consolidated, stringent norms were apparent in everything to do with the rights of older persons. All the (21) signatory States to Article 23 at that time submitted a report. An overwhelming majority (15), that is, 71%, did not conform to the required norm set by the Charter. The Committee deferred its conclusions with respect to five States; only one State (5%) was in conformity with Article 23. This general trend continued in 2017 when, again, only two countries were found to be in conformity with Article 23, while eight countries were found in non-conformity, and the conclusions of six countries were deferred.

However, even if it is possible to examine the changes in norms over the years through quantitative analysis, this is naturally not enough. The appropriate way to understand the Committee’s policy today, while looking towards the future, seems to be by qualitatively examining the norms set down by the Committee in its current

conclusions. This will enable understanding and coordination of expectations in everything regarding the rights of older persons as required by the Charter.

Over the years, and via the reporting mechanism of the European Social Charter, the Committee has developed a body of jurisprudence, which expands the original scope of Article 23. Unlike the “original” text and its “original” logic, down the years, the Committee has developed a more detailed model to examine the material content of Article 23, which can be described as follows:



As can be seen, the “case work” of the Committee has expanded the original model of Article 23 in two manners:

First – it added two totally new “key elements” (that is, “legislative framework” and “prevention of elder abuse”) which are central to the human rights of older persons and did not appear within the explicit text of the article.

Second – it elaborated and expanded the existing elements of the original model, while adding new material contents (for example, broadening the understanding of the term “healthcare” to include palliative care or focusing on the importance of support to informal care for older persons as part of services needing to be provided).

The bottom line is that, in regard to Article 23, the Committee currently examines seven categories derived from what is written in the Charter: (1) legislative framework; (2) elder abuse; (3) adequate resources; (4) information; (5) health care; (6) housing; and (7) institutional care. We will hereby describe very briefly the material content of each category as constructed by the Committee in its conclusions.

The adequacy of legislative frameworks: the term “legislative framework” does not appear as such in the text of Article 23. However, it can be understood from the Committee’s conclusions that, in this category, the Committee seeks legislation that ensures the foundations for the social rights of older persons in two significant fields: age discrimination and legal capacity. These are indeed two key aspects of

the fundamental understanding of human rights of older persons as they relate to ageism and the social construct of old age: the stigmatic and stereotypical understandings that older persons are less worthy, and that older persons are less capable.

As for age discrimination (beyond the narrow scope of age discrimination in the context of employment), as described in the Digest: "Article 23 requires States Parties to combat age discrimination in a range of areas beyond employment, namely in access to goods, facilities and services, health care, education, services such as insurance and banking products, participation in policy making/civil dialogue, allocation of resources and facilities. Therefore, an adequate legal framework is a fundamental measure to combat age discrimination in these areas."

As for the issue of capacity and assisted decision making, the Digest elaborates and explains how: "Elderly persons at times may have reduced capacity making powers or no such powers or capacity at all. Therefore, there should be a national legal framework related to assisted decision making for the elderly guaranteeing their right to make decisions for themselves unless it is shown that they are unable to make them. This means that elderly persons cannot be assumed to be incapable of making their own decision just because they have a particular medical condition or disability or lack legal capacity."

... In this connection, the national legal framework must provide appropriate safeguards to prevent the arbitrary deprivation of autonomous decision making by elderly persons, also in case of reduced decision making capacity. It must be ensured that the person acting on behalf of elderly persons interferes to the least possible degree with their wishes and rights.

Elder abuse: elder abuse also does not appear in the text of Article 23. The Committee included this category for the first time in its conclusions of 2009, while recognising its significance and importance with regard to the realisation of social rights of older persons. On these grounds, the Committee also relied on leading international organisations which warn of potentially significant implications of this social phenomenon. As described in the Digest:

States Parties must therefore take measures to evaluate the extent of the problem, to raise awareness on the need to eradicate elder abuse and neglect, and adopt legislative or other measures.

It is then clear that it is not enough to have legislation for the punishment of elder abuse, but there needs also to be a system of locating and preventing the possibility of elder abuse within society at large, and specifically within welfare services.

Adequate resources: from an historical perspective, securing adequate income is probably the most fundamental social right for older persons. Within the core rationale of social rights, it is clear that, without an adequate income, an individual cannot enjoy his or her fundamental human rights. In this context, the Committee defines the aim of this category as follows:

"... Committee takes into account all the social protection measures guaranteed to elderly persons and aimed at maintaining an income level allowing them to lead a decent life, as well as to participate actively in public, social and cultural life ...¹²⁹".

For this purpose, the Committee examines the existing income for older persons within the framework of the laws of the State. It examines all possible sources, while focusing on the local pension system – both contributory and non-contributory

129. See: Reporting system of the European Social Charter, Sweden 2013

pensions. However, in this context, other complementary financial supports, such as supplementary cash benefits, vouchers or discounts, are also examined. This cumulative basket of resources is then compared with local national levels of income and poverty (for example, the median equivalised income) in order to assess its adequacy.

Information, services and facilities: this category is, yet again, a good example of the importance and significance of the jurisprudential development of the Committee's case work. The original text refers mostly to the centrality of providing information as an empowering instrument, reflecting the core understanding that, without awareness, knowledge and information, there is no real meaning for any rights.

However, under the interpretation of the Committee, as provided by the Digest:

"...not only information relating to the provision of information about these services and facilities is examined but also the services and facilities themselves. In particular; the existence, extent and cost of home help services, community-based services, specialised day care provision for persons with dementia and related illnesses and services such as information, training and respite care for families caring for elderly persons, in particular, highly dependent persons, as well as cultural leisure and educational facilities available to elderly persons."

Housing: housing, a roof over one's head, is a fundamental social right for older persons. On the one hand, the Charter is committed to ensuring housing that meets their needs and state of health. If necessary, States are obliged to adapt older persons' housing to their situations, and are therefore required to build housing tailored to older persons in need of assistance and protection. On the other hand, it is clear to the Committee that this requires a significant financial investment by the countries. The Committee summarises its interpretation in this area in its conclusions for Montenegro:

"The Committee recalls that appropriate housing conditions are very important for an old person's well-being. However, it is also aware that the improvement of housing conditions of senior citizens is not an easy task. First, it requires considerable public funding, as the average elderly person usually cannot afford the costs of modernisation of his apartment or purchasing a new apartment of a higher standard. Second, improvement of housing conditions by moving elsewhere is often not a viable option in that it uproots the elderly person from his/her "natural" environment. Bearing in mind these constraints, the Committee wishes to be kept informed of any public policies providing financial assistance for the adaptation of housing¹³⁰"

These requirements reflect a broader rights-based ideology, which is known in the field of ageing, as "ageing in place". Or, as summarised in the Digest:

"Policies should help elderly persons to remain in their own homes for as long as possible through the provision of sheltered/supported housing and assistance for the adaptation of homes."

Health care: similar to adequate income, or housing, the significance of the right to health to the social rights of older persons is quite clear and obvious. Within the core of this right, the Committee examines whether specific health programmes for the older population exist in the countries in question as part of the overall State health system.

However, and once again, the Committee's jurisprudence has expanded the scope of the right to health beyond basic, primary health care services. In this broader understanding, the Committee's expectations from the States can be learned from its comments to the conclusions regarding Andorra (2013).

130. See Reporting system of the European Social Charter, Montenegro, 2013, p. 4; See also Turkey, 2013, p. 3

"The Committee previously asked for information on specific health care services aimed at the elderly, mental health programmes, palliative care services and special training for individuals caring for elderly persons. The Committee also asked to be kept informed of any measures aimed at improving the accessibility and quality of geriatric and long-term care, and the coordination of social and health care services in respect of the elderly"¹³¹.

It can be said that, with regard to health, the Committee urges the greatest possible expansion of the medical network of services – physical, mental, functional, and psychological – for older persons. It wishes to see the resources allocated to this area and to ensure that the medical system indeed covers all the different fields related to health issues of older persons.

Institutional care: undoubtedly, one of the interesting features of Article 23 is its specific and special attention to the rights of older residents in institutional settings. This is certainly a unique sub-population within the older population, with a special need for attention in the context of social protection and human rights. In this context, the Committee's jurisprudence, has focused on two main elements: first – the availability of institutional care; second – the quality of institutional care.

We suggest that this line of jurisprudence needs to be re-visited. The old language used in Article 23 – a right to remain at home "for as long as possible" – now needs to be interpreted in light of the shift to the social model of ageing, the power of Article E and its vision of active social citizenship and overall trends in Europe toward community-based options to enable long-term care to be provided (see survey of European policy trends in Chapter 3). The emphasis in future should be on community-based alternatives and the phrase "for as long as possible" should cause an interrogation of shortcomings in the provision of support instead of an acceptance that the reason a person can no longer reside at home has something to do with a deficiency or personal shortcoming.

As for availability – under this element, issues such as the adequate supply of beds, or institutional facilities (public or private) are of relevance. Once again, the Committee has broadened its perspective under this element to broader issues such as waiting times or waiting lists, affordability and costs, funding and financial assistance programmes, and more. The availability element includes also the existence and availability of more tailored or specialised institutions (for example, facilities specialised in memory/dementia care). Again, it would probably make sense to turn this analysis around to question much more closely deficiencies in rolling out adequate community-based supports.

As for quality – under this element, the emphasis is placed on providing appropriate care while maintaining older persons' privacy, control over their own care and the ability to make their own decisions about their lifestyle. Moreover, in this context, the Committee also examines the quality, professionalism, and extent of supervision of the nursing institutions (for example, licensing, staff qualifications, monitoring, inspection, use of physical restraints, and more).

131. See Reporting system of the European Social Charter, Andorra, 2013, p. 3.

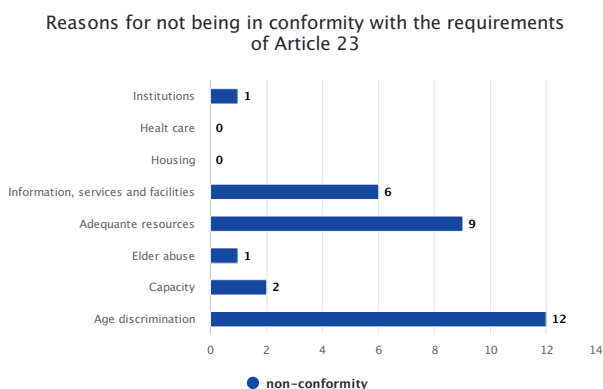
7.2 The operationalisation of social rights: the Committee's standards for examining State reports under Article 23

After describing the seven categories that are subject to the Committee's scrutiny in the various States, and after clarifying the norms demanded by the Committee, we now return to the overall picture.

As presented above in Graph 3, the Committee, in 2013, delivered its conclusions to all 21 signatory States regarding Article 23. However, 15 States were found not to be in conformity with the requirements of Article 23 and the Committee deferred its conclusions regarding five of the States due to a lack of information. Only one State (France) was found to be in conformity.

The question is asked as to why all the States, except one, did not conform to the article's requirements in relation to older persons. Graph 4 describes the distribution of these reasons:

Chart 4: Reasons for not being in conformity with the requirements of Article 23



As can be seen from Graph 4, the main reason for non-conformity with the requirements of Article 23 is the absence of legislation that prohibits discrimination on the ground of age in all areas of life including outside employment. This is an easy element to examine in the sense that either such legislation exists or it does not. For

example, the Committee, in its review of Bosnia and Herzegovina (2013), clarifies the importance of the subject as follows:

"...As regards the protection of elderly persons from discrimination outside employment, the Committee recalls that Article 23 requires States Parties to combat age discrimination in a range of areas beyond employment, namely in access to goods, facilities and services. The European Older People's Platform and other sources point to the existence of pervasive age discrimination in many areas of society throughout Europe (health care, education, services such as insurance and banking products, participation in policy making/civil dialogue, allocation of resources and facilities) which leads the Committee to consider that an adequate legal framework is a fundamental measure to combat age discrimination in these areas. It therefore asks whether such legislation exists ...¹³²".

The second most important reason is the absence of a minimal pension that is supposed to meet the needs of older persons. This reason already appeared in the Committee's 2009 conclusions. In its 2013 conclusions regarding the Czech Republic, the Committee found:

132. See Reporting system of the European Social Charter, Bosnia and Herzegovina, 2013. p. 1.

"...that the minimum old-age pension was manifestly inadequate as it was considerably below the poverty threshold and therefore found that the situation was not in conformity with Article 4 of the Additional Protocol on this point...¹³³".

Once again, and similar to the previous standard described above in relation to the adequate resources category, this is relatively simple to examine. A median income exists, which must be above the poverty line. Any state that does not adhere to this norm will be found as not conforming with Article 23 of the Charter, as was the case with the Czech Republic, Montenegro, Serbia, Slovakia, and Ukraine in 2013¹³⁴.

The third main reason for non-conformity is the lack of information, services and facilities provided by the State. The Committee spares no criticism on this issue and clarifies that the lack of information cannot provide an escape route for non-conformity with Article 23 of the Charter. For example, the Committee refers to Andorra (2013) as follows:

"Pending receipt of the information requested, the Committee defers its conclusion. The Committee considers that the absence of the information required amounts to a breach of the reporting obligation entered into by Andorra under the Charter. The Government consequently has an obligation to provide the requested information in the next report on this provision"¹³⁵.

It is then clear that in other categories, such as health care or information, it is much harder for the Committee to set clear standards and to conclude "non-conformity". In these fields, it is still easier for the Committee to defer the decision and request more information.

The States must know that they are obliged to deliver the information. This is a central point for the Committee because, in the absence of information and the failure of the States to convey the facts, the Committee's work is inefficient. The Committee has the power of enforcement with the assistance of the Committee of Ministers of the Council of Europe, and this power is indeed enforced regarding Article 23 (as can be seen below in the complaint against Finland). However, as is apparent from the studies, the power of enforcement of the Committee of Ministers is very limited and is subject mainly to political needs and pressures. The bottom line is that the States chose to join Article 23 of the Charter. The Committee can present the status quo and the assumption is that, during the dialogue with the Committee, the States will improve their performance, including the level of reporting.

It is important to understand within this context the kind of questions the Committee will ask and the kind of data it requires and examines when analysing the countries' reports. It is interesting to note that within the conclusions of the Committee, there is no uniformity with regard to the examination and evaluation of the reports. In most elements, the Committee raises different questions, asks for different data, and examines different aspects. We will list below some examples of the standards and indicators that the Committee uses in regard to each of the different elements of Article 23 – but they are examples and they do not necessarily appear in all the conclusions:

133. See Reporting system of the European Social Charter Czech Republic, 2013, p.2.

134. See Reporting system of the European Social Charter, Montenegro, 2013, p.5.

135. See: Reporting system of the European Social Charter, Bosnia and Herzegovina, 2013, p.4.

1. 1(1) The standards with regard to legislative framework – age discrimination:
 - a. Is “age” among the grounds of discrimination expressly prohibited under law or the constitution?
 - b. Is there any specific legislation against age-discrimination outside the fields of labour market/employment law?
 - c. Is there any case law protecting elderly persons against this type of discrimination?
- 1(2) The standards with regard to legislative framework – assisted decision making:
 - d. What are the existing guardianship frameworks and how do they operate with regard to older persons and restrictions on their autonomy?
 - e. What are the safeguards to prevent the arbitrary deprivation of autonomous decision-making by elderly persons?
 - f. Are there any plans to introduce a procedure for helping elderly persons to take decisions or to nominate an assisted decision maker or a substitute decision maker?
 - g. Are there data with regard to actual compliance with the law?
2. Elder abuse:
 - a. What are authorities doing to evaluate the extent of the problem – in general, and in specific settings (for example, institutions)?
 - b. What are the authorities doing to raise awareness of the problem?
 - c. What legislative measures have been taken to eradicate elder abuse?
3. Adequate resources:
 - a. What are the main features of the national pension programmes (both contributory and non-contributory)?
 - b. What benefits/assistance programmes exist for the elderly who are not entitled to any pension?
 - c. What are the cash benefits, subsidies, allowances, or other one-off assistance schemes available to older persons?
 - d. What are the national indicators of at-risk-of-poverty rates for persons aged 65 and older?
 - e. What is the minimum guaranteed income compared with the poverty threshold, which is fixed at 50% of the equivalised median income calculated on the basis of the Eurostat at-risk-of-poverty rate? This was estimated at €3,760 per year in 2015 (or €313 per month).
 - f. How does the percentage of elderly persons with an income of less than 40% of the equivalised median income compare with the European average?
 - g. To the extent that countries are engaged in pension reforms – how are these reforms expected to impact older persons, generally, and those with low incomes specifically?

4. Information, services and facilities:
 - a. What are the mechanisms for providing information to the elderly with regard to services and facilities?
 - b. What is the range of services offered in general?
 - c. What is the range of services offered for specific populations?
- i. Older persons with a need for rehabilitation,
- ii. Persons with dementia,
- iii. Family care-givers to older persons.
 - d. What are the average fees charged for receiving these services?
 - e. To what extent does the supply of these services meet the demand?
 - f. How is the quality of the services assessed?
 - g. Is the option given to older persons to choose the service providers?
 - h. Is there a complaints mechanism/procedure regarding these services?
 - i. What impact do these services have on the lives of older persons?
5. Housing
 - a. Are the needs of older persons taken into account in national or local housing policies?
 - b. What are the conditions for entitlement to housing assistance?
 - c. What public policies exist to provide financial assistance for home adaptations?
 - d. What are the actual costs of public housing for older persons?
 - e. What is the value of housing benefits/assistance?
 - f. Does the supply of sheltered or supported housing meet the demand?
6. Health care
 - a. What health care programmes and services exist that are specifically aimed at the elderly (for example, for chronic illness, palliative care, mental health programmes)?
 - b. What measures are taken to improve the accessibility and quality of geriatric and long-term care?
 - c. Are there special training programmes for individuals/professionals caring for older persons?
 - d. What is the proportion of the cost of medicines borne by older persons?
 - e. What are the co-ordination mechanisms between the health care services and social services?
7. Institutional care
 - a. Is the capacity of institutional care sufficient to meet the needs (for example, regarding waiting lists, sufficient beds and institutions)?
 - b. What are the financial costs and fees payable by users?
 - c. What is the inspection system and is it independent?

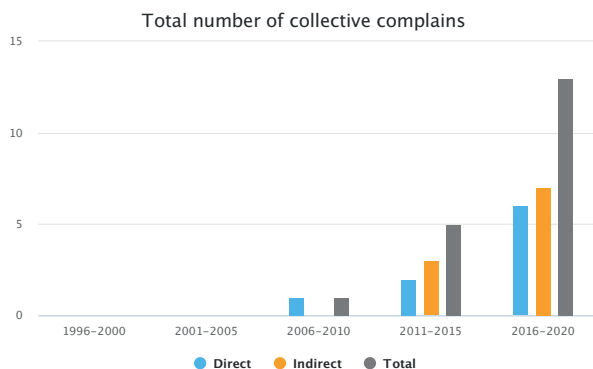
- d. Has there been a change in the number of institutions (for example, a decline)? If so, what is the cause and how does it impact older persons?

7.3 The collective complaints system and Article 23

Before delving into the material content of the collective complaints submitted with regard to alleged violations of the social rights of older persons, we will first provide a descriptive, quantitative picture of the reality in the field. For this purpose, all collective complaints were examined, and only those which either referred directly (“direct”) or referred indirectly to rights of older persons (for example, via other Charter articles, such as compulsory retirement under Article 2 on the right to work – “indirect”) were retained. It should be noted that only 16 countries have accepted the collective complaints procedure.

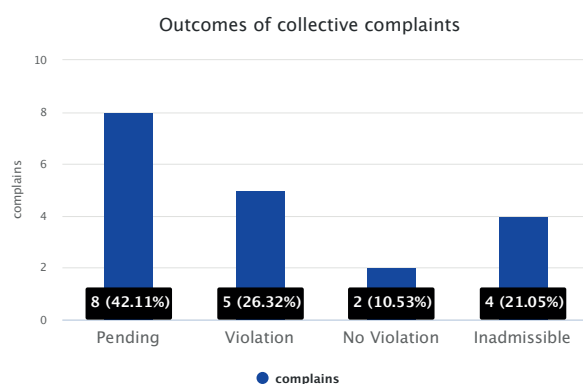
As can be seen below, in the last decade, there has been a clear and significant rise in the total number of collective complaints regarding the rights of older persons.

Chart 5: Total number of collective complaints



Moving beyond the mere numbers of collective complaints, it is interesting to examine the actual outcomes of these complaints. The results are summarised in Chart 6 below.

Chart 6: Outcomes of collective complaints



There are still eight complaints which were found admissible and are pending a decision on their merits. In the majority of the remaining cases deemed admissible, the Committee found the complaint to be justified and elder rights were found to be violated under Article 23.

As described in the sampling section, after reviewing the Committee data base, only four complaints which were directly regarding Article 23 were found to have been given a decision on the merits (of which two for which no violation of Article 23 was found, and two for

which a violation was found). In this section, we will provide a very brief description of these four collective complaints:

Complaint No. 42/2007, International Federation of Human Rights Leagues (IFHR) v. Ireland

The complaint was lodged by the International Federation of Human Rights Leagues (IFHR) and was registered on 26 February 2007. The IFHR alleged that Ireland discriminates against persons who are in receipt of Irish Contributory Old Age Pension and who do not reside permanently in Ireland in that it refuses to allow them access to a Free Travel scheme when they visit Ireland. The IFHR considered that this situation constituted a violation of Article 23 in conjunction with Article E and a violation of Article 12.4 of the Revised Charter.

The Free Travel Scheme, operated by the Department of Social and Family Affairs, allowed people aged 66 years or over, and who were permanently residing in the state, to travel free of charge on most public transport services, as well as on the public transport services of a large number of private operators in various parts of the country.

To avail oneself of Free Travel, a person must have first applied for a Free Travel Pass. The applicant would have qualified if he had been living permanently in the state (that is on an all year round basis) and was aged 66 or over. The IFHR alleged that Ireland discriminated against persons in receipt of Irish Contributory Old Age Pension, who do not reside permanently in Ireland, in that they are refused access to a Free Travel scheme for pensioners when returning to Ireland to visit relatives or friends. Moreover, the IFHR argued that the refusal by the Irish authorities to grant a Free Travel Pass to these persons when visiting Ireland was in breach of Article 23 of the Charter. The provision of free travel for pensioners was clearly among the measures to be adopted by the State Party within the meaning of Article 23 with a view to helping older persons remain full members of society, lead a decent life and play an active part in public, social and cultural life.

In a majority vote, the Committee dismissed the case. In its decision, the majority asserted that, with regard to Irish nationals who are resident outside of Ireland, the Committee recognised the close links that many wish to maintain with public, social and cultural life in Ireland. However, the Committee considered that States may legitimately restrict the scope of application of measures adopted to give effect to Article 23. It can be restricted to residents, individuals regularly working in the State concerned, or to persons with an equivalent degree of integration into the society of that State. If such a restriction is reasonable and does not constitute a denial of the core entitlement of older persons to essential social protection. Taking account of the nature of the benefits at issue in this complaint, the Committee considered that inability of non-resident Irish nationals to avail themselves of the Free Travel Scheme did not therefore constitute an unreasonable restriction on the right to social protection recognized in Article 23.

Moreover, the Committee stressed that a difference in treatment exists between residents and non-residents in respect of access to the Free Travel Scheme at issue in this complaint. However, this difference in treatment can be justified as based

upon a legitimate distinction between residents and non-residents. Therefore, this difference in treatment cannot be deemed discrimination within the meaning of the Charter or its Article E. Finally, the Committee also discussed the alleged violation of Article 12.4, within the context of the right to social security. But, again, it found that the Free Travel benefit cannot be deemed to relate to any of the social security rights covered by this article.

Interestingly, this case also included a minority opinion, which held the point of view that not only Article 23, but all the provisions of the Charter, are based on the principle of non-discrimination, which prohibits any differential treatment related to the criterion of permanent residence. Moreover, according to the minority opinion, Article 12.4 is also violated in the case, as social security rights are part of a “package” including the benefits or privileges granted by the State Party concerned.

Complaint No. 70/2011: The Central Association of Carers in Finland v. Finland

The complaint presented by the Central Association of Carers in Finland was registered on 6 July 2011. The association alleged that Finland violated the right of older persons to social protection in breach of Article 23 of the revised Charter.

The complaint was about the funding and implementation of the Act of Informal Care Support (937/2005), as it applied to family members and other informal carers, who provided care for older persons in the community. The argument was that not only was the act implemented very differently in the 336 municipalities in Finland, but there were no national standards regarding the amount and type of informal care provided under the minimum remuneration fixed by the law. For example, in some municipalities, providing a low level of care might have entitled a carer to the status of informal carer, whereas in some other municipalities, even providing 24/7 care might not have been sufficient to achieve the status of informal carer. Moreover, the fact that the position of the informal carer was linked to the economic situation of the municipality not only created inequality between informal carers in the same situation, but it also created situations where the possibility to deliver informal services ended at the beginning of the year. Finally, as the state subsidy to the municipalities for informal care was not earmarked, municipal politicians could decide freely not to allocate it to support informal care for older persons (and indeed some localities in Finland cancelled all informal carer agreements).

The legal context was based on the Finnish legal framework: the Constitution of Finland gives public authorities the responsibility to guarantee adequate social welfare for everyone. Actual provision of social welfare is assigned to municipalities by the Social Welfare Act (710/1982). Section 17 of the Act stipulates that municipalities are responsible, inter alia, for “provision of support for informal care”. However, municipalities have discretionary power to decide on the ways and means of arranging the social services, and on the type of service structure within which it responds to the needs of municipal residents. Moreover, Finland has a separate law on informal care, namely the Act on Informal Care Support (937/2005). According to Section 3 of the Act, informal care support may be granted by a municipality in certain situations. This provision does not make payment an obligation but leaves it to the discretionary power of the municipality although, according to the Act on Planning and Government Grants for Social Welfare and Health Care (733/1992),

municipalities receive financial support from the government in order to organise these services (on average one-third of the costs).

After considering the case, the Committee, in its report of 4 December 2012, decided that:

“the lack of uniformity in the services provided for elderly persons throughout Finland resulting from the lack of uniformity in the funding of such services by municipalities does not as such violate Article 23 of the Charter. However, the fact that the legislation allows practices leading to a part of the elderly population being denied access to informal care allowances or other alternative support constitutes a violation of this Article.”

On 11 June 2013, the Committee of Ministers, having examined the Committee's decision on the merits, and having reviewed the Government of Finland's reply to the decision, reaffirmed the Committee's decision.

Finally, on 4 November 2014, the Government of Finland provided the Committee with additional information regarding several steps that had been taken to remedy the situation. First, the Act on Supporting the Functional Capacity of the Older Population and on Social and Health Care Services for Older Persons entered into force on 1 July 2013. Second, the State budget for 2013, adopted by the Parliament, includes an increase in central government transfers to local governments with a view to developing support services for informal care in municipalities. Third, a working group appointed by the Ministry of Social Affairs and Health completed a proposal for a National Development Programme for the Support of Informal Care in March 2014. Fourth, the Act on the Arrangement of Social Welfare and Health Care Services and the new Social Welfare Act were to enter into force in 2015. Fifth, legislative reforms concerning informal care support and its administration and funding were to be assessed after 2015. Finally, in the framework of a structural policy programme, in February 2014, the Ministry of Social Affairs and Health prepared an action plan with a view to cutting back on institutional care for older persons and extending services provided at home.

Despite these extensive steps, in its the assessment of the follow-up, the Committee considered that:

“the grounds that led to the finding of violation, namely that the legislation allows practices leading to a part of the elderly population being denied access to informal care allowances or other forms of support, have not yet been remedied”¹³⁶.

Hence, the decision was that the Committee would assess the legislative and administrative measures, when adopted, at the next examination of the follow-up.

Complaint No. 71/2011: The Central Association of Carers in Finland v. Finland

Like the previous complaint, this complaint was presented by The Central Association of Carers in Finland. The Association alleged that Finland violated the rights of elderly persons to social and medical assistance, social services and social, legal and medical protection, in breach of Articles 13, 14, 16 and 23 of the Revised European Social Charter.

136. Assessment of the follow-up to the decision on the merits in *The Central Association of Carers in Finland v. Finland*, complaint No. 70/2011: <http://hudoc.esc.coe.int/eng/?i=cc-70-2011-Assessment-en>

Complaint (71/2011) was about the reorganisation of long-term care whereby former institutional care facilities (elderly homes and long-term health care wards) that operated as residential homes and were part of the institutional care system, are changed into either service housing or service housing with 24-hour assistance, formally regarded as non-institutional (outpatient) care. However, the pricing systems for the two types of services were significantly different. As a result, persons in need of service housing and service housing with 24-hour assistance were charged higher fees than clients in institutional care because: (1) there were no upper limits on fees for service housing and service housing with 24-hour assistance; (2) services, medicines and housing were charged as separate packages.

The general legal context was similar to the one described in the previous case, with regard to the large discretion that local municipalities in Finland hold concerning the provision of services under the Social Welfare Act. However, in particular, and compared with institutional care, service housing and service housing with 24-hour assistance were legally not subject to any specific legal regulation as regards determining the fees or on clients' disposable incomes.

After considering the facts, the Committee concluded that insufficient regulation of fees for service housing and service housing with 24-hour assistance, combined with the fact that the demand for these services exceeds supply, did not meet the requirements of Article 23 of the Charter in so far as these:

- (1) created legal uncertainties for older persons in need of care due diverse and complex fee policies. Even if municipalities adjust the fees, no effective safeguards exist to assure that effective access to services is guaranteed to every older person whose condition necessitates services; and
- (2) constituted an obstacle to the right to the provision of information about services and facilities available for older persons and their opportunities to make use of them as guaranteed by Article 23 of the Charter.

As for Article 14 (the right to benefit from social welfare services), Article 16 (the right of the family to social, legal and economic protection), and Article 13 (the right to social and medical assistance), the Committee held that they were not applicable to the complaint.

On 11 June 2013, the Committee of Ministers, after having examined the Committee's decision on the merits and having reviewed the Government of Finland's reply to the decision, reaffirmed the Committee's decision.

Finally, as part of the assessment of the follow-up, the Finnish government indicated in the information registered on 4 November 2014 that the Ministry of Social Affairs and Health had set up a working group to prepare proposals for the legislation concerning user charges for service housing and service housing with 24-hour assistance. A draft of the proposed Act was circulated to municipalities for comments in July 2014. The bill was to be debated in Parliament in the autumn of 2014. Nevertheless, the Committee concluded that the situation has not been brought into conformity with the Charter, and that it would assess the new legislation and its practical impact on the occasion of the provision of information on the follow-up given to decisions that would be submitted in October 2017.

Complaint No. 145/2017, International Federation of Associations of the Elderly (FIAPA) v. France

The complaint was lodged by the International Federation of Associations of the Elderly (FIAPA). FIAPA alleged that Article 223-15-2 of the Penal Code on the prevention and punishment of the offense of abuse of an individual's state of weakness ("abus de faiblesse") as applied by the national courts does not ensure the effective exercise of the right of the elderly to social protection in violation of Article 23 taken alone and of Article E read in conjunction with Article 23 of the Charter.

Article 223-15-2 of the French Criminal Code (as introduced by Law No. 2001-504 of 12 June 2001 and amended by Law No. 2009-526 of 12 May 2009 - Art. 133) provides:

"Fraudulently exploiting the ignorance or state of weakness of a minor, or of a person whose particular vulnerability due to age, sickness, infirmity, a physical or psychological disability or pregnancy is apparent or known to the offender, or exploiting a person in a state of physical or psychological dependency through serious or repeated pressure or techniques used to affect his or her judgment, in order to induce the minor or other person to act or abstain from acting in any way seriously harmful to him or her shall be punished by three years' imprisonment and a fine of 375 000 euros.

Where the offence is committed by the legal or de facto head of a group that carries out activities the aim or effect of which is to create, maintain or exploit the psychological or physical dependency of those who participate in them, the penalty shall be increased to five years' imprisonment and to a fine of 750 000 euros."

FIAPA alleged that the way in which the legislation on the punishment of exploitation of weakness is implemented by domestic courts fails to protect vulnerable elderly persons. It claimed that French case law does not consider the term "particular vulnerability due to age" as a single condition but as the juxtaposition of two different, cumulative conditions, namely on the one hand, particular vulnerability and on the other, age. There is abundant French case law in which the highly advanced age of victims has not been sufficient for their situation to be considered one of particular vulnerability, which is the prerequisite for an offence to be deemed to constitute exploitation of weakness.

To support its argument, FIAPA provided, for example, the following decisions: in a decision of 8 June 2010, No. 10-82.039, the Criminal Affairs Division of the Court of Cassation stated that even a very advanced age was not enough for a state of vulnerability to be considered to exist within the meaning of the relevant legislation. Furthermore, in a decision of 27 November 2013, No. 12-85.175, the same division found that just because the victim was a person aged 93 with Alzheimer's disease at the time of the facts, this did not necessarily mean that there was any kind of vulnerability: "for there to be an offence of exploitation of weakness, it must be possible for the situation to be deemed one of vulnerability" and "advanced age and its usual inconveniences, such as episodes of memory loss or confusion, are not sufficient to consider that a state of particular vulnerability exists".

In its decision, the Committee remarked that "in the present case, the question to be resolved is whether advanced age should suffice to characterize a state of particular vulnerability." However, the Committee noted that:

"according to the Government, it is precisely in order to protect elderly persons' independence that age alone is not sufficient for a situation to be considered one of particular vulnerability, with no consideration of the practical situation of the person concerned. This would be tantamount to denying, in principle and a priori, that there is any possibility of independence, which would be at odds with the spirit of Article 23 of the Charter."

Hence, the Committee decided that "in order to protect elderly persons' independence, age can not suffice to characterise a state of particular vulnerability. The legal provisions providing that the abuse of weakness must be assessed in the light of the victim's particular state of vulnerability at the time the act is perpetrated are therefore in conformity with the requirements of Article 23 of the Charter." The outcome of this conclusion was that the Committee found that there was no violation of Article 23 of the Charter in this case.

Alongside the above-mentioned collective complaints, it should be noted that there are at least 4 more pending collective complaints, which are important to mention, as they were all found admissible:

- **Complaint No. 188/2019 Validity Foundation – Mental Disability Advocacy Centre v. Czech Republic:** It concerns Article 11.1 (right to protection of health) of the European Social Charter (the 1961 Charter) and Article 4.3 (Right of elderly persons to social protection) of the 1988 Additional Protocol to the 1961 Charter. Validity alleges that the use of cage-beds and net-beds as a means of managing elderly persons and persons with disabilities in psychiatric hospitals in the Czech Republic constitutes a violation of the above-mentioned provisions of the 1961 Charter and its 1988 Additional Protocol.
- **Complaint No. 187/2019 Sindacato autonomo Pensionati Or.S.A. v. Italy:** It concerns Articles 4.1 (the right to a fair remuneration), 12§1 (the right to social security), 16 (the right to appropriate social, legal and economic protection for the family), 20 (the right to equal opportunities and treatment in employment and occupation without sex discrimination) and 23 (the right of elderly persons to social protection) of the Revised European Social Charter. The complainant union alleges that the provisions introduced by Article 1.41 of Law No 335 of 8 August 1995 and its subsequent amendments, which govern the survivor's pension system for the surviving spouse or dependent violate the above mentioned provisions.
- **Complaint No. 165/2018 Panhellenic Association of Pensioners of the OTE Group Telecommunications v. Greece:** It relates to Articles 12.2, 12.3 (right to social security) and 23 (right of elderly persons to social protection) of the Revised European Social Charter. PAP-OTE maintains that Greece, in spite of the Committee's case law and the national case law, which had declared the legislation aimed at reducing pensions as contrary to the Constitution and the Charter, has not addressed the situation.
- **Complaint No. 162/2018 International Federation of Associations of the Elderly (FIAPA) v. France:** It relates to Articles 5 (right to organise), 23 (right of elderly persons to social protection) and E (non-discrimination) of the Revised European Social Charter. The complainant organisation alleges that Ordinance No. 2017-192 of 16 February 2017, which sets an age limit of 71

years for candidates for an election to the board of the Order of health-care professionals, is contrary to the aforementioned provisions of the Charter.

7.4 Article 23 – from invisibility to visibility of older person’s social rights

Several key insights are apparent from the above analysis.

The first and most obvious point which arises from the above analysis is that, within a relatively short period of time – since there was a total absence of elder rights prior to the Additional Protocol of 1988 – the social rights of older persons have been transformed significantly. Not only was Article 4 (1988), and later Article 23 (1996), the first of its kind (at the time) to uniquely and specifically define the social rights of older persons, it did so in a unique manner by emphasising full membership of society along with independence and choice.

However, and regardless of any other insight, there is still a need to push forward for more countries to ratify Article 23, in order to have them committed and legally obligated to its material human rights contents.

As seen in the empirical analysis of the European Committee of Social Rights above, in only small number of cases, did the Committee conclude from the countries' reports that they conformed to the full requirements of Article 23. In the majority of the cases, countries were required to provide more information, and in some cases, the conclusion was that the countries violated Article 23. This is also supported by the fact that, in the majority of the collective complaints (which were admissible), the Committee concluded that there was indeed a violation of Article 23.

It is therefore clear that there is still much work to be done, either for the countries to provide full and transparent information regarding the different aspects of implementation and fulfilment of the various elements of Article 23, or to amend and revise their legislation and social policies in order to respect the social rights of older persons as they are obliged and mandated to under the Charter.

Not only did Article 23 place the social rights of older persons on the formal platform of the European Social Charter, and on the level of a binding legal instrument, as time passed by, more and more countries have adopted it and started to submit their reports to the Committee, initiating the development of a body of case law in the field. And indeed, via the reporting and conclusion mechanism, a new body of jurisprudence has evolved as part of the understanding of Article 23. The Committee on its part, adopted the notion that the Charter in general, and Article 23 in particular are living and dynamic texts, allowing the Committee to further develop, interpret, and construct the material content and standards, in accordance with the changing norms and paradigms in the field.

In this context, the Committee developed significant new elements, such as:

- (1) the importance of anti-discrimination and framework legislation beyond the narrow field of employment law,

- (2) the centrality of legal capacity, and the need for supportive decision making mechanisms to augment legal capacity and the retention of autonomy in old age,
- (3) the significance of the social phenomenon of elder abuse as a barrier for full membership in society in old age,
- (4) support of informal and family-based elder care as an instrument to preserve and promote the social rights of older persons.

Not all of the above were explicitly provided for in the text of Article 23, and it was thanks to the Committee's case law and jurisprudence that they were introduced as requirements of conformity to this article. In a way, the Committee was responding to worldwide trends away from ageism and interpreting the Charter accordingly. In this way the Charter remains at the vanguard against ageism in Europe.

As analysed and described in relation to the collective complaints mechanism, it was also impressive to see the increase in the number of collective complaints under Article 23 and the significant role that NGOs and representative organisations of older persons' rights can play under the Charter. Moreover, this growth, both of direct and indirect usage of the collective complaints mechanism, highlights the significance and potential relevance of NGOs and civil society organisations which specialise in and represent the rights of older persons – as key players for social change and promotion of elder rights.

There is an interesting paradox within the Committee's discourse with regard to the relationships between the social rights of older persons and the social phenomenon of ageism. On the one hand – “ageism”, as a key sociological concept which serves as the foundation for the elder rights movement, is almost totally unrecognised by the Committee. However, a textual search for the word “ageism” in all of the conclusions and decisions described above – finds not a single reference to this term. Given that the Committee are effectively operationalising an anti-ageist philosophy (and rightly so), the time is right for the Committee to expressly articulate its understanding of ageism and how the Charter assists in the fight against ageism in the critically important social sphere.

It is clear that the Committee's conclusions and decisions are evidence of a tendency towards the promotion of older persons' rights – in general, and towards a clear anti-ageist ideology – in particular. This can be found not only through the clear and stringent norms which are gradually becoming fixed through its casework (for example, through the reference to the need for anti-age discrimination legislation, via the legislative framework requirement).

Moreover, this anti-ageist ideology is also apparent in the collective complaint decisions on the merit. A good example can be found in the *International Federation of Associations of the Elderly (FIAPA) v. France* case. The Committee refused to adopt a legal standpoint which concluded that old age – as such – was a vulnerability. It did not fall into the comfortable ageist trap that chronological age is enough to “judge” a person as weak, incapable, or helpless. In a counter-intuitive way, in rejecting a complaint by an organisation which presumably represent the rights of older persons (that is, FIAPA) – the Committee actually promoted the human rights of older

persons while emphasising the need to fight negative stereotypes, prejudices, and the unfounded social construction of the pathology and weakness of old age.

Seven categories examined by the Committee draw on the European Social Charter. As described above, the Committee attempts, in its casework, to operationalise these categories, and to provide clear “measurable” scales in order to grade the conformity to the Article's requirements.

As was seen in the empirical analysis, in certain areas that can be easily and clearly examined, the Committee was successful in presenting and adopting a clear standardised norm. A good example in this context is the poverty line in the context of the required size of pensions, or legislation regarding the prevention of discrimination. However, in the categories less conducive to a clear assessment, for example, housing, information, or health care, the Committee is still struggling to find clear and suitable performance standards.

As described above, from the original text of Article 23, and from the Committee's jurisprudence, there is an awareness of the unique situation of older persons living in institutions. However, within the review process of the country reports, as well as in the Committee's attempts to “operationalise” the legal requirements within this context, there is no serious – and fundamental – questioning, about the legitimacy of institutionalisation of older persons as such. This needs to and must take place.

The last insight concerns the bottom line in cases of violation of Article 23: what happens when countries are found in violation of Article 23? What happens when countries do not provide the requested information? To what extent is there any evidence that Article 23 makes any real life difference to the lives of older Europeans?

8. Substantive social rights and older persons

“Discriminating on the basis of age denies us our right to participate in society on an equal basis with others. For example, due to age limits we may find ourselves excluded from health treatment, insurance, banking products, training and social support, to name just a few. Ageist prejudices also drive other human violations, including poverty, neglect and abuse.

We all age differently and some of us face combined forms of inequalities based on our age but also gender, ethnic origin, disability, socio-economic status, sexual orientation, and others.”

AGE Platform Europe, 2021.

In Chapter 7, we covered the main provision in the Revised European Social Charter (Article 23) dealing with the right of elderly persons to social protection.

It embodies and exemplifies a new working philosophy in the Charter based on autonomy, inclusion and participation and against ageism in social policy. It, along with Article E, should be used to inform the rest of the Charter as it applies to older persons. Pretty much all the provisions of the Charter have application and reach to the issues that affect older persons.

In this chapter, we select certain rights and provisions in the Charter for further analysis because they visibly touch on many salient issues with regard to the rights of older persons. This does not mean that the remaining provisions of the Charter are not relevant. They should, of course, also be consulted when they touch on the lives of older persons. Even when these provisions are relevant to the issues at hand, circumspection is always needed to ensure that the relevant State has in fact opted in to the relevant provision (see Chapter 4 on the nature of the Charter treaty system).

The rights and provisions selected are the following:

Economic independence – the right to work: first, we will look to the right to work (Article 1). As previously indicated, the preponderance of rights and provisions in the Charter relate to the broad field of labour rights (over 20 articles). Nearly all of them have some relevance to older persons. For example, the right to a safe and healthy working environment (Article 3) covers the conditions under which older workers are expected to perform. Freedom of association and the right to bargain collectively have relevance to the representation of older workers as does the involvement of trade unions in championing their rights and negotiating on their behalf (Articles 5 and 6). The rights to vocational guidance and training (Articles 10 and 11) directly affect older workers, especially during economic downturns, as does their equal right to reskilling or upskilling.

The main issues in the employment sphere arising out of the effects of ageism over time range from unequal access to the labour market, unequal terms and conditions in employment, inflexibility and lack of “reasonable accommodation” to differences of age in employment and mandatory age limits and retirement ages. That is why we focus on Article 1 since it embraces many of these issues. Naturally, if reckonable

issues arise under other provisions (for example, Article 19 which covers the rights of migrant workers including older migrant workers) they should be separately consulted where relevant.

A social floor – freedom from want: the right to social security (Article 12), social and medical assistance (Article 13), freedom from poverty and social exclusion (Article 31): second, we will look at the right to social security (Article 12), the right to benefit from social and medical assistance (Article 13) and the right to be protected against poverty and social exclusion (Article 30). Many older persons are not in work, work reduced hours or live in poverty even if they are working. This of course means a reduction in income (often a drastic reduction) and purchasing power, and a risk of poverty. This places a premium on having an adequate income to be able to meet basic needs and outgoings and to avoid a cycle of poverty and social exclusion. Furthermore, modern social security is about more than just a floor of material provision. It should also be configured to actively support (and not indirectly hinder) a continuing life of inclusion and participation – active citizenship. Social security is intimately tied to social inclusion. It should not be engineered simply as a cushion for deficits but also to enable the personhood of older persons.

Meeting the obligations under Articles 12, and 13 (for example) goes a long way toward tackling the effects of poverty. But poverty is only one aspect of social exclusion. Article 30 links poverty in the narrow sense with social exclusion in the broader sense and looks at systems of social support systems. This is the added value of Article 30. It – and especially its emphasis on the centrality of the voice of persons living in poverty and at risk of social exclusion – is very relevant to the social situation of older persons.

Housing – a foundation for independent living: third, we will look at the right to housing (Article 31). Housing is, of course, crucial for individual's well-being and independent living. It is about more than bricks and mortar. The space we inhabit is the scaffolding of the self – a physical embodiment of our sense of self. Central to the physical entity of a house is a home – a place where the self is reflected back and reinforced and a place that connects to the community and beyond. It does not necessarily mean a person has to live alone. Independence and interdependence are not mutually irreconcilable. But it does mean that a person's living arrangements should reflect its own personality, autonomy and preferences, life-choices and needs. By definition, this leans against institutional arrangements, and for available and affordable community-based services. Another interesting facet has to do with the need for life-time adaptable housing which is of course of benefit to everybody as they age in their life cycle.

Health – equal treatment: fourth, we will look at the broad right to health which includes Articles 11 (right to protection of health) and 13 (right to social and medical assistance). Again, the effects of ageism can be seen in many health systems and therefore it is a matter of interest to explore the extent to which Articles 11 and 13 can help push back against this legacy. Of particular concern are aspects such as whether there exist public health strategies to encourage healthy ageing; whether the specific health issues related to the ageing process are adequately covered; and

whether equal treatment is assured with respect to access to health care, especially life-saving treatment.

Family support – the ecosystem for older persons: fifth, we look at the right of the family to social, legal and economic protection (Article 16). Just because a person is getting old it does not mean that family becomes less important. Older persons contribute enormously to their families and to their grandchildren. Likewise, family members – especially spouses – provide vital informal care and support. It is a matter of some concern as to whether families are themselves adequately supported and especially informal carers who often tend to be women and who may be highly disadvantaged because of their caring responsibilities (the so-called “feminisation of poverty”)¹³⁷. Article 16 is the logical place to explore to what extent the Revised Charter extends appropriate protections and supports to enable older persons flourish within their families and to enable their families to provide support where needed.

8.1 Economic independence: the right to work (Article 1)

Interestingly, States Parties need not opt in to Article 1. Although Article 1 forms part of the nine “core” articles of the Charter, States are free to opt in or out. Since only six of the nine inner core articles must be adhered to, Article 1 is not mandatory. In practice, most States have opted in to Article 1.

The text of Article 1 (which has remained unchanged in the Revised Charter) reads:

Article 1 – The right to work

With a view to ensuring the effective exercise of the right to work, the Parties undertake

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation.

Paragraph 2 is the most relevant part in the context of the rights of older workers (or prospective workers).

Paragraph 1 has to do with the policy goal of high employment, as well as with the adequacy of efforts made in that direction. For our purposes, what matters is that older workers are not left out of policies and strategies to achieve high employment rates. It would be odd indeed, and beg strong justification under paragraph, 1 if such strategies were to include broad swathes of workers in vulnerable situations but not include older workers. Strategies to retain older workers are obviously key. If there

137. See Jennifer L. Morris, *Explaining the Elderly Feminization of Poverty: An Analysis of Retirement Benefits, Health Care Benefits and Elder Care-Giving*, Vol. 21, No 2, *Notre Dame J. of Law, Ethics & Public Policy*, (2007) 571.

are lopsided strategies that fail to take account of older workers, then this could be a reckonable issue under paragraph 1.

Article 1.2 prohibits discrimination on the ground of age in the broad employment field.

Paragraph 2 has been held in the case law to essentially require legislation to prohibit discrimination in employment, the prohibition of forced or compulsory labour and the prohibition of any practice that might interfere with a worker's right to earn his/her living in an occupation freely entered upon. We have seen that the exceptions allowed under the relevant EU Framework Directive on employment are fairly open-ended when it comes to older workers.

A key issue, therefore, is whether such restrictions (that is to say, restrictive in regard to older workers) are compatible with Article 1.2. Another way of putting this is to ask, how much latitude do States have to treat older workers differently under Article 1.2? The answer is probably less than under the EU Framework Directive of 2000. Unlike the Framework Directive, there is no provision in the Charter that permits States to have greater latitude to make distinctions based on age as opposed to other grounds. No mention is made of a defence that might be "objectively and reasonably justified by a legitimate aim" and if the means of achieving it are "appropriate and necessary".

Discrimination based on age is harder to defend under the Social Charter compared to the EU Framework Directive.

Certainly, the shape, content and effectiveness of such legislation is a reckonable issue under Article 1.2 especially when contrasted with the treatment of other grounds of discrimination (like disability). The European Committee of Social Rights has held that there must be a right to take judicial proceedings if there has been alleged discrimination, that there has to be ancillary protection against retaliatory actions or victimisation against someone who initiates proceedings, and that the remedies available must be adequate, proportionate, and sufficiently dissuasive.

Given that the European Committee of Social Rights has already concluded that anti-discrimination legislation should contain an obligation of "reasonable accommodation" with respect to disabled workers, it is fairly plain that it would imply a similar obligation directed at older workers who could, with such accommodations, perform the essential functions of the job.

A prohibition of forced or compulsory labour is implicit in Article 1.2. The loss of a benefit for refusing to take up an offer of employment may raise issues under Article 1.2. if, for example, the job offered requires a particular level of physical or mental health or ability which the person does not possess at the relevant time. This may be due to age.

Paragraph 3 has to do with the establishment of a free employment service for all workers. Basically, this means a bridging service that effectively communicates demand

(on the employers' side) with supply (workers who are available for employment). The main issue here of relevance is whether, and the extent to which, such services are available to and effectively accessible by older workers. Effective anti-discrimination law should have the effect of screening out discriminatory advertisements which mean that older workers should have equal access to all notified vacancies and opportunities. If the employment service operates in such a way as to subtly or indirectly screen out older workers, then this clearly raises reckonable issues under Article 1.3.

Article 1.4 (vocational guidance, training, and rehabilitation) is of obvious benefit to older workers who may find the need for upskilling or reskilling later on in their careers. Having equal and open access to these services is key to remaining marketable. Article 1.4. clearly overlaps with several more detailed provisions in the Charter (Articles 9 and 10 on vocational guidance and training and Article 15.1 on the right of workers with disabilities to vocational training). Reckonable issues might include lack of access or unequal terms of access to vocational guidance and training for older workers.

8.2 A social floor – freedom from want: rights to social security (Article 12), social and medical assistance (Article 13), freedom from poverty and social exclusion (Article 31)

Just because persons are at work does not mean that they do not experience poverty and lack the resources needed to gain access to primary goods like health care. And this experience affects persons out of work all the more so.

This places the spotlight on the existence and adequacy of a social floor beneath which no one should be allowed to fall. And nowadays, this also places a premium on configuring such support not only to maintain a floor of material provision but to ensure that persons affected have a realistic opportunity to be included, to participate and to belong (social citizenship).

In general terms, our social protection systems in the past have been heavily focused on the former and not the latter. That is changing and especially for older persons.

i. The right to social security (Article 12)

Article 12 is unusual in that, although it does not directly touch on the broad employment field, it is nevertheless considered to be one of the core provisions of the Charter (Article A.1.b). Thus, States have to consider Article 12 as one of the core provisions to which they must opt in.

Article 12 applies to social security benefits. Usually, it is structured on the basis of the social insurance concept with contributions from the individual, companies and the State. This is in contrast to Article 13 which essentially deals with social assistance programmes which are not based on the social insurance concept and rely more heavily on general taxation. Both target human need arising out of certain contingencies. Thus, there is a substantial overlap between Articles 12 and 13.

The text of Article 12 is as follows:

Article 12 – The right to social security

With a view to ensuring the effect exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
 - a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Paragraph 1 refers to a “system” of social security. By this is understood systematic coverage of certain core contingencies such as unemployment benefit, employment injury benefit, sickness benefit, medical care benefits, old age benefit, maternity benefit and family benefit. When the purpose of the benefit in question is to replace for lost income then the quantum of benefits should stand in some reasonable proportion to the lost income and should not fall below the poverty threshold which the Committee defines as 50% of the median equivalised income. Where that figure falls to 40-50%, then other benefits may be taken into account.

With respect to unemployment benefit, it must last for a reasonable period upon unemployment and there must be a period of grace during which the individual may refuse an offer of employment if it does not match his/her skills and experience. This could be of particular relevance to older workers. In certain circumstances, the removal of a benefit (like unemployment benefit) upon a refusal to take up a job offer may give rise to issues under Article 1.2.

The compulsory loss of benefits for failure to take up a job offer by an older worker might raise issues under Article 1.2.

Paragraph 2 of Article 12 benchmarks the Charter to the European Code of Social Security (ETS. No. 048 of 1964). The Code was re-issued in a revised form in 1990 (European Code of Social Security Revised, ETS No. 139). Monitoring is done by an ILO committee and their conclusions are then considered by the Governmental Committee which prepares the agenda for the Committee of Ministers.

The Code also has an *à la carte* approach to State obligations (Article 2) similar to the European Social Charter. Part V (Articles 25-30) covers old age benefit. It is rather archaic: “[T]he contingency covered is

survival beyond a prescribed age” (Article 26.1 of the Code). Survival, as such, hardly begins to describe the purpose of modern social security regimes as they touch on older persons today. States do not have to opt into Part V. It is modelled on ILO Convention 128 (1967) Invalidity, Old Age and Survivors’ Benefits Convention. When a State that opts in to Article 12 has also ratified the European Code of Social Security then conformity with Article 12.2 is assessed with respect to the Resolutions of the Committee of Ministers adopted under the Code (if any). If a State has opted into Article 12 without having ratified the Code then the assessment is free-standing taking into account the contingencies covered, the personal scope and the level of benefits offered.

Deliberately “restrictive measures” may impact older persons disproportionately raising issues under Article 12.3.

Paragraph 3 of Article 12 is unusual in that it explicitly talks about the obligation to “raise progressively” the system of social security. This of course overlaps with the substance of Chapter 6 (progressive realisation).

What is interesting about the jurisprudence under Article 12.3 is that much of it focuses on the converse – “retrogressive measures”. Such restrictive measures (under Article 12.3) are not automatically in violation. It depends on variables such as the nature of the changes, the reasons

given, the level and extent of the retrogression, the cushioning effect (or not) of social assistance programmes as fallback, and the outcomes. It is suggested that these limiting principles relating to “retrogressive measures” should be better aligned with the general principles outlined in Chapter 6. For example, they should explicitly take account of the degree to which the affected communities were consulted in advance and the impact of the measures on groups in vulnerable situations and the overall norm of equal treatment.

Paragraph 4 of Article 12 concerns equality of treatment between non-nationals (of other Contracting Parties) with nationals with respect to social security. This usually applies to non-nationals lawfully resident or working regularly in a Contracting Party. It also applies to non-nationals who no longer live in the Party in question but who once did so and who presumably built up a social insurance contribution or record while doing so. It appears that these rules apply regardless of whether the second State Party has opted into Article 12. Implicitly, Article 12.4 requires the Contracting Parties to remove all forms of discrimination between nationals and foreign nations

Older persons who build up an insurance record in one Contracting State can take the benefit with them when they retire to their home State.

(of other Contracting Parties). Foreign nationals (of other Contracting Parties) cannot be required to meet conditions that go beyond what nationals are required to meet. Nor may more restrictive conditions be applied. Minimum residency requirements may be required provided they are reasonable.

Interestingly, certain benefits accrued while living in one State Party are maintained regardless of

whether the person moves from one State Party to another. That means that a person who spends 30 years working in State A and builds up an insurance record in that State and then moves back to his home State (State B) can claim his old age benefit (a social insurance-based benefit) paid by State A when back in State B. This is called the “exportability” of social benefits (from one State to another) - or the “retention” of social benefits (by the individual who crosses State lines).

ii. The right to social and medical assistance (Article 13)

Social security programmes may not reach all those in need or the eligibility requirements may preclude many, particularly those in precarious situations. Most European systems emphasise social insurance for the obvious reason that it enhances a sense of ownership and entitlement. Mostly, the funds for such programmes are provided from general taxation. Often (but not always) there will be means tests to ensure the targeting of scarce resources to those most in need. Article 13 is one of the core provisions of the Charter. Having said that, States are not obliged to opt in to Article 13.

The text of Article 13 reads:

Article 13 – The Right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2, and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Clearly, any severe lack of resources (or any person without access to resources) generates needs. Put another way, since most needs are made available through market mechanisms any lack of purchasing power inevitably means unmet needs. Payment from social assistance systems must be made available on the sole ground that the person is in need. Reducing or suspending social assistance is possible provided the individual does have access to subsistence at least in emergency situations. The category “other sources” does not necessarily include family.

Benefits under social assistance programmes generally take the form of cash or in-kind assistance. A minimum income guarantee is not, as such, demanded by Article 13. Article 13 does require reasonable uniformity across a country although some variations are allowed to take account of cost of living variations.

There is an overlap between Article 13 and Article 23 (which also covers the right to social protection of older persons). The level of non-contributory pension (typically a social assistance programme) can be assessed under Article 23 (if it is accepted by the State) or Article 13.

Triage (rationing) of health care for older persons could raise issues under Article 13 in combination with Article E.

The right to medical assistance as part of a social assistance programme is not confined to emergency treatment. The seriousness of the illness (that is, a terminal illness) cannot in itself be ground for a refusal of medical assistance. It is suggested that the right to equality (Article E) in combination with Article 13 might well ground viable collective complaints on the part of older persons with respect to the rationing of medical care (like ventilators) or treatment (like

vaccinations).

Social assistance should be set at a level that allows for a decent life and to cover an individual's basic needs. Assistance programmes should last for as long as the need exists. Time-limits should therefore not apply. Interestingly, and in keeping with the "principle of legality" the right to social assistance should be provided for in law. Decisions on eligibility and the level of award should be subject to review by an independent body.

States cannot use their social largesse to erode the civil rights of older persons.

Paragraph 2 of Article 13 is intriguing. It hints at the US doctrine of "unconstitutional conditions". This doctrine stipulates that whenever a State is not allowed to intrude on a civil right, then necessarily by implication, it cannot condition the enjoyment of a social benefit on agreeing to cede the exercise of a civil right. To allow otherwise would be to enable a State to use its largesse to

erode civil and political rights. For example, forcing (or effectively forcing) an older adult to cede his/her autonomy and legal capacity in order to receive services (whether in an institution or otherwise) would presumably fall foul of Article 13.2. Denying an older person's right to vote especially in institutional settings could also trigger Article 13.2. Likewise, a person's civil status (with no fixed abode, undocumented) cannot be used as a ground to withhold their social assistance rights. That would amount to a punishment of poverty rather than an alleviation of it.

The general rule of Article 13.4 is that social assistance programmes are made available on an equal basis with non-nationals lawfully resident within a State provided their State has ratified the Charter. Article 13.4 is interpreted to allow for a right to emergency treatment for non-nationals of third countries (that is, countries not Parties to the European Social Charter). Article 1.1 of the Appendix is to the effect that the Charter rights only apply to foreigners "in so far as they are lawfully resident or working regularly within the territory of the Party concerned". This is quite restrictive. However, it is subject to the wording of Article 13.4 which only requires that the individual be "lawfully within their territory". This means that for a foreigner (of

another Contracting Party) to avail of social assistance, he/she must only be “lawfully” in the relevant territory. This does not extend to foreigners of non-contracting parties.

Articles 6-10 of the European Convention on Social and Medical Assistance (CETS, No. 14 of 1953) deal with the exceptional possibility of repatriating a foreign national in need of social assistance. Normally, repatriation on the sole ground of need of social assistance is not permitted (Article 6). Exceptionally, such a person can be repatriated if he/she has not been continuously resident in the State for at least 5 years (7.a.i), is in a fit state to be transported (7.a.ii) and has no close ties in the territory of which he is resident (7.a.iii). This can only be done where there is no objection on humanitarian grounds (though it is unclear who is competent to lodge such an objection).

iii. Freedom from poverty and social exclusion (Article 30)

To a large extent, Articles 12 and 13 cover much of the ground contained in Article 30. Put another way, if the bundle of obligations contained in Articles 12, and 13 are fully met then the goal of reducing the risks of poverty and social exclusion should (normally) be met.

However, although individual components of a system may be perfectly adequate, cumulatively they may still have gaps. Thus, the focus of Article 30 is more on the adequacy of the system than on individual rights.

The text of Article 30 reads:

Article 30 - The right to protection against poverty and social exclusion.

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a. To take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance,
- b. to review these measures with a view to their adaptation if necessary.

Implicit in Article 30 is the view that poverty can lead to social exclusion. Social exclusion is a broader term. It has been explained by the UN as a “multidimensional phenomenon not limited to material deprivation: poverty is an important dimension of exclusion, albeit only one dimension. Accordingly, social inclusion processes involve more than improving access to economic resources.” In turn, social inclusion is defined by the UN as “the process of improving the terms of participation in society, particularly for people who are disadvantaged, through enhancing opportunities, access to resources, voice and respect for rights.”

What is interesting is the overlap of emphasis in this definition of social inclusion with the implicit idea of active social citizenship embedded in the jurisprudence of the European Committee of Social Rights under Article E. In assessing the adequacy of social systems, the European Committee of Social Rights takes into account the UN’s Guiding Principles on Extreme Poverty and Human Rights (2012). Interestingly, one of the guiding principles in the UN Guidelines is the “Agency and autonomy of persons living in extreme poverty”. This very much echoes the jurisprudence of

the European Committee of Social Rights under Article 23 and is indeed a ringing endorsement of same. The UN Guidance reads:

36. Persons living in poverty must be recognised and treated as free and autonomous agents. All policies relevant to poverty must be aimed at empowering persons living in poverty. They must be based on the recognition of those person's right to make their own decisions and respect their capacity to fulfil their own potential, their sense of dignity and their right to participate in decisions affecting their lives.

Article 30 may be triggered by negative conclusions as they apply to older persons under the other substantive articles.

The Committee treats the twin goals of ending poverty and preventing social exclusion as both separate and related. And it has emphasised the importance of citizen participation in, inter alia, the setting of government policy and in cultural representations of persons living in poverty in the media.

A negative set of conclusions under, for example, Articles 1, 12 and 13 should not be considered in isolation. Rather, they may point to systemic weaknesses in the overall policy against poverty

and social exclusion and thus trigger a separate set of liabilities under Article 30 in addition to the other provisions. For example, key deficiencies in how a State structures its social security system as it applies to older persons, may trigger concerns under both Articles 12 and 30.

8.3 Housing – independent living and being included in the community (Article 31)

Housing is critical to the exercise of many rights. At a basic level, it provides shelter. By providing privacy it allows for the full development of the human personality and often in intimate association with life partners and family. It represents the “material scaffolding of the self” in the sense that it holds and reflects a sense of identity.

Housing is central to the identity, independence, and community living for older persons.

This is especially important for older persons as their house in many senses reflects and reprints their personal biography. And a house is most often connected to the community. It usually beckons people to engage and can be a site for interaction in civil society. The housing itself might be fine – but the social segregation associated with the housing can cause major problems. Thus,

a house is much more than just bricks and mortar. It goes to the very essence of human identity and the possibilities of social engagement. It is a home.

In most systems, housing is a function of the housing market. That is to say, the laws of supply and demand determine the cost which can often be beyond the reach of many in need. The normal response is to temper markets to try make housing more affordable, to provide public housing in lieu, to subsidise would-be purchasers with low interest loans or to give incentives for social housing enterprises to generate affordable housing.

Ageing in place in one's own home depends on the range and quality of community-based services.

It has been shown in many studies that to institutionalise an older person has many deleterious consequences. Medical conditions tend to deteriorate faster in congregated settings. We are all, of course, interdependent. This is simply more pronounced as we age. This places a premium on having adequate community-based services to enable an older person to continue to live at home. Thus, when one thinks of housing one must also think holistically

about the services that enable one to age in place.

Article 31 runs as follows:

Article 31 - The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard,
2. to prevent and reduce homelessness with a view to its gradual elimination,
3. to make the price of housing accessible to those without adequate resources.

Particular attention should be paid and positive action measures offered to vulnerable groups, including Roma and Travellers. The solicitude, so far, has not extended to older persons. Arguably, it should, as they are at risk of losing their homes especially in the absence of adequate community-based services.

Socially isolated housing for older persons may constitute a violation of Article 31.

Interestingly, the European Committee of Social Rights has held that social segregation represents a violation of Article 31. Logically, it ought to find similar socially isolated congregated settings a violation of the rights of older persons.

Article 31.2 deals with homelessness. The aim is to reduce and prevent homelessness. Evictions are admissible in cases of insolvency or wrongful occupation – but only after

a due process has been put in place. For example, a reasonable notice period is required, as is consultation with the person with a view to finding alternative solutions. Article 31.2 is interpreted as giving rise to a right to shelter in emergency situations. This extends to those who are unlawfully in the territory of the State Party. Eviction from shelter is prohibited as it would nearly always exacerbate the helplessness and the needs of the individual.

Social housing should target the most disadvantaged which includes many older persons.

Under Article 31.3, States are obliged, in the view of the European Committee of Social Rights, to ensure that social housing targets the most disadvantaged. This would often include older persons. They are also obliged to ensure that waiting times are not excessive and the judicial remedies should be available to contest the length and fairness of waiting periods.

Article 31 should be read in light of a broad understanding of equality.

The European Committee of Social Rights has emphasised that the bundle of rights in Article 31 should be applied without discrimination contrary to Article E. This leaves ample space for NGOs for older persons to contest the shape and content of national housing laws and strategies as they apply to older persons. This, of course, places a premium on which concept of equality is relevant and appli-

cable. Building on the analysis provided in Chapter 5, this would turn on notions of recognition, personhood, respect for difference, social inclusion and active citizenship and the need to configure social supports to underpin the same.

8.4 Health – a right to equal treatment (Article 11)

We have already considered some aspects of the right to health under Article 13 above – the right to social and medical assistance. Article 11 (the right to protection of health) is somewhat broader and relates to the overall policy goals of States in this field. This is important for older persons since their adequacy, and especially their relative inclusiveness, mean a lot for those who are experiencing more pronounced health risks as they age.

Article 11 reads:

Article 11 - The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health,
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health,
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Health in the context of Article 11 is understood to mean not just the absence of disease or illness but a state of complete physical, social and mental wellbeing. This tracks the WHO definition of health as set out in the Declaration of Alma Ata. The “protection” of health refers not merely to the right to equal effective access to health but also to the obligation of States Parties to protect, promote and fulfil the right. The European Committee of Social Rights often points to the intersection between Articles 2 (right to life) and 3 (prohibition of torture, inhuman and degrading treatment) under the European Convention on Human Rights and Article 11 of the European Social Charter.

Under paragraph 1, States Parties are expected to respond to known health risks as indicated by life expectancy and the main causes of death. There should be proof of improvement in reducing the same relative to overall European averages. This requires a high degree of epidemiological monitoring. It spans all avoidable risks – including those from the environment. Infant and maternal mortality are taken as

good indicators of how a system is going overall. Getting the relevant rates as close to zero as possible is the goal.

A guarantee of equal treatment in health care services for older persons is implicit in Article 11 on its own and in combination with Article E.

Of particular interest is the intersection of equality (Article E) with Article 11. Particular attention has to be paid to disadvantaged groups. The Committee requires States Parties to take account of Parliamentary Assembly Recommendation 1626 (2003) on “the reform of health care systems”. Section 10.5 of the Recommendation calls on States to:

...take as their main criterion for judging the success of health system reforms the effective access to health care for all, without discrimination, as a basic human right and, as a consequence, the improvement of the general standard of health and welfare of the entire population.

This means, for example, that rules and guidelines that set out discriminatory triage policies on the rationing of health services (triage) for older persons would be suspect under Article E in combination with Article 11. Waiting lists – which are almost inevitable as scarce public resources need to be optimised – are assessed partly in accordance with the Committee of Ministers Recommendation (99)21. It is openly acknowledged that long waiting lists can impact on the care rights of the elderly (Appendix to the Recommendation, p. 2). With respect to age, the Recommendation states that:

Age should not prejudice an older person on health care waiting lists.

[A]ge should not be used to determine priority and should only be taken into account as an aspect of the patient’s general medical condition and as a risk factor for particular treatments.
[p. 4]

What this means is that a person’s place on the waiting list should not be prejudiced because of age and that age is only relevant for treatments in as much as it indicates a risk factor.

The human agency of older persons and their voice is central to health care decision making.

Interestingly, human agency is also core to Article 11. That is to say, all treatments must be referable back to the informed consent of the person. Older persons presumably have an ancillary right to supported decision making, if needed. Overall, one might imply from a web of provisions in the Charter a strong preference against guardianship regimes and in favour of supported decision-making regimes.

This would apply for a cross-section of the public including, in particular, persons with disabilities as well as older persons. In this, the Committee follows the strictures of the 1997 Oviedo Convention (Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: CETS No. 164) although, in truth, that convention still probably allows for too many exceptions and would probably be drafted differently today.

Paragraph 2 of Article 11 gives rise to two obligations. The first has to do with education and awareness raising. This must count as a public health priority. States Parties are obliged to inform relevant sectors of the population where particular risks may be prevalent. This would obviously include older persons. The second has to do with policies that proactively seek to engage individuals in making health choices in lifestyle matters such as alcohol intake, exercise, etc. These choices can dramatically affect the onset of illness and diseases later in life when they can be more difficult to treat. Public health campaigns should follow the life cycle beginning in schools. Presumably, they should extend throughout the lifecycle with appropriate education and social marketing campaigns.

The focus of paragraph 3 of Article 11 is on policies aimed at prevention. Precautionary measures are required where there are reasonable grounds for concern that there may be potentially dangerous impacts on health arising from, for example, the environment, air pollution, water and sanitation hazards, accidents including traffic accidents, tobacco, alcohol and drugs, immunisation and epidemiological monitoring, etc. Older persons are general beneficiaries of these measures. Indeed, older persons may be particularly susceptible to, for example, environmental pollution. If so, then more targeted measures may be required.

8.5 Family support – the ecosystem for older persons (Article 16)

Family life is just as important in older age as it is in earlier life. Maintaining relationships is just as vital for a healthy sense of identity in old age as it is in younger life. Often spouses provide support and care – so-called “informal caring” – which can be critically important as long-term care needs evolve in old age. It matters that family members who perform important caring roles (especially spouses or partners) are supported. In its own way, Article 16 is all about family support.

It reads:

Article 16 - The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

There is space within Article 16 to consider the specific housing needs of older persons.

Family, in the context of Article 16, is not confined to family based on marriage. Article 16 guarantees to families a right to housing – which overlaps with Article 31. So far, the Committee has not insisted that the housing stock (or at least a portion of it) be life-time adaptable which would be a great benefit throughout the life cycle. Much of the Committee’s attention has been paid to the vulnerable situation of the Roma and their specific housing needs. This would apply with some force to Roma who happen

to be older too. There is ample room for the Committee to pay equal attention the specific housing needs of older persons in general.

Informal carers of older persons may be able to challenge restrictive pension entitlements under Article 16.

Article 16 also commits the States Parties to protecting the legal status of the family based on the equality of the spouses. This applies with respect to family property: ownership, administration and use. This includes adequate legal protection of women (including older women) especially against violence and abuse. And Article 16 requires economic protection of the family and its constituent members. This overlaps with and reinforces Articles 12 (social security) and 13 (social assistance).

Particular attention is to be paid to families in vulnerable situations in compliance with equal treatment (Article E). There is ample space here for the Committee to review the situation of informal carers who might typically find themselves leaving the labour market for long spells to care for an older family member and therefore unable to build up a sufficient social insurance record to get an adequate pension upon reaching retirement age. Sometimes, in recognition of the value of this informal care, this is offset by credits. However, the terms under which credits are given can be quite restrictive and inadequate leaving the carer with no social protection in their own old age. It is certainly open to informal carers to challenge this under Article 16 and perhaps in combination with Article E. Probably, most of those directly affected are women who take up informal caring roles. It should not be difficult to mount an argument that such restrictive rules fail to put a proper value on informal caring and amount to indirect gender-based discrimination.

8.6 Conclusions – using the full spectrum of social rights for older persons

The foregoing analysis shows that all provisions of the European Social Charter have relevance to the situation of older persons – and not just Article 23.

Depending on the provisions which a particular State has opted in to, many issues can turn on the interaction between the substantive provisions of the Charter (for example, Article 13 above) with Article 23 (older persons) with Article 30 (poverty and social exclusion) and E (equality). It should not be too difficult to find in each substantive article echoes (no matter how faint) of recognition (autonomy and voice), accommodation of difference and a philosophy of active citizenship and inclusion. This is why advocates should always try to base their arguments on a multitude of Charter provisions and not only on the most prominent ones.

Only 20 States have opted in to Article 23 – which forces the arguments onto other provisions in the Charter for those States that have not opted in. 18 States have opted in to Article 30 (poverty and social exclusion). Only 10 States have opted in to all sub-paragraphs of Article 31 (housing). These numbers reinforce the importance of being able to spot perches for arguments across the broad range of rights in the Charter.

9. Emergencies and the European Social Charter: key principles

'[H]uman rights, including their social rights dimension, permit the safeguarding of the most fundamental values of our societies over time, including through exceptionally difficult times.'

European Committee of Social Rights, Questions on Group 2 provisions to States Parties (2020).

Most systems encounter emergency situations that require course adjustments. Usually, these emergencies take the shape of economic downturns. But they can also be due to other reasons like a pandemic. Whatever the cause, one effect usually has to do with the operation of social systems.

As we have seen in Chapter 6 above, international law is alive to the need for adjustments within reason.

9.1 Derogations, restrictions and retrogressive measures under the European Social Charter

First of all, derogations from obligations may be allowable during emergency situations. Article F of the Revised European Social Charter makes explicit mention of this possibility (Derogations in time of war or public emergency). Derogations are allowable "in time of war or other public emergency threatening the life of the nation". Clearly, the COVID-19 pandemic qualifies.

Derogations under Article F are only allowable "to the extent strictly required by the exigencies of the situation". This inserts a criterion of necessity and proportionality. And the measures adopted should not be "inconsistent with [a State's] other obligations under international law". Does the European Committee of Social Rights have the inherent jurisdiction to pronounce on the proper invocation of Article F? Does the European Committee of Social Rights have the inherent jurisdiction to pronounce of the validity of measures adopted under the derogation? The answer is probably "yes", although it is hard to know since Article F has never in fact been invoked.

Secondly, restrictions to rights are permissible under Article G. Article G introduces the concept of general restrictions which sit alongside more specific restrictions that may apply within the text of each substantive right. Such general restrictions have to be "prescribed by law". This brings to the fore theories about the rule of law and whether, for example, administrative announcements can count. In principle, all aspects of the principle of legality must be met. Such restrictions can be allowable if they serve to protect the rights and freedoms of others or for "the protection of public interest, national security, public health, or morals". The reference to the "rights and freedoms of others" and "public health" would probably stretch to encompass many restrictions to rights (including social rights) introduced as a result of the

pandemic. However, such restrictions, in addition to having a valid purpose, must be “necessary in a democratic society”. This probably introduces a consideration of flexibility, proportionality and whether any lesser restrictive means might have been used to achieve the same goals.

Thirdly, the concept of “progressive realisation” can tolerate some “retrogressive measures” at least under the ICESCR. However, as we have seen, there are limits. First of all, they can only be accepted for those provisions of the Charter that are amenable to “progressive realisation”. That is to say, where it applies to “obligations of results” (obligations that leave open-ended the means by which a right is fulfilled). As noted elsewhere in this study (Chapter 6), most of the obligations in the Charter are in fact “obligations of conduct” that specify exactly how a right is to be complied with. With respect to “obligations of conduct”, the notion of “progressive realisation” does not apply. And if it does not apply, then the notion of “retrogressive measures” cannot apply.

Under general international law (though possibly not under the Charter), there is said to be a certain inner or minimum core to each right beyond which “retrogressive measures” are not allowed to go. Apart from the intrinsic difficulty of distinguishing between core and periphery, this would seem to ill-suit the Charter since many of the obligations are in fact obligations of specific conduct (leaving no room for a distinction between core and periphery).

Another broad limitation on “retrogressive measures” has to do with the reach or impact on those directly affected as well as those indirectly affected. One of the chief merits of the jurisprudence of the European Social Charter is that it shines a light on the impacts of a failure of “progressive realisation” or other backward steps on third parties such as families and carers. They often pay a high price for delays and cutbacks. Unusually, they may have greater than normal opportunities to ventilate their claims under the Charter. Another general limitation on recourse on deliberately retrogressive measures is the putative consultation rights of those directly affected. This strand of the jurisprudence in the Charter is still underdeveloped. It does not confer a veto – merely a right to be heard and taken seriously in the formulation of retrogressive measures.

9.2 Statement of interpretation of the European Committee of Social Rights on the right to protection of health in times of pandemic

This statement of interpretation was released in April 2020 at the height of the pandemic. It provides a useful insight into the implicit thinking of the Committee with respect to derogations, restrictions and retrogressive measures. The focus is on the right to health during the pandemic. This is natural and understandable in the midst of the emergency.

Over time, of course, the many different impacts of the pandemic have been revealed. For example, it led to the removal of basic services in the community that made a difference to people living in vulnerable situations. It led to preventive measures that were not inclusive and were not communicated adequately to, for example,

the deaf community. It led to a heightened risk of exposure to the disease to those living in congregated or institutional settings (including especially older persons living in congregated settings). To the familiar human rights argument against such settings was now added a public health argument. And, in some instances, scarce health resources were rationed on the basis of implicit judgments about the quality or worth of lives. All these impacts give rise to reckonable issues under the Charter. And all of them could have given rise to interpretive statements. Understandably, and for the moment, the statement of interpretation focused on securing the right to health during the pandemic.

Article 11 of the European Social Charter was the focus of the statement of interpretation. Interestingly, the analysis was not prefaced by any general words on derogations, restrictions or “retrogressive measures”. Implicit in the analysis is a sense of the priority of the right to health especially during an emergency. It calls for the right to health to be given “the highest priority in policies, laws and other actions to be taken in response to the pandemic”. What this means in practice amounts to several things according to the Committee.

First, it means that States Parties “must take all necessary emergency measures ... to prevent and limit the spread of the virus”. “Emergency”, in this context, does not mean an occasion for limiting rights but rather an occasion for a more focused attention on effective implementation. Such measures are said in the statement to include “testing and tracing, physical distancing and self-isolation, the provision of adequate masks...as well as the imposition of ‘lockdown arrangements’”. Of course, lockdown was experienced differently by different groups depending on their pre-existing levels of social isolation and vulnerabilities.

Secondly, it means taking “all necessary measures to treat those who fall ill in a pandemic”. This includes “the availability of a sufficient number of hospital beds, intensive care units and equipment”. Falling short of this, and in some instances, hard rationing decisions were called for. The Statement is curiously silent on how these triage decisions were to be made. Of instructive value is the famous settlement reached by the Office of Civil Rights in the US Department of Health with Pennsylvania on its draft triage guidelines (May 2020) which were held to be discriminatory¹³⁸:

- Removing criteria that automatically deprioritised persons on the basis of particular disabilities,
- Requiring individualised assessment based on the best available, relevant and objective medical evidence to support triaging decisions, and
- Ensuring that no one is denied care based on stereotypes, assessments of quality of life, or judgments about a person’s “worth” based on the presence or absence of disabilities.

138. US Department of Health and Human Services Press Release, 16 April 2020: <https://www.hhs.gov/guidance/document/ocr-resolves-civil-rights-complaint-against-pennsylvania-after-it-revises-its-pandemic>. This case and its implications for age as well as disability based discrimination is fully discussed in Quinn, G., ‘COVID-19 and Disability: a War of Two Paradigms’, Ch. 8 in Kjaerum, M., Davis, M., & Lyons, A., (Eds.), Covid and Human Rights, (Routledge 2021)

Although the settlement centred on disability, the latter aspect of it could just as easily have covered older persons. The statement does refer later on to the right to health care without discrimination.

Thirdly, the statement directs States Parties to take all necessary measure to “educate people about the risks posed by the disease”. Of course, that needs to be nuanced for different population cohorts such as those with hearing loss or sight loss or older persons in general. In the absence of nuanced public health education, it is hardly likely that the much-needed messages will get through to the people who really need them.

The Committee pegs the above to Article 11 (health). But it also pegs to an assortment of other substantive articles in the Charter including the right of workers to a healthy and safe working environment (Article 3) and the rights of elderly persons (Article 23).

The Committee does refer to the forward dynamic of the concept of “progressive realisation” (without calling it that). It asserts that States Parties must take all of the above measures:

in the shortest possible time, with the maximum use of available financial, technical and human resources, and by all appropriate means both national and international in character.

And the interpretive statement does invoke the formula used in *International Association of Autism-Europe v. France* to the effect that States Parties:

must be particularly mindful of the impact that their [policy] choices will have for groups with heightened vulnerabilities as well as for other persons affected, including especially their families.

This, of course, includes older persons as well as others.

The statement emphasises another point that first arose in the very first collective complaint: the Charter is intended to ensure effective implementation in fact and not just in theory. In practical terms, this means “making available the resources and the operational procedures necessary to give full effect to the rights specified (in the Charter)”.

Reflecting on the interdependence of the Charter with the European Convention on Human Rights, the Committee also emphasised the close symmetry of purpose between Article 11 of the Charter and Articles 2 and 3 of the European Convention on Human Rights.

9.3 Thematic questions from the Committee to States Parties on health social security and social protection (2021)

It was mentioned in Chapter 4 that the Committee has now progressed since 2015 to a more thematic approach to reporting and now routinely asks priority questions to the States due to report in any given cycle.

It was inevitable that the questions to be addressed by States in the 2021 cycle would include some reference to the pandemic and particularly as Articles 11 (health), 12 (social protection and 13 (social and medical assistance) were in issue. The specific questions asked gives a sense of how the Committee has operationalised the statement of interpretation as outlined above.

The Committee prefaced its questions by emphasising that “[N]ational administrations have been confronted with considerable demands and very difficult choices and decisions, and society as a whole has been placed under enormous strain” as a result of COVID-19. It emphasised that “[H]uman rights, including their social rights dimension, permit the safeguarding of the most fundamental values of our societies over time, including through exceptionally difficult times”.

With respect to Article 3.1 (the right to safe and healthy working conditions) and in the specific context of COVID-19, the Committee specifically asked those States Parties reporting, to:

... provide information on the protection of frontline workers ... Such information should include details of instructions and training, and also the quantity and adequacy of personal protective equipment provided to workers in different contexts. Please provide analytical information about the effectiveness of those measures of protection and statistical data on health outcomes.

With respect to Article 11 (health) and in the specific context of COVID-19, the Committee prefaced its questions by emphasising that the States Parties reporting must:

... demonstrate their ability to cope with infectious diseases, such as arrangements for reporting and notifying diseases and by taking all the necessary emergency measures in case of epidemics. The latter would include adequate implementation of the measures applied in the COVID-19 crisis: measures to limit the spread of virus in the population, ... provisions of surgical masks, the disinfectant, etc., and measures to treat the ill.

The Committee also emphasised how the pandemic did not just create problems but revealed deep-seated and long-standing problems such as “chronic public health underfunding and insufficient capacity to respond to ordinary, let alone extraordinary, needs”.

The Committee again emphasised that access to health care must be assured on the basis of equality and without discrimination. This is of especial importance to older persons. The question posed under Article 3.1 was again posed under Article 11.3 (which likewise focuses attention on prevention).

With respect to Article 12 (right to social security – mostly social insurance based), the Committee asked the States Parties reporting to provide information “on any impact of the COVID-19 crisis on social security coverage and on any specific measures taken to compensate or alleviate [any] possible negative impact”. Of course, one of the main problems with social insurance-based programmes is that they assume active labour market participation to maintain a record of credited contributions. This was impossible for many during mass layoffs in the labour market. This placed a premium on the adequacy and depth of social assistance programmes *in lieu*.

With respect to social and medical assistance programmes (under Article 13) and in the specific context of COVID-19, the Committee asked:

[P]lease indicate any specific measures taken to ensure social and medical assistance for persons without resources in the context of the pandemic... Please also provide information on the extent and modalities in which social and medical assistance was provided to people without a residence or other status allowing them to reside lawfully in your country’s territory.

9.4 Conclusions – emergencies make social rights more rather than less important

Interestingly, the pandemic is serving to underpin the importance of social rights and not to undermine them. The focus in the last year has not been on derogations (though that was possible), or on restrictions to rights or on retrogressive measures. Rather, a healthy consensus of sorts has emerged that has served to accentuate the importance of social rights, especially during an emergency.

This is so because of the evident need for robust health measures to counteract the disease – thus placing a premium on the right to health. It is also so because of the sheer numbers of people laid off work – thus placing a premium on the efficacy of social protection systems and the comprehensiveness (or otherwise) of social assistance programmes. The poverty and social exclusion traps, especially for families in need, are obvious. And human capital always requires investment if recovery is to be sustainable as well as inclusive. All of the abovementioned make social rights more important.

To its credit, the European Committee of Social Rights has identified all of the above and has focused during the pandemic in heightening awareness of the importance of social rights in cushioning the worst of the pandemic and in preparing for an inclusive recovery. Many of the cracks in the existing system have been known for a long time. The pandemic is revealing systemic inequalities and especially among and between different groups who find themselves in vulnerable situations. This undoubtedly includes older persons. And it also reveals ageist assumptions at play, for example, in how scarce medical resources are rationed and indeed in how the vaccine may be rationed.

10. The engagement of governments with the rights of older persons and under the European Social Charter

A detailed questionnaire was sent to all States Parties to the European Social Charter. The intent behind the questionnaire was to gauge the following:

- A: Work of States to date on the rights of older persons (questions 1-6)
- B: Domestic institutional arrangements on the rights of older persons (questions 7-15)
- C: The evolution of domestic policy perspectives on the rights of older persons (questions 16-19)
- D: The general use of international law on the rights of older persons (questions 20-22)
- E: Use of the European Social Charter by States with respect to the rights of older persons (questions 23-27)
- E: Emergencies, social rights and COVID-19 (questions 28-32)
- F: Future perspectives on the use of the Charter by States (questions 33-35).

A total of 25 countries responded to the questionnaire. We are extremely grateful to all the countries that replied.

Approximately half of the participating countries had ratified Article 23. This generally represents the broad reality of the number of ratifications of Article 23 within the members States of the Council of Europe. Only a small number of countries that replied to the questionnaire have accepted the Additional Protocol providing for a system of collective complaints. Once again, this also represents the general reality in this context.

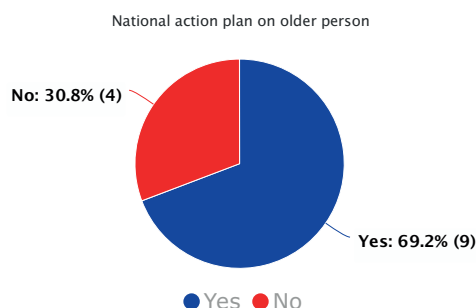
10.1 Summary of the responses

A. Work of States to date on the rights of older persons.

This section covers the work to date of the respondent governments (including the lead ministry and other ministries, as appropriate) on the rights of older persons (that is, in general).

The questions and a selection of representative answers are repeated below.

1. Do you have a national action plan on older persons?

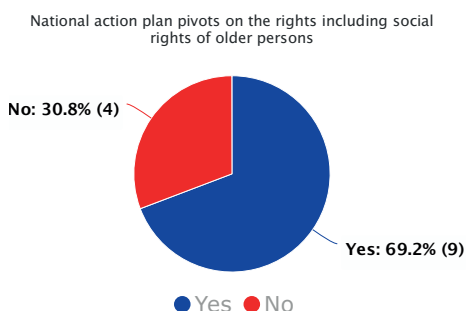


As can be seen, majority of the participating countries had a national action Plan on older persons.

For example, in October 2020, Finland published a horizontal national programme on ageing 2030, in collaboration with ministries, municipalities, third sector organisations and other actors. The age programme extends until 2030.

Some countries reported that while they lack a single national action plan, they do have various other initiatives. For example, “there is no single action plan on older persons that covers the entire United Kingdom. Various initiatives are in place across England and the devolved administrations which seek to address the needs of older persons”.

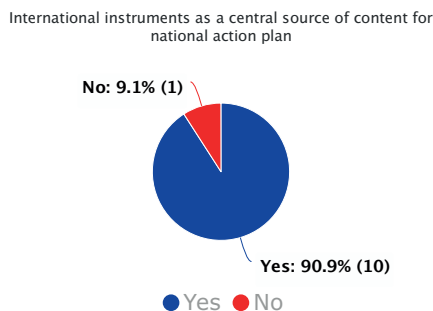
2. Does your national action plan pivot on the rights (including social rights) of older persons?



Once again, the majority of participating countries reported that their national action plan pivoted on rights of older persons.

For example, “the National Strategy for the Elderly of the Republic of North Macedonia is in line with the international legal framework of the European Union. The strategy respects the human right to individual behaviour and choice, in the context of the fundamental rights and needs of the present and the future population.”

3. Did you use international instruments (for example, the Madrid Declaration, human rights treaties) as a central source of the content for the national action plan?



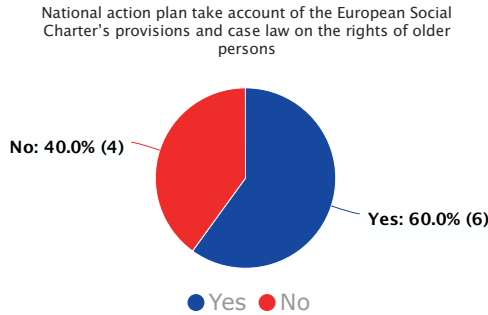
Most countries reported that they used international instruments as a central source for the content of their national action plan.

For example, Serbia has adopted the Madrid International Plan on Action of Ageing, and the goals of this plan are being implemented.

Bulgaria has used several international instruments to develop its National

Strategy for Active Ageing (2019-2030): the UN International Plan of Action on Ageing and the Regional Strategy for Europe, the Lisbon Ministerial Declaration of 2017, the EU Council Conclusions of June 2010.

4. Did the national action plan take account of the European Social Charter's provisions and case law on the rights of older persons?

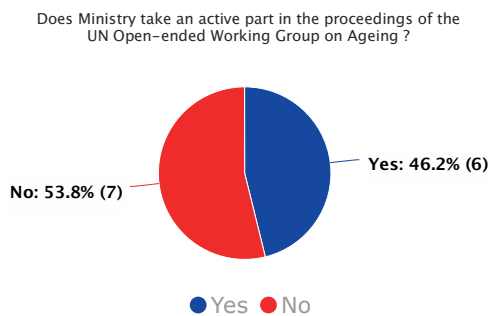


As can be seen from the chart, about two thirds of countries reported that their national action plan had taken into consideration the European Social Charter's provisions and case law on the rights of older persons.

For example, the National Strategy for the Elderly 2010-2020 of North Macedonia "envisages measures and activities to improve the protection of the elderly, especially in the field of social protection and health care. The Ministry of Labour and Social Policy, in accordance with the current social

protection reform, and especially for the provision of appropriate and adequate social benefits and development of social services that provide greater social security and social inclusion for the elderly and improve the protection of the elderly takes into account the provisions of the European Social Charter."

5. Does your Ministry (perhaps in coordination with your Foreign Ministry) take an active part in the proceedings of the UN Open-ended Working Group (UN OEWG) on Ageing?



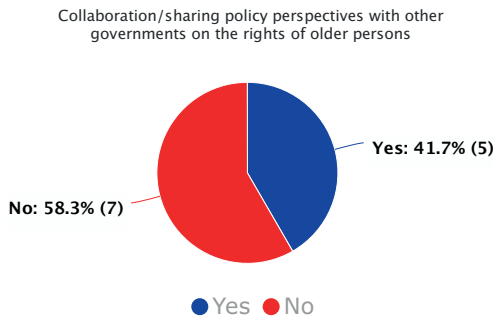
Here, more than half of the countries reported that their ministries do not take an active part in the proceedings of the UN Open-ended Working Group on Ageing. However, those who did – provided information on their participation.

For Example, the French Ministry of Solidarity and Health (DGCS) has represented France in the meetings of the UN Open-ended Working Group on Ageing since 2011. The Bulgarian Ministry of Labour and Social Policy has nominated a national coordinator on ageing issues to the Standing

Working Group on Ageing of the United Nations Economic Commission for Europe (UNECE), based in Geneva.

Finally, the United Kingdom reported: “the UK takes a full and active role in the annual session of the Open-ended Working Group on Ageing (OEWG). That engagement is led by the Foreign, Commonwealth and Development Office (FCDO), but policy positions are coordinated with domestic departments in advance of the session. We think that the OEWG is a useful forum for exploring the challenges facing older people, and its work is helpful in deepening our understanding of the broader issues involved in a potential multilateral instrument on the human rights of older people. The Department for Communities in Northern Ireland, as the co-ordinating Department for the Executive’s Active Ageing Strategy, is occasionally cited on UN OEWG papers from the Cabinet Office for information only. To date, communications received in this regard have been high level and have not required any action or input specifically in regard to the Northern Ireland position.”

6. Do you collaborate/share policy perspectives with other governments on the rights of older persons? If so, through which mechanism, (for example, bilateral, or other ...).



Most countries reported that they collaborate/share policy perspectives with other governments on the rights of older persons.

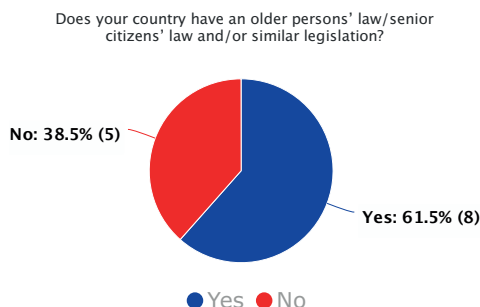
For example, “North Macedonia has concluded 21 social security agreements. Social security agreements contain provisions for pension and disability insurance rights, health insurance rights, unemployment insurance rights, family benefits (child allowance), insurance in case of injury at work and occupational disease, and

avoidance of double taxation, that is, payment of social contributions at the same time in both countries.

The application of the agreements regulates the relations in the field of social security between the North Macedonia and the other contracting state and the realisation of the social security rights for the citizens between those two countries. The agreement belongs to the so-called ‘open agreements’, i.e., modern European agreements, since it refers to persons, and not to citizens from both contracting parties. It is important to note that the provisions of the agreements are in line with Regulation (EC) No. 883 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems applicable from January 2010.”

B: Domestic institutional arrangements.

7. Does your country have an older persons' law/senior citizens' law and/or similar legislation?



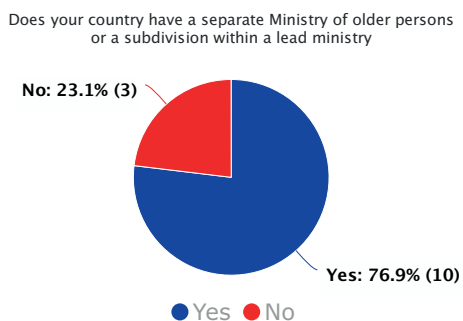
More than half of the respondent countries reported that they have an older persons' law/senior citizens' law and/or similar legislation.

For example, in France, one could mention the Act on supporting the functional capacity of the older population and on social and health services for older persons (980/2012) and the Law on adapting society to ageing, promulgated on 28 December 2015.

Others, such as in Northern Ireland, have incorporated it within broader legal frameworks: "Section 75 of the Northern Ireland Act 1998 provides protections for a range of groups, including that 'a public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity between persons of different...age'"

The Commissioner for Older People for Northern Ireland (COPNI) was established by the Commissioner for Older People Act (Northern Ireland) 2011. The Commissioner's Office is set up as a non-departmental public body. Both the Commissioner and his office are sponsored by the Department for Communities but are operationally independent. The Commissioner's main aim is to safeguard and promote the interests of older people, which includes those aged 60 years and over, and in exceptional circumstances, those aged 50 or over.

8. Does your country have a separate Ministry for older persons or a sub-division within a lead Ministry?



The majority of respondent countries have a separate Ministry for older persons or sub-division within a lead ministry.

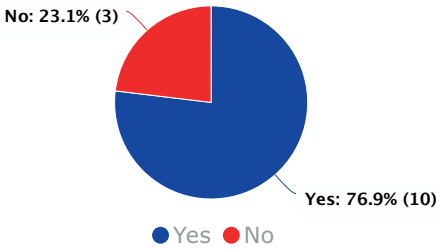
For example, the "Ministry of Labour and Social Affairs of the Republic of Armenia has a division for elderly issues, which is included in the Department for the provision of equal opportunities."

In France, "the Ministry of Solidarity and Health is responsible for policies and issues relating to older people (DGCS). Since July 2020, a minister delegated to the Ministry of Social Affairs and Health has been dealing with issues relating to autonomy. The minister frames policies for dependent elderly people and the policy

to prevent loss of autonomy among the elderly, by delegation from the Minister of Solidarity and Health.”

9. Have there been any major government reports or studies on the future of elder law and policy in your country? Have they (or to what extent have they) pivoted on the centrality of the rights (including social rights) of older people?

Major government reports or studies on the future of elder law and policy in the country



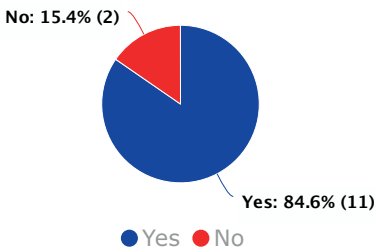
More than two thirds of the respondent countries reported that there have been major government reports or studies on the future of elder law and policy in their countries.

In 2017, “a large-scale study was conducted on Ukraine's implementation of the Madrid International Plan of Action on Ageing and an active longevity index was calculated. In pursuance of the Action Plan, the Ministry submitted to the Cabinet of Ministers of Ukraine an analytical note on the

analysis of the legislation on cash social assistance, compensation, including care for older people to optimise it.”

10. Does your Ministry (perhaps in combination with other Ministries or agencies like the Office of the Attorney General or equivalent) regularly review or proof draft legislation for its possible impact on the rights of older persons?

Does your Ministry regularly review or proof draft legislation for its possible impact on the rights of older persons



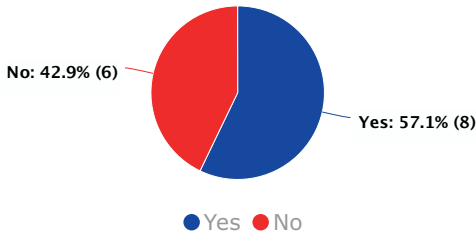
The majority of respondent countries reported that their Ministry regularly review or proof draft legislation for its possible impact on the rights of older persons.

For example, with respect to Armenia, the draft legal acts developed by the Ministry are regularly reviewed or discussed by the Office of the Human Rights Defender and the Ministry of Justice of the Republic of Armenia or jointly with them in terms of their possible impact on the rights of older persons. Or the Department for Elderly

Affairs and Pension Insurance (under the Minister for Families) gives a preliminary opinion on the draft legislation and, if necessary, formulates a proposal for amendments. During the drafting of legislation, the Department involves the members of the Senior Council...to transfer their knowledge and experience regarding issues affecting older persons and other generations.

11. Is there a Committee or Working Group (formal or informal) in your Parliament working on the rights of older persons?

Committee or Working Group in Parliament working on the rights of older persons



Here, once again, more than half of the respondent countries reported that there is a Committee or Working Group (formal or informal) in their Parliament, working on the rights of older persons.

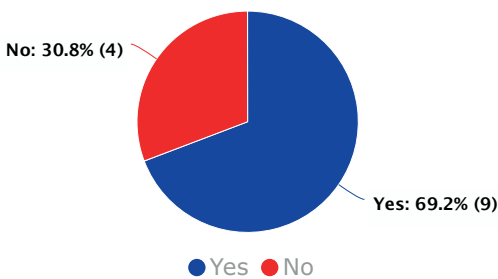
For example, in France this the Family and Integration Committee within the Chamber of Deputies [Chambre des députés, Commission de la Famille et de l'Intégration]. Moreover, the "Social Affairs Committee is one of eight standing committees in France's National Assembly. Its field of competence covers the elderly. The Senate also has

a social affairs committee with competence in the fields of health, family policy, social security, social assistance and action, solidarity and disability policy and social housing."

In Scotland, there is a Cross Party Group on Older People, Age and Ageing. There is also provision for this area in Wales. In Northern Ireland there is an All-Party Group on Older People in the Northern Ireland Assembly. All Party Groups provide a forum by which Northern Ireland Members of the Legislative Assembly, outside organisations and individuals can meet to discuss shared interests in a particular cause or subject.

12. Is there a national Commission or Council on Elder Policy in your country? What is its relationship (if any) to your Ministry?

National Commission or Council on Elder Policy



A majority of respondent countries reported that there is a national Commission or Council on Elder Policy in their country.

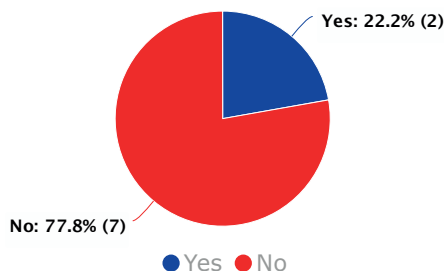
For example, by a decision of the Prime Minister of the Republic of Armenia, an interdepartmental commission dealing with the issues of older persons has been operating in the country since 2013, chaired by the Minister of Labour and Social Affairs of Armenia, and the members are representatives of public administration bodies and interested

non-governmental organisations.

In Hungary, "the Senior Council (Idősek Tanácsa) is an advisory body of the government to facilitate respect, appreciation and safety of older persons, and to represent the interests and proposals of elderly in the elaboration of government decisions. The head of the Council is the Prime Minister, and his deputy is the Minister for Families".

13. Has there been major litigation in the courts on the rights of older people (especially Constitutional Court, Supreme Court) in the last ten years?

Major litigation in the courts on the rights of older people



Here, interestingly, most of countries reported that there has not been major litigation in the courts on the rights of older people (especially in the Constitutional Court or Supreme Court) in the last ten years.

For example, in Hungary, “there were no characteristic movements in the last ten years which were related to old age. Cases related to old age are investigated and followed by the Equal Treatment Authority (Egyenlő Bánásmód Hatóság), which monitors

equal opportunities, and rarely, if at all, do such cases occur. The most recent institutional change is that the Equal Treatment Authority will be integrated and incorporated into the Office of the Commissioner of Fundamental Rights from 1 January 2021”.

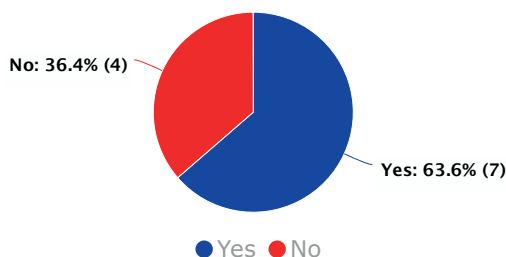
14. If so, what was its character (did it pivot on equality/non-discrimination) and the outcome? Did national law or policy change as a result? Did the litigation touch on or have implications for social policy/social rights?

For this question, only three States answered and said that their national law did not change because of the character or its outcomes.

For example, in North Macedonia, “regarding the regulations on social protection, with respect to the provisions governing the rights of the elderly, no procedure has been initiated to assess the constitutionality of the Law on Social Protection before the Constitutional Court, nor have judgments been rendered by the Supreme Court of the Republic of North Macedonia in this regard”.

15. Is there a national representative council of older people in your country? What is its relationship (if any) to your Ministry?

National representative council of older people in your country



A majority of countries reported that there is a national representative council of older people in their country.

In Serbia, there is an Association of Pensioners of Serbia, as well as a network of non-governmental organisations gathered in the HUMANAS network, which focus on the protection of the rights of the elderly.

In Azerbaijan, there is a Council of Elderlies of Azerbaijan operated independently by the Ministry of Labour and Social Protection of the Population.

C. The Evolution of domestic policy perspectives on the rights of older people.

This section invited governments to describe how their ministries' thinking on the rights of older persons may have evolved. Have there been any distinct phases in the evolution of policy and where do things stand now?

16. How would you describe your overall approach to the rights of older people?

The answers to this question were diverse but revealed two very different approaches: some respondents said that, in their country, elders have the same rights as the rest of population, while other respondents said that, in their countries, the law sees older persons as a group that needs special protection.

For example, in Finland, older people have the same rights as the rest of the population. The Constitution of Finland and other national legislation guarantee legal equality and equality for older persons.

In Hungary, the Fundamental Law of Hungary, passed on April 24, 2011, in its Article XV (5) mentions the elderly, among others, as a group in need of special care and protection, and requires their protection by means of separate measures.

17. In what way has your work and approach to policy on the rights of older persons evolved in the last ten years?

Here, the answers dealt with the phenomenon of societal change followed by policy change.

For example, with respect to Bulgaria, "the analysis of the information received and summarised in the preparation of the biennial reports on ageing for Bulgaria shows the need for integrated actions by the institutions to adapt key sectors such as employment, health, education, social security and social assistance to the ageing process. The policy approach is therefore increasingly comprehensive, horizontal and broad-spectrum."

As the Madrid International Plan of Action on Ageing (MIPAA) is committed to the rights of older persons and Germany is committed to MIPAA and the Regional Implementation Strategy (RIS) as well, the rights of older persons remain of interest for the German government. In the last couple of years, the German government has actively engaged in the discussion at international level, especially with the UN OEWG. Germany is therefore committed to close the existing gaps in the international system of human rights relating to the rights of older persons.

18. In what way or to what extent have equality and non-discrimination been taken into account in your overall approach to public policies on older people?

Most respondent States answered that discrimination against older people is prohibited by law in their countries. However, some reported that their actual usage is low.

For example, in Hungary, "the Equal Treatment Authority (Egyenlő Bánásmód Hatóság) set up in 2003 is a fundamental institute for acting against discrimination. It is an institute that guarantees human dignity, and an autonomous public forum for legal remedy as well as for controlling the fulfilment of the requirements of equal treatment. Pursuant to Act CXXV of 2003, the Authority can be contacted for example in the

case of discrimination on ground of age, otherwise proceedings can also be initiated ex officio. The number of complaints submitted by persons above the age of 65 is rather low; it is below 1% per year. In the field of employment, on one occasion, in the case of a retired employee the Authority found that there had been an infringement, when the equal pay for equal work requirement was violated. Another legal institution for these issues is the Commissioner of Fundamental Rights, but actually only a very few such complaints occurred in their practice as well."

19. Has your overall approach to the rights of older persons been influenced inter-sectionally (e.g., by reference to the rights of persons with disabilities or gender or other)?

Most of participants answered positively to this question.

For example, in Armenia: "the solution of the issues of older persons, their social protection, realisation of their social rights, provision of services are based on individual needs assessment; transition from general to individual approaches; and in that case, of course, age, health status, the presence and type of disability, degree of dependence on another person of the older persons are taken into account, and accordingly, the provision of services is organized taking into account the mentioned factors and peculiarities of that status, as well as based on the regulations established by other legal acts on persons with a given status, as well as based on the provisions of other legal acts about persons with a given status."

In Bulgaria, the overall approach to the rights of older persons "has been influenced by the discussions about the rights of persons with disabilities or gender. Especially the topic of possible multi-discrimination, violence etc."

D. The General use of international law on the rights of older persons.

This section covered general use of international legal instruments with respect to development and implementation the rights of older persons.

What use (how much use) have you made of international law instruments (ICC-PR, ICESCR, ECHR) in your work or policy development on the rights of older persons?

For this question, the answers were quite diverse.

For example, with respect to Ukraine, "the Ministry of Social Policy uses international law documents when developing policies on the rights of the older people. In particular, in the judgment of 2 December 2010 of the case *Ratushna v. Ukraine*, the applicant alleged in her statement of claim at the domestic level that the constitutionally guaranteed inviolability of her home had been violated, which the Court considered to be quite similar to her complaint in Strasbourg regarding the violation of her right to respect for housing enshrined in Article 8 of the Convention."

Poland mostly uses the Madrid International Plan of Action on Ageing and the Revised European Social Charter to establish a coherent policy for the elderly.

In the United Kingdom, "all human rights are taken into consideration when developing and adopting new laws. The Scottish Government is guided by the UN Principles for Older Persons, including in relation to actions that help fulfil economic, social, and cultural rights, such as the right to the highest attainable standard of physical and

mental health, the right to work and to work in decent conditions, and the right to an adequate standard of living. In Northern Ireland, human rights and equality are embedded in its governmental structure through the Northern Ireland Act 1998”.

21. Which treaties did you invoke (for example, UN ICCPR, UN CESCR, Council of Europe instruments) and why?

Again, for this question, there was a variety of answers.

For example, Armenia cited the European Convention on Human Rights, the Revised European Social Charter, the Framework Convention for the Protection of National Minorities (FCNM), the International Covenant on Economic, Social and Cultural Rights (for example E/C.12/FIN/CO/6 and the Committee’s General Comments), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (for example CEDAW/C/FIN/CO/7 and the Committee’s General Recommendations).

In Finland, “the Ministry of Social Policy usually referred to international documents such as the Declaration on Ageing adopted by Resolution 47/5 of the UN General Assembly, the UN Principles for the Elderly, adopted by UN General Assembly Resolution 46/91 of 16 December 1991”.

22. Does your Ministry follow general developments in the Council of Europe on the rights of older persons (Committee of Ministers, European Court of Human Rights, Parliamentary Assembly, Commissioner for Human Rights)?

Most of participants said that their Ministry follows general developments in the Council of Europe on the rights of older persons.

For example, in Finland, the “Ministry of Social Affairs and Health reviews the ECtHR’s and the European Committee of Social Rights’ case law on monthly basis”.

In Serbia, “a general observation is that these developments seem to be limited and general in terms of content... Providing guidance in shaping detailed solutions in the field of policy towards older people, responding to needs of a given society is not their task. In the same vein, the Court cannot go beyond the provisions of the Convention, which gives no space for influencing the content of national social policy”.

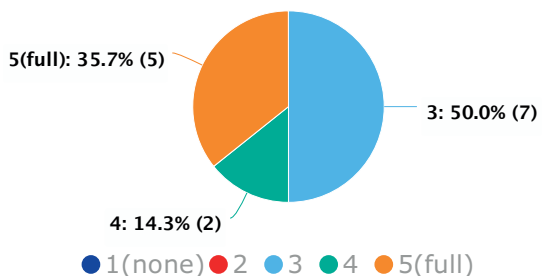
E. Use of the European Social Charter by States on the rights of older persons.

This section covered more particularly the use of the Charter to date, in general and specifically with respect to the rights of older persons.

23. On a scale of 1 (none) to 5 (full), what is the general level of awareness in your Ministry of the ESC and its case law? Please circle as appropriate.

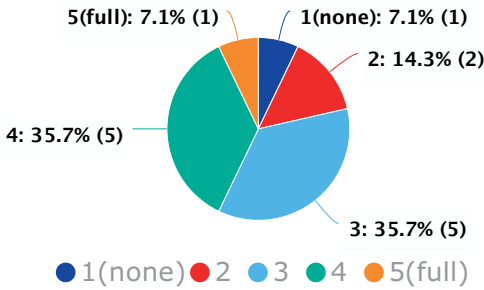
Half of countries said that their Ministry had a “full” (highest) level of awareness of the European Social Charter and its case law.

What is the general level of awareness in your Ministry of the European Social Charter and its case law



24. On a scale of 1 (none) to 5 (full), to what extent do you follow developments in the case law of the European Committee of Social Rights on Article E (equality) and especially as it applies to older persons? Please circle as appropriate.

To what extent do you follow developments in the case law of the European Committee of Social Rights on Article E

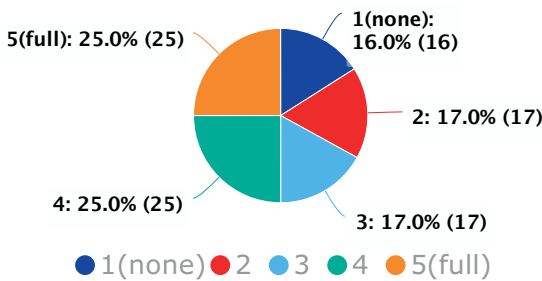


The majority of countries reported a medium or high number denoting the extent to which they follow developments in the case law of the European Committee of Social Rights (ECSR) with regard to Article E (equality) as it applies to older persons.

25. On a scale of 1 (none) to 5 (full), to what extent do you follow developments in the case law of the European Committee of Social Rights on Article 23 (rights of older persons)? Please circle as appropriate.

Again, for this question, the majority of countries reported a high or very high figure denoting the extent to which they follow developments in the case law of the ECSR on Article 23 (rights of older persons).

To what extent do you follow developments in the case law of the European Committee of Social Rights on Article 23



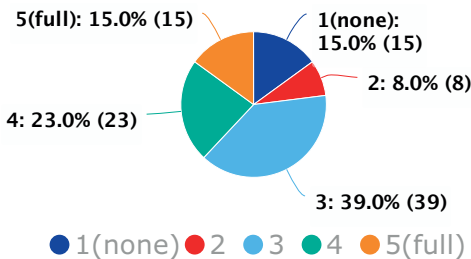
For example, in its last two conclusions concerning Article 23 of the Charter, the European Committee of Social Rights found the situation in France to be in conformity with this article (2013 and 2017). Only two complaints have been lodged against France under Article 23 of the Charter: Complaint No. 145/2017, FIAPA v. France, concerning the offence of abuse of weakness (Article 223-15-2 of the Criminal Code), as interpreted and applied by the domestic courts. By a decision of 22 May 2019, the European Committee of Social Rights held that there had been no violation of Article 23 of the Charter; Complaint No. 162/2018, FIAPA v. France relating to Article L. 4125-8 of the Public Health Code which sets an age limit of 71 years for candidates for election to the boards of the Order of health care professionals or as an assessor in a disciplinary chamber. The government recalled that the ECSR was informed that the provisions in question had been annulled by the Conseil d'Etat. No European Committee of Social Rights decision on the merits has been rendered to date.

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26. On a scale of 1 (none) to 5 (full), to what extent do you follow developments in the case law of the European Committee of Social Rights under more specific provisions (for example, Article 13 on the right to medical assistance) as they apply to older persons? Please circle as appropriate.

For this question, less than 50% of the countries reported that they follow development in the case law under more specific provisions as they apply to older persons.

To what extent do you follow developments in the case law of the European Committee of Social Rights under more specific provisions



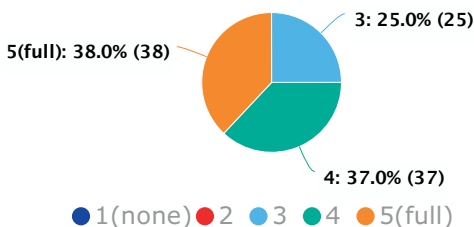
Hungary, which follows these developments, reported that “although Hungary did not ratify Article 23 (rights of older persons) of the European Social Charter, the Hungarian Government handles the right of the elderly as a priority issue during the development of the reforms on the health and social areas. In our national reports on the implementation of the European Social Charter, we provided the most detailed information

on all these reforms, as well as their effect on the elderly, their standard of living and access of social services. Fortunately, we could report on dynamic developments in this area in previous years.”

27. On a scale of 1 (ignored) to 5 (fully implemented), to the extent and if the European Committee of Social Rights has adopted any negative conclusions with respect to your jurisdiction on the social rights of older persons, how would you characterise the response of your government (for example, has it proposed legislative or policy changes)?

The majority of countries reported that in the event of a negative conclusion by

If the European Committee of Social Rights has adopted any negative conclusions with respect to your jurisdiction on the social rights of older persons, how would you characterise the response of your government



the European Committee of Social Rights regarding the social rights of older persons, the likelihood that national authorities would take action via legislation or policy changes would be “high” or “very high”.

For instance, this was reported by Serbia (“In the case of a negative conclusion of the European Committee of Social Rights, the Government of the Republic of Serbia will propose the relevant

legislative or policy changes.”) and by North Macedonia (“The conclusions of the European Committee of Social Rights are monitored and implemented through legislative and other measures and are reported through regular periodic reports.”)

F. Emergencies, social rights, older persons, and COVID-19.

This set of questions sought to track how States were responding to COVID-19 and how or whether the jurisprudence of the European Social Charter was being used or invoked in shaping the responses.

28. Are you tracking the impact of COVID-19 on the enjoyment of social rights by older persons?

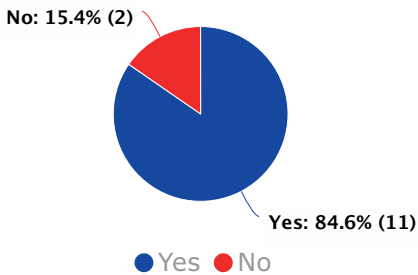
All countries except one (which did not answer) answered positively to this question. For example, in Finland the impact of COVID-19 on older people's rights and access to services is actively monitored throughout Finland.

In North Macedonia, "social rights are exercised, but there is an increased social isolation of the elderly, due to the implementation of measures for protection from COVID-19 (reduced social activities in institutions for provision of extra-familial care)."

29. Do you share/pool this knowledge with other governments or regional/international organisations?

Most countries reported that they share/pool this knowledge with other governments or regional/international organisations.

Do you share/pool this knowledge with other governments or regional/international organisations?



For example, "Finland cooperates with the European Union and the Nordic countries and exchanges and shares information on COVID-19 issues. We do not share information on a regular basis, but we do respond to international inquiries (for example, OECD, UNECE)."

North Macedonia "exchanges experiences with the countries in the region, Croatia, Serbia, Austria and other countries that lead positive processes on the problem of old age and

ageing and have a similar system of social protection of the elderly. The needs for exchange refer to the level of the way of functioning and organisation of protection of the elderly, as well as the way of work of the professionals in this field and their education."

30. If so, what is your main focus or concern with respect to securing the social rights of older persons during the pandemic?

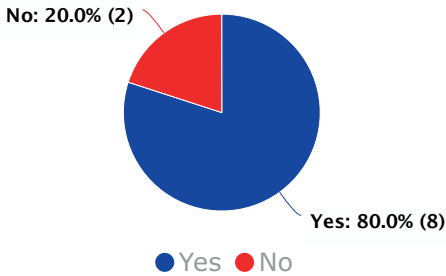
Various issues such as access to care or related to nursing homes were raised.

In Ukraine, for example, "ensuring uninterrupted provision of social services to older people is one of the main priorities of the Ministry of Social Policy, in particular circumstances prevent the spread in Ukraine of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2."

In Serbia, the main focus was on protection of the life and health of the elderly leaving in social protection institutions and on taking preventive measures in order to prevent the spread of the infection in accommodation institutions.

31. Is your government/ministry beginning to re-think any aspects of elder policy into the future as a result of the pandemic?

Government/Ministry beginning to re-think any aspects of elder policy into future due to pandemic



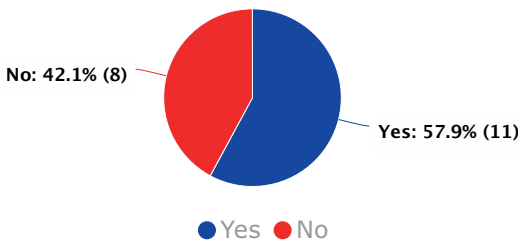
Most countries reported that their government/ministry is beginning to re-think many aspects of elder policy into the future because of the pandemic.

For example, in Armenia, “because of the coronavirus epidemic, some services provided to the older persons have been re-profiled; emphasis was placed on the provision of basic necessities and in-kind assistance and on the implementation of anti-crisis measures for coronavirus prevention”.

In Bulgaria, as a result of the COVID-19 pandemic, attention was drawn to policies that promote digital skills enhancement, especially for vulnerable groups in the labour market (the elderly, people with disabilities, etc.), as well as to policies that promote participation in society.

32. Has your government used the European Social Charter and its case law in assessing the adequacy of national policy and administrative responses to COVID-19 and especially as they apply to older persons?

Government used the European Social Charter and its case law in assessing the adequacy of national policy and administrative responses to COVID-19?



More than half of the countries reported that their governments did not use the European Social Charter and its case law in assessing the adequacy of national policy and administrative responses to COVID-19 and especially as they apply to older persons.

G. Future perspectives in the use of the European Social Charter by States.

This section gave the respondent States space to reflect on how they might engage with the Charter process in the future and on some of the practical steps that might enable this to happen.

33. In your view, how can general levels of awareness among governments be increased about the case law of the European Social Charter on the specific rights of older persons?

Various proposals were provided, for example sharing more information (analyses, overviews) within the relevant stakeholders or through workshops with presentations and conferences.

34. What, in your view, can the European Committee of Social Rights do to make its proceedings and case law especially on the rights of older persons more accessible?

Again, various proposals were made including:

- The Committee could consider establishing thematic fact sheets on the Committee's case law so that the cases dealing with similar issues could be found easily in one place (similar to the European Court of Human Rights' fact sheets) [Finland]
- Since the Hungarian legal system strongly differs from the case law system, it would be very useful to show several typical and concrete examples in this context and to show how they were remedied in the framework of applied proceedings [Hungary]
- The introduction of a common platform for raising the government judicial practice regarding violations of the rights of older people [Ukraine].

35. What other thoughts or insights would you like to share with regard to promoting the social rights of older persons which were not covered in this questionnaire?

National authorities made some concrete practical suggestions, a selection of which is provided below:

- Conduct research on the specific needs of different generations in order to promote a longer working life and the employability of older people [Azerbaijan].
- Issues related to lifelong education for older people, better professional competences, digitalisation, and informal care for older people would be important for the development of a state policy on older people [Finland]
- “The COVID crisis has brought to the surface the problem of unequal access to and use of digital technology, especially among the elderly, who have therefore often been not only physically but also socially isolated from their families and friends. This, on the other hand, also affected the possibility of accessing certain services ..., given that more and more services are being offered online. All this interferes with active and healthy aging.” [Hungary]
- “It could be suggested that Member States be encouraged to ratify Article 23 of the European Social Charter. In addition, the Council of Europe could perhaps be invited to develop an action plan on ageing. Nevertheless, for the purpose of raising awareness of the rights of older persons, the study itself will be a valuable reference document for all those involved in the promotion and protection of these specific rights.” [Serbia]

10.2 Analysis of the responses

The response rate was satisfactory and came from a broad range of States Parties. It at least enables some tentative conclusions to be reached. We start with examining the positive ones.

First, the majority of governments reported having a national action plan on ageing and older persons; that their national action plan was pivoted on rights of older persons; and that they used international instruments as a central source of the content for their national action plan. This evidences a clear shift towards a rights-based perspective on age and away from the legacy of ageism.

Second, about two thirds of the respondent countries reported that they have a national action plan on the rights of older persons and that it has taken into account the European Social Charter's provisions and case law on the rights of older persons. This is most gratifying as it shows a keen awareness of the Charter and its usefulness at the domestic level.

Third, more than half of the respondent countries reported that they have an older persons' law/senior citizens' law and/or similar legislation and that they have a separate or dedicated Ministry of Older Persons or sub-division within a lead ministry. They also reported that there is a national representative council of older people in their country. This means they are slowly equipping themselves with the institutional machinery needed to drive a new rights-based policy agenda.

Fourth, the majority of respondent countries reported that they have conducted major government reports or studies on the future of elder law and policy in their countries. This shows a remarkable awakening, especially in the last ten years or so, with respect to the rights of older persons.

Fifth, the majority of respondent countries reported that their Ministry regularly reviews or proofs draft legislation for its possible impact on the rights of older persons. More than half of the respondent countries reported that there is a committee or a working group (formal or informal) in their parliament, working on the rights of older persons. This is indeed a remarkable development. They also reported that they have a national commission or council on elder policy in their country.

Sixth, interestingly, a majority of respondent countries stated that their Ministry had a "full" (highest) level of awareness about the European Social Charter and its case law. Along similar lines, the majority of respondent countries reported high or very high levels of awareness in following the relevant developments in the case law of the European Committee of Social Rights – both with regard to Article E (equality) in general, and with regard to Article 23 (rights of older persons) specifically. This validates the dual focus of the European Committee of Social Rights on Article 23 in combination with the broad vision of dignity, autonomy and active social citizenship in Article E. The suggestion that the Committee further clarifies its jurisprudence chimes with our suggestion (Chapter 4) that the Committee move toward adopting thematic general comments.

Seventh, most were keenly responsive to the views of the European Committee of Social Rights. The majority of countries reported that to the extent that the Committee

was to adopt any negative conclusions concerning the social rights of older persons in their country – then there would be a “high” or “very high” likelihood that they would act accordingly via legislation or policy change.

Eight, regarding the COVID-19 crisis and more specifically the initial policy responses thereto, almost all of the respondent countries reported that they monitored the human rights situation of older persons during the COVID-19 pandemic and that they shared/pooled this knowledge with other governments or regional/international organisations.

Ninth, indeed, most of the respondent countries reported that their governments/ministries are beginning to re-think aspects of elder policy in the future because of the pandemic. This shows that the pandemic has revealed deep-seated inequalities and is now acting as a catalyst driving the overall trend away from ageism and toward a rights-based approach.

On the other hand, there is much room for improvement.

Firstly, and unfortunately, the majority of countries reported that their ministries do not take an active part in the proceedings of the UN Open-ended Working Group on Ageing. This is somewhat of a paradox since there has actually been quite a lot of movement domestically toward a rights-based platform for change.

Secondly, the vast majority of countries reported that there has not been major litigation in the courts on the rights of older people (especially at Constitutional Court or Supreme Court levels) in the last ten years. Maybe this is to be expected, as the legal system is usually behind policy developments. While the case law has not yet developed, it is likely to do so as more advocates will press the right kinds of test cases in the years to come – including before the European Committee of Social Rights.

Thirdly, from the many suggestions provided, it seems that many more steps can be taken by the European Committee of Social Rights to increase the awareness and usage of the Charter and its jurisprudence with regard to the human rights of older persons. This seems eminently do-able (for example, by having open public days of discussion followed by the drafting of thematic general comments).

Finally, and regarding the COVID-19 pandemic, the majority of respondent countries reported that their governments did not use the European Social Charter and its case law in assessing the adequacy of national policy and administrative responses to COVID-19 and especially as they apply to older persons. Clearly, more needs to be done to communicate the jurisprudence of the Committee.

11. Engagement of National Human Rights Institutions and National Equality Bodies with the European Social Charter

Europe has a rich tapestry of bodies dedicated to human rights and equality. It matters that they are attentive to the rights of older persons, that they frame the relevant issues accordingly and that they promote this framing among the population at large. In this way they both reflect underlying trends as well as help crystallise them and move them forward.

In order to gauge the road travelled by such bodies and the extent to which they have now moved decisively to a rights-based approach, it was decided to forward a detailed questionnaire to European National Human Rights Institutions (NHRIs) and National Equality Bodies (NEBs) which often overlap with NHRIs. The survey questions were grouped around the following themes:

- A. Description of the work to date in the bodies surveyed on the rights of older persons.
- B. Evolution of thinking on the rights of older persons within the bodies surveyed.
- C. Use of general international law on the rights of older persons by the bodies surveyed.
- D. Use of the European Social Charter by the bodies surveyed.
- E. Emergencies, social rights and COVID-19.
- F. Future orientations – stepping up the engagement of the bodies surveyed with the European Social Charter and its jurisprudence on the rights of older persons.

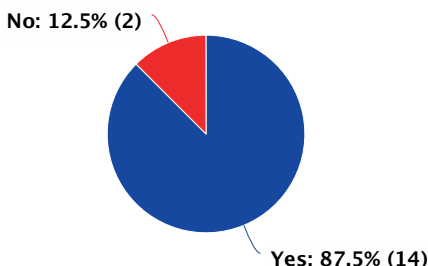
This questionnaire was returned by 15 different organisations from the following countries: the Czech Republic, France, Slovakia, Sweden, Austria, Montenegro, Romania, Georgia, Estonia, Poland, Bosnia and Herzegovina and Hungary. We are extremely grateful to all bodies that participated.

11.1 Summary of the responses

A: Work to date on the rights of older persons: The first part of the questionnaire included questions regarding the current work of these organisations in the field of rights of older persons. The first question was the following:

1. Do the rights of older persons figure in your strategic plan?

Do the rights of older persons figure in your strategic plan?



As can be seen in the pie chart to the left, a large majority of the organisations reported that the rights of older persons were part of their strategic plan.

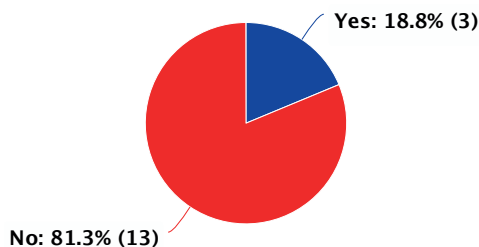
In the vast majority of cases, the reference to the issue of rights of older persons was conceptualised within the field of preventing discrimination

in general, and more specifically – “age discrimination” (for example, equal rights for older persons are included in the strategic plan of the Greek Ombudsman as National Equality Body as regards age discrimination). Some participants mentioned other specific key topics within their strategic plans, such as elder abuse, neglect and exploitation; long-term care; right to health; right to work.

However, there were some examples where an organisation approached the issue of rights of older persons within the broader perspective of protecting the rights of vulnerable groups in general.

2. Have you dealt with the rights of older persons in domestic litigation?

Have you dealt with the rights of older persons in domestic litigation?

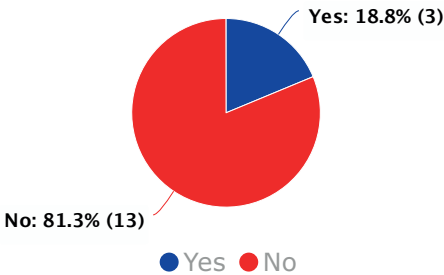


When shifting the focus from the general strategic plan to more specific aspects, the findings show that the majority of organisations did not deal with rights of older persons via domestic litigation. For some, the reason is grounded in laws or regulations which prevent their organisation from taking part in litigation

(for example, the Public defender of the Czech Republic is not permitted to take active part in litigation. And for others, this stems from the limitation of the court system. For example, and according to the information provided, the Estonian court system is very much directed at reaching an agreement or a settlement wherever possible (at all levels of court). Furthermore, rulings of the lower courts have no legislative power in Estonia. Therefore, getting a case far enough to achieve at least some of the aims of strategic litigation, does become rather difficult and even unlikely in many cases. In addition, the institution does not have sufficient resources to bring these cases to court and amount is likely to be very high for the plaintiff.

3. Have you drafted/submitted amicus curiae briefs in support of litigation regarding the rights of older persons?

Have you drafted submitted amicus curiae briefs in support of litigation regarding the rights of older persons?



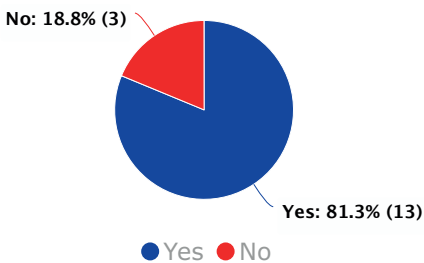
As was the case for litigation mentioned above, the majority of organisations also reported that they did not submit *amicus curiae* briefs in support of litigation regarding the rights of older persons.

Once again, some simply cannot do it under their laws or regulations, and for others it is too complicated or costly via

the local legal system. However, there were some positive examples. For example, “the Public Defender of Georgia submitted to the Administrative Cases Panel of the Tbilisi City Court an *amicus curiae* on a lawsuit alleging discrimination on the grounds of age. The applicant alleged that he was discriminated against on the grounds of age by the Rector of the Vano Sarajishvili Tbilisi State Conservatory: the criterion for the candidate of assistant-professor was to be a young professional. According to the defendant, this criterion served to balance the age of employees and to encourage the younger generation. In the *amicus curiae*, the Public Defender presented a test for the detection of alleged discrimination in labour pre-contractual relations, evoked the rule of redistribution of the burden of proof in discrimination cases, and reflected the international practice. The ombudsman also presented standards for the use of positive measures”.

4. Have you included the rights of older persons in your commentary/submissions on draft legislation?

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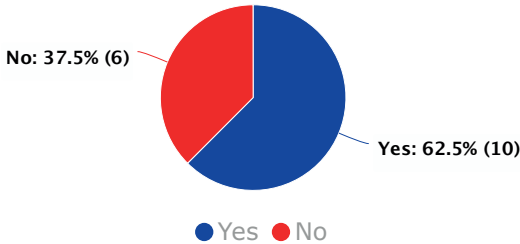
Aside from litigation and the courts, the majority of organisations surveyed did include the rights of older persons in their commentary or submission on draft legislation.

For example, the Office of the Commissioner for Human Rights of Poland provided comments on the draft national policy on ageing (2018) indicating the need for

human rights-based approach and other elements relevant to the rights of older persons. Also, the institution included the rights of older persons as a matter of intersectionality during the consultations on the national strategy for persons with disabilities (2020). Moreover, the institution commented the existing act on older persons (2015) after it had already been adopted.

5. Have you made presentations on the rights of older persons at hearings in the Parliament or other government commissions?

Have you made presentations on the rights of older persons at hearings in the Parliament or other government commissions?



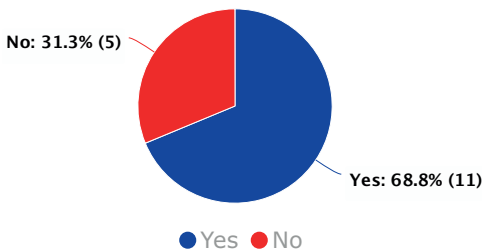
Similarly, the majority of organisations were active – and made presentations – on the rights of older persons at hearings or other government commissions.

The Greek Ombudsman, which has the statute of an equality body submits an annual report and a special report to the Parliament and it is therefore, invited to present these reports

before the Parliament. In addition, special parliamentary commissions invite the Ombudsman to hearings on issues that fall within its mandate, including the rights of older persons.

6. Have you published studies/reports on the rights of older persons?

Have you published studies/reports on the rights of older persons?



The same was true with regard to publications and reports, as the majority of organisations published reports or studies on the rights of older persons.

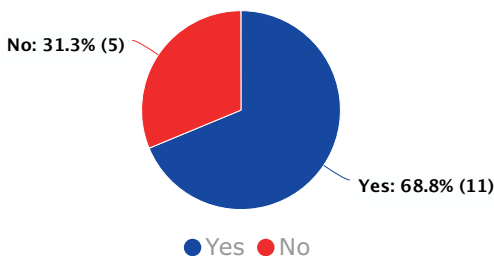
For example, the Serbian Commissioner has published publications on topics such as ageing in cities, abuse of the elderly and position of the elderly

in rural areas. The Commissioner also conducted a survey on the position of older women in the Republic of Serbia.

Other publications and reports mentioned by other participants included topics such as long-term care; socially excluded older persons; abuse of the elderly; poverty of senior citizens; prevention of discrimination and creation of equal opportunities; access to the financial market by older persons; and more.

7. Have you published other studies/reports (for example, on health care) with an elder rights perspective added?

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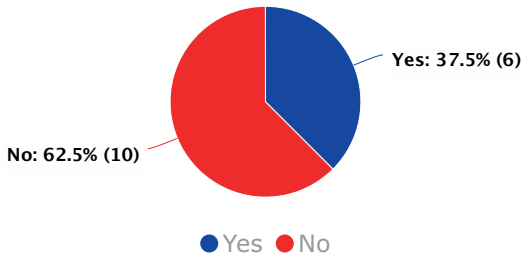
The abovementioned trend continues here. The majority of organisations also reported having published other studies and reports with an elder rights perspective.

For example, the Serbian Commissioner has published a

Special Report on Discrimination in the Field of Labour and Employment, a Special Report on Discrimination against Women and a Special Report on Discrimination against Persons with Disabilities in Serbia with an elder rights perspective added.

8. Do you have a designated focal point or desk on the rights of older persons?

Do you have a designated focal point or desk on the rights of older persons?

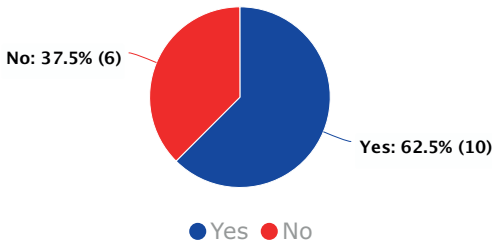


However, when it comes more specifically to having a designated focal point or desk on the rights of older persons, the picture changes: the majority of organisations do not have a designated focal point or desk on the rights of older persons. Often, this is the result of the organisation being small, or with limited resources, and sometimes it is the outcome

of a general strategy of viewing equality as a broad and universal issue, which does not justify breaking it down into specific groups or sub-issues.

9. Do you collaborate with other NHRIs, equality bodies or ombudspersons on the rights of older persons?

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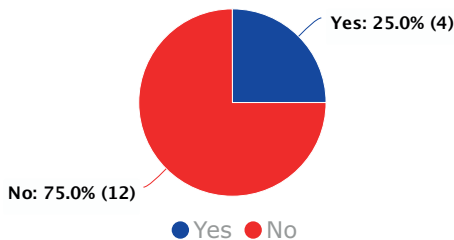
The majority of organisations collaborated with other NHRIs or similar bodies on the rights of older persons.

The Greek Ombudsman reported the institution collaborates with the Greek National Commission for Human Rights and with international and European organisations or networks (International

Ombudsman Institute, Equinet etc.).

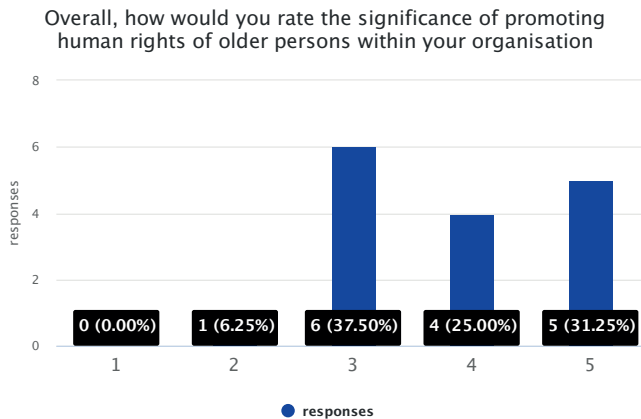
10. Do you follow/take an active part in the process of considering the need for a UN treaty on the rights of older persons?

Do you follow/take an active part in the process of considering the need for a UN treaty on the rights of older persons?



Surprisingly, the majority of organisations did not follow or take an active part in the work of the UN on elaborating a treaty on the rights of older persons. However, it was reported that organisations are supportive of this process and the motivations of the international community to address the human rights issues of older persons.

11. Overall, how would you rate the significance of promoting human rights of older persons within your organisation?



Overall, the majority of organisations rated their level of engagement with regard to the promotion of human rights of older persons as high or very high. This corresponds with their reporting on high levels of contributions and participation in legislative processes or independent reports and other activities in the field. However, there were two aspects in which the actions were limited: firstly, most of the organisations were not active in courts or in litigation; and, secondly, actions were limited with regard involvement and active participation in the international movement towards a new convention for the rights of older persons.

B: Evolution of thinking on the rights of older persons within the bodies surveyed.

After getting a sense of what place rights of older persons are accorded, the focus in this section of the questionnaire, shifted to the description of the overall approach to the rights of older persons.

12. How would you describe your overall approach to the rights of older persons?

Here the answers varied, but two very different key themes were discernible. The first theme was narrow and specific, and focused on the significance of age discrimination as being the key human rights issue which defined the field.

For example, considering the practice of the Serbian Commissioner for Protection of Equality through complaints and other actions, it can be stated that age is a ground for discrimination among the most numerous personal characteristics during the entire period of the Commissioner's work and often appears in combination with other personal characteristic. This fits well with the mandate of equality bodies which mostly deal with equality and non-discrimination. The work of the Ombudsman encompasses discrimination against older persons.

The second theme was much broader and less focused. It was based on the realisation that, in real life, the human rights of older persons were given much less public attention or awareness, were ignored and violated in many different aspects and in various fields of life.

The Institution of Human Rights Ombudsman/Ombudsmen of Bosnia and Herzegovina has received many complaints alleging that certain public authorities and institutions do not pay sufficient attention to the difficulties of older persons in understanding the complexity of the legislation relating to public benefits, and that this sometimes leads to public bodies not taking due account of the frailty, state of health or general incapacity of older people, or even denying them some of the rights or benefits which would make their lives much easier and less stressful.

13. In what way has your work/thinking around the rights of older persons evolved in the last decade?

Moving away from the general approach, the second question in this part sought to explore in what way the work/thinking around the rights of older persons has evolved in the last decade.

Here, again, the answers varied: while some stated that it had not changed or evolved, the majority pointed to some evolution in the field, and indeed, some key themes were apparent:

1) The evolution of more specific and targeted knowledge and expertise in the field, namely, exploring the rights of older persons within specific contexts or within specific fields.

The Serbian Commissioner for the Protection of Equality has conducted in the last 10 years various studies relating to the rights of older persons, for example: "Well-kept family secret: abuse of the elderly", "The position of the elderly in the countryside", "Ageing in cities - challenges of modern society and "The position of older women in Serbia".

2) The rise in the visibility of this field, which is also reflected in the rise in the number of complaints which, in turn, results in the need to place more emphasis on this field in our routine work.

The Serbian Commissioner for Protection of Equality reported that over the years, the number of complaints about age discrimination has increased. Since 2013, the number of complaints filed on the grounds of age discrimination has been around 10% of the total number of complaints submitted on an annual basis. Of the total number of complaints filed on the ground of age, about one third refer to discrimination over the age of 65. Age as a ground for discrimination was the second most commonly cited in terms of the number of complaints received in 2016, 2017 and 2018. The increase in the workload is the result, in some cases, of several actions conducted in the field. For example, the Gender Equality and Equal Treatment Commissioner's Office of Estonia has:

- placed greater emphasis on empowering older persons and informing them of their rights,
- increased attention to the development of new positive action measures,
- increased the use of the intersectionality aspect of age-based discrimination.

Another example provided by the Austrian Ombud for Equal Treatment (Gleichbehandlungsanwaltschaft) shows that the institution receives information about older persons feeling excluded due to the rapid digitalisation of various

services. Moreover, the institution has identified an increased need to develop targeted information for older persons.

A third theme relates to the shift in attention from ageing in general, to intersectionality in ageing specifically, that is, not only the human rights of older person, but the human rights of older persons who are also members or other minorities or disadvantaged groups.

For example, “special attention should be paid to preventing discrimination against those groups of older people who are discriminated against on several grounds, in particular elderly people with disabilities, refugees, elderly people in rural areas affected by violence, etc.” [Commission for Protection against Discrimination of Bulgaria].

14. Do you ground your overall approach on the rights of older persons on the right to equal treatment (non-discrimination) and what theory of equality do you use?

At this point, an even more specific question was asked. The organisations were asked to reflect on whether they ground their overall approach on the rights of older persons on the right to equal treatment (non-discrimination).

Almost all participants stated that they understand and ground their general approach to the rights of older persons based on the principles of equality and anti-discrimination (as they are defined within EU laws and directives). However, within this general consensus, some interesting nuances were observed.

An important factor for success in the fight against discrimination is prevention, an approach applied by the Bulgarian Commission for Protection against Discrimination. “The prevention of all forms of discrimination is the cornerstone of interpersonal relations that would give strength and confidence to our society that everything that has been done is being done or will be done in the future to ensure that discrimination is prevented”, reported the Commission in the questionnaire. Besides, the members of the Commission and the employees of its administration observe the principles of independence, efficiency and transparency; they are guided by the objectives of the law to ensure equality in treatment and opportunities for participation in public life, as well as effective protection against discrimination.”

The Institution of Human Rights Ombudsman/Ombudsmen of Bosnia and Herzegovina gave another interesting example on how is discrimination connected with participatory citizenship: “... age discrimination limits the potential of older persons and affects their health and wellbeing, and diminishes their contribution to social, economic, cultural and political life, and is therefore unacceptable in modern society and is a violation of the rights of older people who are full citizens with the same rights as everyone else.”

Finally, various participants made references to human dignity and the right to dignified life as part of (or the grounds for) the right to equality. The Bulgarian Commission for Protection against Discrimination underlines that “the old shall have the right to dignified living conditions, without discrimination”. The Commission “pursues a consistent and targeted policy to protect vulnerable groups, including the elderly, guided by the principles of non-discrimination, respect for human dignity and ensuring conditions for equal opportunities and equal treatment of all Bulgarian citizens”.

15. In what ways has your approach to the rights of older persons been influenced inter-sectionally (for example, by reference to the rights of persons with disabilities, or gender)?

An even more specific question was then asked. It focused on the ways in which the approach to the rights of older persons have been influenced by intersectionality (for example, by reference to the rights of persons with disabilities, or gender).

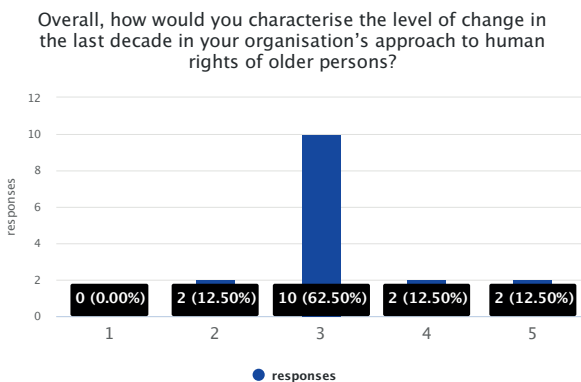
As has already been indicated, this point was raised in previous answers. For the most part, most participating organisations have shown a growing awareness of the intersectional nature of the human rights of older persons. For example, the Czech Public Defender of Rights reported that “disability, gender, ethnic or racial origin, and other grounds of discrimination are taken into account during the examination of a complaint submitted by an older person as regards access to goods and services, employment, etc., in order to examine possible intersectional implications.”

According to the Office of the Commissioner for Fundamental Rights of Hungary, “older age is influenced by more challenges that people must face, such as poverty, and gender, racial, ethnic, or religious discrimination and other types of discrimination”. As already mentioned, older persons are not a homogenous group, and they face different issues under different circumstances. This is why their rights are analysed from different perspectives.

16. Overall, how would you characterise the level of change in the last decade in your organisation’s approach to human rights of older persons?

In conclusion of this part, all participants were asked about the change in the last decade in their approach to the human rights of older persons.

As seen below, and despite the various themes which were identified above, the majority of organisations did not characterise the level of change as high or very high. Therefore, in participants’ view, the last decade did not demonstrate a major shift in their approach towards the human rights of older persons.

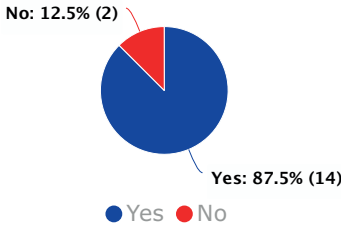


C. Use of general international law in the rights of older persons by the bodies surveyed.

At this stage of the questionnaire, the focus shifted from the level of local and European law to the level of international law, as it relates to the human rights of older persons.

17. Have you made use of international law instruments (whether soft law or hard treaty law) in your analysis/work on the rights of older persons in the last ten years?

Have you made use of international law instruments (whether soft law or hard treaty law) in your analysis work on the rights of older persons in the last ten years?



With regard to the first question, the majority of organisations reported they made use of international law instruments in their work on the rights of older persons.

For example, the Greek Ombudsman regularly uses international and European law. In addition, several mandates of

the Greek Ombudsman are based on international or European law.

Another example confirms the use of the Vienna International Plan of Action on Ageing, adopted by the World Assembly on Ageing held in 1982 and approved in the same year by the UN General Assembly under Resolution 37/5, the United Nations Principles for Older Persons adopted in 1991 by the UN General Assembly under Resolution 46/91 and the International Plan of Action on Ageing and the Political Declaration – adopted by the Second World Assembly on Ageing, Madrid.

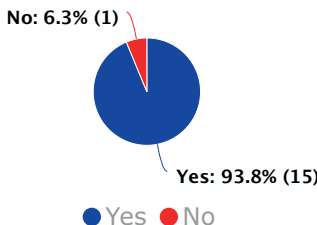
18. Which treaties did you invoke (for example, UN ICCPR, ECHR, ICESCR, ESC) and why?

A follow-up question was much more specific and sought to explore which treaties were invoked (for example, UN ICCPR, ECHR, ICESCR, ESC) and why.

Most of the organisations cited most, if not all, of the well known binding international instruments. For example, the Office of the Commissioner for Fundamental Rights of Hungary refers to the UN ICCPR, ICESCR, UN CRPD, ECHR, ESC as authoritative international instruments. In addition, the Office makes use of the UN general comments, the European Committee of Social Rights' decisions and case law.

19. Do you follow the Council of Europe general developments (for example, Committee of Ministers, Commissioner for Human Rights, Parliamentary Assembly, etc.) on the rights of older persons?

Do you follow the Council of Europe general developments (for example, Committee of Ministers, Commissioner for Human Rights, Parliamentary Assembly, etc.) on the rights of older persons?



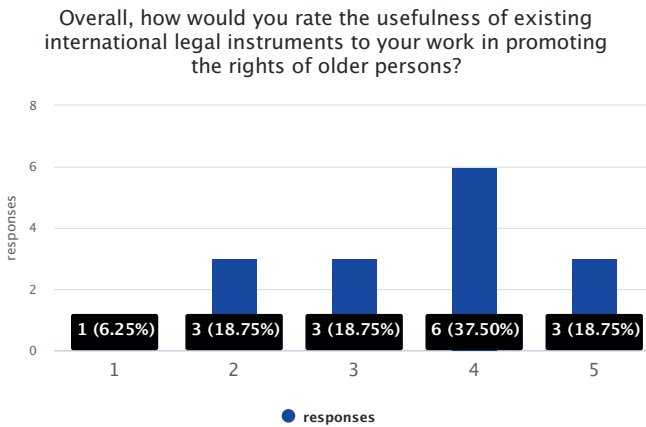
Moving down" from the broad international level to the European level, the next question focused on the Council of Europe's developments in the field.

Here the responses were almost unanimous: all organisations stated the importance of and their reliance on the Council of Europe's policies.

The Council of Europe is a crucial platform for the work of the National Commission for the Protection of Equality of Malta since it provides information on the current situation across the EU. Most organisations follow the developments within the Council of Europe on the rights of older persons which improve the quality of their work and recommendations.

20. Overall, how would you rate the usefulness of existing international legal instruments to your work in promoting the rights of older persons?

To conclude this part, a general question was asked with regard to the usefulness of international legal instruments relating to the promotion of the rights of older persons.

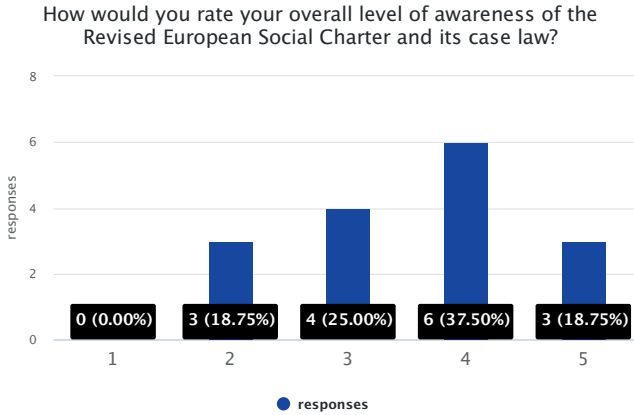


As can be seen, the majority of organisations rated the usefulness of international law as high or very high with regard to their work in promoting the rights of older persons.

D. Use of the European Social Charter by the bodies surveyed

After examining the general approach toward promoting the human rights of older persons, and after looking into the more specific elements of the usage of international law, at this stage, the questionnaire moved on to ask directly about the usage of the European Social Charter.

21. How would you rate your overall level of awareness of the Revised European Social Charter and its case law?



The first question asked the organisations how they would characterise their overall level of awareness of the Charter and its case law.

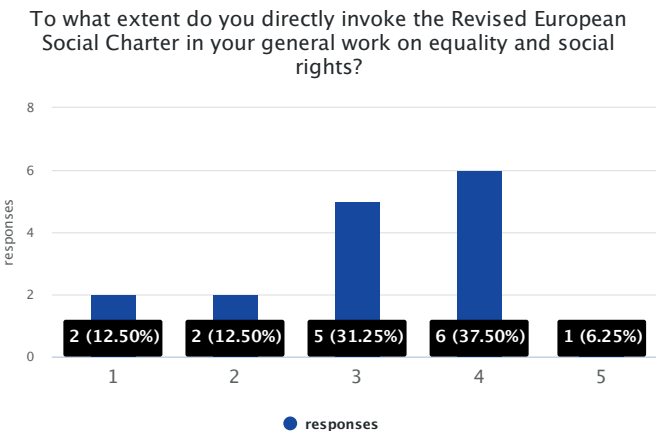
As can be seen, a small majority rated their awareness as high or very high.

Since its ratification in 1999, the European Social Charter has been for the Institution of Human Rights Ombudsman/Ombudsmen of Bosnia and Herzegovina “a useful tool in supporting the institute's positions (elaboration of reports and points of view) and in designing training activities and promotion materials.”

However, various organisations reported that more training and awareness raising activities on the Charter at national level would be desirable, especially for the staff of the various human rights organisations.

22. To what extent do you directly invoke the Revised European Social Charter in your general work on equality and social rights?

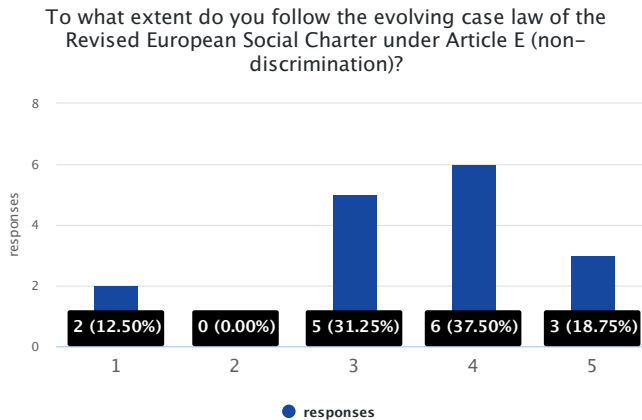
The second question in this context was to what extent did the organisations invoke the European Social Charter in their general work on equality and social rights?



In contrast to responses to the previous question, here, the majority of organisations stated they did not invoke the Charter in their general work on equality and social rights. The reasons varied: in some cases, the home country had not ratified the Charter or some of the relevant articles; or, in other cases, organisations use their national anti-discrimination legislation. Others reported they make use of most of the mechanisms in the European Social Charter in order to strengthen their arguments.

23. To what extent do you follow the evolving case law of the Revised European Social Charter under Article E (non-discrimination)?

The third question in this context concerned the evolving Charter case law under Article E:

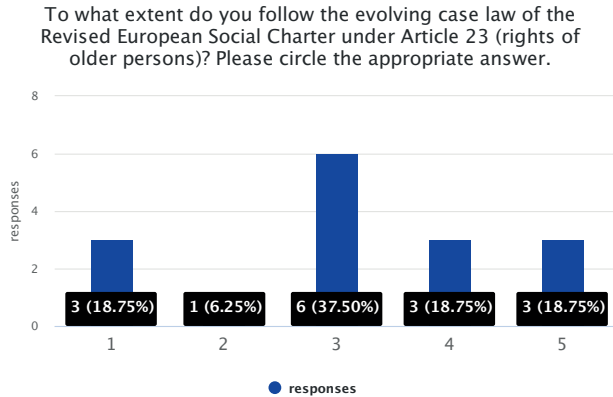


Here again, the responses showed that the majority of the organisations do follow the Charter's caselaw under Article E (non-discrimination).

This is confirmed by the Greek Ombudsman, who points out that the case law of the Charter is essential for its work. However, some organisations did mention that a "more proactive approach is needed from the Charter to disseminate information.

24. To what extent do you follow the evolving case law of the Revised European Social Charter under Article 23 (rights of older persons)? Please circle the appropriate answer.

Drilling down even further and specifically, the next question concerned the extent to which the organisations followed the Charter’s case law under Article 23 (rights of older persons).

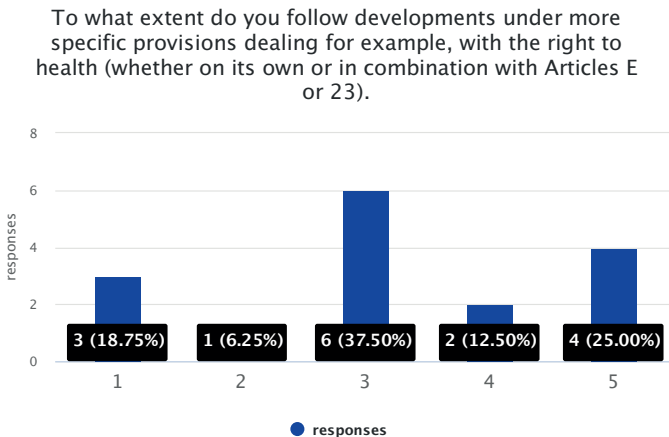


Compared with the previous question (which referred to Article E), the degree of case law follow-up with regard to Article 23 was lower.

In this context, more organisations stated that the Charter should have more proactive approach in disseminating information as this is not a daily priority for human rights organisation.

25. To what extent do you follow developments under more specific provisions dealing for example, with the right to health (whether on its own or in combination with Articles E or 23).

Along similar lines, the next question also focused on specific articles of the Charter, for example, the right to health.

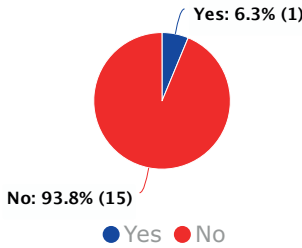


The results here were almost identical to the previous question, and the comments mostly referred to or copied the previous responses.

The next set of questions focused on the Charter's collective complaints procedure.

26. Have you supported any collective complaints under the Additional Protocol?

Have you supported any collective complaints under the Additional Protocol?



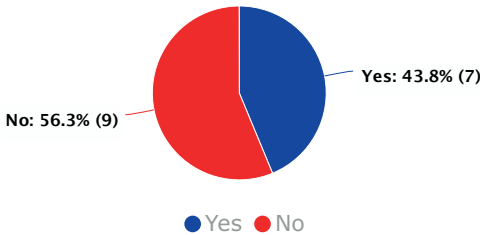
The first question was whether the organisation had supported any such action.

The vast majority had not supported any collective complaint due to the fact that their countries had not ratified the Additional Protocol. However, one example was provided:

“Complaint No. 119/2015, European Roma and Travellers Forum (ERTF) v. France.”

27. Would you consider supporting a collective complaint on the rights of older persons under the Additional Protocol?

Would you consider supporting a collective complaint on the rights of older persons under the Additional Protocol?



The next question with regard to the collective complaint mechanism was whether the organisation would consider supporting such an action.

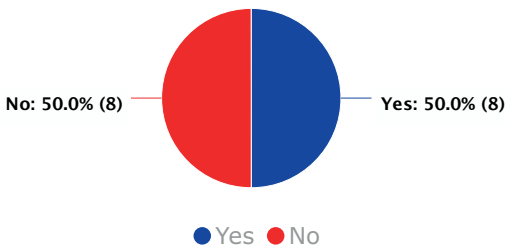
While the majority of organisations still were not willing (or legally able) to support a collective complaint, a larger group of organisations was

open to taking this avenue in the future.

For example, although Romania has not yet ratified the collective complaints procedure, the Romanian Institute for Human Rights shows interest in the procedure.

28. Would you consider lodging an amicus curiae brief to a collective complaint on the rights of older persons?

Would you consider lodging an amicus curiae brief to a collective complaint on the rights of older persons?



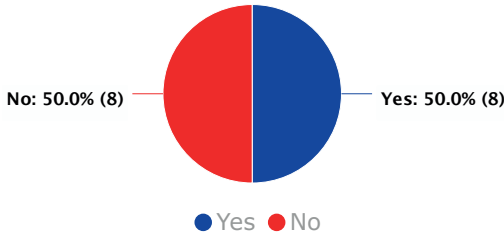
In the same suite of questions, this time the question focused on the organisations' willingness to consider lodging an *amicus curiae* brief to a collective complaint on the rights of older person.

Continuing the previous trend, this time, half of the organisations were willing to

submit such an amicus brief depending on their field of expertise (for example in discrimination cases) or whether their country has ratified the Additional Protocol providing for a system of collective complaints.

29. Would you consider registering with the Charter to be able to launch a collective complaint in your own right (presuming you are allowed to do so under Article 2)?

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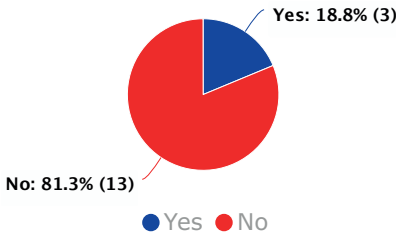
Concluding this series of questions, the next question was about the willingness of the organisation to register with the Charter in order to be able to launch a collective complaint.

The answers here were the same as those to the previous question.

The final line of questions with regard to the European Social Charter touched on engagement with periodic government reports.

30. Have you submitted comments on periodic government reports dealing with the rights of older persons under the reporting procedure of the ESC?

Have you submitted comments on periodic government reports dealing with the rights of older persons under the reporting procedure of the European Social Charter?



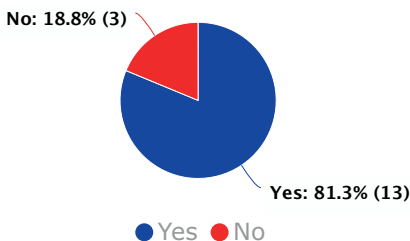
The first question concerned whether the organisation submitted comments on the government reports dealing with the rights of older persons.

As it turns out, the majority of organisations had not submitted any such comments.

The comments on this question tended to be laconic, as most participants simply did not make reference to this activity. It is possible they were unaware that they could engage in the procedure.

31. If the Committee makes a negative finding against your jurisdiction (especially on the rights of older persons) do you highlight that in your work (including with the media)?

If the Committee makes a negative finding against your jurisdiction (especially on the rights of older persons) do you highlight that in your work (including with the media)?



Finally, the last question in this part of the questionnaire, referred to cases of

non-conformity with the Charter and whether the organisation in question would highlight that in its work.

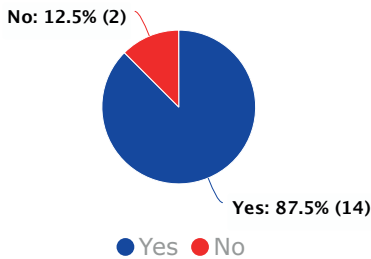
The vast majority stated that they would highlight it and take it into account in their work. This is even more relevant when the finding is related to a topic that is specifically covered by the organisation.

E. Emergencies, social rights and COVID-19.

At this stage, the questionnaire's focus shifted to the COVID-19 pandemic and its impact on the older population and their rights.

32. Are you tracking the impact of COVID-19 on the enjoyment of social rights by older persons?

Are you tracking the impact of COVID-19 on the enjoyment of social rights by older persons?



The first question sought to assess the extent to which the organisations were tracking the impact of the COVID-19 on the social rights of older persons.

As can be seen, the vast majority of organisations were tracking the impact of COVID-19 on the social rights of older persons.

For example, in Serbia, following the adoption of the decision on

declaring a state of emergency, the Commissioner for Protection of Equality continued to monitor the situation in the field of equality and recommended the government and line ministers various measures addressing the situation of the most vulnerable during the pandemic.

The Romanian Institute for Human Rights has issued a preliminary report on the consequences of the COVID-19 pandemic in Romania and the measures taken by the Romanian authorities. The need to ensure participation of older persons in the design of these measures and to ensure older people's right to information and care was highlighted. Moreover, the need to combat ageism and to protect older persons from violence (in family or in care facilities) was stressed by the Institute.

33. What are your main concerns/focus or concern regarding the social rights of older persons during the COVID-19 crisis?

The second question relating to the COVID-19 sought to identify the main concerns/focus or concern regarding the social rights of older persons during the COVID-19 crisis.

Several important themes and key issues were raised in this regard.

One of them was the restriction of movement (lockdown) and its impact on older persons. One aspect was the potential impact of lockdowns on older people relying on formal or informal care providers.

For example, after the adoption of measures of prohibition or restriction of movement for all citizens, the Hungarian Commissioner for Fundamental Rights pointed out

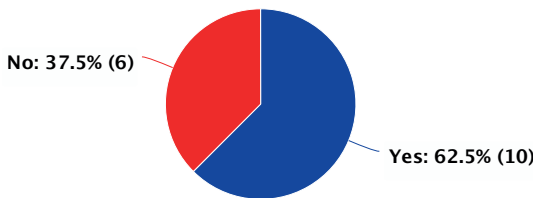
the problems faced by persons with disabilities, people suffering from rare diseases, people who were in the terminal phase of a disease and who were using palliative care at home, as well as persons suffering from dementia, using the services of mobile teams or informal carers with whom they do not live in a joint household.

The rights of older persons in nursing homes and long-term care facilities were another issue of concern for National Human Rights Institutions and Equality Bodies. For instance, the Commissioner for Fundamental Rights of Hungary carried out several investigations where the appropriate care of persons living in residential institutions was checked, in order to ensure in particular, the right to contact.

Issues related to age discrimination and social exclusions, access to health care services and vaccination were also mentioned. A specific reference was made to the “digital divide” that is the lack of technological skills among older persons.

34. Has the COVID experience changed your approach to some key issues – for example, the future wisdom of institutionalisation for older persons?

Has the COVID experience changed your approach to some key issues – for example, the future wisdom of institutionalisation for older persons?



The third question in the context of COVID-19, was focused on institutional care.

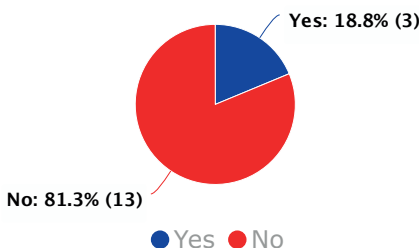
As can be seen, the COVID-19 pandemic made the majority of organisations change their approach on key issues relating to the institutionalisation of older persons.

For example, the National Commission for the Protection of Equality of Malta has, above other aspects, reinforced its work in promoting the importance and quality of what elderly people have to offer our society – rather than to be seen as a burden. Moreover, the Commission has been promoting the strengthening of community care for the elderly.

Other organisations emphasise the importance of consulting older people and enabling them to participate actively in the development of policies and measures that affect their lives. In addition, it is important to put in place supportive measures that guarantee their inclusion.

35. Have you used the European Social Charter and its jurisprudence in assessing the adequacy of national policy and administrative responses to COVID?

Have you used the European Social Charter and its jurisprudence in assessing the adequacy of national policy and administrative responses to COVID?



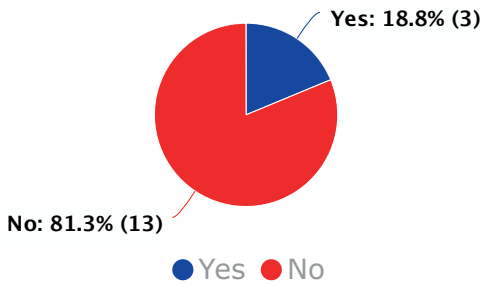
The fourth question connected the COVID-19 crisis with the European Social Charter and its jurisprudence.

The majority of organisations did not use the Charter and its jurisprudence to assess the adequacy of national

policy responses to the COVID-19. Organisations reported that apart from the statement of interpretation on the right to protection of health in times of pandemic, there has not been any other guidance with respect to older persons. Others clearly informed that they had not used the Charter in assessing the adequacy of national policy relating to the rights of older persons.

36. If you have identified a particular problematic in your jurisdiction (e.g., unwarranted rationing of scarce medical resource on the grounds of age) are you thinking of framing or supporting a collective complaint to ventilate the issues before the European Social Charter mechanisms and/or to submit comments on the national report due in 2020 for the adoption of Conclusions by the European Committee of Social Rights in 2021?

If you have identified a particular problematic in your jurisdiction (e.g., unwarranted rationing of scarce medical resource on the grounds of age)?



The last question with regard to COVID-19 sought to reveal whether the organisations were thinking of framing or supporting a collective complaint to ventilate the issues before the Charter’s mechanisms (and/or submit comments on the national report).

As can be seen (and like previous answers regarding the willingness/ability to submit collective complaints), the majority of organisations were not considering taking such avenues of action. The reasons, again, were either that their country had not ratified the Additional Protocol providing for a system of collective complaints, or that they simply had not yet discussed doing so.

F. Future orientations.

The final part of the questionnaire dealt with future orientations and actions with regard to the rights of older persons and the European Social Charter.

37. How, practically, can general levels of awareness about the jurisprudence of the European Social Charter on the rights of older persons be increased among NHRIs etc?

As to how, practically, general levels of awareness about the jurisprudence of the European Committee of Social Rights on the rights of older persons could be increased among NHRIs and NEBs.

Various suggestions were provided. Below are some of the key ones:

- (1) Through conferences and meetings on this subject.
- (2) Capacity building initiatives and training/participation in relevant EU/ International networks and fora.
- (3) Exchange of good practice.

- (4) With synergies, collaboration, and networking.
- (5) Raising awareness through regular workshops and webinars, along with factsheets or newsletters on recent developments in the jurisprudence of the Committee concerning the rights of older person.
- (6) By providing advice to EU Member States on fundamental rights when implementing EU law, as well as expertise that will help build a set of tools to protect the rights of older people and those of vulnerable groups.
- (7) Coherent and short reporting and follow-up, provision of updates via mail or webinars.
- (8) It is important that NHRIs/NEBs have their own human resources dedicated to the organisation's tasks. This could help the monitoring of the human rights of older persons and other vulnerable groups and ensure that cooperation is more efficient.

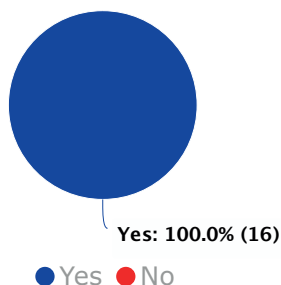
38. What, in your view, can the European Committee of Social Rights do to make its proceedings more accessible including with regard to the rights of older persons?

The second question concerned what the European Committee of Social Rights can do to make its proceedings on the rights of older persons more accessible. Once again, various suggestions were provided. Here are some key directions:

- (1) Encourage the participation of stakeholders with different lines of expertise to facilitate a multi-disciplinary and representative approach. Give stakeholders an opportunity to be a part of/ give their input through user-friendly tools.
- (2) Encourage the collaboration with national institutions and civil society. Raise awareness.
- (3) Encourage the members of the European Committee of Social Rights to be more present at national level and organise exchange of views with NHRIs/NEBs.
- (4) Develop an online network to exchange information.
- (5) Organise webinars and online courses.
- (6) Publish periodic statements or infographics.
- (7) In addition to conferences/platforms, secure regular publishing of information on social media or newsletters.

39. Can NHRIs/NEBs work better together to step up engagement with the European Social Charter machinery?

Can NHRIs/NEBs work better together to step up engagement with the European Social Charter machinery?



The follow-up question focused on how the organisations could work better together to step up engagement with the European Social Charter machinery.

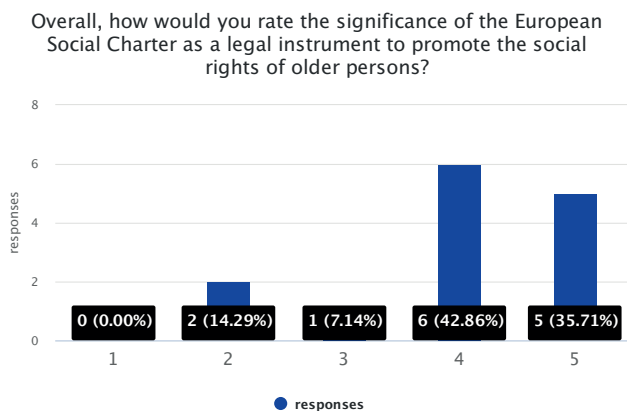
All participants gave positive answers to this question.

Once again, various practical suggestions were put forward, such as holding joint meetings to share knowledge and expertise.

- (1) Organise training on relevant provisions.
- (2) Encourage participation in country-specific social rights projects.
- (3) Mainstream social rights in the work of other Council of Europe sectors.
- (4) Organise special campaigns on the relevance of the European Social Charter.
- (5) Advocate for the full acceptance of the articles enshrined in the European Social Charter.
- (6) Disseminate press releases or reports issued on specific dates.
- (7) Regularly organise international workshops to disseminate knowledge and experience.

40. Overall, how would you rate the significance of the European Social Charter as a legal instrument to promote the social rights of older persons?

The final question in this questionnaire was about the overall rating by the bodies surveyed of the significance of the Charter as a legal instrument to promote the rights of older persons.



The majority of organisations rated the significance of the Charter as a legal instrument to promote the rights of older persons highly or very highly.

11.2 Analysis of the responses

Though far from comprehensive, the survey results nevertheless give rise to some tentative conclusions.

First of all, the human rights of older persons are certainly on the map for NHRIs, ombudspersons and National Equality Bodies in Europe. This is a good sign and augurs well for the slow but inexorable transition to the rights-based framing of age – and away from ageism – across Europe.

Secondly, respondents reported a significant body of activity and involvement in the legislative process, as well as special reports being published, and investigations and studies progressing in the field. This is a step change even compared with ten years ago.

Thirdly, there is a strong sense of a right to equality and anti-discrimination, and of “age discrimination” being the main conceptual framework within the field of human rights of older persons. This of course, places a premium on which theory of equality is brought to bear. Overall, the rich theory of equality put forward by the European Committee of Social Rights under Article E seems well suited to the needs of these bodies. There is also a growing interest in the more specific and targeted human rights issues of older persons (for example, elder abuse, long-term care, and pensions).

Fourth, there was a growing awareness of the inter-sectional nature of the human rights of older persons. This is positive as it enables cross-identity insights to emerge and because it underscores the accumulated disadvantages that can accrue through age when associated with other traits such as LGBTI or disability.

Fifth, overall, the organisations surveyed used international law (both hard and soft law) in their work and viewed it as a useful tool to promote the rights of older persons. They are well placed to use a possible UN treaty on the rights of older persons in their future work.

Sixth, the majority of organisations surveyed were well aware of the European Social Charter. If given the opportunity (that is, once their home-country decides to ratify the Additional Protocol providing for a system of collective complaints or to opt in under the Revised Charter), many of the organisations surveyed would be willing to file cases or to be involved in supporting collective complaints. This shows there is interest in and a willingness to use the collective complaints procedure, provided there is a more widespread opt in to the process on the part of States Parties.

Seventh, most of the organisations surveyed were active and aware of the need for the special protection of the human rights of older persons during the COVID-19 crisis. They were also able to cite specific fields (for example, nursing homes, age discrimination, access to care) where the rights of older persons were infringed at times during the crisis and the various social policies which followed (for example, lockdowns; social distancing and age-based restrictions). Most of those surveyed realised there was a need to review their position regarding the institutionalisation of older persons in light of the COVID-19 experience.

On the other side of the ledger, there were some negative trends which point to the need for change.

First, there was little reported use of litigation or *amicus curiae* briefs at either the domestic level or internationally.

Second, the dominant framing still tends to be a rather narrow conceptualisation of equality or discrimination. That is to say, a deeper understanding of personhood and a human rights framing of old age have yet to emerge. However, it is probably fair to say that the bodies surveyed are well on the road to this.

Third, there seems to be a low level of participation by the bodies surveyed at the international level with regard to the movement to advance a new international convention on the rights of older persons. It is to be hoped that, as they become more aware of the process (and more convinced of its added value), they will step up engagement and also promote the idea in their own jurisdictions.

Fourth, the majority of organisations surveyed did not invoke the European Social Charter in their general work. There seems to be a mismatch here since they are clearly on a journey toward a rights-based framing of old age and the Charter, and its jurisprudence could meaningfully advance that agenda.

Fifth, the majority of the participating organisations' home-countries had not ratified the Additional Protocol providing for a system of collective complaints nor opted in to the relevant provisions of the Revised Charter, thus precluding the option of using the collective complaints mechanism as an instrument to promote the rights of older persons. This points to the need for such bodies to advocate for adhesion by their countries to the relevant provisions - thus, *inter alia*, enabling collective complaints on the rights of older persons to move forward.

Sixth, the majority of organisations did not provide comments with regard to their own governments' periodic reports concerning the rights of older persons. That creates a credibility gap whereby governments are not questioned as closely as they might be in the absence of such authoritative inputs.

Seventh, many of the organisations surveyed did have practical suggestions to enhance engagement with the machinery of the European Social Charter. Most of them centred on increased outreach and awareness raising by the Charter machinery. There were also practical suggestions about how to showcase the jurisprudential highlights. This fits with our overall suggestion that thematic general comments should be adopted by the European Committee of Social Rights as a way of incentivising more widespread engagement.

With regard to the COVID-19 pandemic and the rights of older persons, most of the bodies surveyed acknowledged that governments' responses and subsequent social policies addressing the pandemic resulted in infringing their human rights, including discrimination, ageism, social isolation, and a lack of sufficient access to care. Here, most organisations surveyed did use the European Social Charter as an instrument to address the human rights of older persons during the COVID-19 crisis. Most organisations were not actively thinking of using the European Social Charter mechanisms (for example, collective complaints, or comments on national reports) as a mean to ventilate the issues surrounding the rights of older persons which were raised during the COVID-19 crisis. However, if there was a more widespread ratification of the collective complaints system, they might do so.

Overall, the trend is positive. European NHRIs, equality bodies and ombudspersons are increasingly aware of the human rights framing of old age. They are beginning to go beyond narrow equality or non-discrimination framings. They are aware of the possibility of drafting a new UN thematic treaty on the rights of older persons. They are also aware of the jurisprudence of the European Committee of Social Rights. They seem inhibited by the lack of broader ratification of the collective complaints

procedure by their own countries which, of course, points to the need for more domestic advocacy to do same. And they have practical suggestions for the European Committee of Social Rights to give greater prominence to its jurisprudence. The bodies surveyed form part of the transmission belt between the glittering generalities of international law and their effective application on the ground where it matters most. Provided some of the inhibiting factors listed above can be overcome, there is no reason to doubt that the relationship between the Charter mechanisms and change on the ground for older persons can well serve the European public interest.

12. Civil society engagement with the European Social Charter: survey results and analysis

Human rights begin and end in small places – where people live their lives. As older people across Europe frame their sense of grievance in terms of rights and as they advocate for change, they either find instruments such as the European Social Charter in those endeavours useful or not. Civil society organisations of and for older persons have been in existence for a long time. And they are changing.

The purpose of this part of the survey was to gauge their migration towards a human rights framing of old age and to assess their sense of the usefulness of the Charter as they advocate for a rights-based approach in their home jurisdictions. We are extremely grateful to all those who participated and wish to thank in particular Nena Georgantzi of AGE Platform Europe for the wide dissemination of the relevant questionnaire.

12.1 Results of the survey

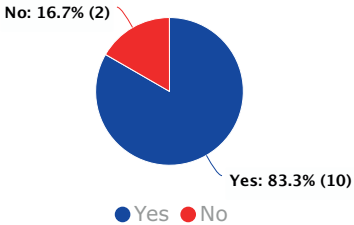
A total of 11 civil society organisations responded to the questionnaire. We are extremely grateful to all those that replied.

1. AGE Platform Europe
2. Charity Foundation Caritas Moldova, Republic of Moldova
3. Slovenska Karitas, Slovenia
4. KG (Koepel Gepensioneerden), Netherlands
5. Türkiye emekliler derneği, Turkey
6. énéo, Mouvement social des aînés, Belgium
7. Caritas Española, Spain
8. Atdal Over 40, Italy
9. Pancyprian Public Employees Trade Union (PA.SY.D.Y. Pensioners), Cyprus
10. 50plus Hellas, Greece
11. Alzheimer Europe, Luxembourg

Part A. Work to date on the rights of older persons.

1. Would you describe yourself as a rights-based organisation of or for older persons?

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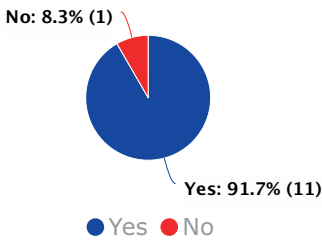


As can be seen, a large majority of the organisations reported that they are rights-based organisations of or for older persons.

For example, “human rights are the backbone” of AGE work.

2. Have you commented/do you comment on draft legislation from the perspective of a rights-based approach to older persons?

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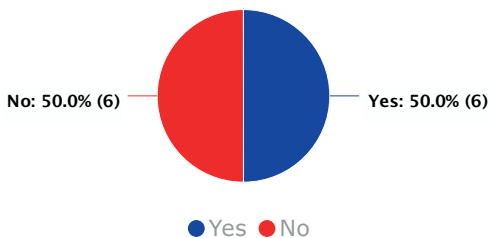


Here again, most organisations commented on draft legislation from the perspective of a rights-based approach to older persons.

For example, the following fields of legislation were mentioned: national minimum standards for home care, reformulation of pension rights, legislation, and ethics at EU level, international and national levels.

3. Have you proposed draft legislation to your government on the rights of older persons?

Have you proposed draft legislation to your government on the rights of older persons?



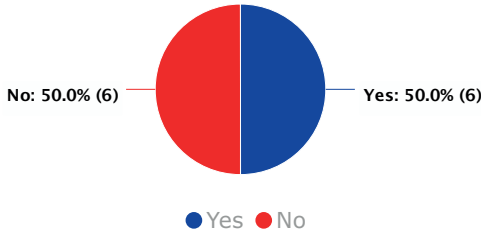
With regard to whether organisations have proposed draft legislation on the rights of older persons to their governments, half of the organisations had done so.

For instance, AGE has been behind a coalition of NGOs calling for extending legislation to cover age discrimination. In Italy, the Associazione di promozione

sociale has been hosted three times in the Senate to present documents about the issue of over 40 unemployed persons and some legislative proposals.

4. Are you actively consulted by the government in the drafting of laws and policies on the rights of older persons?

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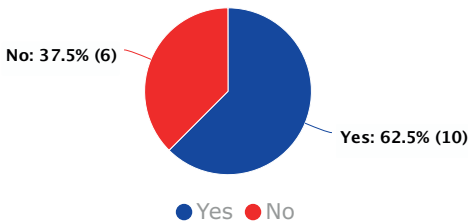
Again, half of the organisations reported they had been actively consulted by their governments in the drafting of laws and policies on the rights of older persons.

For example, as the largest EU network of organisations representing older persons at EU level, AGE is regularly consulted by EU policymakers on a number of

important legal and policy dossiers. In addition, AGE is also represented in several expert and advisory groups which have an 'ageing' focus.

5. Has your organisation made presentations on the rights of older persons at hearings in parliament or other government commissions?

Has your organisation made presentations on the rights of older persons at hearings in parliament or other government commissions?



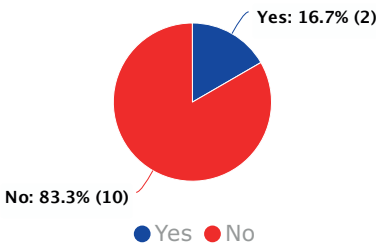
From the responses, it can be seen that a majority of organisations were active – and had made presentations on the rights of older persons at hearings or other government commissions.

For example, the Greek Ombudsman submits its annual report and its special report as an equality body to the Parliament."

The Ombudsman/Ombudsmen of Bosnia and Herzegovina is required to submit the results of activities undertaken during the reporting period at the beginning of each year to the Presidency of Bosnia and Herzegovina, the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

6. Has your organisation been involved with or in supporting litigation in the courts on the rights of older persons?

Has your organisation been involved with or in supporting litigation in the courts on the rights of older persons?



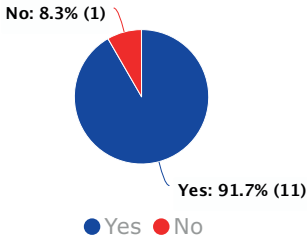
As can be seen, most organisations were not involved with or supported litigation in the courts on the rights of older persons.

For example, AGE can lodge collective complaints before the European Committee of Social Rights, but it has not yet taken advantage of this opportunity due to limited resources and capacity

within the organisation and its membership.

7. Do you work intersectionally with other groups/grounds such as gender, disability, migrants etc.?

Do you work intersectionally with other groups grounds such as gender, disability, migrants etc.?



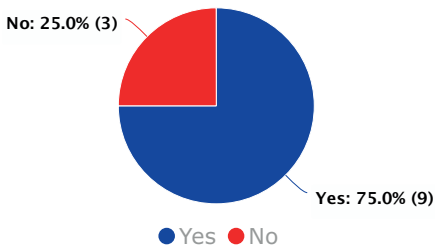
The answers show that the majority of organisations worked intersectionally with other groups/grounds.

For example, AGE takes an intersectional approach as far as possible and also coordinates regularly with other Brussels-based equality networks and equality and human rights actors such as

EQUINET and ENNHRI.

8. Have you published major reports, studies, policy blueprints or other relevant documents on the rights of older persons?

Have you published major reports, studies, policy blueprints or other relevant documents on the rights of older persons?



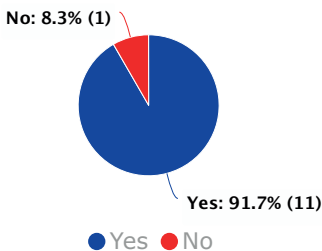
It seems that the majority of organisations had published major reports, studies, policy blueprints or other relevant documents on the rights of older persons.

For example, AGE regularly publishes policy papers on the human rights of older persons, which can be found on the website of the organisation: <https://www.age-platform.eu/age-news-human-rights-and-non-discrimination>.

AGE also develops capacity building materials, such as an online handbook, which aims to help self-advocates use existing human rights mechanisms.

9. Do you engage in media campaigns to advance the rights of older persons?

Do you engage in media campaigns to advance the rights of older persons?

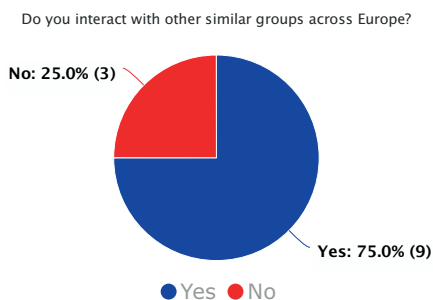


From the responses received, it can be seen that the majority of organisations had engaged in media campaigns to advance the rights of older persons.

For example, AGE publishes regular press releases and, at times, also publishes opinions and articles in mainstream or specialised media. In addition, AGE publishes a news-

letter, participates in projects, shares activities on social media, disseminates press releases and carries out radio, tv, and new media interviews.

10. Do you interact with other similar groups across Europe?



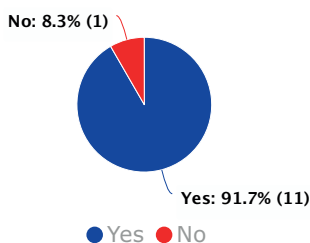
As can be seen in the chart, a majority of organisations do interact with other similar groups across Europe such as with National Equality Bodies, National Human Rights Institutions, other (I)NGOs. For example, AGE Europe, as an umbrella organisation bringing together national, local and European organisations working

to promote the rights of older persons, interacts with several national and international partners, such as HelpAge International.

B. Significant steps in the evolution of thinking on the rights of older persons.

11. Has your organisation evolved to embrace the rights-based perspective on older persons?

Has your organisation evolved to embrace the rights-based perspective on older persons?



From the responses, it can be seen that most of the organisations have evolved considerably to embrace a rights-based perspective on older persons.

For example, Caritas Slovenia has been working to protect the retirement benefits of retired people and the quality of their health care. The rights-based approach is used

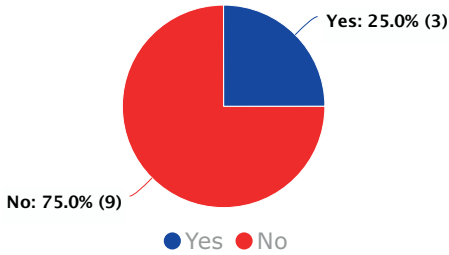
in residence homes, day centres, support and social participation programmes. This positive development is due to the fact that, despite being recognised and administratively and legally regulated, the rights of older persons are not effectively guaranteed.

For this question, there was a sub-question regarding which rights the organisation sees as particularly important. The answers for this sub-question varied and included references to the following rights:

- the right of elderly persons to social protection (as protected by Article 23 of the European Social Charter),
- the right to adequate retirement benefits,
- the right to adequate resources,
- the right to health care,
- the right to information, internet services, digital education in order to bridge the digital divide.

12. Would you say that the rights-based approach is widely understood and shared in society at large?

Would you say that the rights-based approach is widely understood and shared in society at large?

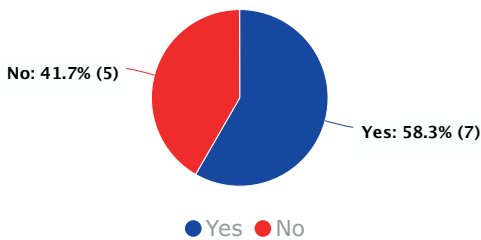


It seems that most of the organisations think that the rights-based approach is not widely understood and shared in society. There is still plenty of room for learning, debating and implementing.

C. General engagement with international human rights instruments and monitoring mechanisms.

13. Do you follow the evolution of the rights-based approach to older persons in the UN treaty system?

Do you follow the evolution of the rights-based approach to older persons in the UN treaty system?



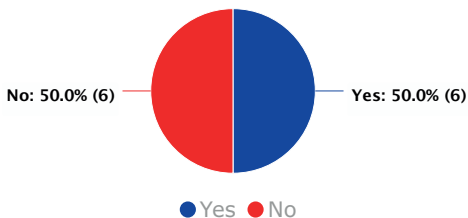
It seems that somewhat more than half of the organisations (58.3%) follow the evolution of the rights-based approach to older persons in the UN treaty system.

Certain organisations reported that, although they understand the critical importance of this process, they do not have enough resources to be fully engaged and

follow the evolution of the human rights-based approach to older persons. For others, this is not of a key importance for their work which is more focused at the EU and European level.

14. Do you follow (or are you actively involved in) the possible drafting a new UN treaty on the rights of older persons in the UN Open-ended Working Group on Ageing?

Do you follow (or are you actively involved in) the possible drafting a new UN treaty on the rights of older persons in the UN Open-ended Working Group on Ageing?



Here, the answers were split down the middle.

Certain organisations do not participate in the UN Working Group, due to the lack of financial resources. On the contrary, AGE Europe has been participating in the OEWG since 2012 and has been actively contributing to the discussions through written and

oral contributions and participation in events and intersessional meetings.

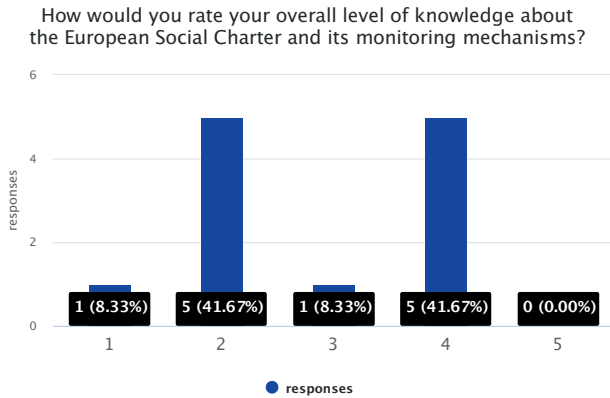
15. To what extent do you use international legal and policy developments in your own work?

Most of the organisations reported that they use international legal and policy developments in their work. Organisations are trying to keep up with legislative and policy changes at the international level, but sometimes it is difficult to implement them due to insufficient resources.

International standards are used in order to achieve programme’s objectives and develop specific activities or to inform partners organisation and other stakeholders about latest developments.

D. Knowledge/use of the European Social Charter.

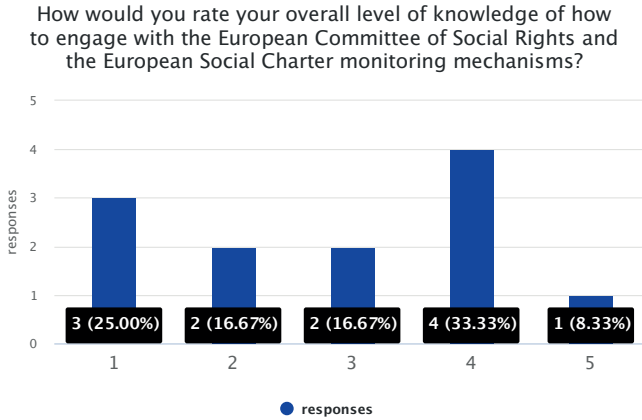
16. How would you rate your overall level of knowledge about the European Social Charter and its monitoring mechanisms?



Only a minority of organisations rated their knowledge/use of the Charter and its monitoring mechanisms as high or very high.

Most of them reported that they have a limited knowledge about the Charter and they are still in the learning process.

17. How would you rate your overall level of knowledge of how to engage with the European Committee of Social Rights and the European Social Charter monitoring mechanisms?



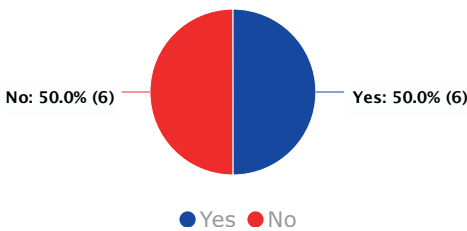
The responses to this question are scattered across the available range; but again, only a minority rated their level of knowledge as high or very high.

Alzheimer Europe for example reported it was aware of the process and understands in theory how to engage with Charter’s mechanisms; however, to date, it has not done so in practice.

18. Are you aware of the case law of the European Committee of Social Rights on Article 23 (rights of older persons)?

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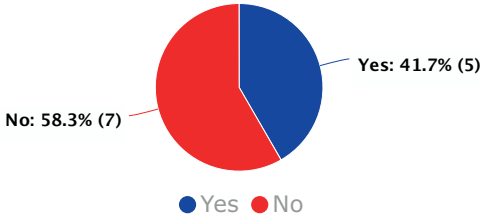
The answers here were split in two equal parts.



19. Are you aware of the case law of the European Committee of Social Rights on Article E (equal treatment/non-discrimination) especially when it concerns the equal effective enjoyment of social rights by older persons?

Are you aware of the case law of the European Committee of Social Rights on Article E (equal treatment/non-discrimination) especially when it concerns the equal effective enjoyment of social rights by older persons?

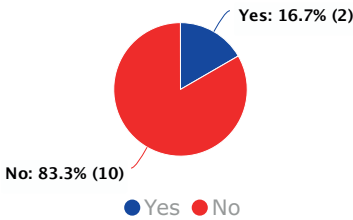
Here, slightly more than half of organisations gave a negative response.



20. Have you availed of the opportunity to comment on draft government reports to the European Committee of Social Rights (as they touch on the social rights of older persons)?

Have you availed of the opportunity to comment on draft government reports to the European Committee of Social Rights (as they touch on the social rights of older persons)?

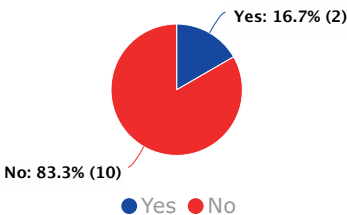
As can be seen in the chart, most organisations surveyed answered "no".



21. Have you supported, or thought about supporting a collective complaint by or on behalf of older persons under the Additional Protocol to the Charter?

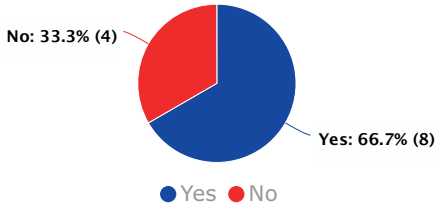
As can be seen in the chart, most of answers were "No".

Have you supported, or thought about supporting a collective complaint by or on behalf of older persons under the Additional Protocol to the Charter?



22. Do you intend to provide additional information to the European Committee of Social Rights on issues related to the rights of older persons for Conclusions 2021 (deadline 30.06.2021)?

Do you intend to provide additional information to the European Committee of Social Rights on issues related to the rights of older persons for Conclusions 2021 (deadline 30.06.2021)?



As can be seen from the chart, most organisations answered that they intended to provide additional information to the Committee on issues related to the rights of older persons for the conclusions.

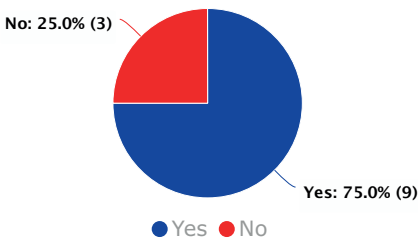
Civil society organisations provide additional information to the Committee in order to inform and support their associates and other

interested persons. This information is also used to support lobbying and specific campaigns.

F. COVID-19 and older persons.

23. Do you track the impact of Covid on older persons in your country?

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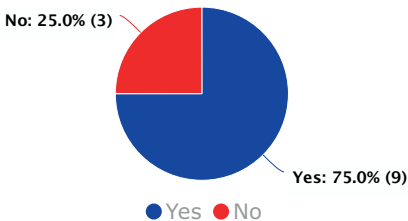
As can be seen, a majority of civil society organisations surveyed track the impact of COVID on older persons in their countries.

For example, an NGO from Slovenia reported to be in regular contact with more than 50,000 elderly people in the country. The main challenge was how to prevent the loneliness of the elderly

and at the same time minimise the risk of infection with COVID-19.

24. Has your thinking on the rights of older persons (or specific rights like the right to live in the community) changed in any way because of COVID?

Has your thinking on the rights of older persons (or specific rights like the right to live in the community) changed in any way because of COVID?



It seems that most organisations' thinking on the rights of older persons (or specific rights) has changed because of COVID.

For example, an NGO reported that there was much more awareness of ageism in society and how it affects different spheres of life and intersects with other forms of discrimination and exclusion.

In addition, the pandemic urged our societies to rethink the way that care was provided to older persons, what a rights-based model would look like and how to put it in practice.

G. Additional suggestions.

The last part of the questionnaire asked the organisations to provide suggestions on the questionnaire's topics.

The suggestions include:

- The European Social Charter must be interpreted in a way that does not discriminate against older persons.
- The elderly should be regularly involved in the development of strategies to help them, systemically within public institutions or within NGOs.
- Provisions concerning the compulsory implementation of the rights of elderly persons should be included, as well as provisions in the cases of non-implementation.

12.2 Analysis of the survey results

Again, while being far from comprehensive, the results point towards the following tentative conclusions.

First of all, most of the civil society organisations surveyed saw themselves as human rights/older persons' organisations. In other words, their self-understanding has changed. Europe is now fortunate in having a good body of grass-roots organisations which can not only be viewed as authentic advocacy and representative organisations but also as elders' human rights organisations.

Second, a majority of organisations reported they were active at the local/national legislative level. About half of organisations surveyed were also actively involved in domestic processes to draft new legislation in the field. Most organisations surveyed were active in policy-making activities, involving presentations on the rights of older persons at hearings in parliaments or other government commissions, advising stakeholders, etc.

Third, most of the organisations surveyed collaborate and cooperate with other organisations so as to engage with the intersectional nature of ageing and older persons. This is a good sign of cross-learning from an intersectional perspective.

Fourth, most of organisations surveyed were actively involved in publishing reports and policy papers with regard to issues concerning the human rights of older persons. Similarly, they were also engaged in media campaigns to advance the rights of older persons. Most of the organisations reported engaging with international human rights instruments and relevant monitoring mechanisms. During the COVID-19 pandemic, the majority of organisations tracked the impact of COVID on the human rights of older persons in their countries.

On the negative side of the ledger, the following tentative conclusions can be reached.

First, in the view of most organisations, the rights-based approach to older persons is not widely understood and shared in society. Clearly, there is a challenge here and having some developed international jurisprudence on same would help.

Second, the majority of organisations surveyed have not used the court system or strategic litigation to promote the rights of older persons. That could either mean that the legal system is not yet ready to respond or that the sector is not yet prepared to mount the kind of concerted effort needed. Perhaps there are lessons here for funders.

Third, around half of the organisations surveyed do not follow the debates in the UN about the possibility of drafting a UN treaty on the rights of older persons. This is probably due to a lack of resource (including insufficient human resource) which points to the need for more concerted efforts on one or two organisations which can then inform and involve the rest.

Fourth, most of the organisations surveyed report that their knowledge/use of the European Social Charter is low (or non-existent). Clearly, there is a need – and, clearly, the Charter supplies useful jurisprudence - to meet that need. The organisations report a low level of knowledge about how to use the collective complaints procedure. Most of the organisations surveyed did not use the opportunity to comment on draft government reports to the European Committee of Social Rights. They report a low level of knowledge about the jurisprudence of the European Committee of Social Rights and particularly on Articles E and 23. There are capacity issues connected with the proper use of this knowledge since many of the organisations are quite small – but the baseline of knowledge seems low. The result is a considerable under-utilisation of the Charter and its mechanisms. That is clearly not in the public interest.

With regard to COVID-19, it seems that most organisations think that rights of older persons (or specific rights) were affected by COVID, especially with regard to the manifestation of ageism – in various forms and shapes – during this period. Some suggestions were put forward to the effect that older persons should be more involved within public institutions or within NGOs in the development of strategies to help them. Perhaps this points to the possibility of more periodic civil society/European Social Charter dialogues/encounters.

13. Conclusions and key recommendations.

Optimising the European Social Charter to combat ageism

What tentative conclusions and recommendations can be drawn from this study?

13.1 Conclusions

At the outset of this study, we emphasised the view of the Secretary General of the Council of Europe that the European Social Charter is “an instrument capable of providing a dynamic response to evolving realities.” The ageing of Europe is certainly an evolving reality that requires a fundamental re-framing of law and policy.

The following conclusions can be drawn from the analysis of this study.

- 1. The ageing of Europe is a major social opportunity as well as a challenge:** the continuing rise in life expectancy, and the decline of fertility rates will re-shape the demography of Europe. Older people will become a significant social group and place the older population at the forefront of re-thinking social policies.
- 2. Ageism as the main Challenge:** ageism is now considered to be a big challenge in the 21st century. Rather, ageist assumptions that have carried over from the 20th century represent a negative legacy that needs to be dealt with. A major re-set of policy needs to take place. Instead of policy based on static welfare and protection, there is now a need to re-set policy based on notions of autonomy (with supports where needed), belonging, inclusion and active citizenship. This transition can be seen in the way European policy has been shifting – both in the Council of Europe and the European Union. It can be seen in the growing calls for the drafting of a new UN thematic treaty on the rights of older persons. Yet more can and needs to be done, especially when the ideological developments around the political identity of older persons and of ageism are taken into account.
- 3. The European Social Charter is decidedly against ageism – a unique history but with a need to continue and develop:** uniquely, the European Social Charter was alive to new thinking from at least the Additional Protocol of 1988. The Charter – the very first piece of international law on the rights of older persons – was nearly 20 years ahead of related developments in the Organisation of American States and the African Union. It directly informed the drafting of the EU Charter of Fundamental Rights. The Council of Europe can

rightly be proud of these far-seeing innovations in the Charter. Nevertheless, there is still a lack of direct reference to the concept of ageism, and the growing conceptual and empirical knowledge of it. It is time to adopt and use ageism within the jurisprudence of the Charter.

- 4. The European Social Charter should reflect and be attentive to global developments in the human rights of older persons:** in the last decade, significant progress has been made at various international and regional levels, adopting a paradigmatic shift towards a human rights approach towards older persons. These developments should be reflected in the future case law of Charter.
- 5. Those States Parties that have not yet opted in to Article 23** should be actively encouraged to do so. They all face the phenomenon of ageing in their societies and the need to purge their laws and policies of ageism. The current and evolving jurisprudence on Article 23 will be a key driver in enabling a common response throughout Europe.
- 6. Article 23 as a pivot for advancing the social rights of older persons:** both quantitative and qualitative analysis reveals how, within a relative short time, Article 23 has become an important instrument to promote the social rights of older persons and to broaden their material scope. Its core elements, namely, the commitment to ensure older persons' full participation in society, while protecting their independent lives and free life-style, have proven to be solid foundations allowing the advancement of the social rights of older persons.
- 7. The "living and dynamic nature" of Article 23:** through its jurisprudence and case law, the European Committee of Social Rights has also shown how Article 23 can be a living and dynamic text that can adapt to social changes. More specifically, this dynamic nature has allowed the Committee to take account of new dimensions, such as:
 - a. the importance of anti-discrimination and framework legislation beyond the narrow field of employment law,
 - b. the central role of legal capacity, and the need for supportive decision-making mechanisms to augment legal capacity and the retention of autonomy in old age,
 - c. the significance of the social phenomenon of elder abuse as a barrier to full participation in society in old age,
 - d. the support of informal and family-based elder care as an instrument to preserve and promote the social rights of older persons.
- 8. The ageism paradox of Article 23:** paradoxically, despite its anti-ageism approach to social rights, there is no direct reference to "ageism" as such either in the language of Article 23 or in the Committee's conclusions or decisions. This paradox could (and should) be easily resolved by the open and clear inclusion of this concept in the future work of the Committee.
- 9. In search of the operationalisation of Article 23:** some elements of Article 23 have been clearly defined and operationalised by the Committee (for example, the minimum guaranteed income in old age in the context of the right to adequate resources). However, most elements (for example, housing, or

information about services and facilities, or health care) are still vague, unclear, and lack standard criteria.

10. Equal treatment – doctrinal innovations in the Charter: the jurisprudence of the European Social Charter has evolved significantly in the past decade or so. Much of this has come from the refreshing perspectives brought to bear by Article E on equality and its interaction with the other substantive social rights protected. The emphasis on human agency, respect for difference, inclusion and active citizenship in Article E inform every aspect of the Charter. With its intersection with Article 23, Article E particularly insists that human differences should always be responded to positively – and this also applies to age. It carries with it an acknowledgement of accumulated disadvantages arising, for example, from ageist laws and policies. And it insists that social arrangements should be redesigned to enable active social citizenship and not to entrap people even in a gilded cage.

11. Progressive realisation – new tools in the Charter: the emphasis of the European Committee of Social Rights on a positive philosophy of “progressive realisation” over the past 15 years or so ensures that its conclusions and decisions now take due account of the economic and social situation of the contracting parties. This is important in the context of age, as the transition away from ageism and ageist laws and policies will take time since they are so deeply embedded. But they must change. And the European Committee of Social Rights now has the tools at its disposal to gauge whether progress has been sufficient. Equally important, and not to be confused with “restrictions to rights,” the European Committee of Social Rights now has the doctrinal means to question deliberately “retrogressive measures” which can arise out of a period of economic shocks. It is suggested that the participatory element (that is to say, the participation of those actively affected by such measures) ought to be a main consideration moving into the future.

12. Emergency responses – showing the strength of the Charter: emergencies reveal deep truths. The true test of an instrument like the Charter is how it responds. The posture of the European Committee of Social Rights, as revealed in its Statement of interpretation of April 2020 on the right to protection of health in times of pandemic, says a lot about the capacity of the Charter to face difficult circumstances. In the statement, the Committee emphasised that a floor of social rights was more important – and not less important – in the midst of a crisis. It also emphasised the crucial value of equality in how different cohorts (including, older persons specifically) are treated. In this way, the Charter will maintain relevance in how Europe builds a more resilient social system into the future.

However, and as revealed in the responses to the questionnaires, more than half of the countries which participated reported that their governments did not use the European Social Charter and its case law in assessing the adequacy of national policy and administrative responses to COVID-19 and especially as they apply to older persons. In general, this was also true for National Human Rights Institutions and Equality Bodies. This reflects the lack of a real life realisation

of the importance and relevance of the Charter to emergency situations, and a specific lesson which can be learnt from the COVID-19 crisis.

13. With more openings to civil society – greater relevance to the process of change: the process of the Charter is now much more amenable to civil society. Many more openings have been crafted in the past 10 years or so to enable a wider degree of participation in the deliberations of the Charter and its various mechanisms. Civil society groups can now lodge their own “shadow reports” to match the periodic reports of the States Parties. Amicus curiae briefs, or their functional equivalent, are now possible in the collective complaints system. Immediate measures may be indicated by the Committee during collective complaint proceedings. These procedural innovations provide ample openings for civil society groups in particular to step up their engagement. This includes civil society groups representing older persons.

14. With widespread support from the social partners: changing law and public policy is relatively straightforward. Changing social systems can be a lot slower and harder. As the various surveys highlight, all social partners – power (governments), voice (civil society) and ideas (National Human Rights Institutions and National Equality Bodies) – acknowledge the positive value of the Charter in guiding systems away from ageist foundations towards a more inclusive social future. In an important sense, the Charter should not be seen as an exogenous force that exerts force only remotely and at the periphery, but as a compass that assists the ecosystem of change away from ageism in the States Parties. It has tremendous potential to help animate domestic advocacy for change and guide policymakers toward a post-ageist future.

15. With many benchmarks of direct relevance to older persons beyond Article 23: there are as many points of entry to the European Social Charter for older persons as there are provisions. We highlight here some of the more important ones that have arisen in our research, that directly challenge the impact and legacy of ageism and that can be raised for older persons and their representative organisations either in the reporting or collective complaints procedures.

Article 1 – right to work. Reckonable issues include discrimination against older workers in recruitment, terms and conditions of employment and the lack of “reasonable accommodation” for older workers in the workplace. We note that discrimination claims are harder to prove under the EU Framework Directive on Employment. Aspects relating to the depth or breadth of medical testing prior to employment (or as a condition of employment) may also arise. This could be particularly important in the context of newer genetic tests that can reveal a host of putative disabilities in older workers (or even in younger workers who might be susceptible to certain known diseases in the future as revealed by genetic testing).

Article 12 – right to social security. Reckonable issues include: the depth and breadth of State measures to remove or restrict enjoyment of a social security benefit upon a failure to take up an offer of employment; the adequacy of a social security system for dealing with the range of contingencies that can arise in old age, the impact of deliberately “retrogressive

measures” in social security during times of economic retrenchment; equality of treatment between nationals and national of other States Parties lawfully residing and working in the national territory of a State Party. In addition, it might be possible to raise issues not directly connected with age but having to do with third parties (usually women in their 30s and 40s) who take time out to become informal carers of older persons (and others). The gaps in their work record/social insurance record can often mean drastically reduced (or no) pension later on in life. Amongst other things, this might amount to gender-based discrimination in social insurance, since most of the informal carers are usually women (triggering Article E in conjunction with Article 12).

Article 13 – right to social and medical assistance. Reckonable issues could include: the adequacy of the floor of social and medical assistance to meet the contingencies that can arise through age; equal treatment/discrimination with respect to medical triage (rationing of scarce medical resources – where ableism can be at play); the setting of conditions that make access to social assistance depending on agreeing to forego civil and political rights; the treatment of older persons who are non-nationals.

Article 30 – right against poverty and social exclusion. Reckonable issues could include: whether social systems pivot on human autonomy (prioritising the decision-making autonomy of the beneficiaries); whether social systems contribute to social exclusion and isolation and are not part of a broader solution aimed at active social citizenship; the appropriateness or otherwise of media portrayals of older persons living in poverty.

Article 31 – right to housing. Reckonable issues include: whether housing policy is configured to enable older persons to “age in place” with the community-based support needed to make this possible; whether a policy of lifetime adaptable housing is in place which reduces the need for massive retrofitting programmes; whether social housing stock is adequate and sufficiently connected to the community; whether social housing policy targets those in the most vulnerable situations like older persons who are at risk of losing their homes.

Article 11 – right to health. Reckonable issues include: whether the health care system adequately mainstreams older persons as well as provides programmes for specific issues related to health; whether older persons are effectively penalised in waiting lists; whether the ethical and other policy guidance regarding the allocation of scarce medical resources (for example, ventilators) does not discriminate against older persons; the centrality (or otherwise) of the autonomy and decision-making capacity of older persons in all health care decisions that affect them.

Article 16 – family support. Reckonable issues include: the depth and extent of family supports to enable families to support older members; the treatment of informal carers within the family; efforts to enable families to retain their home and thus avoid institutionalisation for their older members; efforts to support families placed in vulnerable situations.

16. Dealing with residual ageism: the European Social Charter has always been at the forefront in adopting a rights-based perspective on age. Some elements of it still tend to reflect ageism, if only indirectly. The text still hints that institutionalisation remains a viable option. This needs to be reconsidered and it certainly can be reconsidered given the importance that the European Committee of Social Rights rightly places on human agency and social citizenship and the overall emphasis in Article E on social inclusion. The text, of course, cannot be ignored. But it can and should be narrowed down to make it plain that people are not problems. Building social systems that are more responsive to their needs as they change over time is the challenge.

17. Carers' rights: on several occasions we have pointed to the precarious situation of carers. This has been well flagged in many Council of Europe and European Union policy documents. Clearly a new social contract of sorts is required. The European Social Charter provides a framework for a consideration of their rights and interests. This is long overdue.

13.2 Recommendations

The following recommendations are drawn from the analysis of this study and would, in our view, help to further advance the rights of older persons under the Charter.

The Charter should be foregrounded as the main instrument of the Council of Europe aimed at building a more sustainable economic and social future in Europe. In this, it provides a solid foundation for a resilient society, a functioning democracy insulated from political extremes that grow out of economic insecurity, and the “rule of law” which assures our citizens of equal treatment regardless of difference.

A: Committee of Ministers.

Many of the system-wide changes needed to give greater effect to the Charter have already been highlighted by the High Level Group of Experts on Social Rights, appointed by the Council of Europe Secretary General. We supplement their recommendations with the following.

- 1. Widen the nominations process to the European Committee of Social Rights:** as befits the importance of the social rights in the Charter and its human rights grounding, and to enable its further development as a human rights instrument, States Parties should be encouraged to nominate candidates to sit on the European Committee of Social Rights who have a broad background in human rights including specifically economic, social and cultural rights.
- 2. Consider the future functioning of the Governmental Committee:** consideration should now be given to the place of the Governmental Committee in the process dealing with conclusions of non-conformity based on periodic reports. The European Committee of Social Rights, through its jurisprudence of “progressive realisation” now adequately performs the original function of the Governmental Committee which was to step back from conclusions and consider the broader socio-economic situation or level of development in a jurisdiction. This is no longer as necessary as in the past. At the very least, the criteria used by the Governmental Committee in determining whether a

recommendation will be proposed to the Committee of Ministers needs to be made more human rights-oriented and compliant so that it is consistent with the nature of the European Social Charter as a human rights instrument. If the Governmental Committee is to continue it should perhaps re-focus its work away from considering whether to propose a recommendation to the Committee of Ministers and to consider how exactly the relevant party is to bring its law and policy into line with the conclusions of the Committee. Thus, a consideration of the socio-economic status of the country should be relevant to the nature and content of a proposed recommendation and not the question whether there should be a recommendation.

- 3. Support the move toward smart or thematic reporting:** if there is substantially more opting in to the collective complaints procedure on the part of States Parties, some consideration might be given to a “smart reporting” regimen whereby States Parties would be required to report on an issue (combining several articles) where there are major or common challenges with a view to determining what are the inhibiting factors and what are the critical success factors for change. This would not appear to require treaty changes.
- 4. Take a much more proactive role in the supervision of conclusions of non-conformity:** conclusions of non-conformity should be taken more seriously. They do not just indicate a technical infringement of a provision of the Charter. They could indicate serious failures that threaten the resilience of the European social model. The stakes are high and extend far beyond social rights as such. Such conclusions could signal an inability to get beyond outdated social systems (for example, for older persons) which ultimately cost the taxpayer more. They could signal that our social systems are unable to withstand future pressures. They could exacerbate economic tensions thus contributing to political extremes and thus distorting democracy. In short, the conclusions of non-conformity of the European Committee of Social Rights should be treated as seriously as judgments of the European Court of Human Rights – and especially as the trend toward smart or thematic reporting takes root.

B: European Committee of Social Rights.

This study recounts the many procedural and doctrinal innovations brought about by the European Committee of Social Rights in recent years. Some of our recommendations are generic to the operations of the Committee and some have to do with the rights of older persons as follows.

- 1. Acknowledge ageism and internalise its meaning within Article 23 jurisprudence:** the existing paradox of de facto anti-ageist actions of the Committee while totally ignoring the social concept of ageism and its sociological and political aspects should be resolved. This can be easily done by incorporating the concepts, instruments, and existing rich knowledge around the social phenomena of ageism.
- 2. Operationalise all elements of Article 23:** existing analysis of the jurisprudence of Article 23 reveals the need to operationalise its different elements. It is not enough to ask questions and receive information about various aspects of the different elements of Article 23. Clear, objective, measurable and comparable

variables should be defined in order to understand what constitutes the reality of being in violation of the social rights of older persons and what does not.

- 3. Re-assess its jurisprudence on institutional care:** there is a growing understanding in current human rights discourse of the problematic nature of institutional or congregated care. While the existing work of the Committee certainly understands the need to address issues such as the accessibility and quality of institutional care, it does not raise the need to re-think the legitimacy of using institutional care as a social policy. It would appear that the time is apt, especially with experience of COVID-19, for the Committee to re-assess its foundational approach towards institutional care for older persons. The emphasis in the future should be on the need to build up community-based services in line with the philosophy of “ageing in place”.
- 4. Adopt thematic general comments:** the European Committee of Social Rights might build on its jurisprudence by adopting thematic general comments and follow the example of other international treaty monitoring bodies on economic and social rights.

This would assist States by highlighting the core elements of its jurisprudence – on a topic spanning many rights, on a specific right, or on group (like older persons) rights. It would garner the attention of civil society and enhance its capacity to engage with the Charter mechanisms and advocate for change domestically.

The practice of a day of general discussion with interested stakeholders should be used to inform the Committee about the content of any intended general comment. A good place to start would be with a general comment on the social rights of older persons which would necessarily draw in several articles in the European Social Charter.

At the very least, all the various and thus far scattered, interpretive statements adopted by the European Committee of Social Rights need to be brought together in one place, organised thematically and easily accessible to all. This would not appear to require treaty changes.

- 5. Move towards public hearings with livestream as the rule in the collective complaints procedure:** the European Committee of Social Rights should consider more public hearings in its collective complaints procedure and routinely stream the proceedings live and archive them on the web.

This would substantially increase public attention and educate lawyers and others about the procedure. It would ensure parity of treatment and visibility with the European Court of Human Rights.

This would not appear to require treaty changes.

- 6. Smart/thematic reports:** in moving towards the greater use of smart or thematic reporting, the Committee should consider convening a day of public hearings with civil society groups to gather their views on the record and the questions that need to be posed. This would enhance the public dimension of the process, add to its legitimacy, as well as focus attention on perceived priorities and challenges.

The move towards smart or thematic reporting may require some treaty changes. But the convening of days of discussion would not.

7. Exercise inherent jurisdiction to issue compensatory and dissuasive remedies: the Committee should explore how to exercise more of its inherent jurisdiction in the collective complaints procedure to request compensation and/or other dissuasive remedies, especially where the violations are blatant and egregious. If there is “no right without a remedy” then there is a need to re-think the spread of restorative tools available to the Committee.

Depending on how deep a view the Committee has on its inherent jurisdiction as a human rights treaty body, this may not require treaty changes. But it would require the Committee of Ministers to supervise the enforcement of the remedies awarded.

8. Enhance dialogue with the European Court of Human Rights: even as recently as its April 2020 Statement of interpretation on the right to protection of health in times of pandemic, the European Committee of Social Rights has rightly drawn attention to the nexus between several overlapping provisions in the European Social Charter and the European Convention on Human Rights. The Committee should continue its dialogue with the European Court of Human Rights and perhaps take it one step further by developing more practicable projects like common “fiches” on topics like minimum levels of services to avoid inhuman or degrading treatment (ECHR) and/or violations of the Charter. More joint work could be done to underline the interdependence and interoperability of the two instruments. Deepening these understandings of interdependence and interoperability between both sets of rights is key to maintaining the relevance of the Council of Europe in a changing Europe.

This would not appear to require treaty changes.

9. Assume a leadership role with other regional bodies on the rights of older persons: the European Committee of Social Rights could take a leadership role with other international and regional bodies on, for example, the rights of older persons. One could see a fruitful dialogue between the Committee (especially on Article 23 on the rights of older persons and Article E) with the equivalent treaty bodies in the Organisation of American States and the African Union. This would count as a tremendous contribution of the Council of Europe to advancing the rights of older persons around the world.

This would not appear to require treaty changes.

10. Participate in the UN Open-ended Working Group on Ageing: likewise, the Council of Europe – through the Committee – might get actively involved in the UN Open-ended Working Group (UN OEWG) to consider proposals for drafting a thematic UN treaty on the rights of older persons. Certainly, its jurisprudence could have global impacts. It should be noted that the Council of Europe – through the Committee – was active in the negotiations leading up to the adoption of the UN convention on the rights of persons with disabilities. A similar role for the Council of Europe input might be envisaged on the rights of older persons.

This would not appear to require treaty changes.

11. Engage in capacity building and knowledge distribution: one of our main findings is that civil society organisations of older persons are not aware of the Charter and its jurisprudence – not of their relevance and usefulness of its provisions on the rights of older persons. This is a great pity since engagement with the Charter machinery could meaningfully advance reform across Europe away from laws and policies that embed ageism. More needs to be done to make sure that the knowledge reaches those who advocate for change through, for example, dedicated workshops, convenings and archived video events. Without this outreach the Charter will not have the impact it deserves.

C: Civil society.

There are now many opportunities for civil society groups to get actively engaged with the machinery of the European Social Charter. Most of these opportunities would be of tangible benefit to civil society groups representing older persons.

- 1. Strategically use the Charter as a tool for social change:** law as a tool for social change is well known to civil society and human rights organisations. However, as reflected in the existing jurisprudence, it seems that there is enormous, underused potential for civil society to use the different modes of operations of the Charter in order to promote the rights of older persons.
- 2. Adopt a pro-Active, anti-ageivist language and ideology:** as described above, the language of ageism, and the ideology of ageivism, is totally lacking in existing jurisprudence of the Charter. Civil society has a crucial role in pushing for a change in the language, rhetoric, and ideology of the different Charter institutions in general, and of the Committee more specifically.
- 3. Engage with the reporting procedure:** civil society groups now have the acknowledged capacity to issue “shadow reports” alongside reports from the States Parties. Even if they are only engaged in one or two topics, more active consideration should be given to lodging such reports. This will have an inestimable value to the European Committee of Social Rights as it seeks perspective on State reports. This would be even more important as the system moves towards more smart or thematic reporting which, by definition, will focus attention on specific issues, or rights or topics or groups. Older persons and their representative organisations could be major beneficiaries.
- 4. Engage with the procedure on non-accepted provisions:** because the system is still à la carte and because many States have not opted into important provisions of the European Social Charter, this is an important review process. It was originally intended as a flexibility device – giving States time to “progressively achieve” certain benchmarks before they could comfortably opt in to certain obligations. Very often, these are important provisions like Article 23 on the rights of older persons. Often, States Parties have long since met and even exceeded the benchmarks but they have still not opted in. Civil society has a role to play in informing the reporting procedure on “non-accepted provisions” to nudge States towards greater and more uniform respect for the provisions of the Charter. Again, older persons and their representative organisations could be major beneficiaries.

- 5. Support the collective complaints procedure:** few civil society organisations realise that they can, under certain non-onerous conditions, lodge amicus curiae briefs (or their equivalent) to ongoing collective complaints. For example, if a complaint focuses on the high degree of COVID-19 within an institution for older persons, a civil society group might consider lodging an amicus brief challenging the compatibility of institutional settings with the Charter or educating the Committee on how such issues are framed under related international instruments. Much greater use can and should be made of these procedural opportunities. It may require civil society organisations involved in certain issues or groups (like older persons) to come together to track the docket of the Committee and identify complaints that warrant an intervention. But that should be easily achievable.
- 6. Make more use of “immediate measures” claims:** the Rules of the Committee now allow for “immediate measures” (Rule 26). This is especially useful where irreparable harm is likely – as it might if a group of older persons were the putative victims of allegedly discriminatory triage policies (for example, rationing of ventilators or of vaccines for older persons). Normally, such measures would also attract wider media and political attention which adds to the value of the collective complaints procedure. More importantly, it brings about instant (albeit temporary) relief.
- 7. Develop domestic advocacy strategies based on the Charter:** conclusions and decisions of the European Committee of Social Rights are not ends in themselves. They are certainly not self-executing. Even when a civil society group steps up its engagement with the Committee, it always needs to think through how it will use the output in the domestic arena – whether before a national parliament or the courts or otherwise. It is never enough simply to “gain” a conclusion of non-conformity or a favourable decision. Advocacy strategies before the Committee have to be complemented by advocacy strategies on how to use the outcomes of the process in the domestic sphere. There is ample space here for representative groups of older persons to learn from the experience of other groups in litigating social rights claims under the collective complaints procedure.
- 8. Use strategic litigation as an instrument for social change and the promotion of rights of older persons.** As reflected in the answers to the questionnaire, it is clear that there is a great potential for using the courts, both on the national level as well as on the European Court of Human Rights and Court of Justice of the European Union levels to promote the rights of older persons while relying on the European Social Charter principles. That is to say, the jurisprudence of the European Committee of Social Rights can and should find its way into strategic litigation strategies. This is one way of optimising the Charter as a tool for change.
- 9. The need to develop a holistic legal approach towards the social rights of older persons:** As reflected in the answers provided in the questionnaire, it was shown that NGOs need to play a role and push for a clear and holistic legal approach with regards to social rights of older persons on the national level,

while using the European Social Charter and its jurisprudence as a reference point.

10. Involvement with international actions to promote human rights of older persons: NGOs and civil society organisations need to be more involved - for example to follow, and actively contribute to international processes around the human rights of older persons. They should be encouraged to get involved in the processes of the UN OEWG as well as in the processes conducted by the UN Independent Expert on the rights of older persons.

D: National Human Rights Institutions (NHRIs) and National Equality Bodies.

To power (government) and voice (civil society) must be added the checking value of National Human Rights Institutions and similar bodies. Many of them have already been paying particular attention to the rights of older persons, especially in the last 10 years. And, at European level, they do cooperate especially on economic and social rights, as well as on the rights of older persons. Their work has an upward ratcheting effect – both on governments and on civil society.

- 1. Champion the human rights-based approach to age.** NHRIs (and others) have a role to play both in propagating and clarifying the exact nature of the rights-based approach to age. They have an important role to play in developing consciousness about the negative legacy of ageism and the need to transition away from it if Europe is to face the 21st century.
- 2. Track and disseminate the conclusions and decisions of the European Committee of Social Rights on the rights of older persons.** NHRIs (and similar bodies) have an important role to play in highlighting the jurisprudential advances of the European Committee of Social Rights, especially as they touch on the rights of older persons. It is important that the key messages reach governments and civil society. It is also important that a new bar evolves – with the help of NHRIs and others – to champion the rights of older persons across Europe. The role of NHRIs is vital in helping to cultivate novice lawyers and helping them to become more adept at using the machinery of the Charter, especially to advance the rights of older persons, as well as to invoke the Charter in their general work on equality and social rights.
- 3. Promote the ratification of Article 23 and/or the collective complaints procedure:** National Human Rights Institutions and National Equality Bodies should pro-actively advocate for the ratification of Article 23 and/or ratification of the collective complaints procedure by their respective governments.
- 4. Support strategic litigation to advance the rights of older persons:** National Human Rights Institutions and National Equality Bodies should fulfil a meaningful role in supporting strategic litigation on the national level, (and/or submitting amicus briefs) while relying on European Social Charter principles, for promoting the human rights of older persons.
- 5. Involvement with international actions to promote human rights of older persons:** NHRIs/NEBs should actively contribute to all relevant international processes around human rights of older persons – in general, and in the context of social rights – in particular. For instance, they can and should participate actively in the UN OEWG meetings and engage with, and support, the processes

conducted by the UN Independent Expert on the rights of older persons and more.

- 6. Utilising the European Social Charter in emergency situations:** Realise and utilise the Charter in the context of emergency situations (for example, a pandemic) to assess the adequacy of national policies and administrative responses to the crisis.

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List of abbreviations

ADL	Activities of Daily Living
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CM	Committee of Ministers of the Council of Europe
COE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
EQUINET	European Network of Equality Bodies
ESC	European Social Charter of 1961
ENNHRI	European Network of National Human Rights Institutions
ESIF	European Investment and Structural Funds
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
GA	General Assembly
GAROP	The Global Alliance for the Rights of Older People
IADL	Instrumental Activities of Daily Living
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IE	Independent Expert
MIPAA	Madrid International Plan of Action on Ageing
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
RESC	Revised European Social Charter 1996
SPC	Social Protection Committee
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNECE	United Nations Economic Commission for Europe
UNOEWG	United Nations Open-ended Working Group on Ageing
UNSDGs	United Nations Sustainable Development Goals
VIPAA	Vienna International Plan of Action on Ageing
WHO	World Health Organisation

The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



European
Social
Charter

Charte
sociale
européenne

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE