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Chapter 7

A European Approach to Developing the Field of Law and Ageing

Albert Evrard sj and Clémence Lacour

7.1 Introduction

Does a European approach exist to developing the field of Law and Ageing? The issue has become significant in Europe.¹ For approximately 20 years the spectrum of legal questions related to ageing has grown broader, so that an integrated perspective on Law and Gerontology must be developed as well as a field of Law and Ageing.²

We wish to set out herein an awareness for the need to develop Law and Ageing (Burgelin and Gridel 1999; Stevens 2005; Benzimra-Hazan 2010); some initiatives that are being taken which are changing the European context, including the concept of citizenship at both the national (Member States) and European Union levels as a good way to deal with each older person as a legal subject holding human rights (Macleod 2007; European Union 2009; Van Bueren 2009; Michel 2009;

¹ This text is written from the perspective of Civil Law in Belgium and France. Some of the statements in this chapter may be applied to other 25 Member States of the European Union. All references in this text are taken without modifications from official translations of the European Union services.

² Given the legal principles of the rights and the need for protection in our society, we wonder why older persons are considered "latecomers" when compared to the young, women, disabled and animals. One of the reasons older persons are considered "last served" is probably that we only consider the protective aspect. Thus, we advise to take into account their entire legal position, not only as victim, defendant, contractually vulnerable or suffering the law but also as perpetrator, plaintiff, dominant contracting party and empowered under the law.

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Pettiti 2010; United Nations Programme on Ageing and IAG 2003)³; and finally, to point to research projects we expect to undertake in the future.

In order to develop this, we would like to focus in this chapter on current laws and actions of the European Union which have been under-developed until now⁴ without, however, underestimating laws as they exist in Member States and recommendations and decisions of the Council of Europe⁵ (headquartered in Strasbourg, France).

It will be important for the reader to keep in mind that the European Union which began in 1951 (European Coal and Steel Community) and in 1957 (European Atomic Energy Community and European Economic Community under the Treaties of Rome and Italy) as an integration of six (6) countries for principally political and economic reasons has gradually grown to twenty-seven (27) member nation states (Member States). Each Member State, in addition to its current laws, has adopted many European laws and policies. The European Union itself had its own jurisdictions and competences clearly determined for the first time in 2007 (Treaty of Lisbon). The integration and harmonization of law at the Member State and European Union levels, and the deliberation of new laws and policies have been and will continue to be a great challenge (Dony 2008; Clergerie et al. 2010). Consideration must also be given to the fact that the expanse of continental Europe is rather uncertain in economical, political, cultural, social and human areas. This is without mentioning the large diversity of customs and habits, the concept of the family and the position of older persons within it, life standards, as well as legal systems and traditions of rights and freedoms and their implementation. Moreover, some Member State countries have strong national identities and characters which do not lend themselves to an easy, clear, equal, consistent and uniform continental or "Union" sense of belonging.

³ Decision of the Council of April 19th 2007 establishing, for the period of 2007–2013, a specific program on Fundamental Rights and Citizenship in the framework of the General Program "Fundamental Rights and Justice", Decision 2007/252/EC., O.J.E.U., L.110, April 27th 2007.

⁴ This chapter uses the Treaty of the European Union (herein after called TEU) and the Treaty on the Functioning of the European Union (herein after called TFEU) introduced by the Treaty of Lisbon, signed on December 13th 2007 in Lisbon and entered into force on January 1st 2009 (Article 6 TEU). As stated in Article 1 Sect. 3 TEU: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value (...)"

⁵ About the Council of Europe, we refer to the bibliography and to some documents: Draft of Recommendation of the Parliamentary Assembly 9805 of May 13th 2003, *Les tendances en matière de population et leur sensibilité à certaines mesures politiques*; Res.2008/2209 (INI) of February 19th 2009, *La santé mentale*; Recommendation 1796 (2007), *The situation of elderly persons in Europe*; Recommendation CM/Rec (2009)6, *Le vieillissement et le handicap au 21e siècle: cadres durables permettant une meilleure qualité de vie dans une société inclusive*. See website: <http://assembly.coe.int>. An example of cooperation between the European Union and the Council of Europe is the joint European Union- Council of Europe Programme on The protection and the promotion by national human rights structures of the rights of elderly people, started in 2009 (Council of Europe, LHRCB/NHRS (2009) 7).

We will be unable to discuss further herein the complexities of the European demographic,⁶ geographical, political, legal, social and cultural mosaic⁷ and the complex integration process within the European Union that makes use of its own growing European law (Jolivet 2002; Dony 2008; Eurostat 2010; Clergerie et al. 2010; Grossi 2011). In addition there are two other issues which will not be discussed: the fact that the field has to be seen as trans-systemic, interdisciplinary, across areas of law and other disciplines dealing with ageing, and as multidimensional in its practice. Secondly, there is a need to clarify vocabulary and definitions relevant to the field and across the European Union.

In the European legal context, we intend to restrict our examination to exploring some principles of European law through its primary sources: treaties and their equivalent, some statutes and general principles of law.⁸ We would also like to refer to case law from the Court of Justice of the European Union (CJEU- Luxembourg) and the European Court of Human Rights (ECHR- Council of Europe- Strasbourg) in order to show the convergence between both of these regional judicial institutions and to verify the effectiveness of older persons' rights. Such a limited overview of principles and sources requires reference to and exploration of further principles and sources.⁹ However, this must be left for future research.

Consequently, we would like to present a kind of snapshot of European Law and Ageing issues and directions commensurate with (I) the European legal dimension and policy context and (II) the concept of citizenship as it intersects with the development of human rights in ageing issues within the European Union context.

⁶ The European Union population consisted of approximately 522 million inhabitants in 2007. The demographic ageing process is common everywhere but not evenly distributed amongst the EU 27 Member States or the 47 Council of Europe Member States and nor within each country. Communication from the Commission, Green Paper *Confronting Demographic Change: a New Solidarity Between the Generations*, COM(2005) 94 final (not published in the Official Journal) and the Commission Communication of October 12th 2006 *The Demographic Future of Europe – From challenge to Opportunity*, COM(2006) 571 final (not published in the Official Journal).

⁷ See Article 3 Sect. 3 al. 4 TEU: "It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Article 4 Sect. 2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

⁸ Article 1 al. 3 TEU: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community".

⁹ We specially refer to the secondary sources quoted in Article 288 TFEU: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force".

7.2 European Law and Ageing

In addition to a national and a multilateral approach by Member States, the European Union provides us with a good example of a third approach which is an integrative one. Being a *sui generis* integration process governed by its own system of law, the European Union¹⁰ promotes and employs legal principles,¹¹ concepts and techniques in relation to ageing from the Member States (for example, principles of equality and non-discrimination,¹² subsidiarity and proportionality¹³).

The European Union, an atypical actor on the international scene, has been able to pursue policies having direct effect on the daily life of all the citizens of the many Member States.¹⁴ Law is the preferred means to attain the objectives of the Union (legislative acts such as regulations, directives and decisions are compulsory and have the same binding effect as Member State laws¹⁵). In such a context, older persons are beneficiaries of laws enacted by the 27 Member States. This suggests that there is a large and rich area for future research, exploring the effectiveness of laws concerning access to and exercise of rights and freedoms by older persons, the improvement of existing laws and the enactment of new laws. This also suggests the exploration of the particular and changing European legal order and of the links amongst its 27 national legal frameworks (Monjal 2008; Sudre 2009; Michel 2009).

¹⁰ Article 3 TEU: "6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. Article 4 TEU: "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". Within the Union, 27 Member States having at the moment divested themselves of some parts of their traditionally national sovereignty, have progressively empower a new legal person, the European Union. The corresponding competences and financial taxes are given to this new subject within the International Community and its Member States, National Governmental Organizations and recognized National Non Governmental Organizations (Naskou-Perakki 2010; Clergerie et al. 2010; Dony 2008).

¹¹ Article 6 TEU: "3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

¹² *Inter alia* Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". See also Article 9 TEU.

¹³ Article 5 TEU: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (...)"; see also Article 12 TEU.

¹⁴ Article 13 TEU: "The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions".

¹⁵ Article 288 TFEU.

7.2.1 An Integration Process in Expansion

The building of the European Union and its integration process is not made any easier to understand due to continuous diachronic and synchronic¹⁶ expansion in all directions and in every way. It is part of the complexity of Law and Ageing, as an emerging field at the European level.¹⁷

Some elements needing further legal study with regard to expansion of the goals of the Union and the means taken to achieve these goals can be pointed to. These goals and means show a firm commitment to better understanding and consideration of *older persons* within the Union as, *inter alia*, patients, care recipients and as consumers of goods and services, generally and of special needs, particularly.¹⁸

The outdated perception of older persons as not contributing to the wealth of the Union Market has probably pushed the broader issue of the well-being of older persons into the background. We certainly need to better understand the impact and needs of older persons on and in relation to the main goals of the Union which include¹⁹: "the internal market",²⁰ "sustainable development", a "balanced economic growth and price stability [and] a highly competitive social market economy, aiming at full employment and social progress"; the role of ageing and issues for older adults on "the promotion of scientific and technological advance"²¹; and the

¹⁶ The diachronic dimension refers to a step-by-step chronological perspective. Synchronic dimension refers to the analysis of the evolution of a concept or an institution through time.

¹⁷ We refer to the Communication from the Commission to the Council and the European Parliament of March 18th 2002: *Europe's response to World ageing. Promoting economic and social progress in an ageing world. A contribution of the European Commission to the Second World Assembly on Ageing*, COM (2002)143 final (not published in the Official Journal).

¹⁸ European Commission, *Commission Staff Working Document ex-ante evaluation accompanying document to the decision of the European parliament and the Council on the European Year for Active Ageing (2012)* of September 6th 2010, SEC (2010) 1002 final, 2-4. It refers to active ageing in employment, in volunteering, ageing, urban and home infrastructures accessible and supportive in autonomous living, and social contacts and activities, 3, 6-11.

¹⁹ Article 3 TEU: "3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

²⁰ The position is centred on the workers or former workers (Articles 45 and 46 TFEU) and family in a broad sense to understand thus including ascendant (Article 48 TFEU) (Clergerie et al. 2010). See also Article 21 TFEU.

²¹ See for example, the Decision No 742/2008/EC of the European Parliament and of the Council of July 9, 2008 on the *Community's participation in a research and development program undertaken by several Member States aimed at enhancing the quality of life of older people through the use of new information and communication technologies*.

impact of older adults on the study of "social exclusion and discrimination", "social justice and protection, equality between women and men, solidarity between generations"²² and on the protection of the "rights of the child".²³ These Union objectives also speak to "economic, social and territorial cohesion" as an element of "solidarity among Member States". We need to evaluate these needs, the full potential of older persons within this order and the ways to respect the "rich cultural linguistic diversity" of Europe, through the memory and experiences of older persons. How to ensure "that Europe's cultural heritage is safeguarded and enhanced" must also be addressed.²⁴

7.2.2 Evolution and Expansion of the Goals of the European Union

There has been an evolution of the goals in the European Union. This process, initially and principally an economic one, has extended to the social arena over the past 13 years (Van Bueren 2009; Sunga 2010; Clergerie et al. 2010).²⁵ This includes a progressive integration of issues concerning older persons based on common values such as security and intergenerational solidarity (Sapir 2006; Age Platform 2010; Clergerie et al. 2010). "Old Age" has been increasingly considered under the same heading with "people with disabilities" as a "target group".²⁶ Now, many "shared competences" between the Union and the Member States are important issues for ageing: (a) the internal market; (b) social policy; (c) economic, social and territorial cohesion; (d) agriculture and fisheries; (e) the environment; (f) consumer

²² This point primarily deals with flexible working hours and security of revenues contained in the concept of "flexicurity" in order to allow relatives and family members to care for older family members. Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions du 10 mai 2007 intitulée *Promouvoir la solidarité entre les générations* COM(2007) 244 final (not published in the Official Journal).

²³ In relation to the promotion and protection of the rights of the child, the role of older members of the family and other adult relatives or neighbours would be of significant importance.

²⁴ European Commission, *Commission Staff Working Document ex-ante evaluation* ..., 8-11.

²⁵ One of the first initiatives of the Commission or the Council takes place in the year 1982. See the Council 82/857/CEE of December 10th 1982 relative to: *[les] principes d'une politique communautaire de l'âge de la retraite*, E.C.O.J., L 357 of 18 December 1982 (more development on the initiatives of the European Union bodies in Blázquez Martín 2006; Rodríguez and Echezarreta 2001; Rodríguez-Piñón and Martín 2003). The year 1999 (International Year of Older Persons) marked a turning point. At that time, the European Union ceased to consider the greying of Europe as an exclusively national social issue.

²⁶ The following information is given on the website of the European Union when the search terms are used: "employment and social policy. Social measures for target groups: disability and old age". It is important to recall that old age is not synonymous with disability.

protection; (g) transportation; (...); (j) the area "of freedom, security and justice"; and (k) common safety concerns in public health matters; (...).²⁷

In this context, the jurisdiction of two of the main decision-making bodies of the Union is of great interest in relation to the concerns of older persons²⁸: the European Union Council and the European Union Commission (Age Platform 2010; Rodríguez and Echezarreta 2001).

The Council is the main decision-making entity of the Union. It acts in the field through the work of its Committee of Permanent Representative (COREPER) and principally the preparatory work of the Social Committee and the Employment Committee²⁹ in its configuration of Employment, Social Policy, Health and Consumer Affairs councils. It deals with matters such as the promotion amongst Member States of common goals through harmonization of laws and policies and the coordination of specific national laws and policies such as the prevention of physical or mental illness and the legal protection of the consumer. The Council also contributes to the setting of recommendations to the 27 Member States for the harmonization of employment and social security policies and for activities of promotion and coordination within the Council (Age Platform 2010; Dony 2008; Clergerie et al. 2010).³⁰

²⁷ Article 4. 2 TFEU. For the determination of social policy, the basic concepts refers to the "fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers". Also Articles 153. 1 and 2 and 156 TFEU.

²⁸ Article 13 TEU: "1. (...) The Union's institutions shall be: the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as "the Commission"), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. (...)". Obviously, further research should cover the activity of all the bodies (Parliament, Articles 14 TEU; 223-235 TFEU); the European Council (Article 15 TEU) and specially the advances made in the development of social, regional and research policies. Further research should also cover the activity of other institutions of the European Union.

²⁹ Article 16 TEU: "1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties. 2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote. 3. The Council shall act by a qualified majority except where the Treaties provide otherwise". See also Articles 237-243 TFEU; "(...) 6. The Council shall meet in different configurations, (...)". The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. 7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council". See also Article 240 Sect. 1 TFEU. The Council is not to be confused with the European Council (Article 15 TEU).

³⁰ Article 151 TFEU: "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to

The Commission is the main executive body of the European Union.³¹ It applies the policies of the Council concerning older persons and has its own policy initiatives. Thus the Commissioner in charge of Economic and Monetary Affairs deals with the impact of ageing on national public finances. The Commissioner in charge of the Internal Market and Services deals with long-term care services. The Commissioner for Employment, Social Affairs and Inclusion also sees to long-term care services through the reform of policies relating to older workers and as to pensions. The same Commissioner is also active in some programme policies such as the fight against abuse and neglect of older adults, poverty amongst older persons and isolation, with special attention paid to the situation of older women. Such orientations are reflected in existing community programmes and budgets (Clergerie et al. 2010; Age Platform 2010).³²

As examples of the recent evolution, we can underscore the role of the Commissioner responsible for Fundamental Rights, Citizenship and Justice who is working

lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action".

³¹ Article 17 TEU: "1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. 2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide".

³² European Commission, *Commission Staff Working Document ex-ante evaluation ...*, 19–20. The Commission refers to the activities of the DG Empl (analysis and studies of the social situation, demographics and the family; industrial relations and collective bargaining; information and training measures for workers' organisations); the European Social Fund (priority to promote active ageing; the Progress program (employment, social protection and inclusion, working conditions, non-discrimination, gender equality); DG Eac (adult education- Grundvig program and voluntary activities); DG Sanco (health programs); DG Info (ICT; "Ageing Well in the Information Society"); DG Regio (European Regional Development Fund- infrastructures for : lifelong learning; information and communication technologies; provision of key services in demographic decline areas and restructuring of social service facilities and care services for older persons; education including e-learning for all ages, within the framework of human capital enhancement); DG Move (urban mobility, protection of vulnerable road users including older persons, passenger rights of travelling persons with disabilities and reduced mobility); DG Rtd (7th Framework programme for research and development); Agencies (Dublin Foundation for Living and Working Conditions; European Agency for Safety and Health at Work; European Centre for the Development of Vocational Training).

on age non-discrimination, gender issues in ageing, the protection of older consumers, the fight against abuse and neglect of older adults, and the role played by the Commissioner responsible for Health and Consumers who is also dealing with the rights of the consumer, ageing in health and strategies against Alzheimer's disease in connection with the Pact on Mental Health (European Union 2009; Age Platform 2010; Dony 2008; Clergerie et al. 2010).³³

"Old Age" proposals through the Commission's initiative follow very complicated procedures before a decision to adopt is made under European law.³⁴ In short, a proposal must first be drafted by the appropriate commissioner on the basis of a legal policy decision. Secondly, a consultative process starts with the drafting of a "Green Paper", *in casu*, on ageing and the regular consultation of some advisory groups.³⁵ Then, based on the results of this broad consultation, the commissioner's staff drafts a legislative proposal called a "White Paper". After discussions and verification by various services (legal and political), the proposal is placed on the table (in short, becomes an item in the agenda of the College of Commissioners) for adoption (Age Platform 2010; Dony 2008; Clergerie et al. 2010). It is important to note that the approval of the Parliament and the Council is needed on ageing issues, such as economic services, research, culture, education, employment, transport, promotion of health care policies, fundamental rights, equality based on age and elimination of discrimination, social exclusion, isolation and poverty. It is part of a better democratic process within the Union.

Further research would go deeper into the legal norms set by both bodies and would also disclose the role of other organs and institutions of the Union (the Parliament, Court of Justice of the European Union,³⁶ consultative bodies, Committee of the Regions and the Ombudsperson) in the creation of rules in relation to ageing.³⁷ Finally, we suggest that further research is needed on the determination of

³³ European Commission, *Commission Staff Working Document ex-ante evaluation ...*, 13. Previous evaluation results by DG Empl: the 1993 European Year for Older People; the 1997 European Year against Racism; the 1999 International Year for Older Persons; the 2003 European Year of People with Disabilities, the 2006 European Year of Workers Mobility and the 2007 European Year on Equal Opportunities for All. The DG also used the reports on the 2010 European Year on Social Exclusion and Poverty and the 2011 European Year of Voluntary Activities Promoting Active Citizenship.

³⁴ Article 289.1 TFEU: "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294". See also Article 294 for the entire description of the procedure.

³⁵ Such as: the European Health Policy and the Pension Forum, the advisory group on e-health, the advisory group on e-inclusion and Digital Literacy (Age Platform 2010).

³⁶ Article 19 TEU: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed (...)". The Court ensures the respect of the provisions of the European Charter of Fundamental Rights of the European Union.

³⁷ Council Decision of November 26th 1990, *Premier programme d'action communautaire en faveur des personnes âgées*, O.J. L 028 of February 2nd 1991.

older persons' rights which takes into account the work of the European Union Agency for Fundamental Rights (EUAFR) which observes and collects data on the evolution of human rights in Europe, in collaboration with "civil society", including NGOs³⁸ and the Council of Europe (headquartered in Strasbourg, France).³⁹

7.2.3 Evolution and Expansion of Methods of Working Within the European Union

A second expansion refers to the means taken to achieve the goals of the Union. In addition to the usual instruments resulting from the treaties of the Union, including binding regulations about universal care services (private and public social services within the internal market, equality in employment, cross-border health care, etc.) and the European Social Funds sustaining economic and social cohesion,⁴⁰ the Lisbon Treaty of 2007 provides other mechanisms. For example, the citizen's right of initiative (Article 11 TEU) empowers any group of one million signatories to ask the Commission to propose an EU law advancing older persons' rights and freedoms, and provides for privileged status and new opportunities to private organizations and lobbies of older persons paying special attention to advocate on issues of ageing.⁴¹

³⁸ The term "civil society" refers to specific role of private associations, universities, intermediary groups such as trade unions, pension funds and associations of retired people, charity groups, independent experts, etc. In ageing issues, there is a crucial need for participation by these associations and groups. See Articles 300 and 302 TFEU.

³⁹ See in this regard, the Regulation of the Council of 15 February 2007 establishing the European Union Agency for Fundamental Rights (EUAFR), 168/2007/EC. See also Article 25 TFEU providing a triennial report of the Commission to the Parliament, the Council and the Economic and Social Committee on citizenship within the Union. It refers to the treaty of Lisbon, to Articles 1 al 3 TEU and 335 TFEU. We also refer to the Communication from the Commission to the Council and the European Parliament of 18 March 2002: *Europe's response to World ageing. Promoting economic and social progress in an ageing world. A contribution of the European Commission to the Second World Assembly on Ageing*, COM (2002)143 final (Not published in the Official Journal).

⁴⁰ European Commission, *Commission Staff Working Document ex-ante evaluation...*, 4-6: "The treaty of Lisbon mentions for the first time solidarity between generations as a goal of the European Union (Article 3.3)".

⁴¹ At the European level, Associations like FIAPA, Help Age, HTA, ILC, FERPA, EURAG, Age Concern or the Age Platform take a decisive role in the progress of Law and Ageing, its promotion as well as its determination. They decisively act at every level (the European Union bodies and institutions such as the Council, the Parliament, the Commission, various committees and the national institutions as well) lobbying for their own members and declaring actions in favour of all older persons. They also participate in the main social and political research programmes, namely those financed by European Union research funds. For example, research programs: DAPHNE III (2007-2013) in the field of elder abuse and neglect; PROGRESS, FELICE (Future Elderly Living Conditions in Europe), SHARE (Survey of Health, Ageing and Retirement in Europe), AGIR (Ageing, Health and Retirement in Europe), PROCARE (Providing Integrated Health and Social

Other instruments are used too. They belong to a continual and creative stream of a political nature. For example, since 1982 a European parliamentary intergroup of 40 members on Ageing and Intergenerational Solidarity is active in the field (Age Platform 2010) and since 2005 there is an Intergroup Urban-Logement comprised of 72 members (IUL) out of the 736 Members of the European Parliament.

Another example shows a diachronic evolution. Since 2001, important steps made in the field of ageing employ totally new legal and political forms of cooperation such as the Open Method of Coordination (OMC) for social protection and social inclusion. The OMC is a non-compulsory technical process using comparative skills and the exchange of best practices and information as a coordination method: "It is applied in policy areas where the European Union has limited competence according to the European Union treaties but where Member States feel there is an added value in working together at the European level" (Monjal 2008; Age Platform 2010; Clergerie et al. 2010). The OMC has to be seen within the framework of the "Lisbon Strategy", a 10-year plan (2000-2010) with ambitious aims such as the reform of the European social system, the fight against social exclusion, the support of social cohesion and the promotion of a society of information for all and its necessary extension which includes the "Europe 2020 Strategy", the "European Employment Strategy" (to support a higher rate of older workers), the "Together for Health Strategy" (2008-2013) which promotes healthy ageing and the "2010 Initiative" and corresponding National Action Plans (NAP) prepared on the basis of an European Union standard framework (Réseau européen

Care for Older Persons), OASIS (Old Age and Autonomy in Europe), MERI (research on the life and situation of older women in Europe), URBACT II (2007-2013) in the field of sustainable and social urban development, INTERREG IV (2007-2013) in the field of adapted housing. Finally these associations show initiatives in the soft law through Charters appearing in various countries. For example: France: *Charte des Droits et Libertés des Personnes Âgées en Situation de Handicap ou de Dépendance* at the level of the French National Foundation of Gerontology (FNG), translated into more than 6 languages; Italy: *Carta dei diritti della persona anziana* implemented at the level of a retirement homes under a regional decree; On the level of Europe: *European Charter of the Rights and Freedoms of Older Persons Accommodated in Homes* by the European Association for Directors of Residential Care Homes for the Elderly (EDE); *Progetto di carta rivendicativa: I diritti dei pensionati e delle persone anziane* (FERPA - European Federation of Retired persons and old people); *EuRAG Carta per gli anziani. Dichiarazione dei diritti e delle responsabilità delle persone anziane* (EuRAG - European Federation of Older Persons); *European Charter of the Rights and Responsibilities of Older People in Need of Long-term Care and Assistance* (Age Platform) and on the international level: *Declaration of the Rights of Older Persons* (ILC - International Longevity Center USA). These private initiatives are sometimes encouraged or supported by governmental Agencies. Such a movement encourages a study of the affirmation of rights, responsibilities and freedoms promoting the respect of older persons and of best practices for professionals involved in care and social services. It also suggests a study of the transformation of these soft law initiatives into hard law in relation to the situation of older workers, for example (Abrahamson 2009); the situation of older persons in need of long term care; the living conditions of older persons living in retirement homes, and finally the situation of retired persons in general.

des services à la personne à finalité sociale 2008; European Union 2009).⁴² In short, the trend is towards advancing shared European values on issues of ageing notably health and dignified ageing (Commission Européenne- DG Empl 2008).⁴³

7.3 Citizenship as an Essential Concept in the Development of European Law and Ageing

The evolution of European policy and legal context and the growing awareness and commitment of the European Member States around issues involving older persons leads us to focus on the consistency and the effectiveness of rights, freedoms and duties related to ageing using the concept of citizenship. We need to affirm the common conception of the older person as a legal person benefiting from the rights of dignity and integrity of the person due to all human beings. In so doing we broaden the dimension for study and application of these rights.

Such a human rights approach would apply the "legal principles dimension" as a central element of a "multi-dimensional model of Elder Law" (Doron 2009). For example, "A human rights approach offers the opportunity to move the debate on from a medico-legal dilemma to one focussed on [the] dignity and rights (...)" (Macleod 2007; Jolivet 2002; United Nations Programme on Ageing and IAG 2003). This way of proceeding will contribute to fruitful research in the field of Law and Ageing. Principles of human rights have led to the identification of future research fields on age discrimination in insurance and financial sectors, in matters as diverse as credit, travel, funerals, and housing (United Nations Programme on Ageing and IAG 2003; Van Bueren 2009).

In many respects the European Union recognition of the fundamental rights of all of its citizens under the Charter of Fundamental Rights of the European Union and specific provisions addressing older persons follow this approach (Rodríguez-Piñón and Martín 2003; Clergerie et al. 2010).⁴⁴ A second primary source of law in

⁴² European Commission, *Commission Staff Working Document ex-ante evaluation...*, 5-8. The principal challenges listed are: early retirement; combating isolation of older persons through active participation and ill health in old age.

⁴³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 July 2008, *A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion*, COM(2008) 418 final (not published in the Official Journal).

⁴⁴ Charter of Fundamental Rights of the European Union, doc. 2000/C 364/01, *O.J.E.C.*, 18.12.2000, C.364/1., Article 25 under the heading *rights of the elderly*: "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"; *Præsidium, CHARTE 4473/00 CONVENT 49*, explanation of Article 25: "The Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom, established the major principles on which the European labour law model is based and shaped the development of the European social

the European Union is Article 12 of the TEU that lays the democratic foundation for the protection of fundamental rights in the European legal order through the actions of the Member State parliaments.⁴⁵ Both sources of law set forth the universal and indivisible values of the Union - human dignity, liberty, equality and solidarity and the central place of the human being in Union initiatives involving the concept of citizenship and the dimension of responsibility to future generations (Michel 2009; Dony 2008).⁴⁶

Thus, a comprehensive and multidimensional approach to the defense and promotion of the dignity of each older person depends on detailed studies of the different sources of European law mentioned above. This offers the advantage of cross-national, regional and international perspectives which will enhance and extend Law and Ageing.⁴⁷ It also opens up research on how laws and policies impact the "everyday" lives of older persons. Another branch of research would be to measure the substance and the effectiveness of the respect for fundamental human rights as seen through the lens of principles of legal autonomy and protection. This will contribute to a better understanding of the present evolution of the legal status of older persons through their dual citizenship in the European Union

model in the following decade". Specific provisions deal with old workers under the title "Elderly persons": Articles 24 and 25. "The European Social Charter, Article 23: "The right of elderly persons to social protection" (ETS, n° 163). Website: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp. The foregoing Charter is based upon the Revised European Social Charter (1996) and the Community Charter of the Fundamental Social Rights of Workers (1989). We do not know why the draftsmen of the Charter of Fundamental Rights of the European Union did not modify the term "elderly" taken from this to use "older person" or "adult person" (Borgetto and Lafore 2005).

⁴⁵ Article 12 TEU: "National Parliaments contribute actively to the good functioning of the Union: (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality; (...) (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union". Through the parliamentary action, a democratic check and balance process works on both levels of Member States and European Union.

⁴⁶ Charter of Fundamental Rights of the European Union, *op. cit.*, Preamble Sect. 6: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations." See Article 3 Sect. 3 al. 2 TEU: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

⁴⁷ Charter of Fundamental Rights of the European Union, *op. cit.*, Preamble Sect. 5: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

and within individual Member States. In this connection, a further study of the UN Treaty Body System and the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) would be a useful complement to the activity of other committees like the European Committee of Social Rights on issues of abuse and neglect of older persons (Evrard 2005).⁴⁸

7.3.1 Older Persons and Member State Citizenship

In 1991, one of the first French PhD theses in Law and Ageing presented a study of the constitutional laws and proposed legal framework for the 12 Member States of the European Economic Union of the time (Delpérec 1991). Mme. Delpérec identified the rights, freedoms and duties existing under Member State constitutions directly connected to older citizens. Since then, the European Union has expanded. Following in her footsteps a comparative breakdown of the constitutions and legislation needs to be carried out in the field of social rights and also in the areas of economic, cultural, civil, political and developmental rights for the 27 Member States using standard sociological methodology to evaluate and compare the existence of norms.⁴⁹

Even a cursory glance at the present constitutions shows promising territory to mine. Social rights under these constitutions usually have various expressions and varying content attesting to a slow evolution from the more paternalistic idea of social "assistance and compensation of something lost" to "integration and participation" centred on needs expressed by older persons themselves (Pettiti 2010; Leenhardt 2011). The legal implications of such a social rights evolution will need to be studied taking into account the evolution of constitutional texts and

⁴⁸ Websites: UN Treaty body system: <http://www2.ohchr.org/english/bodies/treaty/index.htm>, European CPT: <http://www.cpt.coe.int/en/docspublic.htm> (visited 23 March 2011). With respect to the Revised European Social Charter, we refer in this book to the chapter of Israel Doron, Benny Spanier, "International Elder Law: The Future of Elder Law".

⁴⁹ Only English official versions of the Constitutions have been used. The recent unusual references in rare constitutions to "generations" (Belgium) and "new generations" (Sweden) are remarkable evidence that ageing is viewed as a part of the domain of sustainable development domain. This recognition reinforces the so-called "third generation" of human rights. Thus, in the field of ageing, rights of development appear next to the classical division of civil, political and economic, social and cultural rights (Evrard 2005). See in this book, the chapter of Israel Doron, Benny Spanier, "International Elder Law: The Future of Elder Law". In this connection, the European Union has developed the concept of "future generations" or "solidarity between generations" (Plateforme Indicateurs 2004). See the Charter of Fundamental Rights of the European Union, *op. cit.*, Preamble Sect. 6: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations" and Article 3 Sect. 3 al. 2 TEU: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

their implementation as well through the reporting system of the European Revised Social Charter (hereinafter referred to as the "European Social Charter"), and compulsory European Union sources of law. In short, Article 23 of the European Social Charter, in large part, meets the rights of older persons (Harper, ISSA Report 2010; Commission Européenne 2008),⁵⁰ in combination with Protocol n°12 of the European Convention which develops, in turn, a prohibition of all forms of discrimination, specifically, on the grounds of age.⁵¹ In this regard, the orientations of the European Union are further confirmed by the results of a large and important study on pensions and on social and health care (Pettiti 2010).⁵² The risk is that age and disability may be automatically coupled together in this massive area of the Union's activity (Van Bueren 2009).⁵³

On matters of "assistance and compensation" in Member State constitutions, it is natural to make references to: "the right to health care services", "social security" and "social assistance" (Belgium, Bulgaria, Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Lithuania, Latvia, Hungary, Poland, Portugal, Romania, Slovenia, Finland, Sweden), "social and medical aid" and "medical care" (Bulgaria, Lithuania, Latvia, Hungary, Poland, Portugal, Romania, Slovakia, Slovenia, Finland, Sweden), "the right to receive suitable means of existence from society", (France, Belgium, Ireland, Greece, Spain, Italy, Malta, The Netherlands, Portugal, Romania, Slovakia, Sweden) and "the right to the highest level possible of physical and mental health" (Hungary, Finland). However, traditionally, Member States have developed community social and health care with a view to maintaining older persons at home. This approach promotes the circulation of service providers and contacts to and from the

⁵⁰ For some authors important steps have been taken to filling some gaps in the understanding of the problems and needs of older persons (Backes et al. 2006; Réseau européen des services à la personne à finalité sociale 2008; European Commission, *Research UE* 2011). Nevertheless, a recent example shows the lack of legal approaches to ageing issues. The EU-funded "European Research Area on Ageing 1 and 2" (ERA-AGE 1 and 2), including the FLARE Postdoctoral Fellowship and the ERA-nets, try to face the fragmentation of the European Research on Ageing issues (European Commission, *Research UE* 2011): "The action that Europe – and the EU in particular – takes now and in the future will have a profound impact on the region's social and economic spheres. The ERA-AGE 2 (European Research Area on Ageing 2) ERA-NET will help Europe meet the ageing challenge by consolidating research resources and expertise, and optimising the impact of research on policy, practice and product development. The solid cooperation developed by ERA-AGE 2 will enable Europe to respond to the ageing question that concerns and affects everyone". See the website: http://ec.europa.eu/research/fp7/index_en.cfm?pg=erancet-prECoJects&mode=search#prECoJects.

⁵¹ This convention refers to the conventions within the Council of Europe. Article 23 of the Social Charter partly covers other provisions of the Charter: Article 11 (protection of health), Article 12 (social security), Article 13 (social and medical assistance), Article 14 (social services benefits). The 12th Protocol has not entered into force.

⁵² It refers again to the above mentioned research programs and their results: SHARE (Survey of Health, Ageing and Retirement in Europe) and AGIR (Ageing, Health and Retirement in Europe) and some other research programs.

⁵³ European Commission, *Commission Staff Working Document ex-ante evaluation...*, 7, 9.

home where the older person lives and clearly reflects an implementation of the European Union policy of social inclusion and cohesion. In this respect the "integration [or "inclusion"] and participation" approach seems to overlap with this attention to social and health care.

Some other aspects are important to emphasize in the constitutional texts of Member States. First, the major reference to the non-discrimination principle⁵⁴ and the sacrosanct constitutional principle of equality of all citizens⁵⁵ before the law stimulates the application of all rights to ageing issues under both approaches.

Second, some specific rights remain understudied although present in some Member State constitutions: "the right to decent accommodation" (Belgium, Spain, Poland, Portugal, Slovenia, Finland, Sweden); "the right to the protection of a healthy environment" (Belgium, Bulgaria, Spain, Sweden) which is in the same category as "the right to the conditions necessary to development" (France, Portugal); "the right to cultural and social fulfilment" (Belgium, Portugal) which is in line with the "right to rest and leisure" (France, Bulgaria, Spain); "the right to legal aid" (Belgium, Bulgaria) and the duty of Member States to guarantee education and the "protection of consumers" (Spain).

Future research should also start to address contractual issues such as housing contracts, credit, care contracts and institutional care agreements, in order to give full scope to the concept of domicile, residence, the principle of choice of residence, the right to choose one's general medical practitioner, nurse and pharmacist, and the development of legal rights related to tenancy and domicile in care facilities. With regard to the "the right to employment and to the free choice of an occupation" it is of the utmost importance to develop some research on anti-discriminatory legislation, on solidarity between workers of different generations, on flexibility in work time, and on reforms of the pensions and benefits system in order to encourage workers to enter and remain in the labour market (Stehlíková 2008).

Third, some constitutional provisions pave the way for new research on rights of participation: "the right to make effective complaints" (Belgium, Czech Republic), the activity of an Ombudsperson, the right to petition (Van Bueren 2009) and the principle of "justice and charity" (Ireland). In the same line, further studies are

⁵⁴ Constitutional texts refer to age or other grounds or status. Czech Republic (Article 3), Germany (Article 3), Estonia (Article 12), Spain (Article 14), Italia (Article 3), Cyprus, (Article 28), Malta (Article 32), The Netherlands (Article 1), Austria (Article 7), Poland (Articles 32, 68), Portugal (Article 13), Slovenia (Article 14), Slovakia (Article 12), Finland (Article 6), Sweden (Article 2); United Kingdom (Article 14).

⁵⁵ We refer to the present Constitution of France (Preamble, Sect. 3), Belgium (Article 10), Czech Republic (Article 1), Germany (Article 3), Estonia (Articles 9 and 12); Ireland (Article 40), Greece (Article 4), Spain (Article 14); Italia (Article 3), Cyprus (Article 28), Lithuania (Article 29), Latvia (Article 91), Luxembourg (Article 10 bis), Hungary (Article 66), Malta (Articles 32, 39), The Netherlands (Article 1), Austria (Article 7), Poland (Article 32), Portugal (Article 13), Romania (Article 16), Slovenia (Article 14), Slovakia (Article 12), Finland (Art 6), Sweden (Article 2). The Charter of Fundamental Rights of the European Union recognizes the *rights of the elderly* (Article 25) in a chapter devoted to the equality principle.

needed on access to administration and the effectiveness and transparency of administrative acts which give effect to the capacity to remain an active citizen in old age.

At present, social, economic and cultural rights derived from legal provisions and treaties still form a major area in legal research. In addition, it is necessary to include an examination of decisions (declaratory judgments) interpreting and applying the law. A methodical examination of Member States' case law material involving older persons in all legal contexts and situations will demonstrate their legal status as interpreted by the courts.⁵⁶ Such a titanic research programme presupposes technical adaptations in order to access raw data. In that regard Law and Ageing researchers urgently require adapted key-words in official case law and tribunal databases. This obviously raises the general problem of vocabulary and the necessity of feedback to the systems.⁵⁷

Given the importance of the economic Internal Market in the European Union, research into the field of social and economic rights is in inverse proportion to interest in civil, cultural and political rights (Evrard 2005; Van Bueren 2009). There is a need for a well-balanced range of research on civil, cultural and political rights of older persons on the level of "participation and integration", identified as "the right to personal development" (Germany, Estonia, Greece, Portugal, Romania) or the "right to self determination" (Leenhardt 2011), voting rights, access to public buildings and transport, access to educational services; integration and participation in social, economic and political life (Greece) and access to judicial services.

⁵⁶ Branches of law usually refer to constitutional law, civil law, contract and obligations, family law, criminal law, administrative law, tax law, labour law, social law, international law, European law. Legal sources refer in the main to constitutions, laws, decrees, court decisions, customs and doctrines. Comparative law traditionally distinguishes French (Belgium, The Netherlands, Luxembourg, commonly referred to as the Benelux, Italy, Romania and Spain), German (Germany, Austria, Greece, Portugal, Slovakia) and Scandinavian (Sweden, Denmark) Civil Law traditions. The other Member States belong to mixed Civil Law systems or to mixed Civil and Socialist Law systems. Common Law countries are: England and Wales, Northern Ireland and Ireland. Mixed Civil and Common Law countries are: Scotland, Malta, Cyprus. It is part of the complexity of the European context. Considering that the basic problems are largely the same among European older persons such as isolation (mostly older women (over 80 years)), malnutrition, dehydration, substandard accommodations, inadequate clothing, poverty, frailty, dependency, limited or no access to the legal system and for many older and adult persons a low level of income in very old age, we anticipate that every law system, despite the differences of legal traditions, will find an appropriate legal response to the needs of older and adult persons.

⁵⁷ For example, this concerns, in Belgium and France, the organization of the Prosecution Office and the Office of the Clerk of the Court in order to register lodged complaints. A second aspect concerns the appointment of some leading magistrates pushing administrations, city or national police forces and services to act in favour of old victims or perpetrators. A serious legal approach to all forms of violence involving old persons cannot start without some adaptations. This problem also concerns the civil divisions of each tribunal and court, in particular, family law, employment and bankruptcy sections, as well as the Justices of the Peace and their equivalent.

7.3.2 Older Persons and European Union Citizenship

Who is an *older person* in the Union context? Originally, the European Union definition of older persons referred to the work status of the citizen. Today, European Union citizens (*workers*) and non-European Union citizens (*migrant workers*) having residence in the European Union, enjoy, to a large extent, the same economic and social rights.⁵⁸ The definitions of the terms *workers* and *migrant workers* include all "dependants" of the family. Among them, we find "the ascendants",⁵⁹ that is to say, the older persons of the workers' family. Similar provisions exist within the framework of European legislation on family entry and settlement⁶⁰ and in Member States legislation. This aspect of the relationship with the outside world of the Union accords with other treaty definitions of older persons at regional and international levels (Evrard 2005).⁶¹ This large section of European Union law certainly requires more consideration and further research on the sensitive context of migration.⁶²

Certainly the question of the worker or the former worker status of an older person has to be understood within the context of the economical aims of the European Union (Article 3 TEU Sect. 3).⁶³ But flowing from the fundamental

⁵⁸ About the social rights, see Articles 45 and 48 TFEU.

⁵⁹ See Article 18 TFEU; Article 10-1b of the Regulation 1612/68/EC of the Council of 15 October 1968, *O.J.E.C.*, L. 257, 19 October 1968.

⁶⁰ See the Directive 86/2003/EC of the Council of September 22nd 2003, *O.J.E.C.*, L. 251, October 3rd 2003 and the Directive 109/2003/EC of the Council of November 25th 2003, *O.J.E.C.*, L. 16, January 23rd 2004.

⁶¹ For example, the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/RES/45.158 of December 18th 1990, entered into force on July 1st 2003, Articles 1 and 4.

⁶² Another section of the relationship with non-Member States (Third States) concerns the promotion and development of human rights within the frame of commercial or non-commercial agreements (Clergerie et al. 2010). Ageing issues have also to be studied in this context. Article 3 Sect. 5 TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"; see also Articles 8 TEU and 220 and 221 TFEU. They refer to the Generalised System of Preferences (GSP) providing "a preferential access to the European market to 176 developing countries and territories" and a very preferential arrangement for "49 of the Least Developed Countries" (LDCs) (Sunga 2010). About the cooperation with developing countries, see Commission Communication of May 21st 1999: *Towards a Europe for All Ages - Promoting prosperity and Intergenerational Solidarity*, COM (99) 221 final. (Not published in the Official Journal).

⁶³ Article 3 TEU: "3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and

changes within the European Union from a purely economic Union, older persons are no longer defined by their labour status. They have become citizens at the Member State and Union levels.⁶⁴ The concept of citizenship now extends to civil, political and cultural rights and beyond solely social and economic ones.⁶⁵

Older persons, as others, are now citizens of both the Member State and the European Union levels, resulting in a reciprocal reinforcement of rights and freedoms at both levels within the European Union collective "area of freedom, security and justice"⁶⁶ settled by treaties. In addition, the cooperative work within the Council of Europe of all European Union Member States also reinforces the concept of citizenship (Garcia 2008).⁶⁷

European Union citizenship includes some rights having an impact on the individual situation of each older person. For example, we would like to emphasize the urgent need, at the Member State and European levels, to study the effectiveness of this treaty-based "area of freedom, security and justice" in the everyday lives of older persons. Respecting "freedom" we would like to suggest an in-depth study of the main European Union proclaimed freedoms.⁶⁸ And as to "security and justice" we would like to examine the following issues: the reality of equality of each

technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced (...)."

⁶⁴ Article 20 TEU: "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship (...)."

⁶⁵ Civil Rights: Articles 20–24 TFEU: the rights to move; the right to vote and to stand as a candidate in European or municipal elections; the right to diplomatic and consular protection; the right to petition [Article 227 TFEU]; the right to apply to the European ombudsman and to address to any institution of the European Union [Article 228 Sect. 1. al. 1 TFEU].

⁶⁶ See also Articles 3 Sect. 5 and 9 TEU; Charter of Fundamental Rights of the European Union, *op.cit.*, Preamble, Sect. 2 gives the outline: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice"; see also Article 12 TEU for the role of the national parliaments in this context and Articles 67–89 TFEU.

⁶⁷ See, for example, the joint European Union–Council of Europe Program on *The protection and the promotion by national human rights structures of the rights of elderly people* started in 2009 (Council of Europe, LHRCB/NHRS (2009) 7).

⁶⁸ Article 3 TEU: "1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. (...); Article 20 Sect. 2 TFEU: "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (...). See also Article 26 Sect. 2 TFEU.

citizen⁶⁹; the awareness of rights and recourses within the European Union by older citizens⁷⁰ as part of the effectiveness of their rights, duties and freedoms; the role of NGOs, lobbies and associations in ageing matters⁷¹; the role of the parliaments of the individual Member States in the decision-making process of the European Union⁷²; the attention that could be paid to the protection of older persons and their individual rights as consumers⁷³; their protection with regard to public health⁷⁴; and the prevalence of serious criminal offenses related to older persons as a European Union phenomenon.⁷⁵

7.3.2.1 Decisions of the European Courts

The case law material of both the Court of Justice of the European Communities and the European Court of Human Rights confirms the central role of equality of economic and social rights and of principles of non-discrimination.⁷⁶ However, with the help of European case law, we would like to put forward other directions for future research.

A search of the more recent decisions of the European Court of Justice⁷⁷ shows that judgments involving older persons deal principally with discriminatory situations on grounds of age questioning controversial attitudes by employers (non-payment of pension allowances, termination of contracts and appropriateness of differing criteria for age groups in various professional activities).⁷⁸ Although at

⁶⁹ Article 9 TEU: "(...) In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".

⁷⁰ Article 10 TEU: "3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen"; see also Article 20 Sect. 2 b), Article 22 TFEU: the right to vote and to stand as candidates in elections.

⁷¹ Article 11 Sect. 2 TEU: "2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society." The Pressure Groups or lobbies pertaining to the civil society are now called *interest representatives*. On March 21st 2007, the Commission adopted the Communication on the follow up to the Green Paper 'European transparency Initiative' (COM (2007)127) and launched in Spring 2008 a voluntary register for *interest representatives*. The CONECCS database is therefore closed. (See website: http://europa.eu/transparency-register/index_en.htm).

⁷² Article 12 TEU.

⁷³ Article 169 TFEU.

⁷⁴ Article 168 TFEU.

⁷⁵ Article 88 TFEU.

⁷⁶ See in this book the chapter of Helen Meenan (Chap. 4).

⁷⁷ Article 19 TEU: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

⁷⁸ Judgment of 12 October 2010, case *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen, v. Region Syddanmark* (C-499/08); Judgment of 12 October 2010, case *Gisela Rosenblatt*

the present time no judgment has dealt with the legal protection under Article 25 of the Charter of Fundamental Rights of the European Union (*rights of the elderly*), it is clear that judges will give meaning to its content and implementation in the future.

Finally, looking at the actions of the European Court of Human Rights which does not have jurisdiction to interpret the Charter of Fundamental Rights of the European Union, but which has nevertheless dealt positively in asserting the equal rights of older persons as human beings, we note that its judgments reflect, to some extent, the same legal issues due to proactive judicial interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms despite the absence of clear provisions (Pettiti 2010).

When we examine the decisions of the last 6 years,⁷⁹ within a first level of cases, the European Court of Human Rights deals with pension allowances (Articles 6 Sect. 1—due process of law and social protection)⁸⁰ and the questionable legal issues surrounding the principle of discrimination (Article 14 and Article 1 Protocol 1—discrimination).⁸¹

On a second level of cases, the legal issues concern violence and abuse and neglect related to older persons, primarily older prisoners and witnesses (Article 3—prohibition of torture, inhuman or degrading treatment), and the right to denounce shortcoming in nursing care (Article 10 – freedom of expression).⁸² This again allows for a comparative observation of the reports of the European

v. Oellerking Gebäudereinigungsges. mbH (C-45/09); Judgment of 18 November 2010, cases *Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv* (Joined Cases C-250/09 and C-268/09); Judgment of 12 January 2010, case *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and others* (C-341/08); Judgment of 5 May 2009, case *The Queen on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (C-388/07); Judgment of 18 December 2007, case *Habelt, Möser and Wachter v. Deutsche Rentenversicherung Bund* (Joined Cases C-396/05, C-419/05 and C-450/05); Judgment of 22 May 2005, case *Werner Mangold v. Rüdiger Helm* (Case C-144/04).

⁷⁹ For a broader examination of the European case law (Evrard 2005).

⁸⁰ Judgment of 19 June 2008, case *Ichirgiaroglou v. Greece* (n°12045/06); Judgment of 5 June 2008, case *Lambadaridou v. Greece*, (n°42150/06); Judgment of 21 December 2006, case *Zehelj v. Slovenia* (n°67447/01); Judgment of 15 January 2008, case *Opalko v. Poland*, (n° 4064/03).

⁸¹ Judgment of 16 March 2010, case *Carson and others v. United Kingdom*, (n°42184/05); Judgment of 10 May 2007, case *Runkee et White v. United Kingdom*, (n°42949/98 et 53134/99); Judgment of 12 April 2006, case *Stec & others v. United Kingdom* (n°65731/01 and 65900/01); Judgment of 22 August 2006, case *Walker v. United Kingdom* (n° 37212/02); Judgment of 6 November 2008, case *Kokkinis v. Greece* (n°45769/06); Judgment of 4 December 2008, case *Reveliotis v. Greece* (n°48775/06); Judgment of 29 October 2009, case *Si Amer v. France* (n°29137/06).

⁸² Judgment of 28 September 2006, case *Andandanskiy v. Russia* (n° 24015/02); Judgment of 17 September 2009, case *Enea v. Italia* (n° 74912/01); Judgment of 28 September 2010, case *Mangouras v. Spain* (12050/04); Judgment of 15 December 2005, case *Barry v. Ireland* (18273/04); Judgment of 3 June 2010, case *Konashkevskaya & others v. Russia* (n° 3009/07); Judgment of 7 January 2010, case *Stoyan Mitev c. Bulgaria* (n°60922/00). Judgment of 21 July 2011, case *Heinisch v. Germany* (no 28274/08).

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Evrard 2005).

Finally, in our opinion, in both European courts the judgments have to be further studied in order to determine the effectiveness of access to justice by older persons. Such research should include, for example, the age of the plaintiff, the delays involved in the proceedings,⁸³ the gender perspective (to identify plaintiffs and to deal with sexual identity issues),⁸⁴ the terms of the older plaintiff's legal aid, where applicable, the recourses required as a precondition to instituting a proceeding and finally, procedural compliance. As a final assessment we underscore that there are not presently many decisions involving older persons as plaintiffs coming before the European Union Court. Older persons are, in most cases, appearing as intervenants in cases which are presented for a preliminary (declaratory) ruling. On the other hand, older plaintiffs may and do file complaints directly before the European Court of Human Rights. These latter are largely individuals aged 63–93 years old.

7.4 Conclusion

An overview of Law and Ageing in Europe is a difficult exercise because of the complex social, political, economic and legal framework which is reflected in ageing issues. Nevertheless, some features show that a conceptual base exists around citizenship which is rooted in a legal and complementary vision of the older person as a human being by Member States and the European Union. We are situated at the intersection of national and European law developments in the field of ageing and a growing awareness of ageing by Member States, by European Union bodies and by society in general. Such an expansion needs a solid base of accurate information so that Law and Ageing becomes an integral part of other scientific pursuits. It is a matter of urgency in the changing demographic and social context of the European continent. We are confident that Law and Ageing will be accepted as an identifiable and specific domain of law practice, research and education.

⁸³ European Court of Justice: Dismissal by reason of retirement, Judgment of 5 May 2009, case *The Queen on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (C-388/07); European Human Rights Court: Judgment of 15 May 2008, case *Mikhaylenko v. Ukraine* (n° 18389/03); Judgment of 9 October 2008, case *Orlova v. Russia* (n° 21088/06); Judgment of 15 July 2010, case *Saikova v. Russia* (n° 25270/06); Judgment of 8 April 2008, case *Sirc v. Slovenia* (n° 44580/98); In all the decisions satisfaction based on Article 6 Sect. 1 (reasonable deadlines) in combination or not with Article 13 (absence of effective remedies) of the European Convention for the Protection of Human Rights.

⁸⁴ European Court of Justice: Judgment of 29 March 2009, case *European Commission v. Greece* (C-559/07); European Human Rights Court: Judgment of 8 January 2009, case *Schlumpf v. Switzerland* (n° 29002/06).

References

- Abrahamson P (2009) De l'or gris ? L'emploi des seniors au Danemark. In: Bulletin de droit comparé du travail et de la sécurité sociale
- Age Platform (2010) Introduction to the Institutions and the European policy-making process of relevance to older people
- Association Collectif des Notaires de France (Collectif) (2006) Les personnes vulnérables. Litec-Jurisclasser (LexisNexis) ACNF, Paris
- Backes GM, Lasch V, Reinmann K (eds) (2006) Gender, health and ageing. European perspectives on life course, health issues and social challenges. VS Verlag, Wiesbaden
- Bayart C, Deiteren C (2010) Recente rechtspraak van het hof van Justitie met betrekking tot de ras- en kaderichlijnen. In: Bayart C, Sottiaux S, Van Drooghenbroeck S (eds) Actualités du droit de la lutte contre la discrimination. Die Keure, La Chartre
- Blázquez Martín D (ed) (2006) Los derechos de las personas mayores. Perspectivas sociales, jurídicas, políticas y filosóficas. Editorial Dykinson
- Benzimra-Hazan J (2010) Les personnes âgées et le droit international. Conférence donnée à l'Association des Chrétiens contre la Torture (ACAT)- section Paris V, transcription écrite
- Borgetto M, Lafore R (2005) Article II-85: Burgorgue-Larsen, Laurence, Levade, Anne, Picod, Fabrice, Traité établissant une constitution pour l'Europe. Partie II, La Charte des droits fondamentaux de l'Union. Commentaire article par article. Bruylant, Bruxelles
- Burgelin J-F, Gridel J-P (1999) Vieillesse démographique et droit. Vers un droit de la vieillesse? Dalloz-Sirey, Paris
- Centre pour l'égalité des chances et la lutte contre le racisme (2010) Discrimination fondée sur l'âge. CECLR
- Clergerie J-L, Gruber A, Rambaud P (2010) L'Union européenne. Dalloz
- Cogulet-Bonnet F (2008) L'incidence de l'âge sur les droits de l'homme et les libertés fondamentales. Editions Jeunesse et droit
- Commission Européenne- DG Emploi, affaires sociales et égalité des chances (2008) Que peut faire l'Union européenne pour protéger la dignité des personnes âgées et prévenir les maltraitances ? Document de réflexion
- Congrès des notaires (2007) A l'automne de ma vie – In de herfst van mijn leven. De Bocck/Larcier, Bruxelles
- Council of the European Union (2008) Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union (30 April 2008), doc. 6655/1/08/REV 1
- Delpérée N (1991) La protection des droits et des libertés des citoyens âgés. Caisse Nationale de Prévoyance
- Dony M (2008) Droit de l'Union européenne. Editions de l'ULB
- Doron I (2009) Theories on law and ageing: the jurisprudence of elder law. Springer-Verlag, New York
- European Commission, doc. SEC (2010) 1002 final, Commission staff working document ex-ante evaluation. Accompanying document to the decision of the European Parliament and of the Council on the European Year for Active Ageing (2012). Brussels, 6 September 2010
- European Commission (2011) Ageing at the forefront of European Research. Research EU Magazine, n° 1, April 2011
- European Policy Evaluation Consortium (EPEC) (2008) Study on discrimination on grounds of religion and belief, age, disability and sexual orientation outside of employment, final report. EPEC, Brussels
- European Union, doc. E/2009/CZ (2009) Conférence européenne sur le Soins et la Protection des personnes âgées. Dignité et Risques pour les personnes âgées, Abstract. Prague, 25–26 mai
- Eurostat (2010) Ageing in the European Union: where exactly? EU Publications, Luxembourg
- Evrard A (2005) La personne âgée dans le droit international et européen des droits de l'homme. Editions namuroises/PUN
- García K (2008) Le droit civil européen. Nouvelle matière, nouveau concept. Larcier

- Grossi P (2011) *L'Europe du droit* (traduit de l'italien par Sylvie Taussig). Editions du Seuil, coll. Faire l'Europe, Paris
- Jolivet A (2002) La politique européenne en faveur du vieillissement actif. *Retraite et société*, 2002/2 n° 36
- Harper S (2010) Les enjeux démographiques et la sécurité sociale. Défis de société et capacité d'adaptation : la sécurité sociale dans un monde vieillissant. International Social Security Association, Forum régional de la sécurité sociale pour l'Europe, Varsovie, 3-5 mars 2010
- Lacour C (2007) Vieillesse et Vulnérabilité. Aix-en-Provence, Presses Universitaires d'Aix-Marseille, collection du Centre Pierre Kayser
- Leenhardt H (2011) Zukunft quartier, l'avenir, le quartier. In: *Gérontologie et Société*. Fondation Nationale de Gérontologie, vol 136
- Macleod N (2007) Human rights in a ageing world: perspectives from around the world. International Longevity Center, Global Alliance
- Michel V (2009) La dimension communautaire des libertés et droits fondamentaux. In: Cabrillac R, Frison-Roche M-A, Revet T (eds) *Libertés et droits fondamentaux*, Dalloz
- Monjal P-Y (2008) Le droit et le vieillissement de la personne dans l'Union Européenne. Le recours à la méthode ouverte de coordination (MOC) comme rajeunissement de la méthode communautaire, in Binet, Jean-René, (dir.), *Droit et vieillissement de la personne*. Actes des journées du 17 au 19 octobre 2007 organisées par la Faculté de droit et de sciences économiques de Besançon. Litec-Juriscasseur (Lexis-Nexis)
- Naskou-Perakki P (2010) International mechanisms protecting human rights. texts, comments and case law. Ant. N. Sakoulas Publishes, Bruylant
- Pettiti C (2010) La protection des personnes en situation de faiblesse. In: Favreau B (ed) *La Charte des droits fondamentaux de l'Union européenne après le traité de Lisbonne*, Bruylant
- Plateforme Indicateurs (2004) Indicateurs du vieillissement dans une approche de développement durable. La situation de la Belgique/Indicatoren voor vergrijzing in een context van duurzame ontwikkeling. Het kader in België
- Praesidium, CHARTE 4473/00 CONVENT 49, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50. Website: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm>
- Réseau Européen des Services à la personne à finalité sociale (2008) Vieillessement de la population: Que fait l'Union Européenne pour les personnes âgées ? Enjeux, services à la personne, TTC et logement
- Rodríguez A, Echezarreta M (2001) El reconocimiento integral de los derechos de las personas mayores por primera vez en una instancia internacional: la Unión Europea. In: *Geriatrionet.com* Revista electrónica de Geriatria y Gerontología, vol 3, 2001. Website: www.geriatrionet.com/index.php/journal/article/view/148/225
- Rodríguez-Piñón D, Martín C (2003) The international human rights status of elderly persons. *Am Univ Int Law Rev*:18
- Rossi C, Liliana S, Maria R, Siniscalchi L (1997) *La terza età nel diritto interno ed internazionale*, Ed. Scientifiche Italiane
- Sapir A (2006) Globalization and the reform of European social models. *ICMS*:44
- Stehlíková D (2008) The human rights of older persons. The Czech Republic, New York
- Stevens Y (2005) Vergrijzing van de maatschappij en de juridische gevolgen. Een zoektocht naar Ouderenrecht. Universiteit Derde Leeftijd, 24 mei 2005
- Sudre F (2009) La dimension internationale et européenne des libertés et droits fondamentaux. In: Cabrillac R, Frison-Roche M-A, Revet T (eds) *Libertés et droits fondamentaux*, Dalloz
- Sunga LS (2010) The EU's Role for the Promotion and Protection of Economic, Social and Cultural Rights - Working Group II: European Union Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward, 12th EU-NGO Forum on Human Rights, Brussels, 12 and 13 July 2010

- United Nations Programme on Ageing and the International Association of Gerontology (IAG) (2003) *Research agenda on ageing for the 21st century*. IAS Publications, New York
- Van Bueren G (2009) The protection of the human rights of older persons in Europe: a legal perspective. Background briefing paper, International symposium on the rights of older people, Age Concern England/HepAge International/International Federation on Ageing, January 2009
- Zahidi A (2008) Features and challenges of population ageing: the European perspective. European Centre for Social Welfare Policy and Research (ECSWPR), in Policy Brief, March 1, 2008