AGEISM IN THE FORM OF MANDATORY RETIREMENT: A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORKS OF THE UN, THE USA AND THE EU

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EXECUTIVE SUMMARY

This thesis discusses the issue of mandatory retirement, defining it as a form of age discrimination in the workplace. It argues that, in today's ageing society, imposing mandatory retirement ages has neither economical nor moral justification. A comparative analysis of the legal frameworks of the UN, the US and the EU is conducted for two purposes. First, to analyse the development of age discrimination legislation within these jurisdictions, and second, to highlight positive examples of legislations and court decisions concerning the protection against mandatory retirement. The findings of the research suggest that the UN system lacks a comprehensive, effective and enforcing mechanism for an adequate protection against mandatory retirement. The US and the EU both enacted legally binding legislation where age enjoys the status of a protected attribute. Termination on the ground of age is however only prohibited in the US due to the Age Discrimination in Employment Act which was enacted in 1967. Long-standing and well-established legislation on age discrimination in the US has provided some of the best examples of good practices, both in the legislation and in case law. The EU Employment Equality Framework Directive and the Court of Justice of the EU, on the other hand, give broad discretion to national states to choose appropriate means of achieving their social policy objectives, even when this includes laying down mandatory retirement ages. Despite of that, the EU provides several examples of good practices. Unlike in the US where older persons do not enjoy constitutional protection, the EU court recognises the principle of non-discrimination on grounds of age as a general principle of EU law. Moreover, the most recent mandatory retirement case decided by the CJEU suggests that EU Member States need to be very careful when they want to change their already established age limits. Considering the most recent developments, the practice of mandatory retirement will undoubtedly undergo significant changes in the coming decades, particularly at the EU and the UN level.

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LIST OF ACRONYMS

ADA - Age Discrimination Act

ADEA - Age Discrimination in Employment Act

BFOQ - Bona Fide Occupational Qualification

CRA - Civil Rights Act

CJEU – Court of Justice of the European Union

CFREU - Charter of Fundamental Rights of the European Union

CESCR - Committee on Economic, Social and Cultural Rights

EC Treaty - European Community Treaty

ESC Rights – Economic, Social and Cultural Rights

EEC Treaty – Treaty Establishing the European Economic Community

EU – European Union

EEOC – Equal Employment Opportunity Commission

EY2012 - The European Year for Active Ageing and Solidarity between Generations

GDOR – Genuine and Determining Occupational Requirement

ICCPR – International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ILO – International Labour Organization

OEWG – The UN Open-Ended Working Group on Ageing

OP-ICESCR – Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

OP-ICCPR – Optional Protocol to the International Covenant on Civil and Political Rights

(R)ESC - Revised European Social Charter

The Employment Equality Framework Directive - Council Directive 2000/78/EC

UDHR – Universal Declaration on Human Rights

UN – United Nations

USA/US – United States of America/United States

WHO – World Health Organization

INTRODUCTION

The world is currently facing a massive demographic transformation: unprecedented population-ageing is changing the demographic picture around the globe. A distinctive and irreversible process of demographic transition is affecting the developed world on multiple levels, but mostly economically. The burden of population-ageing is forcing countries to introduce certain changes in their long established policies and practices in the area of labour markets, capital markets, services and traditional social support systems such as health and pensions.[1] In recent years, the pension system has changed at an astonishing rate. Pension reforms include higher retirement ages, equalising retirement ages for men and women, altering calculation formulas, boosting the employability of the working-age population and many others.[2]

Although the possibility of early retirement under favourable conditions has been largely abolished in most developed counties, employment after the age of 65 is still relatively rare.[3] This is particularly the case in European countries where mandatory retirement - an institution of forcing employees to retire at a fixed age - remains common practice.[4] Setting out a fixed age under which an employee is required to retire, regardless of their actual ability and willingness to work, puts an older worker in an unfair and vulnerable position. While a large number of older workers would like to continue to work after a fixed retirement age, the practice of mandatory retirement prevents them from doing so and effectively forces them to leave the labour market and enter retirement.[5]

[1] European Commission, Special Eurobarometer 378, "Active Ageing," (Brussels, 2012): 11.
[2] OECD, "Pensions at a Glance 2013: OECD and G20 Indicators," OECD Publishing, (2013): 10.
[3] Jaap Oude Mulders, Hendrik P. van Dalen, Kène Henkens and Joop Schippers, "How Likely are Employers to Rehire Older Workers After Mandatory Retirement? A Vignette Study among Managers," De Economist162, no. 4 (2014): 416.
[4] Ibid: 416.
[5] Ibid: 416.

The practice of mandatory retirement arises from a number of negative stereotypes and prejudices which are associated with older workers. Various studies have found that employers tend to label older workers as being less productive[6], less flexible[7], and less motivated[8] than younger workers. Additional problems emerge when these stereotypes are combined with the employer's perception that older workers are more costly than younger ones due to the higher wages they earn and their tendency to use more benefits.[9] The most frequently cited reason supporting mandatory retirement is that later retirement results in higher unemployment among the young (also known as the "lumped of labour theory"). It is, therefore, held that mandatory retirement will create a fair distribution of job opportunities and foster employment and promotion possibilities for younger workers.[10]

None of these justifications have been proven to be true. Numerous studies have shown that one's birth year is irrelevant in determining that person's capabilities[11]; that replacing older workers with younger ones is even more costly for an employer[12]; and lastly, that increased employment among older persons does not affect job opportunities or wage rates of young people nor any other age group.[13]

The right to work is a fundamental human right, yet millions of older persons are denied of this right simply because of prejudices about their age. It is therefore without doubt that

[6] Edward P. Lazear, "Why is There Mandatory Retirement?," Journal of Political Economy 87, no. 61 (1979): 1262.
[7] Richard A. Posthuma, Michael A. Champion, "Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions," Journal of Management 35, no 1 (2009): 162.
[8] Ibid: 162.
[9] Ibid: 162.
[10] Edward P. Lazear, "Why is There Mandatory Retirement?" J. of Political Economy 87, no. 61(1979): 1263.
[11] Elaine S. Fox, "Mandatory Retirement - A Vehicle for Age Discrimination," Chicago-Kent Law Review 51, no 1 (1974): 118.
[12] Terry S. Kaplan, "Too Old to Work: The Constitutionality of Mandatory Retirement Plans," Southern California Law Review 44, no. 1 (1970): 162.

By replacing an older worker the employer is faced with a double burden: training costs for younger employees and the further economic burden of losing highly experienced and loyal workers.

[13] Alicia, H. Munnell, April Yanyuan Wu, "Do Older Workers Squeeze Out Younger Workers", Stanford Institute for Economic Policy Research, Discussion Paper No. 13-011 (2013): 22.

mandatory retirement touches upon the core of the human rights of older workers and represents one of the most widespread and perhaps most vicious forms of age discrimination.

When compared to the situation of other minority groups such as racial, ethnic, religious minorities and women, the rights of older persons appeared relatively late on the stage of protected human rights. The Universal Declaration on Human Rights (1948) (hereafter 'UDHR') does not recognise age as a protected attribute, nor is age included in its two covenants: the International Covenant on Civil and Political Rights (1966) (hereafter 'ICCPR') and the International Covenant on Economic, Social and Cultural Rights (1966) (hereafter 'ICESCR').

The situation differs in the regional field. In the US, for example, the Age Discrimination in Employment Act (hereafter 'ADEA) was written in 1961 and enacted in 1967, even before the adoption of the ICCPR.[14] In Europe, on the other hand, it was only in 2000 with the adoption of the Council Directive 2000/78/EC (hereafter 'Employment Equality Framework Directive' or 'Framework Directive') that age was recognised as a prohibited ground of discrimination. Despite of the relatively early recognition in the US (which should be considered an exception), the status of older persons has not yet received the international attention it deserves. Although there have been some efforts to invoke international sensibility and action for the protection of older persons and for their equal treatment in the workplace, this development is relatively recent and there is still no comprehensive universal international instrument for establishing an adequate and specific protection of older persons. This makes them especially vulnerable for unlawful discriminatory practices such as mandatory retirement.

[14] The ADEA (Age Discrimination in Employment Act) was written in 1961 and enacted in 1967. However, before it was amended, it prohibited discrimination based on age against person aged between 40 and 65 only.

This thesis examines the current status of the anti-discrimination legislation from a comparative perspective, addressing the problem of mandatory retirement as discrimination based on age in the field of the workplace. A comparative analysis of the legal frameworks of the United Nations (hereafter 'UN'), the United States of America (hereafter 'US') and the European Union (hereafter 'EU') is conducted for two purposes: to analyse the historical development of age discrimination legislation within these jurisdictions and to highlight examples of good practices for the protection against ageism in the form of mandatory retirement. It is important to emphasise that the subject-matter of this study is discrimination against the 'aged', and not against the 'young'.[15]

This thesis argues that the international community still lacks a comprehensive universal international instrument which would provide adequate and specific protection of older persons against age discrimination in the form of mandatory retirement. The UN system offers several examples of good practice within its soft-law mechanism. However, the absence of any legally binding mechanism as well as the absence of any relevant case law on mandatory retirement places the UN system at the bottom of the scale when it comes to providing adequate protection against mandatory retirement. The US and the EU, on the other hand, both enacted legally binding documents where age is explicitly recognised as a prohibited ground of discrimination. The difference between these two jurisdictions is that the US outlawed termination of employment on the ground of age. This, of course, implies mandatory retirement as discussed in this thesis. Mandatory retirement is, on the other hand, not prohibited in the EU. In fact, the Court of Justice of the European Union (hereafter 'the

[15] *Young people can also be the subject of discrimination because of to their (real or presumed) lack of physical and/or intellectual maturity, as well as lack of autonomy and responsibility. However, identifying individuals as 'young' in the legal framework has a purpose of regulating their protection (e.g. age limits for drivers' licences) rather than ensuring equal treatment.*

See, Csilla Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination," The Equal Rights Review, 11, no.1 (2013): 69.

CJEU') has given broad discretion to national states when deciding on mandatory retirement. This would lead to the conclusion that US law provides better protection than EU law. However, as will be outlined below, due to the hidden acceptance of indirect age discrimination and the limited scope of the ADEA, older workers in both the US and the EU are in a similarly vulnerable position.

Structure of the Thesis

The thesis is divided into 3 chapters:

The first chapter, *Background and Conceptual Framework,* deals with basic concepts related to the status of older persons. The beginning of Chapter 1 discusses challenges in defining 'old age' and conceptual differences between developed and developing countries in determining the boundaries of 'old age'. While developed countries determine old age according to ones' chronological age, labelling someone as 'old' in developing countries is more connected to their contribution to society.[16] This part discusses the difference between chronological age and functional age, an important distinction when it comes to mandatory retirement as a practice of setting a fixed age at which an individual is forced to retire. For the purpose of this thesis, a new definition of 'old age' is proposed. It is important to emphasise that the focus of this thesis is not discrimination against the 'young', but rather discrimination against the 'aged'. Chapter 1 also discusses common similarities between disability discrimination and age discrimination, both based on stereotypes and prejudices connected to the physical and/or mental differences of the target population compared to the 'normal' attributes of other members of the 'mainstream society'. Moreover, the contemporary

[16] *See* Marc Gorman, "Development and the rights of older people", in The ageing and development report: poverty, independence and the world's older people, ed. Judith Randel et al., (London: Earthscan Publications Ltd., 1999), 4;
See United Nations Population Fund, "UNFPA Report, Chapter 1" (New York, 2012): 41, https://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/UNFPA-Report-Chapter1.pdf (accessed 12 December 2014).

problem of population-aging is examined on the basis of UN statistical sources. Such a numeric approach is helpful when trying to answer two questions. First, was the adoption of anti-discrimination legislation triggered by the pressing problem of population-ageing or some other factors? And second, can mandatory retirement as a practice survive in aging societies? Additionally, the attention is given to the specificity of age as a protected attribute and its presumed lower place in the hierarchy of protected grounds. The final part discusses the need for a new Convention on the Rights of Older Persons.

The second chapter, *Mandatory Retirement,* focuses on the central issue of this thesis: ageism and its manifestation in the form of mandatory retirement. The beginning of the chapter discusses the concept of discrimination based on age as well as the concept of ageism; including its origin and practical use. When discussing ageism, this thesis follows the often cited definition given by American gerontologist Robert Butler who set a cornerstone in understanding discrimination based on age by comparing it to racism and sexism.[17] After defining ageism, attention is given to the narrower concept of mandatory retirement. The subject of mandatory retirement has been analysed by many authors who have offered various definitions.[18] However, none of these definitions discusses mandatory retirement as discrimination based on age. Therefore, this thesis proposes a new definition whereby mandatory retirement is the setting of a fixed age for retirement, which forces people to retire and neglects their ability and/or willingness to continue to work. The final part of Chapter 2 explores different types of mandatory retirement ages; classifies them into two main groups: statutory and collective mandatory retirement age; and discusses their variants.

[17] Robert N. Butler, "Age-Ism: Another Form of Bigotry," The Gerontologist 9, no.4 (1969): 243.
[18] *See* Till von Wachter, "The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts," Centre for Labour and Economics. University of California Berkeley Working Paper No. 49 (2002): 1; *See* Andrew Wood, Marisa Robertson and Dominika Wintersgill, "A comparative review of international approaches to mandatory retirement," Department of Work and Pensions, Research Report No.674 (2010): xiii; *See* David T. Barker, Robert Clark, "Mandatory Retirement and Labour-Force Participation of Respondents in the Retirement History Study," Social Security Bulletin 43, no.11 (1980): 20.

The last chapter, *A Comparative Analysis of the Legislation and Case Law*, conducts a comparative analysis of relevant legislation concerning discrimination based on age. This chapter follows the origin of anti-discrimination law in three chosen jurisdictions (the UN, the US and the EU) and tries to answer the following question: when was 'age' as a protected attribute first included into the catalogue of prohibited grounds and what triggered this decision? Within anti-discrimination legislation analysis, special attention is given to provisions concerning retirement age and possible mandatory retirement. Moreover, in order to provide a full thorough account of anti-discrimination legal frameworks, this thesis also focuses on the most relevant and the most recent case-law concerning mandatory retirement in the chosen jurisdictions. Therefore, besides examining laws and policies, attention is also given to the case law of the UN Human Rights Committee, the US Supreme Court and lower courts, and to the CJEU. Besides determining differences in the legal frameworks of these three jurisdictions, a comparative analysis is used to point out examples of good practice, examples which could be followed by other chosen jurisdictions as well by other countries facing the problem of discrimination based on age such as mandatory retirement.

Choice of Jurisdictions

This thesis provides a comparative analysis of anti-discrimination legal frameworks, placing a particular focus on the problem of mandatory retirement. Three jurisdictions are examined in a comparative analysis, namely: the UN, the US, and the EU.

The system of the United Nations is discussed first. Despite the existence of the UDHR, which guarantees the same universal rights to everyone, old age is not explicitly recognised as a prohibited ground of discrimination under the UN. Consequently, older persons are not specifically protected with regard to their age under existing international

human rights laws.[19] There is no legally binding obligation on governments to protect older persons from discrimination based on age under the UDHR (1948) and its two general covenants: the ICCPR (1966) and the ICESCR (1966). One of the reasons for such a failure is the 'protective attitude' which prevailed at the time that the International Bill of Rights was adopted. Older persons were seen as 'objects of charity' rather than 'subjects of human rights protection' on an equal basis with others[20], as was also the case with persons with disabilities[21]. Only in the last decade have there been some important movements towards specifically recognising the rights of older persons, notably with the creation of the UN Convention on the Rights of Older Persons[22] (hereafter 'CROP'). This convention would give governments the explicit legal framework, guidelines and support in protecting and promoting the rights of the older population in increasingly aging societies.[23] An examination of the recent developments under the UN system is interesting due to its promising effect on the protection against ageism in the form of mandatory retirement.

The second jurisdiction which is examined is the system of the United States of America. The US has a long history of prohibiting age discrimination. This history dates back to 1967, when the US Congress passed the Age Discrimination in Employment Act ('ADEA').[24] The ADEA origin can be traced back to the Title VII of the 1964 Civil Rights Act's (hereafter 'CRA'). The ADEA and Title VII have certain similarities in common, but

[19] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 937.
[20] Help Age USA, A global movement for the rights of older people, "Protecting the Rights of Older People: 10 Reasons Why We Need to Act", http://www.helpageusa.org/what-we-do/rights/rights-policy/un-openended-working-group-on-aging/protecting-the-rights-of-older-people/ (accessed 18 March 2015).
[21] *See* Leslie Pickering Francis and Anita Silvers, "Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices," Marquette Elder's Advisor 11, no. 1 (2009): 140.
[22] United Nations Department of Economic and Social Affairs, The Open-Ended Working Group on Ageing, "Strengthening Older People's Rights: Towards a UN Convention, A resource for promoting dialogue on creating a new UN Convention on the Rights of Older Persons," (2010): 3.
[23] Ibid: 2.

[24] It must be noted that some US states had statutes which outlawed mandatory retirement even before Title VII and the ADEA were adopted. For further discussion see Chapter 3.

also a common purpose which aims to eliminate discrimination in the workplace.[25] Despite of the strong resemblance between the ADEA and Title VII, the ADEA resulted in a slightly lower level of scrutiny when it comes to age discrimination when compared with other grounds.[26] The ADEA amendments continued to expand by covering more workers and extending age limits, until the last 1986 amendment eliminated the upper age limit for defining a protected group of workers, outlawing termination of employment based on age.[27] Such a long practice of prohibiting discrimination on the ground of age has constituted a broad and well-founded system of case law of state's courts and the US Supreme Court. It can therefore be used to determine some of the best examples of good practices in this field.

The system of the European Union will be examined as the last jurisdiction. Unlike the US, the EU has a relatively short history of the protection against age discrimination.[28] Efforts to stamp out ageism in the EU as well as re-considering mandatory retirement were not motivated by civil rights movements, as was the case in the US. Legislative changes were instead driven by massive population-ageing[29] which seized the Europe in the last decades of the 20th century. Although the Council's Directive 2000/78/EC[30] (the Employment Equality Framework Directive) is regarded as the most important piece of EU law when it comes to age discrimination, the roots of the fight against ageism were introduced as a part of the 1997

[25] United States Courts for the Ninth Circuit, "Manual of Model Civil Jury Instructions: Age Discrimination," (San Francisco, California, 2007): 226.
[26] Csilla Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination," The Equal Rights Review 11, no. 1 (2013): 72.
[27] David Neumark, "Age Discrimination Legislation in the United States," Working Paper 8152, Nber Working Paper Series, (2001): 3-4.

[28] It is important to highlight that despite a lack of hard law in the area of discrimination based on age in the EU, many member states have led campaigns to introduce age discrimination laws. For example, the UK introduced the Age Discrimination Bill in 1982.

See, Helen Meenan, "Age Discrimination in Europe: Late bloomer or wall-flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 97, footnote 1.
[29] Malcolm Sargeant, "Mandatory retirement age and age discrimination," Employee Relations 26, no. 2 (2004): 152.
[30] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L303/16.

Treaty of Amsterdam.[31] Until that point there had been only two types of prohibited discrimination in the EU: on the ground of nationality and on the ground of sex. The insertion of Article 13 in the European Community Treaty (hereafter 'the EC Treaty') allowed the adoption of laws with the purpose of combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.[32] The Employment Equality Framework Directive was one of three directives adopted under Article 13. The Framework Directive guarantees equal treatment in employment and the workplace covering age as one of the prohibited ground of discrimination. Despite the short history of combating age discrimination in the EU, the CJEU provides several examples of good practices when it comes to mandatory retirement. One of them is certainly recognising the principle of non-discrimination on grounds of age as a general principle of EU law, principle which has been further strengthened by the legally binding force of the EU Charter of Fundamental Rights.[33]

Objective, Aim and Methodology

This thesis examines the current status of anti-discrimination legislation in a comparative perspective, addressing the problem of mandatory retirement as a form of discrimination based on age in the labour market. A comparative analysis of the legal frameworks of the UN, the US and the EU is conducted for the purposes of analysing the development of age discrimination legislation within these jurisdictions. The aim of this study is to highlight positive examples of legislations and court decisions in the area of the protection against ageism in the form of mandatory retirement.

[31] Helen Meenan," Age Discrimination in Europe: Late bloomer or wall-flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 97.
[32] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.
[33] Viviane Reding, "The importance of the EU Charter of Fundamental Rights for European legislative practice," Lecture given at the German Institute for Human Rights. Berlin, 17 September, 2010:1.

The legal research of this thesis includes a detail examination of the legislation, case law and literature review. Internal and external desk research is used as a first method. Furthermore, a comparative analysis is used to assess common grounds and differences in age discrimination legislation of the three selected jurisdictions. A comparative analysis will help to identify examples of best practices in the legislation and the case law tackling age discrimination in the form of mandatory retirement. The research is based on both primary (laws, judicial decisions and judicial opinions) and secondary sources (academic literature). Additionally, Chapter 1 relies on statistical data with the purpose of analysing numerical trends.

Relevance of the thesis

This thesis argues that imposing mandatory retirement ages has neither economical nor moral justification. On one hand, with growing life expectancy and declining birth rates, more and more working age people are responsible for supporting an increasing number of pensioners. This eventually creates a need to keep older workers in the labour market for as longer as possible in order ensure the sustainability of pension systems. On the other hand, jurisdictions across the globe have recognised age as a prohibited ground of discrimination and made it clear that age discrimination stems from false and unfounded stereotypes. Mandatory retirement is based on such attitudes, thus violating one of the most fundamental rights of older workers: right to work. This thesis aims to identify examples of good practices which can help international and regional communities recognise the practice of mandatory retirement as one of the most vicious forms of age discrimination. Moreover, such examples could prompt them to change their long established discriminatory practices. This thesis argues that allowing older workers to stay in the labour market for as long as they want to and are able to can prove to be beneficial not only for individuals, but for the society as a whole.

CHAPTER 1: BACKGROUND AND CONCEPTUAL FRAMEWORK

1.1. Who is an Older Person?

Before going into details, there is a need to determine who falls under the term 'an older person'. International documents use varying terminologies to describe the 'older person'. Some terms include 'older person', 'the elderly', 'the aged', or 'the third age'.[34] The Committee on the ESC Rights opted for the term 'older persons', the term which was employed in the General Assembly Resolution 47/5 and Resolution 48/98.[35] There are some widely accepted definitions of old age, yet a general agreement on when a person becomes old is still missing. Most definitions use the chronological age (also known as calendar age) which is equivalent to the biological age and represents the "*physical passage of time since birth*".[36] However, because individuals age differently, chronological age and functional age are not necessarily synonymous. Functional age, which considers an individual's physical, mental, intellectual and social capacities[37], varies from one person to another and often does not follow the chronological age. While many argue that the functional age should be used to mark 'old age', public policies rely on more general standards. When defining 'old age', most definitions rely on the age of 65 as the border between the 'working age population' and the 'older population'.

[34] *Various documents also use the term "the fourth age" when talking about persons aged 80 and above. However, this age group will not be the focus of this thesis.*

See, World Health Organization, Health statistic and information system, "Definition of an older or elderly person", http://www.who.int/healthinfo/survey/ageingdefnolder/en/ (accessed 20 November 2014).

[35] United Nations Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995, para.9, http://www.refworld.org/docid/4538838f11.html (accessed 14 March 2015).

[36] Waren Sanderson and Sergei Scherbov, "Rethinking Age and Aging," United Nations Population Bulletin 63, no. 4 (1988): 7

[37] Ibid: 6.

The international community still lacks a standard definition of old age for the purpose of regulating retirement. For example, according to the UN's statistical services, the term older person covers persons aged 60 and above.[38] Eurostat, the statistical service of the EU, on the other hand, considers anyone aged 65 or above as an older person, since 65 is the most common retirement age in EU Member States.[39] The lack of consensus on what constitutes an older person can be attributed to the fact that the concept of age has a different meaning in different societies.[40]

One of the barriers to creating a common definition is the difference between developed and developing countries. Most developed countries have accepted the chronological age of 65 in order to describe an older person. Such a standard is mainly based on the notion that 65 is the most common age for retirement in most societies. It is often used as an age at which a person becomes eligible for old-age benefits under the social security system.[41] However, like many so-called western concepts, it does not fully apply to circumstances in the developing world.[42] While many developed countries define 'old age' according to 'retirement age', old age in countries of the developing world begins at the point when active contribution of the

[38] United Nations Population Fund, "UNFPA Report, Chapter 1," New York, 2012: 40, https://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/UNFPA-Report-Chapter1.pdf (accessed 12 December 2014).
[39] United Nations Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995, para.9, http://www.refworld.org/docid/4538838f11.html (accessed 14 March 2015).
[40] United Nations Population Fund, "UNFPA Report, Chapter 1," New York, 2012: 41.
[41] Ibid: 7.
[42] World Health Organization, Health statistic and information system, "Definition of an older or elderly person," Geneva, Switzerland, http://www.who.int/healthinfo/survey/ageingdefnolder/en/ (accessed 20 November 2014).

Realistically, if the definition of old age in the context of Africa were developed, it should refer to the age of either 50 or 55, which of course depends on the setting, region and country. In many African countries it is difficult to establish a definition since dates of birth are often unknown. This is due to the lack of official birth records for many individuals.

individual is no longer possible.[43] A chronological definition of old age is not considered as important as in developed countries. Rather, developing countries focus on the changes in one's physical and mental capacity and therefore accept the concept of functional age.[44]

The difference between chronological and functional age is extremely important when talking about mandatory retirement. Mandatory retirement is strongly based on chronological age. When a person reaches the fixed retirement age, they are required to withdraw from the labour market regardless of their actual abilities and desire to continue to work. Functional age – in the form of an individual's physical, mental, intellectual and social capacities - becomes irrelevant. Mandatory retirement is strongly based on widespread misperceptions of chronological 'old' age: from the stereotypic perception of unproductiveness and inflexibility of older persons, to the increased financial costs of keeping an older worker.[45]

Although not the focus of this thesis, it would be a shame not to touch upon the connection between discrimination based on age and discrimination based on disability. Old age discrimination and disability discrimination seems to have a number of unfavourable features in common. They are both based on stereotypes and prejudices connected to the physical and/or mental differences compared to attributes of the 'mainstream society'. Membership in either of these two groups presupposes reduced capability, decreased social contribution, increased fragility and therefore dependency on the care provided by others.[46] Some authors argue that protection against age and disability discrimination is highly needed

[43] Marc Gorman, "Development and the rights of older people," in The ageing and development report: poverty, independence and the world's older people, ed. Judith Randel et al., (London: Earthscan Publications Ltd., 1999), 4.
[44] United Nations Population Fund, "UNFPA Report, Chapter 1," New York: 2012: 41.
[45] *See* Chapter 2, subchapter 2.
[46] Leslie Pickering Francis and Anita Silvers, "Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices," Marquette Elder's Advisor 11, no.1 (2009): 140.

because both older and disabled face arbitrary barriers in the labour market and suffer economic disadvantages as a result.[47]

Although the UN still lacks a standard criterion, older persons are generally defined according to a wide range of characteristic, including: chronological age (age of 60-65), changes in social role (i.e. changes in the work pattern, adult status of children, becoming a grandparent, menopause) and changes in capabilities (i.e. invalidity, disability, senility, changes in physical characteristics).[48] However, in order to satisfy the purpose of this thesis and to consider an older person with respect of mandatory retirement, a new definition is proposed. The concept of 'older person' is used to define a person currently in a pre-retirement age. In other words, the term will cover persons who have not yet entered the retirement system but are approaching the retirement age as set by the social security schemes of a certain country. By focusing on a more refined definition of an older person – namely, an individual in pre-retirement stage - this thesis can better focus on ageism in the form of mandatory retirement.

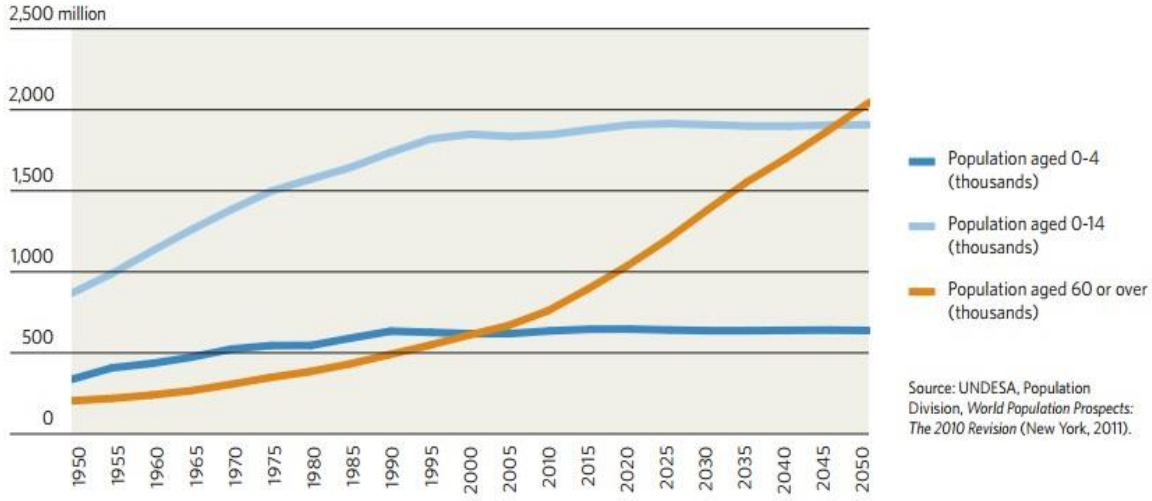
Older persons are, just like any other age group, a diverse population group in terms of age, gender, education, health, abilities and income. This thesis does not rely merely on the chronological age in defining an older person. However the numerical age of 60 is important due to the similar retirement practices of the developed countries which are the focus of this paper. Therefore, when talking about an 'older person' this thesis will mostly refer to persons aged 60 and above.

[47] Ibid: 147.
[48] World Health Organization, Health statistic and information system, "Definition of an older or elderly person," http://www.who.int/healthinfo/survey/ageingdefnolder/en/ (accessed 13 March 2015).

1.2. The Problem of Population-Aging

While population-ageing can be seen as one of the greatest achievement of the human race, it also presents a tremendous challenge. Older persons are without doubt the fastest growing population group in today's world (see *Figure 1*). Population-ageing is progressive and rapid. The demographic transition it brought forth was in a way predictable. Population-ageing was recognised as a threat already three decades ago by the first World Assembly on Ageing, held in 1982. The consequences of the world's ageing could be foreseen, yet its magnitude and rate was nonetheless shocking.

Figure 1: Population aged 0-4, 4-14 and 60 or over, 1950-2050[49]



Already at the turn of the century, the academic literature was overwhelmed with articles on the so-called 'problem' of population-aging. But what is it? According to the UN, population-aging refers to "*a unique and irreversible process of demographic transition*"[50] whereby the reduced mortality rate on the one hand is followed by the reductions in fertility rate on the other.[51] Such reductions eventually lead to a smaller ratio of children and a larger ratio of older persons in the overall population. Fertility rate, as a main factor driving

[49] *Source:* United Nations Population Fond, "UNFPA Report, Chapter 1," New York, 2012: 20.
[50] United Nations, "Global issues: Ageing," http://www.un.org/en/globalissues/ageing/index.shtml (accessed 1 December 2014).
[51] United Nations Department of Economic and Social Affairs, Population division, "World Population Ageing 2013," New York, 2013: 3.

population-ageing, has been in decline in most regions of world for the last several decades. This can be demonstrated with data from the *World Population Prospects* which shows that the world's total fertility rate halved: from 5.0 children per woman in 1950 to 2.5 children per woman in 2015.[52] The second factor supporting population-ageing is increased life expectancy. Average life expectancy increased by 13 years in more developed and by 26 years in less developed regions in the period from 1950 to 2015, and will continue to increase in the future.[53]

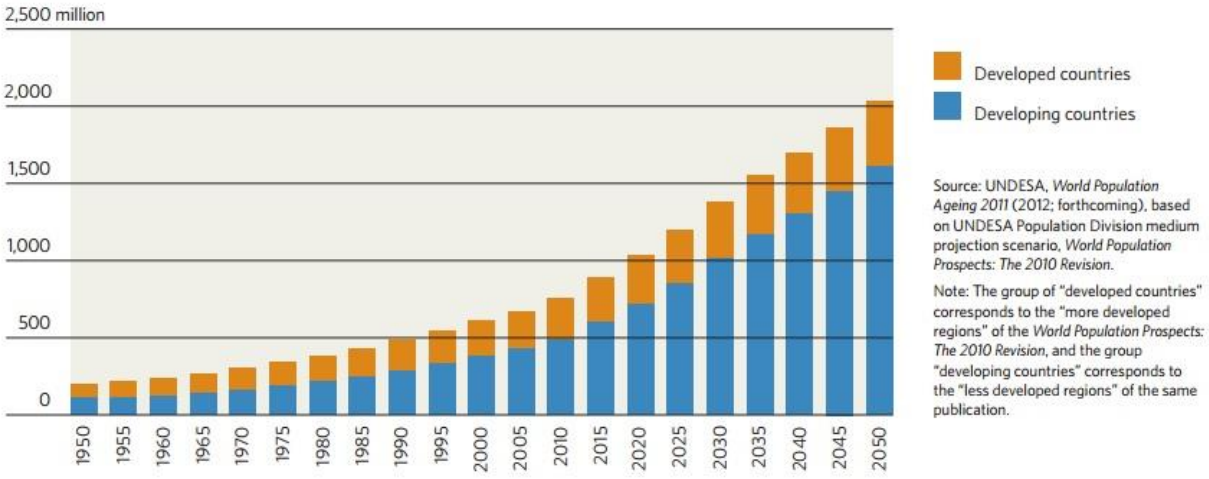
An increased life expectancy means that the 'working population' has to support an increasing number of dependants in a certain country. It also means that many people are more likely to experience a raise in the age limit at which they become eligible for full pension benefits.[54] Most OECD countries have started to raise and equalise the retirement ages for men and women since the mid-90s. This trend will continue in the future, as almost half of the OECD states plan to increase and equalise their statutory retirement ages further over the next four decades. By the year 2050 the average retirement age across the OECD is expected to reach 65 for both sexes. This entails an increase of 2.5 years for men and 4 for women when compared to the average retirement ages in 2010.[55]

High birth rates in the early and middle of the 20th century combined with low birth rates and high life expectancy in the 21st century caused a rapid and progressive increase in the number of people who reached the old age. The UN statistics show that the number of older persons in 2013 was 841 million, which is four times more than the number of older persons in 1950 (202 million).[56] The progressive process of population-ageing can also be

[52] United Nations Department of Economic and Social Affairs, Population Division, "World Population Prospects: the 2012 Revision," New York, 2013: xviii.
[53] United Nations Department of Economic and Social Affairs, "World Population Ageing 2013," NY: 2013: 6.
[54] UN Chief Executive Board for Coordination, "Review of the Mandatory Age of Retirement in the United Nations Common System," Meeting of CEB HR Network, 17th Session UNWTO, Madrid, 4-6 March 2009: 6.
[55] United Nations Department of Economic and Social Affairs, "World Population Ageing 2013," NY, 2013: 54.
[56] Ibid: 9.

demonstrated by the UN predictions which show that the number of older persons will almost triple by the year 2050, reaching the number of 2 billion (see *Figure 2*).[57]

Figure 2: Number of people aged 60 and over: World, developed and developing countries, 1950-2050[58]



Besides the growing number of person aged 60+, the modern world is also facing the growing number of persons aged 80 and over. This group known as the 'oldest old' has been increasing more rapidly than the population of older persons as a whole. The number of so-called 'centenarians' - people aged more than 100 years - is growing even faster.[59]

Population-ageing is a demographic revolution affecting the entire world; no country is exempted. Such a revolution is happening in all regions and in all countries regardless of their level of development. Yet, its speed and extent vary. In most developed countries, the 'problem' of population-ageing has been present for many decades. In developing countries, on the other hand, it has started relatively recently, when the levels of mortality and fertility started to decline. The late appearance however did not affect its magnitude in the beginning of the 21st century. Population-ageing is happening more rapidly in the developing world now than in was in developed countries in the past. Currently, even though chronologically oldest

[57] United Nations Population Fund, "UNPF Report, Chapter 1," New York, 2012: 19.
[58] *Source:* Ibid: 21.
[59] Ibid: 25.

population reside in developed countries, the largest number of older persons can be found in developing countries.[60] Developed and developing countries, however, address the problem of population-ageing differently. While in developed countries social security systems take over the task of providing care for the older population, in developing countries the duty of providing care remains with the family.[61] This is one of the reasons why the high number of older persons in developing countries did not have such a pressing effect on their economies as it does in the case of developed countries.

Due to the shift of the burden of care from family to the state, developed countries face the difficulties in balancing the working population and those who left the labour market. Such disproportion between working and retired population is causing financial problems of sustaining pension systems on one side, and social problems of providing adequate protection for the older population on the other. As argued by Bob Hepple, without appropriate action against age discrimination, retirement will impose costs which are socially and economically unacceptable. Firstly, there will have to be a substantial inter-generation transfer to support the increasing number of persons in the retirement, particularly those without adequate resources. And second, if such a transfer is not provided through financial institutions, the state will have to create a substantial social security net.[62]

Nonetheless, it must be noted that despite the rapid population-ageing and the problems brought by it in the last decades (especially in developed countries), the phenomenon did not encourage the abolition of the practice of mandatory retirement. Higher retirement ages were primarily driven by economic reasons, rather than humanistic ones. George Magnus argued in his book "The Age of Aging" that by extending retirement ages

[60] United Nations Department of Economic and Social Affairs, "World Population Ageing 2013," NY, 2013: 3.
[61] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no.1 (2003): 916.
[62] Bob Hepple, "Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC," in Age as an Equality Issue, ed. S. Freeman and S. Spencer, (Oxford: Hart, 2003), 73.

"[…]…it's doubtful that governments have given much thought specifically to providing for fuller, more enriching working lives for older people. Rather, the decision seems to be mainly motivated by the desire to lower the pension payment burden on the state in the future".[63] It can be seen that, unlike the adoption of other anti-discrimination legislations - mainly for the protection against racism and sexism - the adoption of anti-age discrimination legislation was mainly triggered by the pressing problem of population-ageing. Retirement practices are imposing unacceptable financial and social problems around the globe, one of many reasons why mandatory retirement cannot survive in today's aging society.

1.3. Age as a Protected Attribute

People aged 60 and above continue to be the fastest growing age group in the world's population, and currently exceed the number of 800 million (see *Figure 2*). However, despite of the pressing problem of population-ageing, it seems that the rights of older persons have not yet received the attention from the international community they deserve.[64] Unlike other numerous vulnerable groups (i.e. women, children and people with disabilities) which are protected through special international conventions and standards, no such protection exists for older persons. Indeed, many human rights instruments recognise rights which are of particular interest for older persons. The most important and most influential instrument is undoubtedly the International Bill of Rights, consisting of the UDHR (1948) and its two covenants: the ICCPR (1966) and the ICESCR (1966). The Bill of Rights assures the same rights to all human beings regardless of their race, sex, age, religion, sexual orientation or any other distinction.[65]

[63] George Magnus, The Age of Aging: How Demographics are Changing the Global Economy and Our World (Singapore: John Wiley and Sons Pte Ltd., 2009), 214.
[64] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no.1 (2003): 917.
[65] Marthe Fredvang and Simon Biggs, "The rights of older persons: Protection and gaps under human rights law," Social Policy Working Paper no.16, Centre for Public Policy, University of Melbourne, 2012: 10.

Yet, in addition to the International Bill of Rights, the other vulnerable groups mentioned above are also protected under some others fundamental UN human rights treaties, namely the Convention on the Elimination on All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), and the Convention on the Rights of Persons with Disabilities (2006).[66] Older persons however do not enjoy this privilege.

Neither the UDHR, nor the ICCPR or the ICESCR include age in their lists of prohibited grounds of discrimination. Failure to include age as a protected attribute can be explained by several factors. Firstly, at the time the International Bill of Human Rights was drafted, the problem of population-aging was not as severe or as pressing as it is today.[67] As can be seen from *Figure 2*, between 1948 and 1976 the number of persons aged 60 or over was ranged between 200 and 400 million (compared to more than 800 million today).[68] Later recognition of age as a prohibited ground of discrimination, especially in Europe, came rather as a matter of necessity than a matter of principle.

The second reasons for the failure to include age as a protected attribute could be the 'protective attitude' which prevailed at the time the International Bill of Rights was created. Ageing was predominately a social welfare issue and older persons were seen as objects of charity rather than right holders and subjects of human rights protection.[69] Here, once again, the close relationship between age and disability discrimination can be recognised. Both age

[66] Ibid: 10.
[67] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, para.11, http://www.refworld.org/docid/4538838f11.html (accessed 14 March 2015).
[68] Source: United Nations Population Fund, "UNPF Report, Chapter 1", New York, 2013: 21.
[69] Help Age USA, A global movement for the rights of older people, "Protecting the Rights of Older People: 10 Reasons Why We Need to Act, http://www.helpageusa.org/what-we-do/rights/rights-policy/un-openended-working-group-on-aging/protecting-the-rights-of-older-people/ (accessed 18 March 2015).

and disability are based on the notion that older and disabled people are 'fragile', 'suffering', 'un-abled' and therefore in need of other people's help and protection.[70]

Thirdly, age discrimination differs from any other form of discrimination in the sense of scrutiny.[71] Unlike other forms of prejudicial and discriminatory behaviour - i.e. racism and sexism which many people perceive invidious - negative stereotypes and attitudes towards older persons enjoy a widespread acceptance throughout many societies. They are rarely acknowledged and rarely challenged before the courts.[72] Such a difference between age discrimination and, for example, discrimination of the basis of sex or race can be explained by the fact that the person's gender or race is usually settled at birth and follows the person throughout their life. Age, on the other hand, is an acquired attribute based on relative rather than unchangeable characteristics.[73] Another explanation highly accepted by the US Supreme Court (see *Chapter 3*) is that older persons - unlike those discriminated against on the basis of race, national origin and sex - are not a historically oppressed group. This brings to the apparent acceptance of age discrimination by many employers and employees, making the prohibition of age discrimination not taken as seriously as are others.

And lastly, because of its unique dynamic attribute, age discrimination is considerably different than race, sex, religion discrimination and even discrimination based on disability[74].

[70] Leslie Pickering Francis and Anita Silvers, "Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices," Marquette Elder's Advisor 11, no.1 (2009): 140.
See Dagmar Schiek, "Organising EU non-discrimination law around the nodes of 'race' gender and disability," in EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination, ed. Dagmar Schiek and Anna Lawson (London: Ashgate, 2011), 44.
According to Schiek, conditions associated to both age and disability lead to prejudice based on over-inclusive assumptions. Therefore the same level of protection should apply in both cases.

[71] Colm O'Cinneide, "The Growing Importance of Age Equality," The Equal Rights Review 11, no.1 (2013): 102.
[72] Help Age USA, A global movement for the rights of older people, "Protecting the Rights of Older People: 10 Reasons Why We Need to Act," (accessed 18 March 2015).
[73] Malcolm Sargeant, "Mandatory retirement age and age discrimination," Employee Relations 26, no.2 (2004): 154.
[74] Csilla Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination," The Equal Rights Review, 11, no.1 (2013): 70.

There is a lack of binary nature which clearly exists in the context of other grounds. For example, in the case of gender discrimination, the path between two sexes is equal: back and forth.[75] In order to establish discrimination, the comparator is always the person of the opposite sex. Age, on the other hand, is not only a bipolar term. Age should rather be taken as bipolar and as continuum at the same time[76]. While it is clear that 'young' is different that 'old' and 'old' is different from 'young', there is no equal back and forth in the case of these two groups. In order to establish discrimination based on age, a comparator is not the 'young' but rather the 'mainstream adult'.[77]

All the arguments mentioned above: late appearance, protective attitude, widespread acceptance of negative attitudes towards older persons, economic and financial pressure of population-ageing and the lack of a binary nature pushed age discrimination to a low place in the hierarchy of the protected grounds. Even though the existence of a hierarchy of protected grounds is often disputed[78], the perceived low status of age as a protected attribute can be useful when talking about the neglected rights of older persons.

Despite the general silence of international human rights instruments on age, the rights they guarantee are 'universal' in nature. They apply to all human beings simply by virtue of their humanity. Thus, it is logical that older persons have a legitimate right to enjoy all the rights and freedoms listed in these instruments. Is there a need for a specific treaty covering the rights of older persons? The experience of the Convention on the Rights of

[75] Ibid: 75.
[76] Ibid: 75.
[77] Ibid: 75.
[78] *See* Sarah Haverkort-Speekenbrink, "European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with Emphasis on the Islamic Headscarf Issue," (Cambridge: Intersentia, 2012), 29.

Even the European Commission contested the view on existence of the hierarchy of prohibited grounds of discrimination stating that: "When it comes to protection against discrimination, there can be no hierarchy. [...]. Once adopted, Directive [...] will bring to an end any perception of a hierarchy of protection."

Persons with Disabilities[79] showed that the answer should be 'yes'. This is due to several important reasons.

The first of them is *visibility.*[80] As already argued above, the International Bill of Rights does not explicitly refers to age as one of the prohibited grounds of discrimination, making older persons 'invisible' as subjects of human rights protection. In order to make certain group visible and therefore protected from undue discrimination, there is a need for a specific treaty for this specific group of people. Therefore, one of the principal arguments for an age-specific convention (similar like in ones covering disability, race, and gender) is that it will increase the visibility of older persons in the human rights arena. In other words, such a convention will make older persons explicit subjects of legal protection.[81]

The second argument is *specificity.*[82] An age-specific treaty will articulate precisely on how general rights apply to older persons rather than just 'transmit' the existing rights to the specific situation of older population.[83] The third reason is *data collection.*[84] The international community lacks information on the issue of exclusion and marginalisation of older persons. The existence of an age-specific treaty could oblige states to collect and deliver data concerning the situation of older persons on their territory.[85]

Although there have been calls for a new convention on the rights of older persons, as will be seen in Chapter 3, the older population are still one of few vulnerable groups with no legally binding instrument specifically designed to address and satisfy its particular needs.

[79] United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, December 13, 2006.
[80] Anna Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era of False Dawn?," Syracuse Journal of International Law and Commerce 34, no. 2 (2004): 583.
[81] Ibid: 583-584.
[82] Ibid: 583.
[83] Ibid: 584-585.
[84] Ibid: 585.
[85] Ibid: 585.

CHAPTER 2: MANDATORY RETIREMENT

2.1. The Concept of Non-Discrimination and Ageism

The principle of non-discrimination implies the protection against discrimination on the basis of certain characteristics recognised in various international and regional human rights treaties as well as in the domestic legislation. The UDHR, for example, guarantees the equal enjoyment of all rights and freedoms without distinction of any kind such as race, sex, religion, etc.[86] However, as already mentioned above, most of the international and regional human rights treaties do not, in general, mention age. Only recently age started being recognised as a prohibited ground of discrimination and certain regional human rights documents already explicitly included age under their anti-discrimination clauses. Preventing age discrimination in employment becomes even more important as the need to keep older workers in the labour market becomes more pressing.

Age discrimination is a practical manifestation of ageism.[87] The term was first described by the American gerontologist Robert Butler in his much quoted 1969 article where he defined ageism as *"[...] a process of systematic stereotyping and discrimination against people because they are old, just as racism and sexism accomplish this for skin colour and gender. Older people are characterized as senile, rigid in thought and manner, and old-fashioned in morality and skills".*[88] Butler held that older persons are 'lumped together' with the perception that they are all the same. Such a 'grouping' process consequently leads towards treating older persons unfavourably merely on the basis of their years.[89] A more recent definition of ageism was given in the UN report on ageing stating that "*[a]geism reinforces a negative image of older persons as dependent people with declines in intellect,*

[86] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art.2.
[87] Malcolm Sargeant, Age Discrimination: Ageism in Employment and Service Provision, (Surrey, England: Gower Publishing Limited, 2011), 1.
[88] Robert N. Butler, "Age-Ism: Another Form of Bigotry," The Gerontologist 9, no. 1 (1969): 243.
[89] Ibid: 245.

cognitive and physical performance, and other areas required for autonomous, daily functioning. As a result, older persons are often perceived as a burden, a drain on resources, and persons in need of care".[90]

Ageism was developed within the notion of 'promoting the ideal of youth'.[91] This idea especially prevails in developed, western countries where the promotion of appearance and being young and vital has become an obsession.[92] "*In a society obsessed with youth and productivity, there is no place for the older worker*".[93] Negative attitudes towards older persons, especially older workers approaching the retirement age, often reflect a deeply rooted fear of the fact that everyone is aging.[94] Age discrimination, despite being both morally and economically wrong[95], enjoys a widespread social acceptance.

Ageism can appear in many settings, but it is most noticeable with regard to economic and social rights. Bearing in mind the breadth of these rights, this thesis will solely focus on the most important ones: the labour rights which are often considered to be the fundamental rights of the 21st century.[96] Exploring ageism within the labour rights seems quite timely since the world is on the edge of the baby boomers turning 65. The 'baby boom generation' is a demographic term used to describe the population born post World War II, between the years 1946 and 1964. The first baby boomers turned 65 already in 2011 and most of them are

[90] United Nations General Assembly, "Follow-up to the Second World Assembly on Ageing," Report of the Secretary-General, (2009): para.24.
[91] Australian Human Rights Commission, "Age discrimination – exposing the hidden barrier for mature age workers," Sydney, 2010:2.
[92] Ibid: 2.
[93] Elaine S. Fox, "Mandatory Retirement - A Vehicle for Age Discrimination," Chicago-Kent Law Review 51, no.1 (1974): 116.
[94] Jon MacNicol, Age Discrimination: An historical and contemporary analysis, (UK: Cambridge University Press, 2006), 9-10.
[95] Emerald Group Publishing Limited, "Is ageism the acceptable face of discrimination?: Changing the attitude toward older workers," Managerial Law 48, no 6. (2008): 522.
[96] Philip Alston, "Labour Rights as Human Rights: The Not So Happy State of the Art," in Labour Rights as Human Rights, ed. Philip Alston (UK: Oxford University Press, 2005), 2-5.

expected to retire over the next couple of years.[97] The 'ageing population syndrome' combined with the approaching mass retirements of baby boomers will inevitably result in diverse social and economic problems. One of the problems which triggered changes in the EU legal framework at the beginning of the 21st century is precisely the decrease in the labour supplies which created a need to include older persons in labour market and taxation in order to ensure the sustainability of social security systems.[98] In order to establish a balance between those who are active in the labour market and those who are inactive in retirement, older persons are being forced to stay in the paid work force: either by choice or by economic necessity. The raising of the retirement age in the last decade illustrates the pressing need to keep workers in the labour market for longer than it was before.

2.2. The Concept of Mandatory Retirement

Before discussing the concept of mandatory retirement, there is a need to clarify the concepts of 'retirement' and 'retirement age'. According to Malcolm Sargeant, retirement means "*[...] cessation of service as an employee of the employer in question*"[99], however it does not mean or include "*[...] a change in the nature of service as an employee of the employer in question*".[100] Therefore, the concept of retirement does not include a change in someone's workplace but rather "*[...] the leaving of the workplace by the employee*".[101]

The concept of retirement age, on the other hand, is the age at which a person can retire from their position and the age at which they may be entitled to receive the benefits guaranteed under the social security system of a certain country. An essential element of retirement is a guaranteed income which will continue to be available to an older worker who

[97] Todd D. Nelson, "Ageism: Prejudice Against Our Feared Future Self," Journal of Social Issues 61, no 2 (2005): 218.
[98] Csilla Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination," The Equal Rights Review, 11, no 1 (2013): 69.
[99] Malcolm Sargeant, "Mandatory retirement age and age discrimination," Employee Relations 26, no. 2 (2004): 155.
[100] Ibid: 155.
[101] Ibid: 155.

is no longer personally or legally able to continue with work in paid employment.[102] A person can be either expected or required to retire at a certain age. In the first case, a person can choose to retire at a certain age, but they are not obliged to do so. In fact, many employers allow their employees to stay at work beyond the 'normal' retirement age set by their state's security scheme.[103] The second case is somehow more complex. In that situation a person is required to retire and they cannot choose to continue to work. There are many legal policies and practices across the globe which discourage older workers to stay active in the labour market and strongly encourage their retirement. Such practices create a separate and very controversial issue of age discrimination in the workplace – mandatory retirement.

The existence or non-existence of the individual's choice to retire is not the only difference between retirement age and mandatory retirement age. There is another important distinction based on a legal dimension. These two types of retirement are governed by very different types of law. While retirement age is a part of social security law, mandatory retirement age - either set in legal provisions, employment contracts or collective agreements – is a part of labour law.[104] Ironically, mandatory retirement can actually undermine the protection offered by labour law by changing the type of law applicable once a worker reaches the retirement age. In other words, once a worker reaches the mandatory retirement age, they are no longer entitled to labour law protection, including protection against age discrimination.[105]

The subject of mandatory retirement has been analysed by many authors who have offered various definitions. Von Watcher defines it as *"[…] an institution that allows employers to*

[102] Naj Ghosheh, "Age discrimination and older workers: Theory and legislation in comparative context," Conditions of Work and Employment Series No. 20, International Labour Office, Geneva, (2008): 9.
[103] Malcolm Sargeant, "Mandatory retirement age and age discrimination," Employee Relations 26, no. 2 (2004): 156.
[104] Naj Ghosheh, "Age discrimination and older workers: Theory and legislation in comparative context," Conditions of Work and Employment Series No. 20, International Labour Office, Geneva (2008): 10.
[105] Ibid: 10.

force all employees to retire at a certain age, usually age 65".[106] Wood and others gave greater importance to the factor of age set out in a contract between the employer and the employee defining mandatory retirement as *"[a]n age, which may be set out in a contract of employment, at which an employer can require an employee to retire".*[107] The definition given by Baker and Clark, on the other hand, touches upon the existence of retirement provisions stating that *"[m]andatory-retirement provisions require that, upon reaching a specific age, individuals are compelled to retire even if they wish to remain on the job."*[108] It is important to emphasise that retirement does not fall under the meaning of the mandatory retirement if the employee wants to leave the labour market and retire due to their age, decline in their health status, saturation with the job or any other personal or social reason. The retirement is only mandatory if a person is legally forced to retire at the fixed age and regardless of their wish to continue to work.

The definitions above imply that the issue of mandatory retirement can be discussed both in a narrower and a broader sense. Usually when talking about mandatory retirement, most people refer to mandatory retirement in the narrower sense. A narrower concept includes the termination of one's employment at a certain age or date by the force of law. As will be seen in Chapter 3, many mandatory retirement cases include individuals whose employment was legally terminated on the day of their birthday, at the end of the month in which they reached

[106] Till von Wachter, "The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts," Centre for Labour and Economics. University of California Berkeley Working Paper No. 49, (2002): 1.
[107] Andrew Wood, Marisa Robertson and Dominika Wintersgill, "A comparative review of international approaches to mandatory retirement," Department of Work and Pensions, Research Report No.674, (2010): xiii.
[108] David T. Barker, Robert Clark, "Mandatory Retirement and Labor-Force Participation of Respondents in the Retirement History Study," Social Security Bulletin 43, no. 11 (1980): 20.

mandatory retirement age, or at a certain fixed date (usually 30th of June of the year in which an employee reaches the mandatory retirement age).[109]

Mandatory retirement in a broader sense, on the other hand, does not include the termination of employment by the force of law but rather by the decision of the employer. At a certain age or date, an employer can terminate the employment in an "easier way" than otherwise. An "easier way" in this sense means that the employer does not have to provide any reasons for the termination of the employment. The reference to age is sufficient. This broader concept of mandatory retirement includes termination of employment regulated both by contracts of employment and by collective agreements.

This thesis deals with mandatory retirement both in a narrower and a broader sense, and defines it as the practice of setting out a fixed age - either in laws, in collective agreements or in employment contracts - predominantly based on false and unproven stereotypes about the person's age, at which an employee is required to retire, regardless of their ability and willingness to work.

2.3. Types and Variants of Mandatory Retirement Age

The existence of mandatory retirement in a broader and a narrower sense brings to the need to analyse the types of mandatory retirement ages. There are two main types of mandatory retirement ages. These are the statutory and the contractual retirement age and each type has its own variants. ***Statutory retirement age*** is based on legal provisions incorporated in state or federal laws according to which a person is required to cease work and retire at the certain age provided by such provision. Additionally, the statutory retirement age prevents the employer to hire employees who reached the retirement age. It is important

[109] *See*, Rosenbladt v. Oellerking Gebäudereinigungsges (2010), Hörnfeldt v. Posten Meddelande AB (2012), Love *et al* v. Australia (2003), Fuchs and Köhler v. Land Hessen (2011), Kly v. Canada (2009), Commission v. Hungary (2012).

to emphasise a distinction between public and private services. Statutory retirement age implies termination of the employment in the public service. For private employment, on the other hand, state or federal law may not prescribe that the employment has to be terminated. The clearest example of the state where the statutory retirement age exists is China, where the retirement age is currently set at 65 for men and 60 for women. Once an employee reaches the retirement age set by the state law, they can no longer hold the employment status. This means that an employee is compulsory required to retire at the age of 65 (or 60 in case of women) under the state law.[110] The state law also prohibits employers to hire employees who are at or near the retirement age.[111]

A variation of statutory mandatory retirement is the *retirement age for certain professions*. In this variation, the federal or the state law does not prescribe a general retirement age obliging all employees to retire at a certain age. Such laws rather set the retirement age concerning only members of certain professions. In the US, for example, the ADEA prohibits private employers from imposing mandatory retirement age on their employees who are over the age of 40.[112] The ADEA however allows a specific exemption: when age is a 'bona fide occupational qualification' (BFOQ) reasonably necessary to the normal operation of the particular business.[113] As explained in Chapter 3, this second exemption is rarely used as a justification for mandatory retirement. However courts tend to recognise the BFOQ justification when safety issues are involved. Such examples include the following

[110] Eversheds, "Global Employment HR e-briefing: Compulsory retirement: an international comparison", http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Employment_and_labour_law/Global_Employment_HR_e-briefing-Compulsory_retirement_an_international_comparison (accessed 15 June 2015).
[111] The US – China Business Council, "China's Mandatory Retirement Age Changes: Impact for Foreign Companies," https://www.uschina.org/china%E2%80%99s-mandatory-retirement-age-changes-impact-foreign-companies (accessed 15 June 2015).
[112] The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, Section 12 (a).
[113] Ibid: Section 4, f (1)

professions: law enforcement officers, fire-fighters, air traffic controllers and pilots.[114] Once again, this variation of statutory retirement applies only to professions in the public service and not to the ones in the private. In the *Petersen case*[115] for example, mandatory retirement age was imposed only to dentists in the public sector, and not to the ones in the private.

The second main type of mandatory retirement is based on a ***contractual retirement age***. Unlike the statutory retirement age which has a legal basis in the state's laws, contractual retirement age depends on the employer and is based on an agreement (contract) between the employer and the employee. This is sometimes called a pre-termination agreement: an agreement for the termination of the employment which forms an integral part of the employment contract by specifying its duration.[116] Under the contractual agreement, the employer can terminate the employment once a person reaches the retirement age defined by social security schemes of a country. The employer can do this without specifying any reason for the termination except for age. An example of this type of mandatory retirement age was the UK under the 2006 Employment Equality (Age) Regulations. The Regulations introduced a fixed retirement age of 65 and made the mandatory retirement age below 65 unlawful unless an employer can justify it.[117] In other words, the employer was prohibited to use mandatory retirement ages - without justifying the reasons to do so - on employees under the age of 65, but permitted to use it on employees aged 65 and above. This default retirement

[114] *Mandatory retirement ages under the BFOQ in the US are following: state and local police (55-60); state and local fire-fighters (55-60); federal fire-fighters (57); federal law enforcement and corrections officers (57); air traffic controllers (56); commercial airline pilots (60).*

See, Jagadeesh Gokhale, "Mandatory Retirement Age Rules: Is It Time To Re-evaluate?," Special Committee on Aging, United States Senate, published at CATO Institute, http://www.cato.org/publications/congressional-testimony/mandatory-retirement-age-rules-is-it-time-reevaluate (accessed 13 October 2015).

[115] Case C-341/09 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

[116] Claire Kilpatrick, "Age, Retirement and the Employment Contract," Industrial Law Journal 36, no. 1 (2007): 120.

[117] Andrew Thomas and Juliet Pascall-Calitz, "Default Retirement Age: Employer qualitative research," Department for Work and Pensions, Research Report No 672 (2010): 1.

age was finally abolished in October 2011.[118] Any dismissal for retirement taking place after October 1st 2011 has to be justified under the Equality Act 2010.[119] The contractual retirement age still exists today in Germany. In Germany compulsory retirement is possible if a mandatory retirement age has been agreed to in the employment contract. However, automatic termination of the contract must follow the state pension age, which is gradually increasing from 65 to 67.[120]

When talking about employment agreements, a difference must be made between an individual and a collective employment agreement. While individual employment agreements are negotiated between an employee and an employer and are binding only to those parties, collective agreements are negotiated between a registered union and an employer and are only binding to employees who are members of the union.[121] Therefore, the employee can also be forced to retire under the *mandatory retirement age set in the collective agreement*. This type of mandatory retirement age is legal in Denmark. For example, in the 2013 Supreme Court of Denmark case, an employee in a telecommunications company was forced to retire at the end of the month in which he reached the age of 67, based on a provision contained in a collective agreement. The Supreme Court of Denmark concluded that mandatory retirement at the age of 67 constituted an appropriate and necessary mean to achieve a more appropriate age distribution among employees in the telecommunications company.[122] A similar decision was reached six years earlier, in the 2007 CJEU *Palacios* case (see *Chapter 3*).[123]

[118] Ibid: 1.
[119] Great Britain, Parliament. Equality Act 2010: Elizabeth II. Chapter 15, London: Stationery Office (2010).
[120] Eversheds, "Global Employment HR e-briefing: Compulsory retirement: an international comparison", , http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Employment_and_labour_law/Global_Employment_HR_e-briefing-Compulsory_retirement_an_international_comparison(accessed 15 June 2015)
[121] Aukje A.H. van Hoek, "Collective agreements and individual contracts of employment in labour law: The Netherlands," Electronic Journal of Comparative Law 6, no.4 (2002): 251.
[122] Supreme Court of Denmark, Judgment of 27 August 2013, Case no. 183/2011
[123] Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA*, CJEU (2007)

CHAPTER 3: A COMPARATIVE ANALYSIS OF THE LEGISLATION AND CASE LAW ON MANDATORY RETIREMENT

3.1. United Nations

Legislation

The oldest reference to 'age' under the UN system can be found in the UDHR (1948), often referred to as the founding instrument of contemporary human rights law. Article 25(1) of the UDHR states that "*[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including [...] the right to security in the event of unemployment, sickness, disability, widowhood,* ***old age*** *or other lack of livelihood in circumstances beyond his control*".[124]

The UDHR guarantees universal rights to everyone, just by virtue of their humanity. However, the UDHR is not the most relevant UN instrument when it comes to the rights of older persons. Instead, it is one of its covenants: the ICESCR (1966). The supervisor body of the ICESCR - the Committee on Economic, Social and Cultural Rights (hereafter 'CESCR') - has produced all together 21 general comments on ESC rights. The most important one for this thesis is General Comment No. 6 on the economic, social and cultural rights of older persons[125] which interprets the ICESCR in the context of old age. Under General Comment No. 6, adopted in 1995, the Committee established the most comprehensive analysis of the rights of older persons within the contemporary human rights agenda.[126]

Unlike the UDHR, the ICESCR does not give any reference to the age, nor is age recognised as a protected attribute. The Committee has however made it clear that since

[124] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art.21 (1).
[125] Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995.
[126] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 952.

ICESCR applies to all members of society "*[...] older persons are [as well] entitled to enjoy the full range of rights recognised by the Covenant*".[127] The Committee drew its authority to monitor the implementation of international protection for older persons by interpreting Article 9 of the Covenant.[128] Article 9 deals with "*[...] the right of everyone to social security, including social insurance*"[129] and the Committee interpreted it as explicitly referring to the right to old-age benefits.[130]

General Comment No. 6 starts by defining an older person as any person aged 60 and above.[131] As argued in Chapter 1, this thesis deals with the concept of age in respect of mandatory retirement, but will not rely merely on the numerical age when defining an older person. However, the numerical age of 60 (as was also recognised by the Committee) is important due to the similar retirement practices of the developed countries. In General Comment No. 6, the Committee acknowledged that neither the UDHR nor the ICESCR explicitly prohibits discrimination based on age. Yet, it recognised that age could fall under 'other status' and therefore be recognised as a protected ground.[132] Nonetheless, any further interpretation on age as a protected attribute is missing from the Comment.

When it comes to the protection against mandatory retirement, several rights recognised by the ICESCR are of particular importance. These are the right to work guaranteed by Articles 6 through 8, as well as the right to social security guaranteed by Article 9. Concerning the right to work, the Committee recognised problems which older workers who

[127] United Nations Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995, para. 10.
[128] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 952.
[129] United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 9, http://www.refworld.org/docid/3ae6b36c0.html (accessed 20 July 2015).
[130] United Nations Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995, para. 10.
[131] Ibid: para. 1.
[132] Ibid: para. 11.

have not yet reached their retirement age confront in finding and keeping a job and emphasised the need to prevent age discrimination in employment and occupation.[133] The Committee also recognised the need to implement retirement preparation programmes which would prepare older workers for retirement and provide them with information on their rights and obligations as well as opportunities to continue with work.[134] Recognising the difficulties older workers approaching retirement age face in keeping a job can be seen as the first reference of the CESCR to the practice of mandatory retirement.

The right to social security guaranteed under Article 9 is the only right under the Convention which explicitly protects older persons. The Committee itself drew its authority to interpret the ICESCR in the light of rights of older persons on the basis of the existence of this right in the ICESCR.[135] Focusing on Article 9, the Committee invited the State parties to establish flexible retirement age "*[...] depending on the occupations performed and the working ability of elderly persons, with due regard to demographic, economic and social factors*".[136] The magnitude of population-ageing shows that these factors are becoming more important now than they were 20 years ago when General Comment No. 6 was written.

The problem of population-ageing has not gone unnoticed at the international level. During the first World Assembly on Ageing in Vienna in 1982, the UN adopted the International Plan of Action on Ageing. Even at this stage the UN recognised the problem of statutory mandatory retirement age and its possible consequences on the composition of labour forces.[137] Already in the 1980s the UN proposed more flexible retirement age.[138]

[133] Ibid: para. 22.
[134] Ibid: para. 24.
[135] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 957.
[136] United Nations Office of the High Commissioner for Human Rights, "CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons," Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995: para. 28.
[137] United Nations, "Vienna International Plan of Action on Ageing," adopted by the World Assembly on Aging held in Vienna, Austria from 26 July to 6 August 1982, New York, 1983: para. 42.

However, more effective action by the UN against mandatory retirement as discrimination based on age was still lacking.[139] The Vienna Plan was followed by the 1991 UN Principles for Older Persons which recognised the right of older persons to "*[...] participate in determining when and at what place withdrawal from the labour force takes place*".[140] Within this spirit, the General Assembly proclaimed the year 1999 as the International Year of Older Persons which used the slogan "*Towards a Society for All Ages*".[141]

The 1991 Principles served as a foundation for the 2002 Madrid International Plan of Action on Ageing which identified 35 objectives and produced 239 details recommendations as guidelines for national governments.[142] These include recommendations that "*[o]lder persons should be enabled to continue with income-generating work for as long as they want and for as long as they are able to do so productively*"[143] and that "*[t]here is a need to increase awareness in the workplace of the benefits of maintaining an ageing work force*".[144] Crucially, the Madrid Plan was explicitly dedicated towards eliminating all forms of discrimination, including age discrimination.[145]

Table 1: UN milestones regarding the rights of older persons

YEAR	MILESTONE
1948	Universal Declaration of Human Rights A draft declaration A/C.2/213 on the old-age rights

[138] Ibid: Recommendation 40.
[139] *Paragraph 34(b) recognises that the transition into old age is a gradual and individual process, regardless of the statutory retirement age adopted in some countries. Yet, any recommendation on the removal of statutory retirement ages is lacking.*
[140] United Nations, "United Nations Principles for Older Persons," Adopted by General Assembly resolution 46/91 of 16 December 1991: Principle 3.
[141] Denise Gosselin Caldera, "Older Workers and Human Rights: National and International Policies and Realities," in Ageism and Mistreatment of Older Workers: Current Reality, Future Solutions, ed. P. Brownel and J. Kelly, (New York: Springer, 2013), 6.
[142] Naj Ghosheh, "Age discrimination and older workers: Theory and legislation in comparative context," Conditions of Work and Employment Series No. 20, International Labour Office, Geneva (2008): 9.
[143] United Nations, Second World Assembly on Ageing, Madrid, Spain, 8 – 12 April, 2002, "Political Declaration and Madrid International Plan of Action on Ageing,", New York, (2002): para.23.
[144] Ibid: para.23.
[145] Ibid: Article 5.

1966	The International Covenant on Civil and Political Rights
1966	The International Covenant on Economic, Social and Cultural Rights
1982	The First World Assembly on Ageing (Vienna)
1995	Committee on Economic, Social and Cultural Rights: General Comment No. 6
1999	The International Year of Older Persons
2002	The Second World Assembly on Ageing (Madrid)
2010	The creation of the Open-Ended Working Group on Ageing

Besides the UN main bodies, certain UN special agencies had a central role in creating standards on the protection of the rights of older persons. One of them is certainly the International Labour Organization (hereafter 'the ILO') which has developed standards of particular importance for older workers approaching retirement age.[146] There are two international standards developed by the ILO concerning age discrimination in the workplace which go beyond policy statements. The first one - addressing discrimination in general - is the ILO Convention on Discrimination (Employment and Occupation), adopted in 1958.[147] Although age was not included in the list of protected grounds, Article 1(1)(b) of the ILO Convention allows Member States to add other grounds for domestic purposes.[148]

Another ILO standard which may be of greater importance in relation to mandatory retirement is Recommendation No. 162, adopted in 1980 and cited by the CESC in 1995 General Comment No. 6 discussed above. The Recommendation applies to "*[...] all workers who are liable to encounter difficulties in employment and occupation because of*

[146] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 950.
[147] International Labour Organization, "C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111): Convention concerning Discrimination in Respect of Employment and Occupation," adopted by the General Conference of the ILO, Geneva, 42nd ILC session, (1958): Art.1.
[148] Ibid: Art.1(1)(b).

advancement in age".[149] The General Conference of the ILO recognised that age is not included among the grounds of discrimination listed in the 1958 and 1980 Recommendation, but highlighted the possibility of adding it to the list.[150]

The Recommendation calls upon the Member States to promote equal opportunities and treatment of workers within their national policies regardless of the workers' age and to take action for the prevention of age discrimination in employment and education.[151] The Recommendation also guarantees the right to equal opportunities for older workers, particularly concerning the employment security and termination of employment.[152] Of particular importance for the issue of mandatory retirement is paragraph 21 of the Recommendation calling for measures to be taken to ensure that retirement is voluntary and that retirement age is flexible.[153] The Recommendation further calls for the examination of mandatory retirement practice in the light of equal opportunities for older workers and non-discrimination in the workplace.[154] Despite several recommendations and other publications which benefit older workers[155] it must be emphasised that none of the ILO convention contains a specific provision on age.[156]

The Wold Health Organization (hereafter 'WHO') is yet another UN agency important for the rights of older persons, albeit with less legal significance.[157] The WHO has put emphasis on older people's health concerning medical care and social welfare from the

[149] International Labour Organization, "Recommendation 162: Recommendation Concerning Older Workers," Adopted by the General Conference of the ILO, Geneva, 66th Sess. (1980): para.3(1).
[150] Ibid: preamble.
[151] Ibid: para.3.
[152] Ibid: para.5(c).
[153] Ibid: para.21.
[154] Ibid: para.22.
[155] *See*, United Nations, "Summary Record of the 12th Meeting, UN Economic and Social Council Official Records", Economic, Social and Cultural Rights, para.15.
[156] Diego Rodriguez-Pinzon and Claudia Martin, "The International Human Rights Status of Elderly Persons," American University International Law Review 18, no. 4 (2003): 951.
[157] Ibid: 951.

perspective of gerontology, geriatrics and demography.[158] It is important to notice that the standards on rights of older workers developed by both the ILO and the WHO – particularly ones concerning retirement - were incorporated in General Comment No. 6 on economic, social and cultural rights of older persons.[159]

As argued throughout this thesis, older persons remain one of the few vulnerable groups without specific protection under their own convention. The lack of convention is certainly not the result of the passivity of the international community. As early as 1948, Argentina submitted a draft declaration A/C.2/213 to the UN concerning old-age rights. The draft declaration referred to the rights of older persons to housing, clothing, food, health care, assistance, recreation and work, as well as to the right to stability and respect.[160] Despite the fact that the document reflected ideas enshrined in several other UN documents, Argentina's proposal eventually faded away without prompting any significant action.[161] Efforts emerged again in 1991 and 1999 when the international non-profit organization International Federation on Ageing and the Mission of the Dominican Republic to the UN tried to gather support for the creation of a binding international document on the rights of older persons. However, this was yet another failed attempt.[162]

Nevertheless, similar efforts since 2010 have had greater impact. The most recent development concerning age discrimination at the UN level is the creation of the Open-Ended Working Group on Ageing (hereafter 'OEWG'), established by the General Assembly Resolution 65/182 in December 2010. The OEWG was created with the purpose of *"[...]*

[158] Ibid: 951.
[159] Ibid: 951.
[160] Jennifer Dabbs Sciubba, "Explaining campaign timing and support for a UN Convention on the Rights of Older People," The International Journal of Human Rights 18, no. 4-5 (2014): 462.
[161] Ibid: 462.
[162] Ibid: 462.

strengthening the protection of the human rights of older persons".[163] According to the Group, it will do so by considering *"[…] the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures*".[164] The OEWG was, amongst others, established to consider a Convention on the Rights of Older Persons ('CROP'). The Group's authority was increased in 2012 when the UN voted to strengthen the Group's mandate to draft the text of the Convention.[165] This last effort gained significant support by transnational advocacy organizations, several states of Latin America and other UN regions[166], showing that the birth of the new UN Convention specifically designed for the rights of older persons is on the horizon.

Those who oppose a new convention - including the US, the EU and Canada - claim that there is no need for a new instrument since older persons are already granted some institutionalised protection in many UN Member States. The supporters, on the other hand, argue that a new convention is needed in order to make general human rights applicable to the specific needs of older persons. The list of specific rights to be strengthened by a new instrument includes: right to social security, health, work and property, as well as freedom from discrimination and violence.[167] Considering various drafts of a new convention submitted primarily by the (I)NGOs, a new convention would pay special attention to the right to work, including the right not to be *"[…] forced to stop working because of mandatory retirement ages*".[168]

[163] United Nations Human Rights Office of the High Commissioner, "Open-ended Working Group on Ageing," ,http://social.un.org/ageing-working-group/ (accessed 28 June 2015).
[164] Ibid.
[165] Jennifer Dabbs Sciubba, "Explaining campaign timing and support for a UN Convention on the Rights of Older People," The International Journal of Human Rights 18, no. 4-5 (2014): 463.
[166] Ibid: 463.
[167] International NGO Coalition for the Rights of Older People, "Statement: Formally Protecting the Rights of Older People Globally," New York: United Nations, (2011): 4.
[168] Ibid, para.12.

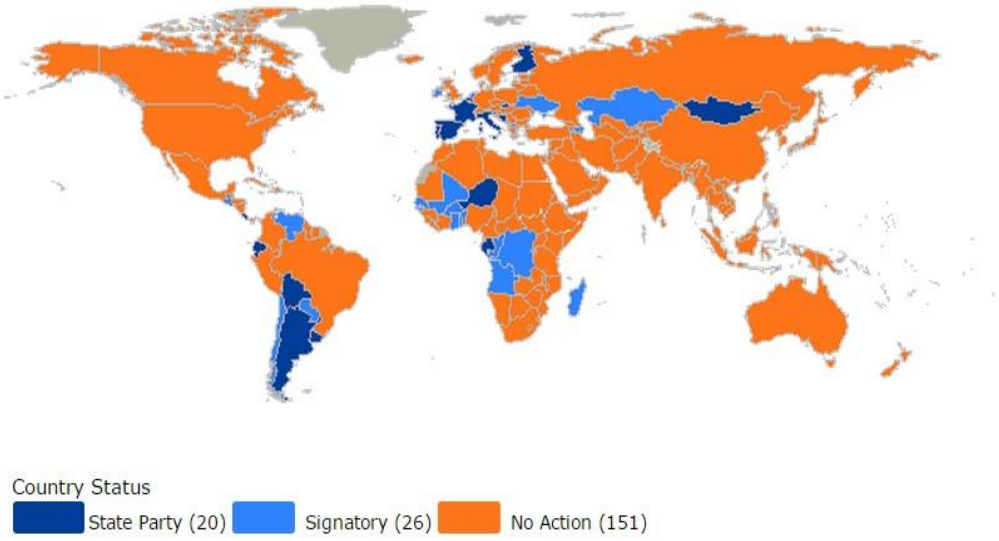
Case Law

Until very recently, there was no individual complaint procedure for a violation of rights guaranteed by the ICESCR. For almost 40 years of the existence of the ICESCR, the only way to monitor the implementation of the Covenant was through the reporting mechanism.[169] However, on May 5th 2013, the Optional Protocol to the ICESCR (hereafter 'OP-ICESCR') came into force and gave the CESCR the capacity to receive and consider "*[...] communications […] submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party*"[170] to the OP-ICESCR. However, to date the CESCR has not produced any decision based on the OP-ICESCR; nor has it registered any communications.[171]

This can be explained by a very small number of State Parties to the OP-ICESCR. In total only 26 states signed the Optional Protocol, 20 have ratified it and 151 UN State Parties took no action (*See* Figure 3).[172] It seems that states remain reluctant to accept the right of individual complaints with respect to ESC Rights and to assure them the same status as enjoyed by civil and political rights.[173]

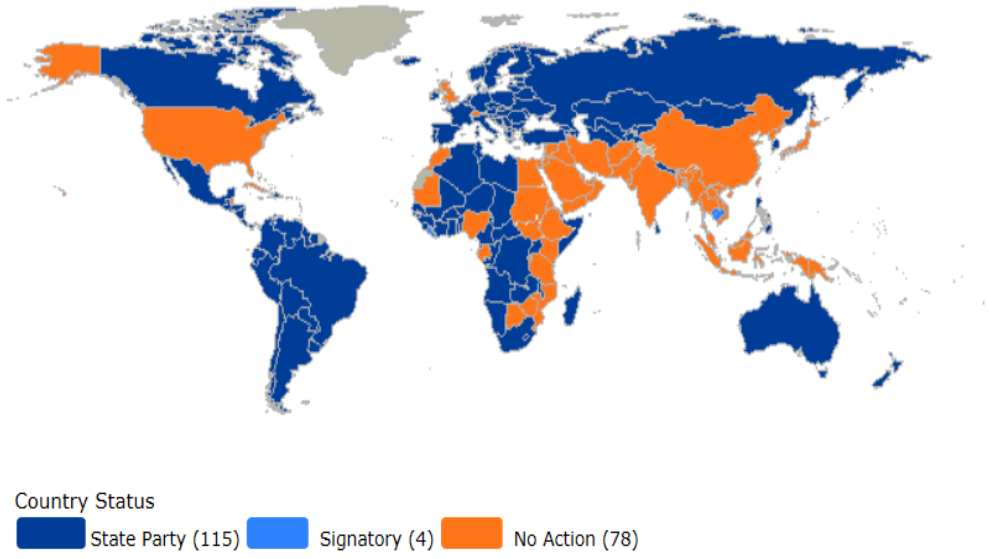
[169] Oxford Human Rights Hub, "ICESCR Optional Protocol: Reconciling Standards of Review," published 16 July 2013, http://ohrh.law.ox.ac.uk/icescr-optional-protocol-reconciling-standards-of-review/ (accessed 23 June 2013).
[170] United Nations General Assembly, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," Adopted by the General Assembly, 5 March 2009, A/RES/63/117, Article 2.
[171] Oxford Human Rights Hub, "ICESCR Optional Protocol: Reconciling Standards of Review," published 16 July 2013.
[172] United Nations Human Rights, Office of the High Commissioner for Human Rights, "Status of Ratification: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", http://indicators.ohchr.org/ (accessed 23 July 2015).
[173] Rochus Pronk, "Toward an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," The Human Rights Brief, (1995), https://www.wcl.american.edu/hrbrief/v2i3/icescr23.htm (accessed 23 June 2015).

Figure 3: Status of Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[174]



This is not the case with the Optional Protocol to the International Covenant on Civil and Political Rights (hereafter 'OP-ICCR) which has been ratified by 115 UN State Parties.[175]

Figure 4: Status of Ratification of the Optional Protocol to the International Covenant on Civil and Political Rights[176]



[174] *Source:* United Nations Human Rights, Office of the High Commissioner for Human Rights, "Status of Ratification: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights"
[175] United Nations Human Rights, Office of the High Commissioner for Human Rights, "Status of Ratification: Optional Protocol to the International Covenant on Civil and Political Rights," http://indicators.ohchr.org/ (accessed 23 June 2015).
[176] *Source:* United Nations Human Rights, Office of the High Commissioner for Human Rights, "Status of Ratification: Optional Protocol to the International Covenant on Civil and Political Rights"

The Human Rights Committee was established by the Covenant with the purpose of monitoring the implementation of the ICCPR by its State parties.[177] The above mentioned OP-ICCR recognises the competence of the Human Rights Committee *"[...] to receive and consider communications from individuals [...] who claim to be victims of a violation by [a] State Party of any of the rights set forth in the Covenant*".[178] While there has been no communication received under the ICESCR (yet), the Human Rights Committee has considered merely three communications where the applicants have claimed that mandatory retirement violated their right to non-discrimination on the basis of age.

The first of such cases was *Love et al v. Australia*[179] decided by the Committee in April 2003. The communication was brought by four Australian nationals who all worked as pilots at Australian Airlines, fully State-owned company operated by Government-appointed management. One day before the authors' 60th birthday, the airline company terminated their contracts pursuant to the company's mandatory retirement policy.[180] The Australian Government argued that dismissals were justified because mandatory retirement age is (a) based on an internationally accepted standard; (b) supported by medical evidences; (c) aimed at ensuring the greatest possible safety to passengers and others affected by air-travel, a purpose legitimate under the ICCPR; and (d) a long-lasting practice of the company.[181]

The importance of the case lies in the Committee's recognition of age as one of the grounds of prohibited discrimination. The Committee noted that while age is not mentioned as one of the enumerated grounds in the second sentence of Article 26, "*[...] a distinction related to age which is not based on reasonable and objective criteria may amount to*

[177] United Nations Human Rights, Office of the High Commissioner for Human Rights, "Human Rights Committee," http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (accessed 23 June 2015).
[178] United Nations General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, Adopted by General Assembly on 19 December 1966, United Nations, Treaty Series, vol. 999, Article 1.
[179] *Love et al v. Australia*, CCPR/C/77/D/983/2001, Decision of 28 April 2003.
[180] Ibid, para. 2.1.
[181] Ibid, paras. 4.10. - 4.12.

discrimination on the ground of "other status" under the clause in question".[182] Nevertheless, the Committee emphasised that *"[…] it is by no means clear that mandatory retirement age would generally constitute age discrimination".*[183] Mandatory retirement age, as argued by the Committee, may be used as a part of workers' protection since it limits the lifelong working time, in particular when a person who reached that age is already protected under the social security schemes. Furthermore, imposing mandatory retirement ages may be based on reasons related to employment policy. Additionally, whilst protection against age discrimination has been extensively elaborated under the ILO regime, the Committee emphasised that mandatory retirement does not appear to be prohibited by any of the ILO Conventions.[184] The Committee eventually accepted the State's justification and held that the aim of maximizing the safety of passengers, crew and other persons affected by air-travel is a legitimate aim under the Covenant.[185] No violation of Article 26 of the ICCPR was found.

Individual opinions of Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati (concurring in the result) further diminished the weak protection against age discrimination guaranteed by the Committee. Both concurring members opposed the recognition of age as one of the prohibited grounds of discrimination arguing that "*[t]he prohibited grounds of discrimination are set out in article 26, but age is not one of them*".[186]

The second case considered by the Human Rights Committee was *Solís v. Peru*[187], decided in 2001. The author of the communication was Mr. Solís, a Peruvian national who worked as a public servant in the National Customs Authority. The body was reorganized

[182] Ibid, para. 8.2.
[183] Ibid, para. 8.2.
[184] Ibid, para. 8.2.
[185] Ibid, para. 8.3.
[186] Ibid: Individual opinion of Committee member Mr. Nisuke Ando and Individual opinion of Committee member Mr. Prafullachandra Natwarlal Bhagwati, pp.16-18.
[187] *Solís v. Peru*, CCPR/C/86/D/1016/2001, Decision of 16 May 2001.

which resulted in a reduction in the number of staff. Dismissals were ordered on the basis of two criteria: (a) time in service (25 years or more for women and 30 for men) and (b) age (55 or older for women and 60 for men). Mr. Solís, who was 61 and had 11 years of service, was one of those employers. He claimed a violation of Article 25 (c), arguing that he was denied the right to have access to public service on the basis of his age.[188] The Commission recalled its jurisprudence established in *Love v. Australia* and reminded that while age is not mentioned as one of the grounds of discrimination, distinction related to age may be recognised as discrimination on the ground of "other status". The Committee however concluded that the age limit used for selecting employees to be dismissed was an objective and distinguishing criteria. Therefore, no distinction based on age was found.[189]

The last case concerning mandatory retirement examined by the Human Rights Committee was *Kly v. Canada*[190], decided in 2009. Mr. Kly worked as a university professor when he was forced to retire against his will, pursuant to the University's Collective Agreement (which set the normal retirement age for academic staff members at June 30th following their 65th birthday).[191] He claimed this was a violation of Article 26 of the Covenant. The Committee eventually declared the application inadmissible on the basis of non-exhaustion of domestic remedies.[192] Regardless of the outcome, it can be assumed that if the application had been declared admissible, the decision would not differ significantly from the one reached in *Love v. Australia*.

* * *

As was seen in this chapter, the UN system offers the oldest reference to old age. Over the years, the UN adopted a comprehensive system of soft-law mechanisms for the protection

[188] Ibid, para. 1.1.
[189] Ibid, para. 6.4.
[190] *Kly v. Canada*, CCPR/C/95/D/1576/2007, Decision of 29 April 2009.
[191] Ibid, para. 2.1.
[192] Ibid, para. 6.4.

of the rights of older persons. Many of them contain either a direct or indirect reference to mandatory retirement. Already in the 1980s, the ILO Recommendation and the First World Assembly on Ageing called for a more flexible retirement age and for voluntary retirement; the 1991 UN Principles recognised the right of older persons to participate in determining when to withdraw from work; and the 2002 Madrid Plan referred to the benefits of keeping older workers in the workplace for longer.

Yet, despite such long-standing soft-law protections against mandatory retirement in the UN, effective enforcement mechanisms are still lacking. The Committee on Economic, Social and Cultural Rights has not registered any communication under the ICESCR. The Human Rights Committee, on the other hand, has failed to offer real protection, stating that it is not clear that mandatory retirement age generally constitutes age discrimination. Some of the Committee's Members even refuse to recognise age as a prohibited ground of discrimination. The Committee found no violation of the Covenant in any of the three age discrimination cases brought under the ICCPR. It seems that the "it is all about justification" portrayal used for EU law (as will be seen later in this Chapter) could be applied to UN age discrimination case law as well.

Chapter 2 of this thesis explored whether there is a need for a Convention specific for the rights of older persons. The ineffectiveness of the UN system in providing adequate protection against mandatory retirement highlights an additional benefit of an age-specific convention, namely the possibility of individual complaint mechanism; the competence of the UN to receive and consider communications from individuals claiming to be victims of a violation of any right set out in such Convention, including the right to work beyond fixed mandatory retirement age. The new Convention could provide better examples of good practice than those offered by the Committee.

3.2. United States of America

Legislation

The prohibition of age discrimination in the US can be traced back to the 1960s when the US Congress, along with the Equal Pay Act (1963) and the Civil Rights Act (1964), passed the Age Discrimination in Employment Act in 1967 ('ADEA').[193] Most discussions on the protection against age discrimination refer primarily to the ADEA. Nevertheless, the history of age discrimination legislation in the US is somewhat longer. When talking about the federal level, already in 1956 the US Civil Service Commission abolished a maximum age of entry into employment, eliminating age discrimination in federal employment.[194] Moreover, the Executive Order 11141 established an anti-discrimination policy in 1964 prohibiting age discrimination among federal contractors.[195] Lastly, the 1965 Older Americans Act was enacted to encourage research and programs which aimed at creating equal opportunities for employment without any discriminatory practices on the basis of age.[196] Although these federal actions preceding the ADEA marked an important starting point in the struggle against age discrimination in employment, they were inefficient. None of them established the complaint procedure which would allow a victim to claim violation and demand remedy.[197]

The protection against age discrimination prior to the ADEA was stronger at the state level than at the federal level. From the beginning of the 1900s until 1960 ten states had age discrimination statutes in place together with enforcement mechanisms (See *Table 2*).[198]

[193] David Neumark, "Age Discrimination Legislation in the United States," NBER Working Paper Series, Working paper 8152, National Bureau of Economic Research, Cambridge (2001): 1.
[194] Ibid: 1-2.
[195] Ibid: 2.
[196] Ibid: 2.
[197] Ibid: 2.
[198] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 1090 – 1098.

Table 2: US States with age discrimination legislation prior to Title VII and the ADEA[199]

STATE	YEAR	AGE DISCRIMINATION LEGISLATION
Colorado	1903	Enacted law prohibiting age discrimination in employment for those 18-60 years old
Connecticut	1959	Amended Fair Employment Practices Act prohibiting age discrimination for those 40-65 years old
Alaska	1960	Enacted law prohibiting age discrimination in employment for those over 45
Delaware	1960	Enacted law prohibiting age discrimination in employment for those 45-65 years old
Louisiana	1934	Banned age discrimination in employment for those under 50 years old
Massachusetts	1937	Enacted law prohibiting dismissal or refusing to employ persons aged 45-65 and contracts with age limits
New York	1958	Amended Fair Employment Practices Act prohibiting age discrimination for those aged 45-65
Oregon	1959	Amended Fair Employment Practices Act prohibiting age discrimination for those aged 25-65
Pennsylvania	1956	Amended Fair Employment Practices Act prohibiting age discrimination in employment for those aged 40-62
Rhode Island	1956	Enacted law prohibiting age discrimination in employment for those aged 45-65

All of the states listed in *Table 2* have established commissions at the state level whose task was to counter discrimination. These commissions functioned primarily by seeking a friendly settlement. However, if they could not reach such a settlement, they could

[199] *Source:* David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 1090 – 1098.

hold hearings, prescribe findings and seek for court orders for employers who engaged in discriminatory practices.[200] The importance of these states' statutes on age discrimination can be seen from the fact that even when federal laws was later enacted, the state-level commissions, govern by their own statutes, were explicitly recognised and given the responsibility to enforce the anti-discrimination laws. This applied to the states which enacted laws prohibiting age discrimination in 1960s as well.[201]

A more serious development of the federal legislation began with the ADEA, enacted in 1967 (see *Table 3*). The ADEA was developed in the wake of Title VII of the Civil Rights Act and enacted in 1964. During the debates which preceded the adoption of Title VII, the US Congress members strived to include a prohibition against age discrimination in this landmark civil rights statute. However, their attempts were unsuccessful.[202] Instead, Congress requested from the Secretary of Labour to prepare a study on the effects of age discrimination in employment. On the basis of this study, the ADEA was passed in 1967.[203] The ADEA mirrors Title VII in its prohibitions where Section 2000e-2 of Title VII[204] is almost identical to Section 632 of the ADEA.[205]

The original objective of the ADEA was *"[…] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment*".[206] According to some authors, the original intention of the

[200] David Neumark, "Age Discrimination Legislation in the United States," NBER Working Paper Series, Working paper 8152, National Bureau of Economic Research, Cambridge (2001): 2.
[201] Ibid: 2.
[202] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 772.
[203] Ibid: 772, citing Civil Rights Act of 1964, Section 715.
[204] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 2000e-2.
[205] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621.
[206] U.S. Code, Title 29, Chapter 14, Section 621 (b), cited in David Neumark, "Age Discrimination Legislation in the United States," NBER Working Paper Series, Working paper 8152, National Bureau of Economic Research, Cambridge (2001): 3.

ADEA was to eliminate discrimination against older persons which is based largely on negative stereotypes. Crawshaw-Lewis, who researched the origin of age discrimination legislation in the US, claimed that the legislative history of the ADEA shows that even the US Congress recognised that age discrimination mostly stems from inaccurate stereotypes about older workers.[207] She supported her claim by relying on several significant citations. Firstly, she cited the part of the debate from the Congressional Record which stated that *"[the ADEA] recognizes two distinct types of unfair discrimination based on age. First, the discrimination which is the result of misunderstanding of the relationship of age to usefulness; and second, the discrimination which is the result of a deliberate disregard of a worker's value solely because of age*".[208] Furthermore, she also relied on the citation from the *Hazen Paper Co. v Biggins* case of 1993 where the US Supreme Court recognised that the US Congress enacted the ADEA because of the worry that "*[...] older workers are being deprived of employment on the basis of inaccurate and stigmatizing stereotypes*".[209] Similar developments were evident at the EU level. Just before the adoption of EU anti-age discrimination legislation, several Europe-wide studies showed that age discrimination stems mainly from false stereotypes.

The ADEA original prohibition of age discrimination covered all workers between the ages of 40 and 65[210], protecting them from age discrimination in hiring, dismissals, and promotions.[211] What distinguishes the ADEA form Title VII are the exemptions accompanying comparable prohibitions of age discrimination discussed above. The ADEA exempts any action otherwise prohibited by the Act in three situations: (a) *"where age is a bona fide occupational qualification* (BFOQ) *reasonably necessary to the normal operation*

[207] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 769.
[208] Ibid: 770, citing 113 Congressional Record 34,747.
[209] Ibid: 770, citing *Hazen Paper Co. v. Biggins*, 570 U.S. 604, 610 (1993).
[210] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 631.
[211] Ibid: § 623.

of the particular business"[212]; (b) "*where the differentiation is based on reasonable factors other than age*"[213]; or (c) "*where such practices involve an employee in a workplace in a foreign country, and compliance with [the Act] would cause the violation of laws of the country in which the workplace is located*".[214] When talking about exemptions from direct discrimination, the US system shares some common features with the EU. In both jurisdictions, direct age discrimination comes with the broadest and most permissible exemptions (although broader at the EU level, as will be seen further in this Chapter).

The ADEA was succeeded by the Age Discrimination Act (hereafter 'ADA'), passed in 1975. The ADA prohibited age discrimination in "*any program or activity receiving Federal financial assistance*"[215] (see *Table 3*). Further important changes occurred in 1978 and 1986 (see *Table 3*). The 1978 Amendment raised the age limit of protected group from 65 to 70, hence prohibiting employers from imposing mandatory retirement before a worker reaches the age of 70.[216] However, the 1978 Amendment introduced several new exemptions. First, it delayed the coverage for tenured employees or educational institutions until 1982. Secondly, it continued to allow mandatory retirement at ages between 65 and 69 for workers in 'bona fide executive policy making positions' who have the possibility to acquire higher pension benefits. And lastly, it exempted employers who employ less than 20 employees.[217]

Most authors agree that the real enforcement of the ADEA began when the Equal Employment Opportunity Commission (hereafter 'EEOC') took over the obligation to

[212] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623 (f) (1).

A common example of using a BFOQ is in acting positions. Throughout case law history, courts have also allowed age to be considered as a BFOQ in cases where public safety may be concerned, including occupations such as pilots, air traffic controllers, firefighters, etc. Law also exempts high-salaried policy making positions, such as COEs from protection under age discrimination law.

[213] Ibid: § 623 (f) (1).

[214] Ibid: § 623 (f) (1).

[215] Age Discrimination Act of 1975, 42 U.S.C. § 6102.

[216] Till von Wacher, "The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts," Center for Labour Economics, Working Paper No. 49, University of California Berkeley, (2002): 4.

[217] David Neumark, "Age Discrimination Legislation in the United States," NBER Working Paper Series, Working paper 8152, National Bureau of Economic Research, Cambridge (2001): 3-4.

enforce the Act from the US Department of Labour in 1979; allowing workers to file a claim on the basis of suffered discrimination.[218] The last 1986 Amendment removed the upper age limit for determining the protected class. This prohibited termination of employment on the ground of age, hence outlawing mandatory retirement. The ADEA currently applies to all private employers who employ 20 or more workers, to state and local governments, federal government, employment agencies and labour organizations.[219] It does not cover private employers with less than 20 employees[220], elected state officials, appointees and legal advisers[221], including appointed state judges.[222]

The last key federal age discrimination legislation was the Older Workers Benefit Protection Act (hereafter 'OWBPA'), passed in 1990 with the aim of clarifying the protection given to older workers by the ADEA with regard to employee benefit plans.[223] The Act resulted from a growing number of companies who have tried to persuade their older workers to retire by offering seemingly generous retirement packages. However, as a precondition, the employees had to sign a waiver of their rights under the ADEA and other labour laws.[224] The OWBPA was a response to the US Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts* case of 1989 where it was held that the provisions of a bona fide employee benefit plan are exempt from the ADEA if the plan is not discriminatory in other areas, such as hiring or wages.[225]

The Congress recognised that, as a result of decision of the US Supreme Court in *Betts*, legislative action is needed to renew the original congressional intent in passing and

[218] Ibid: 4.
[219] Till von Wacher, "The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts," Center for Labor Economics, Working Paper No. 49, University of California Berkeley, (2002): 4.
[220] Age Discrimination Act of 1975, 42 U.S.C. § 630 (b).
[221] Ibid, § 630 (f).
[222] See, *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
[223] Older Workers Benefit Protection Act of 1990 (OWBPA), 104 Stat. 983, 29 U. S. C, preamble.
[224] Charles E. Mitchell, "Waiver of rights under the Age Discrimination in Employment Act: Implications of the Older Workers Benefit Protection Act of 1990," Labour Law Journal 43, no. 11 (1992): 735.
[225] Ibid: 736.

amending the ADEA[226], which prohibited age discrimination *"[...] against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations*".[227] In summary, the OWBPA introduced some restrictions on financial inducements to retire and thus prohibited discrimination based on age by employers when providing employee benefits.[228] The Act ensures that older workers are not coerced or pressured to waive their rights under the ADEA.[229]

Table 3: Key US federal age discrimination legislation[230]

LEGISLATION	YEAR	PROVISIONS
Age Discrimination in Employment Act (ADEA)	1967	Prohibited discrimination based on age in hiring, dismissals and promotion, covering workers between 40-65
Age Discrimination Act (ADA)	1975	Prohibited age discrimination in all programs and activities which receive financial assistance on federal level
ADEA Amendment	1978	Lifted the upper age limit, covering workers between 40 -70
ADEA Amendment	1986	Removed upper age limit, outlawing the imposition of mandatory retirement at any age
Older Workers Benefit Protection Act (OWBPA)	1990	Prohibiting age discrimination by employers when providing employee benefits

Starting from 1979, the EEOC has been in charged with the enforcement of the ADEA. Claims of age discrimination may be issued by the EEOC or by individuals themselves. However, if an individual wishes to seek civil action on the basis of age discrimination, they must first file a request either with the EEOC or at the state level.[231] The

[226] Ibid: 736.
[227] Older Workers Benefit Protection Act of 1990 (OWBPA), 104 Stat. 983, 29 U. S. C, § 101.
[228] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 4.
[229] *See*, Krane v. Capital One Services, Inc., 314 F. Supp. 2d 589 (E.D. Va. 2004): 605.
[230] Ibid: appendix, Table 1.
[231] Web page of the U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/ (accessed 30 July 2015), cited in David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labor Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 6.

role of the EEOC after it receives a claim is to "*[...] eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion*".[232] Once a charge has been filed, there are a number of possible outcomes. First, if according to the EEOC there was no violation of the ADEA, the charge can be dismissed. In that case, the alleged victim can still initiate a civil action in court.[233] Secondly, if the EEOC does not dismiss the charge, it can seek a friendly settlement or act as a mediator. And lastly, if conciliation or mediation prove to be unsuccessful, the EEOC (or the complainant themselves) can file a suit in court.[234] Unlike claims under the Civil Rights Act, which allow a person to seek damages for emotional suffering as well as punitive damages, the ADEA aims at "making the individual whole". In other words, the idea is to return the plaintiff to the point where he would be if he has not been discriminate against on the basis of their age.[235] Possible remedies, according to the EEOC, may include offering job position, re-hiring, back-pays and other benefits which an older worker would have received if not discriminated against, promotion, compensation, or other actions which will 'make the individual whole'.[236] Similar practice of 'making the individual whole' exists in some EU states as well, as will be seen bellow.

Case law

Due to the extensive and well-established case law on age discrimination, and especially on mandatory retirement, this part of the thesis will be discussed in two parts. The first and longer section focuses on landmark decisions with regard to age discrimination and mandatory retirement. These are the decisions which laid down the foundations of the US case law as we know it today (*see* summary in Table 4). The last and shorter part emphasises

[232] U.S. Code, § 626, cited in David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labor Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 6.
[233] U.S. Equal Employment Opportunity Commission, "Remedies for Employment Discrimination," http://www.eeoc.gov/employees/remedies.cfm (accessed 30 July 2015).
[234] Ibid.
[235] Joanna N. Lahey, "International Comparison of Age Discrimination Laws," Research on Aging 32, no. 6 (2010): 682.
[236] U.S. Equal Employment Opportunity Commission, "Remedies for Employment Discrimination".

recent and important judgments of the US Supreme Court, focusing on new developments on the issue of mandatory retirement.

Even after the ADEA was passed, the first cases of age discrimination brought to the US Supreme Court were examined under the Equal Protection Clause of the Fourteenth Amendment. In three major US Supreme Court decisions the applicants argued that imposing mandatory retirement violates the Equal Protection Clause of the US Constitution.[237] However, there has been not one case in which states' imposed mandatory retirement provisions have been declared unconstitutional on such grounds.[238] The current precedent was established in *Massachusetts Board of Retirement v. Murgia* (1976), where a uniform state police officer was forced to retire upon his 50th birthday according to a Massachusetts statute.[239] The Supreme Court held that imposing mandatory retirement for uniformed state police officers at the age of 50 under a state statute does not violate the Equal Protection Clause since older workers do not constitute a suspect class for the purpose of equal protection.[240] The Court recognised that although older persons in the US have not been fully free from discrimination, unlike those discriminated against on the basis of their race of national origin, older persons "*[…] have not experienced a `history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities*".[241]

[237] *Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) concerning statutory mandatory retirement of a uniformed state police officer at the age of 50; Vance v. Bradley, 440 U.S. 93 (1979) concerning statutory mandatory retirement of a foreign service officer at the age of 60; and Gregory v. Ashcroft, 501 U.S. 452 (1991), concerning mandatory retirement of state court judges at the age of 70 under Missouri's Constitution*

[238] Anja Wiesbrock, "Mandatory Retirement in the EU and the US: The Scope of Protection against Age Discrimination in Employment," The International Journal of Comparative Labour Law and Industrial Relations 29, no. 3 (2013): 320.
[239] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976): para.310.
[240] Ibid: para.317.
[241] Ibid: para.313.

The ADEA was passed nine years earlier, yet the *Murgia* decision went directly against the ADEA goals since it supported mandatory retirement practices based on arbitrary age limits instead of employees' abilities and job performance. Still, no reference of the ADEA was included in *Murgia* decision. It appears that litigations attacking mandatory retirement provisions under the US Constitution are not likely to be successful.

Despite of the defeating decision in *Murgia*, the courts have granted considerably greater protection for claims brought under the ADEA. In ADEA cases, the plaintiff who claims to be a victim of age discrimination has the burden to prove that certain employer's action was taken on the basis of his age.[242] Just as in cases of other types of discrimination, discriminatory action taken on the basis of a person's age can be established in two ways. Under the first way, the plaintiff has to demonstrate "disparate treatment".[243] Disparate treatment, established in the case of *International Board of Teamsters v. US*[244] (1977), requires proof that an employer intentionally treated some people less favourably on the basis of a protected ground of discrimination[245] Even though in *Teamsters* the disparate treatment was establish under Title VII and on the basis of the plaintiff's race, the test was reaffirmed in *EEOC v. Francis W. Parker School*[246] (1994) where the US Court of Appeals, Seventh Circuit, held that *"[d]isparate treatment occurs when an employee is treated less favorably simply because of race, color, sex, national origin, or in our case, age. This is the most*

[242] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 9.
[243] Ibid: 9.
[244] *International Board of Teamsters v. United States*, 431 U.S. 324 (1977)
[245] Ibid: Footnote 15.

To establish disparate treatment, an employee has to prove that the employer had the intention to treat him less favourably due to his age. Proof of discriminatory intent can be, for example, statements referring to a plaintiff as being 'too old', or making other derogatory comments about his age.

See, David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 9
[246] *Equal Employment Opportunity Commission v. Francis W Parker School*, 41 F.3d 1073, (1994, 7th Circuit)

obvious form of discrimination. To be successful on this type of claim, proof of discriminatory motive is critical".[247]

However, in the absence of such evidence, the plaintiff may rely on the precedents established in *McDonnell Douglas v. Green*[248] (1973) and clarified in *Texas Department of Community Affairs v. Burdine*[249] (1981).[250] In *McDonnell*, the US Supreme Court established a three-step burden shifting test for deciding on Title VII cases which lack direct evidence of discrimination. Firstly, a plaintiff bringing the claim under Title VII has a burden of establishing a *prima facie* case of discrimination.[251] Then, the burden of proof shifts to the employer who must offer other legitimate and non-discriminatory reason for adverse treatment of the plaintiff.[252] After that the plaintiff has a chance to disprove the explanation given by the employer by showing that his statement is untrue.[253]

Although the original McDonnell test applies to race discrimination, it has been successfully transferred on age discrimination claims. In *Herold v. Hajoca Corporation G Herold*[254], for example, the 1988 US Court of Appeals case, the plaintiff established a *prima facie* case of discrimination since (a) he belonged to the protected age group, (b) he was dismissed, (c) at the time he was dismissed, he was performing his job at a level which meets

[247] Ibid: para.8.
[248] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973)
[249] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)

The US Supreme Court clarified that second step of the test established in McDonnell case shifts burden of proof to defendant (employer) to articulate legitimate and non-discriminatory reason for adverse employment action.

[250] Harry J. Holzer, David Neumark, "Equal employment opportunity and affirmative action", in Handbook on the Economics of Discrimination, ed. William M. Rogers, (USA: Northampton, 2006), 262.
[251] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973): para.802.

The plaintiff may establish a prima facie case *"by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications*".

[252] Ibid: para.803.
[253] Ibid: para.805.
[254] *Herold v. Hajoca Corporation G Herold*, 864 F.2d 317, (4th Circuit, 1988)

his employer's expectations, and (d) at least four other persons outside the protected age class were retained at the same position.[255] The language of the fourth part of the test has been altered to comply with the 1996 US Supreme Court decision in *O'Connor v. Consolidated Coin Caterers Corporation*[256] where it was held that a worker who replaced the plaintiff does not have be outside of the plaintiff's protected class in order for him to invoke the McDonnell test.[257]

Second way in which the plaintiff can prove a discriminatory employer's practice is "disparate impact" which was established in the *Griggs vs. Duke Power Co.* case[258] (1971). Unlike with disparate treatment cases, a plaintiff relying on disparate impact does not have to prove discriminatory intent. Instead, they need to establish two requirements: firstly, the existence of an employer's policy or practice which may seem neutral but still impacts older persons more adversely; and secondly, 'business necessity' cannot be used to justify such a policy or practice.[259] Therefore, "disparate impact" is used in the cases of indirect discrimination, and "disparate treatment" is used in the cases of direct discrimination. Cases of disparate impact often rely on statistical evidences because they need to establish a difference in how certain policies or practices affect different groups, and partly because plaintiffs do not need to prove discriminatory intent.[260]

[255] Ibid: paras.6-8.
[256] *O'Connor v. Consolidated Coin Caterers Corp*. (95-354), 517 U.S. 308 (1996)

[257] *The Plaintiff, Mr O'Connor was dismissed at the age of 56 and replaced by a 40-year-old-worker. The lower court held that Mr O'Connor failed to show a prima facie case of age discrimination because he failed to show that he was replaced by someone outside of the age group protected by the ADEA. The Supreme Court reversed the decision and held that although the ADEA limits its protection to those who are 40 or older, it prohibits discrimination on the basis of age, not class membership. The fact that a comparator was outside of a protected class was irrelevant.*

[258] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)
[259] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy 107, no. 5 (1999): 10.
[260] Ibid: 10.

As recognised by the US Court of Appeals, Seventh Circuit, in the above discussed *EEOC v. Francis W Parker School* case, the court recognised that drafters of the ADEA relied extensively on the language of Title VII which resulted in the incorporation of "disparate treatment" and "disparate impact" – terms traditionally used under Title VII – into the ADEA lexicon.[261]

Despite of the resemblance between the ADEA and Title VII, the ADEA cases have to struggle with a particular problem. As argued earlier, the ADEA prohibits 'arbitrary age discrimination' only.[262] More precisely, it is not unlawful for an employer to make the differentiation between employees "*[...] based on reasonable factors other than age*"[263], a phrase which opened the way for the "reasonable factors other than age" defence ('RFOA').[264] In *Mastie v. Great Lakes Steel Corporation* (1976)[265], for example, the US District Court interpreted the ADEA as allowing an employer to consider employment costs of his workers to determine whom to select for a reduction in work force, when such consideration is based *"[...] upon an individual, as opposed to a general assessment"*.[266]

When concentrating on the issues related to salary, the leading case in disallowing dismissals based on the employee's "excessive" salary is *Metz v. Transit Mix, Inc.* (1987)[267] where the 54-year-old plaintiff, Mr Metz, as one of the highest paid employees who worked for his employer for 27 years, was replaced by 43-year-old employee whose salary was almost half of the salary of Mr Metz.[268] The US Court of Appeals, Seventh Circuit, held that

[261] *Equal Employment Opportunity Commission v. Francis W Parker School*, 41 F.3d 1073, (1994, 7th Circuit): para.7.
[262] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy, 107, no. 5 (1999): 11.
[263] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623 (f) (1).
[264] David Neumark and Wendy A. Stock, "Age Discrimination Laws and Labour Market Efficiency," Journal of Political Economy, 107, no. 5 (1999): 11.
[265] *Mastie v. Great Lakes Steel Corp*., 424 F. Supp. 1299, (1976)
[266] Ibid: para.1319
[267] *Metz v. Transit Mix, Inc*, 828 F.2d 1202 (1987, 7th Circuit)
[268] Ibid: para 1204.

based on the connection between Mr Metz higher salary and his years in service, the employer's action of replacing Mr Metz due to the higher cost of employment, violates the intent of the ADEA.[269] In other words, the court found that the employer's desire to save costs was not a lawful, non-discriminatory reason to replace the plaintiff with a younger and lower paid employee.

Metz set a precedent in age discrimination claims based on dismissals due to high salaries, requiring from the plaintiff to prove that there is a strong link between age and salary and that precisely salary motivated the employer's decision for dismissal.[270] This link was not found in the following *Holt v. Gamewell Corporation*[271] case (1968) where the plaintiff failed to demonstrate that his salary was based on his age and thus no evidence of age discrimination was found.[272] Not all courts have followed *Metz*. In *Hamilton v. Grocers Supply*[273] (1993), the Fifth Circuit court has refused to allow the plaintiff to rely on the link between age and seniority, rejecting the claim that age discrimination could derive from one's salary.[274] It can be seen that despite of precedent set in *Metz*, the ADEA cases where age discrimination was connected to salary have met a mixed acceptance.[275]

The US Supreme Court did not resolve the inconsistence, but has considered the closely related issue: pension status. In *Hazen Paper Co. v. Biggins*[276], a 62-year-old employee of Hazen Paper Company was dismissed just a few weeks before acquiring the right to pension benefits. He filed suit under the ADEA claiming that his age was a determinative factor for dismissal. Lower courts uphold his allegation, holding that

[269] Ibid: para.1208.
[270] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 778.
[271] *Holt v. Gamewell Corporation*, 797 F.2d 36, (1985, 1st Circuit)
[272] Ibid: paras.12-13.
[273] *Hamilton v. Grocers Supply Co Inc*, 986 F.2d 97, (1993, 5th Circuit)
[274] Ibid: paras.7-8.
[275] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 779.
[276] *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)

dismissing a worker based on pension status would violate the ADEA.[277] The Supreme Court argued that while seniority is *analytically* distinct from age, pension is determined by the number of years in employment and therefore *empirically* correlated with age.[278] The Court remanded the case, instructing the lower court to properly establish the employer's motivation for the dismissal of Mr Biggins, or, in other words, to look for evidence whether decision was actually motivated by the plaintiff's age.[279] Since *Biggins*, the US courts were less favourable towards "disparate impact" age discrimination claims which rely on the connection between the employer's discriminatory action and the older worker's high salary. Some courts even ruled that the dismissal of an employee based on his high wage arising from seniority, is not contrary to the ADEA.[280]

Yet, the importance of the *Metz* case is that the Supreme Court explicitly recognised that Congress passed the ADEA with the aim of protection older workers from adverse employers' decisions based on inaccurate and stigmatizing stereotypes.[281] Justice O'Connor argued the following: "*It is the very essence of age discrimination for an employee to be fired because the employer believes that productivity and competence decline with old age*".[282]

Table 4: Key case law on age discrimination under the ADEA

DECISION	YEAR	FOLLOWED IN	CONTENT
Griggs v. Duke Power Co.	1971		Established "disparate impact"
McDonnell Douglas v. Green	1973	Herold v. Hajoca Corporation G Herold (1988)	Established three-step, burden shifting test for deciding on cases that lack direct evidence of discrimination
Mastie v. Great Lakes Steel Corp.	1976		Allowed employer to look and consider employment costs in the case of reductions

[277] Ibid: para.610.
[278] Ibid: para.608.
[279] Ibid: para.614.
[280] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 779-780.
[281] *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), Ibid: para.610.
[282] Ibid: para.610.

International Board of Teamsters v. US	1977	EEOC v. Francis W. Parker School (1994)	Established "disparate treatment"
Texas Department of Community Affairs v. Burdine	1981		Clarified McDonnell test
Metz v. Transit Mix, Inc.	1987		Ruled that replacement of an employee based on the higher costs of their employment is contrary to the ADEA intent
Hazen Paper Co. v Biggins	1993		Recognised that Congress passed the ADEA with the aim of protection older workers from adverse employers' decisions based on inaccurate and stigmatizing stereotypes

* * *

In recent years, the US Supreme Court has issued several decisions which proved to have a considerable impact on mandatory retirement claims brought under the ADEA. One of them is *Gross v. FBL Financial Services, Inc.*[283] (2009) where the plaintiff was reassigned from the position of 'claims administration director' to the position of 'claims project coordinator' at the age of 56. His former position was given to the employee who was, until then, working under the supervision of Mr Gross. Even though Mr Gross received the same compensation as in the former position, he filed suit under the ADEA claiming that FBL relocated him due to his age.[284] The District court ruled in the plaintiff's favour and awarded him the compensation. However, the Eight Circuit Courts of Appeals reversed the decision, holding that the jury in lower court had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*[285] (1989). The US Supreme Court affirmed the reversal.[286]

[283] *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009)
[284] Ibid: I.
[285] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
[286] *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009): A.

The *Price Waterhouse v. Hopkins* case[287], to which the Supreme Court referred to, dealt with so-called 'mixed motives'. In other words, the case concerned a situation where there was more than one motive which could have prompted the employer's discriminatory decision. The Court held that, once a plaintiff proves that his membership in a protected class (class protected under Title VII) played a motivating factor in prompting the employer's decision, the burden of proof shifts to the employer. The Court further argued that the employer can avoid liability only if he can prove that he would make the same decision even if he did not take the protected class into account. [288] An unlawful practice, on the other hand, is established if the plaintiff's race, sex or religion proves to be *a motivating factor* for an employer's decision, even though other motivating factors were also present.[289] The Court however emphasised that ADEA claims are not covered by this burden shifting framework. Unlike Title VII, the ADEA does not prescribe that age has to be merely a motivating factor. In order to establish a disparate treatment under the ADEA, *"[…] a plaintiff must prove that his age was "but-for" cause of the employer's adverse action*".[290]

The US Supreme Court decision in *Gross* has been celebrated as a 'victory for employers'.[291] The Court made it clear that plaintiffs claiming age discrimination must prove that the adverse employer's action was taken only on the basis of their age. Essentially, ADEA plaintiffs have a heighten burden of proof when compared to those bringing the claim under Title VII. The Gross decision certainly makes the employers' defence against age discrimination claims much easier.[292]

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[287] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
[288] Ibid: A.
[289] Ibid: A.
[290] Ibid: A.
[291] Lexology web page, Roetzel & Andress - A Legal Professional Association, "Under examination: Gross v. FBL Financial Services, Inc," http://www.lexology.com/library/detail.aspx?g=0965fe1f-79ec-49ae-8cf9-a51cde901153 (accessed 3 August 2015).
[292] Ibid.

To conclude, age discrimination legislation has a long and well established history in US jurisprudence. Starting from the beginning of the 20th century, some states in the US have enacted statutes which protected older workers against age discrimination in employment. A more serious protection began with the adoption of the ADEA in 1967 whose amendments were gradually protecting more and more workers from termination of employment on the basis of age, thus outlawing mandatory retirement in the US.

The adoption of the ADEA was strongly based on the text of Title VII. Age does however not enjoy the same protection as the other grounds protected under Title VII, such as race, sex, religion and even disability. Besides being subjected to more exemptions, the US Supreme Court made it clear that unlike other protected groups, older persons have not experienced a 'history of purposeful unequal treatment' and therefore age does not require strict scrutiny. In comparison to older workers in the UN and the EU (as will be seen below), older workers in the US enjoy a higher protection against mandatory retirement in a form of direct discrimination. However, in the cases of indirect discrimination – when there are other factors involved rather than just age – the US workers also find themselves in a similarly vulnerable position. When there are 'reasonable factors other than age' involved, it makes it much harder for a plaintiff to prove discriminatory treatment, and much easier for an employer to justify his action. Seniority and salary has both been accepted as reasonable factors, despite of their strong correlation with age.

The US may have offered the best examples of good practices when it comes to the fight against mandatory retirement in the form of direct discrimination. However, age is far from enjoying the same level of protection as other protected attributes. This is particularly evident in the case of indirect discrimination, a failure the US will have to resolve in the future if it wishes to provide the same level of protection to everyone.

3.3. European Union

Legislation

When compared to the US, the EU has a relatively short history of fighting age discrimination. The adoption of the Treaty of Amsterdam in 1997 was one of the most important events for the EU anti-discrimination legislation. The Treaty marked the current 'era' of equality and non-discrimination in the EU by inserting Article 13 into the European Community Treaty ('EC Treaty'), the underlying treaty of the Community.[293] Up to that point, there were only two forms of discrimination prohibited in the EU: discrimination on grounds of sex in employment and discrimination on grounds of nationality.[294] The insertion of Article 13 provided a legal ground for the EU to adopt laws to fight discrimination on an entirely new set of grounds, including sex, racial and ethnic origin, religion or belief, disability, sexual orientation and **age**, both inside and outside employment.[295]

Unlike in the US where a significant number of states had age discrimination statutes in place even before federal legislation was enacted, there were no strong provisions on age discrimination at the national level in most EU Member States prior to the Amsterdam Treaty. Despite of that, it is worth noting that some Member States faced campaigns which advocated the need for age discrimination legislation. In the United Kingdom, for example, a private member's *Age Discrimination Bill 127* was introduced in 1982/1983[296], and France prohibited age-based job advertisements in 1993.[297] Three countries - Germany, Finland and

[293] Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 97

[294] *For more detailed review see*, Evelyn Ellis, Philppa Watson, "EU Anti-Discrimination Law: Second Edition," (UK: Oxford University Press, 2012), 13.

[295] Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 98.

[296] Ibid: 97, footnote no.1.

[297] Joanna N. Lahey, "International Comparison of Age Discrimination Laws," Research on Aging 32, no. 6 (2010): 689.

Spain - had labour laws prohibiting age discrimination within employment[298] and only two countries addressed age discrimination in dismissals. The first was Ireland where, under the Unfair Dismissals Act adopted in 1987 and amended in 1993, dismissals based fully or partly on the age were considered unfair.[299] The second was Italy where the Constitutional Court condemned dismissals or redundancies based on the employee's age.[300]

The difference between the US and the EU can also be seen from the background of the motivation which has driven the adoption of age discrimination legislations. Age discrimination legislation in the US was adopted relatively early and was inspired primarily by a civil rights movement which started with the adoption of Title VII. The adoption of age discrimination legislation in the EU, on the other hand, was motivated by the demographic and economic pressure of population-ageing which seized Europe in the last decades of the 20th century. The EU population age structure is estimated to change even more radically in the upcoming decades. It is predicted that the overall population will not only be larger by 2060, but also older than it is now.[301] The notion appeared that unless older workers are allowed and supported to stay in the workplace, productivity in Europe will decrease drastically in the next few decades, which will eventually cause problems in supporting the EU's social security systems.[302] Outlawing age discrimination in such a setting became a significant response to the challenges brought on by an aging society.

Despite of the differences, there seems to be one common feature shared by these two jurisdictions. As argued above, some authors claim that the legislative history of the ADEA shows that even the US Congress recognised that age discrimination mostly stems from

[298] Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 100.
[299] Ibid: 100.
[300] Ibid: 100.
[301] European Commission, Directorate-General for Economic and Financial Affairs, "The 2015 Ageing Report: Underlying Assumptions and Projection Methodologies," Brussels (2014): 1-2.
[302] Colm O'Cinneide, "Age discrimination and European Law," Brussels: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2005): 7.

inaccurate stereotypes about older workers.[303] Europe-wide researches on age discrimination which were carried out during 1990s showed similar results: age discrimination stems from unfounded stereotypes.[304] The most relevant conclusions obtained from the research are that (a) declines in productivity, efficiency and reaction time which are related to age are insignificant and can be compensated for by experience, and (b) there are considerable variations between aged-individuals' work performance.[305]

The first major change in the EU age discrimination legislation in the post-Amsterdam era was the adoption of the Charter on Fundamental Rights of the EU in 2000, a crucial regional human rights document and a part of the primary law of the EU. The importance of the Charter for age discrimination legislation can be seen from the insertion of age among the Article 21 non-exhaustive list of the prohibited grounds of discrimination. Article 21 of the Charter states that *"[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability,* ***age*** *or sexual orientation shall be prohibited*".[306] Article 25 refers to the rights of older persons: *"[…] to lead a life of dignity and independence and to participate in social and cultural life*".[307] Furthermore, Article 34(1) of the Charter, similar to the ICESCR discussed earlier in the Chapter, gives a reference to social security and social assistance in the case of, among

[303] Stacey Crawshaw-Lewis, "'Overpaid' Older Workers and the Age Discrimination in Employment Act," Washington Law Review 71, no. 3 (1996): 769.

[304] The EU earliest research into age discrimination can be attributable to Elisabeth Drury, who carried out a study on age discrimination against older workers across 11 EU countries on behalf of Eurolink Age in 1998. The Eurolink Age study was followed by 18-country study that covered 14 EU countries plus Austria, Cyprus, Malta, Norway, Finland and Sweden.

[305] Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 100.
[306] European Union, Charter of Fundamental Rights of the European Union, 2000/C 364/01, Official Journal of the European Communities, C 364/1, Art.21.
[307] Ibid: Article 25.

others, old age.[308] However, the legal status of the EU Charter remained unclear until the adoption of the Lisbon Treaty in December 2009. Then at last, the EU Charter has acquitted binging force.[309]

Due to the uncertainty of the Charter's legal status, it can be say that the real protection against age discrimination in the EU began with the adoption of the Employment Framework Directive in 2000. On the basis of the insertion of Article 13 into the EC Treaty, as discussed above, the EU has adopted three Directives: two in 2000 and one in 2004. The first one was the Race Directive[310] which outlawed discrimination on grounds of racial or ethnical origin in employment, working conditions, occupation, vocational training, membership, social protection, social advantages, education, and in access to goods and services.[311] The second one was the Employment Framework Directive[312] which outlawed discrimination on the grounds of religion or belief, disability, **age** or sexual orientation in respect of employment, occupation, working conditions, training, employment and membership.[313] The last Directive adopted in 2004 established an equal treatment of men and women in access to goods and services[314], bringing sex discrimination quite close to the level of protection as enjoyed by discrimination on the grounds of race or national origin.[315]

This is the moment to consider the hierarchy of protected grounds under EU law. The European Commission rejects the idea of a hierarchy between discrimination grounds arguing

[308] Ibid: Article 34 (1).
[309] Viviane Reding, "The importance of the EU Charter of Fundamental Rights for European legislative practice," Lecture given at the German Institute for Human Rights. Berlin, 17 September, 2010:1.
[310] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Union L 180, (2000)
[311] Ibid: Article 3.
[312] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000)
[313] Ibid: Articles 1 and 3.
[314] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Official Journal of the European Union L 373, (2004).
[315] Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 98.

that "*[the] absence of a qualitative hierarchy among the discriminatory grounds is of particular importance in cases of multiple discrimination*".[316] However, this view is not completely reflected in the Directives. They do show a clear hierarchy between the grounds of discrimination. A scope of application of the Employment Framework Directive is somewhat narrower, covering only employment and occupation and several closely related issues[317], as opposed to the Race Directive which covers a whole range of different areas, including employment, social protection, education, and access to goods and services.[318] Sex discrimination legislation established prior to the insertion of Article 13 into the EC Treaty was supported by the 2004 Goods and Services Directive which extended the scope of its application, placing gender in the middle of the hierarchy.[319] The Race Directive has therefore created a hierarchy between the grounds of discrimination placing sex and other grounds – including age – on a lower level of the scale. The position of age is even more complex considering the age-specific Article 6 of the Framework Directive which has probably contributed to the most permissive exemptions from age discrimination under EU law. Among other grounds protected by the Employment Framework Directive, age is the only one for which the Directive offers the possibility to justify direct discrimination.[320]

Unlike the ADEA in the US which prohibits discrimination against those aged 40 and above[321], the Employment Framework Directive does not outlaws discrimination only against older workers. It rather prohibits discrimination based on any age, including discrimination

[316] Erica Howard, "The case for a considered hierarchy of discrimination grounds in EU law," Maastricht Journal of European and Comparative Law 13, no. 4 (2007): 450, citing Explanatory Memorandum to the Proposal for the Framework Directive.
[317] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 3.
[318] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Union L 180, (2000): Article 3.
[319] Ann Numhauser-Henning, "The EU Ban on Age-Discrimination and Elderly Workers –Potentials and Pitfalls," Paper to the IJCLLIR Panel on 'Non-Discrimination Law and Equal Treatment of Employees – Recent Developments and Future Challenges', Barcelona, (2013): 4.
[320] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 6.
[321] See Chapter 3, Subchapter 2.

against young workers.[322] Such reverse age discrimination, often referred to as "two-way discrimination" is a specificity of EU non-discrimination law.

The Employment Framework Directive requires from the EU Member States to outlaw four types of (age) discrimination: direct discrimination, indirect discrimination, harassment and an instruction to discriminate.[323] In addition, Article 11 requires Member States to prohibit victimisation of person who undertook any legal proceeding against the unjust practice of the employer.[324] The Directive also established a minimum requirement, allowing Member States to provide a higher protection than the one guaranteed by the document.[325]

Similar to the case of the ADEA, which exempts situations here age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business[326], the Employment Framework Directive also allows justifications based on genuine and determining occupational requirements (GDOR).[327] In other words, when a particular characteristic is central for an occupation, the employer can insist that only a person who suffices that particular criterion is suitable for the job.[328] The list of potential 'occupational requirements' under the Employment Framework Directive is similar to the list existing in the US, focusing mainly on acting roles as well as occupations where safety can be jeopardised by conditions correlating with an individual's age.[329] For example, a

[322] Joanna N. Lahey, "International Comparison of Age Discrimination Laws", Research on Aging, 32, no. 6 (2010): 690.
[323] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 2.
[324] Ibid: Article 11.
[325] Ibid: Article 8.
[326] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 631.
[327] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 4 (1).
[328] SJ Beale HR Consult, "Applying a Genuine Occupational Requirement in Recruitment," Businesszone, http://www.businesszone.co.uk/community-voice/blogs/sbeale/applying-a-genuine-occupational-requirement-in-recruitment (accessed 8 September 2015).
[329] Joanna N. Lahey, "International Comparison of Age Discrimination Laws", Research on Aging, 32, no. 6 (2010): 690.

difference in treatment on the basis of age will not constitute age discrimination when a director needs a young person to play a 'young' role.

The Directive also requires Member States to provide reasonable accommodation for persons with disabilities, or in other words, to ensure that employers take all appropriate measures to enable a person with disabilities to have access to, to participate in, and to advance in employment.[330] The fact that the possibility of reasonable accommodation is reserved for disability only has prompted a number of critics arguing that the duty to provide reasonable accommodation should be reserved for age as well.[331]

As demonstrated in the previous subchapter, the ADEA can be distinguished from Title VII based on the exemptions accompanying very similar prohibitions of a discriminatory treatment. A similar development is seen in the EU. The Employment Equality Framework Directive contains a number of provisions according to which age is exempted from the Directive's coverage. According to Article 3(3), *"[the] Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes"*.[332] Recital 14 of the Directive further establishes that the Directive is "*[...] without prejudice to national provisions lying down retirement ages*".[333] Similarly, Article 3(4) allows Member States to decide that the Framework Directive does not apply to the armed forces when age and disability are concerned. This means that the use of age distinctions in state social security or social protection schemes, as well as in armed forces, will not have to be justified under Article 6(1) of the Directive.

[330] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 5.
[331] *See* Helen Meenan, "Age Discrimination in Europe: Late Bloomer or Wall-Flower?," Nordic Journal of Human Rights 25, no. 2 (2007): 167
See Marie-Ange Moreau, "Justifications of Discrimination," Paper presented at the European Regional Congress of Labour Law and Social Security, Stockholm, 4-6 September, 2002: 167.
[332] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 3(3).
[333] Ibid: Recital (14).

Despite of the similarities in the list of potential 'occupational requirements', the list of exemptions under the Employment Framework Directive is much broader that the one in the US. Article 6 of the Directive probably offers the most far-reaching provision when it comes to allowing direct age discrimination. This article is often referred to as the age-unique provision since age is the only ground of discrimination where direct discrimination can be legally justified. Article 6(1) provides that "*[...] differences of treatment on grounds of age shall not constitute discrimination if [they can be] objectively and reasonably justified by a legitimate aim [...] and if the means of achieving that aim are appropriate and necessary*".[334] The Article offers three possible legitimate aims: "*legitimate employment policy, labour market requirement of vocational training objectives*"[335]. The Directive offers three examples where differences in treatment can be justified in the way described above. These are:

a. *"the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
b. *the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*
c. *the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement"*.[336]

[334] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 6(1).
[335] Ibid: Article 6(1).
[336] Ibid: Article 6(1).

Similar to the early versions of the ADEA in the US (before the upper age limit was completely removed), the Employment Framework Directive allows Member States to lay down national mandatory retirement ages.[337] Setting statutory mandatory retirement ages, as described in Chapter 2, is permissible under the Directive. However, there seems to be less clarity concerning the question whether employers are allowed to set mandatory retirement ages either in contracts or through collective bargaining. If an employer requires that an employee must retire at a certain age, this could represent less favourable treatment on the basis of age under the Directive *unless* such a requirement can be justified according to Article 6.[338] The absence of an example among the Article 6 exemptions means that any employer-based retirement age must be justified by one of the legitimate aims listed in Article 6(1), either by a legitimate employment policy, by a labour market requirement or by vocational training objectives. In addition, it must be shown that an imposed mandatory retirement age is an appropriate and necessary mean of achieving that aim.[339] Therefore, it seems that the Directive referrers only to the (mandatory) retirement ages which exist as part of the social security schemes of EU Member States. National provisions which permit employers to impose mandatory retirement ages, on the other hand, will have to be justified as predicted by Article 6(1).[340]

The Employment Framework Directive also ensures that all persons who consider themselves wronged or believed to be discriminated against on the basis of a protected

[337] Joanna N. Lahey, "International Comparison of Age Discrimination Laws," Research on Aging 32, no. 6 (2010): 690;
Nick Adnett and Stephen Hardy, "The peculiar case of age discrimination: Americanising the European social model?," European Journal of Law and Economics 23, no. 1 (2007): 33.
[338] Nick Adnett and Stephen Hardy, "The peculiar case of age discrimination: Americanising the European social model?," European Journal of Law and Economics 23, no. 1 (2007): 33, citing Colm O'Cinneide, "Age discrimination and European Law," Brussels: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2005): 7.
[339] Colm O'Cinneide, "Age discrimination and European Law," Brussels: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2005): 15.
[340] Ibid: 15, footnote 25.

ground, including age, can bring a complaint through their national court system.[341] Complaints can be brought within time limits which are prescribed by Member States themselves and can vary from State to State. In Austria, for example, complaints must be brought within one year, while Germany gives the applicants only two months.[342] Besides ensuring the appropriate judicial and administrative procedures, Member States are also allowed to lay down their own rules on sanctions, as long as they are "*effective, proportionate and dissuasive*".[343] Possible sanctions can include compensations similar to the "making a person whole" principle which can be found in the US legislation.[344]

EU non-discrimination law aims at providing an effective protection against discrimination and tends to achieve this through reversing the burden of proof. However, this does not mean that the person claiming age (or any other) discrimination has to convince the court that they have a case. Instead, the victim has to establish a *prima facie case*, or in other words, convince the court that there is a possibility that they have suffered the discrimination.[345] The burden of proof then shifts to the respondent who has to show that there was no difference in treatment or that difference in treatment occurred for some other reasons than the persons' age.[346] Such a practice stemmed from the difficulty of proving a

[341] Ibid: Article 9.
[342] Joanna N. Lahey, "International Comparison of Age Discrimination Laws," Research on Aging 32, no. 6 (2010): 691.
[343] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 17.
[344] Ibid: Article 17.

[345] *In the cases of indirect discrimination, in order to establish a prima facie case, the claimant may rely on statistical evidences in, for example, success rates between age groups, percentage of workers in certain age groups, a mismatch between formal selection criteria and actual selection criteria, et cetera. In the cases of direct discrimination, the Employment Framework Directive includes a "comparator": the claimant must show that he or she was treated less favourable that another person in a similar, comparable situation, but with a contrasting characteristic. A comparator can be real or hypothetical and it is also possible to use a comparator from the past.*

See, Colm O'Cinneide, "Age discrimination and European Law," Brussels: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2005): 6.

[346] European Commission, Directorate –General for Justice, "How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives," Brussels (2011): 52.

discrimination claim in cases based on unequal power relationships, such as those between an employer and employee, where the subordinate party may have problems in obtaining the evidence that can prove the discriminatory treatment.[347]

* * *

This analysis of the EU age discrimination legislation is not complete without considering the prohibition of age discrimination in the European Social Charter.[348] The European Social Charter is a treaty of the Council of Europe adopted in 1961 and revised in 1996 by so called Revised European Social Charter (hereafter '(R)ESC'). The (R)ESC is gradually replacing the original document.[349] The Charter guarantees a wide range of rights, primarily focusing on working conditions, health, housing and social protection. Specific emphasis is placed on the protection of vulnerable groups such as older persons.[350] At present, all 28 EU Member States are members of the "Charter system" comprising of the 1961 Charter, the two Additional Protocols (of 1988 and 1995), and the 1996 (R)ESC. Because the Charter is as an international human rights treaty, it can be seen as a part of the supplementary law of the EU.[351]

Throughout the text, the (R)ESC gives references to age and by Article 23 the Charter guarantees the right of older persons to social protection. However, the importance of the (R)ESC in outlawing mandatory retirement as discrimination based on age can be seen from Article 24 which provides protection in cases of termination of employment.[352] Article 24

[347] European Commission, Directorate –General for Justice and Consumers, "Reversing the burden of proof: Practical dilemmas at the European and national level," Brussels (2014): 9.

[348] *One of the sources of inspiration for the (R)ESC was precisely EU law.*

See, European Committee of Social Rights, "The relationship between European Union law and the European Social Charter," Working Document, Strasbourg, (2014): para.8.

[349] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

[350] Ibid: para.9.

[351] Ibid: para.27.

[352] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, Article 23.

requires Member States of the Charter to recognise *"[…] the right of all workers not to have their employment terminated without valid reasons*".[353] Valid reasons, according to the Charter, can be either those connected to the capacity or conduct of the employee or the operational requirement of the employer (economic reasons).[354] Nonetheless, according to the European Committee on Social Rights, Article 24 of the (R)ESC applies only to contractual mandatory retirement age and not to statutory retirement age. In other words, Article 24 applies to situations when employment is terminated by the will of the employer, and not by the force of law.[355] Despite of this distinction, the interpretation given by the Committee clearly indicates that even in situations when an employee reaches the retirement age set by the state law, an employer has to indicate one of the valid reasons for the termination provided by Article 24. Failing to do so will constitute a violation of Article 25.

As for the most recent developments, the EU declared 2012 as the European Year for Active Ageing and Solidarity between Generations (hereafter the 'EY2012'). The European Commission expressed that the proclamation of the EY2012 is intended to address the challenges brought by population-ageing in Europe.[356] In its assessment report on the EY2012, the Commission wrote that "*[...] ageing is first of all a major achievement [...] and the potentials of a growing number of fit and healthy older people tend to be overlooked*".[357] It has been stressed that the EY2012 aimed to address challenges brought by an 'ageing Europe' by "*[...] looking both at the needs and rights of older persons as well as their*

[353] Ibid: Article 24.
[354] Ibid: Article 24.
[355] European Committee of Social Rights, "Statement of interpretation on Article 24: on age and termination of employment," Document ID 2012_163_10/Ob/EN, 2012.
[356] Jan Tymowski, "European Year for Active Ageing and Solidarity between Generations (2012), European Implementation Assessment" European Parliamentary Research Service, Brussels: 2015, p.4.
[357] European Commission, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations", Brussels: 2014, para.1.

potentials and their contribution to the economy and society".[358] The importance of the EY2012 for this thesis is that the EU lawmakers recognised that demographic change in Europe can be successfully tackled by allowing older people to make a contribution to society, which can be done so by allowing them to stay in the workplace as long as they want to and are able to.[359]

Table 5: EU milestones regarding the rights of older persons

YEAR	MILESTONE
1996	The adoption of the Revised European Social Charter (the (R)ESC)
2000	The adoption of the Council Directive 2000/78/EC (the Employment Framework Directive)
2000	The adoption of the Charter of the Fundamental Rights of the EU
2005	The first age discrimination case decided under the Employment Framework Directive (*Mangold v. Helm)*
2009	The adoption of the Lisbon Treaty (the EU Charter of the Fundamental Rights became legally binding)
2012	European Year for Active Ageing and Solidarity between Generations

Case law

Some legal academics have indicated that, since the EU first addressed age discrimination through Employment Framework Directive, the case law before the Court of Justice of the EU ('CJEU') has been 'mushrooming'.[360] The CJEU data base already shows 43 cases on age discrimination[361], half of which were decided in the last 4 years.[362] This is a

[358] Ibid: para.2.2.
[359] Ibid: para.2.2.
[360] Dagmar Schiek, "Age Discrimination before the ECJ - Conceptual and Theoretical issues," Common Market Law Review 48, no. 3 (2011): 777.

[361] *Note that not all 43 cases concern age discrimination as analysed in this thesis. The number refers to all cases where either the Court or the applicant referred to age, age discrimination or pension benefits. Not all cases are important for the topic discussed in this paper. Instead, this part of the Chapter focuses only on cases of mandatory retirement decided under the Employment Framework Directive.*

significantly high number considering the relatively short period in which age enjoys the status of a protected ground. This apparent "popularity" can be explained by the fact that everyone can experience this form of discrimination, rather than just a part of population as is the case with the other grounds. EU law, as already acknowledged above, prohibits discrimination on the grounds of any age, rather than just focusing on individuals above a certain age (as does the ADEA in the US).[363]

However, of special interest for this thesis is the fact that more than half of the cases decided by the CJEU – 28 to be exact - are related to either retirement issues or to individuals aged 60 and over.[364] This suggests that, on one hand, there is a considerable extent of discrimination experienced by this age group and, on the other hand, there are a high number age-related policies existing in EU Member States which impact the rights of older workers.[365] These results can also be compared with those obtained in 2008 by the Special Eurobarometer 296 on the Discrimination in the EU where age was found as the most common ground of discrimination among the respondents.[366] Moreover, respondents aged 40 or over were more ready to say that age discrimination in the EU is widespread.[367] This thesis will focus on the most important cases where the CJEU dealt with the issue of mandatory retirement.

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[362] Court of Justice of the European Union, Curia, "Case-law of the Court of Justice, http://curia.europa.eu/juris/documents.jsf?page=1&pro=&lgrec=en&nat=or&oqp=&lg=&dates=&language=en&jur=C&cit=L%252CC%252CCJ%252CR%252C2008E%252C%252C2000%252C78%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3B%3B%3BPUB1%3B%3B%3BORDALL&text=age%2Bdiscrimination&pcs=Oor&avg=&mat=or&etat=clot&jge=&for=&cid=281203 (accessed 11 August 2015).

[363] See, C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I- 5325, concerning discrimination of young workers.

[364] Elaine Dewhurst, "The Development of EU Case-Law on Age Discrimination in Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four," European Law Journal 19, no. 4 (2013): 519. See also, Curia web page, Case-law of the Court of Justice, accessed 11 August 2015,

[365] Ibid: 519.

[366] European Commission, Special Eurobarometer Study 296, "Discrimination in the European Union: Perceptions, Experiences and Attitude," Brussels, (2008): 63.

[367] Ibid: 60.

The first age discrimination case decided under the Employment Framework Directive was *Mangold v. Helm*[368] (2005), concerning German legislation (statutory provision) which allowed employers to offer fixed-term contracts to workers aged above 52, without having to offer any objective reason.[369] One of these contracts was concluded between Mr Mangold and his employer Mr Helm. The CJEU applied a strict standard of judicial review and found that the justification offered by the Member State (promoting vocational integration of unemployed old workers[370]) can constitute a legitimate aim according to Article 6(1). Nonetheless, using age as the only criterion to conclude a fixed-term contract, irrespective *"[...] of any other consideration linked to the structure of the labour market [...] or the personal situation of the person concerned [went] beyond what is appropriate and necessary in order to attain the objective pursued"*.[371] The German statutory provision could not be justified under Article 6(1) of the Directive.[372] The importance of the judgment for this thesis also lies in the fact that the CJEU regarded the principle of non-discrimination on grounds of age as a general principle of EU law.[373]

In the following case, in *Palacios de la Villa v. Cortefiel Servicios SA*[374] (2007), the Court applied much looser standard of scrutiny. The case challenged the provision of the Spanish national collective agreement which made it lawful to terminate the employee's contract of employment once the worker reached the normal retirement age of 65.[375] In reaching the decision, the Court for the first time clarified the meaning of Recital 14 according to which the Employment Framework Directive is "*[...] without prejudice towards*

[368] Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.
[369] Ibid: para.21.
[370] Ibid: para: 59.
[371] Ibid: para. 65.
[372] Ibid: para.65.

The Court found the aim offered by the Member State disproportionate despite the fact that the Employment Framework Directive was still not implemented into the national legislation of the Member State.

[373] Ibid: para.75.
[374] Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios* SA [2007] I - 8566
[375] Ibid: para.24.

national provisions laying down retirement ages".[376] Nonetheless, the Court examined the relevant legislation on the basis of its connection to the 'employment and working conditions' area of competence covered by the Directive.[377] Unlike in the *Mangold* case, in *Palacios* 'age' was not the sole factor for mandatory retirement. The Court also took into account the overall situation in the labour market, and held that a legitimate aim of promoting full employment by facilitating access to the labour market[378] can be "*[...] objectively and reasonably justified in the context of national law*".[379] In general, by the judgment in *Palacios* case, the Court gave States wide margin of discretion when it comes to justifying mandatory retirement ages.

Subsequently, the CJEU adopted a similar view in *Age Concern v. Secretary of State for Business, Enterprise and Regulatory Reform*[380] (2009). The case was brought by the civil society organization Age Concern England (which aims at promoting the welfare of older persons) against the UK Employment Equality (Age) Regulations 2006 which was adopted to transpose the age provisions of the Employment Framework Directive into UK law.[381] According to the UK Regulations, employers could dismiss employees who had reached the retirement age set by the employer (in the absence of such, the age of 65). Employees who reached the mandatory retirement age but wished to continue to work could have requested to stay, however, the employers needed only to "consider" such a request. The claimants argued that the provisions of the UK Regulations do not properly transpose the Framework Directive

[376] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Recital 14.
Case C-411/05 *Palacios de la Villa v. Cortefiel Servicios* SA [2007] I – 8566, para.44.
[377] Ibid: paras.44-45.
[378] Ibid: para.72.
[379] Ibid: para.77.
[380] Case C-388/07 *Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR
I-1569
[381] Ibid: para.18.

and are contrary to Article 6 of the Directive.[382] In reaching the decision, the CJEU followed the judgment given in *Palacios*, holding that Member States enjoy broad discretion in choosing a manner in which they implement the Directive.[383] The Court further held that it was apparent from Article 6(1) that social policy objectives, such as those related to employment policy, could be used as legitimate aims for justifying the difference in treatment on the basis of age.[384] But it is for the national court to determine whether the provision which allows employer to dismiss workers who reached the retirement age can be justified by legitimate aims as provided by Article 6 of the Directive[385].

Similarly, in *Rosenbladt v. Oellerking Gebäudereinigungsges*[386] (2010), the Court has once again referred to the "*[…] wide discretion granted to the Member States and the social partners in the area of social policy and employment*".[387] The case involved the applicant, Ms Rosenbladt, who worked as a cleaner for 39 years and whose employment contract was terminated once she reached the age of 65; leaving her with a statutory old-age pension of 253,19 € per month.[388] The CJEU once again emphasised that Member States are given wide discretion in the area of social policy and employment[389] and held that provisions of the German Law could be objectively and reasonably justified by the legitimate aim of promoting better access to employment and achieving a fair distribution of work between the generations.[390] Unfortunately, the Court did not discuss the small and insufficient amount of the pension which Ms Rosenbladt received after working part-time as a cleaner.

[382] Ibid: para.18.
[383] Ibid: para.41.
[384] Ibid: para.46.
[385] Ibid: para.47.
[386] Case C-45/09 *Rosenbladt v. Oellerking Gebäudereinigungsges* [2010] I-09391.
[387] Ibid: para.76.
[388] Ibid: paras.20-26.
[389] Ibid: para.76.
[390] Ibid: para.62.

In a more recent case, *Hörnfeldt v. Posten Meddelande AB*[391] (2012), the EU Court followed the standard set in Palacios case. The *Hörnfeldt* case concerned the Swedish "67-year rule" which allowed an employer to terminate the employment contract once an employee reaches the age of 67.[392] Swedish government argued that the "67-year rule" was established for several reasons. The most relevant ones were to avoid the humiliation of older workers by terminating their contracts on the basis of their advanced age, to give individuals the right to work beyond their 65th birthday and to increase the amount of their pension, and to make it easier for young people to enter the labour market.[393] The Court accepted arguments presented by the Swedish government as legitimate aims and held that *"[…] the automatic termination of the employment contracts of employees who meet the conditions […] has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships*".[394] The Court accepted encouragement of recruitment as "*[...] a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved*".[395]

"*It is all about justification*" was the sentence used by Brian Bercusson to characterise EU non-discrimination law at a 2002 conference in Stockholm.[396] Prof. Monika Schlachter stated that "*[…] there are almost no limits to the discretion of the Member States in adopting mandatory retirement rules*".[397] The case law analysed above has also not been exempted from criticism. Critics were mostly based on the perception that States are given a too excessive degree of discretion. According to the report of the European Network of Legal

[391] Case C-141/11 *Hörnfeldt v. Posten Meddelande AB* [2012] ECR I-0000
[392] Ibid: para.6.
[393] Ibid: para.26.
[394] Ibid: para.28.
[395] Ibid: para.29.
[396] Ann Numhauser-Henning, "The EU Ban on Age-Discrimination and Elderly Workers –Potentials and Pitfalls," Paper to the IJCLLIR Panel on 'Non-Discrimination Law and Equal Treatment of Employees – Recent Developments and Future Challenges', Barcelona, (2013): 12, citing Brian Bercusson, European labour law and the EU Charter of Fundamental Rights – summary version. Brussels: European Trade Union Institute (ETUI), 2002.
[397] Ibid: 12.

Experts in the non-discrimination field, such a wide discretion given to the Member States taken together with the justifiable nature of age discrimination makes criticism on the implementation of the Directive very difficult.[398]

It must be noted that the Court uses two separate and very different standards when analysing cases of mandatory retirement. One standard, used in *Age Concerned*, *Rosenbladt* and *Hörnfeld*, is much looser and focused on more general systems of mandatory retirement. The other one, used in *Petersen*, *Georgiev*, *Fuchs*, and in the recent *Commission v Hungary* case, is considerably stricter and focused on specific professional groups.

The first among this group of cases is *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*[399] decided in 2010. The case concerned German legislation which introduced the maximum age limit of 68 for dentists qualified to treat patients covered by public health insurance (so called 'panel dentists').[400] The justification offered by the German government was threefold. Firstly, it was argued that this age limit aims to protect patients *"[…] against the risks presented by older panel dentists whose work is no longer the best*".[401] Secondly, that it fosters the distribution of employment opportunities among the generations.[402] And lastly, that it creates the financial balance of the public health system.[403] The first justification concerning patients' health was rejected on grounds on inconsistency since the age limit did not cover dentists in private practice.[404] As for the second justification, the Court held that setting the age limit at the age of 68 for the purpose of opening job opportunities for young workers and promoting 'inter-generation solidarity' could be justified

[398] Declan O'Dempsey and Anna Beale, "Thematic Report of the European Network of Legal Experts in the Nondiscrimination Field: Age and Employment," Directorate-General for Justice, Brussels (2011): 12.
[399] Case C-341/09 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.
[400] Ibid: paras.10-14.
[401] Ibid: para.38.
[402] Ibid: para.38.
[403] Ibid: para.38.
[404] Ibid: para.63.

under Article 6(1).[405] However, the Court left it to national courts to decide whether such necessity exists within the national context.[406]

The "inter-generation solidarity" standard used in *Petersen* was subsequently followed in *Georgiev v. Tehnicheski universitet - Sofia*[407], decided in 2010. The case concerned Bulgarian legislation which required university professors to retire from their positions of public servants at the age of 65. University professors were allowed to continue to work until the age of 68, but only after the succession of fixed term contracts. The Bulgarian government argued that the measure aims at establishing a balance between generations.[408] The Court accepted the "inter-generation solidarity" justification, and held that mandatory retirement of university professor at the age of 65 or 68 could be objectively justified under Article 6(1). Such age limits, according to the Court, could establish the mix of different generations among the staff, ensuring the quality of teaching and research at universities.[409] The Court, once again, left it to the national courts to decide whether imposing mandatory retirement is necessary in the context of the current labour market conditions in Bulgaria.[410]

One year later, in *Fuchs and Köhler v. Land Hessen* [411] (2011), the Court adopted a similar analysis. The case concerned the mandatory retirement of two applicants, Mr Fuchs and Mr Köhler, who worked as State prosecutors.[412] The mandatory retirement age set by German legislation required permanent civil servants to retire at the end of the month in which they reach the age of 65. The possibility to continue to work until the age of 68 was

[405] Ibid: para.73.
[406] Ibid: para.74.
[407] Joined Cases C-250/09 and C-268/09 *Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv* [2010] ECR I-11869.
[408] Ibid: para.42.
[409] Ibid: para.68.
[410] Ibid: para.56.
[411] Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler v. Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011.
[412] Ibid: para.18.

provided only if it is in the interest of the service.[413] Once again, the CJEU held that setting an age limit can be justified according to Article 6(1) of the Directive and on the basis of "*[…] establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age*".[414] The argument based on solidarity between generations was once again accepted by the EU Court.

The most recent CJEU case on the issue of mandatory retirement was *Commission v. Hungary*[415] decided in 2012. This was the first time the Court found that national provisions setting the mandatory retirement age are contrary to provisions of the Employment Framework Directive. The case concerned the retirement age of Hungarian judges which was lowered by the new Basic Law. The old law from 1997 allowed judges to stay in office until the age of 70.[416] However, according to the new Basic law adopted in 2011, all judges - with the exception of the President of the Kúria - can remain in office until the general retirement age of 62.[417] If a judge reached the retirement age of 62 before 1st of January 2012, the new law required him to retire on 30th of June 2012.[418] Such a drastic lowering of the age limit was followed by a very short transition period, considering the extent of the reform.[419] Subsequently, in January 2012, the European Commission launched infringement proceedings and referred the case to the CJEU. Following the request of the Commission and

[413] Ibid: para.12.
[414] Ibid: para.68.
[415] Case C-286/12 *Commission v. Hungary* [2012], Judgment of the Court (First Chamber) 6 November 2012.
[416] Ibid: para.5.
[417] Ibid: paras.6. and 14.
[418] Tamás Gyulavári and Nikolett Hős, "Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts," Industrial Law Journal 42, no. 3 (2013): 89.
[419] European Commission, "Court of Justice rules Hungarian forced early retirement of judges incompatible with EU law," Press Release Database, Brussels, 6 November 2012, http://europa.eu/rapid/press-release_MEMO-12-832_en.htm (accessed 13 August 2015).

due to the urgency of the issue, the EU Court dealt with the case in an accelerated procedure, delivering the judgment in less than five months.[420]

On November 7th 2012, the CJEU declared that Hungary had failed to realize its obligations under the Employment Equality Framework Directive. The findings of the Court can be summarized in several points. Firstly, the Court established the existence of direct discrimination, arguing that imposing a statutory mandatory retirement age gave rise to a difference in treatment on the ground of age.[421] Secondly, the Court examined whether provisions imposing mandatory retirement could be justified under Article 6(1). The Hungarian government presented two possible justifications. The first one – standardizing the rules on retirement – failed the "necessity prong" of the proportionality test since it failed to introduce a sufficient transitional period for judges to adopt the new situation.[422] The second one – establishing a more balanced age structure within the profession – was rejected under the "appropriateness prong" since the possibility of achieving a true long-term balanced age structure was called into question.[423]

The *Commission v. Hungary* case is especially interesting for several reasons. Firstly, it was the first case where the CJEU found a measure imposing statutory retirement to be unlawful and showed that even the statutory retirement schemes can be successfully challenged under EU law. Secondly, up to the *Commission v. Hungary* case, the court had used much looser standard of scrutiny for cases related to retirement. Here, the Court applied a strict standard of scrutiny and a strict proportionality test. And lastly, this was the first time

[420] Ibid.

[421] Case C-286/12 *Commission v. Hungary* [2012], Judgment of the Court (First Chamber) 6 November 2012: para.81.

The existence of direct discrimination in the present case was unquestionable, with younger legal officials taken as relevant comparators. Unlike judges who have reached the age of 62, those younger than 62 could remain in the office. Ibid: para.52.

[422] Ibid; paras.68-70.
[423] Ibid: paras.76-77.

when the Court rejected the "inter-generation solidarity" argument based on achieving a balanced age structure.[424] The Court held that *"[…] such apparently positive short-term effects are liable to call into question the possibility of achieving a truly balanced age structure in the medium and long terms*".[425] However, the special circumstances surrounding the case must not be ignored. The Hungarian case did not call the right of Member States to use retirement ages as a part of their social policy measures into question. Nonetheless, the case suggested that Member States have to be careful when they want to change already established age limits.[426]

* * *

To conclude, unlike in the US where age discrimination legislation has long and well established jurisprudence, protection against age discrimination in the EU is somewhat more recent. It started with the Employment Framework Directive, adopted in the context of the population-aging which seized Europe at the turn of the century. However, unlike in the US where termination of employment on the basis of age is completely outlawed by the ADEA, setting mandatory retirement ages is not prohibited in the EU.

When the Employment Framework Directive introduced age as an additional ground of discrimination, it became clear that this ground differs from the others in many ways. Firstly, the Directive provided the broadest possibility to justify a difference in treatment on the basis of age. Article 6 of the Directive, often referred to as the age-unique provision, offers probably the most far-reaching exemptions from age discrimination, making age the only ground accompanied with the possibility to justify direct discrimination. Secondly, the Directive made it clear that national provisions laying down retirement ages are not affected.

[424] Ibid: para.76.
[425] Ibid: para.77.
[426] Tamás Gyulavári and Nikolett Hős, "Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts," Industrial Law Journal 42, no. 3 (2013): 294-295.

The list of possible exemptions has been further broadened by the CJEU who gave wide margin of appreciation to Member States when deciding on mandatory retirement cases. The Court recognised the principle of non-discrimination on grounds of age as a general principle of EU law, but used a less strict standard of scrutiny in considering national policies on imposing retirement ages. The Court gave a broad possibility to Member States to justify mandatory retirement practices by allowing them to rely on national labour market situations and employment policies. One of the most commonly used and highly accepted justifications is to encourage diversity in national labour markets. According to the "inter-generation solidarity" justification, mandatory retirement is necessary to achieve a fair balance between the young and the old generation of workers.

The most recent mandatory retirement case, *Commission v. Hungary*, may seem as a turning point after which the CJEU will become more open towards re-considering mandatory retirement practices. However, this case must be seen as an exception rather than a rule. The Court did not call the right of Member States to impose mandatory retirement ages as a part of their labour market practices into question. The CJEU has once again refrained from interfering into the national policies, allowing mandatory retirement to continue to exist as a long-standing practice of many Member States.

This does not mean that the EU lacks examples of good practice. The CJEU recognised the principle of non-discrimination on grounds of age as a general principle of EU law. This position is further strengthened by the protection given by the Charter of Fundamental Rights and the European Social Charter.

CONCLUSION

The world is currently facing a progressive and irreversible change in its demographic picture: massive population-ageing which exempts no country. Population-ageing can be seen as one of the greatest achievements of the human race but also as a tremendous challenge. The people aged 60 and above are the fastest growing age group in the world, currently exceeding the number of 800 million. Consequently, the number of workers reaching their retirement is increasing sharply and will eventually exceed the number of those entering the labour market. This will result in an enormous pressure placed on states' financial and social security systems. In order to re-establish the balance between the working population and the population in retirement, countries across the globe have introduced certain changes in their long established labour and retirement practices. The most common ones were fostering labour force participation for older workers, gradually increasing in statutory retirement ages and equalising retirement ages for men and women.

The pressure brought by population-ageing may have encouraged the introduction of higher retirement ages, but employment after the age of 65 is still relatively rare. This happens largely due to one of the most widespread and widely accepted forms of age discrimination: mandatory retirement. Mandatory retirement is based on setting of a fixed age - either in laws, in collective agreements or in employment contracts - at which employees are forced to retire, regardless of their ability and/or willingness to work. Mandatory retirement does not look at individual differences, capabilities, skills or experience, but rather at the individual's age only, making it probably one of the most vicious forms of age discrimination.

The beginning of this thesis posed the following question: Can mandatory retirement survive in today's society? This thesis argues that the answer should be 'no'. This answer is

based on two types of justification. The first is the economic justification. The demographic challenges of population-ageing placed an enormous pressure on states' public finances and social security systems. There are a number of solutions which could be taken at international and regional level to tackle this problem. One of them is the reduction of age discrimination in employment; especially the elimination of mandatory retirement. When done so, older people will hopefully become less of a strain on pension systems, social security systems and public finances.

The second reason why mandatory retirement cannot survive in today's society is based on the human rights justification. The UDHR (1948) recognises the right of everyone to be equal before the law without distinction of any kind as a universal right. US jurisprudence acknowledges that discrimination against older persons is largely based on inaccurate negative stereotypes and completely outlawed terminations based on age during the 70s. The CJEU recognised the principle of non-discrimination on grounds of age as a general principle of EU law. The right to work is fundamental human right, deeply based on the principles of autonomy, equality and dignity. No one should be deprived of that right on the basis of generalised presumptions.

This thesis placed an emphasis on the practice of mandatory retirement as a form of ageism. Stereotypes which label older workers inferior and force them to enter mandatory retirement must be discredited as there is as much diversity in this working group as in any other age group in the labour market. With western older people living a longer and healthier life, the abolition of mandatory retirement could benefit both older individuals and the society in which they live. This thesis does not argue that people should work until their death. One's working life inevitably comes to an end at some point in their life. This thesis rather raises the question of who should be competent to determine when the retirement should happen. If societies want to follow the international anti-discrimination framework, the ones in charge

of this decision should not be the law maker, the judge or the employer but rather individuals themselves.[427]

This thesis aimed at examining the current status of anti-discrimination legislation in a comparative perspective, addressing the problem of mandatory retirement as a form of age discrimination in the labour market. A comparative analysis of three important legal frameworks (of the UN, the US and the EU) has been conducted for two purposes: to analyse the historical development of age discrimination legislation within these jurisdictions and to identify examples of good practices for the protection against ageism and mandatory retirement. Highlighted examples of good practices can be used as guidelines to the international community as well as to numerous national states to recognise mandatory retirement as discrimination based on age. Moreover, these examples could prompt them to adopt appropriate and affective mechanism for outlawing such a long-standing discriminatory practice.

The oldest reference to old age among the analysed jurisdictions can be found under the UN's system. Already in 1948 the UDHR mentioned the right of everyone to social security in the event of, among others, old age. Despite of that, neither the UDHR (1948) nor its two covenants, ICCPR (1966) and ICESCR (1966), recognise age as a protected attribute, hence offering no protection against mandatory retirement. The situation differs with the UN's soft-law mechanisms. Many of the UN non-binding documents contain either a direct or indirect reference to mandatory retirement. Already in 1982, the First Wold Assembly on Ageing held in Vienna recognised the worrying consequence of statutory mandatory retirement age on the composition of the international labour force, and proposed a more flexible retirement age. This was followed by the 1991 UN's Principles for Older Persons

[427] *See*, Csilla Kollonay Lehoczky, "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination," The Equal Rights Review 11, no. 1 (2013): 84.

which acknowledged the right of older persons to participate in determining when to withdraw from employment. The 2002 Madrid International Plan of Action on Ageing recognised the right of older persons to continue with work as long as they want to and as long as they are able to. Moreover, as early as 1958, the ILO Recommendation called for voluntary retirement and a flexible retirement age.

The UN's system offers various examples of good practices within its soft-law mechanisms, yet the situation differs within its case-law. Optional protocols to ICCR and ICESCR allow communications to be brought by individuals and groups who claim to be victims of discrimination on the basis of age. Unfortunately, the CESCR has not produced any decision based on the OP-ICESCR; nor has it registered any communications. The Human Rights Committee, on the other hand, produced only three decisions where individuals claimed age discrimination after they were forced to retire. The Committee recognised age as a protected attribute, but none of the communications were successful. It can be concluded that the UN still lacks effective and enforcing mechanisms for an adequate and comprehensive protection against mandatory retirement. It remains to be seen whether decisions delivered by the CESCR or a new body which may be created under the long anticipated CROP will follow such a rigid reasoning delivered by the Human Rights Committee.

Although the UN's system offers the oldest reference to old age, the oldest protection against dismissals based on age can be found precisely under US jurisdiction. Ten US states had age discrimination legislation in force before the 1960s. More serious developments of the federal legislation began with the adoption of the ADEA in 1967. The ADEA originally covered workers aged between 40 and 65, but the explicit prohibition of terminations based on age (which of course implies mandatory retirement) was introduced in 1986 when the upper limit for defining a protected group of worker was removed. This completely outlawed

the termination of employment on the grounds of age in the US. Anti-age discrimination legislation in the UN and in the US began developing at the same time, with a peak during the 1980s.

The US and the UN were relatively early to realize the potential consequences which population-aging might have in the future. The enactment of the age discrimination legislation in the EU, on the other hand, is a relatively recent phenomenon. It was only in 2000 when the EU Charter on Fundamental Rights and the Employment Equality Framework Directive included age in their lists of protected grounds. However, due to the long uncertainty of the Charter's legal status, the most important instrument against age discrimination, including mandatory retirement in the EU, was (and still is) the Framework Directive.

The protection against age discrimination in the US and the EU was not only enacted in different time frames, but also with the different motivation. While in the US the adoption of age discrimination legislation was inspired by a civil rights movement prompted by the adoption of Title VII, in the EU it was driven by the demographic and economic pressure of population-ageing which worsened at the turn of the century. In the US it was about eliminating discrimination in employment on the basis of any ground, and in the EU it was primarily about ensuring that older workers stay in the labour market and continue to contribute to pension systems.

Although it was expected that the drafters of the Employment Framework Directive would follow the American example, the EU and the US legal frameworks on age discrimination, particularly on mandatory retirement, differ significantly. Unlike in the US, mandatory retirement (or dismissals based on age) is not prohibited in the EU. The Employment Framework Directive itself states that it does not affect national provisions

laying down retirement ages. Unlike the ADEA which offers only three possible exemptions from considering certain practices as discriminatory, the list of exemptions under the Employment Framework Directive is much broader. In addition to the non-age specific exemptions enshrined in Article 3, Article 6 of the Directive offers the most far-reaching possibility to justify direct discrimination on the basis of age.

Not only that the prohibition of age discrimination does not apply to state schemes payments and to armed forces, but direct discrimination on the basis of age is also acceptable if can be *"[...] 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*".[428] The list of possible exemptions provided by the Directive has been further broadened by the CJEU which has given broad discretion to national states when deciding on the issue of mandatory retirement. The CJEU have given a broad possibility to Member States to justify mandatory retirement by allowing them to rely on the overall situation in the labour market *(Palacios* (2007)), or on achieving the balance with respect to political, social, economic, demographic or budgetary matters (*Hörnfeldt* (2012)). However, the most commonly cited justification is 'inter-generation solidarity': to promote a fair distribution of work between the generations (*Palacios* (2007); *Rosenbladt* (2010); *Petersen* (2010); *Fuchs* (2011)), to ensure a mix of generations among the staff (*Georgiev* (2010)) or to encourage the recruitment of young people (*Hörnfeldt* (2012)). Broad discretion enjoyed by Member States led to the characterisation of EU law as "it is all about justification".[429]

The general prohibition of age discrimination in termination of employment in the US compared with EU's broad exemptions allowing mandatory retirement can lead to the

[428] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L303, (2000): Article 6(1).
[429] *This was the sentence used by Brian Bercusson at a 2002 conference in Stockholm.*
See, Chapter 3, subchapter 3.

conclusion that the protection of individuals against mandatory retirement is much stronger in the US than in the EU. However, it must be pointed out that the scope of the ADEA is much more limited than the scope of the Employment Framework Directive. The ADEA only protects against old-age discrimination (40 and above) in contrast to the Framework Directive which prohibits discrimination on grounds of any age. Additionally, the ADEA does not apply to private employers with less than 20 employees, nor to few public servants such as elected state officials, appointees and legal advisers, including appointed state judges. Furthermore, termination of employment on the basis of age is not prohibited with regard to the members of certain professions such as pilots, air traffic controllers and fire-fighters. The Employment Framework Directive, on the other hand, does not exclude any professional group from its scope of application. This means that case such as *Commission v. Hungary* (even *Love et al v. Australia* under the UN system) could never come before the US courts, precisely because of the applicant's profession.

Despite of that, the US judiciary has provided some of the best examples of good practices when it comes to the prohibition of age-based dismissals under the ADEA. However, it is necessary to distinguish the cases of direct discrimination from the cases of indirect discrimination. In comparison to the EU, older workers in the US enjoy a higher protection against age-based dismissals in a form of direct discrimination. A person claiming to be a victim of age discrimination under the ADEA needs to establish 'disparate treatment', that is, convince the court that they have been treated less favourably because of their age. If the victim cannot provide the necessary evidence, they must merely establish a *prima facie* discrimination, and a burden of proof shifts to the employer. 'Disparate treatment' has been successfully used in many important cases such as *EEOC v. Francis W. Parker School* (1994), *Herold v. Hajoca Corporation G Herold* (1988), and *O'Connor v. Consolidated Coin Caterers Corporation* (1996).

The level of protection against termination of employment in the form of direct age discrimination might be higher in the US than in the EU, but this does not apply fully when it comes to practices which constitute indirect discrimination. In the US, the employer can avoid liability by relying on the existence of 'reasonable factors other than age' (RFOA). This has been used in *Holt v. Gamewell Corporation* (1968) and in *Hamilton v. Grocers Supply* (1993) where the court has in both instances refused to allow plaintiffs to rely on the link between age and salary. The employer's costs in the form of salary have been accepted as reasonable factors other than age, and no age discrimination was found in the cases where older workers were replaced by younger ones due to their high salaries. This can prove as dangerous since factors as employment costs, salary or seniority are in many cases strongly linked to an individual's age and can be used as a veil covering age discrimination. Therefore, when it comes to indirect discrimination, older workers in the US are in similarly vulnerable position as their colleagues in the EU.

The US and the EU system resemble each other in several important features. In both systems age discrimination is subjected to less intense scrutiny than other grounds of discrimination. Under EU law, age discrimination is easier to be justified than any other ground. A broad list of possible exemptions - further broadened by the CJEU – prompted the idea of the existence of a hierarchy of the grounds where age is enjoying the lowest place in the ranking. Similarly, the US Supreme Court made it clear in the *Murgia* case (1976) that older persons do not constitute a suspect class for the purpose of equal protection since there is no clear age-linked historical experience which exists in the case of, for example, racism and anti-Semitism, sexism, homophobia, or disability discrimination.

Moreover, both the US' and the EU's legal system recognise a broader fundamental principle of equality which applies next to the prohibition of age discrimination. In the US this principle is guaranteed under the Equal Protection Clause of the 14th Amendment, and in

the EU it is recognised by the CJEU. However, the EU seems to ascribe much stronger fundamental value to the principle of non-discrimination on the grounds of age. In the *Mangold* case (2005), the CJEU regarded the principle of non-discrimination on grounds of age as a general principle of EU law for the first time. This fundamental value of the principle has been further strengthened in 2009 when the Charter of Fundamental Rights of the EU acquired legally binding force. The US law, on the other hand, offers limited constitutional protection against age discrimination. While it has been argued that mandatory retirement violates the Equal Protection Clause, there has been not a single case where the courts confirmed that.

A comparative analysis was conducted within three systems to identify examples of good practices. This thesis came to the conclusion that the UN system offers good examples within its soft-law mechanisms. However, due to the lack of their legally binding force, as well as due to the absence of any substantial case law, it appears that the UN system still lacks a comprehensive, effective and enforcing mechanism for an adequate protection against ageism in the form of mandatory retirement. The US and the EU, on the other hand, both enacted legally binding and effective mechanisms for the protection against age discrimination. The difference is that age-based dismissals are only prohibited in the US. The most important example of good practice under the US system was the adoption of the ADEA in 1964 and the following 1986 ADEA Amendment which removed the upper age limit for defining the protected class, thus completely outlawing age discrimination in termination of employment at any age. Besides these legislative examples, the US offers comprehensive case law protecting older workers form direct form of age discrimination.

Termination of employment of the basis of age is not prohibited under the EU's legal system. In fact, the CJEU gives broad discretion to Member States to choose appropriate means of achieving their social policy objectives, even when achieving such objectives

includes laying down mandatory retirement ages. This does not mean that the EU system does not provide examples of good practices. Unlike the US, the EU offers a wide coverage, where any employees, regardless of their age, profession or sector, can bring a claim of age discrimination under the Employment Framework Directive. In the latest *Commission v. Hungary* case, the Court did not call the legal status of mandatory retirement within Member States into question. It did however suggest that Member States have to be very careful when they want to change already established age limits. The inclusion of age in the Employment Equality Framework Directive was a crucial step in the fight against age discrimination in Europe. Nonetheless, the case law of the CJEU (particularly *Commission v. Hungary* being seen as an exception rather than a rule) proved that the journey to outlaw mandatory retirement in the EU is far from over.

As argued by Malcolm Sargeant, "*[a]ge, ageing and age discrimination are destined to be fascinating and pressing objects of our attention, in Europe and beyond, for many years to come*".[430] The treatment of older workers has become not only a human right issue, but also an economic issue. The practice of mandatory retirement will undoubtedly undergo significant changes in the coming decades, particularly at the EU and at the UN level. This thesis highlighted examples of good practices which could be used as a starting point for international and regional communities to finally recognise the practice of mandatory retirement as one of the most vicious forms of discrimination and prompt them to change their long established discriminatory practices.

[430] Malcolm Sargeant, "The Law on Age Discrimination in the EU," (The Netherlands: Kluwer Law International BV, 2008), 27.

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