The Debate Around the Need for an International Convention on the Rights of Older Persons

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In recent years, there has been a growing interest and debate around the question, whether there is a need for an international convention on the rights of older persons. The debate around this question is far from simple or consensual. Although there are strong voices in favor, there are also strong arguments against. Moreover, the mere fact that a legal gap exists at the international level is not a sufficient reason for the advancement of a new convention. Hence, the goal of this article will be not only to provide a detailed analysis of the arguments in support and against such a convention but also to propose some specific recommendations for the advancement of such a convention in the future.

Key Words: Elder law, Law and aging, International issues, Legal rights

Introduction

In recent years, there has been a growing interest and debate around the question, whether there is a need for an international convention on the rights of older persons (Doron, 2006; Morgan & David, 2002; Rodriguez-Pinzon & Martin, 2003; Tang & Lee, 2006; UN Expert Group, 2009). There is no one single reason that can fully explain this new international policy initiative. Probably, a combination of several factors, including the increased awareness of the legal consequences of global aging (Doron, 2005), the successful completion of the International Convention on the Rights of Person with Disabilities (2007) that opened the door for the “next group” in human rights conventions (Kanter, 2009), or grassroots initiatives from international Non-Governmental Organization (NGOs) such as IFA—the International Federation on Aging, that its members were looking to advance more internationally binding instruments that can be used on the local/national.

Among these different reasons, one can also identify the contribution of empirical–legal studies that exposed an international normative gap in the field of the rights of older persons. For example, Rodriguez-Pinzon and Martin (2003) conducted a broad review of the existing international mechanism regarding the rights of older persons and concluded that
A strategy to have a comprehensive legal instrument on elderly rights is missing at the international level in both universal and regional system. There are very few provisions in international law that directly address elderly rights. There are isolated efforts by certain international bodies to systematically refer to the rights of the elderly when interpreting their corresponding conventions.

However, there is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly rights convention in place. It is in fact the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.

Following these empirical findings, Tang and Lee (2006), provided a well-supported conceptual argument in favor of an international convention for the rights of older persons:

As far as the rights of the older people are concerned, there is a gap in the existing legal provisions. An international convention that recognizes the specific rights of all older persons and is clearly applicable to older people as citizens of signatory states will be important for older people to assert their rights in the national arena.

These arguments are not trivial. One can question their underlying assumptions that (a) older persons have experienced discrimination and (b) we need a legal instrument to protect the rights of older persons. A legitimate claim can be made that in contrast to children, women, refugees, or people with disabilities, older adults are more likely to be respected (especially in more traditional agriculturally based societies). Moreover, even if discrimination against older persons does exist, it is an outcome of industrial revolution that restructured societies in developed and transitional countries that have led older persons to be marginalized, a historical process that did not necessarily occur in nondeveloped countries.

Indeed, empirical research on ageism supports the notion that social construction of old age is more complex and ambivalent than that of other social groups, such as women, children, or people with disabilities (Kite & Wagner, 2004). However, there is a growing body of empirical research that points to the fact that similar to racism and sexism, the social exclusion, discrimination, and marginalization of older persons are global issues that cross borders, cultures, and lines of modernization or industrialization (Bodner & Lazar, 2008; Chappell, 2003; Reza, 2006). Moreover, as the experience of aging around the world has been “globalized,” it is almost impossible to understand today the social position of any local or national group of older persons disconnected from the socio-cultural–economics of the international community (Estes & Phillipson, 2002; Fry, 2005; Phillipson, 2009; Walker & Deacon, 2003). Finally, international evidence, as presented by reports made by countries around the world in accordance with their commitment under the Second World Assembly on Aging, demonstrated how discrimination, abuse, and neglect are almost universal issues facing older persons around the globe (Report of the Secretary General, 2009).

It is important to keep in mind that the debate mentioned previously is not only legalistic and derives not only from the jurisprudential perspective of “law as a tool for social change” (Dror, 1970). The question whether the international community should embrace a universal legal instrument to recognize and protect rights of older persons as such touches upon key gerontological theories and paradigms. For example, this debate relates directly to writings of critical social gerontologists focusing on the shifting nature of social responsibility of the nation state and the influences of transnational bodies a world of increased globalization (Estes & Phillipson, 2002). It is extremely relevant to the developing concepts of “active aging” and the shaping of a new meaning to “citizenship” in old age through the adoption of rights discourse (Walker, 2002). Finally, it touches upon fundamental theories regarding the intergenerational relationships and to the extent these relationships can be theorized under categories such as “solidarity,” “conflict,” or “ambivalence” as they are symbolically reflected within formal legal documents (Katz, Lowenstein, Phillips, & Daatland, 2005).

It is clear then that the debate around the future development of an international convention for the rights of older persons is far from simple or consensual. Although there are strong voices in favor, there are also strong arguments against. The mere fact that a legal gap exists at the international level is not a sufficient reason for the advancement of a new convention. Moreover, it seems that a significant part of the gerontological community is unaware of this important debate, and its voice is mostly unheard. Hence, the goal of this article will be not only to raise the awareness of the readers to this important international debate and to provide a detailed analysis of the arguments in support and against such a convention but also to propose some specific recommendations for the advancement of such a convention in the future.
The case for

Those who support the international convention for the rights of older persons anchor their position on two premises: One—the existing international law situation is not good enough and two—the international convention is an important and effective legal tool to promote and advance the social position of older persons in the future.

The most powerful argument in support of a new international convention for the rights of older persons is that simple fact that there is no binding international instrument that addresses the rights of older persons. As described by the UN Expert Group (2009):

The UN policy documents on aging and older persons provide a comprehensive treatment of issues and public policy strategies but as “soft law,” they contain no legally binding obligations and there are no sanctions for non-performance. Instead, they incorporate norms and precepts, which governments agree to be guided by, but without any requirement to account for adherence.

It is not surprising then that all the supporters of an international convention argue that such a convention can make a real life difference. As described by (Tang & Lee, 2006):

Overall, the convention would define older people’s rights as human rights and demonstrate that the abrogation of human rights is not acceptable. It would stipulate positive obligations on nations to realize equality and the enjoyment of rights by older people. The treaty would considerably expand the concept of human rights protection for older people, since it would not be only about refraining from doing harm or placing negative obligations on the participating states, but would also lay down norms in order to assist older people to attain a status comparable with that of the rest of the population. To achieve these goals, national governments would be required to ensure that the rights set forth in the convention were reflected in their national legislation (p. 1143).

If one takes into account the existing success of international conventions, such as the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of the Child (CRC), one can realize the potential importance of an international convention for the rights of the older population.

For example, the CRC globally transformed children’s rights (Jackson, 1999). At least normatively, the CRC changed international instruments and discourse about children’s rights, as reflected in the resulting worldwide domestic legislation (Cohen, 1997; Ferguson, 2007). Some even argue that the CRC created a global consensus on children’s rights, turning it into customary international law, which is internationally binding in and by itself (Atwood, 2008; Hatziammidis, 2007).

Specific human rights treaties have also created new legal dimensions that did not exist in some domestic laws. For example, CEDAW attempted to eradicate “private” discrimination (i.e., conducted by private entities) against women at times when most countries recognized only “public” discrimination (i.e., conducted by governmental bodies; Isa, 2003). This is significant as it added a new dimension to states’ obligations. Even if women would continue to be “privately” discriminated against, the recognition that private actors must refrain from discriminatory practices is of great value (Transcript, 2002).

International treaties are also powerful advocacy and empowerment tools. Although CEDAW has not revolutionized women’s rights legislation in some member states, it has provided NGOs with an important tool for advocacy and empowerment of women’s rights, also due to NGO participation in the drafting process (Courville & Piper, 2004). Scholars argue that without CEDAW, NGO’s promotion of recognition of women’s rights would hardly been as effective (Neuwirth, 2005). Moreover, CEDAW created a foundation for a “global legality” of women’s rights, essential for the global promotion of such rights (Schneider, 2004).

The success of existing international human rights conventions is dependent on relatively effective enforcement mechanisms. One of these mechanisms is mandatory country reporting, enhancing monitoring of compliance and internal discussion in member states, and individual complaint mechanisms. For example, CRC requires states to report on implementation. As with CEDAW, the reporting system has drawbacks, but the benefits outweigh them. In reporting, government representatives engage in a beneficial dialogue with the CRC monitoring body and internal domestic discussions, highlighting implementation failures (Farrior, 1997). This creates discourse on global human rights, facilitating a global exchange of ideas.

Moreover, the CEDAW Optional Protocol allows women and NGOs to file individual complaints to the CEDAW Committee while enhancing the independent inquiry powers of the Committee.
Many scholars view it as a means of enhancing compliance and establishing enforcement mechanisms (Hoq, 2001).

International treaties are also helpful tools in litigation in domestic and international tribunals. Although the use of human rights treaties in international tribunals is natural, the use of such instruments in the domestic realm is much more recent and can be utilized for criminal prosecutions, administrative proceedings, and civil suits for reparations (Van Schaack, 2001). In reality, there are good examples of parties and NGOs that were engaged in strategic litigation while relying on international human rights treaties and were successful in eventually reaching legal prominence, truly affecting women’s lives for example.

It is interesting to note that international human rights conventions affect not only member but also nonmember states. For example, although the United States is not a CEDAW or CRC member, both have become relevant in the United States. American courts use the treaties for interpretation, resulting in actual real (de facto) effectiveness (Gabrielidis, 2006). Gaps in enforcement can thus be resolved by using the treaty as a platform for making domestic legal claims (Cahn, 2006) or by states wishing to protect administrative decisions arising from international obligation (Bruch, 2006).

The importance and advantage of international conventions can be found not only in legal terms as they are also important public education tools. The conventions are tools to educate people—lay and professionals—and to raise awareness about the plight of the targeted groups. They are documents that pronounce clear moral values that can shift public attitudes and biases. This would be true even if at the pre-ratification stage if international players use the proposed treaty when discussing the rights of the targeted groups.

Finally, it should be taken into consideration that an international convention for the rights of older persons could serve as an important “anti-ageist” global policy: Ageism, labeling older persons as incompetent merely for their age (Butler, 1969, 1975, 2005; Bytheway, 2005; Palmore, 1999, 2001), is a prominent social phenomena, like sexism, racism, or antisemitism. Deciding not to support older persons’ rights, convention can be interpreted as yet another symbolic discriminatory behavior ignoring the unique situation of older persons. Establishing such a treaty on the other hand would potentially be a strong anti-ageism, anti-discriminatory, and mainstreaming legal tool.

**The case against**

Although much attention has been given in the existing literature to support the international convention for the rights of older persons, very little attention has been given so far for the arguments opposing it. Those who oppose the international convention for the rights of older persons anchor their position in two arguments: One—from past experience, international conventions do not make a real difference and sometimes even make things worse and two—specifically in the field of older persons’ rights, there is no need for an international convention in light of the wealth of existing international documents.

**The convention will make no difference or even make things worse**

Past experience shows that international conventions for human rights create “superficial” legal rights rather than true social change. It is not uncommon on the international arena for countries with the worse human rights record to be the first to sign international human rights conventions. This allows them to argue that they respect human rights, although in fact continue to infringe these rights on the ground.

Past experience also showed that the international and political process of establishing the convention ignores authentic voices of the population it intends to protect. For example, the lack of emphasis on women’s participation in CEDAW implementation resulted in superficial equality as no “true” equality could be achieved without consulting the targeted group. As some argue, CEDAW ignores past discrimination and that women face unique realities (Southard, 1996).

International human rights conventions do not only create “artificial” equality, they are also sometimes blind to multiculturalism. They ignore specific traditions and sets of beliefs and may ignore long-established unique social norms. For example, the imposition of Western values, via the CEDAW, has eroded that local traditions better suited to protect women in traditional societies. This was the case in Fiji concerning the response to rape (Weissman, 2004).

Moreover, the international process of enacting any legally binding convention embeds paying a “price” in political compromise in substantive rights. Hence, drafting choices can prove fatal to any human right treaty, and the international political process has proved to be crucial in this field.
For example, great criticism has been directed at the decision by CEDAW’s drafter’s to ignore honor killings due to political pressure, focusing only on domestic violence. This choice could potentially be disastrous as it both legitimizes such acts, allowing member states (which ratified the treaty) to ignore them (Madek, 2005).

Past experience also shows that there is an “implementation gap” that is exhibited in an actual failure to enforce international conventions. Accountability systems to monitor human rights compliance are weak and overburdened especially at the international level, with no accompanying effective sanctions attached to them, which can be dangerous. For example, the CRC wished to create standards for children’s rights, enhancing their international status. Research on CRC’s effectiveness, concerning for example Ugandan child soldiers, proved that the failure to enforce it against warring parties legitimized child soldier recruitment (Udombana, 2006). If violations of international rules go unpunished—as is the case with CRC—this sends a message that the illegal actions are permissible and that international conventions are worthless.

In sum, the objectors to a new international convention argue that existing international experience with international human rights conventions, such as CEDAW or CRC, show that despite good intentions, these international legal instruments inhibited women’s and children’s rights rather than advanced them due to political compromises and defective implementation. These arguments could be written off as the usual cynicism about international law, but they should be construed as genuine concerns resulting from past experiences of international human rights law, which as detailed previously, can sometimes, fail to avoid inherent pitfalls and cause much more harm than good.

The Strength of “Soft Law” and existing “Hard Law”

Those who oppose a new convention for the rights of older persons argue that the supporters of this legal instrument ignore a unique key element that is specific to the case of older persons: Unlike the case for women, children, or people with disabilities, older persons already have a strong “soft law” solution under international instruments, which makes the establishment of yet another international document redundant (Doron & Mewhinney, 2007). Although other social group did have some soft law at hand prior to their unique rights convention, it was far behind the scope of international documents that are already in force today for the older population.

Starting from the Vienna International Plan of Action on Ageing (1983), moving to the United Nations Principles for Older Persons and Proclamation on Aging (1992), through the Madrid Plan of Action on Ageing (2002) and its implementation documents and reports (2007), there is almost no sphere of social interest concerning the older population that is not covered by very detailed existing international documents.

Specifically, it should be taken into account that the focus of the 2002 Madrid Assembly shifted the existing policy framework regarding the rights of older persons considerably: It promoted the view of ageing from the perspective of both developing and developed countries. An intergenerational policy approach that pays attention to all age groups with the objective of creating a society for all ages and a shift from developing policies for older persons toward the inclusion of older persons in the policymaking process were major outcomes of the Madrid Assembly. If indeed the Madrid Plan of Action is taken seriously and implemented properly, there will be no need for any new international convention. However, if the Madrid Plan of Action is not taken seriously, there is no real reason why another international document will be treated any differently.

Moreover, conceptually speaking, soft law—although not binding on the formal level—has been proven to play an important role in the making of customary international law (Gold, 1983; Boyle, 1999). Through its specificity, soft international law can act as an extremely useful guide for policy matters. Especially on the international level, where flexibility and diversity are needed, soft law in the form of detailed yet unbinding legal formula stands a better chance to be adopted in local policies. For example, the work of United Nations High Commissioner for Refugees in setting standards for the treatment of older refugees—although having no formally binding status—has effectively captured the vulnerability of persons in emergencies as well as provided useful guidance on how to respond best to the needs of older persons in crisis situations.

Soft law is also a powerful tool in constructing existing universal international human rights hard law. Universal international human rights instruments such as International Covenant of Civil and
Political Rights or International Covenant on Economic, Social and Cultural Rights (ICESCR) provide sufficient legal ground to protect the rights of older persons. A good example in this context was set by the UN Committee on Economic, Social and Cultural Rights in its “General Comment No. 6” (1995). This legal document while referring to soft law provided an in-depth legal interpretation of ICESCR as it should apply specifically to older persons. This legal construction was made despite the fact that ICESCR does not contain any explicit reference to the rights of older persons.

Therefore, the opponents of the convention argue, specifically in the field of rights of older persons, that there is no real need for yet another international convention. The real need is to implement existing international plans, utilize existing human rights conventions, and respect resolutions and declarations, such as the UN Principles for Older Persons. The action, power, and force should focus on implementing the Madrid Plan of Action on Aging and not to lose focus on the political struggles for yet another diluted political compromise in the framework of a binding international rights convention.

Alternatively, if existing declarations are difficult to implement on the international level, governments can still translate these instruments to nationally tailored plans to promote anti-ageist policies. Such an effort does not have to be an internationally driven as each government can adopt the recommended guidelines and act accordingly. The fear in this context is that governments would “wait” for the international community to formulate a specifically targeted international comprehensive instrument, whereas there is a variety of readymade programs to utilize to make the lives of the elderly much more worthwhile.

In sum, so much international effort and thought has been placed in shaping and establishing the wealth of existing plans of action that moving now to establish an international convention will make past efforts and achievements irrelevant and a waste of well-made energy.

The Future Directions and Recommendations

Recent developments suggest that there is a growing support for the need to move forward with the creation of an international convention for the rights of older persons. These new developments include the recommendation of an Expert Meeting Group held in Bonn on April 2009 (UN Expert Group, 2009). This expert group, after extensive deliberations, recommended the advancement of an international convention. In specific, it argued that:

A convention on the rights of older persons would add additional weight in furthering, deepening and more precisely defining the rights of older persons. A convention would create obligatory and binding international law. Similar to the adoption of various other human rights instruments, member states would undertake a threefold commitment when adopting such a convention: to respect, to protect and to fulfill the rights enshrined in the relevant text (p. 18).

Following these recommendations, on July 2009, the UN Secretary General issued a follow-up report on the Second World Assembly on Aging that was presented before the UN General Assembly (Report of the Secretary General, 2009). While referring the Expert Group’s recommendations (2009), the Secretary General’s report noted the failure of existing human rights instruments in addressing the rights of older persons:

Evidence of the lack of capacity of existing human rights instruments to effectively protect the rights of older persons can be garnered from an analysis of the reports that Member States submit to human rights monitoring bodies. From 2000 to 2008, 7 the Human Rights Committee, which scrutinizes Government commitments under the International Covenant on Civil and Political Rights, considered 124 State reports. Of these, only three made specific reference to actions taken to address age discrimination, and just one highlighted the vulnerability of older people in long-term care homes (p. 7).

The Secretary General also specifically pointed out in its report to the Expert Group’s analysis of the advantages of an international convention:

A convention would clarify and consolidate existing international norms with respect to the rights of older persons, and it would encourage a more equitable allocation of needed resources for older persons. A convention would clarify the specific obligations of States in order to ensure the full enjoyment of recognized human rights of older persons. It would also empower older persons and provide the framework for national legislation. Moreover, it would provide older persons greater visibility and recognition nationally and internationally as well as the basis for advocacy, public awareness and education on the rights of older persons (p. 16).
Therefore, in a very diplomatic and sensitive wording, the General Secretary Report concluded with the following recommendation:

Member States may also consider how best to improve international norms and standards pertaining to older persons and, in this regard, they may wish to consider the recommendations put forward by the experts at the meeting in Bonn, including those which explore the possibility of instituting new policies or instruments to better improve the situation of older persons (p. 18).

Overall, it seems then that although there are legitimate concerns that question the need and future effectiveness of an international convention for the rights of older persons, the voices in support have been able to convince that the potential benefits outweigh these legitimate concerns. Although we do accept this policy assessment, this decision will not succeed if the arguments and concerns again such a convention are not addressed. More specifically, we would like to conclude with the following specific points:

1. The importance of the national and regional levels: The debate so far has been mainly focused on a global UN-based international convention. However, there are many international human rights instruments besides an UN-based global convention. There are important international regional bodies (e.g., Organization of American States and its Inter-American Commission on Human Rights) that are able to take leadership positions and advance regional legally binding conventions to promote the rights of older persons. These regional bodies can also embed regional and cultural considerations while establishing new normative standards in this field. All encompassing international instruments are always inherently harder to implement especially when cultural differences are relevant such as with aging. This is why countries are more likely to accept the legitimacy of regional instruments and much more, so regional monitoring and political pressure to implement human rights conventions than global instruments accompanied by global supervision.

2. The need to learn from past experience: Existing international public law has a growing experience with international conventions for the rights of various minority groups. Women, children, refugees, people with disabilities all have there own “unique” international conventions. Some are quite new and novel, and some are already legally “mature.” There is a growing experience regarding the actual implementation process of some of these conventions and some good lessons that can be learnt. For example, the need for better monitoring systems, and better individual-based complaint mechanisms, has been pointed out in the previous part of this article. Hence, any future convention for the rights of older persons should be built after taking into considerations the lessons learnt by existing human rights conventions.

3. Transparency, participation, and cooperation: As noted by those who oppose existing rights-based conventions, one key element to secure a better outcome is to adopt an appropriate process for the establishment of the convention. Such a process should be open and inviting to local, regional, and international NGOs. Such a process should allow authentic voices of older persons to be heard. Such a process should place a central role for older persons, for themselves, to define their rights and vision of citizenship.

4. Finally, there is an urgent need to counter/eliminate/prevent/eradicate ageism: One of the fears from a convention aimed solely at older persons is that such a convention will fall into an “ageist trap.” Or, in other words, that such a future convention will place much emphasis on issues such as elder abuse and neglect or issues of mental incapacity, legal guardianship, or on institutional long-term care. These issues—which are very important and central to the rights of older persons—paint old age in an ageist perspective. It portrays older persons as weak, incapable, and dependent and incorporates “needs-based” discourse instead of “rights-based” discourse.

One has to keep in mind that rights discourse is a power discourse: It enables, it empowers, and it stresses dignity not need. Thus, any future convention should be balanced and place proper weight on the right to citizenship, participation, and inclusion on equal basis alongside securing rights of safety and care. Substantially, this could be achieved only by the inclusion of older rights proponents, gerontologists, and representatives of older persons’ organizations in the drafting process. Eventually, only a truly global negotiation process that fully integrates the diverse and authentic “voices”
of the older population would result in an effective international instrument addressing the true needs of this unique social group.

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References


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593

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