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Elder Law: A Need That Emerges in the Course of Life

María Isolina Dabove

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Abstract At present, the stage of global aging raises a set of questions in the Law field that have not been properly identified until now. This paper considers only two of them: the need for a specific international convention on human rights for older people and the importance of developing a legal branch or specialty promptly referred to the status of the person in old age, called “Elder Law”, including, among other things, tools and institutions, principles, rules, laws, judicial practices and/or specific courts of this matter. Over 30 years ago, Law joined to Gerontology through a “symbolic” document in legal world: Resolution of the United Nations World Assembly on Aging, held in Vienna 1982, Madrid 2002, among others international documents. Ever since, studies slowly began to be developed setting the question about the responsibility and liability we have towards old people, and problems fraught with significance for the Law have emerged, such as: legal capacity, empowerment and autonomy; freedom and civil rights; integrity and health; elder abuse and violence as well as property rights; family legal issues, social rights and social security, access to justice. So, Elder Law is based on five principal issues: Age discrimination, vulnerability and legal capacity in the elderly. Self Determination Human Rights, autonomy and freedom in old age. Participation Human Rights (in family, social and political matters). Social Security Rights, equality and social inclusion. Warranty protection systems and access to justice for old people.

Keywords Human rights · Old age: elder law · International convention

Introduction

This paper aims to consider two central issues in the field of legal problems of the elder. On the one hand, we wonder whether human rights in old age are different

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rights, which their scope is and what they would be useful for (Bobbio 1990, 1996; Huenchuan 2009). On the other hand, we consider whether a new specialty needs to be developed, an “Elder Law”, including among other things, an **International Convention on Human Rights** related to the elderly, that gives more consistence to the tools and institutions, principles, rules, laws, judicial practices in this matter (Dabove 2002; Dabove and Prunotto Laborde 2006).

From a philosophical perspective, Law is a cultural tool that has been built historically. It is not a given entity; it is the result of decisions and it is an instrument that has been developed with a clear purpose: solving the problems of human association in pursuit of trade for goods that meet needs and provide guide to relationships. To solve the question of exchanging goods, aspirations, desires, positions, weaknesses, and affections, although these questions may seem strange to the common sense (Walzer 1983).

This cultural tool has been developed over time depending upon different sociological, political, cultural and anthropological scenarios. At present, the stage of global aging raises a set of questions that were not properly identified in the previous realities (Leeson 2009a, b). That is why, over 30 years ago, Law joined to Gerontology through “symbolic” documents in legal world: Resolution of the United Nations. World Assembly on Aging held in Vienna (1982), the United Nations Principles for older persons (1991) and Resolution of the United Nations. World Assembly on Aging held in Madrid (2002). Ever since, studies slowly began to be developed setting the question about the responsibility and liability we have towards old people, and problems fraught with significance for the Law have emerged, such as: legal capacity, empowerment and autonomy; freedom and civil rights; integrity and health; elder abuse and violence as well as property rights; family legal issues, social rights and social security, access to justice. So, Elder Law is based on five principal questions:

- I- Age discrimination, vulnerability and legal capacity in the elderly.
- II- Self determination Human Rights: Autonomy and Freedom in old age.
- III- Participation Human Rights (in family, social and political matters).
- IV- Social Security Rights: what kind of equality? What kind of inclusion? What kind of elder?
- V- Warranty Protection Systems: Access to justice for old people.

And I think that all of them must be included in a future international convention because they are essential items about old people. Then, you should take a look at that platform of particular problems, which additionally shed light on five main reasons why it becomes necessary to create an International Convention on Human Rights for Old People from an integral viewpoint (United Nations. General Assembly 2010).

Human Rights: Age Discrimination Vulnerability and Legal Capacity in the Elderly

A matter of specificity of this Elder Law has to do precisely with the concepts of **person, autonomy and capacity** and the interaction with the situations of vulnerability, such as the case of someone affected by depression -that does not necessarily have dementia-; someone affected by the reconstruction of their identity which turns them into a critical

situation, generating isolation, loss of relationships with their family, loss of position and power in comparison with the others (Iacub 2001, 2011).

Within this scheme, we must ask whether old people have human rights and which ones; and here - in the legal world- appears the first problem: the need for a more functional legal system of capacity for elders that respects all these gray areas of real autonomy or real vulnerabilities. Then, we should also consider if we can establish a legal system of capacity, with a REAL and sincere connection with the existential and social vulnerability of people in their old age (Bonete Perales 2009; Arias et al. 2009).

As we know, capacity is an important legal instrument, an attribute of legal personality, that sets the position of a person in a legal relationship, giving him the power to act according to this position. In Western Law, capacity is acquired at 18 years old, and it is not legally lost, except for serious reasons connected with the person itself or with his property. Within this basic scheme, each national Law establishes the grounds for the loss of this capacity, in a rigid way. But it may happen that this loss is associated with severe cognitive impairments, ie, to states of insanity, or alcoholism, or severe drug addiction, that affect the will of a person, his intention, his insight and his framework of freedom to act. To Law capacity (or ability) is so important that only a judge can set this restriction. Therefore, in this scenario, lots of questions come up as gray areas which provide us a lot of doubts about the usefulness of this system (Torrente Gari 2006).

Whereas, in practice, there are many situations, that require qualifications regarding this rule, in which the legal systems of each country do not have tools in order to reply (Bariffi and Palacios 2012). So in this web of legal issues related to the person in his old age, I believe it is important to have an International Convention on Aging Laws to strengthen and maximize clearly and vigorously the concept of personhood, autonomy and capacity in this stage of life (Huenchuan and Rodríguez-Piñero 2011). Consequently, it is imperative that the Law of each country, through its Constitution, can receive these instruments so that, ultimately, judges can design solutions in light of the fundamental rights commensurated with the social reality of people in old age. International instruments, as we know, are important as sources of propaganda. But it is also politically relevant to introduce the idea that each State must assume these rights constitutionally so that in legal practice judges do not have their hands tied when dealing with these kinds of cases. Hence, they could solve them with an instrument such as the constitutional rights.

When we talk about fundamental rights we refer to human rights that have been incorporated into the Constitution. As we know, the phenomenon of recognition of these rights and liberties in the Constitution of each Country has led to a new state model called "State Constitutional Law" or "Neoconstitutionalism". This phenomenon, among other things, requires system operators to make a constitutional or iusfundamental interpretation of every institution or legal figures involved in the legal universe. For example, today it is necessary to understand the civil law, commercial law, criminal law, administrative law, etc., from the viewpoint of the contents given by the human rights that exist in each state's constitution. Many Philosophy of Law and Legal Theory studies have been developed in this matter (Zagrebelsky 1992; Guastini 1993, 2000; Prieto Sanchis 1992; Esser 1956; Dworkin 1977; Alexy 1994, 2003).

In Argentina, the 1853 Constitutional Model of State, with its last reform of 1994, has outstanding comprehensive legal tools for the development of fundamental rights attached to old age, such as the case of most of the American and European countries (Dabove 2002). Thus, at the policy level, we should highlight the validity of the

“constitutionality block” of the international texts on human rights which are expressly included in the article 75 inc. 22 of the Constitution.

... The American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of Children; under the terms of their validity, have constitutional status, not repealing any section of Part I of this Constitution and must be understood as complementing the rights and guarantees recognized ... (Argentina. Congreso de la Nación 1994).

It is also worth recalling the explicit recognition of the possibility of implementing national laws which contain affirmative actions for the elder, i.e. the art. 75 inc. 23: that empowers the Congress: *...To legislate and promote positive actions to ensure real equality of opportunities and treatment, and the full enjoyment and exercise of the rights recognized by this Constitution and international treaties on human rights, in particular for children, women, the elderly and persons with disabilities.* (Argentina. Congreso de la Nación 1994).

On the other hand, I would like to emphasize that in **fundamental rights** and in the context of human rights theory, different classifications are often made to refer to them. The most famous one is that of civil and political rights, the economic, social and cultural rights, then the rights of future generations, development, etc. Within this framework, the History of Law shows that the problem of the elderly has been a problem of social security and economic, social and cultural rights. Specifically: a problem of pensions, health and education (Dabove 2002; Prieto Sanchis 1990).

However, from a holistic paradigm of human rights and the elderly, this approach is no longer adequate. So, from the very theory of human rights other classifications have been developed referring to the rights **of autonomy, participation and credit or benefit**. Social security includes the last group of credit or provision forgetting two other important areas (Dabove and Prunotto Laborde 2006). It is this classification the one that we will appeal to refer to the Elder Law, through a transverse method of each branch of the postmodern legal world.

Self-Determination Rights: Autonomy and Freedom in Old Age

Right to Autonomy, connected with self-determination and Civil Rights, is crossed by a philosophical question that has been the *leitmotiv* of the construction of the legal world – the problem of freedom. And in the elderly it becomes a crucial question: Where will you go Freedom when I get old? (Ciuro Caldani 2010; Fanzolato 2011). From Law this is not a question that can be resolved in the current scenario.

Freedom is associated with capacity, the power to take on rights and obligations, -as we have seen-and this position affects a set of legal institutions that have not always been

read in the codes of aging (Argentina. Congreso de la Nación 2010). For example, within the autonomy and freedom new problems are generated in relation to the right to life and the right to decide where you want to live (Nusbaum 2006). Another problem refers to health in relation to self-care, self-determination and self-responsibility in this matter. Some time ago it was used to refer to care and family and state responsibility. But individual responsibility must be added too, if one wants to take the law seriously. When we talk about rights, then we must first talk about my position as a person and that means self-respect, involves prevention, promotion, and in this case, health (Daniels 1988).

Another major conflict of personal autonomy has to do with integrity, which we label as the right to **physical and moral integrity** (Dabove 1999). In relation to the elder, it appears upside down: there is an abuse, and simultaneously, considering those practices that are negative, but legal in the law systems of the countries, we do not have any legislation at all, nor justice, that is, a judicial system that can give effective answers to these problems (Dabove and Prunotto Laborde 2006; Leturia and Etxaniz 2008; Daichman 2005)

In Argentina, for example, there have been national and provincial laws related to family violence. These have been designed to cope with violence against women and against children. But they scarcely refer to violence suffered by an old man or woman by the mere fact of being old. The legal requests to which we have access at the Center for Research in Elder Law at the Law School of Rosario National University in Argentina or in some NGOs like INPEA (The International Network for the Prevention of Elder Abuse), show us that Law is powerless to respond efficiently to a situation of violence. For instance, every time an elder is abandoned at home and the family does not deal with that old person creating a situation of abuse and violence. Also, when there is violence in nursing homes, the Argentine judges are reluctant to apply the violence law because it has been articulated to work with “family” and not with nursing homes since they are different institutions.

Another important issue linked to autonomy is attached to all freedoms: freedom of movement that is the right to leave, enter and stay in one place. This freedom is violated usually within the nursing homes which might be valid alternatives for housing to the extent that they modify the view that society has of them, starting with the respect of what is called informed consent which the elderly must be provided with when they enter the nursing home. Why the directors of nursing homes ask the family to sign for them if the old person can legally do it himself since they are free and responsible to decide what they want for themselves? (Frolik and Kaplan 2003).

An important node of autonomy refers to the **assets**. It is possible that a person, even in a privileged position, has access to a good pension or retirement. However, it also may be probable for that person to share it with the family, with children, as someone recounted: “I have to leave the hardware store... why?” Besides, it is also common for the older person, who might not want to go to the bank so as to get paid, that he delegates the collection of his pension in an agent and that person we know that occupies a legally complicated place because there is a conflict of interests. How do we manage to sort out the conflict of interests between the person who receives the retirement himself, and moved by ambition, envy, or the profit motive, do not deliver the money to the elder, who is entitled to it, because it is their right.

The same applies in relation to housing. There are plenty of legal cases where these situations take place. For instance, this happens when one partner dies, and the

succession is opened, which is another big right referring to autonomy. In this succession there are no heirs. Each country regulates this function in different ways, but generally the surviving spouse, who is alive, shares that estate with the children. These children, because they need it, with good or bad intention, for whatever reason, begin to put pressure on the widow or widower, who was left with a very large house, which perhaps is not necessary from an economic point of view, but maybe it is necessary from an emotional standpoint. Then, there are situations which generate multiple handling of the will, and the capacity of the old person, who also has to go through the grief, is resolved in a detrimental manner to the old because he is strongly positioned in his identity as an old person. He transfers his rights through various mechanisms, some are legal but others are not, and then, these situations get very difficult to resolve at court. That is also specific to the elderly. So, the **rights of autonomy** involve freedom, property, reverse mortgages, inheritance, geriatrics residences, long-term care insurance, nursing homes, board and care, assisted living facilities, as main topics in this area (Dabove and Prunotto Laborde 2006; Frolik and Kaplan 2003; Giraudo Esquivio and Dabove 2012)

Participation Rights (in Family, Social and Political Matters)

A second set of specific problems that justify the development of a new specialty related to the elder is the **right to participation**. Therefore, one of the main obstacles or motives of conflict over old age is the problem of no inclusion generated by discriminatory practices. Negative discrimination is a legal issue as well as a psychological, sociological and anthropological one because it prevents the development of a sense of belonging to a community, to a group and from there it gets harder to link with the other, establishing rights and obligations. Hence, the need for a Convention to develop the idea of membership from “the other” viewpoint, being so different. That is, the elder, in a position of weakness that has to be leveled with the positions of others. Here is a problem of compensation of places: to participate I have to be leveled with the other. One can be above the other, for example, family relationships, taking parenthood regarding minor children, the father holds a position of power, but that position is justified. Nonetheless, it is not the case of an old man, unless he has been judicially declared incompetent.

What rights are included? There are many tools, some are very new, such as those introduced worldwide by the United Nations. International Convention on the Rights of Persons with Disabilities (2006). Although old age is not a synonymous with either disease or disability, as already said, it is a stage in life when the risk of dependence comes up itself statistically. So this Convention is introducing legal instruments in rights across the world, which are very interesting, such as **the problem of barriers**, the obligation to develop accessible cities without architectural barriers, without technological obstacles, etc. (Nusbaum 2006). It also introduces the strengthening of the independence of people with disabilities, including those which have been declared incompetent. This is also very brave. In Argentina, for example, a new Mental Health Law “Ley N° 26.657” 2010 has been sanctioned introducing further reforms to the system of capacity (Argentina. Congreso de la Nación 2010). Among them, judges are required to review the disability decision, which is the most serious one, every 3 years. Before, it would last sine die, unless there was evidence that the person had changed his

state of lucidity, of insight. This concept was formulated by an international convention which produced an enormous change in Law, in this case, Argentinean Law (Bariffi and Palacios 2012; Palermo Romera 2011).

When we talk about participation, we talk about the right to be able, for example, to leave our house without barriers and without a city that is hostile to us and a technology that attacks us, but enables us to participate; without a society or family that condemns us to the position of an old and incompetent person.

Another important group of all the participation rights is referred, obviously, to **family relationships**. Family Law is a very interesting branch feeding the Elder Law because it is the most traditional (Hill 2002; Jelin 1988). In addition to considering the question “Who should answer for our elderly, in an economic way?” one must ask who should respond, or whether to respond, in an affective sense because it also situates them legally in a different place compared to others. (Huanchuan 2009)

Property in Family Law has its own place, but regarding old age, especially I want to remember that while some institutions have very old and clear rules in Western countries, they do not always go together with judicial decisions and practices in that sense. That happens with the right to get married. In old age this right may be subject to opposition from sons and daughters. In Argentina there have been many cases of lawsuits of children who would not allow their parents to marry because of the age difference or another cause. The mayor interest deals with property, which means the fear of losing the inheritance. Law should intervene more effectively to ensure the right to sexuality and marriage properly into old age (Iacub 2006). No matter the age difference, no matter the genre: *you should be able to be autonomous and respond in this case by your affections* (Dabove 2008)

Another interesting institution in relation to family and participation is the right for food and then the right of visit or communication between relatives. What is the right for food? It is the right we all have to get something that allows us our livelihood. That something can be money, food, education, and many other things. In each country, judges determine the meaning of the word “food”. This institution is the oldest: the first important code in the West was the French Civil Code of 1804, which included the right for food among relatives (Dabove and Di Tullio Budassi 2011; Arias et al. 2009).

Notwithstanding, in Argentina only four published judicial rulings can be identified in which the elderly claim their children or grandchildren for food. Who should be liable for it? ... The State with pension and retirement? Yes, of course. Families, only? Society? Everyone? And.. How should they participate on that? ...*A high percentage of people do not foresee their future and therefore, although they could legally do so, they do not take the decision to purchase insurance or an annuity, for example, to alleviate the absence of responsibility of the State and of the family* (Daniels 1988).

Within the participation, there are also specific problems of the elderly in the role of retiree centers and clubs, which are born under the Labor Law and have a unionist sense, but nevertheless today they could be recycled, rethought in their role in the legal position of the elderly. The latter point within participation deals with **leisure and recreation**, the right to **tourism** in particular. There are cases of unfair terms in contracts when there is an old man involved. This is a problem of rich countries and poor countries. All these instruments should be reviewed in relation to the position of the elderly and their particular vulnerability (Frolik and Kaplan 2003; Dabove and Prunotto Laborde 2006).

Social Security Rights: What Equality? What Inclusion? What Elder?

The last group of Human Rights refers to social security. What kind of equality do we want? What kind of inclusion and elder do we want in its relation to social and state responsibility that social security raises? **Social Security and Pension Law** are born in order to cover the contingencies of elder, disability and death, through adequate benefits to each contingency, within the framework of social justice. These Human Rights are frequently associated with economic, social and cultural rights (ESCR). But, as we know, the fulfillment of these rights is subject to the “principle of proportionality”, according to the economic possibilities of each State. (Huenchuan and Morlachetti 2007) For this reason it is not appropriate to link the rights of older people directly and only with ESCR.

From this viewpoint, contingencies have been defined as all circumstances of a person that result in the reduction or loss of work capacity that directly affect the level of income. These may affect the person individually or all the beneficiaries in need of protection. In these cases, Law provides benefits by the way of coverage, within the social security principles that rule out a contractual origin. In Europe and Latin America there is a formal recognition of these rights. While in Argentina, social security, has a constitutional guarantee as Article 14 bis of the Argentinean Constitution (Argentina. Congreso de la Nación 1994) says that the state will grant social security benefits, which shall be treated as integral and indispensable (Frolík and Kaplan 2003; Dabove and Prunotto Laborde 2006).

However, the current scenario of global aging, the sustained expansion of life expectancy and new paradigms of postmodern gerontology empowerment, requires a critical deep rethinking of the concept of the elderly as a phenomenon of “contingency” as well as organizations and systems of distribution of resources in this area (Bellina Irigoyen 2004).

Warranty Systems: Access to Justice for Old People

In Law there are substantive issues, the substantive rights, materials that answer the question: What rights do I have? I have the right to autonomy, participation, retirement, recreation, etc. History of Law shows us real “poems” embodied in their instruments. The French Declaration of 1789, without going any further is a beautiful text, when it says that “*it is an obvious truth that men are born and remain free and equal ...*” But, in addition, tools are required to comply with such beautiful texts so they become “realities” (France. National Assembly 1789).

How is this implemented? Law has much to say and a lot of responsibility. And it covers a large extent when it develops protection systems and guarantees. Specifically, when it designs the whole field of access to justice and respect for the adequate defense at trial, in the elder (Renault Godinho 2007).

Within this scenario, the main problem concerning the access to justice and the proper defense in a trial are, without doubt, **the times**. Procedural law, the courts ...work with times that are not categorized, ruled according to the ages of life. Except in childhood or family matters, where fortunately, there is already a tradition of respecting procedures installed by the ages of children or affection within couples in divorce. There are quick divorces. Countries, such as Costa Rica, have got governing institutions of fast time resolution, as the one named “steamed divorce”, because these orders are usually completed

in few days. But all this is not meant in relation to an old person, even less if we refer to procedural resources on social security. In Argentina since one starts the administrative claim in the entity that provides the retirement or pension until it reaches the maximum court (the Supreme Court of the Nation) it takes an average of 10 years to be fulfilled.

Access to justice, then, requires an urgent change of views, perspectives and tools to make sustainable the exercise of human rights in the elderly. In Brasilia the 14th Iberoamerican Judiciary Summit (2008) was developed dealing specifically with the problems of access to justice and vulnerable groups (XIV Cumbre Judicial Iberoamericana 2006). This is the first document prepared by justice members themselves in this matter, and there, an explicit and prominent place was occupied by the problems of access to justice for the elderly (Dabove and Padilla 2012).

Conclusion

On this brief overview about legal disputes referred to elders, then we ask again, Is the Elder Law necessary? And we keep answering positively. It also seems necessary to build special rights for the elderly. A significant role in this storyline will be displayed by a future International Convention on Human Rights of the Elderly. As much as it is desirable that the Elder Law has a constitutional anchor to release to the public, but also judges, again, in decision-making, with this gerontology view that, at least today, we consider valuable.

In this new reality of global aging, as (Bloch 2007) would say, new hope comes to learning ... And, maybe, why not say so? The road is the strategic development of this **Elder Law** that counts on a Convention tactically effective in all countries, to achieve an inclusive society for all ages...

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