1. Introduction

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1. INTRODUCTION¹

The aim of this book is to introduce the research area of elder law in a European setting, and more specifically how this field has been understood and developed within the Norma Elder Law Research Environment since the programme's start in 2012. Contributors to this book include scholars within this research environment but also invited guests. The book offers an innovative and important interdisciplinary approach to the analysis of legal developments in the European setting from a multitude of theoretical and legal-substantive perspectives. Thus this introductory part (Chapters 1 and 2) is followed by one on conceptual and theoretical perspectives (Chapters 3–6), and the book then continues with a part on different elements of elder law (Chapters 7–15).

This introductory chapter starts out by providing a brief background on ageing society in a European Union (EU) policy development perspective (Section 1.1) and continues with an introduction to studies on law and ageing in the setting of the Norma Research Programme (Section 1.2). The interrelations between the different contributions are then thematized and related more generally to a variety of relevant concepts and perspectives. An established theoretical approach within the Norma Research Programme is the late Anna Christensen's theory of law as normative patterns in a normative field, as described in Section 1.2, and throughout this chapter I relate to the legal developments elaborated upon in the different chapters in the terms of normative patterns. The chapter is organized in parallel with the different parts of the book – that is, conceptual and theoretical perspectives (Section 2) and elements of elder law (Section 3), and finishing with some concluding remarks (Section 4).

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1.1 An Ageing European Society

Demographic ageing is one of the major challenges for the future. In recent decades the EU has carefully monitored the implications of an ageing population. The fifth ageing report, entitled *The 2015 Ageing Report. Economic and Budgetary Projections for the 28 EU Member States (2013–2060)*,² starts out by stating that ‘Europe is “turning increasingly grey” in the coming decades’ and that ‘the Commission, as well as the European Council, have already recognized the need to tackle resolutely the impact of ageing populations on the European Social Models’.³ Due to the interrelated dynamics of fertility, life expectancy and migration, demographics in the EU Member States will change significantly by 2060. The overall population will increase slightly by 2050 (526 million as compared to today’s 507 million), only to decline slightly thereafter (523 million). At the same time, the demographic old-age dependency ratio (people aged 65 or above relative to those aged 15–64) will double – from 27.8 per cent to 50.1 per cent. Labour-market participation rates are projected to rise – especially among those in the 50+ group – due to women’s integration and the expected impact of pension reforms. Nevertheless, labour supply will decline, despite the expected rise in employment rates and migration flows, and already by 2023 the number of employed will begin to diminish. Throughout the projected period, labour productivity growth is assumed to be the sole source of the still-projected gross domestic product (GDP) growth (1.4 per cent). These developments pose a massive challenge for public finances and especially so regarding pensions, healthcare and long-term care. Pension expenditure is expected to grow until about 2040, when it begins to decline due to both pension reforms and significantly lower pensions. Nevertheless it must be noted that the differences in this respect among EU Member States are considerable.

In light of these trends, the EU declared 2012 ‘The Year of Active Ageing and Solidarity between Generations’.⁴ This declaration was accompanied by ‘Guiding Principles for Active Ageing and Solidarity between Generations’ in terms of employment, participation in society, and independent living. The EU’s overall ambitions are expressed in the

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² European Economy 3/2015 (Luxembourg Publications Office of the European Union 2015).

³ Ibid 1.

⁴ Decision No. 940/2011/EU, 14 September 2011, OJ 23.09.2011, No. 246/5.

Europe 2020 Strategy, promoting a healthy and active ageing population as a way to achieve social cohesion and higher productivity.⁵

These strategies find support in the EU Treaty provisions. The Lisbon Treaty now cites solidarity between generations as one of the Union's objectives (Article 3.3 Treaty of the European Union (TEU)) and the EU Charter of Fundamental Rights (CFR) apostrophizes (in Article 25) the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Article 34.1 of the CFR mentions social security and social assistance in the case of old age and Article 15 of the CFR refers more generally to the right to work. Non-discrimination is also an important tool for these strategies – Article 21 of the CFR bans discrimination, among other grounds on age – prohibitions that have received a more detailed expression at secondary law level in the Employment Equality Directive 2000/78/EC.⁶

In Chapter 2, 'Demographic developments and economic challenges in an ageing Europe', Kirk Scott provides us with a deepened understanding of the demographic transition leading to an ageing society. The 'first population ageing', which took place towards the end of agrarian society, was driven by a combination of mortality decline and related fertility decline, and was mostly beneficial to society. The 'second population ageing', on the other hand – characterized more by longevity than fertility decline and thus an ageing society – is indeed troublesome. A key issue is the increasing old-age dependency ratio, also referred to above, with its implied reallocation of capital to the elderly. Scott discusses potential solutions to this challenge in terms of increases in fertility, immigration and/or tax bases. Prospects are not looking so good, though. Increased fertility raises the economic burden over the short and medium terms, whereas immigration has a 'snowball character' in the long run – increasing the ageing population while (originally often high) fertility rates are adjusted. Moreover, there simply are not enough potential immigrants to solve the EU's – and less so the world's – ageing problem. Increasing already high taxes is not an obvious remedy for the EU internal market – and is even less so for a global one. One way of increasing tax revenue, however, is to increase the number of hours worked in an overall perspective. In this regard Europe is trailing far behind both the United States (US) and Japan. There are also the

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⁵ Commission Communication, Europe 2020, *A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final. See also the Commission's Communication *Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, COM(2014) 130 final.

⁶ OJ 2000 L 303/16.

potential positive effects, according to Scott, of ‘the second demographic dividend’, with allusion to the accumulated wealth among an ageing population, which can be transformed into asset income through investment. Notwithstanding these possible effects, the challenges to address will vary considerably between countries. Whereas Europe, generally speaking, is far worse off than the US with its higher fertility rates, there are also huge differences among the EU Member States.

Finally, some additional words on immigration and population ageing in the EU perspective are worthwhile here. In abstract terms, immigration is a poor solution to the looming challenge of an ageing society. However, given that Europe is currently experiencing unprecedented inflows of asylum seekers and immigrants, the potential of this influx in terms of decreasing the old-age dependency ratio – in both the short and the longer run – must not be underestimated. For the coming decades, migration will be a focal point of both politics and social challenges in the EU perspective, and any ‘pros’ in this development deserve to be highlighted.

1.2 Law and Ageing in the Setting of the Norma Research Programme

Despite growing concern regarding ageing society, elder law as a concept – and even more so as a legal discipline – still has a surprisingly modest presence in the European context.⁷ Given the increased presence of ‘ageing concerns’ in EU policies and, eventually EU law, it was only natural for the Norma Research Programme at the Law Faculty at Lund University – of which the Norma Elder Law Research Environment is a part – to take an interest in this area of law. The Norma Research Programme as such started out some 20 years ago when Sweden became a member of the EU, with the aim of studying ‘normative development within the social dimension in an EU integration perspective’. We understand the *social dimension* to mean ‘everyday life’ legal structures in terms of work, family, housing and complementary welfare structures, intrinsically interrelated both with each other and general societal developments. Research is conducted within a multidisciplinary legal science framework, including labour law, social security law, family law, housing law, social law, competition law, EU law and comparative law, and also encompasses legal theory. Moreover, a major characteristic for the Norma

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⁷ Cf, however, A Evrard and C Lacour, ‘A European approach to developing the field of law and ageing’ in I Doron and A Soden (eds), *Beyond Elder Law* (Springer 2012), arguing for this new research area in the terms of ‘Law and Ageing’.

Research Programme right from the start was ‘a social science approach’ to law, applying an external and a structural/functionalist perspective to the studies of law with a view to deepening understanding of law and legal developments in the social dimension.⁸

The legal challenges implied by ageing society can thus be said to constitute a core area of studies in the more general perspective of the Norma Research Programme – as an intrinsic part of societal developments. In addition, given the importance of social welfare structures in the EU (and Sweden!),⁹ it was natural to establish elder law in Europe as a new area of research in response to an ageing society as such, as well as the strategies (legal and others) that go with it. This implies a specific interest in the structural implications of certain legal and societal solutions related to ageing at the macro or institutional level. Initial focus areas of the Norma Elder Law Research Environment were thus expressed in terms of legal empowerment of elderly workers, elderly citizens and elderly migrants – all in line with EU policy statements regarding key areas in relation to a greying Europe. Increased labour-market integration is thus a crucial element of active ageing strategies; active citizenship is an important element in effectuating the right to live in dignity and independence; and migration and internal market mobility are fundamental concerns in relation to the increasing dependency ratio and reversing decreases in the labour force.

Who, then, are these old or elderly people? There is no obvious answer. The social sciences offer many different categorizations.¹⁰ In the Norma Elder Law Research Environment – aiming at a deepened understanding of normative developments in view of societal developments more generally – age has to be understood as a contextualized concept. The group of people relevant for a certain study is thus best defined by taking into consideration the area and problems concerned. In relation to the labour market, an ‘older’ worker in the EU is considered to be in his/her fifties or older.¹¹ Acceptance of the idea that the critical period with regard to old age and employment begins in the early part of the end of a person’s working life is reflected in EU policies on active

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⁸ See further A Numhauser-Henning and M Rönmar (eds), *Fifteen Years with the Norma Research Programme, Anniversary Volume* (Lund University 2010).

⁹ Cf the EU as a ‘Social Market Economy’, Article 3.3 TEU.

¹⁰ Cf for instance, V L Bengtson, D Gans, N M Putney and M Silverstein, *Handbook of Theories of Aging* (2nd edn, Springer 2009).

¹¹ Cf however, the US and Age Discrimination in Employment Act, now covering all workers over the age of 40.

ageing and in the age discrimination cases of the Court of Justice of the European Union (CJEU), which mainly concern employees from the age of just above 50 years of age and older. In regard to pensions, 65 is frequently understood as the ‘normal’ pensionable age. In relation to dementia and questions of autonomy/independence, we usually deal with individuals of a considerably higher age. Even so I have referred only to one notion so far: the chronological conceptualization of ageing. In a more empirically oriented article about important factors for extending working life, Kerstin Nilsson identifies three additional conceptualizations of ageing, which are sometimes clustered as ‘functional ageing’: biological ageing, social ageing and mental/cognitive ageing, to be discussed in a nine-factor work environment perspective.¹² In other words, a contextualized understanding of age is necessary, because age is also ‘a constructed, contested and differentiated social relationship’.¹³ In such an approach, the broad setting of ‘everyday life’ legal structures in the Norma Research Programme is especially valuable; in addition, in the light of Fineman’s vulnerability theory it has been suggested that ageing is more a part of life than a distinct group of (older) persons.¹⁴

As noted earlier, one established theoretical approach in the Norma Research Programme is the late Anna Christensen’s theory of law as normative patterns in a normative field.¹⁵ Christensen’s theory is based on the thesis that different basic normative patterns can be distinguished in the multitude of legal norms – much like in a drawing by Escher¹⁶ or as Hofstadter has depicted human thinking.¹⁷ Up to this point, analysis of law in the social dimension has identified some crucial basic normative patterns within this area of law, and these patterns underlie every legal system; they are a part of the cultural values upon which society is built.

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¹² K Nilsson, ‘Conceptualisation of ageing in relation to factors of importance for extending working life – A review’ (2016) *Scand J of Public Health* 1–16.

¹³ Judy Fudge on gender, in J Fudge, ‘From women and labour law to putting gender and law to work’ in M Davies and V Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2012).

¹⁴ Mattsson and Katzin, Chapter 5 in this book.

¹⁵ See further A Numhauser-Henning, ‘Understanding law as normative patterns in a normative field’ in A Numhauser-Henning and M Rönmmar (eds), *Normative Patterns and Legal Development in the Social Dimension of the EU* (Hart Publishing 2013), with further references to (among others) Christensen.

¹⁶ Maurits Cornelis Escher (1898–1972) was born in the Netherlands and became widely known for, among other things, his symmetry drawings.

¹⁷ D Hofstadter, *Metamagical Themas: Questing for the Essence of Mind and Patterns* (Basic Books 1985).

Among these important basic patterns present in the normative field within the social dimension are, on the one hand, the rights of ownership and the freedom of contract, which together form the market functional pattern, and on the other hand, protection of established position – the right to one's possessions, or for instance, security of employment and the principle of replacement of lost earnings. A third basic normative pattern is just distribution, a distributive pattern related to social justice and solidarity. As social life is quite complex, these normative patterns do not make up the 'hierarchical legal system' we frequently imagine.¹⁸ Instead, these patterns are put into play in a normative field as determined by different basic patterns, which also act as normative poles. The 'origin' of the patterns differs according to the values they are set to protect, and thus, typically speaking, tension exists between different patterns. Societal change is what creates the 'attraction' between the poles over time, and thus also legal change. Changes in the underlying conditions of production provide explanations for the movements in the normative field. These developments also account for the resurrection of basic normative patterns in new legal contexts – new or different normative fields, such as the normative field of social security law complementing that of labour law. Thus the protection of the established position has taken the form of employment protection in the field of labour law, only to emerge as replacement of lost earnings in the field of social security law. The basic normative patterns all represent enduring and legitimate normative conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law. As is reflected throughout this book, this theoretical approach proper has not yet been applied to any larger extent in studies within the Norma Elder Law Research Environment.¹⁹ In a working paper, however, Numhauser-Henning has reflected on retirement in these terms²⁰ and she has also elaborated on the CJEU's case law in terms of the protection of

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¹⁸ Cf Christensen who argues that '[l]egal theory ... has been trapped in that Kelsean dream about a consistent, hierarchical system. This eternal arranging and rearranging of the different parts of the assembly of norms in order to make them fit into a system seldom brings about any new insight.' A Christensen, 'Polycentricity and normative patterns' in H Petersen and H Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth Publishing 1995).

¹⁹ See the list of publications at the beginning of this book.

²⁰ A Numhauser-Henning, *Kort normativ reflektion kring avgång med pension* (selected works working paper 2012), available at <http://works.bepress.com/lundlaw> and www.jur.lu.se/elderlaw.

established position, established rights or legitimate expectations.²¹ Rönmar, too, has written about the protection of established position and the elderly in an EU perspective.²² I return to legal developments in terms of normative patterns throughout this introductory chapter.

Elder law as described in American doctrine is about a mainly applied or practice-oriented approach characterized by concepts such as ‘counseling’. Professor Lawrence Frolik, with a background from the Pittsburgh School of Law as well as the University of Nebraska and Harvard Law School, and one of the founders of elder law as a separate discipline, wrote a fundamental article about the early developments of elder law for the 1993 inaugural issue of the *Elder Law Journal*.²³ In the article, Frolik describes elder law as a product, on the one hand, of the legal profession’s shift towards specialization, and on the other the increasingly inclusive and pragmatic nature of legal education (with admission of more women and second-career students) in combination with the needs of an increasing elderly population. These developments ‘explain’ the applicative perspective in elder law as developed in the US. In another article – ten years later – Frolik again examines elder law.²⁴ Although Frolik here describes the broadening of elder law to ‘late life legal planning’, the applicative character of elder law as a professional ‘practice’ is still evident.²⁵

Frolik also points, however, to the development of legal science as such towards ‘law as social science rather than a self-contained doctrinal

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²¹ For a Swedish version see A Numhauser-Henning, ‘Noteringar om Skydd för Etablerad Position – ett normativt grundmönster’ in A H Persson and L Ryberg-Welander, *Festskrift till Catharina Calleman, I rättens utkanter* (Iustus 2014). See also A Numhauser-Henning, *Annotations on Protection of Established Position – A Basic Normative Pattern* (selected works working paper 2013), available at <http://works.bepress.com/lundlaw> and www.jur.lu.se/elderlaw.

²² M Rönmar, ‘Protection of established position, social protection and the legal situation of the elderly in the European Union’ in A Numhauser-Henning and M Rönmar (eds), *Normative Patterns and Legal Development in the Social Dimension of the EU* (Hart Publishing 2013).

²³ L Frolik, ‘The developing field of elder law: A historical perspective’ (1993) 1 *Elder L J* 2.

²⁴ L Frolik, ‘The developing field of elder law redux: Ten years after’ (2002) 10 *Elder L J* 1.

²⁵ See also L Frolik, ‘Later life legal planning’ in I Doron (ed.), *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Springer 2009). The National Academy of Elder Law Attorneys (NAELA) was founded in 1988 and had in 1993 already more than 2,000 members.

entity'.²⁶ Elder law shifted focus from the needs of the elderly as a social group to specific legal problems – linking to sociology, gerontology, geriatrics, political science, and economics. Israel Doron, Professor of Law at Haifa University, Israel, has argued for law and ageing in the terms of jurisprudential gerontology.²⁷ Already in 1978, gerontologist Elias S Cohen referred to legal analysis as too important to be ignored by gerontologists.²⁸ Despite this, mainstream social gerontology has continued to pay little attention to legal developments in the field of ageing.²⁹ Doron ascribes this to the utterly legal-positivist approach developed in early elder law, which made the field 'just another application of law, without any unique theoretical perspective, thus making it relevant mostly to lawyers working with older clients' and labels this 'the Positivist-Professional Approach', defined by the clients to be served or the areas relevant (the 'content-specific' approach), in both cases standing 'jurisprudentially speaking, on existing ground'.³⁰ He then describes subsequent elder law developments in terms of monist and pluralist approaches to law and ageing. Among the monist approaches he identifies the later-life planning approach,³¹ the law and economics approach,³² the therapeutic jurisprudence approach³³ and the feminist ethic of care approach.³⁴ The pluralist approach to ageing – the multi-dimensional model of elder law – was developed by Doron himself through a number of publications in later years.³⁵

No doubt, a deepened understanding of law in the context of ageing offers important additional knowledge to our understanding of ageing in

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²⁶ Frolik (1993), above n 23, 15.

²⁷ I Doron, 'Elder law: Current issues and future frontiers' (2006) *Eur J on Ageing* 3 60–66; and I Doron, 'Jurisprudential Gerontology: Theorizing the relationships between law and aging' in Bengtson et al. (2009), above n 10.

²⁸ E S Cohen, 'Editorial: Law and aging, lawyers and gerontologists' (1978) 18 *Gerontologist* 229.

²⁹ Doron (2009), above n 27, 644.

³⁰ *Ibid.*

³¹ Cf Frolik (2002), above n 24.

³² Cf R Posner, *Aging and Old Age* (University of Chicago Press 1995).

³³ Cf D Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press 1990) and B M Kapp, *The Law and Older Persons: Is Geriatric Jurisprudence Therapeutic?* (Carolina Academic Press 2003).

³⁴ Cf C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982); R Korzec, 'A feminist view of American elder law' (1997) 28 *U Tol L Rev* 547–61.

³⁵ I Doron, 'A multi-dimensional model of elder law' in I Doron (ed.), *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Springer 2009).

its social and political context. This book offers an innovative and important interdisciplinary approach to the analysis of legal developments in the European setting from a multitude of theoretical and legal-substantive perspectives.

2. CONCEPTUAL AND THEORETICAL PERSPECTIVES

In Chapter 3, ‘Dignity, disadvantage, and age: putting constitutional and fundamental rights to work for older workers’, Judy Fudge introduces the case law of the Supreme Court of Canada (SCC) concerning claims of employment-related discrimination brought by older workers and compares this with case law of the CJEU. Fudge argues in terms of constitutional/fundamental rights for older workers, which no doubt is correct with regard to Canada and the EU. Canada is a federal state; complicated legal regulation exists at constitutional level in the Canadian Charter of Rights and Freedoms and some 14 human rights statutes at provincial/territorial jurisdiction level – all of these concerning age. In the EU, at Treaty level, there are open-ended guarantees of equality rights on the basis of age, interrelating to Member State constitutional rights. The interesting conclusion of Fudge is that despite very different constitutional architectures and anti-discrimination instruments in Canada and the EU, the SCC’s and CJEU’s approaches to resolving employment discrimination claims brought by older workers are virtually the same. ‘Both defer to political authorities and social partners when it comes to justifying mandatory retirement policies in order to achieve employment and labour market goals, and they look to the same set of features – the age of retirement, the availability of pension income, the existence of a collective agreement – to determine whether the policy is reasonably necessary.’³⁶ She also draws our attention to the fact that neither of the courts really considers the adequacy of pension income in the individual case.

In this context, one aspect may be worth noting: despite the fact that age discrimination (generally speaking) holds a more uncertain status in constitutional and international human rights law – and that as yet there is no international convention proper on the rights of old people – national apex courts have been willing to a certain extent to review the compatibility of age-based distinctions with constitutional guarantees of

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³⁶ Fudge, Chapter 3 in this book.

equal treatment and non-discrimination more widely, precisely in such terms of ‘a light touch proportionality test’.³⁷

Fudge contributes in her chapter in an interesting way to discussions on the application of the proportionality principle in the case law of the CJEU, in that she distinguishes a threefold categorization of the Court: ‘a light touch rationality approach’ in cases of general mandatory retirement policies, ‘a slightly higher level of scrutiny’ regarding occupationally specific mandatory retirement policies and ‘a stricter proportionality standard’ to scrutinize public safety justifications and genuine occupational requirements. A strict standard of scrutiny is also applied in relation to employment benefits.³⁸

In Chapter 4, ‘The elder law individual versus societal dichotomy – a European perspective’, Ann Numhauser-Henning elaborates on much of the same case law of the CJEU as does Fudge in Chapter 3, but now in an endeavour to illustrate the differences between US and EU application of age discrimination law. At the basis of this analysis is ‘the weaker format’ of the age discrimination ban – a characteristic which lies at the heart of Fudge’s conclusion in Chapter 3 – in terms of a double bind.³⁹ On the one hand there is the ‘human rights rationale’ reflected in discrimination bans as a dignity defence at individual level; on the other is the scope for more instrumental interests at societal level, often resulting in the justification of age-related differential treatment in terms of ageing policies or age as a traditional social stratifier. Here, the continued acceptance of compulsory (or mandatory) retirement in the EU is regarded as an expression of this double bind and the traditional European welfare devices acceptance of the notion that ‘in Europe, employment equality requires collectively imposed norms about the role

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³⁷ C O’Cinneide, ‘Constitutional and fundamental rights aspects of age discrimination’ in A Numhauser-Henning and M Rönmar (eds), *Age Discrimination and Labour Law, Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International 2015).

³⁸ Cf M Schlachter, ‘Mandatory retirement and age discrimination under EU law’ (2011) *Int J Comp Lab Law and Indus Relations* 27; C Kilpatrick, ‘The Court of Justice and labour law in 2010: A new EU discrimination law architecture’ (2011) 40(3) *Indus L J* 280–301; and E Dewhurst, ‘Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national courts in finding a balance between the generations?’ (2013) 50 *CML Rev* 1333.

³⁹ Cf also Numhauser-Henning, Julén Votinius and Zbyszewska, Chapter 7 in this book.

of work in a person's life cycle'.⁴⁰ These practices stand in stark contrast with those of the US. Firstly, in the US the age discrimination ban is asymmetric, protecting only 40+ workers and leaving a significant amount of age-related differential treatment outside its scope. Secondly, US non-discrimination regulation is firmly rooted in the liberal tradition and the practice of mandatory retirement was abandoned long ago. What is recognized as 'the legal double helix' – hypothetically a parallel to the EU equality law 'double bind' – results in a hybrid norm of equal protection and substantive due process, working to reinforce the role of the individual and free choice in a pluralist market society. The EU acceptance of compulsory/mandatory retirement is argued as an ultimate defence of the conventional standard contract with its typical employment protection devices, and thus age as a social stratifier. As with Somek, this chapter also recognizes non-discrimination regulation's typical role as a neoliberal forerunner in the European perspective.⁴¹ Here, the differences between the EU and the US are also put in the perspective of more general welfare developments in a quest of state welfare versus the market. A conclusion is that despite a European welfare state in flux, societal or collectively institutionalized solutions are still held in relatively high regard in the EU 'Social Market Economy'. The chapter can be read as a discussion on normative developments in terms of the market functional pattern. However, as indicated by its title, this chapter situates its discussion in terms of the elder law individual versus societal dichotomy – arguably an equivalent at a more organizational level of the value-related autonomy versus paternalism dichotomy.⁴² No doubt, EU law represents a more paternalistic stand than US law – and this is not only reflected in its continued acceptance of compulsory retirement. It is argued, however, that 'autonomy and individual choice' – that is, a ban based on the human rights rationale – may well lead to increased vulnerability for certain groups, not least older persons.⁴³

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⁴⁰ J C Suk, 'From antidiscrimination to equality: Stereotypes and the life cycle in the United States and Europe' (2012) 60 Am J Comp L 75.

⁴¹ A Somek, *Engineering Equality* (Oxford University Press 2011).

⁴² Cf Doron (2009), above n 35.

⁴³ Cf also A Wiesbrock, 'Mandatory retirement in the EU and the US: The scope of protection against age discrimination in employment' (2013) 29(3) Int J Comp Lab Law and Indus Relations 305, arguing that in real life, US employer practices force employees to retire against their will despite legal differences.

‘Vulnerability and ageing’ is precisely the subject of Chapter 5, written by Titti Mattsson and Mirjam Katzin. This chapter contains a comprehensive presentation of American Law Professor Martha Albertson Fineman’s ‘vulnerability theory’,⁴⁴ an important theory of reference for the Norma Elder Law Research Environment.⁴⁵ The authors place Fineman’s theory in the borderland between critical theory and normative ethics of care, striving to transform the fundamental ideals of the law. They continue by identifying two central questions in Fineman’s work: what does it mean to be human, and what does this say about how we should organize our society? According to this theory, vulnerability is a *universal* human condition, and also something that characterizes the relationship between the individual and the state – it is the state’s obligation to guarantee the equality of opportunities and decent living conditions which follow from the idea of the equal value of all persons. This leads to an emphasis on the duty of society to provide the resources and institutions necessary to overcome the dependency and shortcomings thus characterizing human life, not only in old age.⁴⁶ Notwithstanding, vulnerability must not be equated with harm any more than age inevitably means loss of capacity – it also presents opportunities for innovation and growth, creativity and fulfilment. The authors conclude that ‘the vulnerability theory has broad applicability for studies that focus [on] the significance of the institutional and organizational conditions in society that can create reasonable living conditions for older people’. It also problematizes the conceptualization of the elderly as a group. In its notion of old people as individuals and taking a more general approach to vulnerability, the theory helps us avoid unnecessary competition among different groups in a society of scarce resources.

This chapter also highlights the importance of Fineman’s theory as a critique of liberal ideology and autonomy. As argued in Chapter 4, US reality – to a larger extent than the European reality – is based on the premise that individuals are responsible for their own welfare; it imposes expectations of self-sufficiency and independence on rich and poor, advantaged and disadvantaged alike – also with regard to the elderly. Vulnerability in this society is rather perceived as a result of ‘poor choices’ and lack of control. Fineman criticizes the idea of the autonomous subject in law and argues that vulnerability is a universal condition

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⁴⁴ M Fineman, ‘The vulnerable subject and the responsive state’ (2010) 60(2) *Emory L J* 251.

⁴⁵ Cf Chapter 5, note 6.

⁴⁶ M Fineman, ‘“Elderly” as vulnerable: Rethinking the nature of individual and societal responsibility’ (2012) 20(2) *Elder L J* 71–112.

positioned as the polar opposite of the liberal subject. She further argues that ‘dependency’, too, is universal and but a physical or developmental aspect of the human condition – not a failure on the part of the individual or the family (conceptualized as ‘derivative dependent’). Dependency ‘has been assumed to attach to the elderly as a group’ and is also assigned to the private sphere in contrast to the liberal subject ‘who dominates the public sphere’.⁴⁷ According to Fineman, the political subject must be developed in a more inclusive manner, placing ‘the individual entirely within societal contexts by developing the relationships between vulnerability and resilience and societal institutions and resources’.⁴⁸ The conclusion is that ‘[a] vulnerability approach is an integrated approach to society, not one of either separate spheres or competing generations’.⁴⁹

The idea of the universal character of vulnerability as the basis for state interventionism thus offers a way to confront claims that elder law is ‘inherently paternalistic’,⁵⁰ and thus confront the autonomy versus paternalism dichotomy referred to earlier. Fineman’s argumentation – apart from reflecting current market hegemony and thus the market functionalist pattern in the US perspective – offers a basic argument for the societal approach in the individual versus societal dichotomy explored in Chapter 4.

In Chapter 6, ‘Intergenerational aspects of elder law: conflict, solidarity – or ambivalence’, Jenny Julén Votinius and Mia Rönömar discuss ageing from a labour-market and industrial-relations perspective, precisely in the terms of competing generations. Whereas much of the legal scholarly debate regarding intergenerational aspects – mainly in environmental and constitutional law, respectively – has developed with frequent reference to forthcoming generations, or in a diachronic perspective, Julén Votinius and Rönömar focus on the concept from the viewpoint of simultaneous but different generations, or the synchronic perspective. The introduction of intergenerational ambivalence – developed within the areas of sociology and social psychology – is argued as an important complement to the binary solidarity-conflict approach when it comes to the understanding of intergenerational conflict in elder law. In this area ‘the intergenerational experience is not characterized only by conflict or solidarity, but rather by a complex coexistence of these two positions’. The ‘solidarity, conflict and ambivalence model’ acknowledges that in the

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⁴⁷ Fineman (2010), above n 44, 117.

⁴⁸ Fineman (2012), above n 46, 139.

⁴⁹ Ibid.

⁵⁰ Cf I Doron (ed.), *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Springer 2009) preface.

elder law area, people are ‘involved in intergenerational relationships in three different capacities: as individuals, as part of families and personal relationships, and as members of the society ... shaping different, and sometimes incompatible, attitudes and actions in intergenerational matters’. In law this materializes in three main ways: legal vagueness, contradictory legal norms and openly ambivalent legal norms.

These three manifestations of intergenerational ambivalence in elder law are then discussed with examples from the area of labour law and industrial relations. Vagueness is reflected in the perceived right to retire at a certain age, which is established in parallel with the perceived right to remain in employment without age-related restrictions, a vagueness said to open up for the influence of age-related stereotypes and misconceptions about the labour market. Intergenerational ambivalence thus also plays out in legal contradictions, such as age discrimination law, which in principle prohibits age differentials but – through exceptions – opens up for age as an important organizing principle in labour law, in the form of not only compulsory retirement but also seniority rules in dismissal and wage-setting (as these concepts are developed in Chapters 3 and 4). Complex intergenerational bargaining at collective level, finally, provides examples of acknowledgement of the impact of intergenerational ambivalence.

All in all, the synchronic perspective calls for a clarification of the actual interests at stake and the need for identifying conflicting interests that must be reconciled. Within the ‘solidarity, conflict and ambivalence model’ the notion of ‘intergenerational solidarity’ – at the heart of both EU policies and EU law – can be interpreted as supporting different normative solutions that are mutually incompatible, making it possible for legal science ‘to embrace the complexities of intergenerational relations in elder law, while investigating the ambivalence permeating intergenerational issues and the implications of this ambivalence for this field of law’. The ‘solidarity, conflict and ambivalence model’ – in the perspective of the law as normative patterns theory – can be said to reflect the basic idea of this theory that different normative patterns, such as the market functional pattern but also the pattern of protection of established position and fair distribution patterns, are persistent over time and must be consistently balanced in the process of legislation and policy-making.

3. ELEMENTS OF ELDER LAW

3.1 Labour Market and Pensions

The third part of the book starts out with a set of chapters relating in the main to the labour market.

In Chapter 7, ‘Equal treatment and age discrimination – inside and outside working life’, Ann Numhauser-Henning, Jenny Julén Votinius and Ania Zbyszewska return to the weaker template of the EU age discrimination ban and its implications for older workers (compare Chapters 3 and 4). This weaker template thus manifests itself in the fact that direct age discrimination can also be justified, and draws upon both a wider uncertainty about its ‘wrongness’ when compared to other grounds and the societal/collective approach inherent to ‘the double bind’ that characterizes this ban. Age-based distinctions are thus not linked to historically embedded patterns of group subordination, and are said not to have a negative impact upon human dignity to the same degree as do distinctions based on archetypical non-discrimination grounds such as gender and race. In addition, age is still influential as a traditional social stratifier, as well as the focus of important social strategies. It is the duty of the CJEU – in its interpretation of Article 6.1 of the Employment Equality Directive – to balance these competing dignitarian and distributional concerns in its case law. This case law, as presented, reveals underlying, partly conflicting, human rights and economic rationales, and also turns out to be particularly problematic (albeit in very few cases hitherto) in situations of multiple or intersectional discrimination.

The chapter goes on to address age discrimination outside working life. In EU law we have not yet seen such a ban, but the work recently resumed to land the so-called Horizontal Directive. In Sweden, though, there is already an age discrimination ban in place covering social protection and healthcare. The analysis shows that there is a high likelihood that a broad scope for justification of continued differential treatment on the grounds of age will prevail, thus applying a double bind in this area of application as well, and creating a scope for the collective interest approach within a cost-effectiveness logic. To this we should add the tradition within social services/elder care of dealing with 65+ persons in terms of care and internal comparisons, rather than using concepts of traditional discrimination law in the liberal tradition (such as inclusion and equality) in comparison with more externalized categories. Such practices, the authors conclude, tend to undermine the potential effects of

a ban on age discrimination in these new areas and maintain attitudes of paternalism and dependency.

Continued acceptance of compulsory retirement thus honours the traditional use of age as a social stratifier. Paternalistic as these practices may be, they may still be favourable to older workers, protecting them in relation to the ongoing precarization of both work and pensions. At the individual level, however, it is easy to see that this continued acceptance of compulsory retirement works to 'stereotype' the old-age individual in terms of ageism and dignity harm. Ageism is a multifaceted concept and is suggested to cover:

negative or positive stereotypes, prejudices and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being 'old' or 'elderly'. Ageism can be implicit or explicit and can be expressed on a micro-, meso- or macro-level.⁵¹

Discrimination – or discriminatory behaviour – is thus an integral part of the very definition of ageism. The concept is crucial to discrimination and may well cover both beneficial and negative differential treatment. At the same time, non-discrimination regulation is an important tool to come to terms with ageism from the legal point of view. In addition, what is beneficial for one group may well be detrimental to another. Not all ageing employees have benefitted from the standard employment contract and its implicit norm of mandatory retirement coupled with a standard pension. This is especially true for already weaker groups in the labour market, such as women and workers coming of age.

Dignity is thus also central to the concept of ageism and has been recognized as both a fundamental right in itself and the real basis of fundamental rights altogether – axiological to the equal rights of every person.⁵² In addition, it has been said that 'strong[er], anti-discrimination laws specifically designed to protect older persons would send a social and political signal that rights and dignity in aging should be the norm'.⁵³ No doubt, however, differential treatment on the grounds of age cannot

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⁵¹ T N Iversen, L Larsen and P E Solem, 'A conceptual analysis of ageism' (2009) 61(3) *Nordic Psych* 14, 15.

⁵² Cf Praesidium of the European Convention, *Explanations relating to the Charter of Fundamental Rights of the EU*, OJ C303/15, 14 December 2007.

⁵³ L O Gostin and A Garsia, 'Governing for health as the world grows older: Healthy lifespans in aging societies' (2014) 22 *Elder L J* 111.

be fought successfully only at individual level and in terms of dignity if we want to come to terms with substantive inequalities in today's societies.⁵⁴

In Chapter 8, 'The rationales of government action on ageing and the extension of working lives', Alysia Blackham, Miriam Kullmann, Hanna Pettersson and Ania Zbyszewska provide an integrated analysis of four different studies of governmental action in response to ageing European society in four Member States: the United Kingdom (UK), the Netherlands, Sweden and Poland. Despite the fact that the countries addressed differ significantly in the level of workforce engagement of older people and the measures required to address demographic ageing, all four countries are working actively to increase participation rates for older workers; the authors 'identify a neoliberal reform tendency, with an associated individualization of the risks of ageing' in these actions. Interventions are identified largely to fall into two categories: supply- or worker-side factors designed to incentivize individuals to remain active in the labour market and demand- or employer-side factors intended to boost demand for older workers. In Sweden, many of the measures directed towards managing employee behaviours and state responsibilities – such as training opportunities or managing the work environment – have become less of a focus than individual work capacity. The Dutch government has relied substantially on tax incentives for employers and tightening eligibility for social protection to promote longer working lives. In Poland, policy documents suggest a focus on responsibility shared by government, employers and employees, but many claim that this has not yet been borne out in practice. Instead, pension reforms focus on individual responsibility, and this is to be added to the discourse of employability. Finally the authors note that individual choice has turned out to have an especially strong position in UK policies, and that all four jurisdictions appear to have renewed focus on individual choice. The overall conclusion is that 'the rationale for managing ageing has largely relied on neoliberal ideas and conceptions of work and individual responsibility' in all four Member States. This, of course, brings us back to the apparent increasing hegemony of the market functionalist pattern – in Christensen's terms. However, the authors of this chapter question the

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⁵⁴ For a discussion of the area of sex and sexual harassment in terms of 'the dignity harm approach' and its tendency to perpetuate the invisibility of structural (and individual) oppression (of women) in society, see A Numhauser-Henning, 'Executive summary' in A Numhauser-Henning and S Laulom, *Harassment Related to Sex and Sexual Harassment Law in 33 European Countries* (Luxembourg Publications Office of the European Union 2013).

efficiency of this tendency, identifying said approaches as being highly fragmented and sometimes contradictory, and having only limited success in practice. Ageing society is too important a challenge to leave it at that!

In Chapter 9, 'Employment protection and older workers', Mia Rönmar, Miriam Kullmann, Ann Numhauser-Henning and Carin Ulander-Wänman offer an analysis of the function, content and future challenges of employment protection from the perspective of older workers and a prolonged working life, with EU law and comparative European law as the focus. As already addressed in Chapter 4 in this book, employment protection is in a way characteristic for European labour law. Article 30 of the CFR now states that 'every worker has the right to protection against unjustified dismissal'. At any rate, employment regulation differs considerably between EU Member States, and the flexibilization of work – as well as austerity measures in the wake of economic crisis – is also known to be a characteristic of employment protection development, and 'flexicurity' is recognized as an important strategy for the EU. Here, the links between employment protection and flexible work – especially fixed-term work – and also compulsory retirement are explored, as well as more specific measures to prolong working life. Non-discrimination regulation at large, in the European perspective – in contrast with the case of the US, where an important function is to compensate for the employment-at-will doctrine – can be seen as an expression of the trend towards individualization and flexibilization of work.⁵⁵ Thus, the ban on age discrimination is identified to promote the further flexibilization of work in respect of the ageing individual, whereas compulsory retirement – justifying age differentials – can be seen as a defence for the standard employment contract, which typically also provides for seniority rules in redundancy situations, seniority wage-setting and the like. Here, upholding the ban on age discrimination is argued as a risk for weakening employment protection altogether. On the other hand, flexicurity strategies call for precisely a shift towards employability rather than employment protection. Issues such as lifelong learning and 'transition measures' for redundancy situations are addressed – also in terms of collective bargaining. A diversified approach is suggested to meet the needs of older workers – with 'not only traditional employment protection elements, but also investments in training and competence development aimed at enabling transitions and employability along with reasonable adjustments in work organization, working time and working environment'.

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⁵⁵ Cf Somek (2011), above n 41.

Such a development can well be argued as representing resignation in the face of ongoing flexibilization or – if you prefer – marketization of work and labour law. It also reflects a parallel to the trend in governmental active ageing strategies as detected in Chapter 8. The flexicurity approach, as well as the discourse on employability, entails an augmentation of the employee's own responsibility for acquiring security, and thus a movement away from the protection of established position (employment protection) towards the market functional position.

Pensions and their long-term stability are crucial issues for ageing societies. In Chapter 10, 'Prolonged working life and flexible retirement in public and occupational pension schemes', Andreas Inghammar, Cécile Brokelind and Per Norberg present a view of the Swedish pension system. This chapter provides us with a multilayer investigation of the contents and coherence within and between the different pillars of this system – including the public pension scheme as well as the main occupational pension schemes – in relation to the overarching goal to prolong working life, eventually through flexibilization of retirement itself. It is important in an in-depth study to fully grasp the complexity of (most) pension systems, and analysis reveals the contradictions typically embedded in such systems. The Swedish public pension scheme was already adjusted to an ageing society through reform in the late 1990s, when the system was changed from a defined-benefit system to a defined-contributions system built on lifelong average earnings. The occupational pension scheme – consisting mainly of four major schemes covering about 90 per cent of Swedish employees – is also considered a reformed and basically solid system. Still, together with social security benefits and a range of tax incentives/disincentives, the system is far from coherent in relation to the goal of a prolonged working life. Some flexibility in relation to retirement age is characteristic for all parts of the system. However, various occupational pension schemes seem rather intended to stimulate premature retirement than a prolonged working life.⁵⁶ Some, for instance, do not imply further contributions after the age of 65 and, correspondingly, do not provide higher future benefits; this practice does not support a prolonged working life. Collectively agreed work-end solutions are designed in much the same way. Moreover, continued defined-benefits elements in various schemes, relating to the

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⁵⁶ Cf also C Ulander-Wänman, 'Swedish collective agreements and employers' willingness to hire and retain older workers in employment' (2016) 6(2) *Nordic J Working Life Studies* 61–79 as well as C Ulander-Wänman, 'The Swedish occupational pension scheme ITP2 – A limiting factor for older employees' employability?' (manuscript).

last five years of employment, are a hindrance to adjustments in relation to ‘a greying staff’ in the form of changes in working time and/or accommodated work situations. Coherence could be significantly improved if the legislator and the social partners were to unite and enforce the idea of a delayed retirement age accommodating individual adjustments (including the case of a change of employers) to existing pension schemes, the opportunity to accrue pension rights at higher ages and coherent financial incentives in the form of taxation and the like. Social security schemes should also be adapted to higher retirement ages. Despite public pension reform, second-pillar occupational pensions as well as related systems on taxation and social security thus provide for features that disenable or at least reduce the full potential of the normative ambition to prolong working life – an ambition that is embedded in the general pension scheme.

At the EU level some attention has already been given to the difficulties encountered in occupational pension schemes, through the introduction of the Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights.⁵⁷ In the Directive, as in Chapter 11, ‘Migrant pensioners – taxation and health-care issues in the EU’, by Cécile Brokelind and Martina Axmin, focus is not only on transitions between employers but more specifically on mobility between Member States and how this relates to pension rules. Pension systems and mobility between the Member States are also addressed by the EU Regulation 883/2004 on the coordination of social security systems including pension rights.⁵⁸ Generally speaking, pension rights are fully exportable to other EU Member States and there are also very complex rules on competences/responsibilities when pension rights have been earned in two or more Member States. Nevertheless, the situation – especially for pensioners on a small pension – is still problematic in respect of mobility, because these pensioners risk being a burden on the host state’s welfare system. This issue is addressed further in Chapter 13 in this book.⁵⁹ In contrast to pensions, taxes are neither coordinated nor harmonized at EU level. Instead, taxation is regulated at domestic level – sometimes, as far as pensions are concerned, in ‘mysterious ways’ – and also by quite complex bilateral (or multilateral) tax treaties with widely varying content. This chapter shows how both the

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⁵⁷ OJ 2014 L 128/1.

⁵⁸ OJ 2004 L 166/1.

⁵⁹ Mattsson, Axmin and Holm, Chapter 13 in this book.

EU social security rules and Member State tax rules may hamper mobility and at best make up for an opaque system that is barely penetrable for the individual pensioner. With Sweden as the example, the study shows that pensioners migrating from an EU Member State to Sweden enjoy a limited right to Swedish welfare in terms of social security coverage, and the extent of their pension rights depends on their situation before migration. They may also face obstacles upon exit from their country of origin. A Swedish pensioner, leaving Sweden and becoming a non-resident, thus is liable to source taxation in Sweden (20 per cent SINK) on all their Swedish income – that is, pension. Add to this the varying effects of often bilateral tax treaties, interrelated with the tax system of the now-host country/country of residence. The conclusion is ‘the lack of a common system and the need to identify the rules that apply. These factors render cross-border situations complicated and sometimes cause juridical double taxation; they can threaten social security coverage and trigger cash flow problems for mobile pensioners, in conflict with their legitimate expectations.’ This chapter also deals with the specific coordination rules concerning healthcare – typically a crucial issue for the ageing individual – for the mobile pensioner. Generally speaking, irrespective of where the rights to pension were accumulated, migrant pensioners’ access to healthcare in the EU is secured. However, the system does not provide any incentive to allow inbound pensioners who have no previous pension rights, as the host state cannot obtain any compensation from the state of emigration. This – together with the requirement of having comprehensive sickness insurance in the so-called Residence Directive⁶⁰ – may hinder mobility of pensioners in fragile economic situations.

The issues treated in the pension chapters, Chapters 10 and 11, reveal a strengthening of the market functional pattern in the wake of pension reform, where defined-benefit systems are replaced by defined-contribution schemes and where individual responsibility and choice are stimulated, both in relation to retirement decisions as such and in relation to pension benefits (including third-pillar savings pensions). This is also in line with the studies presented in Chapter 8 as described above. These chapters also reveal, however, that the market is not necessarily optimally stimulated by these systems in relation to mobility interests, whether in the form of transitional labour-market functioning or mobility within the

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⁶⁰ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.

EU internal market. Here, lingering defined-benefit occupational pension scheme solutions, in combination with poorly synchronized financial incentives, still protect the established position of groups of older workers, to the detriment of active ageing policies, and also stimulate bargained early work-end solutions. System complexity and opaqueness of regulations further inhibit market flexibility and mobility.

3.2 Social Welfare and Family

An ongoing strengthening of the market functional pattern, whether in terms of marketization and privatization or reflected as a weakened position of solidarity, is also the theme of the two chapters discussed in this section.

In Chapter 12, 'Legal approaches to private and public responsibilities for elder care', Hanna Pettersson and Mirjam Katzin examine the transference in recent decades in Sweden of care work performed, and responsibilities borne, from the public sector to the families and relatives of older people – as part of a trend towards the production and mediation of elder care by market mechanisms. After an overall description of the system, particular attention is given to the regulation concerning long-term family caregivers on the one hand, and on the other, short-term family caregivers from the 1970s onwards. The situation is one of ongoing negotiation of boundaries between public and private responsibilities as reflected in legislation and politico-legal discourse – perspectives influenced by prevailing ideologies and ideas about society, the individual and the family.

Family care for older people has increased in recent decades and has gained a new role in the Swedish elder care system. The political ambitions have changed since the 1970s when family care was supposed to gradually become redundant. This remained the goal in the 1980s, although strained public finances now emerged as a threat to the advancement of the welfare state. Still in the 1990s, long-term family care was only seen as a solution to temporary economic problems. More recently, an ideal of long-term family care as something positive and desirable has emerged as a discursive shift 'on two levels: on one is downsizing of elder care an answer to an economic crisis, and on the other is a changed view of the family and ideas about what should belong to the public and private sphere'. New legislation on support to family caregivers is part of a process in which family care, due to downsizing in the public care system, is becoming increasingly important and in fact less and less voluntary. However, this shift is not reflected in short-term family care legislation or case law, which rather reinforces the invisibility

of care work performed by relatives and argues that this care work should be a public responsibility. The authors point here to the fact that ‘the legal rules in question [on limited short-term social security benefits] have no direct potential to transform the division of care work between professionals and relatives’.

The gendered nature of family care work is also addressed. Whereas the association with femininity was recognized and articulated in the more optimistic reasoning of the 1980s, this perspective has become ‘invisible’ in later years, when discourse describing ‘family caregiving as natural and families as unquestionably positive’ legitimizes unjust structures and distribution of unpaid care work.

As developed elsewhere,⁶¹ a strengthening of family responsibilities is, if you will, on the same side as individual responsibility in the individual versus societal dichotomy, and on the same side as neoliberal trends strengthening the market functional pattern. In this context, typically speaking, it also supports paternalism rather than autonomy, making the individual increasingly dependent on his or her relatives. To the extent that this development reflects a withdrawal of the welfare state, it also mirrors a downgrading of solidarity as distributive justice.

In Chapter 13, ‘Perspectives on solidarity in social security, healthcare, and medical research’, Titti Mattsson, Martina Axmin and Emma Holm study the coordination of social security and healthcare at the EU level in terms of the principle of solidarity and from the viewpoint of the older citizen. They also reflect on the function of the solidarity concept in relation to medical research. Solidarity (together with protection of the established position in terms of income replacement) has always been a basis for social security distributive concerns and thus is of the utmost importance for old people – because ageing is an immanent ‘risk’ of life.

The principle of solidarity is essential to the notion of a Social Europe and is referred to in various objectives of the EU, such as the promotion of solidarity among Member States as well as among generations.⁶² At the same time, solidarity is a term that broadly refers to unity and belonging between people or unity of a group or a nation based on a community of interests, objectives, and standards. The EU is striving to become such a unit of more or less inherent belonging, but it is clear that the Union has not yet succeeded in this endeavour. Quite the contrary: the authors demonstrate how the principle of solidarity – understood

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⁶¹ See Numhauser-Henning, Chapter 4 in this book.

⁶² For intergenerational solidarity see further Julén Votinius and Rönmar, Chapter 6 in this book.

from different facets – has actually declined in importance in recent times. Firstly, it is about the level of solidarity between the Member States in the EU from the internal market perspective. The introduction of a Union Citizenship following the Maastricht Treaty in 1993 undoubtedly added to the expectations of solidarity towards the citizens of other Member States, providing freedom of movement also to the non-economically active. Secondary legislation – the 2004/38 Residence Directive – has conditioned this right to free movement, in requirements that the individual must have comprehensive sickness insurance and will not become an unreasonable burden for the host state. Early case law accepted ‘a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary’.⁶³ However, as described here, recent case law from the CJEU shows that there is a shift back to economic activity and self-sufficiency as a precondition for free movement and social benefits. Secondly, it is about solidarity within healthcare systems as such and how EU rules on cross-border healthcare challenge this principle. The worry here is that by putting the individual before the group, case law views of healthcare in kind as a question of free movement of services under the Treaty will undermine solidarity as understood within the competent state. EU law thus benefits those who have the resources to go abroad to receive healthcare and takes resources from vulnerable groups, such as the elderly. Thirdly, it is about the principle of solidarity as a basis for medical research involving human beings – of major importance for the ageing individual and his/her increasing need of medical care. Here, the ethical standard in terms of the solidarity principle is contested by the standards of integrity and patients’ privacy rights. The EU integration process thus challenges the traditional conceptions of solidarity.

It is easy to interpret these developments, again, as an expression of a strengthening of the market functional pattern and the increased individualization that accompanies it. At first glance, the famous *Dano* case⁶⁴ simply adds to ‘the shift back to economic activity and self-sufficiency as a pre-condition for free movement and social benefits’. The fact that it puts any economic activity – even in the form of minor employment – on a pedestal can be said to reinforce the market functional pattern even further.

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⁶³ *Grzelczyk* C-184/00 EU:C:2001:458, para 44.

⁶⁴ *Dano* C-333/13 EU:C:2014:2358.

In Chapter 14, 'New legal conflicts in an old legal context: the law of inheritance and its challenges in the twenty-first century in the perspective of the ageing individual', Elsa Trolle Önnerfors discusses inheritance rights – of surviving spouses and cohabitants, of children and in relation to recent EU international civil law regulations on inheritance. Inheritance rights – and testamentary freedom – are issues intrinsically related to the autonomy or independence of the ageing individual, and pose a constant challenge for the legislator in balancing different interests and meeting the demands of contemporary society. As Trolle Önnerfors puts it: 'For a long time, the role of the family was to reproduce, provide for the family members and protect them in times of misfortune'. Now family is no longer a constant in one's life; longevity implies greater economic needs in old age and the risk of outliving one's savings, at the same time that survivors inherit later in life. Moreover (albeit to a varying degree), welfare structures have been put in place to protect the individual. What purpose and function should inheritance law have in the future? Here, and not surprisingly for this context, Trolle Önnerfors comes up with more good questions than answers. Do marriage and consanguinity still make the best basis for the right to inherit? Is there really a need for forced heirship today? Are the needs of minor and still-dependent children and the surviving spouse or partner of greater importance than the inheritance rights of adult children? Should perhaps social affinity and emotional ties be given greater importance, not only in society but also in the law? The conclusion is that there is a strong need for individuality – and increased flexibility – when it comes to laws of succession, and that with eventual increased self-determination comes an increased need for 'death planning'. In this – it seems – European elder law is closing in on US elder law as 'late life legal planning'.⁶⁵

The elderly individual in a relational context is also the focus of Chapter 15, 'Dementia and autonomy', by Eva Ryrstedt. This chapter addresses the fact that with increased longevity follows a growing number of elderly individuals suffering from dementia. In light of existing international documents relevant to the rights applicable for persons suffering from dementia – and most prominently the UN Convention on the Rights of Persons with Disabilities – Ryrstedt discusses the shift from substituted to supported decision-making in relation to the requirements of both protection and autonomy for the elderly individual. The UN Convention thus provides, in its Article 3, for

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⁶⁵ Frolik (2002), above n 24. See also Frolik, 'Later life legal planning' in Doron (2009), above n 50.

the right to autonomy; in Article 12(2) that persons with disabilities are to have legal capacity on the same grounds as other persons; and in Articles 16 and 17 the right to protection from exploitation, violence and abuse and the right to physical and mental integrity, respectively. These rights are not arranged in a hierarchy but must all be balanced in the process of application. One question that arises is this: to what extent must the need for protection entail a paternalistic view, or rather, how can protection be balanced against the right to autonomy? The wishes of a person suffering from dementia can thus be interpreted in the context of what is perceived to be in the best interest of the elderly person, established in an objective way. A less paternalistic approach is to allow for what Ryrstedt calls ‘a subjective best-interest test’, taking into account individual characteristics of a person’s earlier life in combination with the possibility of harm. According to Ryrstedt, whereas doctrine traditionally seems to have advocated substituted – yet carefully monitored – decision-making, supported decision-making in this less paternalistic way could be the answer when balancing autonomy and protection. Incapacity is simply no longer a legitimate concept! Instead we are witnessing a shift from a focus on protection to a focus on autonomy, with supportive strategies bridging the gap. In this context Ryrstedt also raises the special problem of relatives in protective/supportive functions. Just as discussed in Chapter 14, families are no longer (and indeed it is not certain if they ever were) a closely knit unity of interests.

Both chapters in this section are argued in terms of increased individualization and autonomy in combination with a certain retreat from government – or societal – intervention. To this extent they mark a movement towards the market functional pattern and individual choice as a replacement of family-belonging, and thus institutionalized solidarity. The fact that the US in principle already recognizes the freedom of disposition by will – not upholding a statutory share of inheritance for children – may be interpreted as just another expression of the hegemony of the market functional pattern. In Sweden, for instance, which has far more welfare structures in place, doing away with the statutory share is still only a debated issue. The direction of change – increasingly responsabilizing individuals and families as welfare society withdraws – does not really advocate the abandonment of solidarity within families, but rather continued inheritance rights within families, if only the family had not developed beyond such traditional conceptions!

4. CONCLUDING REMARKS

As this book demonstrates, the challenges of demographical ageing as experienced in European society have played a significant role in the origins of the Norma Elder Law Research Environment. It may seem that in studies until this point, the threats implied by these developments are the centre of concern. No doubt, increased longevity is first and foremost a good thing, both in view of society and the ageing individual, implying undiscovered cultural, relational and also economic potentials. Still, it challenges the basis of many existing legal institutions.

Among the important gains of our studies are the multifaceted analysis of age discrimination law from the European perspective, first and foremost in a labour-market perspective but also in relation to current neoliberal trends and addressing intergenerational tension. This analysis was also broadened here to include the functioning of age discrimination regulations in other areas of society such as healthcare and long-term care. The intrinsic relation between employment regulation, modern/globalized labour markets and pensions was also the subject of in-depth studies – along with consideration of these aspects in a European mobility perspective. The concept of solidarity is another centre of concern, in an EU perspective and as the basis for social security and social services complementing wage society. Here, family relations come to the fore – both as an increasingly important basis for elder care and as a questionable basis for future inheritance law and supportive decision-making in regard to the ‘oldest old’.

If we turn to Christensen’s theory of law as normative patterns put into play in the normative fields of law introduced in Section 1.2, most studies presented in this book – and this is hardly astonishing – reveal a trend towards a strengthening of the market functional pattern. In this respect, it can be said, studies hitherto in the Norma Elder Law Research Environment confirm an earlier conclusion that not only do normative patterns ‘move’ between different normative fields; the boundaries between such fields – labour law, social security law and family law – are increasingly blurred or even ‘amalgamated’.⁶⁶ The simultaneously weakened protection of established position and just distribution patterns has not yet received the same attention. However, the conclusion of the studies presented here, for instance in Chapter 8, is that the efficiency of this market functional trend is questionable, identifying governmental

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⁶⁶ A Numhauser-Henning and M Rönmar (eds), *Normative Patterns and Legal Development in the Social Dimension of the EU* (Hart Publishing 2013).

approaches hitherto in this direction as highly fragmented and also contradictory. Chapter 6 also identifies the current approach to elder strategies in an intergenerational perspective as not sufficiently embracing the complexities of intergenerational relations in the area of elder law, and recommends an ‘ambivalence model’. Chapter 4, finally, questions the market functional approach in terms of ‘autonomy and individual choice’ as potentially leading to markedly increased vulnerability for certain groups, not least for older persons.

European elder law is thus only starting out and there is much research to be done – anything and everything in society deserves to be looked upon through the lens of the older person. It became clear already from the start of this introductory chapter that there is no well-defined area of study as concerns elder law. Age – and even more so old age – is ultimately defined by the problem being studied and its context. In addition, old age has many definitions – apart from the mere chronological perception – in these different settings, and these definitions change constantly as society develops; or, as Fudge writes, age is ‘a constructed, contested and differentiated social relationship’.⁶⁷ Consistent ‘boundary work’ is thus part and parcel of the elder law field.

Moreover, the lack of a cohesive identity has been seen as a characteristic of the ageing individual, as his or her ‘age-based identity is typically secondary to other, previously adopted identities such as those based on gender, family, religion, ethnicity, occupation and political affiliation’.⁶⁸ Whereas feminist elder law is already a fairly well-established area of studies, gendered perspectives remain a less extensively explored domain in the studies of the Norma Elder Law Research Environment. This of course should not be seen as a matter of principle but as a result of the project’s relatively brief period of existence. The role of gender, both in regard to ‘the privatization’ of elder care in terms of increased family care and in relation to multiple and/or intersectional age discrimination, is touched upon in the studies referred to in this book and, no doubt, further studies into the normative realities of the ageing individual will reveal how elder law is another social construct of patriarchy.⁶⁹ In a migration perspective, the importance of ethnicity and religion also comes to the fore.

Another aspect of elder law not explored to any greater extent in this book is the classical ‘counselling approach’ of elder law. Although far

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⁶⁷ Fudge (2012), above n 13.

⁶⁸ N Kohn, ‘A civil rights approach to elder law’ in I Doron and A Soden (eds), *Beyond Elder Law* (Springer 2012), 24.

⁶⁹ Gilligan (1982), above n 34, and Korzec (1997), above n 34.

from claiming that there is no obvious need for this approach in elder law, I do fear that elder law's counselling character may be growing in importance in the European perspective, mainly because the market functional pattern is growing stronger – and this is indeed a reality that is harder to embrace!