Older Europeans and the European Court of Justice

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Abstract

Background: the European Court of Justice (ECJ) is considered by many to be the most important judicial institution of the European Union today. Despite the potential importance and relevance of the ECJ rulings to the lives and rights of older Europeans, no research has attempted to analyse or to study the ECJ rulings in this field.

Objective: to describe the ECJ case-law in the field of elder rights.

Methods: using a computerised search of the ECJ database, between the years 1994 and 2010, 123 cases directly dealing with legal rights of older persons were analysed.

Results: on average, only 1–2% of the annual ECJ case-load addresses rights of older persons. Unlike the clear trend in the increase of the total ECJ case load, there was no similar trend of increase in the number of cases directly involving older persons’ rights. However, in the majority of the elder-rights cases, the ECJ decision was in support of the older person’s rights.

Conclusions: the ECJ can potentially serve as an important protector of rights of older Europeans, if and to the extent that these cases reach its jurisdiction.

Keywords: European Court of Justice, geriatric jurisprudence, jurisprudential gerontology, older people

Introduction

According to legal theories courts are important social institutions that play an important role as a tool for social change. Both in North America and Europe, courts have been used as strategic tools by individuals or human rights organisation in order to promote the rights of minority or excluded social groups. From an historical perspective, legal ruling can serve as a ‘magic mirror’ to at least partially reflect the existing social norms and power relationships. Finally, court rulings may represent and be part of the culture within which the court and the sides to the legal dispute operate [1–3].

It is against this backdrop that the European Court of Justice (ECJ) is considered by many to be the most important judicial institution today of the European Union. Since its establishment in 1952, it has gained a reputation and a position that is equivalent to that of a constitutional court, becoming the ‘high’ court of the European Union [4–6]. Through developing and applying legal concepts such as ‘direct effect’ and legal ‘supremacy’, the ECJ has acquired a significant and symbolic position in the integration and institutional development of the EU [5, 7]. This has been true not only in the fields of market economics, but also in the spheres of public health and health-care rights policies [8–12].

Despite of the potential importance and relevance of the ECJ rulings to the lives and rights of older Europeans, no research has attempted to analyse or to study the ECJ rulings in this field. This, in part, may be the result of the general neglect of gerontology and geriatrics to look into what is known as ‘geriatric jurisprudence’ (i.e. the multi and interdisciplinary approach to the field of law and ageing) [13, 14]. This may furthermore be a result of the fact that until the ratification of the Treaty of Lisbon and the entrance into force of the Charter of Fundamental Rights of the EU in 2009—the ‘elderly’, as such, were not recognised as individuals who have their own subjective legal status (the Treaty of Lisbon, signed in Lisbon on 13 December 2007 and entered into force on 1 December 2009, significantly amended the EU and EC treaties, while strengthening the powers of the European Parliament, simplifying decision-making processes at the European
Council, and introducing a new Charter of Fundamental Rights) [15–17]. The goal of this research was to fill this knowledge gap and to describe and analyse the cases that involved the rights or older European in the ECJ.

Before presenting the current study it should be noted that the ECJ is not the only legal tribunal that deals with the rights of older Europeans. Another important tribunal is the European Court of Human Rights (ECHR). Unlike the ECJ, the ECHR is not part of the EU institutions, and operates under a totally different legal and political framework: the framework of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which is a regional, public international-law, human-rights convention [18, 19]. There is no doubt that the ECHR is a key legal tribunal in protecting the human rights of Europeans. However, describing and analysing the place of elder-rights in the ECHR, as well as the power relationships between the ECJ and the ECHR (especially after the Treaty of Lisbon) is beyond the scope of this study.

Methods

This research used a mixed, quantitative and qualitative research method approach. In this short report only the descriptive quantitative part will be presented. Accordingly, ECJ cases involving older persons were collected and descriptively analysed. The sample of cases in this study included all ECJ judgments that directly involved the legal rights of older Europeans or directly addressed issues of age discrimination.

In establishing the sample, an internet-based computerised search was conducted within the ECJ official website. Various key words were used in order to trace and collect all ECJ cases that included relevant words (e.g. ‘old age’, ‘elderly’, ‘pension’, ‘age discrimination’ etc.). The preliminary search found 1,325 cases including these words. All the cases were reviewed and divided into three different groups: (i) irrelevant: cases that included one of the words but had nothing to do with rights of older persons (859 cases); (ii) indirect cases: cases that dealt with legal issues that indirectly might affect rights of older persons (296 cases); (iii) direct cases: cases that included issues directly relevant to rights of older persons (123 cases). Only this last group compromised the sample for both the quantitative and qualitative parts of this study.

From a time frame perspective, the research was limited by two points of time. The starting point of was technically limited by the computerised data base of the ECJ, which included reported cases only since 1994. The endpoint of time was cases who were submitted to the court before 31 December 2010. The reason for this ending point was that the Lisbon Treaty, (which included the Charter of Fundamental Rights of the EU and Article 25 that relates specifically to elder rights), was ratified and entered into force in December of 2009. This new HR instrument included for the first time a specific reference to rights of older persons, and potentially changed the ECJ landscape in this specific field. As this descriptive study was based on publicly published open-court records, no ethical approval was needed. The study was conducted while the author was a visiting scholar at the Oxford Institute of Aging. The Institute played no role in the execution, analysis and interpretation of data, or writing of this study, except for providing financial support to the stay in Oxford.

Results

General background variables

In the vast majority of cases involving older persons’ rights, the applicants were older individuals (90/73.2%). In the rest of the cases, the applicants were governments (16/13%), the European commission (9/7.3%) or private companies (7/5.7%). In a kind of a ‘mirror’ picture, the majority of respondents were governments (93/75.6%), while only in the minority of cases were the respondents private persons (21/17.1%) or private companies (9/7.3%). It was very difficult to extract personal background details of the older persons involved from the court’s rulings. In many cases the court refrained from elaborating on issues that the financial, marital or health status of the persons involved as these were mostly irrelevant to the adjudication process before the ECJ. The only personal data that was extracted mostly by the name of the individual was gender, of which 60% were men.

Most cases originated in the following countries: Germany (32/26%), Belgium (25/20.3%), Italy (11/8.9%), UK (10/8.1%), Spain and Austria (9/7.3% each). To some extent this reflected the fact most of these countries were part of the founding nations of the EU. On the other hand, only five cases originated in France (one of the founding countries of the EU); Nordic countries had very few cases (Finland—5; Sweden—1 and Denmark—2) and finally, the relatively newly added members to the EU from Eastern Europe also had very few cases (Poland—1; Bulgaria—2 and Czech—2). Overall then, the ‘typical’ elder rights case was that of an older person (male) versus a government, originating in either in Germany, Belgium or Italy.

The 123 cases were spread throughout the period of 1994 to 2009 in the following way.

As seen in Figure 1, there is no clear pattern of either increase of decrease in the number of cases along the years, and on average, in most of the time period, each year between 5 and 10 cases were filed. This equals to 1–2% of the general annual new case load of the ECJ. While there is limited year span, it seems that before 1996, the number of ‘elder cases’ was lower (only one case each year). Interestingly, the significant enlargement of the EU in 2004 (most Eastern European Countries) was not accompanied with any significant increase in the number of elder rights cases, but the higher number of cases in 2009 (12 cases) may indicate an increased awareness in this field. Moreover, unlike the general trend of increased number of new cases submitted to the ECJ (from <400 cases in the early 1990s to >600 cases in the late 2000s), there was no similar trend of increase in the number of cases directly involving older persons’ rights.
Legal issues

Almost half the cases (58/47.2%) were categorised by the ECJ as 'Social Policy' issues, whereas the two other major legal issues were Free Movement of Persons (29/23.6%) and Social Security for Migrant Workers (26/21.1%). Only very few elder rights cases involved issues like Competition (three cases) or Principles of Community Law (one case). Attempting to move beyond the ECJ's own categorisation, and analysing the actual legal issues, it was found that the vast majority of the cases involved issues of pensions: either state funded pensions (61/49.6%) or employer-based occupational pensions (36/29.3%). The rest of the cases were mostly age discrimination, mandatory retirement or attendance/home care (all of them six cases each). There were only two cases involving health-care issues, and one case involving the regulation of nursing homes. Moving even more specifically into the legal argumentations, it was found that issues around the calculation of the pension rights (39%) and equal treatment for men and women (31.7%) consist of the majority of legal disputes. Overall then, the ECJ in its 'typical' elder rights case, had to deal with legal issues of pensions' rights, under its general category of 'social policy' and within specific legal issues around its calculation or examining its validity in light of sex discrimination.

Legal procedure

The vast majority of elder rights cases (114/92.7%) were preliminary rulings procedures (i.e. legal procedures that were referred to the ECJ by local national courts with regard to the legal interpretation of EU law). More specifically, in the majority of the cases, the referring national court was an administrative or labour court (67/54.5%), while in the minority of cases, the referring court was either a regular court (27/22%) or a constitutional court (20/16.3%).

Outcomes of the proceedings

Finally, in the majority of the cases, the ECJ decided in favour of the older persons or in support of the elder rights (85/69.1%), while only on 31 cases did the ECJ decide against the older person or the elder rights argument (31/25.2%); in six cases the outcome was not clearly in favour or against the older person.

Actual example

It is beyond the scope of this short report to fully describe the actual cases of this study. However, in order to go beyond mere numbers, and provide the readers with some actual legal context, a short example of the ECJ case-law (C-382/98) is provided. A man born in June 1935 was employed by the English Post Office until he retired. In 1998, aged 62, he was in receipt of a pension. However, he was denied a ‘winter fuel payment’, a payment that under State Regulations would have been paid to him if he was a woman. He claimed to be a victim of unlawful discrimination, and the Divisional Court referred the case to the ECJ for preliminary ruling.

The ECJ ruled that ‘...the application of different ages, according to sex, to a benefit scheme... can be justified only if the discrimination to which the difference in age gives rise is objectively necessary in order to avoid disrupting the financial equilibrium of the social security system or to insure consistency between the retirement pension scheme and the other benefit scheme...’ (Section 28 of the ruling). In applying this rule on the facts of the case, the court concludes that ‘...it must be concluded that discriminatory treatment such as that at issue in the main proceedings is not necessarily linked to the difference in the statutory age of retirement for men and women and is therefore not covered by the derogation...’ (Section 35 of the ruling).

Conclusions

There is a growing interest in the field of older persons’ rights both in Europe and around the world [15, 16]. The findings of this study provide a first-of-its-kind look to the way elder rights are mirrored in the ECJ judgments and activity. The outcome of this study reveals a mixed picture.

On the one hand, the amount of elder rights cases brought before the ECJ is very low, and their overall quantitative weight is minor at best. Moreover, from an historic perspective, there is no real sign of increased awareness or rise in the number of cases in this field. Once these cases do reach the ECJ, the core legal issues are usually narrow, and focus around economic or sexual discrimination issues of pensions. Major legal issues in the field of elder rights such as patients’ rights, health-care, institutional or community-based long-term care, housing or employment—are almost non-existent. Finally, older persons from key European countries and key elder rights NGOs have little or no presence before the ECJ.

On the other hand, within these limited numbers of cases and narrow scope of legal decisions, the outcomes are encouraging. In the majority of the cases the court rules in favour of the elderly. It seems that there is significant awareness for the illegality of sex-discrimination in old age and of the illegality of governments’ attempts to hinder the pension
rights of older Europeans. In the context of specific countries, e.g. Germany or Belgium, there is a strong awareness and the usage of local courts to the ECJ role. Overall then, the findings of this study suggests that the ECJ can potentially serve as an important protector of rights of older Europeans, if and to the extent that these cases reach its jurisdiction. This finding is supported by broader literature that emphasises the important role ECJ in protecting and promoting the human rights of Europeans in general [5, 20, 21].

The general empirical picture described above should be viewed in the unique historic and legal context in which ‘elder rights’ such did not exist until very recently in EU jurisprudence [16, 22]. The political awareness of a specific human rights discourse in the field of elder law is still in its grass roots stage. However, it should be kept in mind that since 2010, this reality has changed dramatically: a new and specific reference to elderly rights was established in Article 25 of the HR Charter; and calls for the development of European elder law and geriatric jurisprudence were well conceptualised [16]. Hence, it will be for future research to compare the findings of this study with future developments on the ECJ case-law, with regard to rights of older person. Nevertheless, if geriatricians or gerontologists in Europe are presented today with cases that involve gross infringements of human rights of older clients, they should encourage them to make use of the ECJ powers and jurisprudence.

Finally, it should be noted that the ability of the ECJ, as well as other international or supra-national institutions to serve as tools to protect or advance the rights of older persons or influence health-care policies depends on the existence of ‘hard law’ on which the case law can be built upon [23]. If and to the extend the EU law did not recognise elder rights, as such, prior to 2010, the findings of this study are not surprising, and are a simple reflection of this legal reality. Hence, within the debate around the need for a specific HR instrument to protect the rights of older persons, it may be also concluded that there is a need for more specific and detailed HR provisions that directly addresses such issues in order to enable this population to bring its cases before inter or supra-national judicial institutions such as the ECJ [15].

### Key points

- Very few cases regarding rights of older persons are being dealt by the ECJ;
- Within the limited elder-rights case-load, the ECJ plays an important role in advancing and protecting rights of older Europeans;
- There is a potential for the ECJ to serve as an institutional instrument to promote and advance health and human rights of older Europeans;
- In cases of gross infringements of human rights, geriatricians and gerontologists should refer their clients to the jurisprudence of the ECJ.

### Conflicts of interest

None declared.

### References

Ageing, cognitive disorders and professional practice

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Abstract

Background: the workforce is ageing. The contribution of older workers is considerable. Their occupational health profiles differ from those of younger workers.

Objective: we wished to establish whether consideration has been given by regulatory and professional bodies of the impact of ageing-related conditions such as dementia on professional practice.

Methods: We e-mailed a questionnaire to 22 regulatory and professional bodies in the UK and the Republic of Ireland. We asked whether there are supports for their practitioners should they develop age-related diseases, (particularly cognitive disorders), whether the body considered that the practitioner was responsible for their own health, and whether the body has resources to arrange for medical review for their professionals if concerns arose regarding competence. Where bodies did not respond, information relating to the questions was extracted from their on-line resources.

Results: thirteen bodies responded. None of these had specific supports to assist older workers. Some knew of other supports (occupational health, employee assistance supports, benevolent funds or counselling services). All of the bodies who responded either have or are developing structures to deal with concerns regarding their practitioners.

Conclusion: The absence of specific policies for age-related diseases, (particularly dementia), among professional and regulatory bodies is a challenge for an ageing workforce in the liberal professions. Closer working between geriatric medicine, old age psychiatry, occupational health and professional bodies is recommended to develop age-attuned policies and systems which protect the public while supporting the professionals in both work and timely transition from work.

Keywords: dementia, Alzheimer’s disease, occupational health, professional practice, professional regulation, older people

Introduction

Life expectancy is increasing. Currently, a retiree at the age of 65 can reasonably expect to live for a further 17.8 (if male) or 20.4 (if female) years [1]. At the same time, the amount of savings required to both maintain one’s standard of living and to cover healthcare and other costs have risen exorbitantly [2, 3]. The potential demands that this puts on retirement and pension funds are well recognised [4]. Now a number of countries, including the UK, are rising the age at which state pensions are