Legal Issues with Aging, and Human Rights

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Guardianship and Older Persons

• What is Guardianship?
• Guardianship and the older population:
  - 1941, Chicago, State Mental Hospital: 70% of patients
  - 1987, 500,000 elderly persons are wards
  - 1991, 75% of all legal mental assessments involve subjects aged 70 or older
The “Fool” Era

- The XII Tables (449 b.c.):
- “If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.”
The Lunacy Era

- De Prerogativa Regis (1324):
- The King shall have the custody of all the lands of natural fools.
- Also the kings shall provide, when any that beforetime hath had his wit and memory, happen to fail of his wit . . . . That their lands and tenements shall be safely kept without waste and
The Incompetence Era

• The Mental Incompetence Act 1937 (Ont.):
• The powers of the Lunacy Act . . . shall apply to every person declared to be mentally incompetent . . .

Through mental infirmity, arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs . . .
The Incapacity Era

• The Substitute Decision Act (Ont.) 1992:
  - A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonable foreseeable consequences of a decision or lack of decision.
The Supported Decision Making Era

- Israel Legal Capacity & Guardianship Act of 1962 – the 2016 Law Reform:
- The legal situation prior to the new reform;
- The political struggle for reform and the 2004 study;
- The core changes:
  - The value shift;
  - The procedural justice reform;
  - The advance planning/substitute decision making reform;
The Lessons from the History of Adult Guardianship

- The “politics” of elder guardianship;
- The “cultural” context of law;
- The issue of “age”, ageism, and “old age”; and
- The significance of human rights.
Story No. 4: Now What?
The International Example
[Time?]
Now What? An Int. Example

• How can we deal with ageism?
• What do we do with social injustice?
• One answer is: using international human rights law.
• The importance of bringing the International Perspective to American
The Origins of the call of international HR action:

• Rodriguez-Pinzon and Martin (2003):
  – A strategy to have a comprehensive legal instrument on elderly rights is missing at the international level in both universal and regional system. There are very few provisions in international law that directly address elderly rights...
  – ...[T]here is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly rights convention in place. It is in fact the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.

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

- Doron (2005): It may be that the most important challenge in international elder law is the framing of an international charter that defines the fundamental rights of old people the world over.”
Doubts & Questions

- 2008 UN Expert Group;
- 2011 OEWG
- 2014 UN HCHR IE
- 2015 OAS HR Convention
- 2016 AU HR Additional Protocol
- The legitimacy of my "now what" perspective: is it valid?
**Pro: Exiting success stories**

International Convention on the Rights of the Child

- CRC globally transformed children’s rights.
- At least normatively, CRC changed international instruments and discourse about children’s rights, as reflected in the resulting worldwide domestic legislation.
- Some even argue that the CRC created a global consensus on children’s rights, turning it to customary international law.
Success stories: cont.

International Convention on the Elimination of all forms of Discrimination Against Women

• Specific human rights treaties have also create new legal dimensions that did not exist in some domestic laws.

• For example, CEDAW attempted to eradicate “private” discrimination against women at times when most countries recognized only “public” discrimination.
Empowerment, Advocacy and Education

- International treaties are also powerful advocacy and empowerment tools:
- While CEDAW had not revolutionized women’s rights legislation in some member states, it provided NGOs with...
The “Internationalization” of Local Litigation

- International treaties are also a helpful tool in litigation in domestic and international tribunals.
- In reality, there are good examples of parties, and NGOs, that were engaged in strategic litigation while relying on international human rights treaties, and were successful in eventually reaching legal prominence, truly impacting women's lives for example.
The Relevance to "non-party" members, e.g. USA

- It is interesting to note that international human rights conventions affect not only member but also non member states.
- For example, while the US is not a CEDAW or CRC member, both have become relevant in the US. American courts use the treaties for interpretation, resulting in actual real (de-facto) effectiveness.
Setting standards & clarifying state duties

• The importance of setting a standard terminology, setting standards for services, and clarifying the actual meaning and material content of "rights" in the field of elder law
• A new HR convention can refer to the intersectionality of human rights in old age (the theme of this conference):
  – Older women;
  – Older migrants;
  – Older persons with disabilities;
  – Older LGBTQ
  – And more.
The Opposition: The “Negative” Approach
Cons — in general

- International conventions are “blind” to multiculturalism:
  - The imposition of western values, via an international convention, can erode local traditions better suited to protect older persons in traditional societies.
Cons. General – cont.

• International conventions pay a “price” in political compromise:

• Drafting choices can prove very problematic to human rights treaty.
Cons general – cont.

• Failure to enforce international conventions is dangerous and makes more damage than good:
  – If violations of international rules go unpunished this sends a message that the illegal
Disputing the moral values of “rights” based conventions:

- From a value perspective, Convention for the rights of older persons will increase inter-generational tension and be destructive to family values and informal caregiving
Cons. – Elder Specific

• The price of legal “generalizations” in old age:

  • International HU conventions tend to avoid particularities. This may result in similar treatment of “normal” and “high risk” older
Cons. – Elder Specific

• International convention on the rights of older persons will strengthen ageism

• It is a symbol of ageism
Cons. – Elder Specific

• Politics of identity will be harmful to older adults
• Older persons “against” women or persons with
The American Argument

• The American Way: We don’t want the world to tell us how to behave;

• The American Constitution and American laws provide ample protection of the HR of older persons – so there is no real
The Struggle Continues....
Then what?

Concluding Thoughts
Then what? Then Human Rights

- Older persons are human beings;
- Older persons have human rights;
- Ageism, social construction of old age, violates human rights;
- It is time to adopt a human rights discourse and language in the field of aging and gerontology;
- Human rights of older persons are universal, and they are inclusive (e.g. intersectionality with other groups);
- Human rights law has an important role in social change;
So, how do you respond to ageism?
Thank you very much for your kindness.

IT’S NEVER TOO LATE!