Globalisation, Fragmentation, Labour and Employment Law
– A Swedish Perspective

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An ageing population is a demographic trend that is generating difficult economic and social challenges around the globe. This is also the case in terms of intergenerational solidarity. In a European perspective, low fertility rates contribute to this picture. The EU’s overall ambitions are expressed in the Europe 2020 Strategy\(^1\), promoting a healthy and active ageing population to achieve social cohesion and higher productivity. High youth unemployment and the difficult situation of younger workers are also important issues in the Europe 2020 Strategy, potentially making the development of active ageing strategies more difficult. All these strategies are also reflected in the EU Treaty provisions. The Lisbon Treaty now cites solidarity between generations as one of the Union’s objectives (Article 3.3 TEU) and the EU Charter of Fundamental Rights apostrophises (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 mentions social security and social assistance in the case of old age and Article 15 refers more generally to the right to work. Younger workers and young people are also specifi-

cally targeted by Treaty provisions (Articles 47 and 165 TFEU). Both the functioning of labour markets and the dependency ratio between active and inactive persons are crucial from this perspective, as are the interrelations between work and pensions and other parts of social security/social welfare institutions.\(^2\) The ban on age discrimination has developed into an important – but also complex – tool in relation to these concerns. Thus age discrimination regulation intrinsically inter-relates with the functioning of labour law in a more general sense. This reality forms the backdrop of our recently published book *Age Discrimination and Labour Law*.

The current chapter offers a ‘synthesis’ of the book.\(^3\) The comparative analysis presented here is based on the national developments in a range of countries, as provided by a large number of distinguished experts in the fields of non-discrimination law and labour law.\(^4\)

\(^2\) Compare, for instance, *An Agenda for Adequate, Safe and Sustainable Pensions*, COM(2012) 55 final. See also the report *Implementation of the EU White Paper on pensions, Status as of 20/03/2014*. The pension challenges identified included the following: securing the financial sustainability of pension systems; maintaining the adequacy of pension benefits; linking retirement age to gains in life expectancy; restricting access to early retirement; supporting longer working lives; and closing the pensions gap between men and women, thus equalising pensionable age.

\(^3\) See Ann Numhauser-Henning and Mia Rönnmar eds., *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (2015). The book contributes with a topical and multi-faceted discussion and analysis of EU law and national European law in nine Member States on age discrimination regulation and its interrelations with labour law, while also adding important international, conceptual and comparative perspectives by including developments in Australia, Japan, Latin America, South Africa and the US. This chapter draws especially on Chapters 1, 6, 22 and 23. The work was carried out within the Norma Elder Law Research Environment (www.lu.se/elderlaw), funded by Ragnar Söderberg’s Foundation and The Marianne and Marcus Wallenberg Foundation.

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Despite our starting point in the EU perspective, this chapter by no means provides a thorough presentation of basic EU law in the areas concerned; rather, we have adopted an analytical approach. Any generalisations about the EU Member States made in the following refer to the countries covered in our study. In Sections 2 and 3 we present age in the context of non-discrimination law and the ban on age discrimination in the context of labour law, respectively, from an overall and EU view but also in a broader, comparative perspective. Section 4 provides a concluding analysis.

1. Age in the context of non-discrimination law …

1.1 … from overall and EU perspectives

A ban on age discrimination is one important tool for promoting active ageing. It can also be an important means for providing young people with both access to the labour market and adequate working conditions. A prohibition against the discrimination of older workers has long been a reality in the US. In the EU the Amsterdam Treaty (now Article 19 TFEU) provided new competences for EU institutions to take measures against discrimination \textit{inter alia} on the grounds of age. The EU Charter of Fundamental Rights (after the Lisbon Treaty, legally binding and part of primary law) in its Article 21 contains a ban on discrimination concerning, among other grounds, age. Against this background, the European Council’s Directive 2000/78/EC (the Employment Equality Directive) was adopted in December 2000\textsuperscript{5}; it covers age as a ground for discrimination, among other grounds.\textsuperscript{6}


\textsuperscript{6} There is also a proposal currently pending for extending the protection against discrimination on the grounds of \textit{inter alia} age to areas beyond working life, in parallel with that of the 2000/43/EC Directive, dealing with discrimination on the grounds of ethnicity, OJ L 180, 19.7.2000 COM(2008) 426 final. This proposal has been in a ‘dormant’ stage for some time now; see further Lisa Waddington, \textit{Future prospect for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive}, 36(2) European Law Review 163–184 (2011). There are, however, recent signs of a revival – the Juncker Commission has made it a priority to maintain the proposal and con-
In his description of European equality law over time, Bob Hepple refers to the period after the year 2000 as one of ‘comprehensive and transformative’ equality\(^7\), whereas Mark Bell has described it as a time hallmarked by ‘widening and deepening’\(^8\) of equality law. The terms comprehensive and widening refer to the broadened scope of non-discrimination regulation post-Amsterdam, taking on new grounds and new areas of society, and transformative and deepening imply both the constitutionalisation of non-discrimination and equal treatment as a fundamental right\(^9\), but also a more ‘substantive’ approach to systemic inequalities.

It goes without saying that EU developments are closely related to international developments in the areas concerned. The use of age-based distinctions in different social contexts has become increasingly controversial. Already in 1967, age joined sex and race as a ground of prohibited discrimination in the US, in the form of the Age Discrimination in Employment Act (ADEA). At domestic level, age as a prohibited ground has subsequently appeared in the constitutions of countries such as Canada, South Africa and Finland. However, age is not expressly referred to in international instruments such as the Universal Declaration of Human Rights, the UN International Covenant on Civil and Political Rights,\(^10\) ILO Convention No 111 Concerning
Discrimination in Respect of Employment and Occupation, the European Convention of Human Rights (ECHR)\(^{11}\) or the European Social Charter; in addition, there is still no international covenant proper on the prohibition of age discrimination.

Unlike US law, EU law bans age discrimination regardless of the age concerned. The Employment Equality Directive applies to conditions for access to employment, self-employment or occupation; to vocational guidance and training; to employment and working conditions, including dismissals and pay; and to membership of and involvement in a trade union or an employer’s organisation. The Directive applies to Member States when legislating, to social partners when concluding collective agreements, and to employers. The Employment Equality Directive is aligned with the other non-discrimination directives and encompasses prohibitions of direct and indirect discrimination, harassment, and instruction to discriminate, as well as provisions on positive action and active measures and a rule on a reversed burden of proof.

However, the ban on age discrimination differs from bans for most other discrimination grounds in that direct differential treatment can be justified if it concerns a legitimate aim, and the measure at issue is both appropriate and necessary (Article 6.1). Legitimate aims shall be related to employment policy, the labour market and vocational training objectives, and the Member States are given considerable scope to define these aims. In scrutinising the appropriateness and the necessity of such measures, the Court of Justice of the EU (CJEU) has developed different standards of justification depending on the issue at hand. A more lenient ‘control’ standard is applied as regards more general systems of compulsory employment, whereas a stricter standard is applied in situations such as compulsory retirement of specific professional

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**Notes:**

11 The European Court of Human Rights has recognised in its case law, however, that discrimination on the grounds of age can constitute a violation of Article 14 of the Convention in combination with Article 8.

Ageing; and, more recently, an Open-ended Working Group on Ageing was established by General Assembly Resolution 65/182 in December 2010 to explore the need for a UN treaty on the human rights of older persons in particular.
groups, premature retirement and special conditions for younger workers.\footnote{12}

This ‘weaker’ template of the age discrimination ban has been referred to as the ‘double bind’ of age discrimination law. On the one hand there is the individual-interest approach, protecting the individual’s fundamental right not to be treated differently, and reflecting existing stereotyping and ageism. On the other hand there is the collective-interest approach, reflecting society’s interests in age as a traditional social stratifier.\footnote{13, 14}

EU age discrimination legislation thus relates to the protection – and inclusion – of both older and younger workers in today’s labour markets. At application level, the ‘double bind’ finds expression in the difficult balance to be struck between the individual-interest approach – so important in discrimination law, built on individual rights within a liberal, individual claim-based design – and the collective-interest approach linking age discrimination to a larger policy context concerning not only the functioning of labour markets but also pension schemes and overall social welfare in an economic and political perspective. Up to now, the CJEU has decided upon some 30 cases on age discrimination – close to half of them dealing specifically with the issue of compulsory retirement and a few others with issues linked to premature retirement.\footnote{15} Only a few have dealt specifically with the dis-

\footnote{12} For a discussion along the lines of a control standard and a stricter standard, respectively, see Monika Schlachter, *Mandatory Retirement and Age Discrimination under EU Law*, 27 *International Journal of Comparative Labour Law and Industrial Relations*, 287 (2011).


\footnote{14} See also Helen Meenan, *Reflecting on age discrimination in the European Union – the search for clarity and food for thought*, 10 *ERA Forum* 107, 109 (2009).

Compulsory retirement (in contrast with the general question of pensionable age) is thus covered by the Employment Equality Directive, and the CJEU basically deems rules on compulsory retirement to be age-discriminatory. However, in many cases the CJEU has accepted such compulsory retirement rules and found them justifiable. The Member States and the social partners have been given a broad margin of appreciation, and when applying Article 6(1) the CJEU has found the differences of treatment on grounds of age to be objectively and reasonably justified by the legitimate aims, such as intergenerational fairness in terms of access to employment, prevention of humiliating discrimination of younger workers.\textsuperscript{16}


\textsuperscript{17} Cf. the preamble paragraph 14, which states that ‘This Directive shall be without prejudice to national provisions laying down retirement ages’.

\textsuperscript{18} The CJEU’s acceptance of rules on compulsory retirement, in terms of justification on grounds of intergenerational fairness in relation to younger workers and their access to employment, contrasts with economic research (of both a theoretical and empirical nature), which emphasises the ‘lump of labour fallacy’, and opposes propositions that compulsory (or premature) retirement schemes will help combat youth unemployment or that older workers crowd younger workers out of the labour market. The picture is complex, though; see Elaine Dewhurst, Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national
forms of termination of employment, and a reasonable balance between labour market and budgetary concerns. An illustrative example is the Swedish Hörfeldt case\(^1\) where the CJEU stated that ‘the automatic termination of the employment contracts for employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships’. In the Rosenbladt case the CJEU stated, in relation to intergenerational fairness, that the practice of compulsory retirement reflected a longstanding political and social consensus in Germany based on the ‘notion of sharing employment between the generations. The termination of the employment contracts of those employees directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment. The rights of older workers are, moreover, adequately protected as most of them wish to stop working as soon as they are able to retire, and the pension they receive serves as a replacement income once they lose their salary’.\(^2\) The CJEU’s case law so far indicates that compulsory retirement at a set (65+) age is regarded as being in line with the Employment Equality Directive’s requirements, provided there is a reasonable system of pensions in place.

\(^{19}\) An employee has a right to stay in employment until the age of 67, when the employer may terminate the employment relationship after one month’s notice and without having to provide objective grounds for dismissal; Sections 32a and 33 of the (1982:80) Employment Protection Act. If the employer does not make use of this possibility, the permanent employment relationship continues; however, it does so with limited employment protection (for example, the employee has one month’s notice, and is given no right of priority in accordance with seniority rules or rules on re-employment in redundancy situations).

1.2 ... from a comparative perspective

The design and content of non-discrimination and age discrimination law in different countries are influenced by legal culture (alongside economic and societal conditions; see Section 4).\textsuperscript{21} Constitutional traditions form an important part of national legal culture. In a majority of the EU Member States the constitutional framework encompasses a general principle of equal treatment or non-discrimination – linked to exhaustive or open lists of protected grounds. Only in Finland does the Constitution expressly refer to age in this regard. In some Member States (such as Germany), constitutional provisions are afforded a horizontal effect and are applied in the relationship between private individuals. In the countries beyond the EU, the situation varies. The South African constitutional framework contains an express ban on age discrimination (within an open list of protected grounds). In the US, discrimination on grounds of age is not expressly prohibited by the Constitution. In Latin America the constitutional framework often includes non-discrimination, with age sometimes expressly mentioned. Australia lacks a bill of rights or a constitutional framework of non-discrimination. In Japan the legal culture is characterised by lack of litigation in the non-discrimination law field and few cases of employees claiming their rights individually; this culture has prompted the development of an active promotion approach instead of a non-discrimination approach as a way to tackle the challenge of an ageing population.

\textsuperscript{21} Schiek et al. discuss, for example, the characteristics of common-law and civil-law countries in this respect and point to a long tradition of non-discrimination law in common-law countries; they argue that ‘the relatively pronounced position of non-discrimination law in the common law countries can be attributed to two different reasons; namely the heightened public awareness of diversity, above all ethnic diversity, and the absence of welfarist traditions’. See Dagmar Schiek, Lisa Waddington and Mark Bell, Cases, Materials and Text on National; Supranational and International Non-Discrimination Law (2007) 16. The Nordic countries, forming a ‘sub-group’ of European civil-law countries, are characterised by an emphasis on reasonableness and realism, but also by an early emphasis on active measures in the field of gender equality. See Dagmar Schiek, Lisa Waddington and Mark Bell, 22.
Despite a lack of express provisions banning age discrimination, apex courts in many countries review the compatibility of age-related differential treatment with constitutional guarantees of non-discrimination – as O’Cinneide says, often applying ‘a light-touch “rationality” standard of review’.22

In most EU Member States both the ban on age discrimination and related provisions have been implemented through regulation which is closely modelled on the provisions of the Employment Equality Directive. In some countries we find so-called single non-discrimination acts, for example in Sweden23 and in the UK.24 In some EU Member States such as Finland and Lithuania – and beyond the EU in South Africa – the ban on age discrimination was implemented through both non-discrimination legislation and labour law legislation (such as labour codes). Added to this, sometimes there is also regulation in criminal law, administrative law and human rights law. In federal states (such as Germany, and beyond the EU such as Australia25 and the US26) further complexity follows from the regulation at federal and state/territory levels, and the interaction between these levels. Judging from the national experiences, this ‘fragmentation’ of age discrimination law seems more prone to create tensions, uncertainties and lacunae, than mutual re-enforcement and increased protection.

23 The Swedish (2008:567) Non-Discrimination Act not only gathers different discrimination grounds but is also applicable in part outside the realm of working life, for example in goods and services, public employment services, education, health care, social services, and social security.
25 Australian non-discrimination and age discrimination law is particularly fragmented, with regulation at federal, state and territory level, and with three key acts banning age discrimination, namely the Age Discrimination Act, the Human Rights and Equal Opportunity Act and the Fair Work Act.
26 In the US the key non-discrimination regulation is found in the Constitution and in Title VII of the Civil Rights Act. The Age Discrimination in Employment Act was enacted in 1967, and is modelled on Title VII.
Several EU Member States, for example Germany, Poland and Sweden, have already expanded the scope of the ban on age discrimination beyond working life. In Australia the ban on age discrimination also applies in areas such as education and the provision of goods and services.

In most of the countries, case law in the area of age discrimination is limited and predominantly concerns old-age discrimination. Little discussion has taken place about the actual occurrence of age-related discrimination and harassment, and relatively little has been said about the regulation of age-related active measures. However, in France, following the conclusion of a collective agreement and tripartite negotiations, employers with more than 50 employees are obliged to define an action plan or to conclude a collective agreement on older workers’ employment (covering issues such as the continued employment or hiring of older workers 55+, improvement of working conditions and development of skills and qualifications, and access to professional training). In Germany the Works Constitution Act provides that employers and works councils are to ensure equal treatment and exclude discrimination *inter alia* on grounds of age in relation to the content of concluded agreements and daily business operations.

All EU Member States studied have introduced a general provision on the justification of age-related differential treatment, modelled on Article 6(1). In addition, national regulation provides for further specific exemptions, such as genuine and determining occupational requirements. Age discrimination law in countries beyond the EU encompasses both general provisions on the justification of age-related differential treatment and specific exemptions – for example in the US, in relation to genuine and determining occupational requirements or specific professions or groups of employees, such as firefighters, police officers and executives. Australian law builds on specific exemptions, and here – as well as in South Africa – one such important exemption relates to the inability to perform according to the inherent requirements of the job. In Australia much case law relates to the scope of this exemption in relation to disability, and the associated obligation of employers to make reasonable adjustments.
and accommodations. In the age discrimination context, though, there is no such obligation.27

The protection and efficiency of non-discrimination law has been increased by implementation of the rule on a reversed burden of proof, developed by the CJEU in case law in the area of gender equality (following the US model), and subsequently codified in secondary law. In cases where the ban on age discrimination is also regulated in criminal law, or when criminal sanctions apply (for example in Finland and France), other rules on burden of proof apply – for example, a rule that the burden of proof lies with the prosecutor. This makes successful litigation more difficult from the employee’s point of view. In the US different rules on the burden of proof apply, for example in cases of disparate treatment and disparate impact. Under certain conditions and in different ways, the burden of proof may be shifted to the employer. Similarly, in Australia the rules on the burden of proof differ between the different acts; this also is the case in South Africa.

We have seen that EU law and the national regulation in the EU Member States and countries beyond the EU contain a ban on age discrimination. Japan stands out as an exception, with only a limited ban on age discrimination in recruitment and hiring. Here, efforts to deal with the challenges of a rapidly ageing population and the need to extend working life have been guided by an active promotion approach. This method focuses on older workers and emphasises the collective interest of promoting active ageing, instead of concentrating on the individual interest of exercising a fundamental right to non-discrimination. This approach thus contains an ‘age-conscious’ policy to promote employment of older workers, and is built on a gradual proc-

27 Article 5 of the Employment Equality Directive states that in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. Employers shall take appropriate measures, where needed in a particular case, to enable a person with disabilities to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. See also Joined cases C-335/11 and C-337/11, HK Danmark (on behalf of Ring) v. Dansk almennyttigt Boligselskab and HK Danmark (on behalf of Skouboe Werge) v. Dansk Arbejdsgiverforening, judgment of 11 April 2013, EU:C:2013:222.
ess where soft-law measures are used, and sometimes turned into hard law, underpinned by financial incentives. In the 1970s a guideline was set regarding the employment rate of older workers (55+), and a duty to endeavour, or to make a good-faith effort, was introduced. In the 1980s focus shifted to measures to increase the compulsory retirement age beyond the age of 55. This became all the more pressing in the 2000s when the pensionable age was gradually increased to 65 years. Measures were now needed to fill the gap between the compulsory retirement age and the pensionable age. Employers were offered three options: to extend compulsory retirement age to 65; re-employ the older worker after compulsory retirement, until 65; or abolish compulsory retirement. Today, Japanese employers are legally obliged to retain older workers in the workplace, using one of these options.

2. Age discrimination in the context of labour law …

2.1 … from overall and EU perspectives

Generally speaking, a relationship exists between non-discrimination law and employment protection – or, rather, insufficient employment protection. Non-discrimination law thus developed early in the US, where it became an important substitute for poorly developed employment protection, and domination of the employment-at-will doctrine in the labour market. The ban on gender-based pay discrimination was introduced early on in Europe – in the 1957 Treaty of Rome – basically as a means to guarantee fair competition in the original Member States (because France had already introduced gender-neutral wages). Already in these early developments, the ban on discrimination can be seen rather as a challenge to or a partial replacement of the standard employment contract – namely to counteract the integral role of male breadwinner wages in such contracts. Today, non-discrimination law is seen as an expression of the general trend towards individualisation, going hand in hand with the flexibilisation of work.

The flexibilisation of work is known as a ‘hegemonic trend’ in the wake of technological development and the rise of global markets. For decades, flexibilisation of work has been central to labour law discourse, and the general development towards an acceptance of flexible
work is reflected in the EU flexicurity strategy that is now part of the EU 2020 Strategy as well as the Employment Guidelines. In a European setting these discussions are closely linked to employment protection regulation and devices that developed in that sphere during the 20th century. Despite variations among countries in Europe, many of them have elaborated schemes of employment protection in place in relation to large groups of employees in permanent, or open-ended, employment – also reflected in Article 30 of the EU Charter on Fundamental Rights on workers’ rights to protection against unjustified dismissal. In fact, more or less developed employment protection was a characteristic of the standard employment contract in a European setting, and even more so in a Japanese one. Non-discrimination regulation has thus been seen as a companion to deregulation of such employment protection regulation, thereby replacing employment protection and labour standards with individualisation and equal treatment. Core employment protection rights are typically related to abusive individual dismissals, whereas business-related dismissals are often compensated only in economic terms, with compensatory damages and the like. The difference between an emphasis on abusive individual dismissals and a focus on discriminatory dismissals is not very big.

There is, however, no global understanding of the concept of flexibilisation, at least not in relation to labour law and non-discrimination law. From an overall perspective, in the US non-discrimination law has thus been seen – and rightly so – as an employment protection device in the overall context of the employment-at-will doctrine. In the absence of employment protection in the form of a just-cause require-

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28 The Council has adopted Common Principles of Flexicurity, which are handled within the context of the European Employment Strategy and the Europe 2020 Strategy; see Communication Towards common principles of flexicurity: more and better jobs through flexibility and security, COM(2007) 359 final.
ment, prohibitions on discrimination on the grounds of ethnicity, gender and age have amounted to important restrictions on the managerial prerogative.

A legal and theoretical analysis of compulsory retirement reveals the complex relationship between age discrimination law, labour law and employment protection. Compulsory retirement at a certain age (accompanied by the right to a pension) is a long-term practice; at first glance it seems incompatible with a ban on age discrimination.

In EU law, the CJEU has accepted compulsory retirement as a general rule to be applied at normal pensionable age, despite the ban on age discrimination within the framework of Article 6.1 of the Employment Equality Directive. These practices reflect the ‘double bind’ characterising EU age discrimination law. No doubt, the current acceptance of compulsory retirement within the EU harmonises poorly with both the EU strategy on active ageing and modern pension systems based on life-long earnings. Active-ageing policies – as well as sustainable pension schemes and adequate pensions – clearly indicate that the pensionable age should be higher and possibly also more individualised. There is a need to replace the existing pension norm of ‘there is a right and a duty to retire at a certain age’ with a new one: ‘you have both a right and a duty to work according to your abilities’.31 However, on the collective-interest side, we find not only current active ageing strategies but also traditional practices of using age as a social stratifier – both in labour law and in terms of organising our societies.

In her contribution32 to the book Age Discrimination and Labour Law, Numhauser-Henning explains how compulsory retirement practices are part and parcel of standard employment and pension contracts;33 together, these practices and contracts form a scheme implying

33 Concerning these concepts, see further Mark Freedland, Burying Caesar: What Was
a long-term trade-off in wage society as developed during most of the 20th century – thus reflecting age as a social stratifier. Compulsory retirement builds on an implicit contract model, stating that employers pay employees a wage premium towards the end of their careers on the assumption that the employment relationship will come to an end at a predictable, fixed point in time.\footnote{Edward Lazear, \textit{Why Is There Mandatory Retirement?}, 87(6) \textit{Journal of Political Economy} 1261–1284 (1979).} This implicit contract is dependent on employment protection devices to maintain the inherent promise of a wage premium. The acceptance of compulsory retirement implies support for standard contracts at a time when these appear to be increasingly giving way to more flexible work forms and reformed pension schemes.

On closer scrutiny, compulsory retirement is thus deeply interwoven with employment protection, and the upholding of a ban on age discrimination may have serious repercussions for core labour-law norms. Numhauser-Henning has previously pointed to the risk in a European setting of undermining existing employment protection, should the ban on age discrimination be upheld and compulsory retirement abolished.\footnote{See, for example, Ann Numhauser-Henning (2013).} The termination of employment would then always be a process of disqualification – in itself a less satisfying order\footnote{As recognised in the case law of the CJEU, compare cases Rosenbladt, Georgiev, Fuchs and Köhler and Hörnfeldt, (supra note 15).} – making ‘capability’ the central theme of employment protection. If capability is the key to employment protection, then why would this question not be asked before ‘normal’ retirement age as well?

According to Numhauser-Henning, the ban on age discrimination works as a tool to aid in moving towards ‘ultimate flexibilization’, although it is far from being the primary driving force. She argues along the following lines: (i) age is still an acceptable – and maybe even
necessary – social stratifier; (ii) flexibilisation is a dominant trend; and (iii) EU age-discrimination regulation fits both (i and ii) with its weak template and basic function of promoting further flexibilisation. Non-discrimination regulation does not question (with regard to direct discrimination) the ‘reference norm’\(^{37}\) – the standard to be compared against – and is thus in itself very flexible in times of change. It supplies only a relative protection in terms of equal treatment, according to the circumstances at hand. It was only to be expected that non-discrimination law would grow in importance as the standard employment contract had to give way to more flexible and individualised work arrangements. Upholding the ban would lead to an increase in fixed-term contracts as a way of employing older workers because, typically speaking, the dismissal process in permanent employment would be unacceptably costly and burdensome for all parties. Even the acceptance of compulsory retirement has the effect of furthering fixed-term contracts, according to the same logic – but in post-retirement. At a research workshop in Lund, Schiek tentatively suggested the ‘neo-liberal agenda’ rather than ‘flexibilisation’ as the policy motive. This is an argument that is also at the basis of Somek’s understanding of non-discrimination regulation, challenging the belief that anti-discrimination law is at all capable of delivering social progress.\(^{38}\) Basically, according to Somek, ‘anti-discrimination law is (-) a strategy of calibrating and strengthening market rationality’.\(^{39}\) This interpretation is made with a reference to the intrinsic importance of the basic conceptual design of non-discrimination bans and their ‘internal normative weakness’, i.e. their individual claim-based design and what Numhauser-Henning refers to as their basically elitist (i.e. ‘rational’) design character. According to Somek, anti-discrimination law notoriously lacks a distributive perspective. – Nevertheless, given the general trend towards


\(^{39}\) Somek 151.
weakening employment standards and their replacement by bans on discrimination, there is no doubt that from the older worker’s point of view there are important benefits to be gained from inclusion as a member of a protected group.

2.2 … from a comparative perspective

A ban on age discrimination in working life can be expected to have considerable implications for labour law, whereas continued differential treatment on the grounds of age depends on the typically weak format of the ban and the scope for justification.

In the EU, issues related to recruitment and the conclusion of employment contracts are regulated predominantly by national law, with the obvious exception of precisely non-discrimination law and the so-called Cinderella Directive.40 Wages and other working conditions are generally set by a combination of legislation, collective bargaining, personal employment contracts and managerial prerogative, and the strength of and balance between these legal sources are determined by national labour law and industrial relations traditions. Not only EU Member States but also social partners enjoy a broad margin of appreciation when it comes to justifying differential treatment on grounds of age in collective agreements.

Working environment regulation is highly relevant for ensuring special protection of both older and younger workers; working-time regimes, are also a way of adapting the working situation to different needs, especially for older workers and thereby prolonging working life. In some EU Member States intergenerational strategies have been developed both to advance the inclusion of younger and older workers in the labour market, to combat youth unemployment and promote active ageing and longer working life for older workers. One example is France, where traditionally there was an emphasis on early retirement and intergenerational redistribution. In 2013 a new, different attempt was made to achieve intergenerational solidarity through the

contrat de génération, based on the complementarity of younger and older workers.\footnote{On the issue of intergenerational solidarity, and collective bargaining, see further the iNGenBar research project (intergenerationalbargaining.eu) and, for example, the resultant reports B. ter Haar and M. Rönnmar, \textit{Intergenerational Bargaining, EU Age Discrimination Law and EU Policies – an Integrated Analysis. Report for the project iNGenBar}, 2014, and M. Rönnmar, \textit{Intergenerational Bargaining in Sweden. Report for the project iNGenBar, Intergenerational Bargaining: towards integrated bargaining for younger and older workers in EU countries}, 2014.}

In many EU Member States, and also in countries beyond the EU, specific fixed-term employment contracts for younger and older workers are used to improve labour-market entry for younger workers and prolong working life for older workers.\footnote{Compare, for instance, the case C-144/04 Mangold v. Helm, 2005 E.C.R. I-09981.} In many countries in and beyond the EU, rates of youth unemployment are high and younger workers are over-represented when it comes to flexible and precarious employment. Specific regulation on fixed-term employment contracts for younger workers is in place in a majority of the EU Member States studied here, such as Finland, France, Poland, Spain and Sweden. These fixed-term employment contracts sometimes include an emphasis on training, in line with an apprenticeship tradition. In the wake of the economic crisis, some countries – such as Spain, but also Greece, Italy and Portugal – have also seen the emergence of fixed-term employment contracts more closely directed at deregulation, cost-cutting and a ‘levelling-down’ of employment rights. These reforms have not yet been tried by the CJEU against the ban on age discrimination. Similar fixed-term employment contracts have been introduced in Latin America, and these contracts are also supported by the ILO in efforts to promote the Decent Work Agenda. Swedish law, for instance, also provides for unlimited access to fixed-term employment for employees above the age of 67 years (the compulsory retirement age), as a way of promoting work after compulsory retirement, and a prolonged working life.

Seniority principles have traditionally been influential – and still are – in many EU Member States and countries beyond the EU, when it comes to wage-setting and working conditions such as periods of...
notice, length of annual leave, severance pay and specific bonuses. Any reference to age and length of service in this context gives rise to directly or indirectly age-related differential treatment (in relation to younger workers) and thus needs to be justified. Legitimate aims put forward in this context include the value of experience on the job and of rewarding loyalty as well as the need for extra protection of older workers. Thus, age-related wage-setting is also a constituent of the standard employment contract and an especially important and characteristic feature of the Japanese long-term employment system. Based on the CJEU’s case law in sex discrimination cases, it is clear that experience in terms of length of service – and an indirect connection to age – is a justified criterion as far as wage-setting is concerned, without the employer having to establish the importance this experience has in the performance of specific tasks entrusted to the employee in question.43 This does not mean that a more ‘automatic’, age-related wage-setting system would be acceptable, however. US law, and industrial relations too, entail acceptance of some seniority rules and seniority-based systems, not least since these rules and systems principally favour older workers, and therefore are in line with the US ban on old-age discrimination. Some EU Member States such as France and Sweden – given the high rates of youth unemployment – have witnessed debates on and proposals for the introduction of specific youth wages (or lower entry wages) as a way of promoting inclusion of younger workers in the labour market.

Seniority rules (such as the last-in-first-out principle, LIFO) still influence redundancy regulation in many countries in the EU and

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43 See, for instance, Case 109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss, 1989 E.C.R. 3199 and Case C-17/05, B. F. Cadman v. Health & Safety Executive, 2006 E.C.R. I-09583, Case C-132/11 Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v. Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt, EU:C:2012:329. Here, the CJEU made it clear that a provision of a collective agreement which takes into account, for the purpose of classification according to the employment categories determining the level of pay, only the professional experience acquired, as such, as a cabin crew member of a specific airline, was neither inextricably nor indirectly linked to age and thus did not establish a difference of treatment on the grounds of age.
beyond. The CJEU has yet to try these rules explicitly against the ban on age discrimination. However, such rules may be found acceptable according to EU law.\footnote{Compare the Opinion of Advocate-General Bot \textit{Küçükdeveci} para. 43. For a further discussion on length of service and professional experience as justification for age-related differential treatment, see Joined Cases C-297/10 and C-298/10, \textit{Hennigs and Mai}, 2011 E.C.R. I-07965 and Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, \textit{Specht and others v Land Berlin}, EU:C:2014:2005. In the wake of age-discrimination legislation, more complex and ‘generation-neutral’ systems are evolving; compare Petra Foubert \textit{et al}, An \textit{EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands}, 29(4) \textit{International Journal of Comparative Labour Law and Industrial Relations} 425–432 (2013).} In several EU Member States (such as France, Germany, the Netherlands, Poland, Sweden and the UK), and in some countries beyond the EU (such as Australia and Japan), severance pay and other forms of compensation in redundancy situations, set by legislation or collective bargaining or negotiation with works councils (such as transition agreements in Sweden or social plans in Germany and France), are also seniority-based and linked to length of service. At the same time older workers, having reached pre-retirement or retirement age, sometimes receive less or no compensation in such situations, with reference to their access to pensions and social security benefits.\footnote{However, in the \textit{Ole Andersen} case the CJEU found the Danish rule and practice of not paying severance to an employee in case of redundancy dismissal, when the employee was eligible for old-age pension, to be disproportionate, unjustifiable and age discriminatory – because the rule did not take into consideration whether or not the employee in question actually received old-age pension or continued to work.}

The extent to which sickness or reduced working capacity constitutes just cause for dismissal differs in the Member States. In some EU Member States such as Sweden, there is a general and important rule that sickness or old age does not constitute just cause for dismissal. Otherwise, older workers are especially vulnerable to dismissal both for personal reasons and in situations of redundancy. In Poland – despite a requirement for employers to justify dismissal – the scope for managerial prerogative is broad and Polish employers are under no obligation to warn, retrain or try to find alternative work for the employee.
prior to dismissal, and this may place older workers in a difficult position. In France it is feared that the procedure for a consensual termination, introduced in 2008, will be used to encourage older workers to leave their jobs prematurely. At the same time some countries such as Poland and Lithuania provide specific protection for older workers during a ‘pre-retirement’ period. Nevertheless, such rules are sometimes ‘circumvented’, with the employer dismissing the employee before he or she reaches the pre-retirement age. As a result, protection is undermined and working life shortened.

We have seen (Section 2.1) that rules on compulsory retirement reflect important links between labour law, employment protection and pension systems. However, compulsory retirement is not a general norm, and many different compulsory retirement rules can be found in the EU Member States. In some Member States, introduction of the ban on age discrimination has brought about abolishment of rules on compulsory retirement. In Lithuania, Poland and the UK, for example, there is no general or statutory compulsory retirement. In the US and Australia there are no (longer) any rules on compulsory retirement. However, in the US the age when an employee is eligible for a full public pension influences the social norms on when to retire. Despite the absence of compulsory retirement in Australia, employees exit working life relatively early. In Latin America the lack of adequate pensions induces older workers to remain in working life, though often in self-employment or in the informal sector. There is no statutory or national compulsory retirement age in South Africa, but employers often set a compulsory retirement age at 65 years (or earlier), and may then justifiably terminate the employment relationship when the employee reaches this age. In Japan, compulsory retirement is an important element of the long-term employment system.


47 However, if an employee continues to work after retirement, seniority-based wages are abandoned, and wages are lowered with the help of specific rules on the unilateral modification of working conditions.
3. Concluding analysis

Our book *Age Discrimination and Labour Law* displays the importance and value of broadening the perspective beyond the EU. The more ‘global’ analysis highlighted similarities and differences, as well as common challenges and complexities, often related to the crucial interplay with overall demographic, economic, societal and welfare-state developments and the multifaceted and partly conflicting rationales of age discrimination law. Thus, the countries studied are influenced to a great extent by the same trends, such as an ageing population, a shrinking workforce, feminization of the labour force and flexibilisation of work. In some EU Member States, such as Spain and Lithuania, the developments since 2008 are marked by economic crisis, high youth unemployment rates, large youth emigration and social unrest – a turn of events that challenges the legitimacy of the EU and increases pressure on states to find solutions. Likewise, developments in Latin America and South Africa emphasise the crucial links between the situation of younger and older workers and poverty, informal work, economic and societal inequalities, and the level of development, as well as the vulnerability of older workers associated with a lack of pensions and social security protection – you just have to keep on working. In many of the countries studied, these developments – together with general implications of an ageing population – have resulted in a risk for increased intergenerational tension, or even conflict.

International law provides uncertain protection against age discrimination, and at national level the constitutional framework of age discrimination law is also rather undeveloped. The Employment Equality Directive was imperative for the introduction of a ban on age discrimination in the majority of the EU Member States. However, age – not only in international and EU law, but also in many national contexts – is viewed as a less ‘suspect’ or ‘forbidden’ ground than others. The current state of EU age discrimination law reflects its underlying, partly conflicting human rights and economic rationales, respectively. The EU Charter of Fundamental Rights, and the right to equality, the right to non-discrimination and the rights of the elderly emphasise the human rights rationale. At the same time, the traditional role age plays in the organisation of labour markets and the design of labour laws is
partly maintained and reflected in the broad scope for justification of age-related differential treatment, and age-related regulations and measures for younger and older workers.

From the perspective of age discrimination law, much less emphasis is put on younger workers than on older workers; this is reflected, for example, in the focus on old-age discrimination in CJEU and national case law. The content and interpretation of age discrimination law in the EU and its Member States is focused on the prohibitions of direct and indirect discrimination, the scope for justification and exemptions and the rule of a reversed burden of proof. Much less attention is given to issues related to harassment and there is a lack of regulation on active measures, such as reasonable accommodation, flexible hours and adaptations of the working environment. Likewise, in countries beyond the EU, where age discrimination law exists, the emphasis is also on direct and indirect discrimination, but also on some other forms of prohibitions against age discrimination in (general) labour law legislation, such as Australia’s laws on adverse action and unfair dismissal. Also here, rules on the burden of proof are crucial for the actual protection offered, and the extent to which the burden of proof is shifted to the employer varies. The Japanese active promotion approach is focused more on the collective interest of promoting active ageing than on the individual interest of a exercising a fundamental right to non-discrimination.

In the EU the social partners enjoy a broad margin of appreciation when it comes to justifying differential treatment on grounds of age. Collective agreements contain age-related provisions, and concern has been expressed in relation to the social partners’ willingness and ability to address inequality. In principle, the involvement of trade unions and works councils, at least in countries with strong collective structures such as the Nordic countries, could provide new routes for dispute resolution and effective enforcement, and the development of active measures. The comparative analysis also reveals that many directly and indirectly age-related labour law rules and practices remain in the areas of recruitment, working conditions, flexible employment and employment protection, and the introduction of age discrimination law has not succeeded in challenging the existing order.
Rules on compulsory retirement reflect important links between labour law, employment protection and pension systems, and different forms of compulsory retirement schemes exist in a number of EU Member States, and in countries beyond the EU. However, an abolishment of compulsory retirement requires finding alternative ways to end the employment relationship, such as voluntary retirement (encouraged with financial incentives) or performance management (followed by a possible dismissal on grounds of lack of performance). Such approaches entail a risk of weakening employment protection before actual retirement age and could further the process of flexibilisation of work.

An ageing population and the introduction and increased importance of age discrimination law formed the starting point for our study. We have seen that today, intergenerational conflict presents a real threat in many countries, such as Spain and Lithuania in the EU, as well as other areas such as Latin America and South Africa. In a sense, the CJEU’s acceptance of intergenerational fairness and redistribution as justification for compulsory retirement confirms the fear and logic of perceived intergenerational conflict. The complexities reflected in this chapter also imply one important aspect: without doubt, there is still a long way to go in building sustainable labour markets and societies for the future in view of population ageing.