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OLDER PEOPLE AS VULNERABLE PERSONS IN THE PERSPECTIVE OF LAW

abstract

In the era of the “silent revolution” of an unstoppable aging of the world’s population, there is a question regarding the appropriateness and desirability of establishing a legal category called “elderly individuals” to address the gradual decline in physical and mental abilities associated with aging. This essay explores the potential designation of older people as an independent category under the law, considering that linking changes in their socio-legal status solely to the passage of time has been viewed as a form of “subjective discrimination” by civil law scholars so far. While labour and social welfare laws have already recognized the “special status” of elderly individuals, and the EU has increasingly referred to them in recent consumer-focused legislation, the prevailing view in Italian civil doctrine opposes the creation of an “old subject” category, arguing that vulnerability cannot be considered an intrinsic and defining characteristic solely based on age. Notwithstanding that, the essay suggests that creating a group or category for vulnerable (elderly) individuals could have several advantages, including recognizing their rights, assigning obligations, implementing tailored procedures, and providing forms of protection. Moreover, it would offer an opportunity to reflect on the importance of empowering individuals and promoting their autonomy in using legal instruments to plan their future.

keywords

elder law, older people, legal categories, age discrimination, vulnerable individuals, autonomy v. paternalism, individual v. society

1. Older persons: a legal category?

With his “hands tied” by the paradigm of the “subject of law” as an unreal image of the ever-same human being who “plunges into incapacity when his freedom stops sailing clear and strong” (Zatti, 2009, pp. 123 ff.) the civil law scholar discovers that he can no longer procrastinate on the urgency of addressing the “silent revolution”, the unstoppable aging of the world’s population, one of the most significant demographic changes in recent history, harbinger of certain – though perhaps still unpredictable – repercussions on all socio-economic-legal systems.

Against a common opinion that does not hesitate to identify in the progressive decline in physical and mental strength that accompanies ageing the distinctive element of a ‘category’ of vulnerable subjects, which deserves specific attention, a much less united front emerges in the legal sphere (in particular civil law),¹ due to the difficulty of identifying common and constant characteristics dependent on age that could justify the identification of a legal category,² similar to what has been established for subjects under the age of 18, are subject to which to attribute peculiar protections. In the view of many (Bianca, 1998; Perlingieri, 1991; Dogliotti, 1987; Minervini, 1989; Rossi Carleo et al., 1997), linking a change in the individual’s socio-legal condition to the mere advancement of time could in fact manifest itself as a form of “subjective discrimination”³ based on reasoning of a presumptive nature.

Legal discussion, therefore, struggles to elaborate a specific notion of the elderly individual around which building a *special* and derogatory legal status with respect to the common law (Bacciardi, 2015; Tamponi, M., 2021; Cascione, 2022), unlike what happened with the minors, where it is the crossing of a certain registry threshold that separates citizens into two categories: “those who can personally participate in legal traffic (...) from those, who, being considered psychically immature, must be represented by others” (Mengoni, 1982, p. 1119).

1 The debate regarding the recognition of the subjectivity of older persons is very open, “so much so that even the discussion regarding the appropriateness of the United Nations adopting a specific convention to protect their rights seems to have stalled, mainly due to the difficulty of identifying the “boundaries” of the group in question and of discerning any homogeneity within it,” thus Bernardini, M.G. (2020). (In)visibili? La vulnerabilità alla violenza di chi non ha l’età. *Genius*, 2, pp. 1 ff., p. 10.

2 At the 63rd National Congress of the Italian Society of Gerontology and Geriatrics (SIGG) in November 2018, a new dynamic definition of old age (threshold from 65 to 75 years) was given, which is more appropriate to the current physical and mental *performance*, the demographic situation of the Italian population, and, in general, the psychophysical conditions of individuals belonging to high-income countries.

3 The principle of non-discrimination based on age is expressly enshrined in Article 21 of the Nice Charter.

The only legal field that escapes this binary logic is *labour law* which, by virtue of the implementation of pension policies, introduces a third legal ‘category’ of relevance, the retirement age (conventionally set today at around sixty-seven) which, however, has not shown any expansive capacity in the civil law sphere, remaining confined within the specific subject matter.

Shifting our attention to the normative publicistic side, it is in fact possible to observe how all social welfare legislation⁴ is the source of measures to assist ‘elderly subjects’ identified, for the most part, as those who have reached the age of 65; measures that find application regardless of the health, social and usually also economic conditions of the individual who has reached this threshold age. Any proposal to extend the age limits defining the category benefiting from such policies and measures is therefore commonly described as unacceptable⁵ and perceived as anti-social measures.

The different approaches that private and public (welfare) law lend to the issue of advancing age are reflected in the pair of dichotomies that some “*Elder Law*” scholars⁶ place at the basis of the regulatory models applicable to the subject: the “autonomy v. paternalism” dichotomy (Caterina, 2005, pp. 771 ff.)⁷ and the “individual v. society” dichotomy (Doron, 2009, p. 59; Gardella Tedeschi, 2021, pp. 181 ff.). In legislative choices concerning the elderly individual, the former stands at the center of the debate (in our legal system specially among civil law scholars) between promoters of the most radical respect for the individual’s autonomy and those who, on the other hand, note the need to place limits on the autonomy of the individual when it may bring choices contrary to his or her own interests. The second pair, insofar as it is functional in selecting those areas of intervention in which it is society (with its institutions) that must shoulder the burden of supporting and protecting those most in need, is more relevant on the publicist side, contributing to marking significant differences between different social and welfare models.

European models, which share the value-principle of solidarity (Alpa, 2022) as a mechanism of social cohesion and a factor of economic and political integration, contribute to guaranteeing the satisfaction of some essential needs of the elderly individual by using the fiscal lever with solidaristic redistributive purposes. They are social systems in which the same obligation to retire on reaching the age limit is perceived as an inalienable instrument for the protection of the individual, an expression of the “pact between generations” that wants the active generation to be required to bear the financial burden of retirement benefits for the generation destined to conclude its productive cycle, also by this means promoting a progressive generational turnover in the world of work.

2. Autonomy v. paternalism and individual v. society

4 The reason for such an operation is to be found, according to some, in the Constitutional Charter itself where the elderly person receives protection only on the welfare and social-sanitary level; this would make it superfluous to elaborate a statute for the elderly (Lisella, 1991).

5 From the end of January 2023, millions of people in France will take to the streets to strike against a pension reform that would raise the retirement age from 62 to 64.

6 *Elder Law* refers to that field of legal practice that specializes in issues affecting the elderly population, a branch of law that has developed mainly in America and Australia.

7 Legal paternalism is the ethical-political conception according to which the state, or another subject authorised by the state, may intervene, even by force and against the express will of an adult and conscious individual, if the latter’s choices, albeit consistent, based on knowledge of the relevant facts and free from compulsion, are against his or her interests. The exclusive and main purpose of the State is, therefore, to protect what society considers to be the interests of the individual, his good; in particular to prevent him, through an action or omission, from causing, or risking, or significantly attempting to cause, harm to himself (what is considered to be), e.g. physical, psychophysical, economic-public health, contributing to marking significant differences between different social and welfare models (Dworkin, 1983, p. 20).

These welfare models, although being very well grounded in Europe, are increasingly being pointed at as an expression of a now no longer sustainable⁸ “institutional paternalism”, especially when compared to those of American origin, where the idea that one should be forced to retire upon reaching a certain age limit is considered discriminatory (Kaplan, 2009), and the problems of old age are addressed from an individual perspective aimed at enhancing as much as possible the autonomous choices of the individual (Numhauser-Henning, 2017).

3. On vulnerability From the civil law perspective, the conventional use of age thresholds intended to identify the “category” of elderly persons, even when it comes to recognising and attributing possible benefits to them seems not recommended.

References to the elderly individual have indeed become more frequent in recent years, especially in consumer-oriented legislation, where, however, the “age category” is considered as part of the broader category of the “vulnerable consumer” (Riefa, Saintier, 2021). Examples include: dir. 2001/95/EC of Dec. 3, 2001 on general product safety, which in recital 8 notes that “product safety must be assessed taking into account all relevant aspects, in particular the categories of *consumers* who may be *particularly vulnerable* to the risks presented by the products under consideration, *especially children and the elderly*”;⁹ and again dir. 2019/944/EU (replacing dir. 2009/72/EC concerning common rules for the internal market in electricity), which leaves it up to the member states to define who the “vulnerable energy consumers (civilian customers)” are and to ensure that they are adequately protected, indicating among the factors of vulnerability (in addition to the level of income, the share of disposable income allocated to energy expenses, the energy efficiency of homes, critical dependence on electrical equipment for health reasons) the overcoming of a certain age, from which then the national legislation (Art. 11 Legislative Decree No. 210 of Nov. 8, 2021), which identifies among “vulnerable customers” – who are guaranteed specific protections to be assumed by the energy regulator -, those “(f) over 75 years of age”.

What is conceptualized in these (and other¹⁰) provisions is, as we said, the “general” category of *vulnerable consumers*, of which *elderly consumers* end up representing a mere *species*; an evidence that, on closer inspection, manifests itself as the punctual spillover in this normative sphere of a process of elaboration of the category of “vulnerable subjects” initiated on the European continent following the spread of reflection on the condition of vulnerability of the human person developed by scholars of political philosophy (Goodin, 1985; Nussbaum, 2001) and, in particular, feminist thought (Butler, 2004; Fineman, 2004, 2008, 2010; MacKenzie, Rogers, Dodds, 2014) in the United States over the last two decades. A reflection that has been well taken to arouse the interest of scholars from multiple disciplinary fields, including those in the legal disciplines.

The term vulnerability has, as a result, begun (and continues) to enjoy undeniable success in legal language (Virgilio, 2018), perhaps due in part to the fact that, although “indeterminate and endowed with extreme semantic latitude” (Pastore, 2018, p. 135), it is manifested as a

⁸ “Forecasts of the demographic future in Italy return a potential picture of crisis” states the ISTAT; starting from 59 million resident population in 2020, it is expected to decline to 58 million in 2030, 54 million in 2050 and 47 million in 2070 (ISTAT, 2020, p. 1 ss.).

⁹ Hence, then, the provision of art. 103, co. 1, lett. a, no. 4 cod. cons., which for the purposes of the notion of “safe product” requires to consider the “categories of consumers who are in a condition of risk in the use of the product, in particular minors and the elderly”.

¹⁰ The vulnerable consumer is already present in recital 34 of dir. 2011/83/EU on consumer rights in the area of pre-contractual information although the first notion of regulatory relevance is offered by recital 19 of dir. 2005/29/EC.

“notion of a descriptive-prescriptive character” capable of expressing in itself “a normative idea”, an “evaluative meaning”:

tendentially, the statement that a certain individual is *vulnerable* does not, that is, inform the simple fact that he or she is in a certain situation (to be clarified, given the generality of *vulnerable*), but also suggests that it would be good to remedy this situation, by granting that individual a particular protection, or by eliminating a discrimination to which he or she is subject, or by reducing a disadvantage from which he or she suffers, etc.. (Diciotti, 2020, pp. 1, 239, 245, emphasis added)

Bringing the category of the elderly into the category of vulnerable subjects means, therefore, to assess and make it clear that to the advance of age as such, the regulatory system associates the need to intervene to eliminate a potential (or already effective) discrimination or reduce a potential (or already effective) disadvantage. This condition of vulnerability may be accentuated by the coexistence of other factors (poverty, social marginalization, etc.) that, overlapping with the former, give rise to a situation of “complex vulnerability”¹¹ that requires additional and different attention.

In more recent legal philosophical studies, however, suggesting to the idea of “the vulnerability of a group” (Macioce, 2021, p. XII) in order to conceptualize a *category* is not considered possible, nor desirable: “vulnerability is mostly understood as individual vulnerability, and claims that it is possible to identify vulnerable groups, and to identify common or collective conditions of vulnerability, are discredited as essentialist, and stereotypical” (Luna, 2009, p. 121) especially since qualifying a group of people as vulnerable ends up having the effect of labeling the individuals who are part of it, and making them even more vulnerable and exposed to discrimination.

One ends up, in short, by raising against the category of “vulnerable subjects” the same objections historically raised by our majority civil doctrine against the category of “old subject”, where it is argued that it is the real psycho-physical and situational conditions of the (elderly) person that give the measure of vulnerability, without it being possible or correct to understand vulnerability as an *intrinsic* and *distinctive* characteristic of a certain category of individuals: those who have reached ancient age. Consequently, the elderly individual’s condition of vulnerability should be assessed on a case-by-case basis, because of the individual’s contextual and proven conditions, which, however, are concretely detectable only because of an *ad hoc* investigation, mostly conducted *ex post*.

Discussing vulnerability, moving from the philosophical-conceptual to the political-legal dimension, raises the question of what criteria should be used to select those for whom resources should be allocated, rights guaranteed, specific forms of protection arranged: in this regard, the “collective dimension of vulnerability” (Macioce, 2021, p. 59) makes its usefulness more evident. To this end, the elderly have been spoken of as a “group in the *positional* sense” (Macioce, 2021, p. 65) meaning that their being a group resides

in the common positioning of older people with respect to social and economic structures (the world of work), with respect to institutional arrangements (the pension

4. On the vulnerability of a group

¹¹ “Multifactorial vulnerability” is discussed by Luciani (2022) in the keynote address of the *Lectio magistralis of the President of the European Court of Human Rights*, Prof. Robert Spano, *Human Rights and Vulnerable Persons*, delivered at Sapienza University of Rome on April 22, 2022 (available at www.costituzionale.it).

system), with respect to mechanisms of operation and practice in certain sectors (health, education), such that they condition the possibility of action and resilience; (...) to speak of older people as a category of vulnerable subjects is to highlight the fact that (...) age contributes to positioning people in a certain way within social and family systems (Macioce, 2021, p. 59),

without wanting by this means to define their essence in identity and victimizing terms and without denying that economic status, gender, health conditions, etc. are “layers of vulnerability” (Macioce, 2021, p. 59) that can add up to being elderly, significantly altering the position of the individual.

Identifying a group, a category of vulnerable individuals is functional in terms of recognizing rights, assigning obligations, implementing specific procedures and forms of protection (Gentili, 2019, pp. 41 ff, spec. p. 47); likewise, identifying an age limit beyond which these provisions can find direct application (Patti, 2009, pp. 259 ff; Fossier, 2005) is useful in terms of their effectiveness (Vettori, 2020).

5. Autonomy and care

That said, to admit the recognition of elderly individuals as a group (*rectius* category) only if and to the extent that it is functional to promote legislative action with ‘protective welfare’ aims of a publicistic nature means addressing the issue of the advancing age of the population from a social/collective point of view (individual/society dichotomy) implicitly emphasising the more distinctly paternalistic dimension of legal intervention.

The path taken could (and should) also be useful, however, from the individual perspective, so that the approach and entry of each individual into old age can be experienced as a moment from which it is appropriate to reason about the opportunity to organize one’s future through the use of legal instruments that, in enhancing the autonomy of the individual¹², are functional in identifying figures and tools useful in co-managing, both from a practical and legal point of view, the progressive loss of self-sufficiency that may depend on advancing age.

The focus is on increasing awareness, also from a civil law perspective, of the consequences that the condition of vulnerability that depends on progressive aging has on the balances of both personal and patrimonial nature of the individual, as well as of the family context in which each person lives (Cascione, 2022, p. 28); a condition of vulnerability that – and this is a fact that needs to be brought into sharp focus – is destined to create further and more complex vulnerabilities and dependencies (Kittay, 2020).

In the face of this order of problems, which place the issues related to the aging of the population in an intergenerational perspective, one must reflect on the need to empower not only society, but also individuals with respect to choices concerning the future – and to do so before it is too late – by encouraging the ability of each individual to organize what kind of support he or she intends to receive as he or she ages, whether and how he or she intends to use his or her own means to ensure that he or she and the support figure identified or to be identified have the necessary resources.

¹² Autonomy in decision-making is a fundamental and necessary element in defining a person’s identity: it is an expression of the ability to choose and manage one’s own life, of the freedom to decide according to one’s preferences and to make one’s choices by appropriate means.

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