



# Age discrimination in employment and biases in the CJEU case law

## APPLYING EU ANTI-DISCRIMINATION LAW

European Law Academy (ERA)

21 April 2023, Barcelona Spain

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# Objectives

**#1** Present EU's achievements & challenges to fight age discrimination

**#2** Make the case for application of theory of equality anchored in dignity, autonomy and participation

**#3** Discuss role of CJEU and legal practitioners

# EU legal basis to fight age discrimination

- Treaty of Amsterdam 1997

- Article 13 provides a legal basis for combating discrimination, including on the basis of age

- The Charter of Fundamental Rights of the EU

- Article 1 – human dignity
- Article 21 – non-discrimination on the basis of age and other grounds
- **Article 25 – the rights of the elderly**
- Article 34 – social security and services encompassing also old age

- Council Directive 2000/78/EC - Employment Equality Directive

- Covers equal treatment in employment and occupation
- Direct and indirect discrimination
- Encompasses age

# Article 25 – Charter of Fundamental Rights

*The EU recognizes the rights of the elderly to lead a life of **dignity** and **independence** and to **participate** in social and cultural life*

- Included under the Equality Chapter of the Charter ≠ welfare/protection approach
- Provides with benchmarks on the basis of which we can measure the EU's performance in the pursuit of equality in old age: dignity, independence/autonomy, participation/inclusion
- No qualifiers/exceptions

# Ageism and the CJEU



# The right to work in old age - 2021

- ✓ Based on critical analysis of EU caselaw until 2019
- ✓ Human rights perspective
- ✓ Lifecourse approach
- ✓ Focusing on potential age biases as a way to challenge legal thinking
- ✓ Building on work of European Network of Equality Bodies (Equinet) and UN Global Report on Ageism
- ✓ **Key conclusion:** Courts accept age discrimination as less severe form of discrimination; they legitimise and perpetuate ageism → need for radical/inclusive interpretation of the universal right to work by courts.



# Achievements but also challenges

- the principle of non-discrimination on the grounds of age must be regarded as a general principle of Community law'. (Mangold case, C-144/04, paragraph 75)
- different statutory retirement age for women and men is not acceptable (Kleist case, Case C-356/09)
- Proportionality: Hardship on person vs benefit to society assessment (Commission v. Hungary)
- Court has taken a restrictive approach to the exceptions applied to age discrimination (O'Connide)
- After Lisbon Treaty categorization of elder rights cases as part of the "fundamental rights and principles" category (Doron et al, 2021)
- Nuanced approach to the objective justification test by accommodating policy aims rooted in broad social policy considerations (Quinn and Doron, 2021)

# Identified issues from a critical human rights perspective

- Justification of mandatory retirement
- Unfavorable working conditions beyond pensionable age
- Forced career change
- Age limits in recruitment
- Redundancy
- Early retirement



# Biases in CJEU caselaw

- Work merely as source of income
- **Right/choice to work subject to age limits**
- **Advanced age as synonym of loss of abilities**
- Biased notion of 'intergenerational fairness'
- Assume pensions are adequate

**Case study:** mandatory retirement



**Old Age as functional  
decline**

# Fitness to work / avoid humiliation justification

- **Fuchs and Kohler:** avoiding disputes relating to employees' ability to perform their duties beyond the age of 65 as legitimate aim
- **Hörnfeldt:** the 67-year rule, by authorising employers to terminate an employment contract when the employee has reached that age, makes it possible to avoid a situation in which employment contracts are terminated in situations which are humiliating for elderly
- **Petersen:** the Court accepted that the skills of dentists declined with age - based on 'general experience', rather than reference to scientific studies indicating this fact, nor an individual assessment of the person concerned.





Who is old?

# Ageing : a universal natural process

- *Ageing isn't something that happens to us in the second half of our life: it's a **lifelong process***
- *We age from the moment we are born. In this sense, ageing is another word for **living***

Anne Karpf – How to age

***Old age is therefore neutral, neither good nor bad***





## The reality of older workers based on science on ageing and ageism

- Heterogeneous group
  - No evidence that age uniformly affects capacity
  - Accumulated lifelong inequalities, bad working conditions far better predictors of loss of ability/health deterioration
  - Limited impact of age on cognitive performance
- Some skills improve with age - Decrease in abilities can be compensated by accumulated experience and skillset
- Internalisation of stereotypes lead to 'self fulfilling prophecy' → declining performance



Age is a social construct whereby social, economic and political contexts determine whether an individual is considered old.

*Financial and food insecurity, social isolation, harsh living conditions, exposure to life stressors and environmental barriers, among others, create greater risks of poor health, morbidity and mortality than age does*

UN Independent Expert, 2021

Chronological age	Physiological/ biological age	Social age
Measured in years from birth	How your body changes with time	Social construct
Often set by law at 60 or 65	Focuses on loss of functional (physical or mental) capacities	Attitudes and behaviours seen as appropriate for a certain age group
Associated with responsibilities and privileges	Distinction between young-old and old-old; third age vs fourth age	Based on stereotypes we associate with old age

***'When is a person old? At 55? 60? 65? 75? Nothing is more ephemeral than the outline of the old age, this physiological-psychological-sociological complexity. Is a person of the same age as their veins, heart, brain, their spirit or their personal data? Or is it the gaze of others that will one day qualify us as old?'***

Minois G.,(1994) History of Hell

Three-stage lifecycle



**Poll: Is mandatory  
retirement justified or a  
potential breach of  
individual freedom to  
work?**

A. Justified

B. Human rights violation

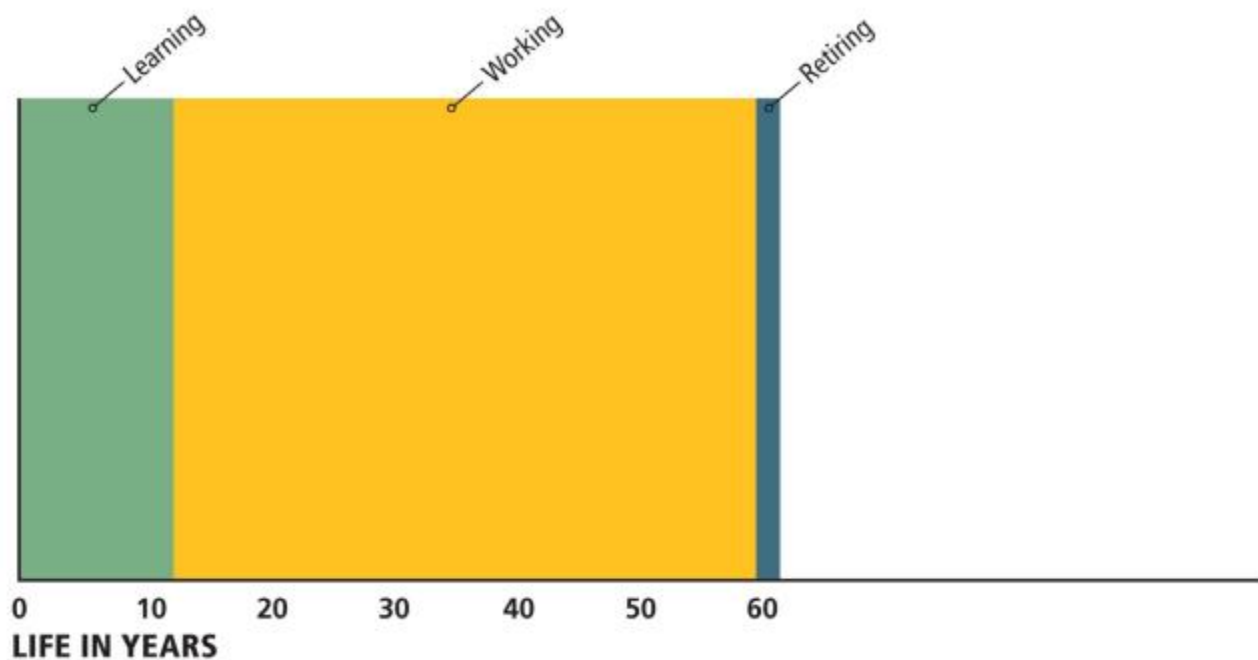
# Population ageing – challenge and opportunity

- *Almost 1/5 of EU's total population was over 65 in 2018*
- *Projected to reach 28.5% of EU population in 2050*
- *People 85+ fastest growing group – projected to more than double by 2050*

Ageing Europe – Looking at the Lives of Older People in the EU, 2020



# Archetypical conception of lifecycle

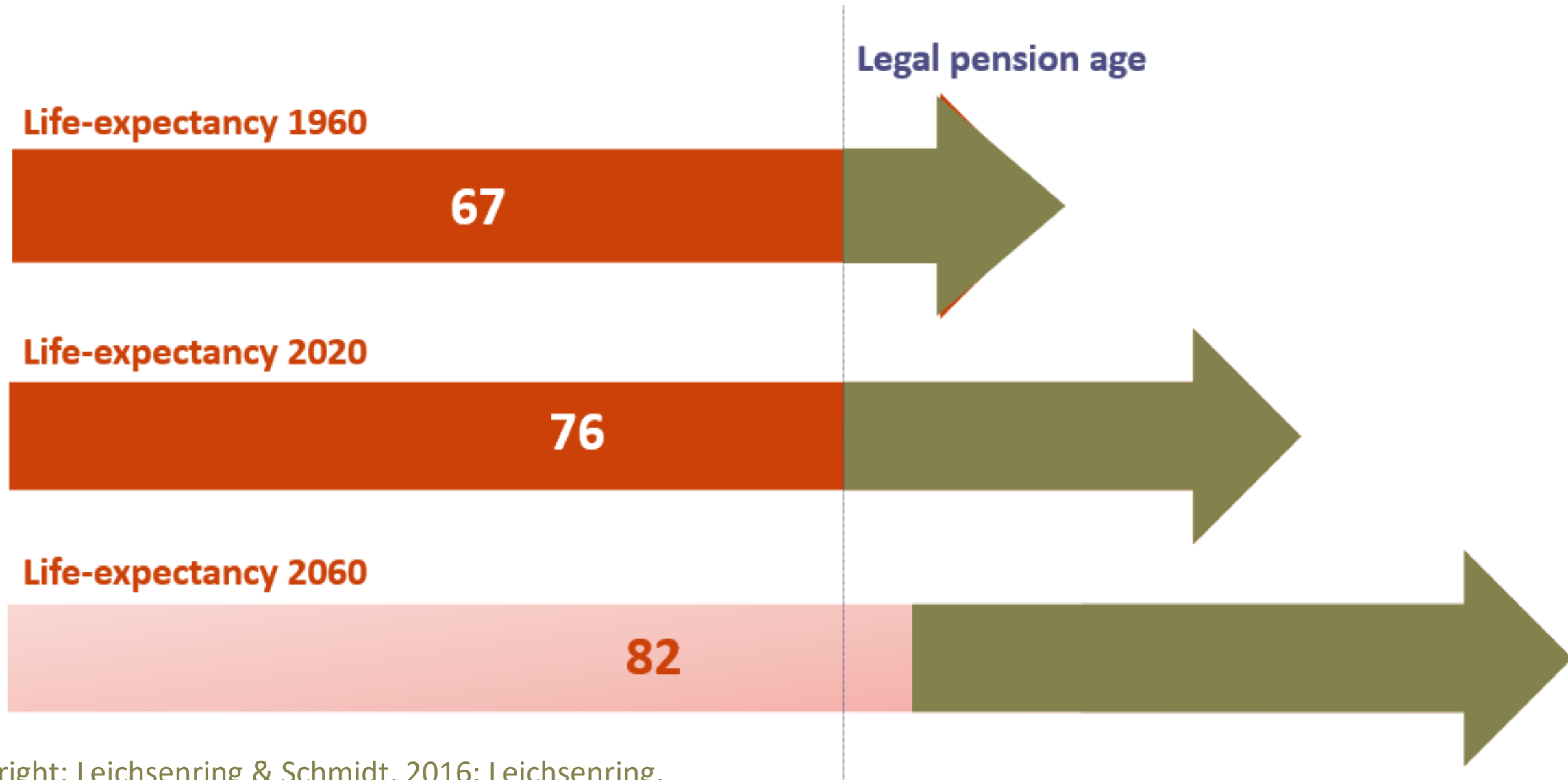


Right to work, right to education have limits

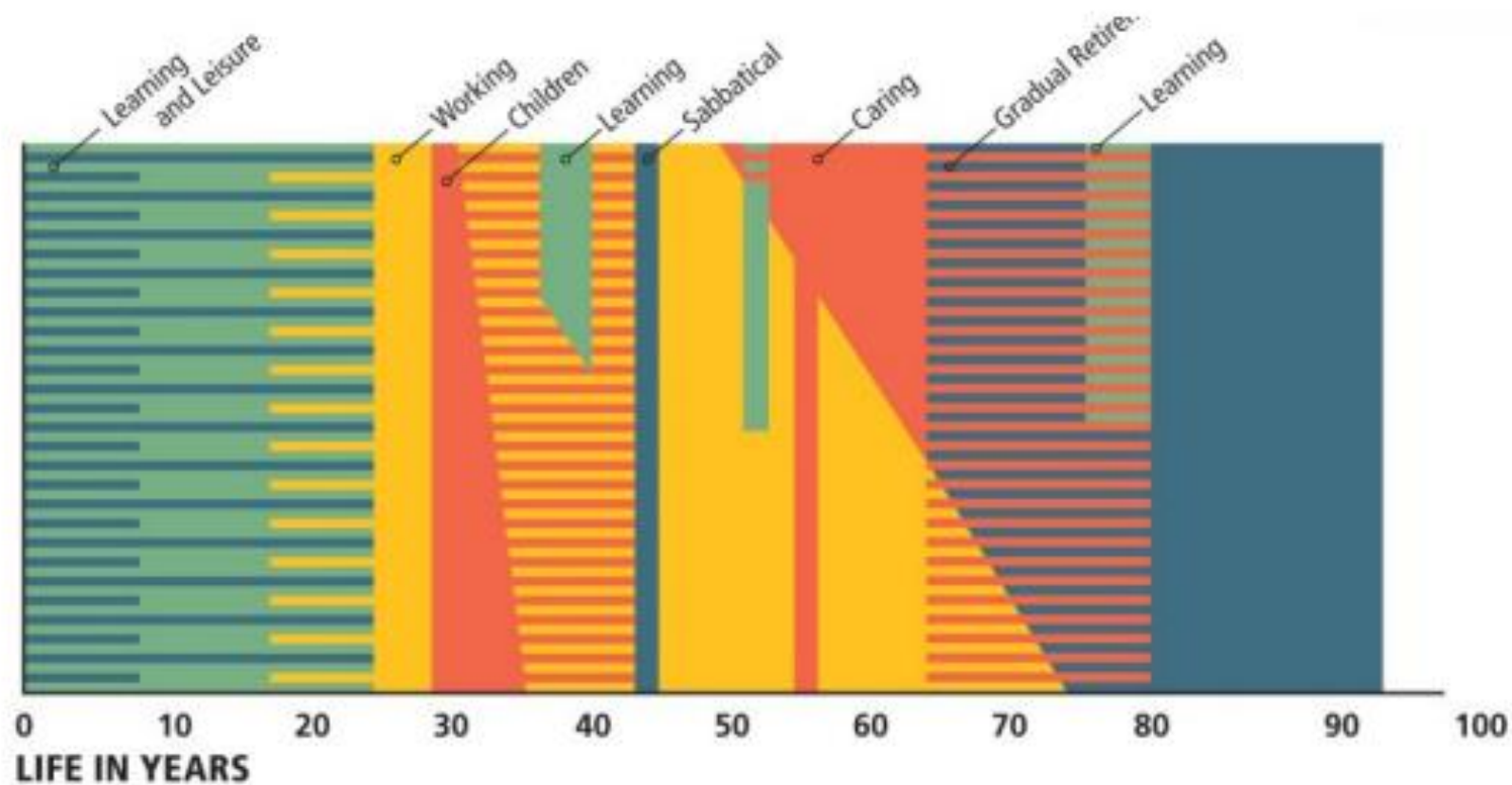
**Figure 4** Bismarck's life course: the life course of a person in the 1880s

Source: A. Kalache – The longevity revolution

# Longer lives as an opportunity for new types of life-courses



# ‘New’ multistage lifecourse



**Figure 7** A woman's life course in the future

Source: A. Kalache – The longevity revolution

# CJEU (1)

- Accepts by default that fitness to work declines with age (e.g. Petersen, Fuchs)
- Assumes that it is humiliating to be associated with declining capacity (e.g. Rosenblatt)
- Asserts that dignity is upheld by removing individuals from employment at a fixed age (e.g. Hörnfeldt)
- Ignores that compulsory retirement undermines the equal treatment of individuals of different ages, and is grounded in stereotypical assumptions regarding age and capacity
- Risks curtailing core civil rights (dignity and autonomy)
- Fails to tap on the potential of older workers and the opportunities of longevity

# CJEU (2)

- May deny older workers access to adequate income (e.g. Rosenbladt-statutory old-age pension would put applicant in a difficult financial situation)
- Excludes older workers from meaningful engagement in work, learning, social connectedness → marginalisation
- Treats older people as a homogeneous group → ignores differences and intersectional inequalities
- Tends to legitimise and perpetuate ageism → allows for continuation of ageist practices, incl beyond workplace
- Can fuel intergenerational conflict
- Goes against 'active ageing' strategies

A photograph of an older man with grey hair, wearing a black top hat and a gold and black sequined jacket over a white shirt and a dark patterned tie. He is resting his chin on his right hand, looking directly at the camera with a slight smile. The background is a solid blue color.

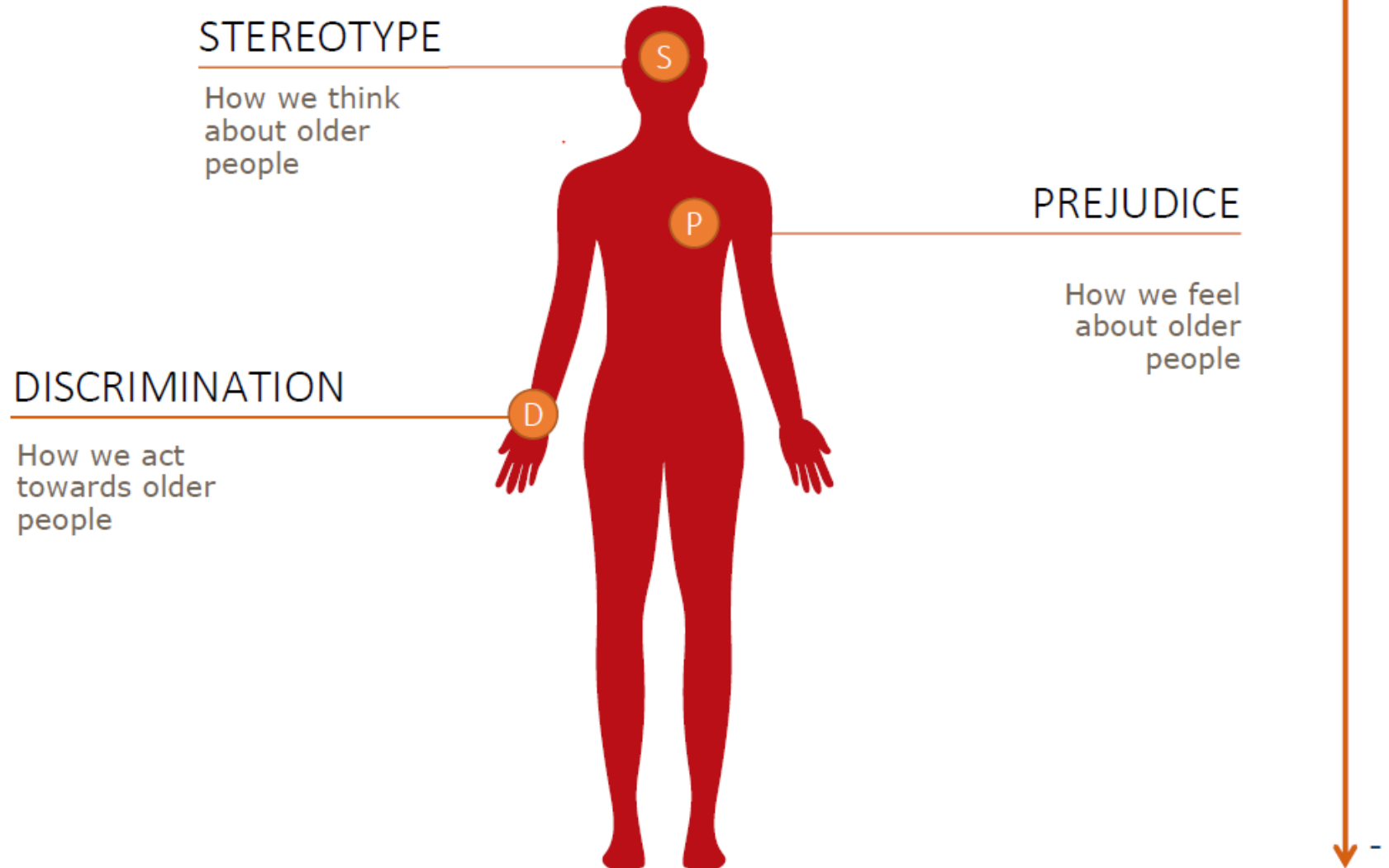
# Opportunity for caselaw to overcome age stereotypes

Credit: AGE Platform Europe



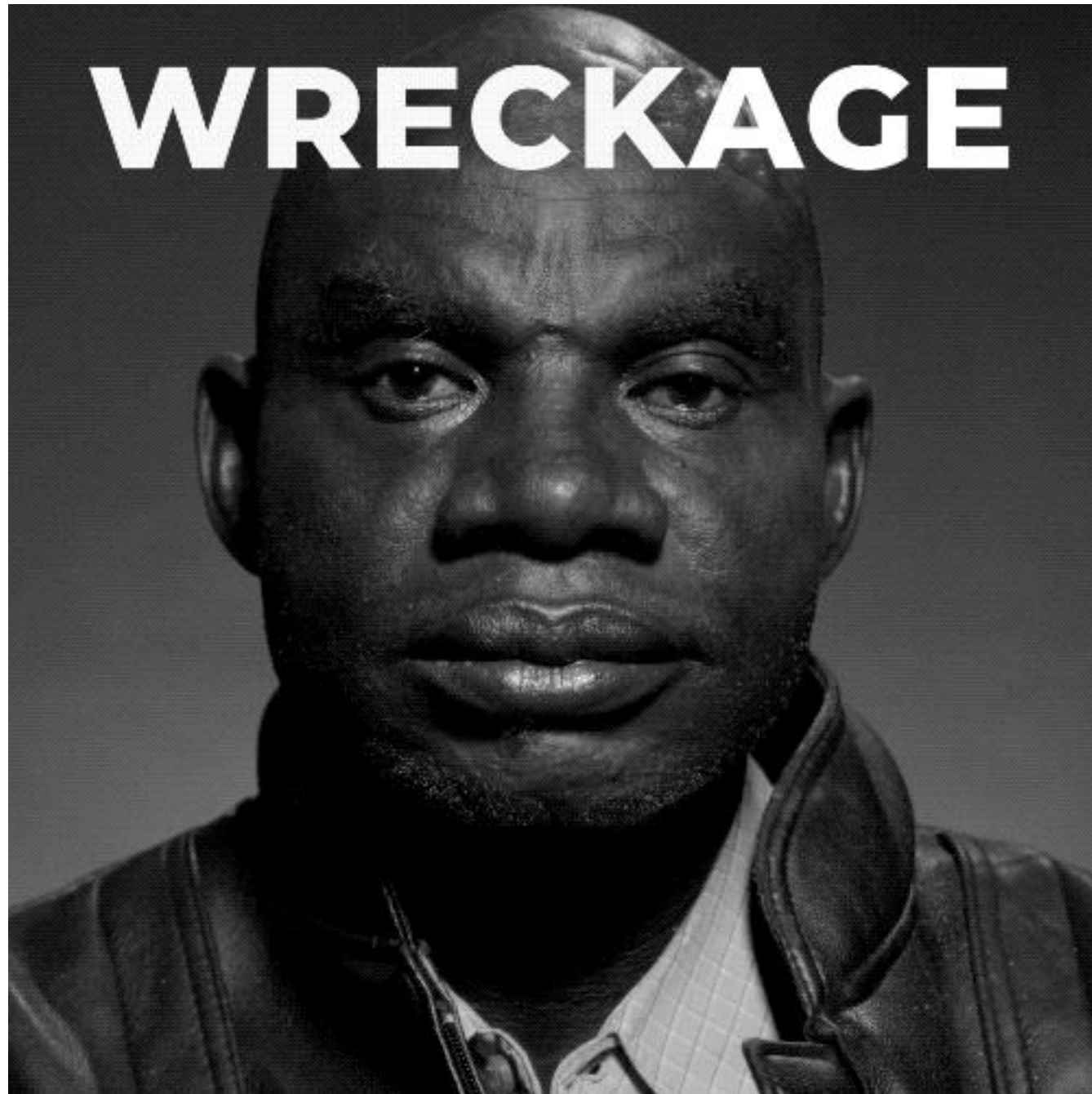
Law as a key strategy to  
fight ageism

# Three dimensions of ageism



Global report  
on ageism,  
2021

# WRECKAGE



# AGEISM IS HARMFUL

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**Ageism has far-reaching**  
**IMPACTS ON ALL ASPECTS**  
**OF PEOPLE'S HEALTH**



**PHYSICAL HEALTH**



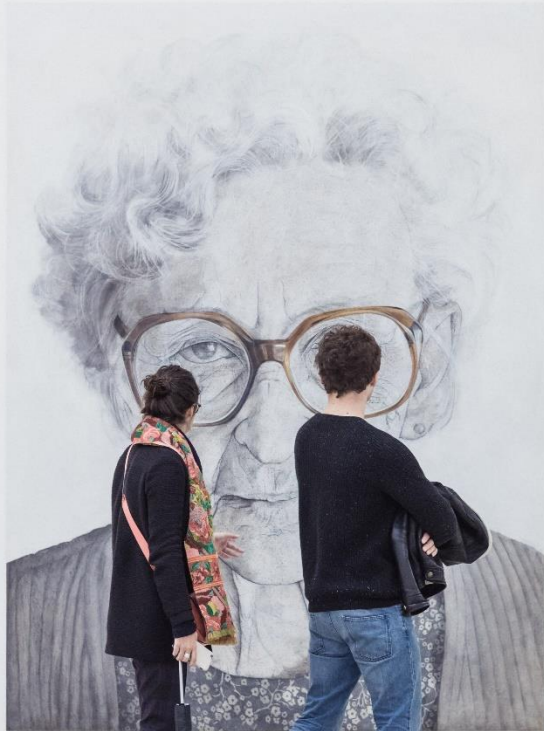
**MENTAL HEALTH**



**SOCIAL WELL-BEING**



**Ageism takes a**  
**HEAVY**  
**ECONOMIC**  
**TOLL**  
**on individuals**  
**and society**



**AGEISM**  
makes inequalities against older  
people seem **natural** or  
**inevitable**





Law is a key strategy to  
fight ageism

Credit: AGE Platform Europe



Towards a rights-based  
interpretation of equality  
in old age?

# Fundamental Rights Agency, 2018

- ✓ From responding to old age in terms of '**deficits**' that create '**needs**' – to encompassing a '**rights-based**' approach towards ageing
- ✓ Respecting the fundamental right to equal treatment of all individuals – regardless of age; without neglecting protection and support to those who require it
- ✓ A rights-based approach enables one to better meet needs – underpinned by a **legal basis** and the possibility of **redress**

# EU Council Conclusions – 2020 and 2021

- call for adopting an **age-integrated, rights-based, life-course perspective** approach to ageing
- a stronger commitment of the EU and its Member States to **prevent and combat all forms of discrimination** against older persons
- to develop adequate responses to close **existing gaps** in the international human rights system for older persons
- to strengthen social inclusion and mutual **solidarity between the generations**



States must ensure that protection from discrimination on the basis of age receives **the same standard of scrutiny** as other forms of discrimination (...)

Governments should review, amend or abolish existing laws, regulations, customs and practices that promote and constitute age discrimination, including mandatory retirement ages, and age-segregated laws and policies that deny older persons access to training and education, health or other services, which constitute derogations to the rule of age equality that are underpinned by ageist assumptions

UN Independent Expert, 2021





## UN Open Ended Working Group on Ageing

“Although the Universal Declaration on Human Rights proclaims that all human beings are born free and equal, it is evident that the **enjoyment of all human rights diminishes with age**, owing to the negative notion that older persons are somehow less productive, less valuable to society and a burden to the economy and to younger generations.” - 2017



Secretary-General António Guterres wishes happy birthday to Captain Tom Moore on his 100th birthday. Mr. Moore is a WWII veteran from the UK who walked around in his garden to raise money for Britain's National Health Service. UN Photo/Eskinder Debebe

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BY ANTÓNIO GUTERRES

**"Our response to COVID-19 must respect the rights and dignity of older people"**

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# Regional standards- OAS



# OAS

More rights for more people

Article 18 of the Interamerican Convention enshrines older persons' **right to dignified and decent work** and to equal opportunity and treatment on the same terms as other workers, whatever their age. It calls for the **prevention of discrimination** and measures to promote formal employment and to protect those in informal, domestic, unremunerated work and self-employment. The Convention further draws attention to policies ensuring **good working conditions and safe workplaces and to training and education** for older workers. Article 18 also guarantees labour and union rights on an equal basis with others. The convention also calls for the identification and elimination of obstacles and barriers to accessibility of workplaces-among others

# Regional standards- African Union



The Protocol to the African Charter offers protection from **discrimination** in employment and aims to ensure **appropriate work opportunities** taking into account older people's medical and physical abilities, skills and knowledge. It also calls for the **support of older persons** who take care of children (article 12) and recognizes **a right of older persons to education and acquisition of digital skills.**

# Regional standards- CoE



COUNCIL  
OF EUROPE

CONSEIL  
DE L'EUROPE

- Framing based on autonomy and inclusion (Quinn and Doron, 2021)
- 2014 Recommendation: older persons should not face discrimination in employment, training, working conditions, membership in trade unions or retirement. Member States should include the **promotion of participation of older persons in the labour market** in their employment policies and pay specific attention to safety and health problems of older workers.
- 2011 PACE Resolution: **states to adopt legislation** to prohibit age discrimination in the labour market; social protection, flexible work arrangements, training and lifelong learning, health promotion and the organisation of voluntary activities as means to promote active ageing

# ILO – Future of Work



- Recognizes transformative pace of ageing populations multistage lifecourse
- calls for *‘measures that help older workers to expand their choices, optimizing their opportunities to work in good-quality, productive and healthy conditions until their retirement, and to enable active ageing’*
- Adopts ‘human-centered approach’





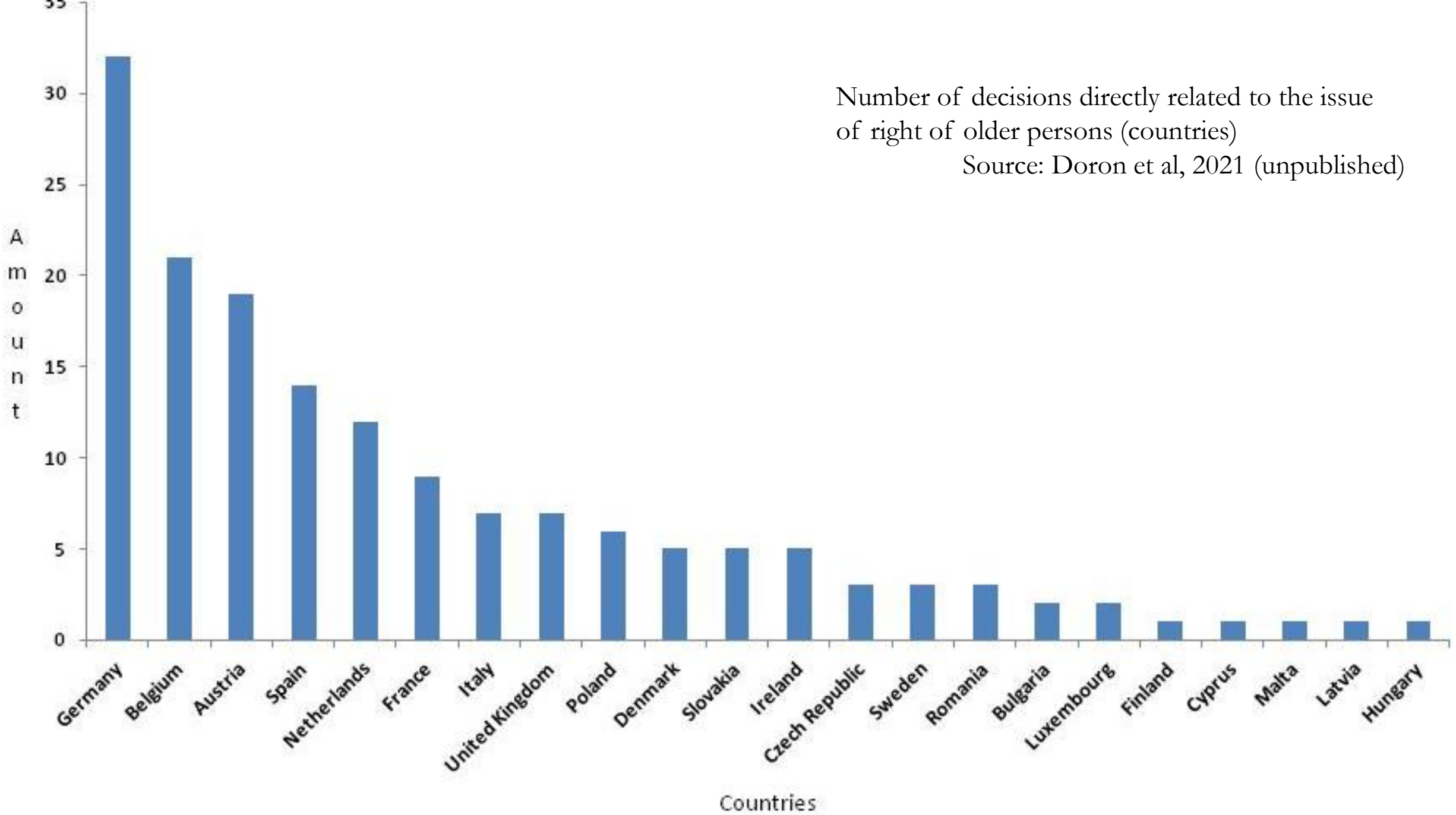
What's the way  
forward?



# **1. More caselaw on age discrimination**

incl. Legal assistance and financial support to older victims of discrimination; measures to prevent under-reporting (e.g. information); simplified procedures





## 2. Bias check – training and awareness raising



**Check our own biases: How do(es) older age/older people make you feel? Where do your assumptions come from?**





### **3. Reanimate age equality to face the reality of longevity and of ageism**

- Guided by art 25 principles of dignity, independence and participation
- Beyond sameness – towards 'inclusive equality'

Credit: Michelen Studios on Unsplash

# Results of empirical data

*It would have been expected that after the taking into force of the Treaty of Lisbon and the presence of a specific article relating to the rights of older persons (i.e. Article 25), there would be a significant increase in not only the number of cases before the CJEU, but also a much broader spectrum of cases, dealing with key aspects of rights of older adults (e.g. in the context of autonomy/guardianship, or in context of health/nursing homes). However, and in comparison to the period prior to the Treaty of Lisbon, **it seems that there has not been a dramatic change or any strategic shift in the role the CJEU plays in promoting the rights of older persons in Europe (...)** There is a need for grass-roots action, in order to change the mind-set of older persons, of NGOs, and of lawyers, in order to have them realize and adopt the option to utilize rights-based instruments – in general, and Article 25 of the EU Charter – in specific, in order to allow and present to CJEU to become a more central player in this field.*

Doron et al, 2021 - unpublished



# Anti-ageist effect of caselaw

*Central aim of law: to protect the dignity of the worker from stereotypical assumptions relating to their age (Dewhurst) →*

- When differential treatment based on stereotypes it must be unlawful
  - More individual assessments
  - Focus on societal/environmental changes



Credit: Sacha Verheij on Unsplash

WHAT LESSENS  
ONE OF US  
LESSENS  
ALL OF US



# Key resources

- AGE Platform Europe, 2021 – [The right to work in old age: How the EU Employment Framework Directive leaves older workers behind](#)
- Council of Europe, [Against Ageism and towards Active Citizenship for Older Persons](#), 2021
- Equinet, 2019 – [Fighting Discrimination on the Ground of Age](#)
- United Nations, 2021 – [Global Report on Ageism](#)
- Doron and Georgantzi, 2018 – [Ageing, Ageism and the Law](#)
- Ayalon and Tesch Romer, 2017 – [Contemporary Perspectives on Ageism](#)





## Want to know more?



[www.age-platform.eu](http://www.age-platform.eu)



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