

# Theories on Law and Ageing

The Jurisprudence of Elder Law

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## Preface

This book is about trying to answer questions. These questions were well introduced by Prof. Margaret Hall in the opening of her chapter in this book:

“The fundamental idea of ‘law and aging’ as a discrete category of legal principle and theory is controversial: how and why are ‘older adults’ or ‘seniors’ or ‘elders’ (the very terminology is controversial and fraught with difficulties) a discrete and distinct group for whom ‘special’ legal thought and treatment is justified? For some, a category of law and aging is inherently paternalistic, suggesting that older persons are, like children, especially in need of the protection of the law.

In this sense, the argument continues, the category itself internalizes ageist presumptions about older adults and is therefore inherently flawed and even harmful. If certain older adults are, because of physical or mental infirmities, genuinely in need of an enhanced level of legal protection, this entitlement should be conceptualized in terms of their disability; older adults are not a distinct group but an arbitrarily delineated demographic category which contains within it any number of groups that are legitimately distinct for the purposes of legal theory (the disabled; women; persons of colour; Aboriginal persons; rich and poor; etc.) Indeed, the artificial category of “older adults” may be seen as obfuscating, submerging these more meaningful distinctions.

The essential question underlying any theory of law and aging is, therefore, this question of conceptual distinction. What special feature and characteristics of “older adults” justify and even require a particular theoretical approach? Is it possible to formulate legitimate generalizations about a group identified as “older adults,” while avoiding the harmful stereotypes of ageism? And what if anything is gained by that approach?”

While elder law and the research and study of the older population has grown substantially in the last three decades, only a few attempts have been made to conceptualize or theorize this field of law in a systematic manner. Similar to the field of gerontology, (e.g. Bengtson et al. 2005), there are various good reasons for failing to theorize: existing jurisprudence already provides ample theoretical basis; abstract theory is mostly irrelevant to lawyers and attorneys who represent older clients on daily basis; one does not need theory to study and conduct legal research in this field; and finally, theory could actually become, at least sometimes, a limitation to our understanding and places unnecessary borders to the development of this field.

However, in this book, we beg to differ. The authors in this book share the belief that developing, discussing and providing a theoretical frame work to the field of elder law, has become necessary. When we use the word “theory” we use it as a broad

term: theory in this book means any construction of explicit explanation that accounts for the reality (in its empirical sense). Every one who works, studies or is involved in the legal field of law and ageing, encounters some kind of a legal reality: court rulings, parliamentary legislation, administrative rulings, family agreements, and much more. We need theory in order to systematize what we know, to conceptualize the “how” and the “why” behind the “what” that we are doing (Bengtson et al. 1999).

Without a theoretical framework, we cannot justify the existence of elder law as a distinct field within law. Theory provides us with the necessary intellectual tools to evaluate and put to a test what we are doing. In the words of Bengtson et al. (1999, p. 5), theory provides “a set of lenses through which we can view and make sense of what we observe in research.” It is through this lens that we can eventually build knowledge and understanding in a systematic and cumulative way, so that our empirical efforts will lead to integration with what is already known as well as a guide to what is yet to be learned (Bengtson et al. 1996).

In an attempt to stand up to the challenge of presenting different theoretical frameworks in the field of law and ageing, each chapter in this book will try to present a different theoretical perspective, which contains the answers to the questions posed above. The first chapter, written by the American attorney Allan Bogutz, provides the historical perspective for the theoretical discussion. As an active elder law attorney, and as one of the founders of NAELA (the National Academy of Elder Law Attorneys), advocate Bogutz has experienced in person the struggles that surrounded the need to define and justify the creation of a distinct legal specialty. His historical overview and personal insights provide an excellent basis for the understanding of the rest of the book.

The second chapter in this book, written again by one of the leading American scholars who have followed the development of elder law throughout time, is Prof. Lawrence Frolik. Prof. Frolik presents one of the most well known and important approaches to elder law: elder law as later-life planning. As he describes, “[i]n response to client needs, elder law has expanded and is gradually redefining itself into “later life planning.” While some still identify elder law with helping clients pay for long-term care, specifically in the United States by qualifying for Medicaid, the reality is that the practice of elder law is a rich mosaic of legal planning that is continually evolving to better meet client legal, financial and social needs and concerns.”

“Later life planning” is a term that hides a richness of legal tools, mechanisms and instruments. Starting from property management and long term health care planning, this concept has broadened to include old-age housing issues, retirement planning, health-care decision making, and advanced legal planning for mental incapacity. Prof. Frolik describes in his chapter these different issues, and the ways law can become an efficient legal planning tool for adults and older persons.

In the next chapter, Prof. Marshall Kapp argues that the proper theoretical framework in which elder law should be placed is Therapeutic Jurisprudence (TJ). Prof. Kapp has written and studied the different regulatory aspects of law and ageing in an extensive manner. His prolific writing in this field has led him to adopt a relatively novel approach to elder law, one that focuses on prevention and on therapy. As described by Prof. Kapp, “TJ [Therapeutic Jurisprudence] suggests

the law and legal practice have inevitable consequences for the well-being (psychological, physical, financial, and other) of involved people. It is an interdisciplinary, interprofessional field of legal scholarship – a particular analytical lens – with a pragmatic, realist law reform agenda. TJ seeks to identify the therapeutic and antitherapeutic (and therefore counterproductive) effects of law and involvement in the legal process, and to shape the law and legal practice in ways that diminish the antitherapeutic consequences and maximize the therapeutic potential for actual, identifiable (as opposed to abstract) older individuals.”

Prof. Kapp provides in his chapter ample examples on how TJ is applied in real life in different spheres of elder law, and how adopting the TJ “analytical lens” can provide different insights on the appropriate regulatory schemes in the field of law and ageing. His conclusion is that “law is not an end in itself; rather, it is a necessary instrument to move societies toward desired practical goals. TJ is a valuable tool for telling us how well or poorly the law is doing in moving us toward the goal of improving the quality of life for older persons.”

From therapy and prevention, the theory moves to the field of feminism and the feminist perspective on law and ageing. As analyzed by Prof. Kim Dayton, yet another central pillar of the academic field of elder law in the US, a feminist analysis of law and ageing is crucial to this field. This is so not only because of demographics: women consist the majority of the older population, especially that of the older-old and the poor. It is also because feminist legal theory is actually rich and diverse as to include a critical perspective on the ways law constructs old age – in general, and elderly women – specifically.

The next chapter, by Dr. Israel (issi) Doron, tries to escape the “monist” approaches: the key for conceptualizing elder law is not found in one dimension or a single perspective. Rather, a multi-dimensional model is needed in order to encompass this dynamic field. Known for his international and comparative perspectives on law and ageing, Dr. Doron provides a model which consists of five different “legal dimensions,” which are inter-related and inter-connected.

The core of Dr. Doron’s model is based on the fundamental constitutional and legal principles of the existing legal system by means of which the rights of the old can be defended and grounded in law, even though they contain no specifically age-related provisions; The protective dimension aims at protecting the elderly population against abuse and injury; The dimension of family support strengthens informal social reinforcement networks; The planning and preventive dimension attempts to put into practice the principle of the individual freedom of the aged and to enable them to realize their desires and aspirations even when they are no longer competent or in control of their faculties; And, finally, the dimension of empowerment includes techniques of education, explanation and representation without which old people are incapable of exercising their legal rights. In the chapter, different examples are given to the applications of the model in real elder law cases.

The sixth chapter is by Prof. Richard Kaplan. Prof. Kaplan has been one of the leaders in adopting an already well known and well established approach to law, the law and economics approach, and implementing it to the field of law and ageing.

As presented by him, the common understanding of this approach is that “[e]conomics provide[s] a scientific theory to predict the effects of legal sanctions on behavior” and that “economics provides a behavioral theory to predict how people respond to changes in laws.” Moreover, economics is able to accomplish this important function, its proponents assert, because it “has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) of analyzing the effects of prices on behavior.”

Prof. Kaplan takes this well known theoretical approach and applies it to the field of law and ageing. In different legal examples, which are described in detail in his chapter, he shows how economic analysis of legal policies regarding the older population is crucial to the understanding and evaluation of any legal regime in this field. Yet, this application is not done without a critical observation of the limits and hazards that one has to take into account once adopting this approach to the field of law and ageing.

The next chapter by Prof. Margaret Hall. Prof. Hall, one of the leading Canadian scholars in the field, traces the key concept within law and ageing as “vulnerability,” or the resistance to this concept. In her words,

“[r]esistance to the idea of vulnerability as key to a conceptually coherent category of “law and aging” is strong, and rooted in the idea that vulnerability = weakness and resistance to the presumption that age = loss of capacity. The fear is that legal theory focusing on personal vulnerability increases social vulnerability, the more significant source of harm, to the extent that it reinforces ageist presumptions of weakness and incapacity. Legal protection for the truly incapable, of whatever age, exists; and beyond that, older adults should be treated in law and otherwise like any other adult persons.”

Prof. Hall finds her theoretical “solution” to the “vulnerability” challenge in an original application of well known legal concepts. “The key is to rethink our ideas of vulnerability in this context, drawing on the conceptual framework of equitable fraud: the venerable doctrines of undue influence, and unconscionability. Equity provides a coherent and sophisticated theoretical model for understanding vulnerability as both situational and relational, as opposed to the capacity/autonomy duality. The doctrines are related, but distinct. The inequity of the unconscionable transaction lies in one person’s exploitation of the vulnerability of another. The inequity of undue influence lies in the effect of one person’s “undue” influence of the ability of another to give free and independent consent. In neither scenario does the “weaker” part lack capacity; vulnerability arises through the power dynamics of the relationship together with factors of dependence and inequality.” Prof. Hall provides ample examples and evidence of how her theory actually works in real life and with real older people.

Elder law has been challenged by those who have argued that it is nothing more than another branch of disability law. Prof. Doug Surtees, a Canadian expert in the field of disability law, does not adopt this point of view. However, through his own expertise in the field of disability law, Prof. Surtees describes the historical development of the disability rights movement, and the different mile-stones along its way. Taking up this rich experience, Prof. Surtees argues that lessons learned from the disability movement are relevant to the field of elder law. Most impor-

tantly, the concept of “universalism,” which has been developed in the legal realm of disability rights, is of much relevance to the conceptualization of elder law.

As asserted by Prof. Surtees, “Universalism as a model to understand elder law carries with it the hope that all of us can be united in designing programs and policy which include us all, wherever we currently find ourselves on time’s continuum. Age is a circumstance which, when combined with some life situations, can impact upon a person’s vulnerability. Age should not be ignored. The civil rights model, however, risks using age to divide us. It uses age to determine if a certain person is an ‘elder’ or not, in the same way as it asks if a person is ‘disabled’ or not. It is divisive. When we are divided some are marginalized. A continuum of age should be used for inclusion, not to divide us. Universalism holds this promise.”

Before closing, Prof. Winsor Schmidt presents another, yet different, theoretical analysis to the field of law and ageing. Prof. Schmidt has for many years studied the legal instrument of adult guardianship, and his research and empirical findings serve as the basis for significant law reforms in this field. His mental-health perspectives provide another unique and original lens to understand the uniqueness of elder law. As described by Prof. Schmidt, from a critical perspective, law and aging can be seen as a “potential mechanism of socially controlling the social deviance of aging through the therapeutic state and therapeutic jurisprudence.”

However, he proposes to adopt an alternative mental health theory approach to law and aging, which is normatively based on the premise of free will and responsibility and a legal mental health system that abolishes involuntary civil commitment and has sanism as a principal challenge. From this original theoretical perspective, it is clear that the challenge elder law faces in the future is to transform itself from a social control mechanism of a therapeutic state and a therapeutic jurisprudence into an emancipating, empowering, integrating assertion in an aging society.

The book is closed by a concluding chapter written by one of the leading scholars in the field of elder law, Prof. Rebecca Morgan. Prof. Morgan, provides in the final chapter a personal vision on the future conceptual development of the field of law and ageing. In her words: “aging is a great universal – everyone does it – every day, but everyone does it differently. No one solution, no one theory, no one-size-fits-all approach to Elder Law will serve. Instead, take the best of all and craft the best solution – or solutions – for the client – or clients. Remember that aging is universal – since everyone does it every day, each person has a vested interest in the future of Elder Law.”

This challenge which is set in her chapter, establishes a platform through which we can relate to, once we will look back in retrospect, and try to see what, if any, of the theoretical approaches presented in this book, has actually proven to be valid, or successful, in advancing the knowledge and understanding of the field of law and ageing.

It is our hope that this book will serve its goal: it will serve as a basis for further discussions and developments in conceptualizing what is done in the field of law and ageing. We hope that the richness of ideas, of legal perspectives and of original point of view that are presented in this book, will force any one who is involved in legal issues of older persons, to try and place his or her action within a broader

theoretical framework. We hope that this book is only a beginning: a beginning of a new legal road, which will look at law and ageing as a rich, full and exciting field of law that holds a coherent – yet diverse – conceptual basis for future growth.

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