

# Legal panorama on regulations regarding the rights of older persons in Colombia

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## INTRODUCTION

“The world population is ageing progressively at a surprising rate. The total number of persons 60 years of age or more has grown from 200 million in 1950 to 400 million in 1982, reached 660 million in the year 2005, and is expected to grow to a total figure of 1,200 million in 2025 (Villareal, 2005), and approximately 70% of said population will be living in developing countries.

The number of people 80 years of age or older has maintained an even more accelerated growth rate: It has grown from 13 million in 1950 to much more than 50 million at present, and could reach 137 million by 2025. It is the fastest-growing population group in the world: Between 1950 and 2025 it will multiply tenfold, while the number of people 60 years of age or more will multiply six times and the total number of the planet’s inhabitants will triple during the same period” (Villareal, 2005).

### RESUMEN

#### Panorama legal sobre la regulación de los derechos de los adultos mayores en Colombia

La población conocida como adultos mayores viene presentado un aumento significativo, lo que obliga a los Estados al reconocimiento de sus derechos y a la implementación de instrumentos que procuren su bienestar. En este marco es importante establecer que no existe un documento de protección de carácter internacional, y vinculante jurídicamente para los países sobre los derechos de los adultos mayores o personas de edad, sin embargo algunos organismos internacionales como Naciones Unidas (ONU) y la Organización de Estados Americanos (OEA) han generado recomendaciones y algunas resoluciones que tratan de generar los antecedentes de protección y bienestar para esta población.

En este contexto presenta este documento los antecedentes de las normas, recomendaciones y resoluciones internacionales referentes a la defensa y amparo de las personas de edad, junto a la enunciación de las normas que regulan la materia en Colombia y los criterios establecidos por la Corte Constitucional sobre la protección a personas adultas mayores como sujetos de especial protección.

**PALABRAS CLAVE:** Vejez, envejecimiento, derechos, adultos mayores.

### ABSTRACT

#### Legal Panorama on the Regulation of the Rights of the Elderly in Colombia

The elderly population has been increasing significantly, which obliges states to recognize their rights and to implement the instruments that procure their wellbeing. In this framework it is important to establish the fact that there is no international document that is legally binding for countries regarding protection of the rights of the elderly, although some international entities such as the United Nations (UN) and the Organization of American States (OAS) have produced recommendations and some resolutions that try to generate the background of protection and wellbeing for that population. Within said context, this document presents the background of the international rules, recommendations and resolutions referring to the defense and protection of the elderly, together with an enunciation of the rules that regulate the subject in Colombia and the criteria established by the Constitutional Court regarding the protection of the elderly as subjects requiring special protection.

**KEY WORDS:** old age, aging, rights, the elderly..

### RESUMO

#### Panorama legal sobre a regulação dos direitos dos idosos na Colômbia

A população conhecida como idosos vem apresentando um aumento significativo, o que obriga os Estados a reconhecerem seus direitos e a implementarem instrumentos que procurem seu bem-estar. Nesse âmbito, é importante estabelecer que não há um documento de proteção de caráter internacional e vinculante jurídicamente para os países sobre os direitos dos idosos ou pessoas de idade; contudo, alguns organismos internacionais como as Nações Unidas (ONU) e a Organização dos Estados Americanos (OEA) têm gerado recomendações e algumas resoluções que tentam gerar os antecedentes de proteção e bem-estar para essa população. Nesse contexto, este documento apresenta os antecedentes das normas, recomendações e resoluções internacionais referentes à defesa e ao amparo das pessoas de idade, junto à enunciação das normas que regulam a matéria na Colômbia e os critérios estabelecidos pela Corte Constitucional sobre a proteção de pessoas idosas como sujeitos de especial proteção.

**PALAVRAS CHAVE:** velhice, envelhecimento, direitos, idosos.

This phenomenon of ageing requires the focused attention of the country on topics of planning and attention to the deficiencies that said population can experience both now and in the future, and for this reason both the international and national community have generated regulations, some binding and others that are not, to protect and defend the elderly.

## 1. CONCEPT OF OLD AGE IN HUMAN RIGHTS

Both old age and ageing refer to the process that a person experiences with the passage of time, which has repercussions in physiological and social as well as cultural aspects. It can be conceived of in at least three senses, which are: (a) chronological, (b) physiological and (c) social.

“In the chronological sense it refers to age in years. According to this concept, old age is supposed to begin at 60 or 65 years of age, a threshold that is often fixed by law using terms like ‘older adult’ or ‘elderly person’” (Huenchuan, 2010:14).

The physiological aspect refers to the process of physical ageing, which is linked to chronological age, but cannot be interpreted simply as age expressed in years. It is more closely related to the loss of functional capacities and the gradual decrease of bone density, muscular tone and strength that comes with the passage of years (Arber and Ginn, 1995).

Finally, the social aspect refers to the attitudes and conduct considered adequate for persons of a specific chronological age (Arber and Ginn, 1995), i.e., the cultural model constructed around a given age. For Human Rights matters, this concept is considered the determining factor for constructing instruments of protection for adult persons, since myths about and stereotypes of old age are socially accepted, due to the fact that old age is known to be a stage full of economic, physical and social limitations (Huenchuan, 1999, 2004 and 2009).

## 2. INTERNATIONAL INSTRUMENTS OF PROTECTION

The rights of elderly persons have not been specifically recognized in any concrete instrument of the United Nations Human Rights System like those that exist for the protection of other groups, i.e., women,

children or persons with disabilities. Despite this, the international community has shown interest in the human rights of the elderly and has managed to establish international instruments that, although most of them are not binding, serve as a starting point regarding respect for and integration of laws to the extent permitted in each state. Thus the background, the legislative initiatives on topics of the elderly, and the documents that set forth international criteria regarding protection are presented below:

### 2.1 Initiatives for a declaration of the rights of the elderly

There have been four initiatives in this sense, which have taken the following form (Sidorenko, 2008):

1. The original declaration of the rights of old age was presented by Argentina in 1948. The document proposed the rights to assistance, shelter, food, clothing, physical and mental health, moral health, recreation, work, stability and respect (Huenchuan, 2010). The General Assembly decided that the Economic and Social Council would examine the Declaration project. The following year the Economic and Social Council asked the Secretary General to elaborate a brief document on the subject. However, the Human Rights Commission in charge of studying it replied through a memorandum from the Secretary General that there was not enough time between the session of the Economic and Social Council and that of the Commission to prepare the documentation, so they proposed that it be considered again in the following session of the Human Rights Commission in 1949). “Nonetheless, there was no major follow-up or progress regarding this early initiative on the part of Argentina” (Huenchuan, 2010).

2. In 1991 the National Federation of Old Age and the Dominican Republic presented the Declaration on the Rights and Responsibilities of the Elderly, which constituted the basis of the United Nations’ principles in favor of the elderly (Huenchuan, 2010).

3. Later, in 1999 the Dominican Republic presented a project of Declaration of Interdependence before the Social Development Commission, in which it called for promotion of and respect for the links existing among different peoples on the international scale as well as those uniting individuals and groups on the

micro-social scale (Economic and Social Council, 1998).

4. Finally, the American Association of Retired Persons (AARP) of the United States presented a proposal for a society for all ages (Sidorenko, 2008) for consideration by the United Nations in 1999, the International Year of the Elderly. It was hoped that this initiative would follow the same process as the proposal promoted by the International Federation of Old Age in 1991, but it did not prosper (Huenchuan, 2010).

## 2.2 International instruments of protection

The international human rights instruments related to the older adult population are particularly limited to the protection of social security and the right to an adequate standard of living (Huenchuan, 2010), as manifest throughout the following instruments:

### 2.2.1 The United Nations System

- Universal Declaration of Rights – International Covenant on Economic, Social and Cultural Rights: It recognizes the right to social benefits in old age.
- Convention on the Elimination of all Forms of Discrimination Against Women: It prohibits the use of age as a motive for discrimination, especially discrimination regarding access to social security in the case of old age, thus turning the convention into a binding instrument for the States Parties with respect to discrimination against women of any age. This prohibition was expanded and ratified by the International Convention on the Protection of the Rights of All Migrant Workers and their Families. In addition, the Committee for the Elimination of Discrimination against Women has also paid attention to the situation of elderly women on topics such as violence against them, education and illiteracy and access to social benefits.

Resolutions issued by the United Nations: The General Assembly of the United Nations initiated its interest in the rights of adults in 1973 through Resolution 3137 of December 14 on the question of

persons of age and the elderly, reiterating the need to protect their rights and well-being. Later, in 1990 the Assembly recognized the rapid process of ageing of the world population, which led to the passage of Resolution 46/91 in 1991 on the United Nations' principles in favor of the elderly, a resolution based on five important principles that also correspond to the rights recognized in the International Covenant on Economic, Social and Cultural Rights, which are: (a) independence, which establishes the basic guarantees of water, clothing, shelter, food, health, education, security and work; (b) participation, understood as the active inclusion of the elderly in formulating the policies that affect them, as well as participation in associations in accordance with their interests; (c) care, which establishes the duty of both the family and society in caring for and protecting the elderly, their access to social and legal services and the attention of institutional entities, as well as the enjoyment of human rights and fundamental freedoms when they are living in assistance institutions, and the right to decide on their own quality of life; (d) self-fulfillment, understood as the guarantee of development of the potentialities of the elderly, by providing them access to educational, recreational, cultural and spiritual services of society; and (e) dignity, such as the right to receive dignified treatment, free from physical and mental mistreatment, and to be valued regardless of their economic contribution.

- UN Committee on Economic, Social and Cultural Rights in General Observation No.14, which in paragraph 25 establishes that:

In reference to exercise of the right to health of older persons, the Committee, in accordance with the provisions of paragraphs 34 and 35 of General Observation No. 6 (1995), reaffirms the importance of an integrated focus on health that includes prevention, cure and rehabilitation. These measures should be based on periodical checkups for both sexes; physical and psychological rehabilitation measures aimed at maintaining the functionality and autonomy of older persons; and provision of attention and care for both the chronically and the terminally ill, sparing them avoidable pain and permitting them to die with dignity.

- International action plans: The Member States of the United Nations have promoted two plans to

mitigate the suffering and recognize the rights of the elderly. The first was the International Plan of Action generated in the first World Assembly on Ageing held in Vienna, Austria, establishing that the Member States

reaffirmed their belief that the fundamental and inalienable rights enshrined in the Universal Declaration of Human Rights apply fully and without detriment to the elderly, and recognized that quality of life is no less important than longevity and that the elderly should, as far as possible, enjoy a full, healthy and satisfactory life within their own family circle and community, and be esteemed as an integral part of society (United Nations, Resolution 37/51).

On the other hand, the second plan, which was drawn up in Madrid, Spain within the framework of the Second World Assembly on Ageing, had two central axis points: one, regarding respect for the human rights of all elderly persons and another, regarding the guarantee of economic, social and cultural rights, and the elimination of all types of violence and discrimination against the elderly.

### **2.2.2 The Inter-American Human Rights System**

The Inter-American system of human rights has only incorporated the rights of the elderly since 1988, in comparison with the United Nations System. Nevertheless, some of the rights granted to the elderly are found in dispersed form in the regional system, including the following (Permanent Council of the OAS, 2011).

The right to life: enshrined in Articles 4 and 6 of the American Convention and in the International Covenant on Civil and Political Rights (ICCPR) regarding specific measures to protect the right to life of older persons until the end of their lives, above all in relation to terminal patients under the protection of the State. These include: providing the palliative measures needed to alleviate their pain and support their nutrition; maintaining the quality of attention to the end of life, above all preventing their isolation, physical or mental mistreatment, inappropriate attention, abandonment, financial exploitation; taking specific steps to deal appropriately with

problems such as the fear of death so as to enable older persons to die with dignity.

The right to personal integrity: Articles 5 and 7 of the American Convention and Article 7 of the ICCPR, formulating specific measures of protection, above all in relation to older persons residing in long-term institutions such as assistance-providing residences or homes, to regulate the functions of care-givers and health personnel as well as their training regarding standards on human rights and ageing.

The right to freedom: Article 7 of the American Convention and Article 22 of the ICCPR on the obligation to create national policies and laws that establish specific measures in institutions and community homes to guarantee visits or contacts of older persons with the community, participation of the community in activities of the home and the physical structure of the institutions adapted to facilitate access and the right to mobility for older persons.

The right to personal security: Article 7 of the American Convention and Article 9 of the ICCPR on specific measures linked to the right to personal security, such as those that guarantee the freedom to make decisions and to accept or reject medical or scientific interventions or experiments - either physical or psychological - voluntarily and without duress, as well as clear protocols in this respect; the creation, through international human rights instruments and standards of measures to enable health personnel and other actors to determine whether a person is capable of receiving necessary information, using their own judgment and making a decision of their own free will.

The Additional Protocol to the American Convention on Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, was limited to the sphere of welfare and social policies (Huenchuan, 2010), but Article 17, on the protection of the elderly, determined that:

Every person has the right to special protection during his or her old age. To this end, the States Parties to the protocol agree to progressively adopt the measures needed to enforce this right in



practice and in particular: (a) to provide adequate facilities as well as food and specialized medical attention, for elderly persons who lack them and are not able to provide them for themselves; (b) to execute specific work programs designed to give old people the opportunity to engage in productive activity appropriate for their capacities, while respecting their vocation or desires; (c) to stimulate the formation of social organizations designed to improve the quality of life of the elderly.

Likewise, in May 2009 the General Assembly of the OAS (Organization of American States) signed Resolution AG/RES 2654 (XLI-O/11) on human rights and the elderly, demanding of States the “creation of international instruments” and the “adoption of measures for their protection” (OAS, 2009). The resolution called for strengthening regional cooperation in this sphere and asked the Permanent Council of the OAS to call a meeting of experts in order to “examine the viability of elaborating an Inter-American Convention on the Rights of the Elderly” (OAS, 2009). The Permanent Council was also put in charge of creating a work group for the purpose of preparing a report analyzing the situation of older persons and the effectiveness of the binding universal and regional human rights instruments related to protection of the rights of older persons, before the end of 2011.

Subsequently, on October 28, 2010 the representatives of the Member States of the OAS and experts on the topic of human rights and older persons met in Washington, DC to debate the viability of creating a convention to protect and promote these rights. In addition, the possibility of creating a work group was discussed, along with the possibility of producing a declaration to present to the General Assembly of the OAS to be held in San Salvador in June of 2011 (United Nations, 2011).

### 3. NATIONAL INSTRUMENTS OF PROTECTION

In Colombia the protection of the elderly is regulated in Article 46 of the text of the national constitution, which obliges the State, society and the family to provide protection and assistance for senior citizens, promoting their active integration into the community, and determines the obligation of the

State to guarantee integral social security services and a food subsidy in cases of indigence.

Furthermore, in accordance with the legal authority of Article 93 of the Political Constitution of 1991, known as “the block of constitutionality”, the rights recognized in international treaties regarding the elderly have been included in the legal texts of Colombia, and within this framework Law 1251 of 2008 was recently enacted regarding old age in Colombia: “For which purpose rules are created to ensure the protection, promotion and defense of the rights of the elderly,” establishing the following criteria, principles, ends, guarantees, rights and institutional attentions:

Law 1251 of 2008 aims to protect, promote, reestablish and defend the rights of the elderly, to orient policies that take into account the ageing process, plans and programs on the part of the State, civil society and the family, and to regulate the functioning of the institutions that provide services of attention and integral development for people in their old age (Law 1251 of 2008). It is based on the principles of active participation, co-responsibility - understood as the action of the State as a whole together with the family, civil society and the elderly - to promote, assist and strengthen the active participation and integration of the elderly in the planning, execution and evaluation of the programs, plans and actions to be developed for their inclusion in the political, economic, social and cultural life of the nation (Law 1251 of 2008), equal opportunities, access to benefits, attention, equity, independence and self-fulfillment, solidarity, dignity, decentralization, permanent training, non-discrimination, universality, efficiency and effectiveness.

Furthermore, the law determines that it is the responsibility of the State to elaborate the National Policy on Ageing and Old Age, applying a gender perspective as its transversal axis and paying attention to the most vulnerable populations. It also generates the areas of intervention of said policy, concentrating on four themes: (1) protection of health and social welfare that includes (2) education, culture and recreation, (3) favorable physical and social surroundings, and (4) productivity.

With respect to institutionalization, it created the the National Council of the Elderly as a permanent consultancy of the Ministry of Social Protection. In addition, the Ministry of Social Protection must

present an annual report to the Congress on the progress, budget execution and fulfillment of the National Policy on Ageing and Old Age.

Although the above-mentioned law is dedicated primarily to the elderly, with a guaranteed governmental structure and with the effective initiative of a National Policy on Ageing and Old Age, there are also other important regulations to ensure the well-being of the adult population, such as Law 271 of 1996 which established the National Senior Citizens and Pensioners Day. Law 687 of 2001 authorized the emission of a pro-resources stamp and the functioning of the Centers for the Welfare of the Elderly, institutions and life centers for senior citizens, establishing their beneficiaries and enacting other provisions. Law 700 of 2001 provided for measures to improve the living conditions of pensioners, while Law 1171 of 2007 improves the benefits granted to older persons since it grants persons over 62 years of age special discounts in spectacles and educational institutions, a preferential fare for public transport, and priority in legal-aid centers and in obtaining medical appointments. Furthermore, Law 1276 of 2009 established new criteria for integral attention to the elderly in the so-called life centers, “as institutions that help to provide integral attention to their needs and improve their quality of life” (Law 1276 of 2009).

#### 4. THE ELDERLY AND THE PROTECTION OF THE COLOMBIAN CONSTITUTIONAL COURT

The Constitutional Court has developed its jurisprudence with respect to the fundamental rights of the elderly in relation to three main rights: the right to a dignified life, the right to health, and the right to satisfaction of their vital minimum needs.

The Constitutional Court has determined that senior citizens are special subjects protected by the State, as reiterated in Decision T-1752 of 2000 in which it presented the following arguments:

In the cases in which there is a threat of or an actual commission of a transgression of the right to live a dignified life, senior citizens enjoy an exceptional protection, that makes judicial tutelage appropriate, despite the existence of other means of defense, when it constitutes a necessary mechanism to prevent irreparable damages. This constitutional

sub-rule, that has been formulated as a preventive measure to ensure the enforcement of the rights of persons who due to their physical conditions are not in equal conditions with the general population, is grounded in the predominance that the axiology of the constitution itself grants to the protection of fundamental rights, as support and reason for being of the Social State of Law.

This was further supported by decision T-953 of 2010 through which the Court reiterated its jurisprudence, as follows:

Article 46 above established protection for senior citizens as subjects especially protected by the State to ensure they can live their lives in conditions of human dignity to the degree that, due to their condition, they have to face the irreversible and progressive deterioration of their health as a result of natural-wear-and-tear on the organism and also suffer the appearance of diverse illnesses proper to old age.

Likewise, regarding senior citizens’ right to health, the court considers that human beings need to maintain certain levels of health in order to survive and perform, so that when certain health anomalies appear, even when they do not really constitute diseases, they affect health levels and put personal dignity in danger. It is thus valid to think that the patient has the right to harbor hopes of recuperation, to obtain relief for his or her sufferings and to seek the possibility of a life that can be led with dignity<sup>1</sup> (Decision T- 949 of 2004).

What the jurisprudence seeks is therefore to respect a concept of life that is not limited to the restrictive idea of danger of death, nor to simple biological life, but to consolidate a broader sense of existence tied to the dimensions of dignity and decorum. The aim of said notion is to preserve the existential situation of human life in conditions with full dignity, since man does not deserve just any type of life, but rather a healthy life, to the degree that it is possible (Decision T-395 of 1998).

The right to social security, monthly pension payments and satisfaction of vital minimum needs is evaluated

<sup>1</sup> Concept established in Decision T- 224 of 1997 (Presiding Justice, Carlos Gaviria Díaz) and reiterated in the jurisprudence in Decisions T- 099 of 1999, T-722 of 2001 and T-949 of 2004.

by constitutional jurisprudence “from a viewpoint of the satisfaction of the individual’s minimum needs, for which it is necessary to evaluate the circumstances of each concrete case, doing a valuation more along qualitative than quantitative lines (Decision T-338 of 2001), verifying that whoever alleges that their rights have been infringed will have the possibility of enjoying the satisfaction of necessities such as food, clothing, health, education, housing and recreation as mechanisms to make their right to human dignity a reality (Decision T-581A de 2011).

“The situation of senior citizens regarding the satisfaction of vital minimum needs is especially relevant, since in many cases their only income is the pension they receive after retiring from the labor force, so that the effect it produces generally has a profound impact on the living conditions of pensioners” (Decision T-581A of 2011). Thus, the right to the satisfaction of vital minimum needs of pensioners “is affected by unjustified delay in payment, lack of payment or partial payment of their retirement benefit or monthly pension payment. As a result, the link between the right to social security and the fundamental right to satisfaction of vital minimum needs is greater when dealing with the elderly, including police and armed forces personnel, whose retirement benefits are equated with the concept of old age pension and retirement, which enjoy special protection on the part of the State” (Decision T-152 of 2010). This is so because pensioned persons can “find themselves deprived of their only source of income, with no certainty regarding the date on which they can expect to receive payment, [which] implies the progressive deterioration of the material, social and psychic conditions of their existence, in violation of the fundamental principles and rights to which pensioners are entitled in the Social State of Law” (Decision T-412 of 2006).

Together with this, in Decision T-416 of 2008 the Court ruled that non-payment of salary and pension for an indefinite period of time constitutes a violation of the right to satisfaction of the vital minimum needs of workers, pensioners and those who depend on them.

## 5. CONCLUSIONS

There is no international instrument that unifies or standardizes the needs of the elderly population, nor

any that is specifically dedicated to defending the rights of said population, although there are diverse universal, regional and national normative sources, a situation that causes difficulties for them with respect to practice and enforceability.

There is evidence of important normative advances in the protection and guarantee of the rights of senior citizens, which permit them to demand their welfare and respect. Nevertheless, the mere existence of a normative framework does not necessarily mean, much less prove, that the conditions of the population have improved.

The dispersion of regulations regarding the rights of the elderly has negative repercussions since it does not have international support that would concretely permit the enforcement and materialization of adequate rules for the promotion and protection of the rights of the elderly. It should also be emphasized that the few rules established in the different existing instruments do not conform to any clear set of principles that would make it possible to orient both the normative actions and the public policies of each State.

Regarding the reasons to support the need for an instrument that will specifically establish the rights of the elderly, we find the following: It would make it possible to shed greater light on the problems facing this social group in the exercise of their fundamental human rights; it would constitute a solid pedagogical instrument, especially within the national sphere, for combatting the predominant stereotypes and generating positive and realistic images regarding the ageing process; it would raise greater consciousness regarding the many contributions that the elderly make to society as a whole (OAS, 2011); it would clarify the content of the rights of the elderly; it would explain the obligations of States with respect to the elderly; it would strengthen international protection and, finally, it would permit the promotion of the Human Rights focus in policies related to ageing.

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