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# LEGAL

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PROTECTION OF  
OLDER PEOPLE

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edited by Wojciech Lis



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REVIEWERS *dr hab. Katarzyna Krzysztofek-Strzała, UJ*  
*dr hab. Dariusz Walencik, prof. UO*

PROOFREADING *Lingua Lab*

TYPESETTING AND COVER DESIGN *Tomasz Smółka AT ONCE*

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ul. Krakowskie Przedmieście 25, 00-071 Warszawa  
SEKRETARIAT tel.: (22) 630 94 53, e-mail: [wydawnictwo@iws.gov.pl](mailto:wydawnictwo@iws.gov.pl)

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## Preface

Human subjectivity derived from human dignity, which is inherent and inalienable, is not subject to any gradation, regardless of circumstances, including those caused by age. It is not diminished either by old age or the aging process leading to it, which is a normal stage of human life determined by the regularities of nature. This is because a person is born, matures, reaches his full potential in adulthood and gradually fades away as he enters old age. It can be said that those who have managed to make it to this stage of life are lucky. Many people, as a result of various diseases, accidents or their consequences, do not live to old age. This is a stage that completes human life, allowing it to be shown in all its fullness, with all its weaknesses. Thanks to this, a broader perspective of humanity is revealed. The period of old age means that a person has often already exhausted his possibilities arising from the vitality of life, no longer makes long-range plans for himself and no longer strives for family, social, financial or professional success. With longer life expectancy, the risk of limiting one's ability to carry out daily activities independently increases more and more. It is not uncommon for the elderly to require assistance from other people, usually those close to them, whom they have accompanied and supported in overcoming life's difficulties, and sometimes specialised institutional

entities. In this sense, old age teaches humanity, sensitivity, solidarity and readiness to make sacrifices for a person in need of support.

The State, as a great community uniting people of different generations, does not leave the elderly without the necessary support, taking up dedicated measures for them. They are not always effective, but nevertheless, the very fact of awareness of taking them and providing special assistance to the elderly proves that this problem is recognised, that the authorities are aware of the problems involved. All the more so because at the normative level, it provides this category of its citizens with special protection. Unfortunately, however, many areas of the functioning of the elderly still require changes leading to their improvement, which will translate into more effective assistance and better use of the resources at hand. These issues are addressed in the studies included in this volume, prepared by a team of researchers from Poland and Hungary, which makes it possible to look at the problem of old age and the aging process from different perspectives, although based on a similar system of values, centred on the human being, which is the point of reference for any action taken by the State in accordance with international standards. After all, the legal systems of the two countries under analysis are anthropocentric in nature.

Of course, the studies included in this volume do not exhaust the entire wealth of problems related to old age and the aging process but nevertheless allow us to point out the most typical ones and thus open up a broader discussion on the need to think about and implement the necessary reforms to mitigate the effects of old age. It seems that only a comprehensive approach to the problems of old age will ensure the effectiveness of the measures taken, contributing to improving the state of functioning and quality of life of the elderly; thus, health programmes dedicated to the elderly, educational and cultural support, incentives to convince them to change their lifestyles, stay in the labour market and be active as long as possible. The primary goal of these activities is to preserve the independence and self-reliance of the elderly for as long as possible. This is particularly important due to the aging of European societies, which will change not only the structure of these societies but also the availability and extent of support from the younger part of the population. It is also

a challenge for the State to undertake measures to increase activity and change attitudes toward the elderly and to make the younger part of the population aware that old age is an inevitable part of human life and to prepare them for it mentally as well.

*Wojciech Lis*



# Chapter 1. An Elderly Person (Older People) as a Group Subject to Special Protection within the Perspective of Article 31 section 3 of the Polish Constitution

## 1.1. Introduction

The purpose of the presented study is: to present, on the basis of theoretical formal solutions contained in the Constitution of the Republic of Poland,<sup>1</sup> the possibility (admissibility) of limiting the constitutional freedoms and rights of older people.

Main thesis is: the elderly are a group that, due to natural conditions, has special rights and is subject to specific (in a particularly limited way) obligations, usually having general freedoms, and the main research areas are constitutional regulations, especially Article 31 section 3 of the Polish Constitution.

Under the Polish constitutional law, the elderly have been given little space – even in comparison with other social groups which, by their nature, require special protection, e.g. children or women. Provisions of a general (constitutional) nature, apart from the value itself, constitute a reference point for detailed regulations, and as a result, they are the basis for the practical implementation of legal norms.

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<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997 No. 78, item 483, as amended).



The functioning of a community, especially one organised in the structures of the state, by its nature, requires various kinds of state interference in the sphere of behaviour of entities under its authority, which is necessary for the good of the public.<sup>2</sup> Pursuant to Article 31 section 3 of the Constitution of the Republic of Poland, restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its safety or public order or for the protection of the environment, public health and morality, or the freedoms and rights of other persons, and they may not violate the essence of freedoms and rights.<sup>3</sup>

Thus, the Polish Constitution only mentions the admissibility of restricting the exercise of constitutional freedoms and rights and not depriving them or refusing to recognise them. This is obviously related to the assumption that the source of freedom, as well as human and civil rights, is the inherent and inalienable dignity of man (Article 30 of the Polish Constitution).<sup>4</sup>

In the context of this regulation, it should be emphasised that older people, as a rule, enjoy all the constitutional rights and freedoms that other people are entitled to, and taking into account the “natural specificity”, special (exceptional) freedoms and rights may appear. Due to the aforementioned “natural specificity”, restrictions on the

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<sup>2</sup> See: K. Walczuk, *Commentary to Article 31*, [in:] M. Karpiuk, P. Sobczyk (eds.), *Defence, security and public order. Commentary on selected provisions of the Constitution of the Republic of Poland*, Olsztyn 2018, p. 88; L. Garlicki, *Polish constitutional law. The outline of the lecture*, Warsaw 2009, p. 96.

<sup>3</sup> “Restrictions on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others.”

<sup>4</sup> “The inherent and inalienable dignity of the human person is the source of freedom and rights of man and of the citizen. It is inviolable and it is the duty of public authorities to respect and protect it.” See: K. Walczuk, *Inborn character, dignity and equality as attributes of human rights*, [in:] B. Sitek, T. Jasudowicz, M. Seroka (eds.), *Fides et bellum. A book dedicated to the memory of Bishop, Professor General Tadeusz Płóski. Vol. II*, Olsztyn 2012, pp. 117–125; D. Dudek, *The Constitution and Constitutional Law*, Lublin 2008, p. 89.

exercise of constitutional rights and freedoms may also take on a specific form and scope.

However, in order to implement the disposition contained in the presented principle of the admissibility of limitations on the exercise of constitutional freedoms and rights in relation to the elderly, it is necessary to establish the admissibility of restrictions (limitations) and establish these freedoms and rights that are enjoyed by the elderly.

## 1.2. Meaning and Scope of the Term “an Elderly Person”

Using the term “an elderly person” may pose considerable difficulties. Unlike other particularly vulnerable entities, such as children, mothers, fathers<sup>5</sup> or women, here it is not possible to rely solely on obvious, biology-related or clearly defined formal (legal) conditions.

The actual uniqueness of the elderly, particularly relevant to the issue in question, consists of the fact that, unlike children who do not have full legal capacity because they are minors (they cannot shape their legal situation independently), the elderly, for as long as they do not stay (formally) incapacitated, do have such an ability, though – as shown by life experience – often their ability to perceive the world and respond to various types of external stimuli remain at a level similar to that of children.

The dilemmas related to the elderly as a group subject to special protection are further exacerbated by the multitude of phrases used to refer to them, not only in colloquial language or in journalistic works or the media but also in legal acts and official state (national), international and EU documents, etc. The terms include,

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<sup>5</sup> See: K. Walczuk, *O potrzebie konstytucjonalizacji ochrony ojcostwa*, [in:] P. Sobczyk (red.), *Podstawy przeciwdziałania przestępczości oraz pomocy osobom pokrzywdzonym. Interpretacja i kierunki zmian*, Warszawa 2020, pp. 221–250.

for example, “the elderly<sup>6</sup>” and “seniors”.<sup>7</sup> From our point of view, all these terms should be considered synonymous by design as defining the same subjects of human and civil freedoms and rights.

Under Polish conditions, a precise (to the extent possible) reference point determining who an elderly person is in the light of the law is, without a doubt, the regulation of Article 4 point 1 of the Act of 11 September 2015 on the elderly. Under the provision, an elderly person is any person over the age of 60. However, at the same time, the age limit provided for in the regulation in reality will not be absolutely applicable to the justification of special treatment with respect to the (constitutional) freedoms and rights of human beings and citizens.

### 1.3. General Principles of Admissibility of Limitations in Exercising Constitutional Rights and Freedoms

The principle of freedom of a human being (liberty to decide about oneself) has been specified in section 1 and section 2 sentence 2, preceding the cited Article 31 section 3 of the Constitution of the Republic of Poland.<sup>8</sup> Whereas in section 2 sentence 1, the con-

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<sup>6</sup> For example, in accordance with the Act of 12 March 2004 on social assistance (Journal of Laws of 2021, item 2268, as amended), The Social Assistance Act of 12 March 2004 (Journal of Laws of 2021, item 2268, as amended). Among the types of nursing homes, there are homes for the elderly (Article 56 point 1). Generally, this Act uses the term “the elderly”, although it mentions the profession of “a caregiver of an elderly person.”

<sup>7</sup> For example, in Poland, primarily on the basis of the Act of 8 March 1990 on local government (Journal of Laws of 2022, item 559), as amended. See especially: Article 5c § 5 the Act of 8 March 1990 on Municipal Self-Government (Journal of Laws of 2022, item 559, as amended). Senior Councils are common in the municipalities. There is also a senior policy, understood as all activities of public administration bodies and other organisations and institutions that carry out tasks and initiatives that shape the conditions for dignified and healthy aging (Article 4 point 2 of the Act of 11 September 2015 on the elderly, Journal of Laws of 2015, item 1705).

<sup>8</sup> Article 31 section 1 of the Polish Constitution: “Freedom of the person shall receive legal protection”, section 2 sentence 2: “No one shall be compelled to do that which is not required by law.”

stitutional freedoms and rights have been granted a horizontal dimension,<sup>9</sup> which entails an obligation to respect the freedom of every human being – thus, also the elderly, not only by the state and its bodies but also by other people (citizens) and legal persons (and legal entities without legal personality) which are not part of the broadly understood public administration.<sup>10</sup> This seems particularly significant with reference to the elderly, as they often need inherently resulting special treatment. At the same time, it should also be strongly emphasised that the obligation to respect the freedom of every human being also – and, in many cases, first and foremost – applies to the representatives of the state administration, including the government, local government and court administration (or, more broadly, judicial authorities).

During the works on the currently binding constitutional regulations in Poland regarding admissibility of limitations upon the human and civil rights and freedoms, two opposing concepts have been taken into consideration – the first allowed for implementation of specific (sometimes even individual) possible limitations, while the other considered it appropriate to formulate a general clause.<sup>11</sup> The winning concept defined the general principles of admissibility of limitations, which is not without significance for the issue of granting (or not) the specific guarantees for protecting

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<sup>9</sup> Article 31 section 2 sentence 1 of the Constitution of the Republic of Poland: “Everyone shall respect the freedoms and rights of others.”

<sup>10</sup> It should be noted, however, that Article 31 section 2 sentence 2 of the Constitution of the Republic of Poland is actually a reversal of the regulation of Article 7 of the Constitution (specifying the principle of legalism), where the legislator stated that “The organs of public authority shall function on the basis of, and within the limits of, the law.” Essentially, this means that all widely-understood public authorities may only act as they are explicitly permitted or ordered by the law (thus expressed, not implied), whereas the citizens and – to a wider extent – people (i.e. everyone, including the elderly) may, in general, do anything that the law does not explicitly forbid or order them to do.

<sup>11</sup> See: K. Walczuk, *Komentarz do Article 31...*, *op. cit.*, p. 83–84, and the references made. See also: the constitution drafts prepared for print by R. Chruściak: *Projekty konstytucji 1993–1997. Część 1*, Warszawa 1997. On the formation of constitutional regulations, including those of interest to us, see: J. Zaleśny, *Tworzenie Konstytucji 1997. Przejaw kooperacji czy rywalizacji elit politycznych?*, “Przegląd Sejmowy” 2017, nr 6, pp. 193–202.

the freedoms and rights of the elderly. As the general principles of admissibility of limitations has been determined in general terms, the natural consequence is admissibility and, in some cases, even the necessity to implement or interpret admissibility with reference to individual social groups or individuals, especially since the regulations contained in Article 31 section 3 of the Constitution of the Republic of Poland do not actually provide a sufficiently unequivocal answer as to whether they constitute an independent authorisation to limit the constitutional rights and freedoms.<sup>12</sup> By

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<sup>12</sup> K. Walczuk, *Dopuszczalność ograniczeń konstytucyjnych praw człowieka ze względu na bezpieczeństwo ekologiczne państwa*, [in:] M. Karpiuk (ed.), *Stan prawny, zakres przedmiotowy, podmiotowy oraz funkcjonalny prawa bezpieczeństwa narodowego RP*, Warszawa 2013, p. 210. Whereby some legal scholars held the opinion that the provisions of Article 31 section 3 of the Polish Constitution, allowing for the general and broad limitations, are non-compliant with international and European regulations, and thus subject to depreciation. According to: T. Jasudowicz, *Rozważania ogólne*, [in:] T. Jasudowicz (red.), *Polska wobec europejskich standardów praw człowieka. Materials from the scientific conference of doctoral and undergraduate students of the Nicolaus Copernicus University in Toruń (NCU). W 50-lecie Europejskiej Konwencji Praw Człowieka i 10-lecie Katedry Praw Człowieka i Prawa Europejskiego UMK*, Toruń 2001, pp. 16–17. However, bearing in mind the hierarchy of the sources of law, in which the constitutional regulations take precedence over international and community (EU) law, it is difficult to agree with such an approach. Cf.: K. Walczuk, *The hierarchy of Polish state security laws from the perspective of European integration*, [in:] P. Sobczyk (ed.), *Security and Globalization in the Context of European Integration. Legal Aspects*, Hamburg 2017, pp. 53–66; K. Walczuk, *Umowy międzynarodowe i prawo europejskie w konstytucyjnej hierarchii źródeł prawa*, [in:] E. Kozerska, P. Sadowski, A. Szymański (red.), *Pacta sunt servanda – nierealny projekt czy gwarancja ładu społecznego i prawnego*, Kraków 2015, pp. 247–255. See also: K. Klíma, *Suverenita – ústavní význam*, [in:] K. Klíma a kol., *Encyklopedie ústavního práva*, Praha 2007, p. 628; W.J. Wołpiuk, *Niepodległość i suwerenność. Dystynkcje pojęciowe*, [in:] W.J. Wołpiuk (red.), *Spór o suwerenność*, Warszawa 2001, p. 95; M. Granat, *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2019, p. 94; L. Antonowicz, *Podręcznik prawa międzynarodowego*, Warszawa 1998, p. 39; L. Garlicki, *Konstytucyjne źródła prawa administracyjnego*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (red.), *System prawa administracyjnego. Vol. 2. Konstytucyjne podstawy funkcjonowania administracji publicznej*, Warszawa 2012. See also: judgments by the Polish Constitutional Tribunal: dated 27 April 2005 (case file No. P 1/05); dated 11 May 2005 (case file No. K 18/04); dated 24 November 2010 (case file No. K 32/09). Judgments by the Polish Constitutional Tribunal are available under the following address: <http://otk.trybunal.gov.pl/orzeczenia/> [accessed



way of interpretation, one should opt for the claim that Article 3 section 3 of the Constitution of the Republic of Poland does not essentially constitute an independent basis for limiting the constitutional freedoms and rights,<sup>13</sup> it only specifies the impassable limits of interference which may be specified “only statutorily” and extended exclusively in regulations of constitutional importance,<sup>14</sup> whereby it may – in a way conditionally – applicable directly, provided that it is compliant with formal requirements<sup>15</sup> in cases where there are no individual, i.e. referring to a particular freedom or right, constitutional regulations specifying the individual conditions of the substantial admissibility of the limitations.<sup>16</sup>

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on: 24.08.2022]. Cf. K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 81–83, with the comment in: K. Walczuk, *Comment to Article 31...*, *op. cit.*, pp. 89–92.

<sup>13</sup> As, however less strict: K. Wojtyczek, *Granice...*, *op. cit.*, p. 82. Cf.: K. Walczuk, *Comment to Article 31...*, p. 91.

<sup>14</sup> Cf.: K. Walczuk, *Dopuszczalność...*, *op. cit.*, p. 393; M. Wyrzykowski, *Granice praw i wolności – granice władzy*, [in:] *Obywatel – jego wolności i prawa. Zbiór studiów przygotowanych z okazji 10-lecia urzędu Rzecznika Praw Obywatelskich*, Warszawa 1998, p. 57.

<sup>15</sup> The Polish Constitution distinguishes one formal requirement – the necessity of introducing limitations upon constitutional freedoms and rights in the provisions of statutory importance. This entails the necessary participation of the directly elected representatives of the sovereign (in Poland, the sovereign is the Nation, pursuant to Article 4 section 1 of the Constitution of the Republic of Poland), i.e. deputies and senators, constituting the legislative authority. However, it would be far-fetched to conclude that non-legislators have been completely excluded from the process of limiting freedoms and rights. It is especially significant from the perspective of regulating the legal standing of the elderly, as it is admissible for the parliament (i.e. the lower house – Sejm and the upper house – Senate in Poland) to statutorily determine the scope of limitations and to impose on the executive authority (in Poland, it is the Council of Ministers, i.e. the government and the President of the Republic of Poland) the duty to issue the executive acts, or the duty to issue the local law acts (which also constitute the generally applicable legislation, although only in the territory of the organs issuing them – see Article 87 section 2 of the Constitution of the Republic of Poland) on the local government bodies, in order to carry out statutory provisions. Another approach to the formal aspect of limiting constitutional human and civil rights and freedoms, see: M. Ławrynowicz-Mikłaszewicz, *Koncepcja istoty wolności i praw jednostki oraz aspekt formalny ich ograniczenia*, “Przegląd Prawa Konstytucyjnego” 2014, nr 4(20), pp. 73–91.

<sup>16</sup> See and cf.: K. Walczuk, *Comment to Article 31...*, *op. cit.*, p. 93.

It is worth noting that the constitutional freedoms and rights are manifestations of a single freedom stemming from “the inherent and inalienable dignity of the person” (Article 30 of the Constitution of the Republic of Poland)<sup>17</sup> and resulting from natural law.<sup>18</sup> We also cannot forget, however, that according to the view established among commentators on constitutional law, the definition of freedom in the Constitution of the Republic of Poland of 1997 covers three different though – to some extent – overlapping scopes.<sup>19</sup> In the broadest understanding, “freedom” is a general liberty to decide about oneself (i.e. as specified above with reference to the regulations in Article 31 section 1 and 2 in accordance with the assumptions adopted in the preamble to the Constitution of the Republic of Poland). In a narrower sense, “freedom” seems to denote a certain group of rights of an individual,<sup>20</sup> and it should be assumed that this is the meaning in which the term was used in Article 31 section 3 and other relevant regulations. On the other hand, “freedom” in its most narrow meaning denotes a solely personal inviolability, as specified in Article 41 of the Constitution of the Republic of Poland. This interpretation is complemented by the following assumption: if a constitutional norm generally authorises the legislator to limit a particular freedom or particular right without indicating the prerequisites for such limitation, the prerequisites contained in Article 31 section 3 of the Polish Constitution shall apply.

Taking into account the nature of the legal regulations concerning the elderly, it should be assumed that when certain circumstances,

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<sup>17</sup> *Ibidem*, pp. 82, 87.

<sup>18</sup> See for example: D. Dudek, *Konstytucja...*, *op. cit.*, p. 21; K. Walczuk, *Prawa człowieka a prawo naturalne*, [in:] M. Fałdowska, A.W. Świdorski, G. Wierzbicki (red.), *Kultura bezpieczeństwa. Potrzeby i uwarunkowania*, Vol. 3, Siedlce 2016, pp. 99–119; L. Wiśniewski, *Prawo a wolność człowieka. Pojęcie i konstrukcja prawna*, [in:] L. Wiśniewski (red.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, p. 58; J. Kalinowski, *Zagadnienia aksjomatyzacji nauk prawa*, “Roczniki Nauk Społecznych” 1958, nr 1, p. 39. Cf.: resolution of the Polish Constitutional Tribunal dated 2 March 1994, case file No. W 3/93.

<sup>19</sup> Sometimes even considered as three different definitions of freedom. See the remarks of: K. Walczuk, *Comment to Article 31...*, *op. cit.*, p. 84.

<sup>20</sup> Cf.: D. Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie*, Lublin 2000, p. 81.

or even the whole area of social and political life, have not been regulated in the provisions concerning particular constitutional freedoms and rights (of a human being and a citizen), the guarantee of individual freedom of action<sup>21</sup> can be derived directly from the quoted Article 31 section 1 and 2 of the Constitution of the Republic of Poland. Such reasoning is confirmed by judicial decisions of the Constitutional Tribunal (hereinafter PCT), pursuant to which Article 31 section 1 “complements the provisions defining individual constitutional freedoms”<sup>22</sup> and constitutes *Lex generalis* in relation to the provisions governing constitutional freedoms and rights.<sup>23</sup>

In any case, we must not forget that neither the states operating within the international public sphere (contracting primarily in the form of international agreements and by adopting EU law), the drafters of national constitutions nor ordinary legislators can limit the fundamental freedoms and rights at their own discretion. As the nature of fundamental rights and freedoms has been assigned to natural law, the role of the legislator – a positive legislator – is primarily only to “affirm the existence of this freedom, define its fundamental aspects and establish the indispensable guarantees and necessary limitations.”<sup>24</sup>

The above is reflected in the constitutional requirement for introduction of certain limitations of a particular freedom or right. This requirement can be limited to the application of the meta-principle,<sup>25</sup> as the constitutional principle of proportionality is referred to. The sole principle, however, does not guarantee the

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<sup>21</sup> Unlike the possibility to impose limitations on constitutional freedoms and rights.

<sup>22</sup> Judgment by the Polish Constitutional Tribunal dated 20 December 1999, case file No. K 4/99; judgment by the Polish Constitutional Tribunal dated 04 November 2015, case file No. K 1/14.

<sup>23</sup> Judgment by the Polish Constitutional Tribunal dated 07 May 2002, case file no. SK 20/00.

<sup>24</sup> Resolution of the Polish Constitutional Tribunal dated 02 March 1994, case file No. W 3/93.

<sup>25</sup> See: A. Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka*, Wrocław 2019, p. 23. See also: M. Safjan, *Introduction*, [in:] M. Safjan, L. Bosek (eds.), *Constitution of the Republic of Poland. Vol. I. Comment to Article 1–86*, Warsaw 2016, p. 37.

respect for freedom and rights. Its essence lies in prohibiting excessive intervention (first and foremost of the broadly defined state), i.e. acknowledging that if it is truly necessary to impose limitations upon the rights and freedoms of an individual, this can only be done to the minimum extent truly necessary, and the primary measure for determining such necessity is comparing the significance of the public interest that such limitation is intended to serve and the right or freedom such limitation is to affect.<sup>26</sup> The constitutional imperative to respect the essence of individual freedoms and rights is also not without significance here.<sup>27</sup>

#### 1.4. The Elderly as Subject to Constitutional Freedoms and Rights. Inherent Nature, Dignity, Equality

It should be stated at the very beginning of this analysis that the elderly have all the subjective qualities that allow them to enjoy general constitutional freedoms and rights. Although this observation is seemingly obvious, it constitutes a starting point for further considerations which are to answer the question of whether any special freedoms and special rights have been, or should be, granted to the elderly.

Constitutional freedoms and rights, also broadly defined as human rights, are characterised by certain attributes that can also be applied to the elderly and their freedoms and rights. These are directly derived from the recognition of the norms of natural law: inherent nature, dignity and equality.<sup>28</sup>

The first of the indicated elements – inherent nature – means every human being possesses special freedoms and rights (is subject

<sup>26</sup> See: K. Walczuk, *Comment to Article 31...*, *op. cit.*, p. 99.

<sup>27</sup> Article 31 section 3 Constitution of the Republic of Poland.

<sup>28</sup> See: T. Majerčák, *Ústavná koncepcia osobných práv a slobôd*, “Prány obzor” 2008, Nr 1(91), p. 16; M. Piechowiak, *Filozofia praw człowieka*, Lublin 1999, p. 115. Although it seems, for example, M. Freeman denies the inherent nature of human rights. See: *Prawa człowieka*, Warszawa 2007, pp. 76–77.

to them) due to the very fact of being human<sup>29</sup> since the beginning of their existence.<sup>30</sup> The claim that “the concept of a human being is undetermined to some extent” is completely incomprehensible. In the most general terms, it suggests a certain stage of biological and psychological development. It is difficult to associate it with the early stage right after birth or with the final stage of one’s life. The initial level of development is usually described with expressions like an infant, a baby or even “a little man”. When speaking about the elderly, the following phrases are used: an elder, an old man, even “it was a man”.<sup>31</sup>

Quite often, the inherent nature is only assigned to freedoms but denied its rights, as conferred by the positive legislator on their own volition. Sometimes, the fundamental freedoms are considered (especially by some legal scholars and academics) as “cultural achievement and accomplishment”,<sup>32</sup> or the conclusion of a social contract is considered a condition for their recognition; alternatively, it is left to the discretion of the sovereign, which is actually equivalent to denying their inherent nature. However, taking into account that, in principle, the rights are granted based on freedoms which, in my opinion and, it seems, according to the view of most legal scholars, are of an inherent nature, it should be assumed that

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<sup>29</sup> See: J. Donnelly, *The Concept of Human Rights*, London 1985, pp. 1–6; M. Chmaj, [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J.Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa w Polsce, Vol. I. Zasady ogólne*, Kraków 2002.

<sup>30</sup> Which should essentially be considered the moment of conception. See: D. Dudek, *Konstytucja i prawo konstytucyjne*, Lublin 2010, p. 27; K. Walczuk, *Przyrodzony charakter...*, *op. cit.*, p. 115. Some consider birth as the moment when rights and freedoms are granted. For reflection on this topic in the context of international regulations, see: T. Jasudowicz, *Prawo do życia*, [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona. Podręcznik dla studentów prawa i administracji*, Toruń 2005, pp. 241–244.

<sup>31</sup> K. Complak, *O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP*, [in:] B. Banaszak, A. Preisner (red.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 64.

<sup>32</sup> See: A. Łopatka, *Międzynarodowe prawo praw człowieka. Zarys*, Warszawa 1998, p. 10. Interestingly, when expressing the cited view, A. Łopatka states, at the same time, that the source of human rights is “the inherent dignity of a human being.”

in the case of some rights, it is appropriate to leave a certain option allowing to affirm their inherent nature. Even more so, theoretical division into freedoms and rights is not unambiguous, and thus sometimes, it is debatable.

Freedoms and rights of an inherent nature also granted to the elderly may not be treated only as positive rights (granted by state or international legislator); however, their positivisation undoubtedly facilitates their implementation, realisation and protection,<sup>33</sup> also due to the real opportunity for imposing sanctions should the provisions in question not be observed.

The other element – dignity (of a human being) – is of fundamental importance in understanding the essence of a human being and their place in reality, also social and legal. This value is the starting point for the recognition of the constitutional freedoms and rights of an individual. As such, it is also one of the foundations of a democratic state of law<sup>34</sup> and “provides every human being with protection from being objectified, constitutes a premise for the comprehensive development of personality”,<sup>35</sup> and although related to the right to life, equally affecting every human being, from conception until death, including death from old age, it is not limited solely to the right to life.<sup>36</sup>

Provisions of law contain various definitions on the subject of dignity. For example, the introduction to the Universal Declaration of Human Rights speaks of “all members of the human family”,

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<sup>33</sup> The preamble to the Universal Declaration of Human Rights of 1948 rightly states that “it is essential that human rights should be protected by the rule of law”, <http://libr.sejm.gov.pl/teko1/txt/onz/1948.html> [accessed on: 23.8.2022].

<sup>34</sup> The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice (Article 2 of the Constitution of the Republic of Poland).

<sup>35</sup> M. Chmaj, *Godność człowieka jako źródło jego wolności i praw*, [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J.Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa w Polsce. Vol. I. Zasady ogólne*, Kraków 2002, p. 73. See also: D. Dudek, *Konstytucja i prawo konstytucyjne...*, *op. cit.*, p. 26.

<sup>36</sup> See: J. Filip, *Vybrané kapitoly ke studiu ústavního práva*, Brno 2001, p. 66. See also: V. Zoubek, *Svoboda, rovnost v důstojnosti a rovnost v právech (rovnoprávnost)*, [in:] A. Gerloch, J. Hřebejk, V. Zoubek, *Stan systém České Republiky. Základy českého ústavního práva*, Praha 1999, p. 307.

whereas the phrase “all human beings” has been used in Article 1 thereof. It is characteristic, however, that the legislator does not actually define the concept of human dignity. They probably assume that it is sufficiently clear from the culture (thus also philosophy and religion) in general,<sup>37</sup> both that of the whole of Europe and the culture of particular states. Another issue is that the disputes over “European values” have proven to be significant discrepancies in understanding European culture and its foundations.<sup>38</sup>

When defining the concept of human dignity for practical reasons (application of law), two commonly used classic concepts should be indicated originating from religion and their associated Greek, Roman and, in particular, Jewish-Christian culture:

- 1) personality-based (empirical), stating that dignity is a value (element of personality) which may be acquired and then developed or lost or might never have been obtained, and
- 2) person-oriented (axiological-ontic),<sup>39</sup> which every human being is entitled to from the very beginning (inherent nature), and thus characterised primarily by inviolability, regardless of the actions of the person or the acts of others; it is also non-transferable, inalienable and non-degradable.
- 3) These are usually complemented with personal dignity, specified as “in a sense, dignity in horizontal interpersonal action: our sense of what we mean and what is due to us, and the

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<sup>37</sup> Cf.: T. Romer, *Godność człowieka w prawie pracy i pomocy społecznej*, [in:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa 2003, p. 59. See: D. Dörre-Nowak, *Ochrona godności i innych dóbr osobistych pracownika*, Warszawa 2005, p. 3.

<sup>38</sup> See, for example: K. Walczuk, *Filozoficzne i prawne zagadnienia dotyczące preambuły Konstytucji Unii Europejskiej*, [in:] A. Wentkowska (red.), *Fundamenty nowego porządku konstytucyjnego UE. Aspekty prawne, polityczne i ekonomiczne*, Sosnowiec 2005, pp. 43–49, with footnotes.

<sup>39</sup> See: J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (red.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, pp. 39–42. See also: S. Zieliński, *Rozumienie godności człowieka i jej znaczenie w procesie stanowienia i stosowania prawa. Propozycja testu zgodności regulacji prawnych z zasadą godności człowieka*, “Przegląd Sejmowy” 2019, nr 4(153), pp. 108–125.

expectation that this will be recognised and respected by others.”<sup>40</sup> Personal dignity may be violated by the improper actions of another entity, most often meaning violation of personal rights.<sup>41</sup> This is considered in individual terms and as such may not be treated as the source of freedoms and rights of an individual indicated in Article 30 of the Constitution of the Republic of Poland. Thus, despite the undoubted impact on the elderly, this remains beyond our interest. The value we are going to refer to is personal dignity, understood as stated above.

As a result, it is reasonable to identify dignity with humanity and assume that due to the inherent human dignity, it should be considered a goal in itself,<sup>42</sup> a primary objective, which may not be reduced to a means to achieve goals that are detrimental to the essence of the concept of dignity, e.g. reducing a person to a means to satisfy the need for utility in any form.<sup>43</sup> The last stipulation seems to be of particular significance with reference to the elderly, who, inherently, as the years go by, usually need more attention and assistance from other people and organisations (including the state) than

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<sup>40</sup> T. Jasudowicz, *Konstrukcja normatywna międzynarodowo chronionych praw człowieka*, [in:] Gronowska B., Jasudowicz T., Balcerzak M., Lubiszewski M., Mizerski R., *Prawa człowieka i ich ochrona. Podręcznik dla studentów prawa i administracji*, Toruń 2005, p. 92. See also: M. Piechowiak, *Klasyfikacja koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka*, [in:] P. Dardziński, F. Longchamps de Bérier, K. Szczucki (red.), *Prawo naturalne – natura prawa*, Warszawa 2011, pp. 3–20. It is worth quoting here the view expressed by E. Łętowska in her dissenting opinion against the judgment by the Polish Constitutional Tribunal dated 30 October 2006 (case file No. 10/06), pursuant to which “personal dignity”, mentioned in Article 30 of the Constitution of the Republic of Poland, should not be identified “with the object of protection which is ‘honour’ – whether under criminal law or civil law (within the context of protection of personal rights)”. For more on these concepts, see: K. Walczuk, *Przyrodzony charakter...*, pp. 120–122.

<sup>41</sup> See, for example: the ruling by the Polish Supreme Court dated 27 June 2012 (case file No. IV CSK 389/11).

<sup>42</sup> See: I. Kant, *Uzasadnienie metafizyki moralności*, Warszawa 1972, p. 58. See also: M. Piechowiak, *Pojęcie praw człowieka*, [in:] L. Wiśniewski (red.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, p. 18.

<sup>43</sup> See: K. Walczuk, *Przyrodzony charakter...*, p. 121.



they are able to return; thus, they are less useful from a utilitarian point of view. Defining a human being as a goal in itself is especially important from a practical point of view (decision-making) that the content of each law and freedom contains a certain root of content which may not be violated, as it constitutes *conditio sine qua non* of the rule of dignity.<sup>44</sup>

Another fundamental element is equality, especially important in democratic states (and civic societies). In many respects, it is the same as prohibition of discrimination, although some legal scholars distinguish between these two concepts.<sup>45</sup> Equality also refers both to the contents or, in fact, the scope of the granted (expressed) rights and freedoms (entitlements) and the source of their origin. This means that identical (i.e. equal) rights have been granted to all people to the same extent, especially as they originated from the same source, namely human dignity. However, an important reservation should not be overlooked – the principle of equality does not mean everyone is to be treated in the same way, and equality before the law should be understood as treating all entities characterised by the same quality to an equal degree equally and thus using equal measure. However, sometimes so-called positive discrimination is allowed, consisting in actively preferring certain groups, when necessary, in order to bring about actual equality.<sup>46</sup> Moreover, on numerous occasions, introducing such a distinction has actually been the essence of a particular law. For example, this is the case in women's rights related to childbirth – also stemming

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<sup>44</sup> Judgment by the Polish Constitutional Tribunal dated 30 October 2006, case file No. 10 06. See also: L. Garlicki, *comment to Article 30*, [in:] *The Constitution of the Republic of Poland Komentarz, Vol. I*, Warszawa 1999, note 2.

<sup>45</sup> Cf.: K. Walczuk, *Przyrodzony charakter...*, *op. cit.*, pp. 125–126.

<sup>46</sup> *Ibidem*, pp. 126–127; R. Wieruszewski, *Zasada równości i niedyskryminacji*, [in:] *Prawa człowieka. Model prawny*, Wrocław–Warszawa–Kraków 1991, pp. 76–77; L. Wiśniewski, *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, [in:] K. Działocha (red.), *Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny*, Warszawa 2004, p. 99; J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000, pp. 269–270, 282; B. Banaszak, *Prawa człowieka i obywatela w nowej Konstytucji Rzeczypospolitej Polskiej*, “Przegląd Sejmowy” 1997, nr 5(22), p. 60.

from the inherent and inalienable human dignity, specific rights of the children themselves or of the parents towards (in relation to) their own children<sup>47</sup> or the rights related to age and access to particular health benefits, etc.

We may distinguish between equal rights and equality before the law, whereas equality before the law is, in a way, derived from equal rights. Equal rights derived from inherent human dignity, thus having its source in natural law, obliges or mandates the application of equality before positive law.<sup>48</sup> Equality before the law may be understood as the application of a given legal norm in all cases in which positive law provides for its application.<sup>49</sup>

The elderly, as subjects of freedoms and rights of a human being and a citizen, fully enjoy the indicated attributes which characterise those freedoms and rights. At the same time, it is important to remember that the elderly have certain age-related qualities resulting in – despite the general equality – special treatment, especially in terms of extended guarantees of freedoms and rights, but also – as presented in more detail in the further, concluding argument – in terms of limitations.

### 1.5. Summary of Applicable Law (*de lega lata*) and Conclusions for Future Law (*de lege ferenda*)

Although in many respects based on regulations of a constitutional nature, the presented considerations are largely theoretical in nature. This is due to the fact that they refer to fundamental questions. Nevertheless, they have significant practical potential, consisting in, among others, providing argumentation, on the one hand, to the entities protecting the freedoms and rights of the elderly and, on the other hand, e.g., to the representatives of public authorities

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<sup>47</sup> See: K. Walczuk, *Przyrodzony charakter...*, *op. cit.*, p. 127.

<sup>48</sup> *Ibidem*, p. 128.

<sup>49</sup> M. Piechowiak, *Pojęcie praw człowieka...*, *op. cit.*, p. 23.

(both on the state/domestic and international/community level)<sup>50</sup> guarding public order and security.

Taking into consideration the current political and legal circumstances, especially in the context of continuous threat from aggressive states such as Russia (*vide* full-scale war with Ukraine started in 2022) and Belarus (*vide* migrant movement resulting in the migration crisis on the borders with Poland and Lithuania, initiated in 2021) and epidemiological situation (*vide* the worldwide situation related to the COVID-19 coronavirus), it seems appropriate, on the one hand, to leave considerable freedom in shaping the understanding of particular freedoms and rights to the entities applying certain legal provisions; however, on the other hand - as learned, for example, from the experience with distorting the meaning (understanding) of the content of constitutional regulations regarding marriage, which did not raise any doubts for years and only recently, as a result of subversive movements, they have had a radically different meaning assigned to them – the immutability (permanence) of the meanings attributed to fundamental freedoms and rights could be considered a value subject to special protection.

Without doubt, the elderly enjoy inherent and inalienable dignity, constituting the source of all fundamental freedoms and rights. They also enjoy the attribute of equality: equal rights and equality before the law. However, due to their specific position, resulting from their age, the scope of these freedoms, and especially rights, must be properly modified in order to achieve equality in practice – in certain situations, it is necessary to apply the so-called positive discrimination, e.g. in the field of health protection or in situations where, due to age, a person is not able to undertake certain actions (and thus have full control of their legal and factual situation) – e.g. service in the military or in other (especially armed) formations. As a result, the attributes defining the position of the elderly in terms of freedoms and rights affect the implementation of the regulation

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<sup>50</sup> Broadly speaking. See and cf.: K. Walczuk, *Bezpieczeństwo publiczne, próba definicji*, [in:] M. Karpiuk, K. Walczuk (red.), *Prawo bezpieczeństwa publicznego*, Warszawa 2013, pp. 11–22.

contained in Article 31 section 3 of the Constitution of the Republic of Poland.

Special protection of the elderly based on the said provision will not be of an extensive nature; on the contrary, it will be limited to certain issues. As highly sensitive entities, the elderly may encounter statutorily sanctioned limitations, arising, for example, from the necessity to care for public health, which was seen in practice in many countries of the world (including Poland) during the COVID-19 pandemic. Both *de lege lata* and *de lege ferenda*, any limitation upon the constitutional freedoms and rights requires individual assessment, and especially in the case of the elderly, it may not be assumed that – by definition – it violates the essence of the freedom or right in question or violates (is against) the attributes defining subjectivity in the sphere of human rights.

As for future law, on the grounds of Polish law and within the appropriate scope of European law, there are no general contraindications to the introduction of limitations upon the exercise of constitutional freedoms and human and civil rights appurtenant to older persons, as long as the said limitations are compliant with the disposition indicated in Article 31 section 3 of the Constitution of the Republic of Poland or do not result from *lex specialis* of a constitutional nature and respect the inherent dignity of human beings in line with the principles of equal rights and equality before the law, as outlined above.

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## Chapter 2. The Rights of Older Persons: Protection and Gaps in Public International Law

### 2.1. Introduction

On 12 May 2021, Michele Bachalet, at that time the United Nations High Commissioner for Human Rights, within the framework of a virtual debate concerning human rights of older persons, emphasised that: “Every life has equal value. Our rights do not diminish with age.”<sup>1</sup>

The preamble of the 1948 Universal Declaration of Human Rights<sup>2</sup> (hereinafter referred to as UDHR) says that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Article 1 of the same document declares that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. It is undisputed that human dignity without discrimination is a right of everyone, not only a fundamental and universal right in itself, but it constitutes the real basis of all fundamental rights. Nevertheless,

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<sup>1</sup> <https://www.ohchr.org/en/older-persons>.

<sup>2</sup> [https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf).

it is a fact that the difficulty and dependency in preserving this dignity is changing from one human being to another depending on the country and the circumstances they are born into, as well as the life conditions and medical status they are born with, etc. Moreover, the question of preserving dignity does not only arise if we consider separate lives, but it is there emphatically during the life of one individual from the moment they are conceived until the moment they are buried, and due to the nature of human life, the level of the support and the strength of “brotherhood” that is needed for a dignified life varies as well. It is without question that, after birth, a human cannot survive without the physical support of adults, and this support is their inherent right for preserving human dignity. To put it simply, this is the guarantee of one’s fundamental right to live. With the passing of time, different human rights come to life, such as the right to education, right to work, right to marry and have a family, right to social security, right to rest and holiday, right to own things, right to be equal before the law, etc., all in order to support the flourishing of human dignity throughout one’s lifetime. Therefore, it should be unquestionable that aging does not gradually erase one’s human dignity; it only calls on the family, society and the legislator for more support.

Independently on which part of the world we live in, it is a fact that our society is aging. This is even more tangible if we are citizens of Western society and live in Europe or North America. According to the United Nations, due to the projected overall fertility, population ageing will continue at high levels globally, and by 2050, 22% of the world’s total population will be 60 years of age or over.<sup>3</sup> Currently, Europe has the highest percentage (24%) of population 60 years of age or over; however, rapid aging will occur in other parts of the world as well.<sup>4</sup> All major areas of the world, except for Africa, will have nearly a quarter or more of their populations 60 years of age or over by 2050.<sup>5</sup> Apart from the data of the UN, this is very

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<sup>3</sup> United Nations: World Population Prospects.

<sup>4</sup> *Idem* at 2.

<sup>5</sup> *Idem* at 2.



much underlined by national data. For instance, the aging index,<sup>6</sup> published by the Hungarian Central Statistical Office,<sup>7</sup> is constantly increasing. In 2020, in the area of Budapest, it amounted to 153%.<sup>8</sup> This phenomenon is transforming many aspects of society and is posing new economic, social and legal challenges, which calls on international and national regulators to create new laws and amend existing legal frameworks in order to offer effective protection to the elderly.

My first paper<sup>9</sup> on this topic will cover the responsibilities of the international regulator and will look closer at the issue from the perspective of international human rights law. The first part of this paper examines the existing public international law framework of protection of the elderly as a first step analysing the nature of human rights of the elderly, afterwards listing the binding, as well as the non-binding legal instruments of protection. Unlike, for instance the rights of a child, the rights of elderly people are not regulated in a separate international convention. The Convention on the Rights of Persons with Disabilities (hereinafter referred to as CRPD) offers perhaps the most useful form of protection; therefore, the paper covers the CRPD in a deeper manner compared to the other international law instruments, and it will also examine the monitoring

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<sup>6</sup> The aging index expresses the ratio of the elderly population (ages 65–X) to the population of children (ages 0–14). It is the most important indicator of the change in the age composition of the population and the aging process, which is of particular importance from the point of view of the demographic future.

<sup>7</sup> <https://www.ksh.hu/?lang=en>.

<sup>8</sup> Data of the Hungarian Central Statistical Office, [https://www.ksh.hu/thm/2/indiz\\_1\\_2.html](https://www.ksh.hu/thm/2/indiz_1_2.html).

<sup>9</sup> As part of the research project, I will prepare a second Article that will examine and which will focus on the existing Hungarian legal background of protection, with a special regard to the implementation of Article 12 of the CRPD. The research paper will cover the following questions:

- regulation of legal capacity under Act V of 2013 on the Civil Code (hereinafter referred to as the Civil Code);
- regulation of guardianship under the Civil Code;
- procedures initiated to ensure guardianship under Act CXXX of 2016 on the Civil Procedure Code, preliminary juridical act;
- *de lege ferenda* proposals on ensuring the full legal recognition of elderly persons, especially elderly persons with disability.

of the CRPD and the work and the soft law instruments issued by the Committee on the Rights of Persons with Disabilities, and finally it will try to investigate the need for a separate rights-based international law instrument that focuses merely on the protection of the elderly in order to conclude in *de lege ferenda* recommendations for the international legislator.

## 2.2. Definition and Nature of Elderly Rights

When commencing involvement in a discussion on the rights of the elderly, the very first question arising is the definition of the elderly. Even regarding the terminology,<sup>10</sup> one may find several options, such as “elderly”, “aged person”, “seniors”, “the aged” or the “third age”.<sup>11</sup> This is so even in international documents. In 1995, in its General Comment No. 6 on ‘the economic, social and cultural rights of older persons’, the Committee on Economic, Social and Cultural Rights (hereinafter referred to as: CESCR) opted for older persons;<sup>12</sup> nevertheless, this is not used consequently.

Looking at the age bracket, the legislator faces even bigger challenges. From a political-legal point of view, the category of the elderly is defined according to the criterion of chronological age.<sup>13</sup> Age, defined as the time elapsed from the birth of a person to a certain time of observation, constitutes a significant demographic variable: according to it, each state fixes the rights and obligations associated with the status of a citizen (compulsory schooling, majoring, entry into the labour market, retirement, etc.).<sup>14</sup>

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<sup>10</sup> This Article makes no definite choice, regarding terminology and uses older person, the elderly, etc. with the same meaning, as people part of a vulnerable group as a result of aging and needing legal protection.

<sup>11</sup> Md Abdul Malek, *Rights of Elderly: An Emerging Human Rights Discourse*, “International Journal of Law and Management” 2017, No. 10, p. 285.

<sup>12</sup> CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Person, p. 3(11).

<sup>13</sup> M. Constantinescu, A.L. Cercel, *Ageing and Quality of Life in Elderly People*, “Revista Universitară de Sociologie” 2019, Vol. 2029, No. 110, p. 115.

<sup>14</sup> *Idem* at 10.

As a thought experiment, it is worth drawing a parallel between the definition of the elderly and the definition of children. When drafting the Convention on the Rights of a Child (hereinafter referred to as CRC),<sup>15</sup> one of the biggest challenges was the question of the definition; more precisely, how to define and delimit something universally that can be so fragmented in the light of geographical, cultural or religious factors and is so dependent upon the own characteristics of the individual. Regarding children, however, science (e.g. neurology, psychology) measuring the average development of the brain and the nervous system has given more support, and the age of 18,<sup>16</sup> as the end of the childhood, seemed to be a realistic global consensus, even though it is obvious that the life-stages of a human cannot be divided upon the basis of the number of candles on a birthday cake. The case is a bit more complex regarding the elderly, and to give a universal definition is even a greater challenge, as at this point, the geographical and cultural factors, as well as all other factors stemming from the characteristics of individual genetics, lifestyle, etc., are intensified and push a probable consensus further. One could say that a universally applicable definition of what constitutes “the elderly” is still a far cry.<sup>17</sup> Nevertheless, if we look at the data of the United Nation or the Hungarian Central Statistical Office, we see an implicitly uniform age limit at 60 and 65, whereas these numbers are to be considered only as implications that ease the collection of representative data and not something that shall lead nor the legislator nor the supporting system for the elderly.

Regarding the nature of elderly rights, two factors are inevitable and shall be underlined. One is the fact that the elderly are considered a disadvantaged or vulnerable group, and the other is the enhanced danger of discrimination against them.

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<sup>15</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>16</sup> It is worth noting at this point that in order to reach a common consensus on the definition of children, the CRC does not cover the beginning point of childhood, as this particular question would lead to a dispute which would jeopardise the acceptance of the CRC.

<sup>17</sup> *Idem* at 9.

The image of the elderly is not always a favourable one, and this time of life can be a qualitatively different experience for each person, as the quality of life of the elderly is influenced by emotional, cognitive, physiological, economic and interpersonal factors.<sup>18</sup> However, it is most definitely a vulnerable period, with a lot of physical and psychological difficulties, even if we consider a relatively healthy individual; therefore, the preservation of inherent human dignity even in this period calls for strengthened human rights protection.

The 2009 General Comment No. 20 of the CESCR on non-discrimination in economic, social and cultural rights identifies discrimination as a factor that “undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population”. General Comment No. 20 lists age as a prohibited ground for discrimination. Even though the core international treaties do not explicitly mention prohibition of discrimination on the basis of age, General Comment No. 6 of the CECSR emphasises that “the unacceptableness of discrimination against older persons is underlined in many international policy documents and is confirmed in the legislation of the vast majority of states.” Elderly rights are typically a group of rights where positive discrimination is a way to address vulnerability, which is an acceptable direction in order to strengthen the human rights of elderly people as long as the measures securing it are “reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved”. In some cases, however, these measures need to be of a permanent nature in order to have the ability to continuously maintain equality (i.e. interpretation services for linguistic minorities or barrier-free access for disabled persons). The rights of the elderly are typically a field where permanent positive discrimination shall be considered to some extent.

When analysing the nature of elderly rights, one shall conclude that whenever taking into consideration the regulation with the aim of safeguarding these rights, the protective and enabling nature of

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<sup>18</sup> *Idem* at 7, p. 117.

the law<sup>19</sup> shall be enhanced. The other aspect worth highlighting derives from the fact that in human rights systems, rights are traditionally classified on the type of rights that are protected.<sup>20</sup> Civil and political rights – being in one group – require immediate protection together with a strong international supervision, while economic, social and cultural rights are monitored through general reporting.<sup>21</sup> Economic social and cultural rights are often considered as goals and aims and are more connected to political processes and economic resources and not directly to judicial activity.<sup>22</sup> The rights of the elderly are usually placed in treaties that protect economic, social and cultural rights;<sup>23</sup> nevertheless, one might be mistaken if accepting them as being merely part of this group, as such depending upon political and economic resources,<sup>24</sup> especially from their nature of being protective of a vulnerable group, where states are obliged to ensure their non-discrimination from a human rights perspective. In such meaning, elderly rights therefore contain both economic, social and cultural, as well as civil and political, rights, which require political, economic and judicial activity. They are the rights of a vulnerable group and – as already discussed above – require targeted human rights protection with positive discriminatory measures.

### 2.3. Existing Protection in Public International Legal Instruments (excluding the CRPD)

For the time being, there is no international law instrument that would solely focus on the rights of the elderly. Nevertheless, there are several binding and non-binding soft law instruments of public

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<sup>19</sup> M.A. Sommerville, *Law, Aging and the Elderly*, “Legal Medical Quarterly” 1980, No. 17.

<sup>20</sup> D. Rodríguez-Pinzón, C. Martín, *The International human rights status of elderly persons*, “American University International Law Review” 2003, No. 18, p. 918.

<sup>21</sup> *Idem* at 18.

<sup>22</sup> *Idem* at 18.

<sup>23</sup> *Idem* at 18.

<sup>24</sup> *Idem* at 18, p. 922.

international law that can be invoked and referred to when seeking to understand the protection of the human rights of older persons.

As far as the binding instruments are concerned, they may be divided into two group. In the first group, on the one hand, there are the foundational human rights instruments that provide the basis of human rights and, as such, are the root of the human rights of the elderly as well: the UDHR,<sup>25</sup> the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR). On the other hand, there are the regional human rights treaties or the treaties that are adopted under the supervision of special agencies of the United Nations (not necessarily, and specifically human rights treaties).<sup>26</sup> Each of these contains provisions that are of particular importance for old age.<sup>27</sup>

Article 25 of the UDHR declares that: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

Neither the ICCPR nor the ICESCR explicitly mentions age within the meaning of old age,<sup>28</sup> but both offer generic protection of cultural, economic, social, civil and political rights,<sup>29</sup> which – as highlighted by the CDESCR – equally protects the elderly. The CDESCR

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<sup>25</sup> Whereas the UDHR is not a legally binding instrument, it contains principles and rights that are based on human rights standards enshrined in other legally binding international instruments that are legally binding. Therefore, and taking into account its foundational nature, it is discussed among binding documents.

<sup>26</sup> This article – as mentioned in the introduction – aims to provide an overall picture on international law protection; therefore, at this point, merely the foundational human rights treaties, the treaties adopted within the framework of the ILO and from regional human rights treaties, the European Convention on Human Rights and the Revised European Social Charter of 1996 is discussed.

<sup>27</sup> M. Fredvang, S. Biggs, *The rights of older persons: Protection and gaps under international human rights law*, August 2021, Center of Public Policy, p. 10(25).

<sup>28</sup> Both documents mention age in the context of children.

<sup>29</sup> *Idem* at 22.

also underlined that even though discrimination on the basis of age is not included in these instruments, it would be a mistake to explain it as an intentional exclusion. “The omission is probably best explained by the fact that when these instruments were adopted, the problem of demographic aging was not as evident or as pressing as it is now.”<sup>30</sup> Nevertheless, in the text of the treaties, there is the prohibition of discrimination on some expressed grounds,<sup>31</sup> and the phrase “other status” is added as well, which, according to General Comment No. 20 of the CESCR, includes disability, age, nationality, marital and family status, sexual orientation, health status, place of residence and economic and social situation. Therefore, implicitly age (include old age) is integrated and protected.

Part V of the International Labour Organisation (hereinafter referred to as ILO)<sup>32</sup> Convention Concerning Minimum Standards of Social Security (hereinafter referred to as ILO Minimum Standards) deals with old-age benefits. Article 25 declares the binding nature of the provisions by saying that “each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of old-age benefits”. Basically, the convention discusses minimum social security standards that governments should provide for their citizens.

The most relevant regional human rights instrument, as regards Europe, is the European Convention on Human Rights (hereinafter referred to as ECHR) and the Revised European Social Charter of 1996 (hereinafter referred to as Revised ESC). Similarly to the above mentioned foundational human rights treaties, the ECHR does not explicitly mention age. Nevertheless, the case-law of the European Court of Human Rights (hereinafter referred to as ECHR) confirms that old age is a factor to be considered from several aspects.<sup>33</sup> Article 23 of the Revised ESC declares the right of the elderly to social protection, with the aim to ensure their active presence and

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<sup>30</sup> *Idem* at 11, p. 11.

<sup>31</sup> Race and colour, gender, language, religion, political or other opinion, national or social origin, property, birth.

<sup>32</sup> <https://www.ilo.org/global/lang-en/index.htm>.

<sup>33</sup> From the aspect of length of procedure (see: *Süssmann case*), special status of elderly persons (see: *Spadea and Scalabrino v. Italy case*, *A.O. v. Italy case*).

involvement in the society as long as it is possible, their right to information and freedom to lead a life and follow a life-style that is most appropriate to them independently and surrounded by a familiar environment as long as they wish doing so and are able to do so. In order to maximise their ability, the state should intervene with health care and services and living institutions that are capable of providing support, while respecting the privacy of the elderly and allowing them to actively participate.<sup>34</sup>

Among the binding documents, the second group to be distinguished is the international human rights treaties that specifically deal with the rights of disadvantaged groups.<sup>35</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as CEDAW) was adopted after 30 years of work in 1979 and aims to take “an important place in bringing the female half of humanity into the focus of human rights concerns”. As far as older women are concerned, the CEDAW explicitly addresses their rights in Article 11, saying “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular (...) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.” The Convention on the Protection of the Rights of Migrant Workers and the Members of Their Families (hereinafter referred to as ICMW) in Article 7 prohibits discrimination on the grounds of age. The most useful protection offered to the elderly is in the CRDP (see point 4).

The non-binding instruments (documents and soft laws) contain more detailed recommendations for protection, but these are only recommendations, and states are not obliged to follow them, nor are the rights-holders able to invoke them. Nevertheless, they contain provisions and collect the common knowledge as regards elderly rights and therefor have the ability to direct national legislators, as well as international regulators, when adopting binding laws.

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<sup>34</sup> *Idem* at 22, p. 977.

<sup>35</sup> *Idem* at 22, p. 11.



The *Vienna International Plan of Action on Aging* (hereinafter referred to as VIPAA)<sup>36</sup> was adopted by the World Assembly on Aging held in Vienna, Austria, from 26 July to 6 August 1982. The document recognises the general problem of aging and reinforces the application of the UDHR to elderly people. It calls for world-wide attention to the problem, parallel to acknowledging that the real formulation and implementation of policies on aging are the sovereign right, as well as responsibility, of the states, and in order to reach maximum effectiveness, they need to respond to the specific national needs and objectives. The VIPAA sets down five core objectives which are able to support national policy makers in creating effective national action plans. The objectives in brief are (i) deeper understanding of the world's aging process, (ii) including stronger focus on understanding of the humanitarian and developmental issues related to aging, (iii) putting a stress upon the social and economic security of the elderly and allowing them to actively participate in decision making, (iv) parallel to giving special regard to main national values and goals, developing policies that can be integrated into internationally recognised principles that deeply consider the needs of elderly people, (v) enhancing education and expertise in the field of elderly rights. There is one very important element that is underlined by the VIPAA as regards aging and the problems stemming from the process itself. This element is the importance of prevention. Good prevention policies are means that can and shall be invoked in multiple human rights situations; therefore, unsurprisingly, it is an element coming closer to a solution when considering the protection of the elderly as well. Obviously, aging itself cannot be prevented, but “from birth onwards, the detrimental effects of premature aging on the individual could be avoided” or at least mitigated.

The United Nations Principles for Older Persons (hereinafter referred to as UNPOP)<sup>37</sup> was adopted General Assembly Resolution 46/91 of 16 December 1991. The UNPOP is a set of non-binding

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<sup>36</sup> <https://generationen.oehunigraz.at/files/2012/07/Wiener-Aktionsplan-zur-Frage-des-Alterns-1982.pdf>.

<sup>37</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons>.

principles which take a rights-based approach and collect the concrete provisions into five groups, which is the guarantee of independence, participation, proper and accessible care, self-fulfilment and dignity.

The Political Declaration and Madrid International Plan of Action on Ageing (hereinafter referred to as MIPAA)<sup>38</sup> was adopted at the Second World Assembly on Aging held between 8 and 12 April 2002. It reviewed the recommendations of the VIPAA and organised the 'fresh' ones into three priorities: Older Persons and Development, Advancing Health and Well-Being into Old Age, Ensuring Enabling and Supportive Environments. The MIPAA sets down recommendations that are aimed at being implemented both at the national and at international level. At a national level, the national governments are the ones responsible for implementation. At an international level, this is the United Nations Department of Economic and Social Affairs. However, it is important to note that the MIPAA is a set of recommendations at an international level, and therefore, deriving from its nature, lacks any real commitment, as well as any real impact.

The ILO also adopted several standards that are relevant from the point of the elderly. These are: Recommendation 162 standards for preventing the discrimination of older workers in employment, social security and retirement; Recommendation 122 that refers to employment policy regarding certain vulnerable groups, including the elderly.

Last but not least among international non-binding documents, it is worth emphasising the work of the World Health Organisation (hereinafter referred to as WHO).<sup>39</sup> The WHO particularly addresses the mistreatment of the elderly.<sup>40</sup> It defines elder abuse as "a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which

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<sup>38</sup> <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html>.

<sup>39</sup> <https://www.who.int/>.

<sup>40</sup> J.M. Miller, *International Human Rights and the Elderly*, Marquette Elder's Advisor, 2010, p. 354(33).

causes harm or distress to an older person”. It is a problem in all societies, and therefore requires a global response as well.<sup>41</sup>

## 2.4. Convention on the Rights of Persons with Disability and Its Importance Concerning the Protection of Older Persons

The CRDP was adopted on 13 December 2006, aiming to address human rights protection of disabled people. It offers similar protection as the CEDAW to women or the CRC to children. The CRPD is special in that it does not define ‘disability’, and it marks a shift from a caring model to a rights-based approach – it is similar to the CRC in this aspect in as well. The principles of the CRDP are also tangibly relevant, such as respect for dignity, non-discrimination, full participation and inclusion in the society, equality of opportunity and accessibility.<sup>42</sup>

Although not all older persons have disabilities, and the CRPD does not single out elderly people for special protection, and many of its articles can be utilised by older persons seeking human rights protection. This comes from the fact that many older persons meet the definition of disability.<sup>43</sup>

Nevertheless, if we seek for the explicit term ‘age’, ‘old(er)’ or elderly in the text of the convention, we find just several explicit reference. Point p. of the Preamble mentions the concern about discrimination on the basis of age. Within the framework of Article 8 regulating awareness, raising the convention aims at combatting stereotypes which are based, among others, on age. Article 13 calls for age-appropriate accommodation in order to ensure access to justice. Article 16 on freedom from exploitation, violence and abuse requires states to offer age-sensitive assistance and protection services, as well as address age-specific needs. Article 23 on respect for

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<sup>41</sup> *Idem* at 33, p. 355.

<sup>42</sup> *Idem* at 25, p. 11.

<sup>43</sup> P. Harpur, *Old age is not just and impairment: The CRDP and the need for a Convention on Older Persons*, 2016, p. 1042(35).

home and family underlines the right to age-appropriate information. Article 25 on the right to health, in connection with the state obligation to provide health services, explicitly mentions the group of older people, as well as Article 28 on an adequate standard of living and social protection within a context that their access of these services must be ensured. To conclude – as regards the explicit reference – it is obvious that under the CRPD, there is specific protection, certainly more tangible than that offered by any other, but this is far from generic protection. However, it is also evident that apart from explicit references, the implicit applicability is to be examined as well, which at this point would be that all older persons experiencing disability are protected by the CRPD, and as it occurs. Article 1 of the CRPD defines disability as follows: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.” The question that needs to be posed here is: When is a person considered old or disabled? From a historical point of view, a person was regarded as elderly when their abilities decreased to a point at which they were regarded as crippled or infirm.<sup>44</sup> During this time, the definitions of old age and disability were largely conflated, but for contemporary times, medical science has clearly altered this position and now distinguishes between old age and disability.<sup>45</sup> Nevertheless, the CRPD’s definition include those disabilities which are as a result of aging and thus offers more support to those elderly who are disadvantaged by policies associated with the medical model; however, the CRPD offers little support to older persons who are disadvantaged by structural discrimination based upon age<sup>46</sup> and who are victims of ageism. Article 12 affirms the right of disabled persons – within this the rights of disabled older persons – to equal recognition before the law, the provision of which requires states to stop denying people their legal capacity

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<sup>44</sup> *Idem* at 35, p. 1043.

<sup>45</sup> *Idem* at 36.

<sup>46</sup> *Idem* at 35, p. 1048.

and instead enables individuals to exercise their legal capacity by providing necessary support.<sup>47</sup>

Article 34 of the CRPD calls for the establishment of the Committee on the Rights of Persons with Disability,<sup>48</sup> which is a body of independent experts that monitors implementation of the CRPD by state parties. The Committee has several General Comments, none of which specifically addresses the rights of older persons, but their rights are rather discussed in the larger group of disabled rights – even if being distinguished explicitly sometimes, and as such, the implementation of their rights are monitored under one umbrella.

## 2.5. Need for a Separate Human Rights Treaty on the Elderly (Older Persons)

Whenever adopting a human rights instrument, states make a three-fold commitment:

- the state commits to respect and refrain from interfering with the enjoyment of human rights;
- it commits to protect individuals against human rights abuses;
- it commits to take positive action to facilitate the enjoyment of rights.<sup>49</sup>

The question is whether or not this form of commitment is necessary from the states in order to ensure broad and effective protection of the elderly and not to only those who become disabled through the natural aging process but also to those who are victims of ageism, without experiencing any disability within the sense of the CRPD.

The need for a new human rights instrument that addresses the right of the elderly is not only a question that arise among academics, but it is there on the table and within the agenda of the decision makers. The Open-ended Working Group on Aging (hereinafter

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<sup>47</sup> *Idem* at 35.

<sup>48</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html>.

<sup>49</sup> *Idem* at 25, p. 9.

referred to as OPWA) was established by the UN in 2010. The OWGA aims at discussing concrete ways to strengthen the protection of human rights in the process of aging. Every year, the OWGA meets at the UN headquarters in New York, and the last session was held between 11 and 14 April 2022. For the time being, the OWGA is not in a process of drafting a convention. It does however aim to identify specific issues that may require further protection in a new convention.<sup>50</sup> At this session, the Report of the United Nations High Commissioner for Human Rights on the ‘normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons’<sup>51</sup> was submitted in order to pull the OWGA into a discussion. The report summarises the problem of aging, analyses the severe impact of COVID-19 on elderly people, puts an emphasis on the problem of ageism and highlights the potential need to create a new convention. At the same time, it urges the use of the current framework as well.

When analysing the need for a human rights instrument directly targeting the protection of older persons, it is important to identify the incoherency of the current international legal framework from the point of view of the elderly. Experts in most papers discussing this issue, together with the OPWGA, agree that there are four types of gaps in the current human rights law: (i) a normative gap, (ii) an implementation gap, (iii) a monitoring gap, and (iv) an information gap.<sup>52</sup> A normative gap exists where the current legislative framework does not provide sufficient protection under human rights law, which is intended to formally define the thresholds that identify situations in which human dignity is threatened or violated. A normative gap is a lack of such definition. An implementation gap refers to a relatively good normative framework – in this sense, at the level of international law – and a clear definition, together with a catalogue of rights and obligations; however, it is not translated into

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<sup>50</sup> <https://www.age-platform.eu/un-open-ended-working-group-ageing-oweg>.

<sup>51</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/238/86/PDF/G2223886.pdf?OpenElement>.

<sup>52</sup> M. Murphy, *International human rights law and older people: Gaps, fragments and loopholes*, HelpAge International, 2012, p. 2.

national law and practise. A monitoring gap refers to the lack of an independent body or mechanism that has a mandate to ensure states' compliance with particular human rights obligations. An information gap is basically a lack of real knowledge on a group of people as a result of no disaggregated data and statistics.

When revising the current legislative public international legal framework, it is without doubt that all four gaps are easily identified. There is a normative gap, as older people have no definition in international law (even if it is a flexible one) and have no clear protection when experiencing discrimination merely from the fact that they are old. There is an implementation gap, as currently existing instruments, such as CRPD and soft law instruments and policies directly addressing elderly people, have evidently stayed on paper, and very little has been implemented. There is a monitoring gap, as the Committee on CRDP only screens the rights of elderly people that suffer from disability, at least to some extent. There is an information gap, as our knowledge is not sufficient on the specific needs and challenges. Therefore, I argue that adopting a 'Convention on the Rights of Older Persons' would be a next step forward and a real commitment towards protecting the elderly and not only those who somehow fit into the definition of disabled but also those who are aging naturally and are facing social exclusion and ageism as a result of this. Nonetheless, before going to the final conclusions and making a very definitive *de lege ferenda* recommendation on law-making, I would like to list the pros and cons already collected by the OWGA, as well as by the academia, and examine them from a closer angle.

Arguments against adopting a convention may be collected around five main points:<sup>53</sup>

- human rights are universal, and therefore the protection offered is universal as well, which can equally be invoked by anyone seeking justice, even elderly people;
- the existing soft law protection is strong enough; therefore, there is no need for a binding convention;

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<sup>53</sup> *Idem* at 25, p. 13.

- the process of negotiating, drafting and adopting would be far more costly than the benefit gained from adoption;
- human rights conventions – and the more there are, the higher the risk is – contain paradoxes which actually have a detrimental effect on the rights of already marginalised groups;
- drawing attention to elderly people in such way would endanger their further marginalisation.

These arguments have already been disproven by the research already conducted up to this point. Universalism of human rights is undoubtedly a very important safeguard, but it is not a real solution for such an increasing social problem as aging, and it is incapable of addressing the special needs of older persons. The existing soft law has no real international legal ‘weight’, even binding international conventions are sometimes hard to hold responsible. If we make a comparison again between the situation of the elderly and children, and the adoption of the CRC, we see an attitude changing the effect of the CRC, which is obviously not a closed process and is still ongoing, but this was undoubtedly a milestone, which is why I argue that it would also be a milestone to people who are at the end of their lives.

Arguments in favour of a convention may also be collected around five main points:<sup>54</sup>

- elderly people experience many violations of rights as a result of their age;
- it is problematic to define the group of ‘elderly’, ‘old people’ and ‘third age’; nonetheless, it should not be an obstacle to provide them with protection, which, if needed, shall make room for flexibility;
- the normative gaps identified affect the dignity of older people;
- the implementation and monitoring gaps result in further discrimination of the group of elderly;

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<sup>54</sup> *Idem* at 25, p. 15.



- and finally, as a definitive contra argument to the above, drawing attention to elderly people is this way will strengthen the struggle against ageism.

My reference here would again be to the CRC, which made a real and tangible difference to people starting their life by addressing rights violations, defining their group, making an attempt to fill in the normative gaps and creating a monitoring system which, indisputably, is not effective enough and has no implementing power but nonetheless creates something important and enhances constant dialogue on the rights of a child on the basis of a catalogue that is widely accepted by the international community. Even though there is still an implementation gap, this gap is able to be defined, and therefore there is a more evident way forward.<sup>55</sup> A similar effect could be expected from a Convention on the Rights of Older Persons.

## 2.6. Conclusions

The 2030 Agenda for Sustainable Development sets out a universal plan of action to achieve sustainable development in a balanced manner and seeks to realise the human rights of all people.<sup>56</sup> It calls for leaving no one behind and for ensuring that the Sustainable Development Goals (SDGs) are met for all segments of society, at all ages, with a particular focus on the most vulnerable – including older persons. The UN Sustainable Development Goals<sup>57</sup> envisage a world where people who are most vulnerable are empowered, and among the most vulnerable are the older persons explicitly

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<sup>55</sup> One must not forget about the monitoring and interpretation done by the Committee on the Rights of the Child. While some interpretations might not necessarily be in line with the initial intention of the states, and this obviously has detrimental effects, this kind of further interpretation process and the disadvantages deriving from it are not within the scope of this article. This would rather clearly underline the attitude changing nature of the CRC.

<sup>56</sup> Ageing, older persons and the 2030 Agenda for Sustainable Development, [https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2017/07/UNDP\\_AARP\\_HelpAge\\_International\\_AgeingOlderpersons-and-2030-Agenda-2.pdf](https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2017/07/UNDP_AARP_HelpAge_International_AgeingOlderpersons-and-2030-Agenda-2.pdf).

<sup>57</sup> <https://sdgs.un.org/goals>.

mentioned. Older persons are also explicitly underlined in connection with ending hunger and making cities and human settlements inclusive, safe, resilient and sustainable.

Most academics conclude that there are sufficient regulatory gaps in the current human rights regime to justify the adoption of a new convention dealing exclusively and intentionally with the human rights protection of elderly people. I agree with this approach and therefore would definitely conclude with a suggestion on starting, in the very near future, the drafting process of a new human rights instrument addressing the rights of the elderly that puts great attention on:

- deeply understanding the specificities and specific needs of the elderly;
- apart from accepting the universalism of human rights, understanding that the targeted and more specific instruments have greater ability to empower vulnerable groups and mitigate the effects of discrimination;
- providing full legal capacity to elderly people and ensuring their right to actively participate;
- involving them closely in the drafting process and working with them in the implementation and monitoring phase as well.

Human rights have universality throughout the course of our lives. Nonetheless, there are some stages of life where universality is not enough for the universal protection, particular attention, detailed understanding and targeted law-making that is needed to achieve real universalism, as: “We do not grow absolutely chronologically. We grow sometimes in one dimension, and not in another, unevenly. We grow partially. We are relative. We are mature in one realm, childish in another. The past, present and future mingle and pull us backward, forward or fix us in a present. We are made up of layers, cells, constellations.”<sup>58</sup>

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<sup>58</sup> J.M. Miller, *International Human Rights and the Elderly*, op. cit., p. 343.

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## Chapter 3. Older People and Their Needs as a Challenge for Education and Socio-cultural Animation

### 3.1. Introduction

According to the statistics of the Central Statistical Office (CSO) on the demographics of the population in Poland, the number of elderly people in the society is gradually increasing.<sup>1</sup> The difference in comparable data for 1989 and 2020 indicates that at the beginning of the 1990s, people over 60 years of age accounted for approx. 12% of the population, while in 2020, this already amounted to over 22% of all inhabitants of Poland. The annual increase in the number of seniors also increased. This is the age group that grows the fastest. Polish society is changing – it is getting older. Currently, almost 9 million people over 60 live in Poland. In 2030, there will be 10.7 million of them, and they will constitute nearly 30% of the population.<sup>2</sup>

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<sup>1</sup> <https://stat.gov.pl/obszary-tematyczne/osoby-starsze/> (accessed on: 12.08.2022).

<sup>2</sup> Central Statistical Office, Note prepared for the meeting of the Sejm Committee on Senior Citizens' Policy on "Information from the Minister of Health on the impact of demographic change and population ageing on the organisation of the health care system and the National Health Programme" on [https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5468/24/1/1/ludnosc\\_w\\_wieku\\_60.\\_struktura\\_demograficzna\\_i\\_zdrowie.pdf](https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5468/24/1/1/ludnosc_w_wieku_60._struktura_demograficzna_i_zdrowie.pdf) (accessed on:

The elderly are a special group of recipients in the sphere of broadly understood culture. It would seem that one of the main factors hindering contact with culture, which is lack of time, does not apply to seniors, but in the case of this group of people, a number of other barriers naturally arise that must be overcome.<sup>3</sup> The work of the Ministry of Culture and National Heritage focuses on the systemic elimination of all types of barriers in this respect. This also applies to the needs of the elderly. Support is also provided by local governments that participate in ministerial projects and create their own programmes that constitute an attractive offer for seniors. Another entity is non-governmental organisations, often acting exclusively for the elderly. This issue is worth paying attention to, not only in Polish law. The aging society in all European countries and the change in lifestyle forces governments to react in the form of activating their financial and legal resources in order to implement the cultural activity of the elderly.<sup>4</sup>

In the era of fast changes in all spheres of human functioning, education becomes of special importance. In old age, people also look for areas and forms of activity that would allow them to find themselves in the new reality.<sup>5</sup> In light of the current and projected demographic situation, characterised by a significant increase in the share of older people in the total population, the need for lifelong learning becomes crucial.<sup>6</sup> Undoubtedly, the greatest challenges related to the changes taking place in the lives of seniors concern the biological, psychological and social spheres.<sup>7</sup> This influences

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15.08.2022); <https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/struktura-ludnosc,16,1.html> (accessed on: 15.08.2022).

<sup>3</sup> T. Różański, *Wybrane problemy czasu wolnego ludzi starszych w Polsce*, [in:] *Starość – poznać, przeżyć, zrozumieć*, red. M. Halicka, J. Halicki, E. Kramkowska, Białystok 2016, pp. 389–400.

<sup>4</sup> S. Słowińska, *Aktywność kulturalna osób starszych pomiędzy autotelicznością a instrumentalnością*, „Dyskursy Młodych Andragogów” 2019, nr 20, pp. 383–396.

<sup>5</sup> A. Rudnik, *Edukacja w starości – życzenie czy szansa na przeciwdziałanie marginalizacji osób starszych?*, „Pedagogika Społeczna” 2017, nr 1(63), pp. 116–120.

<sup>6</sup> O. Czerniawska, *Edukacja osób trzeciego wieku*, [in:] *Wprowadzenie do andragogiki*, red. T. Wujek, Warszawa 1996.

<sup>7</sup> G. Orzechowska, *Rola edukacji w późnej dorosłości*, in: *Edukacja dorosłych jako czynnik rozwoju społecznego (Materiały I Ogólnopolskiego Zjazdu*

their learning ability and effectiveness, as well as the very possibility of participating in specific conditions of providing educational services.<sup>8</sup> Biological age is not an obstacle in acquiring new knowledge but requires adaptation in its transmission, including, among others, the length of the form and content of the classes.<sup>9</sup>

### 3.2. Identification of the Problem

One of the first and most important issues to be resolved when assessing the situation of the elderly in legal sciences is determining the subjective scope of the research area. It would seem that legal definitions should be sufficient to indicate a group of society that is classified as seniors. Despite the fact that many fields and scientific disciplines deal with this issue, in accordance with their methodology and research problems, legal sciences also contain norms and legal provisions dedicated to seniors. Here, however, one should be careful with the expressions used by the legal language, as they are often not unambiguous or, depending on the branch of law, may contain terminological discrepancies. The requirements set for the legislator oblige him to indicate the definition in the most stable and permanent manner. Unambiguous determination of biological age, which is simplest from the point of view of evidence in the form of a birth certificate, will not always correspond to the purpose of the legal act. Date of birth determines a number of rights resulting from individual legal acts. Most often it is related to labour law and social insurance. Acts and regulations from this branch of law directly indicate the date of birth or the achievement of a certain biological age as the basis for applying for, for example, a retirement

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*Andragogicznego – Kraków, 23–24 czerwca 2009*), red. T. Aleksander, t. 2, Radom 2010, pp. 444–445.

<sup>8</sup> A. Fabiś, *Edukacja osób starszych*, [in:] *Ludzka starość: wybrane zagadnienia gerontologii społecznej*, red. A. Chabior, A. Fabiś, J. Wawrzyniak, Kraków 2015, p. 171–197.

<sup>9</sup> B. Szatur-Jaworska, *Ludzie starzy i starość w polityce społecznej*, Warszawa 2000, p. 29.

pension.<sup>10</sup> The general retirement age is not the only option for this type of benefit, as there are also early retirement pensions, for example for people working in a creative or artistic activity.<sup>11</sup> It is also worth noting other conditions granted to uninformed services, including, for example, soldiers.<sup>12</sup> Therefore, retirees should not be equated with seniors, although most of this benefit is collected by the elderly. Due to the lack of obligatory termination of employment after reaching retirement age, many seniors are still economically active. This is related not only to the financial aspect of performing paid work but also often results from the good physical and mental condition of an employee who does not want to retire.

Many discounts and reductions also result from national regulations concerning old age and disability pensioners, people with disabilities, etc. Some of these depend on age groups, usually starting from the age of 60.<sup>13</sup> The rights resulting from the reductions for public transport, both statutory and local, are also related to reaching a certain age. It should be noted, however, that individual local governments apply different discounts.<sup>14</sup> Seniors can also count on discounts granted to them by private entrepreneurs.

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<sup>10</sup> Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych, t.j. Dz. U. z 2022 r. poz. 504 [Act of 17 December 1998 on Pension and Disability Pensions from the Social Insurance Fund, Journal of Laws of 2022, item 504, consolidated text].

<sup>11</sup> <https://www.zus.pl/swiadczenia/emerytury/emerytura-dla-osob-urodzonych-po-31-grudnia-1948/emerytury-wczesniejsze/emerytura-z-tytulu-wykonywania-dzialalnosci-tworczej-lub-artystycznej> (accessed on: 18.08.2022).

<sup>12</sup> Ustawa z dnia 10 grudnia 1993 r. o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin, Dz. U. z 2022 r. poz. 2528 [Act of 10 December 1993 on Pension Provision for Professional Soldiers and Their Families, Journal of Laws of 2022, item 2528, consolidated text].

<sup>13</sup> <https://zycieseniora.com/ekspert-radzi/od-jakiego-wieku-darmowe-przejazdy-komunikacja-miejska> (accessed on: 18.08.2022).

<sup>14</sup> Some airlines encourage people over 60 to fly by offering them discounts or special programmes. For example, in Poznań, Kraków, Warsaw and Łódź, people 70 years of age and over and people with disabilities travel for free on buses and trams, and earlier, the very status of a pensioner entitles them to a 50% discount. In Katowice, people 70 years of age and over are entitled to free travel, and pensioners over 60 are entitled to a 50% discount. In Wrocław, people 65 years of age and over can travel for free. In Szczecin, travel with a 50% discount is valid for pensioners over 55 years of age – for women, and 60 years of age – for



Pensioners receive preferential treatment in theatres, museums and cinemas. Depending on the cultural institution, they can count on a 30–50% discount. Pensioners in Poland can also count on reduced admission tickets in most art galleries, as well as in botanical and zoological gardens and open-air museums. Some entertainment and cultural establishments offer cheaper tickets on certain days or at certain times. Reduced tickets are available to seniors who want to participate in sports events. They are admitted to some mass events for a nominal fee or even for free. In some guesthouses, seniors receive discounts for retired holidaymakers. More and more facilities also offering recreational services, such as a swimming pool, gym, bowling alley, and encourage people over 60 years of age to use them, using a price discount or offering activities dedicated to 50+ or 60+ people.<sup>15</sup>

Pensioners and their spouses who are their sole dependents and persons staying in nursing homes or care institutions are entitled to a 50% discount on the issuance fee of a passport. In turn, people over 70 are exempt from these fees altogether. Local authorities decide upon the amount of dog ownership fees. In some cities, seniors are exempt from paying this type of fee. Persons over 75 years of age, classified as disability group I, war veterans and people over 60 years of age with the right to a retirement pension, the monthly amount of which does not exceed 50% of the average wage, are exempt from paying the radio and television licence. Anyone over 75 is also entitled to free medication from the list announced by the Minister of Health. The list includes drugs used in diseases of old age, as well as cardiological, urological and rheumatic diseases.

It follows from the above, however, that having the status of a pensioner is often absolutely necessary to obtain specific rights, although, as it has already been explained, this concept cannot be

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men and pensioners, respectively. Free travel is available for those over 70. In Gdańsk and Gdynia, a discounted ticket is available for pensioners. Free rides are for persons over 70 years of age. In Lublin, a concessionary ticket for public and municipal transport is available to pensioners, with free rides for people over 60.

<sup>15</sup> <https://6oplus.pl/?article=1156> (accessed on: 19.08.2022).

equated only with an elderly person, and a senior himself does not always have to be a pensioner in the light of the law.

Another important issue in defining the situation of the elderly in the field of culture and education is indicating the area of research.<sup>16</sup> The term cultural activity should be understood as any activity specified in the Act on organising and conducting cultural activity.<sup>17</sup> The biological age does not constitute any limitations in both the use and carrying out of this type of activity. However, the situation is different with education. It is obligatory only until the age of 18 in Poland. Seniors still benefit from formal education to a very limited extent, for example while studying. This form of activation is most often provided by universities of the third age, i.e. teaching institutions for people in post-working age.<sup>18</sup> The aim of the measure is to improve the quality of life of the elderly. Due to the lack of strictly defined formulas for classes, assessment and curricula, it is informal education.<sup>19</sup> It can also take place in other places and institutions, including cultural institutions as part of, for example, senior clubs or senior academies.<sup>20</sup> For this reason, cultural activities aimed at seniors can, and sometimes must, be considered together with the area of education that has been specially prepared for them.<sup>21</sup> It is difficult to separate the assessment of, for example, art classes conducted as part of the TAU or lectures in community centres. The

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<sup>16</sup> T. Aleksander, *Potrzeby kulturalno-oświatowe ludzi dorosłych*, [in:] *Wprowadzenie do pedagogiki dorosłych*, red. T. Wujek, Warszawa 1992, pp. 332–335.

<sup>17</sup> Ustawa z dnia 25 października 1991 r. o organizowaniu i prowadzeniu działalności kulturalnej, Dz. U. z 1991 r. Nr 13, poz. 123, z późn. zm. [The Act of 25 October 1991 on Organizing and Conducting Cultural Activity, Journal of Laws of 1991 No. 13, item 123, as amended].

<sup>18</sup> U. Nowacka, A. Gil, L. Ochoa Siguencia, *“Uczyć się, aby być” w aspekcie aktywności edukacyjnej seniorów*, *“Podstawy Edukacji”* 2014, nr 7, pp. 349–355.

<sup>19</sup> B. Ziębińska, *Uniwersytety Trzeciego Wieku jako instytucje przeciwdziałające marginalizacji osób starszych*, Katowice 2007.

<sup>20</sup> A. Chabior, *Uczestnictwo i aktywność kulturalna osób starszych*, [in:] *Ludzka starość: wybrane zagadnienia gerontologii społecznej*, red. A. Chabior, A. Fabiś, J. Wawrzyniak, Kraków 2015, pp. 216–219.

<sup>21</sup> I. Mandrzejewska-Smól, *Aktywność edukacyjna seniorów jako forma uczestnictwa społecznego*, [in:] *Uczestnictwo społeczne w średniej i późnej dorosłości*, red. D. Seredyńska, Bydgoszcz 2012, pp. 152–170.

subject of culture is, next to health and physical culture, the most frequently discussed subject in education prepared for seniors.<sup>22</sup>

### 3.3. Legislation

The legal aspects of seniors' participation in cultural activities and the educational process are not directly reflected in Polish legislation. Possibilities for the activity of the elderly in these spheres should be sought in the legal acts that concern the activity in question or the legal position of seniors themselves. Indirectly, one should also focus on non-legal elements that in practice will be necessary for the elderly to function. Therefore, all kinds of limitations resulting from the biological age of seniors should be taken into account, as it is this feature that creates a special social group for us. The health-related ailments that appear with age significantly affect the ability of seniors to be active. Of course, various types of disabilities are not always related to age, as even young people have them, but are problems related with movement, vision, hearing, etc. These often appear in old age. It should then be borne in mind that a physically fit, healthy and active person may need help. For this reason, in many situations, legal norms connect the group of people with disabilities to the elderly.<sup>23</sup>

Provisions relating to the legal status of the elderly have been in place for a long time in Polish legislation; however, they are dispersed within legal acts belonging to various branches of law. Still, there is a noticeable dissonance between the postulated state and the reality, in which people of advanced age play a marginal role in social life. Therefore, in order to fully analyse the undertaken research topic, it is necessary to verify the legal acts relating to the legal situation of seniors in terms of their probable educational and

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<sup>22</sup> K. Rejman, *Znaczenie edukacji w procesie integracji społecznej osób w wieku senioralnym*, [www.pulib.sk/elpub2/FF/Balogova1/pdf\\_doc/9.pdf](http://www.pulib.sk/elpub2/FF/Balogova1/pdf_doc/9.pdf) (accessed on: 14.08.2022), pp. 83–84.

<sup>23</sup> Z. Wołk, *Spoleczno-kulturowe uwarunkowania aktywności osób w starszym wieku*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1999, nr 1, p. 74.

cultural activity, as well as the regulations that facilitate access to this activity.<sup>24</sup>

It should be emphasised that care for the elderly and securing their rights is also a topic raised at the level of international organisations.<sup>25</sup> In this regard, it is worth mentioning the United Nations Decade of Healthy Aging 2021–2030 initiative. This is a global collaboration tailored to meet the Sustainable Development Goals, designed to bring together governmental, community and international agencies, professionals, academia, media and the private sector to improve the lives of the elderly, their families and the communities in which they live.<sup>26</sup> Nevertheless, it should be noted that UN Member States are not committing themselves to adopting the Convention as regards the elderly as a legally binding instrument.<sup>27</sup> In 2022, the 12<sup>th</sup> session of the United Nations Open Working Group on Aging was held, during which an initiative was taken to create an interregional group to prepare the next meeting at the UN level.<sup>28</sup> Despite the UN's activity in this legal area for many years, all arrangements still remain in the sphere of recommendations and declarations. In 1991, General Assembly Resolution 46/91 was adopted, containing the UN principles for the elderly. One of the legal bases for this act was the implementation of the International Plan of Action on Aging, adopted and approved by the General Assembly in Resolution 37/51 of 1982, and the recommendations and resolutions of the International Labour Organization, the World

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<sup>24</sup> A. Kuchciak, *Ustawa o osobach starszych – nowy czy kolejny rozdział polityki senioralnej?*, "Acta Erasmiana" 2016, nr XIII, p. 88.

<sup>25</sup> B. Mikołajczyk, *Międzynarodowa ochrona praw osób starszych*, Warszawa 2012, p. 59.

<sup>26</sup> <https://www.who.int/initiatives/decade-of-healthy-ageing> (accessed on: 20.08.2022).

<sup>27</sup> The participation of the Polish authorities was also negatively assessed by the Ombudsman <https://bip.brpo.gov.pl/pl/content/rpo-seniorzy-konwencja-onz-polityki-mrips-odpowiedz> (accessed on: 18.08.2022).

<sup>28</sup> The meeting discussed access to justice and the right to work and access to the labour market for older people, as well as the contribution of older people to sustainable development and economic security, <https://www.age-platform.eu/special-briefing/older-people%E2%80%99s-human-rights-civil-society-deplores-lack-involvement-member-states> (accessed on: 22.08.2022).

Health Organization and other United Nations entities. In addition to general terms on safety and security, the document explicitly mentions the right of the elderly to access appropriate education and training programmes, as well as access to educational, cultural, spiritual and recreational resources in society.<sup>29</sup>

The primary sources of European Union law directly related to the situation of seniors include Article 25 of the EU Charter of Fundamental Rights, according to which the Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. In addition, of course, all anti-discrimination provisions taking into account the age criterion, Article 21 section 1 of the EU Charter of Fundamental Rights.

Normative work carried out within the Council of Europe by the Steering Committee on Human Rights (CDDH) in 2012–2013 resulted in the adoption by the Committee of Ministers in 2014 of recommendation CM/Rec(2014)2 for Member States on promoting the human rights of the elderly.<sup>30</sup> This instrument, which aims to raise the awareness of public authorities and civil society on the human rights and fundamental freedoms of the elderly, provides for an evaluation by the Committee of Ministers, five years after its adoption, of implementation at the national level. To this end, information provided by Member States was collected and analysed in order to update, in particular, the examples of good practice included in the Annex to the Recommendation.<sup>31</sup> It is worth noting that among the directly mentioned national initiatives, there is the Polish programme of Accessible Culture, which deserves recognition in the area of culture.

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<sup>29</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons> (accessed on: 22.08.2022).

<sup>30</sup> <https://rm.coe.int/promotion-of-human-rights-of-older-persons/16809fb9bf> (accessed on: 22.08.2022).

<sup>31</sup> Council of Europe, Human Rights of Older Persons, The promotion of human rights of older persons. Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States adopted on 19 February 2014, <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/promotion-of-human-rights-of-older-persons> (accessed on: 22.08.2022).

### 3.3.1. ACT ON SENIORS

There is only one act in Polish legislation that deals with the subject of seniors in a subjective manner. This is a legal act of 11 September 2015 – the Act on the Elderly.<sup>32</sup> The document obligated public administration bodies, state organisational units and other organisations involved in shaping the situation of the elderly to monitor the situation of the elderly in Poland, which resulted in information on the situation of the elderly in Poland being prepared annually by the Council of Ministers.<sup>33</sup> The act defines the scope of monitoring and presenting information about the situation of the elderly, as well as entities participating in the implementation of this task and the sources of its financing.<sup>34</sup> The tasks resulting from the act are coordinated by the Prime Minister.<sup>35</sup>

The information on the situation of the elderly in Poland for 2015 was a historical study, as it was the first document on the situation of the elderly in Poland, as well as the state of implementation of the senior policy, prepared by the Council of Ministers. In turn, the document for 2020 presents the current socio-economic situation of the elderly in Poland. The data presented in it concerns, in particular, issues related to the demographic, economic, family and health situation, the situation on the labour market, the availability and level of social services, as well as all kinds of activities undertaken by the elderly. The information on the situation of the elderly in Poland for 2020 also includes a study on the implementation of the assumptions contained in the social policy towards the elderly in 2030: Security – Participation – Solidarity.<sup>36</sup> Particular attention was

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<sup>32</sup> Ustawa z dnia 11 września 2015 r. o osobach starszych, Dz. U. z 2015 r. poz. 1705 [Act of 11 September 2015 on the elderly, Journal of Laws of 2015, item 1705].

<sup>33</sup> According to Article 4(1) of the Act, an elderly person is a citizen who has reached the age of 60.

<sup>34</sup> Article 1: “The Act defines the scope of monitoring and presentation of information on the situation of the elderly, the entities involved in the implementation of this task and the sources of its financing.”

<sup>35</sup> Article 6(1): “The tasks resulting from the Act are coordinated by the Prime Minister.”

<sup>36</sup> Adopted by Resolution No. 161 of the Council of Ministers of 26 October 2018 (Official Gazette of the Republic of Poland of 2018, item 1169).

also paid to issues related to counteracting the negative effects of the coronavirus pandemic. Therefore, the government, as well as central, regional and local institutions, has taken appropriate measures to ensure the safety of the elderly, which have been adapted to the epidemiological situation in the country. The current restrictions on the everyday life of seniors, as well as the national vaccination programme, influenced the implementation of activities addressed to the elderly.<sup>37</sup>

When assessing this legal act, it should be recognised, however, that this is an extremely economical act, as it consists of seven articles. Its main task is to introduce information obligations; hence, it should be assumed that only the monitoring of the situation of the elderly is a direct form of assistance introduced under this act. However, this form of assistance should not be assessed negatively, because following the monitoring and informing of relevant entities and institutions, a long procedure of introducing changes and improving the existing solutions begins on the basis of other legal acts concerning individual sectors of social and economic life.<sup>38</sup>

In the context of the proposed changes, an important item seems to be the collective petition of the Warmia and Masuria Delegation of the “Citizens’ Parliament of Seniors” (P10-64/21), according to which a proposal was presented to integrate and unify the provisions on seniority policy in the Act on the Elderly. The authors of the petition pointed to the lack of coordination of activities for the elderly, which are carried out in several ministries and at different levels of local government. Moreover, they raised the argument that the Polish legal system does not support the functioning of the parliament of seniors and the ombudsman of the elderly responsible for shaping the senior policy. The principles of financing the senior policy have not been defined, and no recommendations on counteracting violence and discrimination against seniors have been presented. The petitioners proposed to comprehensively regulate the rights of

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<sup>37</sup> <https://www.gov.pl/web/rodzina/informacja-o-sytuacji-osob-starszych-w-polsce-za-2020-r> (accessed on: 23.08.2022).

<sup>38</sup> A. Kuchciak, *Ustawa o osobach starszych – nowy czy kolejny rozdział polityki senioralnej?*, *op. cit.*, pp. 86–99.

the elderly in a single legal act – the Act on the Elderly, define the directions of senior policy and establish a Senior Parliament as the representative and spokesman for this group of people.<sup>39</sup>

### 3.3.2. ACT ON PROVIDING ACCESSIBILITY TO PERSONS WITH SPECIAL NEEDS

The purpose of the Act on Providing Accessibility to Persons with Special Needs is to improve the living conditions and functioning of citizens who are at risk of marginalisation or discrimination, e.g. due to disability or a reduced level of fitness due to age or disease.<sup>40</sup> This legal act creates a legal and organisational framework to implement the idea of accessibility, imposing on all public entities obligations to ensure accessibility in the architectural, digital, information and communication aspects<sup>41</sup>. Most of the provisions of this act have been in force since 30 September 2019.

<sup>39</sup> [https://www.senat.gov.pl/gfx/senat/userfiles/\\_public/k10/komisje/2022/kpcpp/materialy/152pos/mat\\_do\\_p10-64-21\\_.pdf](https://www.senat.gov.pl/gfx/senat/userfiles/_public/k10/komisje/2022/kpcpp/materialy/152pos/mat_do_p10-64-21_.pdf) (accessed on: 23.08.2022).

<sup>40</sup> Ustawa z dnia 19 lipca 2019 r. o zapewnieniu dostępności osobom ze szczególnymi potrzebami, Dz. U. z 2020 r. poz. 1062 [Act of 19 July 2019 on Ensuring Accessibility for Persons with Special Needs, Journal of Laws of 2020, item 1062].

<sup>41</sup> Article 6: “The minimum requirements to ensure accessibility for persons with special needs include: (1) in terms of architectural accessibility: (a) the provision of barrier-free horizontal and vertical communication spaces in buildings, (b) the installation of equipment or the use of technical means and architectural solutions in the building that allow access to all rooms, excluding technical rooms, (c) the provision of information on the layout of the rooms in the building, at least visually and tactilely or by voice, d) providing access to the building to a person using an assistance dog referred to in Article 2(11) of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Journal of Laws of 2020, items 426, 568 and 875), (e) providing persons with special needs with the possibility of evacuation or other rescue; 2) in the field of digital accessibility – the requirements set out in the Act of 4 April 2019 on digital accessibility of websites and mobile applications of public entities; 3) in the field of information and communication accessibility: a) service with the use of means supporting communication referred to in Article 3(5) of the Act of 19 August 2011 on Sign Language and Other Means of Communication (Journal of Laws of 2017, item 1824), or through the use of remote online access to the interpreter service via websites and applications, b) installation of devices



According to the definitions in the act, seniors are elderly people who may have special needs related to their health or condition. This does not mean that every senior needs special treatment.<sup>42</sup>

The act is a key element of the government's Accessibility Plus programme, which the government adopted on 17 July 2018.<sup>43</sup> The solutions provided for in this act implement the norms of the UN Convention on the Rights of Persons with Disabilities, which oblige them to provide such persons with access to various facilities on an equal footing with other citizens. The draft act was created in cooperation with the community of disabled people. The public sector is required to provide at least the minimum availability that will guarantee the accessibility of the public entity. The public entity, in turn, ensures accessibility by applying a universal design of new solutions or improvements in removing existing barriers. The institutional party responsible for implementing the provisions of the act is the Minister for Regional Development, assisted by the Accessibility Council, which is an opinion-making and advisory body.<sup>44</sup> Moreover, each public authority body, including central and local government administration and state control and law protection, as well as courts and tribunals, is required to appoint at least one

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or other technical means to support the hearing impaired, in particular induction loops, FM systems or devices based on other technologies, the purpose of which is to support hearing, c) providing information on the website of a given entity about the scope of its activities – in the form of an electronic file containing machine-readable text, a recording of the content in Polish Sign Language and information in an easy-to-read text, (d) ensuring, at the request of a person with special needs, communication with the public body in the form specified in that request.”

<sup>42</sup> [https://zitwrof.pl/wp-content/uploads/2020/03/PORADNIK\\_o\\_ustawie.pdf](https://zitwrof.pl/wp-content/uploads/2020/03/PORADNIK_o_ustawie.pdf) (accessed on: 23.08.2022).

<sup>43</sup> <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-europejskie-bez-barier/dostepnosc-plus/> (accessed on: 22.08.2022).

<sup>44</sup> Article 56(2): “The reports referred to in paragraph 1 shall be addressed to the minister responsible for regional development, who shall refer them to the Accessibility Council for an opinion. The reports are reviewed by the Accessibility Council by way of resolution, which may include recommendations for legal changes. The opinion of the Accessibility Council is not binding on the Council of Ministers.”

person to act as an accessibility coordinator.<sup>45</sup> The financial side is guaranteed by the Accessibility Fund, the purpose of which is to provide support for the adaptation of buildings of public entities and multi-family housing buildings. Support from the Fund's resources is granted in the form of a loan, though with the possibility of its partial redemption after meeting certain criteria.

The act provides for sanctions for failure to comply with the principle of availability. Public entities that do not meet the minimum accessibility requirements are entitled to a complaint about non-availability.<sup>46</sup> In order to submit this, a person with special needs must first apply for its accessibility, and only the lack or improper reaction from the public entity allows one to submit a complaint to the President of the State Fund for Rehabilitation of Disabled Persons. A positive consideration of the complaint may result in an order to ensure availability, and failure to do so may result in a fine. The act also provides for optional certification for private entities and non-governmental organisations. Those who decide to undergo an audit confirming their availability in the certificate will be able to get a 5% discount in payments transferred to PFRON.<sup>47</sup>

The first report on the state of country accessibility was prepared in 2021,<sup>48</sup> and the statutory reporting obligation sets a four-year period for each public entity to complete it.<sup>49</sup> According to the report, action no. 25 includes the Culture Without Barriers project,

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<sup>45</sup> Article 14(1): "Each public authority, including central and local government bodies, state control and law enforcement bodies, courts and tribunals, shall appoint at least one person to act as accessibility coordinator."

<sup>46</sup> [https://www.funduszeuropejskie.gov.pl/media/92295/lista\\_podmiotow.pdf](https://www.funduszeuropejskie.gov.pl/media/92295/lista_podmiotow.pdf) (accessed on: 22.08.2022).

<sup>47</sup> <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-europejskie-bez-barrier/dostepnosc-plus/ustawa-o-dostepnosci/> (accessed on: 22.08.2022).

<sup>48</sup> <https://www.funduszeuropejskie.gov.pl/media/110036/Sprawozdanie2021.pdf> (accessed on: 22.08.2022).

<sup>49</sup> Article 11(1): "A public entity shall submit every 4 years, by 31 March of a given year at the latest, a report on the state of ensuring accessibility for persons with special needs in a given entity, and publish it on its Public Information Bulletin subject page, and if there is no Public Information Bulletin subject page – on its website."

under which a new edition of the programme, entitled National Reading Development Program 2.0. for the years 2021–2025, commenced. It was considered necessary to take into account separate needs, e.g. of the elderly. The programme envisages making architectural changes in library buildings and the purchase of books. In 2021, work was also continued on the project entitled Culture without barriers, financed by European funds and implemented by PFRON, the Ministry of Culture and National Heritage, the Culture Without Barriers Foundation and the Institut für Bildung und Kulture from Austria. In the field of improving the competences of the staff, the implementation of training courses in the field of accessibility, addressed to employees of the cultural sector, was also continued in 2021.<sup>50</sup>

### 3.4. Institutional Activities

The possibility of creating legal acts at the central and regional level, meeting the needs of the elderly, is not possible without specific entities and institutions that are specifically empowered or obliged to do so.

In the Sejm, the Senior Policy Committee acts as a standing committee, dealing with matters of shaping the state policy regarding the elderly, including taking legislative initiatives in matters concerning the situation of the elderly in Poland.<sup>51</sup> In the Senate, similar tasks

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<sup>50</sup> The National Institute of Museums and Collections Protection (NIMOZ) has organised online training courses, e.g. Museums in the Law on Ensuring Accessibility for Persons with Special Needs; A Visitor with a Disability in a Museum – Audio Description and Alternative Texts; Seniors in a Museum. In turn, the National Centre for Culture (NCK) in 2021 conducted online training courses on the topics: Accessibility coordinator: responsibilities and tasks; Volunteering in a cultural institution-Senior volunteers as local animators; Accessibility of educational activities.

<sup>51</sup> <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-europejskie-bez-barrier/dostepnosc-plus/aktualnosci/sejm-komisja-polityki-senioralnej-o-realizacji-rzadowego-programu-dostepnosc-plus/> (accessed on: 22.08.2022).

are performed by the Family, Senior and Social Policy Committee.<sup>52</sup> In turn, the Council of Ministers annually presents the Sejm and Senate with information on the situation of the elderly in Poland. The subject of the information is, among others: professional activity of seniors, their educational and cultural activity. The minister responsible for social security is responsible for the preparation of information for the Council of Ministers.<sup>53</sup>

As part of the Ombudsman's activity, the Commission of Experts for the Elderly of the Ombudsman was established in 2011.<sup>54</sup> This body also deals with the issue of social activation of the elderly, access of the elderly to consumer and financial services, as well as intergenerational relations and the perception of the elderly in society, media and public administration.<sup>55</sup> In order to intensify and improve the quality of the work performed, problem-solving teams have been selected from among the members of the commission, and people from outside the Commission – eminent specialists in their fields, are also invited to work in them.<sup>56</sup> The activities of the Committee of Experts translate into a number of books, and the members of the Committee represent the Human Rights Defender at numerous meetings, debates and conferences.<sup>57</sup> Work in the

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<sup>52</sup> The area of work and the name related to the sphere of senior citizenship policy have been changed since the 8th Senate term.

<sup>53</sup> Article 6(2): “The minister responsible for social security is responsible for the preparation of the information.”

<sup>54</sup> The Expert Commission for Older Persons was established by Professor Irena Lipowicz, Ombudsman, on 23 February 2011. Currently, its rules of operation are set out in Order No. 12/2017 of the Ombudsman of 13 March 2017 on the establishment of the Commission of Experts to the Ombudsman. The current composition is defined by Order No. 36/2021 of the Ombudsman of 27 December 2021 amending the Order on the determination of the composition of the Commission of Experts on Older Persons for the Ombudsman.

<sup>55</sup> <https://bip.brpo.gov.pl/sites/default/files/Synteza%20-%20Systemu%20wsparcia%20osob%20starszych.pdf> (accessed on: 23.08.2022).

<sup>56</sup> M. Wróblewski, *Ochrona praw osób starszych w działalności Rzecznika Praw Obywatelskich jako krajowej instytucji ochrony praw człowieka*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2012, nr 3, p. 131.

<sup>57</sup> Rzecznik Praw Obywatelskich, *System wsparcia osób starszych w środowisku zamieszkania – przegląd sytuacji, propozycja modelu. Synteza*, red. B. Szatur-Jaworska, P. Błędowski, Warszawa 2017, pp. 32–35; <https://bip.brpo.gov.pl/pl/>

Committee is performed voluntarily, and members do not receive remuneration for participating in meetings.<sup>58</sup>

At the territorial level, the municipality council, upon its own initiative or at the request of interested groups, may establish a municipality council of seniors, which has a consultative, advisory and initiative character.<sup>59</sup> It should be noted that both an applicant and a member of such a body do not have to be only people over 60 years of age. The competence to establish and issue a statute of a municipal council of seniors belongs to the municipal council. The role of the municipal council of seniors is primarily to communicate the needs of the elderly by giving opinions and consulting local authorities regarding their decisions. However, it can also undertake many other activities to improve the situation of seniors in the municipality. The subject of its activity most often remains: giving opinions and consulting on matters concerning the situation of seniors; issuing opinions on local legal acts concerning the oldest inhabitants of the municipality; presenting proposals for setting priority tasks and legislative work for seniors in the short and long term; initiating activities for seniors; disseminating and promoting the cooperation

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content/sytuacja-osob-starszych-w-polsce-wyzwania-i-rekomendacje-raport-komisji-ekspertow (accessed on: 23.08.2022).

<sup>58</sup> <https://bip.brpo.gov.pl/pl/tagi/komisja-ekspertow-ds-osob-starszych> (accessed on: 23.08.2022).

<sup>59</sup> Article 5c The Act on Municipal Self-Government: “1. The municipality fosters intergenerational solidarity and creates conditions for stimulating the civic activity of older people in the local community; 2. The municipal council, on its own initiative or at the request of the communities concerned, may establish a municipal council of seniors; 3. The municipal council of seniors is consultative, advisory and initiative-oriented; 4. The municipal council of seniors is composed of representatives of the elderly and representatives of entities acting for the benefit of the elderly, in particular representatives of non-governmental organisations and entities running universities of the third age; 5. When appointing a municipal council of seniors, the council of a commune grants it a statute specifying the procedure for electing its members and the rules of operation, striving to use the potential of existing organisations of the elderly and entities acting for the benefit of the elderly, as well as to ensure an efficient manner of electing members of the municipal council of seniors; 6. The council of a municipality may, in the statutes of an auxiliary unit, authorise it to establish a council of seniors of the auxiliary unit. Paragraphs 3 to 5 shall apply *mutatis mutandis*.”

of local government authorities of the municipality with the community acting for the benefit of the elderly; supporting various forms of activity of seniors; striving to strengthen intergenerational social bonds; monitoring the needs of seniors living in the municipality; taking actions to break stereotypes about the old age and seniors, as well as building their authority; disseminating knowledge about the needs and rights of the elderly; undertaking activities aimed at building a positive image of seniors.<sup>60</sup> In practice, however, there are seniors' councils only in every eight municipality in Poland.<sup>61</sup>

At the international level, it is worth mentioning the establishment by the European Commission of AGE Platform Europe, which is a network of non-profit organisations established in 2001 for and with the participation of 50+ people. AGE Platform Europe was founded in January 2001 as a result of discussions on how to improve and strengthen cooperation between the elderly organisations at the EU level. Membership is open to European, national and regional organisations, both for the elderly organisations and for organisations working in favour of the elderly. The main goal of AGE is to raise the awareness of seniors living in European Union countries about the issues that most concern them. AGE focuses primarily on: anti-discrimination, employment, active aging, combating poverty and social exclusion, issues related to health, intergenerational solidarity and access to public transport or new technologies. The activities of the members of this group include giving the elderly and pensioners a voice in EU policy debates through the active participation of their representative organisations at the EU, national, regional and local level, as well as providing a European platform for the exchange of experiences and best practices. In addition, they inform the elderly about their rights as EU citizens or residents and

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<sup>60</sup> P. Błądowski, *Polityka społeczna wobec ludzi starych i starości. Lokalna polityka wobec ludzi starych*, [in:] *Podstawy gerontologii społecznej*, red. B. Szatur-Jaworska, P. Błądowski, M. Dziągiewska, Warszawa 2006.

<sup>61</sup> M.J. Januszewska, *Charakterystyka modeli zachowań konsumpcyjnych seniorów na rynku kultury*, "Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne" 2018, nr 26, pp. 73–74; J.A. Sienkiewicz-Wilowska, *Seniorzy na terenach wiejskich – możliwości i ograniczenia rozwoju*, "Studia Edukacyjne" 2017, nr 44, pp. 377–385.

about EU policy-making processes and recent policy developments. The activities of this entity are financed by grants from the European Union, membership fees and donations.<sup>62</sup>

#### 3.4.1. MINISTERIAL PROGRAMMES

The Accessible Culture programme implemented by the Ministry of Culture and National Heritage in 2015 was a systemic solution aimed at eliminating competence and financial barriers, taking into account, in particular, the situation of groups at risk of being excluded from participation in culture.<sup>63</sup> The implementation of this programme was aimed at intensifying and expanding the number of cultural initiatives and reducing obstacles to access to culture, as well as raising awareness of the need to participate in culture. As part of this project, a grant programme was also made available to support tasks aimed at facilitating access to culture, aimed at a wide audience and favouring social integration.<sup>64</sup> The main goal of this action was to finance trips of organisers of cultural events to those places where there are no cultural institutions or to where there are but are of a different type. This is because the barrier to using the event is often the journey and its cost to the place where it takes place. Due to the limited mobility and financial resources of seniors, over a quarter of the submitted projects included tasks for seniors<sup>65</sup>. On the other hand, the programme of Accessible Culture – Cinema, according to which special screenings of Polish films were held for tickets costing PLN 10, accounted for approx. 20% of people over

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<sup>62</sup> <https://www.age-platform.eu/about-age> (accessed on: 23.08.2022).

<sup>63</sup> <https://kulturadostepna.pl> (accessed on: 23.08.2022).

<sup>64</sup> The programme's budget is PLN 5,000,000. Applications could be submitted by, among others: state cultural institutions; local government cultural institutions; art academies; public art schools with independent bookkeeping; non-public art schools with independent bookkeeping; local government units solely as bodies managing public art schools.

<sup>65</sup> <https://www.gov.pl/web/kultura/kultura-dostepna-dla-seniorow> (accessed on: 23.08.2022).

55 years of age.<sup>66</sup> The main idea of the Ministerial Very Young Culture initiative was to strengthen cultural education. The aim of the programme was to select 16 cultural education institutions in all voivodeships, which received funds from the minister responsible for culture and which were then transferred to other, smaller cultural institutions. The Ministry also co-finances cultural education, and as a part of this, for example, subsidies for admission to museums, is the author of regulations, according to which, as part of facilitating access to museums, admission is free one day a week. It also provides allowances for retirees and seniors. In addition to direct support for seniors, the Ministry of Culture and National Heritage also encourages directors of various institutions, including local government institutions, to introduce various types of discounts. The Ministry also takes care to eliminate architectural barriers to access to cultural institutions.

The Ministry of Funds and Regional Policy (MFiPR) has been coordinating the implementation of the governmental Accessibility Plus+ programme since 2018. Its purpose is to ensure free access to goods, services and the possibility of participation in social and public life for people with special needs. The activities of the programme are aimed at the whole of society; however, people with disabilities and seniors are groups that are particularly included in its assumptions.<sup>67</sup> The activity of the Accessibility Partnership is also an important element of the programme. This partnership is based on cooperation for accessibility in a wide group with local governments, entrepreneurs, non-governmental organisations and the community of people with disabilities and seniors. Among the numerous investments at the national and regional level, there are

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<sup>66</sup> <https://www.legalnakultura.pl/pl/czytelnia-kulturalna/wspolne-sprawy/news/1665,kultura-dostepna-w-kinach> (accessed on: 23.08.2022).

<sup>67</sup> A key outcome of the programme was the introduction of two laws dedicated to accessibility in 2019. The first is the law on digital accessibility of public entities' websites and mobile applications, regulating the digital accessibility obligations of public institutions. The second is the law on ensuring accessibility for people with special needs, obliging public entities to ensure architectural, digital and ICT accessibility, as well as creating tools to improve accessibility outside the public sector.



over 100 cultural institutions.<sup>68</sup> The key effect of implementation of the programme was the two accessibility laws introduced in 2019. The first is the Act on Digital Accessibility of Websites and Mobile Applications of Public Entities, regulating the obligations of public institutions in the field of digital accessibility. The second is the Act on Providing Accessibility to Persons with Special Needs, obliging public entities to provide architectural, digital, information and communication accessibility, as well as creating tools to improve accessibility outside the public sector. The report on the implementation of the governmental programme Accessibility Plus+ 2018–2025, prepared by the Ministry of Development Funds and Regional Policy, as of 31 December 2021, indicated the main activities of the programme in 2021 and the implementation status of its individual areas.<sup>69</sup>

#### 3.4.2. PUBLIC INSTITUTIONS FOR SENIORS

The provision of services for seniors relies heavily on public institutions. State and local governments should create legal, financial and organisational conditions to ensure a dignified old age, but the very provision of services should be decentralised and handed over to the society for implementation. Thanks to this, seniors do not feel excluded from the community, and they can make decisions on their own, while the environment learns respect and takes responsibility for the elderly. Municipalities play an important role in this process, as they are responsible for a range of services essential for the elderly. A large part of these services can be provided by

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<sup>68</sup> <https://www.gov.pl/web/fundusze-regiony/program-dostepnosc-plus>; <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-europejskie-bez-barier/dostepnosc-plus/> (accessed on: 25.08.2022); <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-europejskie-bez-barier/dostepnosc-plus/o-programie/uslugi/> (accessed on: 25.08.2022).

<sup>69</sup> Ministerstwo Funduszy i Polityki Regionalnej, *Sprawozdanie z realizacji rządowego Programu Dostępność Plus+ 2018–2025, według stanu na 31 grudnia 2021 r.*, pp. 72–78; <https://www.funduszeuropejskie.gov.pl/media/110036/Sprawozdanie2021.pdf> (accessed on: 25.08.2022).

non-governmental organisations, and entrusting them with their performance is a practical manifestation of de-institutionalisation and the implementation of the constitutional principle of subsidiarity. Organisations are closer to people and their problems than government and even self-government administrations. They are made up of citizens, including the seniors themselves, who know the needs of the elderly best.<sup>70</sup> Organisations can act quickly and flexibly adapt to the individual needs and expectations of each senior. They are able to mobilise residents to act for the benefit of the elderly and organise social support networks.<sup>71</sup>

Many such initiatives based on the involvement of residents were implemented, for example, under the Act Locally programme. Seniors also have constant support from non-governmental organisations, e.g. as part of seniors' clubs, universities of the third age or volunteering. Organisations most often offer services that do not require specialist preparation. New technologies play an increasingly important role in the provision of social services, which contributes to increasing the effectiveness and efficiency of service provision and facilitates their use, also by seniors. A good example of this is the Good Support system, which offers digital tools to improve the management of services addressed to seniors. It enables the coordination of activities of various entities providing support, and the seniors themselves have easier access to the services offered. Importantly, the system allows families, neighbours or local organisations to be included in the provision of services, i.e. to de-institutionalise them.

In addition to special programmes, institutions also organise special campaigns that take place regularly and are of great interest to recipients. For several years, the Ministry of Culture and National Heritage has been preparing the Senior Weekend with Culture campaign, the main goal of which is to encourage seniors to actively participate in cultural life. Every year, nearly 400 institutions from

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<sup>70</sup> R. Spyrka-Chlipała, *Uwarunkowania i struktura potrzeb życiowych seniorów*, "Roczniki Teologiczne" 2014, t. LXI, nr 1, pp. 238–239.

<sup>71</sup> M.J. Januszewska, *Charakterystyka modeli zachowań konsumpcyjnych seniorów na rynku kultury*, "Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne" 2018, nr 26, p. 66.

all over the country take part in it. Thanks to the campaign, seniors have the opportunity to find out how and see how much the cultural institutions operating within it have to offer. Among the free or paid with a symbolic one-zloty proposals are, among others, museum tours, thematic walks, exhibitions, performances, film screenings, concerts, workshops, meetings with authors, lectures and even gymnastic and dance classes, as well as travels in the virtual world.<sup>72</sup>

Regardless of the adopted criterion of the strength of the relationship with universities, universities of the third age should be assessed from the perspective of an institution focused on: disseminating knowledge about culture, promoting knowledge about maintaining health in old age and mobilising to solve problems of the elderly and the old age.<sup>73</sup> The first facility of this type was established in 1975 in Warsaw.<sup>74</sup> It is worth emphasising that Poland was one of the first countries in the world to develop the U3A. At that time, the focus was on the inclusion of the elderly into the system of lifelong learning and their intellectual, mental and physical activation, as well as on conducting observations and research. The intensive development of the U3A took place in the years 1975–1979 and after 1989. In order to coordinate the activities carried out by such institutions from all over the country, in 1981, a U3A section at the Polish Gerontological Society was established. This institution belongs to the International Association of Third Age Universities (AIUTA). The section recognised the following as the main goal of the U3A's activity: "improving the quality of life of the elderly, creating conditions for good aging, breaking down erroneous stereotypes and ideas assigning the elderly the roles of the mentally and

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<sup>72</sup> More than 400 institutions from across the country will take part in this year's campaign. In the previous edition, which took place in 2019, more than 22,000 seniors benefited from the offer of cultural institutions.

<sup>73</sup> G. Orzechowska, *Young-Old Uniwersytet Trzeciego Wieku. O zmianach, doskonaleniu form edukacyjnych i podnoszeniu jakości kształcenia*, [in]: *Aktywność społeczna, kulturalna i oświatowa seniorów*, red. A. Fabiś, Bielsko-Biała 2008, pp. 137–144.

<sup>74</sup> As a result of the cooperation and scientific contacts between Professor Halina Szwarz and Professor Pierre Vellas, they established the University of the Third Age in Warsaw, under the name Studium III Wieku, on 12 November 1975.

physically handicapped. This goal is served by the inclusion of the elderly in the system of lifelong learning, based on the intellectual and scientific potential as well as the material base of universities”. Currently, almost 400 U3As operate in Poland, which on average have 230 listeners, which amounts to approx. 90,000 people.<sup>75</sup> The importance of such entities in the social policy of the state is also evidenced by the fact that the Senate of the Republic of Poland decided that 2012 was the Year of the Universities of the Third Age.

An important place where seniors have great access to cultural and educational activities is Social Assistance Centres (OPS). In addition to the traditional day stay, which is the main type of care for this type of institutions, the cultural offer is also directed to seniors who use OPS services less frequently.<sup>76</sup> Often these are Senior Clubs and Senior Support Groups, the aim of which is, among others, increasing fitness through multidirectional activation; organization of free time; supporting the elderly in good psychophysical condition; counteracting the isolation and marginalization of the elderly; ensuring access to cultural goods; shaping the habit of social action; social integration of seniors; developing and building a generational and intergenerational dialogue; promotion of a positive image of the senior. Therefore, among the classes, the dominant ones are those aimed at physical activity, as well as broadly understood culture through manual activation, e.g. art classes, tailoring classes, needlework, theatre and artistic classes, cultural activities – going to cinemas, theatres, museums.

### 3.5. Summary

Seniors are a source of priceless pragmatic knowledge, unique skills, traditions and values that can be passed on to future generations. Therefore, first of all, state and local governments should provide

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<sup>75</sup> <https://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/uniwersytety-trzeciego-wieku-w-roku-akademickim-20172018,11,2.html> (accessed on: 28.08.2022).

<sup>76</sup> <https://www.opsbielany.waw.pl/owds1.php> (accessed on: 28.08.2022).

seniors with a dignified old age, i.e. create conditions for full satisfaction of their needs.<sup>77</sup>

The aging process of modern societies, especially European ones, becoming more dynamics since the beginning of the 20<sup>th</sup> century, influences many aspects of their functioning. Currently, the share of people over 65 in the total population of Europe and North America is 18.7%, while according to forecasts, it will reach 22% in 2030, and in 2050, 26.9% of the total population. This situation entails the need to focus on the problems of the elderly. In the face of constant changes of reality in the technical, technological, cultural and social spheres, one of the key issues is that of learning in late adulthood. On the one hand, keeping up with progressive changes requires lifelong education, and on the other hand, participation in it is one of the main strategies for maintaining good physical and mental health.<sup>78</sup>

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<sup>77</sup> B. Szatur-Jaworska, *Zasady polityk publicznych w starzejących się społeczeństwach*, [in:] *Strategie działania w starzejącym się społeczeństwie. Tezy i rekomendacje*, Warszawa 2012; <https://www.rpo.gov.pl/pliki/13541772380.pdf>, pp. 12–13.

<sup>78</sup> Globally, people aged 65 or older outnumbered children under five for the first time in 2018. In 2022, there will be 771 million people aged 65 or older worldwide, three times more than in 1980 (258 million). The older population is projected to reach 994 million by 2030 and 1.6 billion by 2050. As a result, by 2050, there will be more than twice as many people aged 65 or older in the world as there will be children under five, while the number of people aged 65 or older in the world will be almost the same as the number of children under 12. While in some countries, the rapid increase in the number of older people is mainly due to historically high fertility in other countries the main driver is the continued reduction in premature mortality of successive generations. The proportion of people aged 65 and over is projected to increase globally between 2022 and 2050. Globally, around 10% of people will be 65 or older in 2022. The proportion of older people globally is projected to reach nearly 12% in 2030 and 16% in 2050. Europe and North America had the highest proportion of older people in 2022, with nearly 19% aged 65 or over, followed by Australia and New Zealand (16.6%). Both regions are experiencing further population ageing. Projections indicate that by 2050, one in four people in Europe and North America could be 65 or older. United Nations, Department of Economic and Social Affairs Population Division, *World Population Prospects 2022*, New York 2022 available at: [https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022\\_summary\\_of\\_results.pdf](https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022_summary_of_results.pdf) (accessed on: 29.08.2022).

In turn, cultural education and the increasing participation of society in cultural life are the priorities of the Ministry of Culture. Activities in this sector of public life are needed, because the interest of the public is not directly aimed at satisfying this area of activity. Looking also from the perspective of the economy, it is rather difficult to define culture as a highly profitable activity, especially when it comes to so-called high culture. In this sphere, it is easier to combine elements of culture with the entertainment industry, but it is increasingly moving away from traditionally understood culture.<sup>79</sup>

Cultural policy is one of the most important tasks of the state, especially taking into account the area of national heritage.<sup>80</sup> More and more often, new legal acts are created, and norms of international law are adopted in order to preserve the traditional and characteristic values of a given cultural area. In this task, Member States support the institutions of the European Union, as well as materially. However, the direct decision-maker are specially delegated national entities, the task of which is not only to protect culture but also to animate and educate.

The autumn of life and retirement is a time of well-deserved rest, when you can enjoy the charms of life and catch up, start implementing previously unfulfilled plans, passions and dreams. It is the perfect time for active and creative participation in culture. One should remember about facilitating seniors' access to the cultural offer, e.g. by regulating the rules of payment but also by adjusting the time of events to the needs of seniors. It is worth remembering that the organisers of such events can use the knowledge, experience and skills of seniors. The elderly can learn, and if they can no longer do this alone, it is necessary to provide them with someone to read to them and teach them how to use modern devices that facilitate access to, for example, culture.<sup>81</sup>

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<sup>79</sup> S. Magala, *Po co seniorom kultura?*, "Studia Kulturoznawcze" 2013, nr 2(4), pp. 25–34.

<sup>80</sup> H. Hrapkiewicz, *Potrzeby osób w wieku starszym i próba ich realizacji*, [in:] *Seniorzy w rodzinie, instytucji i społeczeństwie. Wybrane zagadnienia współczesnej gerontologii*, red. A. Fabiś, Sosnowiec 2005, pp. 103–112.

<sup>81</sup> E. Konieczna, *Senior w kulturze – kultura dla seniora: o kulturowym wzbogacaniu człowieka starszego*, "Dyskursy Młodych Andragogów" 2016, t. 17, pp. 209–210.

In 2015, the Ministers of Labour and Social Policy, as well as Culture and National Heritage, appealed to the directors of artistic institutions to make their institutions more accessible to the elderly. During the conference “Culture and Seniors,” representatives of both ministries discussed methods of wider participation of the elderly in cultural events. As part of activities undertaken at local government levels, more and more cities are introducing local Senior Cards, entitling them to many discounts in cultural, art and recreation institutions, as well as in selected companies.<sup>82</sup>

Despite information and promotion campaigns undertaken in Poland, as well as co-financing at various levels, the participation of the elderly in cultural and educational activities is one of the lowest in Europe<sup>83</sup>. Polish seniors still use this type of activity less frequently than their peers from Western and Northern Europe.<sup>84</sup> The main reasons are health problems and needs related to meeting other, more important areas of life, including, for example, social security.<sup>85</sup>

Based on the analysis conducted, the following *de lege ferenda* postulates should be put forward:

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<sup>82</sup> Activities in this field are implemented as part of the ASOS (Social Activity of Older Persons) programme. The programme is being implemented in successive editions, as it is very popular. This programme stipulates, among other things, that the shaping of conditions enabling seniors to lead active lifestyles, with a special focus on participation in culture and its dissemination, makes it possible to use their intellectual creative resources as a factor in the development of social potential.

<sup>83</sup> S. Słowińska, *O “gettoizacji” aktywności kulturalnej seniorów*, “Rocznik Andragogiczny” 2014, nr 21, pp. 271–281.

<sup>84</sup> L. Lassota, *Doświadczenia zagraniczne w animacji kulturalnej osób starszych*, [in:] *Aktywność społeczna, kulturalna i oświatowa seniorów*, red. A. Fabiś, Bielsko-Biała 2008, pp. 39–46.

<sup>85</sup> It is also worth noting studies by international actors that point to past experience within the framework of assisting older people and which present statistics: Ageing Europe – looking at the lives of older people in the EU, Eurostat 2019, <https://ec.europa.eu/documents/3217494/10166544/KS-02-19%E2%80%91681-EN-N.pdf/c701972f-6b4e-b432-57d2-91898ca94893> (accessed on: 29.08.2022); Kancelaria Senatu, *Aktywność osób starszych. Opracowania tematyczne OT-672*, Warszawa 2019, pp. 25–28; M. Mękariski, *Stan badań nad uczestnictwem osób starszych w kulturze*, “Studia Kulturoznawcze” 2013, nr 2(4), pp. 35–51.

- international law should seek to harmonise the rules in the Member States of international organisations with regard to the protection of the rights of senior citizens;
- legal norms defining the age of seniors should be clarified not only within one branch of law;
- European Union legislation should ensure that the rights of seniors are the same in all Member States;
- the Polish legislator should take note of the problem of population ageing and adapt legal provisions to changing demographic structures;
- the drafting of new legislation should take into account the experience of social sciences dealing with the situation of older people;
- legislation should take into account the needs of seniors, hence, drafts should be consulted with representatives of this social group;
- culture and education are higher-order needs, so lower-order needs, including, among others, safety and health, should be taken care of first;
- culture and education, especially for seniors, should also be available in smaller towns and villages;
- educational offerings for seniors should include topics oriented towards improving their knowledge, including in the areas of health, physical culture, etc.;
- legislation should oblige local governments to create special institutional structures aimed at the needs of senior citizens;
- the position and needs of senior citizens should be differentiated, taking into account their possible disabilities.

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## Chapter 4. Access to Healthcare Services for the Elderly Financed from Public Funds

### 4.1. Introduction

Ageing and old age are a normal stage of human life, a natural process of decline in the biological activity of the body associated with the passage of time. It is difficult to identify the threshold beyond which a person enters old age and is classified as an elderly person. It is accepted that this is the moment of reaching retirement age, which is currently 65 years of age. However, the group of older people is not homogenous but very diverse in terms of capabilities and needs.

A feature of modern times is the extension of life, which is due to the development of civilisation, medical achievements, improvements in the quality of health services, changes in lifestyles aimed at caring for health and preferring health-oriented behaviour. In view of this, the perspective of old age as an important stage of life is becoming increasingly important, and the pursuit of satisfaction during this stage has become the goal not only of individuals but also of the entire system of care for the elderly. This satisfaction is driven by a number of factors, one of the most important of which is health well-being. Maintaining good health for as long as possible promotes a sense of satisfaction with life, enables full participation in family and social life and enables people to engage in a wide range of activities, whether these are work-related or pursuing hobbies

and interests.<sup>1</sup> Physical well-being also influences mental well-being. Health well-being is one of the main determinants of older people's quality of life and ability to undertake a range of activities.

Polish society is an aging society. This process is mainly due to declining fertility and the medical progress-driven extension of life expectancy, which results in a decrease in the number of people of pre-productive age and an increase in the number of old people in the total population. In the time of ageing and old age, illness becomes an integral part of a person's everyday life. The ageing of the population therefore entails a need to reorganise the healthcare system, with particular attention being paid to geriatric care dedicated to the elderly.

The main research assumption of the study boils down to answering the questions of whether the elderly have access to medical care adequate to their health needs, taking into account the specific needs resulting from aging and old age.

## 4.2. Ageing and Old Age

Ageing is a slow but progressive and irreversible process. The ageing process leads to old age, which ends with death. Old age is the final phase of life, beginning when the threshold of old age is reached, which is determined by: typical biological and psychological changes, developmental tasks, critical life events and typical social roles.<sup>2</sup> By convention, the chronological age determined by the date of birth is taken as the threshold of old age. It is easier to determine than biological, psychological and social age, although it is these aspects of a person's life that determine the stage of old age.<sup>3</sup> Visible changes begin between the ages of 30 and 40, which is why public perception has become firmly established that human development reaches

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<sup>1</sup> M. Zadworna-Cieślak, M. Marszałek, *Różne oblicza starości*, [in:] *Człowiek wobec zagrożeń współczesności*, V. Tanaś, W. Welskop (red.), Łódź 2017, p. 173.

<sup>2</sup> B. Szatur-Jaworska, P. Błędowski, M. Dziegielewska, *Podstawy gerontologii społecznej*, Warszawa 2006, p. 45.

<sup>3</sup> A. Leszczyńska-Rejchert, *Człowiek starszy i jego wspomaganie – w stronę pedagogiki starości*, Olsztyn 2007, p. 40.



its peak during this period of life and then, in an irreversible and unavoidable way, is already heading towards old age.

Ageing and old age are inhomogeneous concepts, meaning that older people are a diverse group in many respects: age, health, work, family, social, etc. Some authors even point out that older people should not be referred to as representatives of a single group but that attention should be paid to the diversity of factors influencing their possible categorisation.<sup>4</sup> Biological factors are related to the characteristics of the organism, which reduces its performance or loses particular functions over time. Socio-cultural factors are no less important in determining a person's state of health. This is because the physical condition of the elderly is influenced by lifestyle, the social roles played in earlier life, exposure to pathogenic factors (stress, working conditions, diet, state of the natural environment) and genetic factors. It can be said that a person has been working since childhood to determine when they will begin to age, at what rate the ageing process will take place and what its manifestations will be.<sup>5</sup> It is therefore extremely difficult to pinpoint the point at which the "threshold of old age" is crossed. Entering old age is an eminently individual matter; moreover, everyone has his or her own rate of ageing, and every organ ages at its own rate, so at most we can only try to put a specific age frame around it.

### 4.3. The State of Health of Elderly People

The World Health Organization has defined health as a state of complete physical, mental and social well-being. The enjoyment of the highest attainable level of health is one of the fundamental

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<sup>4</sup> A. Przybyłka, *Profilaktyka zdrowotna populacji wieku poprodukcyjnego*, [in:] *Polska a Europa. Procesy demograficzne u progu XXI wieku*, L. Frąckiewicz (red.), Katowice 2002, p. 76.

<sup>5</sup> M. Pieprzyk, P. Pieprzyk, *Osoby starsze w systemie ochrony zdrowia*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, 3, p. 177.

rights of every human being without distinction of race, religion, political belief, as well as economic or social conditions.<sup>6</sup>

As we get older, the risk of developing a chronic disease or syndrome increases, the treatment of which is long, and the strategy often chosen is only to alleviate the symptoms, as complete recovery is not possible.<sup>7</sup> A typical situation is the co-existence of several chronic disease processes that intermingle, causing many discomforts that reduce the quality of life. This also leads to a blurring of the distinction between symptoms caused by ageing and co-morbidities. The most common diseases that accompany the ageing process commonly include: osteoarthritis, osteoarthritis, osteoporosis, kidney disease, heart failure, atherosclerotic complications, declining lung capacity, hypertension, phlebitis, diabetes, cancer, stroke, Parkinson's disease, Alzheimer's disease, dementia and depression. Also included in the group of geriatric syndromes are visual impairment, hearing loss, incontinence and dizziness. Severe chronic illness can lead to a state of senile infirmity, which makes the elderly person increasingly less independent, unable to perform activities of daily living, requiring constant care and assistance from the family and healthcare system. The task of physicians is to alleviate the symptoms of these diseases and delay their progression. According to the report 'Health at a Glance: Europe 2020', as many as 58% of people over 65 suffer from these diseases, significantly higher than the European Union average of 37%.<sup>8</sup>

Older people are mainly supported by long-term care services (nursing and care services), inpatient rehabilitation or palliative and hospice care services. Nursing services (support in carrying out daily activities) are the domain of social policy, while care services are the domain of health care. Due to the change in the demographic structure and the nature of the conditions accompanying older

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<sup>6</sup> Preamble to the Constitution of the World Health Organization of 22 July 1946, OJ of 1948, no. 61, item 477 as amended.

<sup>7</sup> See: E. Jaul, J. Barron, *Age-Related Diseases and Clinical and Public Health Implications for the 85 Years Old and Over Population*, "Front Public Health" 2017, No. 5, pp. 2–5.

<sup>8</sup> OECD, *Health at a Glance: Europe 2020: State of Health in the EU Cycle*, Paris 2020, p. 133.

people, it seems necessary to increase the number of places in long-term care facilities.

#### 4.4. Older People (the Elderly)

Demographic changes taking place around the world have resulted, among other things, in an increase in the proportion of older people in the general population. According to the World Population Ageing 2020 report, there were 727 million people over 65 years of age living in the world in 2020, the majority of whom will be women. It is estimated that the number of elderly people will increase to 1.5 billion over the next three decades. This is a very large and rapid transformation that implies many new challenges for both global society and local communities in different regions of the world.<sup>9</sup>

Old age is defined by chronological (calendar) age; 65 is now taken as the threshold for old age, for social rather than medical reasons. A consequence of this approach is that the health status of people entering old age varies considerably. With regard to the criterion of age, doctrine distinguishes three categories of elderly people: younger seniors (60–69 years), older seniors (70–79 years) and the aged (over 80 years).<sup>10</sup>

The region particularly affected by population ageing is currently Europe. In 2019, more than a fifth of the continent's population was over the age of 65.<sup>11</sup> The reasons for this state of affairs are mainly attributed to rapidly advancing civilisational, cultural, social and technological changes, which are resulting in increased life expectancy, while fertility rates are declining in highly developed

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<sup>9</sup> United Nations Department of Economic and Social Affairs, Population Division, *World Population Ageing 2020 Highlights*, New York 2020, p. 1.

<sup>10</sup> M. Podkowińska, *Aktywny senior – życie towarzyskie, rodzinne i zawodowe seniorów w Polsce*, "Journal Socioterapie" 2018, No. 3, p. 16.

<sup>11</sup> Eurostat, *Population structure and ageing*, 2020, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Population\\_structure\\_and\\_ageing#The\\_share\\_of\\_elderly\\_people\\_continues\\_to\\_increase](https://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing#The_share_of_elderly_people_continues_to_increase), access: 14 September 2022.

countries.<sup>12</sup> In this context, Poland's demographic situation appears extremely unfavourable. According to a forecast by the Central Statistical Office, after 2060, people over 65 will account for more than one third of the population.<sup>13</sup>

The increase in the subpopulation of the elderly is caused, on the one hand, by the decrease in the number of births in Poland (1950 – approximately 770,000; 1970 – approximately 550,000; 1990 – approximately 550,000; 2000 – approximately 380,000), on the other hand, by improvements in health care and the consequent increase in life expectancy. This is currently 80.1 years for women and 71.4 years for men and will increase to 83.6 years and 77.5 years, respectively, by 2030. The projected increase for women is therefore 2.1 months per year, while for men, this is 3.6 months per year.<sup>14</sup> Similar trends are observed in all developed countries of the world.

The share of elderly people in the population of Poland has been systematically increasing since 2005. In 2005, this share was 17.2%, in 2015, it increased to 22.9%, and in 2020, it was 25.6%. According to the forecast of the Central Statistical Office, in 2030, the number of people 60 years of age and over will be 10.8 million (10.0% increase compared to 2020), in 2040 – 12.3 million (25.1% increase), while in 2050, Poland will have 13.7 million elderly people (39.8% increase compared to 2020), accounting for 40.4% of the total population. In 2050, seniors living in cities are expected to account for 23.5% of Poland's population, while rural residents of this age group will account for 16.8%.<sup>15</sup>

At the same time, as the elderly population grows, the need for social assistance and health care will increase. Of course, the deterioration in health resulting from ageing is a staggered process. In developed countries, most people over the age of 65 enjoy relatively

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<sup>12</sup> J. Rakowska, *Zróżnicowanie poziomu starości demograficznej Polski w ujęciu lokalnym*, "Studia Ekonomiczne i Regionalne" 2016, nr 2, p. 13.

<sup>13</sup> M. Waligórska, Z. Kostrzewa, M. Potyra, L. Rutkowska, *Prognoza ludności na lata 2014–2050*, Warszawa 2014, pp. 20–21.

<sup>14</sup> For more information see Główny Urząd Statystyczny, *Prognoza ludności na lata 2008–2035*, Warszawa 2009.

<sup>15</sup> Główny Urząd Statystyczny, *Sytuacja osób starszych w Polsce w 2020 r.*, Warszawa–Białystok 2021, p. 23.

good health, are physically and mentally fit and do not require constant assistance from others. Problems associated with ageing in a relatively healthy person do not appear until around 75–80 years of age and are most often associated with reduced mobility. It is therefore essential to adapt the healthcare system to the growing health needs of a demographically changing population. This is all the more so as, with the ageing of the population, the elderly are an increasingly large, and therefore increasingly important, part of it. Suffice it to recall that 322.6 million medical consultations were given in 2018, of which the proportion of the number of consultations given to the elderly accounted for 29.6% of all consultations. The costs of health services incurred by the National Health Fund amounted to nearly PLN 81.1 billion, of which nearly PLN 34 billion was spent on the treatment of people 60 years of age and over.<sup>16</sup>

Inpatient care in Poland in 2020 was provided by 898 general hospitals with a bed capacity of 167,567. In inpatient care, the hospital wards providing comprehensive medical care and nursing services to the elderly are geriatric wards, the number of which increased steadily until 2018. In 2010, there were 21 geriatric wards in general hospitals; in 2018, the number of such wards stood at 52, and in 2020, it fell to 51. At the end of 2020, geriatric wards had 1,045 beds, in which 21,900 people were treated during the year. Compared to the previous year, the number of beds in geriatric wards decreased by 4.7%, and the number of people treated decreased by 32.7%.<sup>17</sup>

Departments primarily treating the elderly also include long-term and hospice inpatient care units. These include long-term care facilities, nursing and care facilities, hospices and palliative wards. During 2020, these facilities assisted 92,500 people, including 70,900 people 65 years of age and over. In 2020, people 65 years of age and over thus accounted for 76.7% of patients in such facilities.

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<sup>16</sup> More information see: Główny Urząd Statystyczny, *Sytuacja osób starszych w Polsce w 2018 r.*, Warszawa–Białystok 2020.

<sup>17</sup> Główny Urząd Statystyczny, *Sytuacja osób starszych w Polsce w 2020 r.*, Warszawa–Białystok 2021, pp. 46–47.

#### 4.5. Constitutional Guarantees for the Provision of Special Health Care to the Elderly

The universal right to health care is guaranteed in Poland by Article 68 of the Constitution of the Republic of Poland,<sup>18</sup> which is a natural consequence of Articles 30 and 38 of the Constitution of the Republic of Poland. Indeed, there is no doubt that Article 68 of the Constitution of the Republic of Poland is exceptionally strongly, even inextricably linked to Articles 30 and 38 of the Constitution of the Republic of Poland. The protection of health is closely related to the protection of life and the right to human dignity. The right to the protection of health is, above all, the right to preserve life and to defend it when it is endangered.<sup>19</sup> These guarantees also apply to the elderly population, which is anchored in the principle of equality and non-discrimination on any grounds.

Moreover, the legislator distinguishes among all those entitled to health services four categories of subjects to whom the ordinary legislator should provide special health care.<sup>20</sup> Pursuant to Article 68(3) of the Constitution of the Republic of Poland, “Public authorities are obliged to provide special health care to children, pregnant women, persons with disabilities and the elderly”. The common feature of these subjects is that, on the one hand, they most often have an increased need for healthcare services, on the other hand, they are less independent than the average individual. Thus, one should share the view expressed in literature that the subjective scope of Article 68(3) of the Constitution is conditioned by humanitarian

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<sup>18</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended.

<sup>19</sup> Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

<sup>20</sup> Health care is a narrower concept than health protection but, at the same time, broader than provision of health care; at the same time, health care is only one element of health protection. Health care is identified not only with the fulfilment of objectives in the form of treatment and rehabilitation but also with efforts to preserve health and prevent disease by taking diagnostic and preventive measures. Healthcare services are regarded as a basic component of health care, Judgment of the Constitutional Tribunal of 22 July 2008, K 24/07, OTK-A 2008, No. 6, item 110.

considerations and the concern to ensure the development of the Nation.<sup>21</sup> Providing special health care to these categories of persons is a consequence of their life situation and therefore results from the necessity of increased demand for healthcare services. Adoption of a solution privileging certain beneficiaries of healthcare services is justified by the increased health needs of these categories of subjects, which are associated with a higher risk of occurrence of various types of bodily dysfunctions, including a higher frequency of illnesses and the occurrence of diseases typical of these groups, which in turn is associated with the necessity of applying specific types of therapeutic measures.<sup>22</sup> If health care is to be specialised, it should take into account the health interests of the entitled categories more fully than in the case of other entitled groups. The adopted solution is an expression of the axiology adopted by the legislator, in which concern for the above-mentioned categories of persons is an expression of concern for the development of the nation, human dignity and protection of life and health, constituting a form of control standard relating to the standards of service provision in health care, understanding of the essence of this care and the ability to decode the legal norms of ordinary legislation.

It should be noted that of the four categories of subjects listed in the wording of Article 68(3) of the Constitution of the Republic of Poland, only the category of the elderly poses definitional problems. The other categories of subjects, as opposed to 'elderly persons', appear in the constitutional provisions. The elderly may be identified with the persons 'having reached the retirement age' referred to in Article 67(1) of the Constitution of the Republic of Poland, bearing in mind the social context of both norms.<sup>23</sup> Helping to define this

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<sup>21</sup> Judgment of the Constitutional Court of 22 July 2008, K 24/07, OTK-A 2008, No. 6, item 110.

<sup>22</sup> W. Lis, *Państwo jako gwarant bezpieczeństwa zdrowotnego*, [in:] *Bezpieczeństwo zdrowotne w praktyce medycznej*, M. Sadowska, W. Lis, Warszawa 2022, p. 26.

<sup>23</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 412.

concept is the Act of 11 September 2015 on the elderly,<sup>24</sup> which defined an elderly person as one who has reached the age of 60. Nevertheless, a definitive indication as to when a person deserves the attribute of an elderly person is problematic. What is not in doubt is that old age refers to old age, the threshold of which, however, is ambiguously understood.

The distinctive feature of the regulation of the provision of Article 68(3) of the Polish Constitution is the provision of health care with the quantifier of 'special'. The following three considerations are fundamental in this respect: firstly, special health care *ex definitione* goes beyond the sphere of ordinary, general health care, so it should be intensified, more intensive or more specialised, i.e. adapted to the specific needs characteristic of a given group of subjects; secondly, the purpose of health care is not only treatment and rehabilitation but also care for the preservation of health; and, thirdly, prevention of disease<sup>25</sup>. The specialness of health care implies the necessity of providing care organised on a different basis than in the case of universal care. In particular, this refers to the obligation to create and finance special dispensaries or special conditions for the use of universal dispensaries for the groups (categories) listed in Article 68(3) of the Constitution of the Republic of Poland, as well as to create special benefits for them (leave, benefits).<sup>26</sup>

The constitutional legislator imposed an obligation on the ordinary legislator to develop a detailed normative concept of health care. It did not prejudice the construction of this system as a whole or in its individual elements, its legal nature, the sources of financing of healthcare services, the nature and structure of the payer(s) of these services or the ownership structure of healthcare providers. However, certain limitations on the discretion of the ordinary legislator may arise from other constitutional principles or values. Thus, it follows from the obligation of the public authorities to actually

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<sup>24</sup> Cf.: Article 4 point 1 of the Act of 11 September 2015 on elderly people, Journal of Laws of 2015, item 1705.

<sup>25</sup> Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

<sup>26</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 411.



ensure the conditions for the realisation of the right to health protection, which cannot be treated as an illusory or purely potential entitlement, and that the system – as a whole – must be effective.<sup>27</sup>

The conditions and scope of the provision of healthcare services are defined by the Act of 27 August 2004 on health care services financed from public funds.<sup>28</sup> However, the provisions of the Act do not distinguish or differentiate between the needs of older people – the elderly – and the needs of the rest of society.

A manifestation of the provision of special health care for the elderly is the provisions on reimbursement of medicines. The provision of Article 43a of the Act on healthcare services financed from public funds guarantees the benefit for recipients over 75 years of age the right to free supply of medicines, foodstuffs for special nutritional purposes and medical devices specified in the list announced by the minister competent for health matters pursuant to Article 37(1) of the Act of 12 May 2011 on reimbursement of medicines, foodstuffs for special nutritional purposes and medical devices. The current list of medicines, foodstuffs for particular nutritional uses and medical devices for persons over 75 years of age is contained in the Notice of the Minister of Health of 22 August 2022 on the list of reimbursed medicines, foodstuffs for particular nutritional uses and medical devices as of 1 September 2022.

#### 4.6. Risk Areas Related to Older People's Access to Health Services

A number of risks can be distinguished in connection with the provision of health services to elderly people, the existence of which undermines the constitutional guarantees of special treatment for this category of subjects.

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<sup>27</sup> W. Brzozowski, *Konstytucyjne gwarancje ochrony zdrowia*, [in:] *Pojęcie, źródła i zakres prawa medycznego. System prawa medycznego*, Vol. 1, R. Kubiak, L. Kubicki (red.), Warszawa 2018, p. 124.

<sup>28</sup> Act of 27 August 2004 on healthcare services financed from public funds, Journal of Laws of 2021, item 1285, as amended.

1. **Treating the elderly like any other patient.** However, it is characteristic of the elderly to have a number of different chronic diseases at the same time, which intermingle and reduce the quality of life. This process is referred to as multimorbidity. This leads to a blurring of the distinction between symptoms caused by ageing and comorbidities.

Older people with multimorbidity very often require a special approach, characterised by a comprehensive diagnosis of all diseases and the implementation of simultaneous treatment of all diagnoses. This special approach is necessary to first diagnose the patient well and then treat him or her optimally. The diagnosis of the patient is not the sum of the diagnoses of the individual organs; within the framework of the diagnosis, it is still necessary to identify the interconnections between the diseases, the mutual influences, etc., but these interconnections can and often do go beyond the biological sphere.<sup>29</sup> The specificity of the illness of the elderly therefore requires teamwork between doctors of different specialisations. The current organisation of the health protection system favours the fragmentation of health services, which is reinforced by the way in which services are financed for procedures in narrow specialities and the treatment of a strictly defined system or organ. The healthcare financing system does not provide for any “cure bonus”, the performance of appropriate procedures being sufficient, nor does it require or enable cooperation between doctors of different specialisations in the treatment of patients who are forced to go to many specialists, often to different outpatient clinics.<sup>30</sup> The health protection system does not require cooperation between specialists, nor the integration of actions on behalf of the patient’s health priorities, among which the primary one is the cure. The organisation of the health protection system, based on narrow speciality medicine and the treatment of a specific system or organ, reinforced by the financing of services “per procedure”, promotes fragmentation of

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<sup>29</sup> M. Pabiś, D. Kuncewicz, *Potrzeby osób starszych w zakresie opieki zdrowotnej – konteksty*, “Pielęgniarstwo XXI wieku” 2016, nr 4, p. 59.

<sup>30</sup> A.M. Fal, *Rekomendacje zmian systemowych w opiece nad osobami starszymi w Polsce*, Warszawa 2016, pp. 13–14.

health services, which serves neither the patient nor the system. The experience of many countries shows that the fundamental problem of the health protection system for the elderly is its incoherence, lack of proper coordination and lack of communication between doctors caring for the same patient.<sup>31</sup>

A consequence of multimorbidity is multidrug use (polypragmasy), which is the simultaneous use of at least several drugs by a patient. Multimorbidity and polytherapy create a disease-therapy spiral, or vicious circle, in which the increasing number of diseases necessitates treatment by an increasing number of specialists, and therefore the use of an increasing number of drugs, leading to damage to further organs, which leads to hospitalisation. Many patients take drugs whose properties are either repeated or mutually exclusive. The use of a large number of drugs very often reduces the effectiveness of treatment, especially in the elderly, whose body has a weaker metabolism and absorbs and excretes drugs less effectively, which consequently very often leads to the occurrence of adverse effects, including dangerous drug interactions. The risk of drug interactions is higher the more drugs a patient takes. A basic principle of pharmacotherapy for the elderly, especially those with multimorbidity, is that any ailment or clinical symptom may be a consequence of the pharmacotherapy used.<sup>32</sup> Polypragmasy is one of the most common treatment errors. Polypragmasy generates additional treatment costs in two ways: firstly, costs associated with the purchase of further (often expensive) medicines, and secondly, costs associated with the treatment of adverse side effects, as symptoms associated with iatrogenic errors account for 20% of all hospitalisations of older people, placing an additional financial and organisational burden on the health protection system. The reasons

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<sup>31</sup> “Family caregivers reported lack of coordination within healthcare institutions, as well as between institutions. Within hospitals, for example, family caregivers said that doctors often do not talk to each other about patients they have in common”; A. Brookman, M. Harrington, *Family Caregivers: A Shadow Workforce in the Geriatric Health Care System?*, “Journal of Health Politics, Policy and Law” 2007, No. 6, p. 1015.

<sup>32</sup> A.M. Fal, *Rekomendacje zmian systemowych w opiece nad osobami starszymi w Polsce*, *op. cit.*, p. 16.

for this include the lack of coordination between highly specialised care and primary care.<sup>33</sup>

Older people require the specific approach offered by geriatrics, which is clearly better for the patients and, not least, for the health protection system. Geriatrics deals with multi-disease conditions typical of ageing and their functional consequences. What distinguishes geriatrics from other fields of medicine is its comprehensive approach to the patient and its holistic assessment of the patient's health status – as health care for the elderly requires a holistic analysis not only of the patient's physical condition but also of the functional and socio-economic status. Knowledge of a comprehensive geriatric assessment, which includes various aspects of the patient's health, helps the doctor to make an objective diagnosis of the patient's condition. The development of geriatrics has the potential to reduce the cost of treating elderly patients. For the patient, the use of a comprehensive geriatric assessment means an accurate diagnosis, reduced mortality, improved physical and mental well-being and a reduction in the number of medications taken.<sup>34</sup> Without a doubt, the essence of geriatrics is the subjectification of the patient - treating him or her holistically as a psycho-physical whole rather than as a conglomerate of multiple diseases or the subject of palliative or long-term care. Geriatrics, with its standards for the holistic assessment of a patient's condition, is able to replace many of the initial narrow-specialist interventions as it focuses not on a single disease entity but on the complex, interpenetrating functional, anthropometric, metabolic and inflammatory disorders arranged into large geriatric syndromes. This not only avoids visits to many different specialists but also reduces pharmacotherapy and saves money in the health protection system for possible outpatient or inpatient treatment.

In an older person, a comprehensive geriatric assessment, which additionally assesses performance in activities of daily living, should

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<sup>33</sup> M. Pieprzyk, P. Pieprzyk, *Osoby starsze w systemie ochrony zdrowia*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, nr 3, p. 181.

<sup>34</sup> M. Pieprzyk, P. Pieprzyk, *Osoby starsze w systemie ochrony zdrowia*, *op. cit.*, p. 180.

be the basis for diagnosis and treatment. A comprehensive geriatric assessment consists of a thorough medical examination, an assessment of possible nursing problems, a psychological, rehabilitation and social assessment and the performance of a specific set of laboratory tests. The purpose of the assessment is to determine the functional capacity of the organs, to find out the health, psychological and social needs and to establish a management plan for the elderly person as part of a team diagnostic and treatment process. Such an assessment makes it possible to identify an elderly patient's unrecognised problem, improve their functional and psychological state, reduce the burden on carers, reduce the cost of care and prolong the ability to function independently. The main aim of geriatrics should therefore be to keep the elderly fully capable to function independently in their living environment and to improve their quality of life. The basis of care for the elderly should be comprehensive geriatric care, taking into account the multimorbidity associated with ageing and old age. In view of this, the limited access to geriatricians is completely incomprehensible, which indicates that there is no system of geriatric medical care for the elderly in Poland.<sup>35</sup> With the above in mind, access to geriatricians for the elderly is almost non-existent, in addition to being unequal in terms of territory. In 2018, 73.7 thousand geriatric consultations were provided out of 116.3 million total specialist consultations, representing only 0.06% in the outpatient specialist care group.<sup>36</sup>

The problem of disability is also linked to the ageing of the population. Without a doubt, the incidence of disability increases with age, sharply after the age of 40. One in ten people in their 40s has a disability, almost one in five in their 50s, and almost one in two in people over 70.<sup>37</sup> Many cases of dependency and disability could be

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<sup>35</sup> Najwyższa Izba Kontroli, *Opieka medyczna nad osobami w wieku podeszłym*, Warszawa 2015, p. 12.

<sup>36</sup> B. Bień, J. Derejczyk, *Zdrowie i opieka zdrowotna osób starszych*, [in:] *Sytuacja osób starszych w Polsce – wyzwania i rekomendacje. Raport Komisji Ekspertów do spraw osób starszych na podsumowanie VII Kadencji RPO*, Warszawa 2020, p. 60.

<sup>37</sup> A. Przybyłka, *Świadczenia dla osób starszych i niepełnosprawnych w ramach systemów ochrony zdrowia i pomocy społecznej (wybrane zagadnienia)*, "Acta

avoided if the starting point in the treatment of patients was their needs based on their health status rather than the division of conditions by competence, speciality and medical discipline.

This is accompanied by an inadequate training programme for students of the health professions, resulting in inadequate preparation for the modern management of elderly patients. This is particularly evident at the stage of doctor-patient communication, which determines proper cooperation. Lack of communication skills hinders and sometimes even prevents relationships with elderly patients. Taking the time to talk to and get to know the patient has the potential to “pay off” in the form of better cooperation in treatment and care.<sup>38</sup>

**2. Reduction in mobility and independent living as a result of ageing.** Physical well-being influences psychological well-being. All medical measures should aim to keep older people as physically fit as possible for as long as possible, which is the basis for independent living and satisfaction with life in its later stages. Moreover, activity is a prerequisite for meeting all human needs.

Advanced age and diseases accompanying old age inevitably reduce mobility and make it more difficult to carry out daily activities independently. Diseases of old age therefore require a combination of pharmacological treatment and early motor rehabilitation during periods of acute illness and convalescence (the early start principle), as well as in chronic diseases permanently limiting mobility.<sup>39</sup> Chronic diseases cause disorders in the functioning of the whole organism, and dysfunctions in the biological sphere most often affect mental health. The key to achieving psycho-physical well-being is to remain active, both mentally (e.g. mental exercise, reading books, absorbing valuable content) and physically (e.g. physical exercise, social activity, occupational activity). For this to be achievable, however, it is necessary to maintain a certain level

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Universitatis Lodziensis. Folia Oeconomica” 2013, nr 297, p. 184.

<sup>38</sup> M. Pabiś, D. Kuncewicz, *Potrzeby osób starszych w zakresie opieki zdrowotnej – konteksty, op. cit.*, p. 56.

<sup>39</sup> W. Pędich, *Zaspokajanie potrzeb zdrowotnych ludzi starych*, [in:] *Aktywne starzenie się – przeciwdziałanie barierom*, P. Szukalski, B. Szatur-Jaworska (red.), Łódź 2014, p. 126.

of health. Thanks to the development of medicine and technology, it is possible not only to prolong life but also to ensure a high level of well-being over a long period of time.<sup>40</sup>

Maintaining mobility and independent living depends on prevention. Preventive measures taken at a young age are important factors in minimising the risk of many diseases characteristic of old age, including, above all, cardiovascular diseases.<sup>41</sup> Prevention combined with the improvement of older people, primarily through rehabilitation, is the best way to prevent the infirmity or disability that is a consequence of the ageing process.

The primary aim of rehabilitation is to maintain or restore the ability to function independently, especially with regard to basic activities of daily living, and to improve specific organs and systems where there is dysfunction. Rehabilitation for older people is often the only chance for many of them to improve their functioning, but it is difficult to achieve this because of the waiting times for these services. Delaying rehabilitation has the effect of nullifying the effects of interventional medicine. Appropriate early rehabilitation allows patients to be properly and non-invasively improved and reduces the duration of disability, thus extending life in good health and enhancing quality of life, in addition to helping to reduce the cost of health services provided to older people.

Prevention and rehabilitation in healthy ageing programmes have two strands of action. One strand addresses older people by providing them with better access to rehabilitation health services, which enables them to participate in society for longer (an integration function) and reduces the need for health services such as hospital treatment and long-term care services. The second strand addresses people who are not yet elderly - it is primarily preventive

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<sup>40</sup> A. Rokicki, *Starość nie znaczy bierność – współczesne metody aktywizowania seniorów*, "Annales Universitatis Mariae Curie-Skłodowska" 2016, nr 1, p. 191.

<sup>41</sup> M.L. Daviglus, K. Liu, A. Pirzada *et al.*, *Favorable Cardiovascular Risk Profile in Middle Age and Health-Related Quality of Life in Older Age*, "Archives of Internal Medicine" 2003, No. 20, p. 2466.

in nature. Preventing infirmity and disability will reduce subsequent social and health expenditure.<sup>42</sup>

The lack of any activity on the part of older people increases their social isolation, which, with weakening of family ties, increases loneliness, affecting their health and increasing their need for health services. Wider, stable social contacts are able to compensate for the lack of closer, family contacts, which is why it is so important to activate older people, their participation in senior citizens' clubs, universities of the third age, workshops, intergenerational projects, physical recreation, developing their own interests or any other form of physical and intellectual activity.<sup>43</sup> However, in order for such measures to have the desired effect, they need to be widespread and long-term; one-off or short-term measures are ineffective. Keeping active is a prerequisite for maintaining fitness, which is, of course, in the interest of the individual, as well as being of great benefit to society as a whole.

**3. Ageing and old age are associated with the stigmatisation of older people**, which results in their marginalisation, even isolation, affecting their mental and physical health. The process of passing is pushed out of public consciousness by all means. Ageing and old age associated with illness, infirmity, disability and dependence on the help of others is treated as a sign of failure, which only accelerates the process of widening the intergenerational gap. Young people view the inevitability of old age with fear. This is linked to the fashion for youth and the lack of proper education. It is feared that there will be a development of modern gerontophobia, manifested in indifference and lack of understanding of older people in need of help, care and understanding. Old age is related to infirmity, sickness and the need for help from others. Such outlooks adversely affect social attitudes

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<sup>42</sup> For more information see: M.A. Mrozek-Gąsiorowska, *Rehabilitacja medyczna osób starszych. Zasadność, potrzeby i możliwości*, "Zdrowie Publiczne i Zarządzanie" 2011, nr 1, pp. 128–143.

<sup>43</sup> M. Pabiś, D. Kuncewicz, *Potrzeby osób starszych w zakresie opieki zdrowotnej – konteksty, op. cit.*, p. 58.



to old age, as well as the well-being of those who have crossed the threshold of retirement age.<sup>44</sup>

The cult of youth, utility and hedonism leads to contempt for old age and, consequently, for the elderly. A generation that pays tribute to health, youth and a high standard of living, confusing happiness with pleasure, confronts the ailing, infirm elderly with the limitations of life and the inevitability of death. Anything that interferes with the pleasure of life and is beyond a person's control would most readily be forgotten by them, banished from consciousness. Modern culture promotes the acquisition of more skills that will enhance the quality of life but, at the same time, drown out existential questions. This constant flight from questions about how to live, how to grow old, comes at a price both individually and socially. Such a model of life makes a person proficient in many skills, often beyond the ability to live.<sup>45</sup> Ageing and old age are painful reminders of the fragility of life, of dependency, of limitation, of unanswered questions. The fear of death that is transferred to the elderly and the promotion of the cult of youth fosters social exclusion and even age discrimination. A lack of acceptance of the ageing process, old age and death does not build space for a culture in which helping and caring for the elderly is a natural part of life.

One of the most damaging stereotypes about older people is considered to be the infantilisation stereotype, which is the belief that older people are like children and that their physical and mental abilities are diminished. This belief entails another belief that older people should be addressed in simple, uncomplicated sentences, that it is not worth taking what they say completely seriously, etc.<sup>46</sup>

The currently widespread negative image of old age is at odds with the image of medical achievements, modern diagnostics and therapies that prolong a person's life, keeping them mentally and

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<sup>44</sup> See: J. Dziewulska, *Przeciw beznadzieiności*, "Magazyn Pielęgniarki i Położnej" 2000, No. 1–2.

<sup>45</sup> M. Pabiś, D. Kuncewicz, *Potrzeby osób starszych w zakresie opieki zdrowotnej – konteksty*, *op. cit.*, p. 57.

<sup>46</sup> For more information see: W. Kołodziej, *Stereotypy dotyczące starzenia się i ludzi w podeszłym wieku*, [in:] *Starzenie się a satysfakcja z życia*, S. Steuden, M. Marczuk (eds.), Lublin 2006, pp. 91–102.

physically fit even in late old age. This is causing the population of older people to increase, to become an increasingly large social group with specific expectations that will have to be met.

4. **The way the health protection system is organised is not adapted to demographic change.** A consequence of the increasing number of older people is the need for increased investment in health and social services. Meanwhile, the rationing of health services, reflected in the waiting queues for health services, makes it very difficult for older people to receive timely treatment in accordance with medical indications. Moreover, long waiting periods for health services, especially specialised ones, which older people need most, mean that, because of their age, they do not live to receive the planned treatment. Waiting times for health services apply to almost all types of health services, from outpatient specialist care to spa treatment.

Regulation of health services due to limited financial resources, combined with the inadequate organisation of the functioning of the health protection system, not only limits access to treatment but also affects its continuation. The inability to continue treatment means that previous treatment does not have the intended medical effect, exposing patients to the need to undergo further medical procedures and, in extreme cases, to return to hospital in a state of significant deterioration. Access to health services, which depends on economic conditions, has an impact on the quality of health services. The economic rationale is that healthcare providers, seeking to minimise the costs associated with the provision of healthcare services, will limit them to the minimum in order to achieve a favourable financial result of their activity. In other words, despite the fact that health services are purchased by the payer as comprehensive benefits, including basic laboratory diagnostics and imaging, they are fragmented, which means that patients are deprived of access to tests they should normally receive. Fragmentation of health services increases the demand for health services provided by doctors of other specialisations (internists, cardiologists, diabetologists, neurologists, etc.), increasing waiting times for these

services and multiplying the costs of care for the elderly.<sup>47</sup> Failure to carry out a proper diagnosis forces patients to perform some tests on a commercial basis, which, taking into account the waiting, resulting in a struggle for access to the test and strain on the financial capacity of patients, often delays the start of the treatment process, contributing to the aggravation and perpetuation of the conditions.

Doctors are subjected to the pressure of economisation (looking for savings). Contracts with the National Health Fund set limits on the number and duration of medical visits and the number of diagnostic tests ordered, which reduces the standard of advice given to older people. Doctors are constantly forced to make choices about who can be treated with more commitment and who can only be treated conservatively, and these decisions are less and less embedded in an ethical context.<sup>48</sup> Closely related to this is the problem of the valuation of care services for elderly patients. In geriatric care, the valuation of the health services provided does not correspond to the actual costs incurred due to the fact that in geriatrics, the health of the elderly patient is assessed holistically, not selectively, and since such a comprehensive geriatric assessment involves many body systems and functions, this entails costly diagnostics. One could venture to argue that the way in which services in hospital care are funded (one patient stay is payment for one illness) is the main culprit for unnecessary hospitalisations and associated costs – forcing shorter stays and repeat hospitalisations.<sup>49</sup>

5. **The objectification of the elderly** causes them to be eliminated from the healthcare process, starting at the stage of consenting to the healthcare service. Doctors do not have the patience or the ability to communicate with an elderly patient, undoubtedly requiring more attention and understanding, which, combined with time pressure, causes them to agree upon treatment actions with the patient's family. Agreeing upon therapeutic actions with persons accompanying an

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<sup>47</sup> B. Bień, J. Derejczyk, *Zdrowie i opieka zdrowotna osób starszych*, op. cit., p. 59.

<sup>48</sup> J. Twardowska-Rajewska, *Dyskryminacja ze względu na wiek w obszarze ochrony zdrowia*, [in:] *Co wiemy o dyskryminacji ze względu na wiek?*, Warszawa 2005, p. 48.

<sup>49</sup> B. Bień, J. Derejczyk, *Zdrowie i opieka zdrowotna osób starszych*, op. cit., p. 59.

elderly patient with full legal capacity, even if they are the persons closest to the patient, is unacceptable under current legislation. Persons accompanying elderly persons may at most act as a guardian *ad litem*, who has no authority to decide for the patient.<sup>50</sup> Such a practice violates the patient's autonomy in decision-making, which stems from human dignity, and the fundamental rights of the patient to comprehensive and comprehensible information about his or her condition, to consent to the provision of health care, to respect for his or her privacy and to the confidentiality of information about him or her. The elderly patient, who is deprived of his or her right to self-determination and eliminated from the decision-making process, ceases to be a partner in dialogue with the doctor and becomes a mere object of medical interference.

**6. The need to implement effective health education.** Health education makes it possible to popularise healthy lifestyles, prepare younger generations for the ageing process and teach habits that will enable them to remain active and independent for as long as possible. A lack of health education and teaching correct health habits from the earliest years of a person's life leads to a lot of health neglect, the consequences of which will be felt in old age. This is because the quality of life in old age is largely determined by one's attitude towards one's health, one's diet, the use of stimulants, how one spends one's time, one's physical activity, one's ability to cope with stress and the separation of one's professional and personal life.

Health education seeks to improve and protect health through learning-driven voluntary changes in individual behaviour. Activities include increasing health knowledge, counselling on health risks, building high self-esteem and life autonomy. It should be emphasised that health education for older people should be holistic, covering all aspects of human health. It cannot be limited to activities aimed at strengthening health, preventing disease, infirmity and disability but should teach people how to derive satisfaction from life despite obstacles and how to minimise factors negatively affecting health and quality of life. Health education that prepares

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<sup>50</sup> W. Lis, *Błędy związane z wyrażaniem zgody na udzielenie świadczenia zdrowotnego*, "Zeszyty Naukowe KUL" 2018, Nr 4, p. 401.

people for old age and old age behaviour has many benefits on an individual level (ensuring better functioning and independence in coping with problems that arise), on a family level (healthy and satisfied older people are not a burden on their families but can provide help and support to their families), socially (healthy older people are good employees) and economically (prevention of illness is less costly than cure), and in terms of social relations (healthy and happy older people change stereotypes about old age, resulting in better cooperation between generations),<sup>51</sup> this involves changing the way older people are perceived and treated by those around them.

Health education in conjunction with prevention oriented towards maintaining health until the earliest years of life is unfortunately not sufficiently widespread, and the programmes created, whose adoption is justified by political considerations rather than actual need, have little impact.

#### 4.7. Recommendations

In view of the above, it should be stated that the main aim of health services provided to older people should be to strive to keep them at full functional capacity for as long as possible, enabling them to function independently in their living environment and to improve their quality of life. However, providing effective health care for older people requires integrated action, rapid diagnosis and consistent treatment at the place of their residence.

1. In order to achieve this goal, it seems necessary to change the state's health policy, starting with the realisation of the provisions of the Polish Constitution, which prescribes special treatment for the elderly. Meanwhile, the health protection system does not grant any special privileges to the elderly. In the context of the constitutional guarantees stipulating the "provision of special health care to the elderly", the failure to take into account the needs of the elderly in the health protection system can be regarded as a form of age

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<sup>51</sup> For more information see: E. Kościńska, *Edukacja zdrowotna seniorów*, [in:] *Edukacja do i w starości*, M. Kuchcińska (red.), Bydgoszcz 2008, pp. 199–211.

discrimination. However, this phenomenon is not given enough attention, leading to a clear gap between the expected and actual state of affairs.

2. The current way in which the health protection system operates is not conducive to keeping older people as fit, independent and autonomous as possible for as long as possible. In its current form, the health protection system does not provide adequate health services to the elderly, especially in the field of geriatrics and rehabilitation. Due to the ongoing process of population ageing, the development of geriatrics is the most desirable direction for changes in state health policy. The distinctiveness of ageing pathology should find its counterpart in the distinctiveness of the health protection system. It should be guided by the universally accepted principle in geriatrics of integrated care for the elderly, based on a holistic assessment of needs (integration of methods and measures), team implementation of these needs (cooperation of health protection institutions, social care and other communal structures) and the priority of the goal of maintaining the health, material and psychological independence of the elderly person.<sup>52</sup> It is therefore necessary to change the procedures of the health protection system in favour of those that take into account the different pathologies of old age and the needs of older people.

The approach to the elderly should take into account the health condition determined by old age, often characterised by multimorbidity and chronicity. Without doubt, older people belong to a group of patients who, due to the frequent occurrence of several chronic diseases at the same time, require health services from different areas. It therefore seems necessary to call for the development of geriatrics and the personalisation of medicine. This will bring tangible results in the form of an improvement in the health of the elderly and reduce treatment costs.<sup>53</sup>

3. Awareness of the ageing of the population requires a change in attitudes towards the elderly and, consequently, state health policy,

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<sup>52</sup> W. Pędich, *Zaspokajanie potrzeb zdrowotnych ludzi starych*, op. cit., p. 131.

<sup>53</sup> M. Pieprzyk, P. Pieprzyk, *Osoby starsze w systemie ochrony zdrowia*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, nr 3, p. 188.

which, in its current form, does not take into account the needs of the elderly or lead to the implementation of the principle of integrated care for the elderly. The current state of health care for the elderly contradicts the principles of modern gerontology and is at odds with demographic projections. Meanwhile, in the face of the challenges posed by an ageing population, health care and ensuring a high quality of life for older people should be one of the priorities of social policy.<sup>54</sup>

4. Medical measures, including treatment and rehabilitation, should aim to keep older people as fit and independent as possible for as long as possible. To achieve this goal, it is necessary to increase funding for health and social services. This entails increasing the number of geriatricians and providing them with jobs appropriate to their qualifications. A consequence of this should be the creation of dedicated geriatric clinics for the elderly and the development of a ward base in hospitals. The creation of a stable and accessible system of geriatric care is one of the most urgent needs arising from the problem of an ageing population. In this regard, it is necessary not only to organise emergency health care in terms of training specialist doctors and setting up geriatric wards but also to organise specialised facilities such as nursing homes, care homes, hospices, community centres, etc., and to support families deciding to care for an elderly family member.<sup>55</sup>

5. Increasing the medical staff dedicated to the specificity of health care for the elderly patient, which should consist of a geriatric team led by a specialist in geriatrics supported by other doctors (cardiologist, neurologist, hypertensiologist, among others), a qualified nursing team, physiotherapists and rehabilitation therapists is a challenge for the health protection system. Training of primary care physicians in geriatric care and communication skills with the elderly is also important. Elderly patients require more attention

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<sup>54</sup> A. Przybyłka, *Starzenie się ludności w Polsce jako wyzwanie dla systemu ochrony zdrowia*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2017, nr 309, pp. 182–183.

<sup>55</sup> K. Sygít, *Problemy zdrowotne seniorów na przykładzie wybranych chorób wieku starszego*, "Health Problems of Civilisations" 2018, No. 1, pp. 38–39.

to be paid to them, and showing empathy is often the determining factor for them to continue treatment.<sup>56</sup> It should be added that many countries are developing models of geriatric care linked to primary care based on the principle of integrated care for the elderly including comprehensiveness, continuity and accessibility.

6. Due to changes in the age structure of patients, it is necessary to prepare medical staff to work with the elderly, which requires the implementation of systematic training of family doctors on the clinical differences in the pathology of old age and the principles of integrated care of the elderly, the introduction of compulsory education of future doctors in the field of geriatrics at medical universities and valuing the training of doctors choosing to specialise in geriatrics.

The implementation of appropriate preventive measures and health education will allow successive generations to enter old age increasingly healthy and aware of the factors determining their future health. The education of society on old age should be multi-dimensional - it must take place at all stages of human development and "should consist in making society as a whole aware not only of the problems and rights of old people but, above all, of the positive aspects of old age."<sup>57</sup> In view of this, it is necessary to take decisive action to combat stereotypes about older people, enabling them to become more courageously involved in public activities in all aspects of life, which can only have positive effects for everyone in economic, social and health terms.

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<sup>56</sup> M. Wideman, *Geriatric care management: role, need, and benefits*, "Home Healthc Nurse" 2012, No. 9, p. 553.

<sup>57</sup> B. Szmigielska, *Starość w wypowiedziach młodzieży i dorosłych*, "Państwo i Społeczeństwo" 2007, nr 3, p. 105.



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## Chapter 5. Procedural Protection of the Elderly in Judicial Cooperation in Civil Matters in EU Law

### 5.1. Introduction

According to Eurostat data, population ageing is a long-term trend which began several decades ago in Europe. This trend is visible in the transformations of the age structure of the population and is reflected in an increasing share of older people, coupled with a declining share of working-age people in the total population. In 2021, more than one fifth (20.8%) of the EU population was 65 years of age and over. The share of people 80 years of age or above in the EU's population is projected to have a two and a half fold increase between 2021 and 2100, from 6.0% to 14.6%.<sup>1</sup> Consistently low birth rates and higher life expectancy are transforming the shape of the EU's age pyramid; probably the most important change will be the marked transition towards a much older population structure, a development which is already apparent in several EU Member States. As a result of demographic change, the proportion of people of working age in the EU is shrinking, while the relative number of those retired is expanding. The share of older people

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<sup>1</sup> See more: *European Commission Report on the Impact of Demographic Change European Commission 2020*, [https://ec.europa.eu/info/sites/default/files/demography\\_report\\_2020\\_n.pdf](https://ec.europa.eu/info/sites/default/files/demography_report_2020_n.pdf) [accessed on: 5.06.2022].

in the total population is expected to increase significantly in the coming decades. This may, in turn, lead to an increased burden on those of working age to provide for the social expenditure required by the ageing population for a range of related services.<sup>2</sup>

The share of the population 65 years of age and over is increasing in every EU Member State, as well as EFTA and candidate country. The growth in the relative share of older people may be explained by increased longevity, a pattern that has been apparent for several decades as life expectancy has risen, at least until 2019; this development is often referred to as ‘ageing at the top’ of the population pyramid.

However, consistently low levels of fertility over many years have contributed to population ageing, with fewer births leading to a decline in the proportion of young people in the total population. This process is known as ‘ageing at the bottom’ of the population pyramid and can be observed in the narrowing base of the EU population pyramids between 2006 and 2021.

In an attempt to look at future trends for population ageing, Eurostat’s latest set of population projections at a national level were made in April 2020, covering the period from 2020 to 2100. The EU’s population is projected to increase to a peak of 449.3 million around 2026, thereafter gradually declining to 416.1 million by 2100.<sup>3</sup>

According to the “Ageing Report 2021” issued by the European Commission on 20 November 2020, the total population of the EU is projected to decline in the long term, and the age structure will change significantly in the coming decades.

A significant number of adults face limitations: Eurostat expects a fifth of the EU population to have some form of disability by 2050. Many of these adults are or will become vulnerable and, by virtue of the multiple barriers that are still in place for persons with a serious

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<sup>2</sup> *Population structure and ageing*, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population\\_structure\\_and\\_ageing](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing) [accessed on: 5.06.2022].

<sup>3</sup> See more: Green Paper on Ageing – Fostering Solidarity and Responsibility between Generations, European Union, 2021, [https://ec.europa.eu/info/sites/default/files/green\\_paper\\_ageing\\_2021\\_en.pdf](https://ec.europa.eu/info/sites/default/files/green_paper_ageing_2021_en.pdf) [accessed on: 12.06.2022].

mental and/or physical disability, are not or will not be able to protect their own interests without adequate support.<sup>4</sup>

Strengthening the legal protection of the elderly has been a central issue in international law for decades. The issue of protecting the rights of the elderly has been further highlighted by the COVID-19 pandemic. Many international organisations are keeping the adoption of the United Nations Convention on the Rights of Older Persons on the agenda, but governments show little interests in adopting such internationally legally binding instruments.<sup>5</sup> The most comprehensive international law instrument is the UN Convention on the Rights of Persons with Disabilities (hereinafter: CRPD). The CRPD has a cardinal role to play in establishing a comprehensive and coherent set of rules for the persons concerned, which seeks to promote the equal exercise of human rights and fundamental freedoms while preserving human dignity.<sup>6</sup> The CRPD is part of EU law, and Member States and the Union itself are party to it. The CRPD is the subject of a separate chapter, and as such, it is not discussed in this section.

This chapter analyses the legal framework for the procedural protection of the elderly in civil matters, with a view to the relevant EU law and the level of protection established within the framework of the Hague Conference on Private International Law.

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<sup>4</sup> Council Conclusions on the Protection of Vulnerable Adults across the European Union (OJ 2021/C 330 I/01), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XG0817\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XG0817(01)&from=EN) [accessed on: 12.06.2022].

<sup>5</sup> See more in this topic: <https://www.age-platform.eu/special-briefing/older-people%E2%80%99s-human-rights-civil-society-deplores-lack-involvement-member-states> [accessed on: 15.06.2022].

<sup>6</sup> See more: L. Series, A. Nilsson, *Article 12 CRPD: Equal Recognition before the Law*, [in:] I. Bantekas, M.A. Stein, D. Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Select Chapters, Oxford (UK) 2018, <https://www.ncbi.nlm.nih.gov/books/> [accessed on: 15.06.2022]. Furthermore: C. de Bhailís, E. Flynn (eds.), *Recognising legal capacity: commentary and analysis of Article 12 CRPD*, “International Journal of Law” 2017, Vol. 13, Special Issue 1: Legal Capacity and Human Rights, March, pp. 6–21.

According to my research hypothesis, there is a regulatory deficit at the level of EU law affecting the procedural support of the elderly.<sup>7</sup>

## 5.2. Legal Framework for the Protection of Rights of the Elderly in EU Law

The ageing of the population<sup>8</sup> clearly highlights the issue of the legal protection of the elderly, which will also be the focus of legislation in the European Union. The analysis of this issue of EU law is extremely actual, because the European Commission has foreseen the initiation of a legislation proposal on the civil aspects of the cross-border protection of vulnerable adults for the first quarter of 2023.<sup>9</sup>

It is important to emphasise that the sources of EU law that will be discussed later do not define the concept of old age. A fundamental question is: Who do we consider elderly? Age can be expressed by the number of years; this is the ‘chronological age’, but ‘biological age’, for example, can differ from this, as it is a function of health status. We can talk about ‘psychological age’, how old people feel they are, or ‘sociological age’, meaning how old society thinks someone is. In the case of old age, a clear age limit cannot be drawn, as, for

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<sup>7</sup> Relevant literature analyses the concept of access to justice from the point of constitutional law with special regard to the human rights aspect, e.g. P. Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations*, Cheltenham 2017. Civil procedural literature focuses primarily on the institution of legal aid, e.g. M. Barendrecht, L. Kistemaker, H.J. Scholten, R. Schrader, M. Wrzesinska, *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?*, 2014, <https://www.hiil.org/research/legal-aid-in-europe-nine-different-ways-to-guarantee-access-to-justice/> [accessed on: 5.06.2022].

<sup>8</sup> See more: *Ageing Europe: Looking at the lives of older people in the EU. 2020 Edition*, Luxembourg Publications Office of the European Union, 2020, <https://ec.europa.eu/eurostat/documents/3217494/11478057/KS-02-20-655-EN-N.pdf/9b09606c-d4e8-4c33-63d2-3b20d5c19c91?t=1604055531000> [accessed on: 5.06.2022].

<sup>9</sup> *Call for evidence of impact assessment on “Civil aspects of the cross-border protection of vulnerable adults”*, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults_en) [accessed on: 5.06.2022].



example, when determining the age of a minor as defined in the relevant sources of EU law in the field of civil matters.

Therefore, the sources of EU law typically choose a much more comprehensive category: the ‘vulnerable adult’ category, which also includes elderly people in need of support. Population ageing is leading to an increase in the number of protection measures, as older people are more likely to be in a situation of vulnerability (for instance, due to dementia, Alzheimer’s and other diseases that may affect their intellectual capacities).

Moreover, because of the free movement of people within the EU, a significant number of older EU citizens now live in a Member State other than that of their nationality (3.2% of the population 65 years of age or over are foreign citizens).<sup>10</sup>

In the following, we will look at which EU law currently ensures the protection of elderly people.

#### 5.2.1. NAMING THE RIGHTS OF THE ELDERLY IN EUROPEAN LEGAL SOURCES

At the outset, it can be noted that there is hardly any legally binding source of EU law that specifically addresses the rights of older people.

##### 5.2.1.1. *Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the European Union (hereinafter: CFR) is one of the few sources of EU law in which the rights of the elderly appear specifically. Since the entry into force of the Charter, it has had the same legal binding force as the Treaties of the European Union. The CFR defines the rights of the elderly as fundamental rights.

In Title III in “Equality chapter” under Article 21, the CFR, under the heading “Non-discrimination”, states that “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin,

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<sup>10</sup> *Call for evidence of impact assessment...*, *op. cit.*

genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.<sup>11</sup>

The rights of the elderly arise from the basic principles of dignity and non-discrimination.<sup>12</sup> Article 25 of the Charter states, under the title “The rights of the elderly”, that “The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

The CFR comprises rights derived from the Treaty on the European Union (hereinafter: TEU) and the Treaty on the Functioning of the European Union (hereinafter: TFEU) or which are recognised as general principles of the EU by the Court of Justice of the European Union, in addition to so-called second-generation fundamental rights, i.e. economic, social and cultural rights, as well as third generation rights that are not thoroughly secured by other relevant international treaties.<sup>13</sup> Among the most innovative are the rights of the elderly to lead a life of dignity and independence (Article 25).<sup>14</sup>

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<sup>11</sup> The European Court of Justice stated in the Judgment *Werner Mangold v. Rüdiger Helm* C-144/04 that: “the principle of non-discrimination on the grounds of age must thus be regarded as a general principle of Community law” (paragraph 75).

<sup>12</sup> See for example the case-law of the European Court of Justice: “With regard to the principle of non-discrimination on the grounds of age, the Court in its Judgment of 6 November 2012 stated that the Hungarian law requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 gives rise to a difference in treatment on the grounds of age, which is not proportionate as regards the objectives pursued by EU non-discrimination law”. Therefore, it is inconsistent with Articles 2 and 6 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. C-286/12, *European Commission v. Hungary*, Judgment of 6 November 2012, paragraph 82.

<sup>13</sup> See in detail: Á. Váradi, “Equality of arms” and the civil lawsuit: Remarks on the procedural measures of protecting the weaker party from the point of view of constitutional, EU and international law [A “fegyverek egyenlősége” és a polgári per: A gyengébb fél védelmének eljárásjogi eszközeiről alkotmányjogi, uniós és nemzetközi jogi nézőpontból], “Iustum Aequum Salutare” 2019, Vol. XV, No. 1, pp. 71–87.

<sup>14</sup> Ł. Bojarski, D. Schindlauer, K. Wladasch, *The European Charter of Fundamental Rights as a Living Instrument, Manual*, Rome–Warsaw–Vienna 2014, p. 15,

Article 25 of the CFR recognises in a more complete way the relationship between the non-discrimination principle covered by Article 21 of the CFR and older persons. There is growing interest in the rights of elderly people to fully enjoy basic human rights. Elderly people are not often perceived as people able to manage their own lives or to participate meaningfully in the life of their communities, especially after they have reached an advanced age. This entails that many older people are often exposed to the risk of discriminatory treatment, which also increases the risk of abuse and similar forms of mistreatment, as well as the risk of poverty and social isolation. Undoubtedly, older people in general often have particular medical or social care needs which, if not met, can seriously endanger their right to a dignified existence. The rights set out in Article 25 are grounded upon three main concerns which are inter-linked. Firstly, the right to respect their inherent dignity. Secondly, the right to an independent and autonomous existence. Thirdly, the right to participate in social and cultural life.<sup>15</sup>

As is known according to Article 51 of the CFR, the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The provisions of the Charter define rights and principles. During the drafting process of the Charter, it was decided that social rights should be normatively conceptualised as “principles” – hence, while the values expressed by such a principle were common for the whole Community, the implementation was left to particular Member States. The European Union recognises and respects the

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[https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu\\_manual\\_o.pdf](https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_o.pdf) [accessed on: 25.06.2022].

<sup>15</sup> Ł. Bojarski, D. Schindlauer, K. Wladasch, *The European Charter of Fundamental Rights...*, *op. cit.*, p. 54. [https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu\\_manual\\_o.pdf](https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_o.pdf) [accessed on: 25.06.2022].

principles of the rights of elderly people to lead a life of dignity and independence and to participate in social and cultural life in order to promote the social and territorial cohesion of the Union.<sup>16</sup>

The enforcement of these “rights” follows directly from the rules of the Charter, and no separate EU legal measure is needed to ensure them. The principles, on the other hand, can be enforced through EU legislative and executive acts or through Member State legal acts during the implementation of EU law.

In accordance with this, the Charter states in paragraph 5 of Article 52 that these EU or Member State acts can only be referred to in court with regard to their interpretation and legality. Therefore, to allege the violation of a “principle” in front of any court, it is necessary to invoke certain legislation implementing the principle. This means that the principles are not directly enforceable.<sup>17</sup>

The explanations to the CFR also make it clear that Article 25 is a “principle to guide EU institutions when they legislate, rather than an enforceable right.”<sup>18</sup>

Despite the above-mentioned characteristics, the importance of the Charter lies in the fact that it is one of the few international documents which “specifically refer to the rights of the elderly” (not as vulnerable persons, not as persons with disability, but as elderly people).

On the other hand, the significance of the Charter lies in the fact that the secondary sources of EU law must be created in accordance with Article 25 of the Charter.

#### 5.2.1.2. Revised European Social Charter (1996)

In connection with Article 25 of the CFR, we cannot avoid mentioning the Revised European Social Charter, Strasbourg 1996

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<sup>16</sup> *Ibidem*, p. 20.

<sup>17</sup> *Ibidem*, p. 20.

<sup>18</sup> *Charter of Fundamental Rights of the EU Right by Right Analysis*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/664891/05122017\\_Charter\\_Analysis\\_FINAL\\_VERSION.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf) [accessed on: 15.06.2022].

(hereinafter: ESC), as a legal reference model in the field of protecting the elderly. The ESC is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare. The Charter lays specific emphasis, e.g., on the protection of vulnerable persons such as elderly people.

As we mentioned above, the European Convention on Human Rights (hereinafter: ECHR) does not contain provisions on elderly rights. At the European level, the protection of elderly people has been realised through the relevant case law of the European Court of Human Rights (hereinafter: ECtHR) and, in particular, through the European Committee of Social Rights' interpretation of Article 23 of the ESC.

The rights of elderly people were recalled for the first time within the European framework by the ESC. Article 23 of the ESC establishes the obligation for State parties to adopt appropriate measures aimed at guaranteeing the effective exercise of the rights of elderly people to social protection. "Article 25 of the CFR assumes Article 23 of the Revised European Social Charter as a juridical model of reference."<sup>19</sup>

The Article 23 of the ESC declares "The right of elderly persons to social protection." Based on Article 23, Member States of the Council of Europe undertake to ensure the effective exercise of the right of elderly persons to social protection. The Member States undertake to adopt or encourage, either directly or in cooperation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
  - a) adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;

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<sup>19</sup> Ł. Bojarski, D. Schindlauer, K. Wladasch, *The European Charter of Fundamental Rights...*, *op. cit.*, p. 54.

- b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them;
- to enable elderly persons to choose their lifestyle freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
  - a) provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
  - b) the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

The importance of the above-mentioned provisions of these two charters is accentuated by the circumstance that at universal level so far, no treaty is specifically dedicated to the rights of older persons. This has meant a “normative gap” in the protection of elderly people. Accordingly, due to the lack of specific international treaties on the rights of elderly, soft law encodes norms in various declarations, recommendations, guidelines and statements of principles<sup>20</sup> adopted by States which agree to act in accordance with them.<sup>21</sup>

#### 5.2.2. STRENGTHENING THE RIGHTS OF THE ELDERLY IN CROSS-BORDER SITUATIONS

Previously, we examined the protection of the rights of the elderly from the perspective of fundamental rights and social rights. In the following, we will mainly analyse the legal situation of the elderly in cross-border situations.

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<sup>20</sup> See for example: Recommendation CM/Rec (2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons of 19 February 2014; Recommendation 1796 (2007) of the Parliamentary Assembly on “The situation of elderly persons in Europe” of 24 May 2007; Resolution 1793 (2011) of the Parliamentary Assembly on “Promoting active ageing – capitalizing on older people’s working potential” of on 28 January 2011.

<sup>21</sup> Ł. Bojarski, D. Schindlauer, K. Władysz, *The European Charter of Fundamental Rights...*, *op. cit.*, p. 55.

The decision-making bodies of the EU have recently recognised that, due to the ageing of European society, it is increasingly urgent to deal more thoroughly with the situation and rights of vulnerable adults, including the elderly.

As a result, the European Commission published the Green Paper on Ageing – Fostering solidarity and responsibility between generations [COM (2021) 50. final] in January 2021, which examined all the essential aspects of ageing.

For example, it deals with the issues of:

- making the most of our working lives;
- employment and productivity;
- new opportunities and challenges in retirement;
- meeting the growing needs of an ageing population;
- meeting the health and long-term care needs of an ageing population;
- mobility, connectivity and accessibility;
- improving well-being through intergenerational solidarity.<sup>22</sup>

#### 5.2.2.1. *Impact Assessment on the Civil Aspects of the Cross-border Protection of Vulnerable Adults*

Following the publication of the Green Paper, the European Commission launched a public consultation<sup>23</sup> on EU-wide protection for vulnerable adults.<sup>24</sup> According to the initiative of public consultation,

<sup>22</sup> Green Paper on Ageing – Fostering solidarity and responsibility between generations, *op. cit.*

<sup>23</sup> The public consultation was conducted between 21 December 2021 and 29 March 2022 using the EU Survey. The questionnaire was provided in English and consisted of two main parts. The first part focused on awareness about the current situation and problems relating to the protection of vulnerable adults, while the second part aimed at gathering opinions about the possible EU action on the cross-border protection of vulnerable adults. It contained twenty-one questions. In: *Protection of the vulnerable adults Initiative Factual summary report – Open Public Consultation*, Brussels, May 2022, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults_en) [accessed on: 17.06.2022].

<sup>24</sup> See the outcome of public consultation: *Protection of the vulnerable adults Initiative Factual summary report...*, *op. cit.*

vulnerable adults are adults who are unable to protect their interests because of an impairment or insufficiency of their personal faculties. This is because the rules governing cross-border cases differ from one Member State to another. The Commission wishes to gather evidence on the problem and its consequences and to give all interested parties the opportunity to share their views on the possible policy options. “The aim of this initiative is to harmonise and simplify the legal rules for the designation of the court having jurisdiction in a cross-border case, the law applicable to the case and the recognition of foreign measures of protection”. The objective is also to facilitate cooperation between EU Member States and speed up the processing of cross-border cases.<sup>25</sup>

In the call for evidence of the impact assessment on “Civil aspects of the cross-border protection of vulnerable adults” (hereinafter: call for evidence paper), the European Commission highlighted that the protection of vulnerable adults in cross-border cases is ensured at an international level by the Hague Convention of 13 January 2000 on the International Protection of Adults (hereinafter: Hague Convention), which establishes rules for determining the competent court or authority and the law to be applied in international situations involving parties to the Convention. It also provides for the mutual recognition and enforcement of protection measures and rules facilitating cooperation. The call for evidence paper made it clear that considering current demographic trends, ageing of the population and use of the internal market free movement, the number of older people in need of assistance will only grow in the future. Harmonisation of private international legal rules applying in cross-border cases is, by definition, an area where Member States cannot take appropriate legislative measures on their own. The Hague Convention provides an international framework, meaning that Member States can sign and ratify it.

However, in the last 13 years, despite strong encouragement from EU institutions, only twelve Member States have ratified the

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<sup>25</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-for-vulnerable-adults_en) [accessed on: 17.06.2022].



Hague Convention. Even in the event that all Member States ratify the Hague Convention in the near future, some of the problems described above will not be solved in the absence of EU legislation. “The call for the evidence paper projected the need of stronger EU action”. The legal basis of this EU action would be taken under Title V TFEU, Chapter 3 on judicial cooperation in civil matters and, in particular, pursuant to Article 81(2) TFEU on measures concerning civil matters with cross-border implications.

The Commission established that “without stronger EU action, judicial cooperation would not attain the level of efficiency reached in almost all other civil and family matters in the EU”. When considering action at an EU level, the Commission will examine the following options:

- a) The “adoption of soft law measures”: the Commission will examine whether national authorities under EU guidance could effectively resolve the problem in the form of, for example, promotional campaigns or recommendations. These recommendations would aim at encouraging Member States to ratify the Hague Convention.
- b) The “adoption of legislative measures in the form of a proposal for a regulation” and a Council decision on the general ratification of the Hague Convention.<sup>26</sup>

The proposal would address jurisdiction, applicable law, recognition and enforcement, as well as cooperation between central authorities. Within this policy option, the Commission will examine, in particular, the following issues: whether the proposal should cover

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<sup>26</sup> The European Parliament Resolution of 1 June 2017 encouraged Member States to sign and ratify the Hague Convention and to promote the self-determination of adults by introducing into their national law legislation on mandates in anticipation of incapacity. It also issued recommendations to the Commission on this topic, noting that the protection of vulnerable adults, including those with disabilities, requires a comprehensive set of specific and targeted actions. This Resolution called for the Commission to adopt a proposal for a Regulation aimed at improving cooperation among Member States and at guaranteeing the automatic recognition and enforcement of decisions on the protection of vulnerable adults, as well as mandates in anticipation of incapacity. Council Conclusions on the Protection of Vulnerable adults across the European Union (OJ 2021/C 330 I/01), points 24–28.

all areas covered by the Hague Convention, in addition to specific EU provisions, or only complement the Convention; whether exequatur should be abolished and grounds for non-recognition limited; whether an EU certificate of powers of representation should be adopted; and whether there is room for strengthened cooperation between courts and authorities (digitalisation, legal aid,<sup>27</sup> access to foreign law or national registries, etc.).<sup>28</sup>

The European Commission set the deadline for the initiative of legislative proposal as the first quarter of 2023.

### 5.2.3. ON THE POSSIBLE BACKGROUND OF THE LACK OF PROTECTION AT THE REGULATION-LEVEL OF EU LAW

In the field of judicial cooperation in civil matters<sup>29</sup>, the EU's decision-making bodies have adopted several regulations, essentially to protect EU citizens. Of these, EU regulations for the protection of children can be highlighted<sup>30</sup>, where procedural protection of children has been achieved for decades through the application of uniform rules by Member States in cross-border cases.<sup>31</sup> I cited the regulation on matters of parental responsibility for children as an

<sup>27</sup> See in detail: Á. Váradi, *The Concept of Legal Aid in the Most Recent Case Law of ECJ*, [in:] M. Szabó, P.L. Láncoš, R. Varga (eds.), *Hungarian Yearbook of International Law and European Law 2015*, 11th publishing, The Hague 2016, pp. 461–478.

<sup>28</sup> *Call for evidence of impact assessment...*, *op. cit.*

<sup>29</sup> See more: A. Osztoivits, *The Present and Possible Future of Judicial Cooperation in Civil Matters*, [in:] A. Osztoivits, J. Bóka (eds.), *The Policies of the European Union from a Central European Perspective*, Miskolc–Budapest, 2022, pp. 239–258, [https://doi.org/10.54171/2022.aojb.poeucep\\_12](https://doi.org/10.54171/2022.aojb.poeucep_12) [accessed on: 9.06.2022].

<sup>30</sup> Such as Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIa), which is replaced by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIb) from 1 August 2022.

<sup>31</sup> This harmonised regulation of jurisdiction or interim and protective measures is of particular importance for the effective legal protection of children.

example, because “children are in a situation comparable to that of the elderly” due to their vulnerability. The difference is that while in the case of children under the age of 18, legal sources presume that there is a need for protection for this age group, and old age does not always mean that there is a need for legal support.

It is therefore very difficult to deprive EU law of its personal scope if it wishes to create a right specifically for a group of persons who cannot be considered a homogeneous group, so it is difficult to determine, for example, those who are the target group of a given EU regulation. While in the case of children or married people, this can be clearly defined so that they can be included within the scope of EU regulation. In the case of the elderly as a target group in need of support, this group of persons is difficult to define.

This is probably the reason why EU legislators have not yet undertaken to regulate at the level of regulations in the field of judicial cooperation in civil matters, because even the scope of the persons to be protected cannot be clearly defined.

EU legal protection is currently represented by the Hague Convention, which was adopted in 2000, but only twelve EU Member States have ratified. Regarding EU law and the Hague instruments, it should be noted that the protection of children’s rights is implemented jointly by these two areas of law: the EU secondary sources of law and to conventions adopted within the framework of the Hague Conference on Private International Law.<sup>32</sup>

There is also an example in the field of judicial cooperation in civil matters, where a part of the EC regulation is the Hague Convention. This is the case with Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereinafter: Maintenance regulation). The Maintenance regulation itself does not contain the rules of

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<sup>32</sup> The best example of this is the relationship between the Hague Convention on the Civil Aspects of International Child Abduction and Regulation Brussels IIb. The Convention is, in essence, incorporated into the provisions of the Regulation and, in relation to Member States – supplementing the Hague Convention – by Articles 23 to 29 of the Regulation, and Article VI shall apply.

applicable law to maintenance obligation but contains a reference to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter: 2007 Hague Protocol), adopted within the framework of the Hague Conference on Private International Law. According to Article 15 of the regulation, the law applicable to maintenance obligations shall be determined in accordance with the 2007 Hague Protocol in the Member States bound by that instrument.

This special codification manner was necessary, because unanimity was required for the adoption of the Maintenance regulation, and it would not have been created if the provisions on the applicable law had also been part of the regulation. Therefore, with a tricky solution, one of the regulatory subjects falling within the scope of the Maintenance regulation was finally regulated by the Hague Protocol.

This unique solution was made possible by the fact that the European Union joined the Hague Conference on Private International Law in 2007, so as a member of the Conference, it had the opportunity to have the protocol signed by the Union itself, based on a Council decision, and not by the Member States individually.

### 5.3. Hague Convention on the International Protection of Adults

#### 5.3.1. BACKGROUND OF THE HAGUE CONVENTION

The aging of the world's population, combined with greater international mobility, has created the need for improved international protection for vulnerable adults by means of legal regulation and international cooperation. The increased lifespan in many countries is accompanied by a corresponding increase in the incidence of illnesses linked to old age. As international travel becomes easier, many people reaching the age of retirement decide to spend the last part of their lives abroad. Private international law issues concerning, for example, the management or sale of goods belonging to persons suffering from an impairment in their personal faculties are arising with ever greater frequency. Where adults themselves

have organised in advance their protection for the time when they will not be in a position to look after their own interests, such as appointing a representative, it is important that such arrangements will be respected abroad. Questions arise, such as which law applies and who may represent the adult and with what powers. In these circumstances, it is important to have clear rules concerning the authorities which are competent to take any necessary measures to protect the person or the property of the adult.<sup>33</sup>

The Hague Convention establishes uniform private international legal rules which will provide greater efficiency, legal certainty and practical protection for vulnerable adults whose life circumstances and property are connected with more than one State.<sup>34</sup> The Convention provides rules on jurisdiction, applicable law and international recognition and enforcement of protective measures. The Convention also establishes a mechanism for cooperation between the authorities of Contracting States. The Convention was made within the framework of the Hague Conference on Private International Law.<sup>35</sup>

### 5.3.2. SIGNIFICANCE OF THE HAGUE CONVENTION

Today, there are no uniform private international legal rules applicable in the field of judicial cooperation in civil matters regarding the protection of vulnerable adults in cross-border situations across the EU, and there are disparities between Member States' laws on jurisdiction, applicable law and the recognition and enforcement

<sup>33</sup> The Hague Convention of 13 January 2000 on the International Protection of Adults. European Parliament's Committee on Legal Affairs, 2012, <https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58310/20121219ATT58310EN.pdf> [accessed on: 15.06.2022].

<sup>34</sup> See in detail: D. Hill, *The Hague Convention on the International Protection of Adults*, "International and Comparative Law Quarterly" 2009, April, pp. 469–476.

<sup>35</sup> See more: S.E. Rolland, A. Ruck Keene, *Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities*, 3 June 2021, <https://www.ohchr.org/issues/disability> [accessed on: 25.06.2022].

of protection measures. The diversity of the rules on these issues might impair the exercise of the right of vulnerable adults to move freely and reside in the Member State of their choice. It might also hinder the possibility for these citizens to obtain adequate protection regarding the administration of their property in a cross-border context.

As the call for the evidence paper pointed out, vulnerable adults and their legal representatives currently face multiple barriers when they move abroad, buy or sell property or simply manage their bank account in another Member State. This is because the rules governing cross-border cases differ from one Member State to another. This creates a lack of legal certainty and unforeseeable hurdles for the people concerned (vulnerable adults, their relatives or their legal representatives), as well as for economic operators wishing to enter into contractual arrangements with them.

Although the total number of vulnerable adults in the EU is not known, the protection of vulnerable adults constitutes a significant proportion of the work of national courts. For instance, in 2017, around 688,000 protection measures were adopted in a consulted group of seven Member States (Austria, Czechia, France, Hungary, the Netherlands, Portugal and Slovakia). As a result of the current situation, protection measures taken in one Member State may not be recognised and enforced in another Member State. When exercising their freedom of movement, vulnerable adults and their legal representatives are at great risk of refusals from banks and other institutions. They equally face uncertainty regarding the continuity of their medical treatments and lack of information on their rights, etc. Furthermore, powers of representation established as a useful precautionary measure in a Member State at a time when a person is still capable of protecting their own interests may not, later on, be recognised in other Member States. This is a violation of individuals' right to self-determination. In such cases, vulnerable adults or their representatives will need to introduce costly and time-consuming *exequatur* (declaration of enforceability) proceedings or start protection proceedings all over again. As a consequence, they may forsake the exercise of their right to free movement, not follow up on medical treatment or, if they move and are no longer legally

protected, suffer financial losses and be victims of abuse. Member States apply different rules for establishing their international jurisdiction. Courts and competent authorities responsible for taking protection measures apply their national rules, which may conflict with other Member States' rules in the same case. Two Member States may end up dealing with the same case if the ground for jurisdiction provided by the law of one Member State is nationality and the other is residence. If national courts do not have domestic remedies to transfer their competence to another Member State's courts, this will "create long-term situations of parallel proceedings" and complex situations for vulnerable adults and their families. This creates additional administrative burdens for the authorities in charge and undermines vulnerable adults' right of access to justice. In general, courts and central authorities cannot request and obtain assistance from foreign courts and central authorities in the absence of a legal basis for cross-border cooperation. Their national law (if it exists) has a limited territorial scope. For instance, the ongoing European Commission legal study's preliminary findings show that 75% of legal practitioners lack information on foreign procedural and substantial law that would enable them to make decisions (courts) or advise their clients (notaries). In addition, when vulnerable adults leave their country of residence and move to another Member State, courts and competent authorities cannot inform their counter partners. Conversely, it is currently impossible for the authorities of the Member State to which a vulnerable person has moved to be informed of previous measures by consulting foreign registries or sending an information request. Therefore, there is a risk that vulnerable adults are no longer protected in their new place of residence and that arrangements contrary to their best interests are made. Alternatively, it obliges them to start new proceedings, placing a disproportionate and unfair burden on this highly fragile category of people. In practice, language barriers and the disparity of rules (or lack of them) on electronic communication are also a major hurdle for individuals seeking to establish their rights and for the competent courts and authorities to communicate.<sup>36</sup>

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<sup>36</sup> *Call for evidence of impact assessment...*, *op. cit.*

The importance of the Convention lies, above all, in establishing uniform and clear rules for situations that may affect vulnerable adults in cross-border situations.<sup>37</sup> This Convention aims to prevent conflicts between the legal systems of Contracting Parties in respect of jurisdiction, applicable law and the recognition and enforcement of measures for the protection of adults. According to the status table of the Adult Convention on 8 June, signed by nineteen States and entered into force in thirteen States.<sup>38</sup> The latter are exclusively European countries.

The Hague Convention is similar in its structure to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter:

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<sup>37</sup> The following cases are examples of how the Convention might be applied to situations that require the protection of an adult's interests.

1. A Scotsman has been living in Argentina since his retirement 10 years ago. He owns property in Scotland and Argentina. He now suffers from age-related dementia and is not fully capable of managing his affairs. The property needs to be sold to provide funds for the care of the man living in Argentina. He has a son living in Scotland. Some years ago, the man granted his son extensive powers of attorney to be exercised in the event of any incapacitating illness certified by a Scottish medical practitioner. If the Convention were in force between the countries, the powers of attorney would be recognised in Argentina and the son could act on the man's behalf to assist in making the necessary arrangements to manage his father's affairs. The powers of representation would be exercised in accordance with the law in Argentina.

2. An elderly person in the Netherlands has been diagnosed with early-onset Alzheimer's disease and has designated, in accordance with Dutch law, her eldest son as her representative should she one day become unable to manage her affairs. As her disease progresses, she eventually becomes unable to independently manage her own care and property. Her daughter, who resides in Switzerland, upon visiting her mother in the Netherlands, decides to secretly take her mother to Switzerland without informing the older sibling. The daughter influences her frail mother in order to gain direct access to her bank accounts and other assets. If the Convention were in force between the two States, the son could use the Convention's Central Authority cooperation mechanisms to assist in locating his mother, and have recognised and enforced his rightful powers of representation of his mother, <https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58310/20121219ATT58310EN.pdf>, p. 11 [accessed on: 25.06.2022].

<sup>38</sup> <https://www.hcch.net/en/instruments/conventions/status-table/?cid=71> [accessed on: 9.06.2022].



Convention on the Protection of Children), but it has been adapted to meet the specific needs of vulnerable adults.

### 5.3.3. SCOPE OF THE CONVENTION

According to Article 1, “the Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.”

Paragraph 1 defines the adults to whom the Convention applies. The text contains two factual elements. The first is that of an “impairment or insufficiency of [the] personal faculties” of the adult. The adults whom the Convention is meant to protect are the physically or mentally incapacitated, who are suffering from an “insufficiency” of their personal faculties, as well as persons usually elderly, suffering from an impairment of the same faculties, in particular persons suffering from Alzheimer’s disease. Although the Commission did not wish to spell this out in the text, to avoid making it pointlessly cumbersome, it accepted that this impairment or this insufficiency could be permanent or temporary, since it necessitates a measure of protection. The insufficiency or impairment of the personal faculties of the adult must be such that he or she is not “in a position to protect [his or her] interests”. The second element in the definition must be understood broadly. The text takes into consideration not only the property interests of the adult, which his or her physical or mental state may prevent him or her from managing properly, but more generally his or her personal and health interests.<sup>39</sup>

An adult is defined by Article 2 paragraph 1, as “a person who has reached the age of 18 years”. This lower limit very naturally coincides with the upper limit on the application of the Convention on the Protection of Children. Thus, problems of the borderline

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<sup>39</sup> *Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults* by Paul Lagarde. Published by The Hague Conference on Private International Law Permanent Bureau, The Hague, The Netherlands 2017, paragraphs 9–10 (hereinafter: Lagarde Report).

between the scope of application of the two Conventions as to persons should be avoided.

Article 3 details the types of measures of protection contemplated by the Convention, but it “does not purport to be exhaustive”. The measures include, for example, a determination of incapacity, the institution of a protective regime for the adult and the designation and functions of a person representing the adult and having charge of the adult’s property. It is important to note that the measures of protection which will be recognised and enforced under the Convention will be determined in accordance with substantive domestic law, including any international obligations that a State might have in this field.

Article 4 enumerates certain matters or questions which are “excluded from the scope of the Convention”. It should be emphasised that the Convention does not apply to public measures of a general nature in matters of health (Article 4 point f)). It is not the entirety constituted by education and health which is excluded from the Convention but only, within this entirety, the public measures of a general nature, such as those which make vaccination obligatory. The placement of a specific adult in a particular care institution or the decision to have him or her undergo a surgical operation, for example, are decisions falling within the scope of the Convention.<sup>40</sup>

#### 5.3.4. RULES OF JURISDICTION

The Convention provides uniform rules determining which country’s authorities are competent to take the necessary measures of protection. The Convention attributes jurisdiction primarily to the authorities of the “adult’s habitual residence”. In case of a change of the adult’s habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

No definition was given of habitual residence, which despite the important legal consequences attached to it, should remain a factual concept. Like EU law, “the Convention does not define the issue

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<sup>40</sup> Lagarde Report, paragraph 40.

of habitual residence.” In my opinion, the jurisprudence of the European Court of Justice (hereinafter: ECJ) is guiding in the interpretation of this concept. Recently, the ECJ established in connection with a matrimonial case of the Brussels IIa regulation, in case C-289/20 *IB v. FA*, that the concept of ‘habitual residence’ essentially reflects a question of fact, and it is for the referring court to verify, on the basis of all the factual circumstances, whether the Member State of the national court seized corresponds to the place where the applicant is a habitual resident. The concept of ‘habitual residence’ is characterised, in principle, by two factors, namely, first, the “intention of the person” concerned to establish the habitual centre of his or her interests in a particular place and, secondly, a “presence which is sufficiently stable” in the Member State concerned.<sup>41</sup>

In the event of a change in the habitual residence of the adult to another Contracting State, jurisdiction passes to the authorities of the State of the new habitual residence. The question of the continuance in force of measures taken in the first State is governed by Article 12 (see below).

Article 7 creates “concurrent subsidiary jurisdiction” of the basis of nationality of the adult. This means that the Contracting State of which the adult is a national has jurisdiction to take measures for the protection of the person or property of the adult if they consider that they are in a better position to assess the interests of the adult. The jurisdiction of the national State is set out without the need for any supplementary connecting factor, such as the previous residence of the adult, the residence of relatives or the presence of property, and without any authorisation having been requested from the authorities of the State of the adult’s habitual residence. It is clearly a case of concurrent jurisdiction. This jurisdiction is general, like that of the authorities of the State of habitual residence, and may affect the measures of protection of the person or the property of the adult.<sup>42</sup>

Also accepted are the jurisdiction of the authorities of the State where the property of the adult is situated to take measures of protection concerning that property (Article 7) and the jurisdiction of

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<sup>41</sup> Judgment in case C-289/20 *IB v. FA*, paragraphs 52, 57.

<sup>42</sup> Lagarde Report, paragraph 57.

the State in whose territory the adult (Articles 10–11) or property belonging to the adult (Article 10) is present to take emergency measures (Article 10) or temporary measures with limited territorial effect for the protection of the person (Article 11).<sup>43</sup>

Article 8 shows the flexibility of the Convention when it allows for the transfer of jurisdiction to an appropriate forum. It may be that the authorities of the adult's habitual residence, on whom principal jurisdiction is conferred (Article 5), or even more so the authorities of the State where the adult is simply present in the case of Article 6, are not the best placed to assess in a particular case the interests of the adult. If, for example, the adult was living in a State other than that of his or her nationality, where he or she was under the protection of a person who had just died and the only relative in a position to provide for his or her protection in the future had his or her habitual residence in another State, the authorities of this State are undoubtedly best placed to assess the fitness of this relative and to arrange the conditions under which protection is to be exercised.<sup>44</sup>

Allowing this option is nothing more than the application of the doctrine of *forum non conveniens* known from Anglo-Saxon law, which exemplifies the incredible flexibility of jurisdictional rules of the Convention. This solution is also used with preference based on Article 15 of the Brussels IIa Regulation. Unlike the Brussels IIa Regulation, Article 8 of Convention does not set a time limit within which the designated authority must decide whether or not to accept the jurisdiction.

### 5.3.5. RULES OF APPLICABLE LAW

Generally, in exercising jurisdiction under the Convention, the authorities in Contracting States shall “apply their own law” (Article 13). As a general rule, the Convention stipulates that the law of

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<sup>43</sup> <https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58310/20121219ATT58310EN.pdf>, p. 8 [accessed on: 25.06.2022].

<sup>44</sup> Lagarde Report, paragraph 66.

the State of the court having jurisdiction, the *lex fori*, shall be applied when making decisions on protective measures falling within the scope of the Convention. This approach allows the authority having jurisdiction to apply the law it knows best. Furthermore, since the jurisdictional provisions of the Convention always give priority to the court (authority) closest to the adult (with the closest connection), the measures will thus be primarily implemented by the authorities of the State that made the provisions.

However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection (Article 13(2)).

This paragraph constitutes an exception clause based not on the principle of proximity (the closest connection) but on the best interests of the adult. For example, if an authorisation is requested from the authorities of the habitual residence (and not those of the State of location as would be permitted by Article 9) to sell the property of the adult situated abroad, it is preferable that the authority exercising jurisdiction should be able to apply or take into consideration the law of the *situs* of the property and grant the authorisation provided for under this law, even if the law of the authority exercising jurisdiction requires no authorisation in such a case.<sup>45</sup>

An exception to the general rule on applicable law relates to powers of representation. Where an adult has made advance arrangements for his or her care and/or representation in the event of incapacity, the question of the validity of these arrangements in the new country of residence has to be resolved. Under the Convention, the adult may designate the law to be applied to the existence, extent, modification and extinction of the powers exercised by a person representing the adult (Article 15). The adult may choose to designate the laws of a) a State of which the adult is a national; b) the State of former habitual residence; or, c) a State where there adult's property is located (Article 15). In this way, the Convention enables "powers of attorney" or similar institutions to be recognised in Contracting States that do not have an analogous institution. This

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<sup>45</sup> Lagarde Report, paragraph 92.

provides the adult with the assurance that arrangements previously made for the management of his or her affairs will be respected in other Contracting States.

According to the Lagarde Report, Article 15 of the Convention envisages the situation in which the adult himself or herself organises in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. He or she does this by conferring on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act, powers of representation. The situation envisaged here is characterised by the fact that, on the one hand, the powers of representation cannot, in general, begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests and that, on the other hand, their taking effect requires, at least in certain legal systems, the intervention of the judicial authority to establish incapacity.<sup>46</sup>

Article 18 of the Convention establishes the “universality of the applicable law.” This means that the provisions of Chapter III of the Convention apply even if the law designated by them is the law of a non-Contracting State.

Under Article 21 of the Convention, it is possible to refuse the law applicable under the Convention by referring to public policy, if its application would be “manifestly contrary to public policy.”

The Lagarde Report states that the reference to the “best interests of the adult” appeared in Article 21. It has been observed that the expression “best interests of the child” is found in the United Nations Convention on the Rights of the Child, but there is no comparable public international legal text in respect to adults.<sup>47</sup>

### 5.3.6. RULES OF RECOGNITION AND ENFORCEMENT

The Convention distinguishes recognition (Articles 22–24), the declaration of enforceability and registration for the purpose

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<sup>46</sup> Lagarde Report, paragraphs 95–96.

<sup>47</sup> Lagarde Report, paragraph 114.

of enforcement (Articles 25 and 26) and, finally, enforcement (Article 27).

Article 22 states that the measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. Paragraph 2 lists the grounds on which recognition may be refused. These are the only grounds for non-recognition that may be relied upon by the State addressed. In particular, the authority addressed is not authorised to review the law applied by the authority of origin.

Under Article 25, if measures taken in one Contracting State and which are enforceable there require enforcement in another Contracting State, they shall, upon request by the interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State. Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure. The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 22 paragraph 2.

Article 27 stated that measures taken in one Contracting State and which were declared enforceable or were registered for the purpose of enforcement in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.

Paul Lagarde claims those certain fears were expressed concerning the application of this provision to adults during the Special Commission. The risk of an infringement upon civil liberties arising from recourse to State-imposed restrictions was mentioned. There were also misgivings concerning the financial consequences of this provision if it had the result of obliging the State in which the adult is present to accept responsibility for the expenses of hospitalisation or placement resulting from the enforcement of measures taken by the authorities of another State. These fears were dispelled by the observation that Article 27 only applied here to the enforcement of a measure in its 'private-law context'.<sup>48</sup>

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<sup>48</sup> Lagarde Report, paragraph 128.

#### 5.4. Evaluation of the Hague Convention and *de lege ferenda* Proposals

More than 20 years have passed since the Hague Convention was adopted, and the number of countries signing and ratifying the Convention has not increased significantly in recent years. From this, we can conclude that it is not expected that the Hague Convention will enter into force in all EU Member States in the near future either. Failing that, however, the Hague Convention does not provide adequate legal protection for vulnerable adults, including the elderly in cross-border situations. For this reason, we cannot talk about effective EU legal protection in this field.

The European Law Institute published its report on the *Protection of Adults in International Situations* in 2020 (hereinafter: ELI report)<sup>49</sup>, in which it analyses in detail the Convention itself and the possibilities for its further development.

In this report a separate section is devoted to the possible further development of the international protection of vulnerable people. They established that after 20 years, the Hague Convention is beginning to show its age. The operation of its rules can be improved in some ways. “The improvements could be done by the Union enacting a legislative measure, in the form of a regulation,” aimed at complementing the Hague Convention in the relationship between the Member States of the Union, once the Hague Convention is in force for all of them.<sup>50</sup>

We note that the same regulatory method was implemented in connection with the Brussels IIa and Brussels IIB Regulations and the Hague Convention on the Civil Aspects of International Child Abduction. Thus, there is an efficient regulatory model.

The ELI report is referred to as the “Suggested Adults’ Protection Regulation” (hereinafter: Suggested Regulation). The purpose of

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<sup>49</sup> *The Protection of Adults in International Situations. Report of the European Law Institute 2020*, Vienna, Austria, [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Protection\\_of\\_Adults\\_in\\_International\\_Situations.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Protection_of_Adults_in_International_Situations.pdf) [accessed on: 5.06.2022].

<sup>50</sup> *The Protection of Adults in International Situations. Report of the European Law Institute 2020, op. cit.*, pp. 28–29.



the Suggested Regulation is to enhance the operation of the Hague Convention in the Member States of the Union.

How could the protection of the elderly be made more effective? How could the Convention be further developed if it were to become a regulation?

First of all, it should be made clear that “law of protection of adults is not part of family law”; thus, paragraph 3 of Article 81 of the Treaty on the Functioning of the European Union<sup>51</sup> (TFEU) does not apply to this. Serious debate is expected in this regard, as the European Commission stated in the follow up to the European Parliament’s Resolution of 1 June 2017 that the protection of adults falls within the scope of Article 81(3) on family matters. Measures concerning the protection of adults would thus need to be ‘established by the Council, acting in accordance with a special legislative procedure’: specifically, the Council would need to act ‘unanimously after consulting the European Parliament’.<sup>52</sup>

The ELI report contains convincing arguments why the legal protection of adults “does not fall under the scope of family law.”<sup>53</sup> In my opinion, the protection of adults does not belong to family law either.

Let us see some proposed improvements<sup>54</sup>:

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<sup>51</sup> TFEU – 81 paragraph (3): “(...) measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.”

<sup>52</sup> *The Protection of Adults in International Situations. Report of the European Law Institute 2020, op. cit.*

<sup>53</sup> *Ibidem*, pp. 19–20.

<sup>54</sup> The proposals are fundamentally based on the suggestions of ELI report (Further possible improvements of the Hague Convention).

1. **Clarification of the Scope of Application.** The Suggested Regulation clarifies the scope of the regulation, as this regulation shall apply in civil and commercial matters to the protection of adults who, by reason of impairment or insufficiency of their personal faculties, are not in a position to protect their interests. The expression ‘in civil and commercial matters’ is a common feature of legislative texts enacted on the basis of Article 81 TFEU. The scope of one Suggested Regulation is narrower than the scope of the corresponding provisions in the Hague Convention: it applies to the protection of adults who, at the time the authority is seized, are a habitual resident in a Member State.<sup>55</sup>

In my opinion, the scope of the proposed regulation could be supplemented with an exemplary list of adults who are not in a position to protect their interests due to impairment or insufficiency of their personal faculties. “Elderly people could also be named in this exemplary list.”

2. **Creating a Choice of Court Provision.** The Suggested Regulation should include a provision enabling the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when they are capable, the Member State whose courts are to have jurisdiction over their protection; this should include the power to supervise guardians, persons appointed by a court or by the adult concerned (by way of a power of attorney) or those having power *ex lege* to take care of the adult’s affairs.<sup>56</sup>

3. **Acceptance and Enforceability of Authentic Instrument.** According to the ELI report, the Suggested Regulation should provide for the acceptance and, where appropriate, the enforceability of such authentic instruments as are established in a Member State for the purposes of protecting an adult. Authentic instruments bring about, as such, special evidentiary effects. The claims stated in an authentic instrument may, in appropriate circumstances, be enforceable under the law of the State where the instrument itself

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<sup>55</sup> *The Protection of Adults in International Situations. Report of the European Law Institute 2020, op. cit.*, p. 32.

<sup>56</sup> *Ibidem*, p. 35.

was established. Private mandates are often established in the form of authentic instruments.

The Hague Convention fails to include provisions that make it possible to claim, in one Contracting State, the effects of an authentic instrument originating in another, i.e. the particular effects that arise from those instruments by virtue of their authentic character.

Various legislative measures have been adopted by the Union to deal with the cross-border acceptance of authentic instruments and their enforceability. These include e.g. Regulation No. 650/2012 on matters of succession. The Suggested Regulation should fill this gap by introducing rules on the acceptance and enforceability of authentic instruments modelled on the existing measures of the Union.<sup>57</sup>

**4. European Certificate of Powers of Representation.** The Suggested Regulation should make it easy for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed. This may be done by creating a European Certificate of Powers of Representation, taking into account the experience developed with the European Certificate of Succession.

The advantages of the European Certificate of Succession in the Union and the manner in which they have made the administration of cross-border estates easier clearly demonstrate the value that the existence of a European Certificate of Powers of Representation would bring to reducing cross-border discrimination against vulnerable adults in the Union.<sup>58</sup>

## 5.5. Summary

In summary, it can be said that taking into account the current demographic trends, the aging of the population and the use of free movement in the internal market, the number of elderly people in need of help will only increase in the future.

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<sup>57</sup> *Ibidem*, pp. 39–40.

<sup>58</sup> *Ibidem*, pp. 41–42.

In order to effectively protect the procedural rights of the elderly, stronger EU action is clearly needed. The legal basis for this EU action is Title V of the Treaty on the Functioning of the European Union, Chapter 3 on judicial cooperation in civil matters, and, in particular, measures relating to cross-border civil matters. This would take place on the basis of Article 81(2) of the Treaty on the Functioning of the European Union, since the rights of the elderly cannot be considered a family law issue. If the EU decision-making bodies had the political will to adopt a regulation, this could easily be created on the basis of the Hague Convention.

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